

New Zealand Written Comments on the List of Issues for the Protection of Traditional Knowledge and Traditional Cultural Expressions/Expressions of Folklore (attached to document WIPO/GRTKF/IC/10/7 Prov. as Annex I) for WIPO IGC 11:

WORLD INTELLECTUAL PROPERTY ORGANISATION
INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY
AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND
FOLKLORE
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General comments

New Zealand supports the continuation of the IGC's work in **all** its areas, but retains its position on the need to reach some consensus on policy objectives and guiding principles before determining potential legal mechanisms for the protection of TK or making decisions about the form of any international obligations that may ensue (including the possibility of drafting guidelines, a declaration, protocol, treaty or amendments to existing treaties).

The key issues that have emerged from the Tenth Session are a positive step in addressing the complex more contentious issues at the interface between IP and TK. We consider this approach to be crucial prior to entering into discussions on potential policy or legal options to address the issues. The policy objectives and principles contained in the papers still require substantial work; that and the work on the sets of key issues should be the IGC's priorities. The exercise of delving deeper into the substance of the key issues associated with the protection of TK and TCEs has been a constructive step on which the Committee should expand.

The New Zealand responses below build upon our comments made in previous sessions of the IGC and should be read in conjunction with and in addition to those comments. The responses do not constitute New Zealand's final position on these issues. New Zealand would welcome the opportunity to make further comments at future sessions, as we continue to receive views from various domestic stakeholders, and as our national experience develops.

A number of indigenous stakeholders in New Zealand have stressed that issues relating to TK and TCEs should be addressed as a whole.¹ New Zealand deems these concerns to be valid and therefore has taken a more holistic approach by combining our responses to the two sets of key issues.

¹ Maui Solomon in his Peer Review Report, which was submitted to the IGC at the Tenth Session and is published in document WIPO/GRTKF/IC/11/4(b), states that one single document on TK and TCEs would be more user-friendly, given the commonality and repetition between the two documents.

The Ministry of Economic Development of New Zealand, Intellectual Property Policy group, hosted a workshop on the protection of TK and TCEs on Monday 12 March 2007 in order to discuss with Māori and other domestic stakeholders the key issues that emerged from the Tenth Session of the IGC. A report on the workshop was produced in consultation with the participants; it is attached to this document as **Appendix A**. The content of the report, the submissions received to date on the draft policy objectives and guiding principles and the Peer Review by Maui Solomon (submitted to the IGC at the Tenth Session and published in document WIPO/GRTKF/IC/11/4(b)), have informed New Zealand's response below.

In order to provide some analysis of the issues, examples of stakeholder views and domestic indigenous customary concepts have been provided where such examples assist in elucidating New Zealand's position. Reference to such individual stakeholders' views and concepts in the New Zealand response does not necessarily mean that they are endorsed by the New Zealand Government. They have been incorporated in the document in order to reflect and integrate the distinctive domestic views and indigenous customary concepts that relate to these key issues. We consider this approach to be beneficial, especially given WIPO's current study on (i) the role of customary laws and protocols of indigenous and local communities in relation to their traditional knowledge (TK), genetic resources and traditional cultural expressions (TCEs)/expressions of folklore, and (ii) the relationship of customary laws and protocols with the intellectual property (IP) system.

All domestic indigenous customary terms and concepts are translated in English and are defined for the broader international audience to understand. A glossary of Māori² terms is also available for reference at the end of the document.

1. **Definition of TK and TCEs that should be protected.**

The first question we should ask is whether a formal or rigid definition is needed. This is particularly important given the evolving nature of knowledge and culture. By attempting to define TK and TCEs, we run the risk of freezing or restricting the rights at the time that they are defined, hence not fully taking into account their evolutionary nature. Rather we should explore models of protection which do not require the elaboration of formal definitions of TK and TCEs or that fully recognise the changing nature of TK and TCEs.

There is currently no agreed formal definition of what are considered TK and TCEs. TK has been generally defined in the context of the Convention on Biological Diversity as "*knowledge, innovations and practices of indigenous and local communities around the world, developed from experience gained over the centuries and adapted to the local culture and environment, and passed on orally from generation to generation.*"

² Māori are the Indigenous peoples of New Zealand.

The WIPO working definitions state that TK is knowledge which is *“generated, preserved and transmitted in a traditional context and between generations; distinctively associated with or linked to a traditional or indigenous cultural or community (or communities) through a sense of custodianship or cultural responsibility; or identified by the source community as being traditional knowledge.”* TK is defined in general, indicative terms at Article 3 of document WIPO/GRTKF/IC/11/5 (c) as *“the content or substance of knowledge resulting from intellectual activity in a traditional context, and is not limited to any specific field, extending to agricultural, environmental and medicinal knowledge, and knowledge associated with genetic resources.”*

However, the draft at Article 4 suggests that to be eligible for specific protection against misuse or misappropriation, more precision is needed, and that TK should (i) exist in a traditional and intergenerational context; (ii) be distinctively associated with a traditional or indigenous community or people which preserves and transmits it between generations; and (iii) be integral to the cultural identity of an indigenous or traditional community or people which is recognized as holding the knowledge through a form of custodianship, guardianship, collective ownership or cultural responsibility. This relationship may be expressed formally or informally by customary or traditional practices, protocols or laws.”

TCEs are defined at Article 1 of document WIPO/GRTKF/IC/11/4 (c) as:

- (a) *“... any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:*
- (i) *verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;*
 - (ii) *musical expressions, such as songs and instrumental music;*
 - (iii) *expressions by action, such as dances, plays, ceremonies, rituals and other performances,*
 - (iv) *whether or not reduced to a material form; and*
 - (v) *tangible expressions, such as productions of art, in particular drawings, designs paintings (including body-painting); carvings; sculptures, pottery, terracotta, mosaic, woodwork, metal ware; jewellery, baskets, needlework, textiles, glassware, carpets, costumes, handicrafts, musical instruments and architectural forms which are:*
 - *(aa) the products of creative intellectual activity, including individual and communal creativity;*
 - *(bb) characteristic of a community’s cultural and social identity and cultural heritage; and*

- (cc) *maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.*
- (b) *The specific choice of terms to denote the protected subject matter should be determined at the national and regional levels.”*

These WIPO working definitions, in particular the one for TCEs, reflect the strong focus on IPRs. Many Indigenous peoples define their TK and TCEs much more broadly to include: learning systems, traditional institutions for environmental management; common-property management practices; traditional decision-making processes; local classification and quantification structures; knowledge and practices relating to health; the ecosystem; animal breeding and production; water soil conservation; agriculture; textiles and other local crafts; building materials; energy conservation; amongst other things.

The individuals and organisations with whom we have consulted on the above working definitions have said that they generally agree with them, as they appear to cover most areas of concern. They also agreed that traditional knowledge and particularly mātauranga Māori (Māori knowledge)³, is often orally transmitted and distinctly linked to the local culture and to the relationship that the community has to the land and its natural resources.

“Toi te whenua, knowledge is based in land. Identity is anchored to it. To be landless is to lose your soul.” (Dr Hirini Moko Mead) The importance of the land and the environment to Māori cannot be overstated. It is reflected through whakapapa (genealogy), ancestral place names and tribal histories. The regard with which Māori held land was a reflection of the close relationship that Māori had with their ancestors. Māori see themselves as not only “of the land” but “as the land”.

“The Māori believe that the earth is the elemental womb to which we must all return. Folded within her, carefully placed, bones complete the cycle; for as she gives, so does she receive.” (Dr Ngahuia Te Awekotuku, 1982)

Not only was land important to Māori, but also the water that flows through it. It is said that all water originates from the pain of the separation of Ranginui (Sky Father) and Papatūānuku (Mother Earth) and is endowed with a mauri or life force of its own. (*Reference: He Hinatore ki te Ao Māori*) Māori knowledge or mātauranga Māori originates from that ancestral and multigenerational relationship (whakapapa) to the culture, the land and its resources.

³ Māori are the Indigenous peoples of New Zealand. Mātauranga Māori or Māori knowledge represents the most significant body of indigenous traditional knowledge in New Zealand.

“Knowledge was created over time, not by a single author or inventor. It was the repository of culture and identity. The benefits were shared. It could neither be owned nor sold. Not all knowledge was available to everyone; its custodians had responsibilities for its protection and use.”
(Moana Jackson)

Those custodial responsibilities have been defined by the Waitangi Tribunal in the context of the Treaty of Waitangi claim WAI 262⁴, using the Māori concept of ‘kaitiaki’ (custodianship or guardianship) in relation to mātauranga Māori (Māori knowledge) and Māori taonga (treasured belongings - which include cultural expressions, natural resources, and knowledge systems). The following indigenous customary terms and concepts are important to the domestic analysis of the issues relating to TK and TCEs:

Mātauranga Māori means the Māori knowledge of kaitiaki together with the systems for the organisation, transmission, dissemination, and protection of such knowledge and further includes te reo Māori (Māori language and dialects), tikanga Māori (see definition below) and taonga works (see definition below).⁵

Taonga works or Māori TCEs include artistic and literary works such as carving, weaving, waiata (songs), pātere (rhythmical chants), oriori (lullabies), haka (dramatic/poetic expression of cultural issues), mōteatea (overall generic term for traditional Māori songs), painting, crafts, written works, graphic works, dramatic works, musical works, oral traditions, performing arts, symbols, images and designs, artefacts and the mauri (life force) of those taonga works, where the work reflects in some way the culture and/or identity of the kaitiaki (customary guardians or custodians) of the work and includes the knowledge, skill, cultural or spiritual values upon which the work is based.

⁴ The Waitangi Tribunal is a commission of inquiry mandated by statute to look into and report on allegations of breach of the Treaty of Waitangi, the founding document of New Zealand. Claimants in the WAI 262 claim, also known as the Fauna and Flora Claim, have raised concerns in relation to IPRs and the protection of mātauranga Māori. Closing submissions in the WAI 262 inquiry were heard in June 2007. The Waitangi Tribunal is presently in its report writing phase.

⁵ In the Treaty of Waitangi claim WAI 262, Ngāti Koata claimants (Māori tribal entity from the South Island of New Zealand) discussed their interpretation of ‘Mātauranga’: “Mātauranga is what provides Ngāti Koata with their understanding of their intricate relationships with and connections to the universe, the environment and each other. ...there is no single word or description which defines the meaning of mātauranga. The term “traditional knowledge” gained currency during the hearings as an English language equivalent for mātauranga. Mātauranga is much more than “knowledge”, traditional or otherwise (e.g. acquired). Knowledge can be defined as an acquaintance with facts, truths, or principles, derived from study or investigation. What differentiates mātauranga from knowledge is that knowledge is gained through study or investigation whereas mātauranga is both learned and inherent in the people that hold it. Knowledge may be studied from a book, whereas mātauranga is passed on from generation to generation. Mātauranga can best be described as “understanding” for when one loses their mātauranga they lose their understanding as opposed to losing their knowledge. This understanding which mātauranga embodies is the basis upon which we exist in the universe and how we interact with it.”

Kaitiaki in respect of taonga works, biological and genetic resources in indigenous and/or taonga species, the environment, te reo Māori, tikanga Māori and mātauranga Māori, means the individual(s), whānau (family (-ies)), hapū (sub-tribe (-s)) or iwi (tribe (-s)) (as the case may be) whose customary relationship with those taonga gives rise to an obligation and a corresponding right to: protect, preserve, control, regulate, use, develop and/or transmit those taonga and the relationship with them.

Tikanga Māori means the customs, laws, practices, traditions and values of kaitiaki (customary guardians or custodians) that comprise, underpin and inform Māori culture and its many distinctive tribal cultures.

Examples of traditional knowledge and traditional cultural expressions in New Zealand might include knowledge systems and practices in relation to weaving, performing arts, medicines, traditional house building, games, songs, tribal stories, fishing, hunting and agricultural knowledge and practices, food gathering practices, biological and environmental knowledge, classification and quantification structures such as the Māori calendar, among other things.

The key characteristics of TK and TCEs are that they:

- originate, are preserved and transmitted in a traditional context;
- are transmitted from generation to generation;
- pertain to a particular traditional or indigenous people or community;
- are not static, but rather evolve as communities respond to new challenges and needs; and
- are collective in nature.

Any definition of TK and TCEs that should be the subject of protection should also take account of the commonly understood facts that:

- Indigenous knowledge is a subset of traditional knowledge
- Traditional cultural expressions are the manifestation of traditional knowledge.
- TK and TCEs are embedded in cultural systems of intergenerational transmission and preservation, which each community has developed and maintained in its local cultural and physical environment.
- The term ‘traditional’ in “traditional knowledge and cultural expressions” does not necessarily imply that the knowledge or cultural expressions are old or unscientific in nature. They may be new tradition-based, evolutionary, creations or innovations, which build upon cultural traditions and emerge when individuals and communities take up the new challenges and realities presented by their social and physical environment.

However, a distinction can be drawn between:

- the 'traditional knowledge base' (which includes cultural traditions and heritage, language, sacred sites, human remains, natural resources, and the knowledge associated with them); and
- 'traditional knowledge based innovations and creations' (which build upon or are inspired by the 'traditional knowledge base'.

The 'traditional knowledge base' is subject to customary laws and protocols. It is often collectively 'owned' or guarded, and may be sacred/secret or in the public domain. Traditional knowledge based innovations may be individual creations, to which communal responsibilities may attach, and which may be subject to both formal and customary laws.

Conventional IPRs only protect innovations and creations based on TK, not the underlying TK itself. The problem arises because traditional knowledge based innovations and creations cannot be separated from the TK itself. Traditional cultural expressions cannot be dissociated from the traditional knowledge itself or from the cultural and physical environment from which they emerge. However, traditional cultural expressions, being specific cultural manifestations or practices of TK, are possibly easier to protect than traditional knowledge.

2. Who should benefit from such protection or who should hold the rights to protectable TK and TCEs?

The rights holders and beneficiaries of any benefits flowing from the use or exploitation of TK and TCEs should be the traditional knowledge holders and TCEs creators themselves and their community (-ies).

For Māori, the answer to this question has consistently been ngā uri – all the descendents who whakapapa (genealogically descend) through to the TK and TCEs in question. The structure of Māori communities is organised by iwi (tribe), hapū (sub-tribe), and whānau (family). Māori who have been consulted on this issue have stated that the distribution of benefits and the holding of rights may cause problems, given the customary structure of the communities. Some elements of TK and TCEs may be held by more than one iwi, hapū, or whānau; and elements of TK or TCEs may slightly vary from one iwi, hapū, whānau to another but may still be fundamentally the same TK and TCEs.

The rights of individual creators as opposed to those of the community from which the TK and TCEs originate must also be determined. This issue is where the difference between TK and TCEs needs to be fully analysed and defined prior to determining what type of rights should be awarded and who the rights holders should be. As stated in our response to Question 1, traditional knowledge is subject to customary laws and protocols and is often collectively 'owned' or guarded, and

some aspects may be sacred/secret or in the public domain. Traditional knowledge based innovations or expressions may be individual creations, to which communal responsibilities attaches, and which may be subject to both formal and customary laws.

Some Māori stakeholders have categorised this issue of rights holders and beneficiaries as being 'in the too hard basket' at the moment. However, it is also recognised that a system to manage the holding of rights and the distribution of benefits needs to be designed in accordance with indigenous customs and norms.

The use of TK and TCEs may also benefit and contribute to the well-being of all New Zealanders and to humanity as a whole, and often fosters innovation, creativity and growth on a much broader scale than simply the indigenous and local communities from which they originate. Recognition of contributions to innovation and creativity is important and in line with the objectives and principles underlying IPRs systems and therefore any attribution of rights or distribution of benefits generated from the use of TK and TCEs should fairly and equitably recognise those contributions. Acknowledgement of the sources of innovation and creativity or of the traditional knowledge holders' contributions is important, regardless of who is using the TK or TCEs. Individuals and organisations consulted assert that it is essential that whakapapa (ie the source) of the TK or TCEs be acknowledged.

Further analysis is also needed in order to define what is meant by 'benefit'. There is a wide range of benefits that may flow from the use of TK and TCEs. We are not simply dealing with potential economic benefits. Further analysis is needed on this issue to fully consider the nature and extent of protection that should be afforded in the IPRs context, and what types of benefits should be attributed to IPRs owners and the beneficiaries or TK and TCEs holders.

3. **What objective is sought to be achieved through according intellectual property protection (economic rights, moral rights)?**

- Prevent misappropriation, misuse, and misrepresentation of TK and TCEs by providing communities with the means to control the ways in which TK and TCEs are used beyond the customary and traditional context.
- Foster and encourage more respectful practices by individuals and organisations who wish to use TK and TCEs, in accordance with customary laws and protocols associated with TK and TCEs.
- Strengthen and recognise the application of customary laws and protocols in relation to TK and TCEs.
- Ensure the recognition of the contribution to innovation and creativity that TK and TCEs holders make – moral right of

acknowledgement (from whom and from where?) Ensure proper attribution of rights through recognition of TK and TCEs contributions to creative endeavors.

- Promote fair and equitable management and sharing of benefits (economic or otherwise) flowing from the use of TK and TCEs.
- Recognise collective responsibilities associated with TK and TCEs. Although the law currently recognises economic and some moral rights held by the individual descendants from the tipuna (ancestors) who translate the mātauranga (Māori knowledge) into traditional cultural expressions, those individual creators are seen by some Māori as simply being a vehicle of expression of TK. They consider that the customary rights in relation to TK and TCEs are first and foremost collective rights, with an individual expression. The customary collective dimension of the rights should be recognised in IPRs systems.

Some argue that a tension exists between Western or European models of law and world views and indigenous laws, customs and world views. The commodification of culture can be seen as an example of this perceived divergence in laws and world views. One principle to be followed in according intellectual property protection for TK and TCEs should consist of balancing the competing views and expectations in relation to the use of TK and TCEs to the general satisfaction of all. This is also in line with the objectives to promote intellectual and artistic freedom, research and cultural exchange on equitable terms, and to enhance certainty, transparency and mutual confidence.

Other peripheral, but important, objectives would be to:

- Raise awareness, domestically and internationally, of issues at the interface between TK/TCEs and IPRs (for example through education and best practice mechanisms).
- Assist indigenous and local communities to preserve, develop, and promote their TK and TCEs and support their traditional structures of creation, preservation and transmission.
- Assist in safeguard and promotion of cultural integrity and diversity.
- Promote positive working relationships that enhance or build mutual respect, trust and cooperation.
- Assure consistency with, and promote respect and adherence to, other related international and domestic indigenous rights and rights of local communities.

4. **What forms of behaviour in relation to the protectable TK and TCEs should be considered unacceptable/illegal?**

- Use of TK and TCEs without adequate consultation with or permission from the TK/TCEs holders.

- Unauthorised reproduction, adaptation and commercialisation with no sharing of benefits (economic or otherwise) with the TK and/or TCEs holders.
- Use of TK and TCEs which is contrary to or disrespectful of customary laws, protocols, and practices in relation to such TK and TCEs. For example, appropriation of a traditional language for use outside of the customary cultural context without authorisation from the indigenous people (-s) or local community (-ies) whose language is being appropriated.
- Use of TK and TCEs in a way that is insulting, degrading, culturally or spiritually offensive.
- Manufacture, importation/exportation and/or sale of fake traditional souvenirs as 'indigenous' or 'authentic' and the misrepresentation of TK and TCEs in terms of its integrity; or the attempt to associate and market products or services in a fashion that would lead consumers to reasonably assume that the TK and TCEs holders support or endorse the product or service in question.
- Unauthorised access to and disclosure of sacred-secret TK and TCEs, such as burial sites, objects of spiritual and cultural significance.
- Failure to recognise and acknowledge the source of a tradition-based innovation or creation and the TK and TCEs holders themselves. Failure to recognise and acknowledge the contribution that TK and TCEs make to innovations and creative endeavours.
- Granting of erroneous or invalid IPRs over TK and TCEs and derivatives thereof. The creation of works or inventions that are adaptations or derivatives of TK and TCEs is a form of behavior that requires further analysis in order to determine what should be considered unacceptable or illegal.

5. **Should there be any exceptions or limitations to rights attaching to protectable TK and TCEs?**

We note that items not resulting from intellectual activity and heritage in the broader sense (e.g. human remains, languages in general) are excluded from the WIPO definition of TK and TCEs. There may be situations where such elements of culture may be misappropriated, misused, or misrepresented in the IPRs context, and therefore they should also form part of the analysis.

As stated under question 4, the creation of works or inventions that are adaptations or derivatives of TK and TCEs is a form of behavior that requires further analysis in order to determine what should be considered unacceptable or illegal, and where limitations can be drawn in the IPRs context.

The current exceptions and limitations in the IPRs system mean that a significant amount of TK does not qualify for protection. New sui generis mechanisms and rights are needed to address this gap in protection. Until such mechanisms and rights are designed, it is difficult to fully assess which exceptions or limitations should attach to them. It is inappropriate to solely refer to current IP types of exceptions and limitations in answering this question. The exceptions and limitations should be informed by customary laws, protocols and practices associated with TK and TCEs, as well as by broader humanitarian and environmental objectives and principles that Member States agree should take precedence.

6. For how long should protection be accorded?

The protection should be accorded to perpetuity, or until there is no one who whakapapa (genealogically connects) to the source of the TK or TCEs, or as long as there are uri (descendants) who want to assert the rights.

Most existing IPRs place limits on how long the accorded protection lasts. Māori stakeholders have clearly indicated that there should not be any 'economic or innovation driven' duration limits on the duration of the general protection accorded to TK and TCEs. However, some stakeholders have indicated that the duration for economic type rights accorded in relation to TK and TCEs could be shorter, but the moral type rights should be perpetual as defined by the customary relationship to those TK and TCEs.

7. To what extent do existing IPRs already afford protection? What gaps need to be filled?

Intellectual property mechanisms were not designed with the protection of TK and TCEs in mind. New Zealand is therefore giving thought to the possible development of sui generis models of protection for cultural and intellectual property of Māori, beyond existing intellectual property rights systems. We are mindful that intellectual property rights protection is only one aspect of a broader set of concerns relating to the protection of traditional knowledge and cultural heritage. For New Zealand this means that alternative means of providing protection, additional to that which can be accommodated under the existing intellectual property regime, is being explored at the national level.

New Zealand supports further work by the Committee on sui generis systems to protect elements of traditional knowledge not covered by existing intellectual property rights systems.

The issue as to what extent does the current IPRs system afford protection for TK and TCEs arose in the context of the Treaty of Waitangi claim WAI 262⁶ in New Zealand. The Ngāti Kuri, Ngāti Wai and Te Rarawa claimants⁷ described the relationship between mātauranga Māori (Māori knowledge) and intellectual property rights as follows:

“The Intellectual Property Rights (“IPR”) system, whilst providing a very limited form of protection for mātauranga does not reflect or protect the underlying *values* of traditional and customary knowledge systems. For example IPR are private, monopolistic rights that provide economic protection for the holders of those rights and are for a limited duration in time. Whereas mātauranga Māori (as with indigenous knowledge systems worldwide) are collective by nature, intergenerational and are integral to the ongoing maintenance and survival of Māori culture and identity.

That is not to say that the IPR system does not provide some form of protection for Māori. There have been many examples given in evidence where Māori have used trademarks and copyright to protect the commercial aspects of their works. The key issue for the claimants is that the IPR system is limited to the protection of *economic and commercial* rights. It was not designed to protect *cultural values and identity* associated with mātauranga Māori.”

Some aspects of existing IPRs can be used to protect TK. For example, the assertion of copyright (including moral rights) over artistic and literary works, which meet the criteria under copyright law, may be possible. However, we note that the resources (financial and otherwise) required for TK and TCEs holders to effectively monitor and enforce their IPRs domestically and internationally may be beyond the means of many indigenous and local communities.

Certain exceptions and criteria in current IP law, such as novelty/prior art and inventiveness/non-obviousness, contrary to morality (such as scandalousness or offensiveness), may also provide grounds upon which indigenous and local communities may object to the granting of IPRs to third parties wishing to inappropriately exploit their TK and TCEs. Again, an issue arises in terms of the capacity for indigenous and local communities to undertake such objections.

⁶ The Waitangi Tribunal is a statutorily created commission of inquiry mandated to look into and report on claims of breach of the Treaty of Waitangi, the founding document of New Zealand. Claimants in the WAI 262 claim, also known as the Fauna and Flora claim, have raised concerns in relation to IPRs and the protection of mātauranga Māori.

⁷ Three Māori tribal entities from the Northern portion of New Zealand.

It is possible to register collective patents, if the traditional knowledge-based innovation or creation meets the criteria for registration. Traditional knowledge that is passed on from generation to generation will in most instances constitute prior art, unless it has been kept secret, and therefore it will most often not be patentable.

It is also possible for TCEs holders to register trade marks, marks of authenticity (eg. Toi Iho – Māori Made Mark) and designs for certain types of traditional cultural expressions that are intended to be used in the context of trade. However the protection accorded only relates to and is conditional to the use of those TCEs in an economic trade context, which might not be spiritually or culturally acceptable for all TCEs. Conversely, certain elements of TCEs have become part of main stream culture to the point where they can no longer be said to be sufficiently distinctive to distinguish the goods or services of one trade from those of another. In both circumstances, current trade marks law does not fully take account of the realities associated with the protection of TK and TCEs.

The review of the Trade Marks Act 1953, in New Zealand, introduced a series of measures to address concerns of Māori over inappropriate registration of Māori text and imagery as Trade Marks. These took the form of provisions to prevent individuals and enterprises from registering Trade Marks that are likely to be offensive to a significant portion of the population, including Māori.

Subsection 17(c) of the Trade Marks Act 2002 prescribes that the Commissioner of Trade Marks “must not register as a Trade Mark or part of a Trade Mark any matter, the use or registration of which would, in the opinion of the Commissioner, be likely to offend a significant section of the community, including Māori.”

In relation to any Trade Marks registered under the former Act, which might today be considered offensive, the 2002 Act provides that any person (including a person who is culturally aggrieved) may seek a declaration of invalidity under the Act. This means that the Commissioner of Trade Marks or the Courts have the ability to declare a Trade Mark invalid if it would not have been registrable under the current 2002 Act.

The Trade Marks Act 2002 also provided for the establishment of an Advisory Committee to the Commissioner of Trade Marks. The function of this Committee as prescribed under the Act is to advise the Commissioner whether the proposed use or registration of a Trade Mark that is, or appears to be, derivative of Māori sign, including text and imagery, is, or is likely to be offensive to Māori.

Some elements of protection can also be found in the common law principle of passing-off, in legal provisions relating to competition and fair trading, and in the law of contracts (e.g. confidentiality agreements, ABS agreements, trade secrets, breach of confidence). However, none of these possible mechanisms of protection have been designed with the primary objective to protect TK and TCEs, hence they often do not fully address the concerns and needs of TK and TCEs holders, and often require a trade-off or compromise on the part of the TK and TCEs holders. For example, many IP experts have praised the merits of the law on trade secrets as a possible option for TK and TCEs holders who wish to protect sacred TK and TCEs from misappropriation and misuse. The compromise may be that the indigenous peoples and local communities that are trying to protect those sacred elements of TK and TCEs, by using such a legal mechanism, are restricted in their ability and liberty to transmit and promote those sacred elements of TK and TCEs within their communities. Those sacred elements may get locked up and kept away from the people and the community. This may have some significant ramifications in terms of the survival, vitality, and integrity of the culture.

In order for trade secrets instruments to be efficient in protecting TK and TCEs, the provisions in such instruments should be in accordance with customary laws and practices, and allow for controlled dissemination of the TK and TCEs within the indigenous and local communities, without the risk of them falling into the public domain. It may be difficult for indigenous and local communities to control the dissemination of TK and TCEs in such a way, given the social context and the prevalence of modern information-sharing technologies such as the internet. The protection context is different from secret-knowledge held by businesses or corporate entities.

8. What sanctions or penalties should apply to behaviour or acts considered unacceptable/illegal?

It may be too early in the process to fully assess this issue. It is important to first build an ethical foundation and behavioural practices which are consistent with the needs and aspirations of indigenous and local communities before determining what types of sanctions or penalties would be most effective to foster adherence to those practices and deter unacceptable or illegal use of TK and TCEs.

The participants at our 12 March 2007 workshop were of the view that there needs to be a formalised framework or 'bottom line', and that penalties should be quite imposing and should effectively enforce compliance. One group of participants were in support of economic sanctions, as a possible effective means of deterring businesses from misappropriating, misusing, or misrepresenting TK and TCEs in the context of trade. This is consistent with sanctions that apply to infringement of existing intellectual property rights, which generally

provide that infringers must pay some form of compensation to the rights holder.

Compliance policy for users of TK and TCEs was suggested as a possible means of achieving the objectives; those should eventually go beyond voluntary measures such as best practice guidelines.

For existing intellectual property rights, infringement is usually a civil matter rather than criminal, although criminal penalties apply to some forms of copyright infringement. This means that IP rights holders must take action against infringers. This may not be the most desirable and effective way of enforcing potential IP rights in relation to TK and TCEs, if the holders of those rights have limited resources and capacity to monitor their rights and take action against infringers. Criminal penalties and appropriate resourcing of enforcing agencies, or a combination of both criminal and civil remedies, might be more appropriate.

The need for strong legal sanctions (economic or otherwise) was expressed in most of the submissions received by the New Zealand Government on the draft policy objectives and principles for the protection of TK and TCEs. Education and awareness-raising were also seen as important for compliance and enforcement.

9. **Which issues should be dealt with internationally and which nationally, or what division should be made between international regulation and national regulation (member states must maintain the flexibility to adapt regulation to domestic realities, legal, cultural, and economic)**

Any protection that is provided in New Zealand for TK and TCEs does not extend to other States, unless provided for in international bilateral or multilateral instruments. The New Zealand experience has shown that numerous incidents of misappropriation, misuse, and misrepresentation of TK and TCEs have occurred outside of New Zealand and for this reason, we consider that protection of TK and TCEs is needed at an international level in order to provide Member States and its citizens with recourse mechanisms to prevent such misappropriation, misuse, and misrepresentation from occurring outside of the source country.

Our domestic experience has also shown that individuals and organisations from the international community who wish to use indigenous TK and TCEs from New Zealand are often not aware of the customary laws and protocols applicable to such use. Some of those customary laws and protocols are common to a number of indigenous and local communities around the world. The development and promotion of international codes of ethics, guidelines, and/or best practice mechanisms for users of TK and TCEs would be one way of

ensuring a certain level of respect and appreciation for those common customary laws and practices associated with the use of TK and TCEs.

An international instrument, while facilitating protection of New Zealand TK and TCEs in other countries, may limit the ability of New Zealand to tailor its protection system to suit the particular domestic circumstances, as the instrument will need to be acceptable to and appropriate for groups in the rest of the World.

In the Waitangi Tribunal claim WAI 262⁸, the Ngāti Kuri, Ngāti Wai and Te Rarawa claimants (three Māori tribal entities from the Northern portion of New Zealand) submitted that:

“While there are efforts being made at the international level such as the World Intellectual Property Organisation (WIPO), to develop policies and guidelines for protection of traditional knowledge this is occurring within and thus subject to, the existing IPR system. New Zealand has a unique opportunity to develop a new and innovative system that draws from both tikanga Māori (Māori protocol and values) and tikanga Pakeha (Western protocol and values) systems to create a new and innovative system of protection. ... Such a framework would have tikanga Māori (Māori protocol and values) as a starting point and would provide more protection for Māori whilst providing greater certainty for non-Māori who wish to access mātauranga (Māori knowledge) or work collaboratively with Māori in research and development of indigenous flora and fauna.”

We reiterate our comment from previous sessions that it is also important to retain flexibility for countries to develop solutions and mechanisms appropriate to their own unique characteristics and circumstances. While the development of sui generis systems at the international level is an objective that many states support, this should not preclude the development of country or region-specific alternative approaches to protecting the knowledge and practices of indigenous communities.⁹ This is particularly important given the ‘culturally distinctive’ nature of TK and TCEs, and the possibility of other domestic legal sources of rights in relation to TK and TCEs that may need to be taken into account (e.g. indigenous and human rights, Treaty of Waitangi).

However, New Zealand considers there is a need for measures (legal or otherwise) to achieve extra territorial protection of TK and TCEs and their holders. Such measures could include:

⁸ The Waitangi Tribunal is a statutorily created commission of inquiry mandated to look into and report on claims of breach of the Treaty of Waitangi, the founding document of New Zealand. Claimants in the WAI 262 claim, also known as the Fauna and Flora claim, have raised concerns in relation to IPRs and the protection of mātauranga Māori.

⁹ For example, in 2005 the New Zealand government agreed to provide a package of assistance to the Secretariat of the Pacific Community to assist the further development of national legislation for the protection of TK and TCEs in Pacific Island countries and territories. The IPRs Policy Group, in particular Anne Haira, worked with the Secretariat of the Pacific Community to develop detailed guidelines for developing national legislation for the protection of traditional knowledge and expressions of culture based on the Pacific Model Law. This regional work is needed, especially given that only five Pacific Island countries are members of WIPO (Fiji, New Zealand, Papua New Guinea, Samoa, and Tonga).

- measures to prevent the misappropriation, misuse, and misrepresentation of TK and TCEs accessed from the public domain (e.g. cross-state sources such as the internet);
- measures to ensure that reasonable attempts are made to identify the origin of TK and TCEs and their holders prior to using them; and
- measures to ensure proper attribution of IP rights in relation to TK and TCEs, and recognition of the contribution that TK and TCEs make to innovation and creative endeavours; fair negotiation of access to TK and TCEs and ownership of any IPRs that may emerge from their use; and equitable sharing of benefits flowing from the use of TK and TCEs in the context of the international IPRs system.

The international concepts of reciprocity, national treatment, and most favoured nation status are examples of potential models to deal with international relationships relating to the use of TK and TCEs across state borders.¹⁰

10. How should foreign rights holders/beneficiaries be treated?

Our response to question 9 also applies to this question. Comments received to date from stakeholders indicate that if New Zealand provides protection for TK and TCEs originating from New Zealand, the same protection should extend to TK and TCEs originating from other States, if they so choose. However, some of the IPRs and obligations in relation to TK and TCEs may originate from domestic non-IP sources of law (e.g. indigenous rights contained in the Treaty of Waitangi). Those unique and exclusive rights should not have to be reciprocal, unless agreed by Member States.

The protection should apply to all foreign TK and TCEs, not only those which come from countries that provide protection to New Zealand TK and TCEs; and New Zealand rights holders should receive the same treatment in other countries.

¹⁰ The WIPO/UNESCO Model Laws for the Protection of Folklore and art. 15(4) of the Berne Convention, which deals with situations where the author of an unpublished work is unknown, are examples that could be considered.

Glossary of Māori Terms

Haka	Dramatic/poetic expression of aggression
Hapū	Sub-tribe
Iwi	Tribe
Kaitiaki	Custodianship, guardianship
Kaupapa	Strategy, theme, philosophy, analysis
Taonga Māori	Māori treasures
Mātauranga Māori	Māori knowledge
Mauri	Life force
Moko	Māori tattoo
Mōteatea	Overall generic term for traditional Māori songs
Ngā uri	Descendants
Oriori	Lullaby
Papatūānuku	Mother Earth
Pātere	Song, rhythmical chant
Ranginui	Sky father
Te ao Māori	Māori world view
Te reo Māori	Māori language
Tikanga Māori	Māori protocol and values
Tikanga Pakeha	Western protocol and values
Tino Rangatiratanga	Chieftainship
Tipuna	Ancestors
Toi iho	Māori Made Mark
Toi te whenua	Hold fast to the land
Waiata	Song, chant
Whakapapa	Genealogy
Whānau	Māori Family

Appendix A

Report

Workshop on Intellectual Property Rights and the Protection of Traditional Knowledge and Traditional Cultural Expressions 12 March 2007

Background

The Ministry of Economic Development (MED), Intellectual Property Policy group, hosted a half-day workshop on the protection of traditional knowledge and traditional cultural expressions on Monday 12 March 2007, 1:00-5:00 pm.¹¹ The World Intellectual Property Organisation (WIPO) established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) in 2000. As part of its work in examining the interface between intellectual property (IP) and traditional knowledge (TK) the IGC is developing two sets of policy objectives and principles for the protection of TK and traditional cultural expressions (TCEs). MED has used the work of the IGC, in particular the development of draft Policy Objectives and Guiding Principles, as an opportunity to engage discussions with Māori and other public and private stakeholders on issues relating to the interface between IP and TK/TCEs.

At the tenth session of the IGC in December 2006, member states agreed on a series of key issues or questions on the protection of TK and TCEs. They are attached to this report as Appendix A. Member states have been asked to comment on those issues by the end of March 2007. The Intellectual Property Policy group held the workshop on 12 March 2007 in order to foster discussions and generate feedback from key stakeholders on the issues.

Attendance

The workshop brought together a diverse group of individuals with backgrounds and interests in a range of traditional knowledge related areas, such as designs and artistic creations, science research and bio-prospecting, resource management and environmental law, customary fisheries, information and records management, publishing, and intellectual property rights. Approximately 35 individuals participated in the workshop. The group included Māori and non-Māori stakeholders from the community, private and public sectors. The workshop provided a good opportunity for networking and free and frank exchanges of ideas.

¹¹ The term traditional knowledge and mātauranga Māori are terms frequently used in this report. Traditional Knowledge is a commonly used and more general term that encompasses knowledge arising from all local communities, including that held by indigenous communities. This generic term is also used internationally in the context of the WIPO-IGC and the Convention on Biological Diversity. In comparison, mātauranga Māori has a more precise meaning as it refers specifically to Māori knowledge originating from Māori communities. It represents the most significant body of traditional knowledge in New Zealand.

Purpose and structure of the workshop

In hosting the workshop we had five objectives:

- Inform stakeholders on the work of the IGC, particularly on the draft policy objectives and guiding principles for the protection of TK and TCE.
- Analyse and discuss key issues for the protection of TK and TCEs in the New Zealand context.
- Generate feedback and resources which can be used in the preparation of New Zealand's response and fed into the IGC process.
- Generate feedback and resources which can be used at the domestic level to inform policy analysis on the interface between TK and Intellectual Property.
- Invite written submissions on the draft policy objectives and guiding principles.

The afternoon started with a general overview of the history and work of WIPO and the IGC, as well as information on the Ministry of Economic Development's domestic work programme on the interface between intellectual property and traditional knowledge.

Given that the main purpose of this particular workshop was to foster discussion of and generate feedback on the IGC's key issues relating to the protection of TK and TCEs, the intellectual property policy group designed an exercise to facilitate this process. Participants were invited to break-out into smaller groups and discuss the key issues in the context of factual scenarios, and subsequently present their comments, concerns, and recommendations to the entire group.

Several key messages came out of the discussions, which we have attempted to summarise below. Please note that these key messages emerged from smaller group discussions and were presented to the broader group by specific individuals and may not necessarily be endorsed by the majority of the group or MED. We also subsequently received written comments from one group on the issues, which is attached to this report as Appendix B.

General comments from participants

The following are generally applicable comments or issues raised by some of the participants:

- Appropriateness of the design or the use of traditional knowledge is very important.
- At what point can a design be said to be a Māori design and who should you talk to when it is a Māori design? For example Moko – individual artwork; who is the 'owner' of the design?

- Was the design 'inspired by' or a direct copy?
- Who should be asked? Who should be consulted? Some designs or elements of mātauranga are generic to Māori – some are specific to Māori iwi, hapū, or whānau.
- Where do you go to find the origin? One option is to build off of organisations and models like the Toi Iho that could be used across sectors (not necessarily Toi Iho itself but a similar body). There needs to be fewer levels of process and consultation – use existing bodies and structures.
- Māori are consulted out. We are so busy it's hard to keep up. Human and financial resources are stretched out. We should try to use existing processes, mechanisms, and bodies that have proven to bring positive results where possible and extrapolate from them, such as for example, Treaty settlement processes and Toi Iho.
- Plus Māori have their own consultation processes that could be linked.
- Better communication is needed between government departments in order to coordinate efforts and not duplicate the work. Internal capacity (government) needs to be looked at as well as external capacity.
- Must understand mātauranga to use Māori designs and artistic works. Must go back to people to whom the design or art belongs, not government departments.
- No trust in this IGC forum or its process as a means of addressing Māori concerns. Do not see Māori tikanga (Māori protocol and values) nor te ao Māori (Māori world view) reflected in this kaupapa (strategy, theme, philosophy, analysis). Our own structure, tino rangatiratanga (chieftainship), is in opposition with this WIPO-IGC framework.
- These key issues emerged out of an impasse at the last session of the IGC. Indigenous peoples have already answered these questions numerous times before. The issuance of these questions by the IGC is a step backwards in addressing the issues. It is a way for certain countries to stall the process, create an impasse, and deter the discussion away from the more important and pressing matters, such as advancing the work on the two draft documents on the protection of TK and TCEs. This impasse is not good for us. We are not moving forward.

Question 1 - Definition of Traditional Knowledge and Traditional Cultural Expressions/expressions of folklore that should be protected

- In order to provide “food for thought” for participant in analysing the issues, we had provided examples of working definitions for traditional knowledge and traditional cultural expressions. Most participants said they generally agreed with those working definitions of TK and TCEs as they covered most areas of the groups’ concerns/issues. They also agreed that traditional knowledge and particularly mātauranga Māori, is orally passed on and distinctly linked to culture. It was also agreed that it is constantly evolving and that it is not necessarily old.
- Because it is constantly evolving, it is difficult to have a formal definition that will withstand the test of time.
- TCEs being specific cultural manifestation or practices are possibly easier to protect than TK.

Question 2 - Who should benefit from any such protection or who should hold the rights to protectable TCEs/EoF?

- Iwi/hapū based and may create problems for distribution of benefits and in holding the rights. For example, Te Arawa represents 62 hapū. This issue is in the too hard basket at this stage, although may be able to manage distribution of benefits via treaty settlement or legislative means.
- Iwi, hapū, whānau. It is not about iwi as such, it is more about hapū and whānau. Ngā uri – all the descendents who whakapapa back through to the TK or TCEs. Example given of Ngāti Kahungunu (a Māori tribe) who whakapapa through hapū not iwi.
- Difficult to say – this is where the difference between TK and TCEs needs to be really teased out, in particular in relation to the individual creators versus collective ownership issues. Some rights and benefits can go to the individual creator, however some may more appropriately be held collectively.
- We don’t individually “own” traditional knowledge and creative expressions.
- Acknowledgment of the sources or traditional holders is very important regardless of who is using the TK and TCEs – whakapapa of the TK or TCEs should be acknowledged.
- For the rights to certain cultural expressions, such as the haka, the answer is likely not in trade marks but rather in copyright.

Question 3 - What objective is sought to be achieved through according intellectual property protection (economic rights, moral rights)?

- More respectful practice by individuals.
- It was noted that there is a tension in law created by difference in world views, ie. European context incompatible with indigenous world view (commodification of culture). One objective could be the balancing of competing views and expectations to the general satisfaction of both.
- Economic benefit – what’s in it for me, how much will I get? Dependent on economic benefit.
- Managing economic rights moving forward – no firm view. Depends on how big the benefit was. If large benefit difficult to manage. If modest, could look at education or subsidisation back to subject matter.
- Don’t want to lock knowledge away, but want to retain some control.
- Moral right of acknowledgement - from who, from where (Nō wai?), for whom (Mo wai?)
- Economic rights - creativity held by individual descendants from tipuna (ancestors). Through that person as a vehicle of expression (not an individual right as such). Control of expression through hapū (sub-tribe).
- There is an economy in the reproduction. Collective right with an individual expression.

Question 4 - What forms of behaviour in relation to protectable TCEs/EoF should be considered unacceptable/illegal?

- Use without permission of group and changing the name of the device. Publishing without proper acknowledgement.
- When use is removed from the original intent. For example:
 - use of waiata as theme song in porn film
 - use in conjunction with certain products such as cigarettes or alcohol.
- Adaptation of creative works is also an issue that would need to be addressed.

- Different forms of unacceptable behaviour to address: at one level there are general ways of behaving that should be encouraged (and all iwi would agree on) eg. not putting heads with moko on tea towels – this situation could be addressed by raising awareness; developing principles and guidelines etc. The other extreme is where there is unauthorised copying and inappropriate use of designs or TCEs where the cultural property owners are known but no effort has been made to obtain permission. An example of good practice is Moontide.

Question 5 - Should there be any exceptions or limitations to rights attaching to protectable TCEs/EoF?

- No exception for research or commercial purposes, but iwi allowed to use for themselves (covered by customary practices).
- Difficult to say – would need to consider further.

Question 6 - For how long should protection be accorded?

- Indefinitely, or until there is no one who whakapapa to the source of the creation, or as long as there are uri who want to assert the right.
- Did not discuss in depth but noted other forms of knowledge currently have protection for a finite period.

Question 7 - To what extent do existing Intellectual Property Rights already afford protection? What gaps need to be filled?

- We don't know enough about protection mechanisms that currently exist to comment on this question.
- Gaps – the current copyright framework and the right of adaptation seen as a gap that needs to be closed.
- TRIPS – compulsory disclosure of origin.

Question 8 - What sanctions or penalties should apply to behaviour or acts considered to be unacceptable/illegal?

- Penalties should be quite imposing and enforce compliance. There needs to be a formalised bottom line. Possibly the development of a Compliance Policy for agencies and users? Best practice guidelines are not enough. Some people comply and some don't. This is linked to an awareness and respect issue. Education could be part of this compliance policy. Any policy has to be area and organisation specific and must be actively managed.

- Financial sanctions are one way to penalise people.
- But the big problem right now is that there are no enforceable rights.

Question 9 - Which issues should be dealt with internationally and which nationally, or what division should be made between international regulation and national regulation?

- Reducing costs of protecting rights internationally. How would other countries recognise Māori rights and would Māori have a say in their criteria?
- Globalisation is a worrying issue. No boundaries and is seamless. It appears similar to colonisation and imperialism. That is why consultation with iwi, hapū, whānau is important.

Question 10 - How should foreign rights holders/beneficiaries be treated?

- Treat others as you want to be treated – respect other indigenous peoples rights whether or not they have a legal enforcement regime.
- The mana of the people needs to be respected, need to respect moral authority when dealing with cultural expressions and taonga.
- Also important to understand and respect the whakapapa of creative expressions, their wairua. That is why it is important to go back to the people and consult.

Those are the key messages emanating from the discussions at the workshop. The report was initially issued in draft form for participants to review, and subsequently finalised taking account of further feedback received.

In conclusion, we wish to extend our most sincere gratitude to all the participants for their contributions to this workshop. Thank you also to those who have made submissions to MED on the draft Policy Objectives and Principles. The constructive comments we have received will assist us in the development of New Zealand's contributions to the IGC forum, and will guide our domestic policy development in this area.

We also would like to express a warm thank you to LOOP Recordings Aot(ear)oa and to the artists produced under their label; A Tāwera / Black Pearl Production, producer of the documentary *Guarding the Family Silver*; and Serena Stevenson, creator of the short film *Moko Art of Nature*, for their fantastic visual and musical contributions to this event. In light of the turn up at the workshop, the quality of the discussions it generated, and most importantly the useful and productive feedback received, we consider that the workshop was a success.

The Intellectual Property Policy Group plans to hold similar workshops in the regions, so we invite you to keep an eye on our website for the next “seminar near you.”

By necessity, some of the elements of the regional workshops will be different from the one held on 12 March 2007. We are developing an intellectual property guide (IP Guide) which aims to assist Māori communities understand the risks and opportunities related to IP issues. The regional workshops will be more practically orientated and will focus on the use of the IP Guide as a key resource. The regional workshops will also provide an opportunity for the communities to discuss broader TK/IP issues.

For more information about the Ministry’s traditional knowledge work programme, please contact Paryse Suddith or Ana Parkinson on 04 472 0030 or refer to the MED website:

http://www.med.govt.nz/templates/ContentTopicSummary_7577.aspx

Appendix A

Key Issues

1. Definition of Traditional Knowledge (TK) and Traditional Cultural Expressions (TCEs)/expressions of folklore (EoF) that should be protected?

- There is no clear formal definition of what is considered traditional knowledge or traditional cultural expressions. Traditional knowledge has been loosely defined as "knowledge, innovations and practices of indigenous and local communities around the world, developed from experience gained over the centuries and adapted to the local culture and environment, and passed on orally from generation to generation", or knowledge which is "generated, preserved and transmitted in a traditional context and between generations; distinctively associated with or linked to a traditional or indigenous culture or community (-ies) through a sense of custodianship or cultural responsibility; or identified by the source community as being traditional knowledge".
- The Ministry has come to understand that examples of traditional knowledge and traditional cultural expressions in New Zealand might include weaving, kapa haka or performing arts, carving, Rongoā or Māori medicine, traditional house building, string games, waiata or Māori songs, tribal stories, fishing practices, environmental knowledge, and food gathering practices, among other things.
- We have also come to appreciate that contrary to common perception, traditional knowledge is not necessarily old knowledge, but that it is constantly evolving, as individuals and communities take up the challenges presented by their social and physical environment; and that traditional knowledge is embedded in traditional knowledge systems, which each community has developed and maintained in its local cultural context.
- Do the above properly define TK and TCEs? Should there be a formal definition in the context of the IGC or domestically?

2. Who should benefit from any such protection or who should hold the rights to protectable TCEs/EoF?

- Should the rights be held by iwi, hapū, the original creators or their descendants or someone else?
- Should the rights holders merely be "guardians" of the TK or TCEs/EoF, or should they receive some sort of economic benefit? If the holders are merely guardians, who should receive the economic benefits, if any, of exploitation of TK or TCEs/EoF.

3. What objective is sought to be achieved through according intellectual property protection (economic rights, moral rights)?

- Economic rights relate to the ability to capture some form of monetary or financial benefit from the exploitation of TK or TCEs/EoF. Economic rights can be assigned or sold.
- Moral rights are “guardianship” rights. For example they may include the right to prevent inappropriate use of TK or TCEs/EoF or to insist that the creators, originators be acknowledged. Moral rights generally cannot be assigned or sold.

4. What forms of behaviour in relation to protectable TCEs/EoF should be considered unacceptable/illegal?

- This question relates to the activities that might be considered to “infringe” rights in TK or TCEs/EoF. These may include unauthorised copying or inappropriate use.

5. Should there be any exceptions or limitations to rights attaching to protectable TCEs/EoF?

- Exceptions to rights would allow the public, or certain groups to use TK or TCEs/EoF in ways that might infringe any rights in those TK or TCEs/EoF, but without seeking authorisation from the holder of the rights.
- For example, exceptions might include the use or copying of TK or TCEs/EoF for private and non-commercial use, or for research purposes.

6. For how long should protection be accorded?

- Most existing intellectual property rights place limits on how long a protected item can be protected. For example 20 years in the case of patents, the life of the author plus fifty years for literary works in the case of copyright.
- Should there be any limit at all on the protection accorded to TK or TCEs/EoF?
- Should there be different terms for economic and moral right? For example, there might be a limit on the term for economic rights, but no limit for moral rights.

7. To what extent do existing Intellectual Property Rights already afford protection? What gaps need to be filled?

- Some intellectual property rights such as patent or registered design protection require novelty - this may exclude many elements of TK or TCEs/EoF which are not new.

- Many elements of TCEs/EoF may not be protectable by copyright as the TCE/EoF was created so long ago that any copyright protection they might have been eligible for has long since expired.
- Under the Trademarks Act 2002, marks which might be offensive to Māori may be refused registration. A Māori Advisory Committee was established by the Act to advise the Commissioner of Trademarks on these matters.
- The draft Patents Bill will also establish a Māori Advisory Committee to advise the Commissioner of Patents where patent applications involve traditional knowledge or indigenous plants and animals.
- Most existing intellectual property rights provide protection for a limited time (see comments under Question 6 above). Once the term of protection expires, the protected item enters the public domain and is free for anyone to use.
- IP legislation generally confers rights to individuals or legal persons, although there are some provisions which allow for rights to be held collectively.

8. What sanctions or penalties should apply to behaviour or acts considered unacceptable/illegal?

- The sanctions that apply to infringement of existing intellectual property rights generally provide that infringers must pay some form of compensation to the rights holder.
- For existing intellectual property rights infringement is usually a civil matter rather than criminal, although criminal penalties apply to some forms of copyright infringement. This means that IP right holders must take action against infringers.

9. Which issues should be dealt with internationally, and which nationally, or what division should be made between international regulation and national regulation?

- Any protection that is provided in New Zealand for TK and TCEs/EoF will not extend to other countries.
- One way of obtaining protection internationally for TK and TCEs/EoF is some form of international Treaty.
- A Treaty, while facilitating the protection of New Zealand TK and TCEs/EoF in other countries, may limit the ability of New Zealand to tailor its protection system to suit our particular circumstances, as the Treaty will need to be acceptable to groups in the rest of the world.

10. How should foreign rights holders/beneficiaries be treated?

- If New Zealand provides protection for TK and TCEs/EoF originating in New Zealand, should the protection be extended to TK and TCEs/EoF originating in other countries?
- If protection is extended to foreign TK and TCEs/EoF should this be the same as that provided for New Zealand TK and TCEs/EoF?

- Should protection be extended to all foreign TK and TCEs/EoF or only those which come from countries that provide protection to New Zealand TK and TCEs/EoF?
- How should New Zealand rights holders be treated in other countries?

Appendix B

Traditional Knowledge Workshop, 12 March 2007

Question 1.

No problems with definitions per se but TCEs being specific cultural practices they are possibly easier to protect than TK.

Question 2

Difficult to say - this is where the difference between TK and TCE's needs to be really teased out ie. individual creators versus group ownership. Acknowledgement of sources very important regardless of who is using the material – whakapapa of the design should be acknowledged.

Question 3

- More respectful practice by individuals requiring education and awareness raising.
- Noted that there is a tension in law created by difference in world views ie. European context incompatible with indigenous world view (commodification of culture). One objective could be the balancing of competing views and expectations to the general satisfaction of both.

Question 4

Different forms of unacceptable behaviour to address: at one level there are general ways of behaving that should be encouraged (and all Iwi would agree on) eg. not putting heads with moko on tea towels – this situation could be addressed by raising awareness; developing principles and guidelines etc. The other extreme is where there is unauthorised copying and inappropriate use of designs or TCEs where the cultural property owners are known but no effort has been made to obtain permission. An example of good practice is Moontide.

Question 5

Difficult to say – would need to consider further.

Question 6

Did not discuss in depth but noted other forms of knowledge currently have protection for a finite period.

Question 7

TRIPS – compulsory disclosure of origin probably does not apply here.

Case Study: Designer skirt

Issues

- Moko – individual artwork; who is the 'owner' of the design?
- Was the design 'inspired by' or a direct copy?

Process

- Could alert an offshore person of the process – a Māori advisory committee?
- This case is about potential misuse – depends on getting appropriate advice -who is the appropriate person/group to approach to give permission?
- Any information portal could provide guidance (but who would create it?)
- Difficult to secure any real compensation.
- Some opportunities: Iwi could develop registers of acceptable designs.
- Reproduction of designs (e.g. in books, photo-calendars, post-cards) should acknowledge original photographer / carver / artist. Continual citation would enable drill-down to find rights holder in the case of art imagery, where someone wants to use it. This would facilitate benefit-sharing.
- Code of conduct required?