MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

Notes from taonga works and copyright kōrero – 26 March 2019

Facilitator: Rauru Kirikiri

Participants: Angeline Greensill, Anthony Dancer (TPK), Aroha Mead, Chris Szekely (Alexander Turnbull Library), Desna Whaanga-Schollum, Dominic Kebbell (TPK), Dmitry Mitenkoff (MBIE), Eboni Waitere, Gareth Seymour (Ngā Taonga Sound and Vision), Honiana Love (Ngā Taonga Sound and Vision), Karaitiana Taiuru, Liam Robins (MBIE), Jonas Holland (MFAT), Karl Wixon, Kiri Nathan, Lisa Paraku, Liz Cleary (Creative New Zealand), Lois Searle (MCH), Lynell Tuffery Huria, Marcus Smith (MBIE), Ngāwini Keelan (MFAT), Naomi Solomon (Te Rūnanga O Toa Rangatira), Paul Diamond (Alexander Turnbull Library), Potaua Biasiny-Tule, Rio Hemopo-Hunuki, Susan Hall (MBIE), Tīpene Merritt, Tracey Tawhiao, Trevor Himona (Archives New Zealand), and Wī Pere Mita.

On the status quo

- There is a fundamental tension between Māori lore and Pākehā law – lore versus law (noting that neither is superior; they are just different).
    - Māori and Pākehā worldviews are completely different, and colliding all the time.
- Tikanga Māori is not recognised in (Western) intellectual property law; Western intellectual property law was never developed with indigenous rights and interests in mind.
- Problematic aspects of copyright and the IP system raised include:
    - *The automatic nature of copyright results in immediate loss of control by Māori:* there is loss of control when a new work with Māori elements is created, as copyright vests in the owner at that moment, regardless of whether or not the author respects tikanga or is using mātauranga appropriately.
    - *The concept of a set of rights owned by one person is too narrow*: copyright in a photo vests with a photographer, but tikanga recognises that the subject of the photograph also has rights and interests in the photo that affect how that photo should be used. We also heard about how rights in film are vested with the broadcasters (for example, Te Matatini must pay broadcasters for access to the archival footage of their festival).
    - *The concept of the public domain is at odds with tikanga Māori*: there is an assumption that everything in the 'public domain' is free to be used (for example, photos of tūpuna where copyright has expired). The law does not set any rules on

the use of these taonga, but some uses may be inappropriate without permission from (eg from descendants).[1]

- *Enforcement costs disincentivise contemporary creation of taonga Māori:* some Māori writers and illustrators are concerned with misuse of their taonga works – enforcement is too difficult and expensive, so they simply do not publish their work to avoid the expected cost of enforcement once they do so.
- *Copyright law facilitates and protects culturally inappropriate creation:* respect for Māori cultural practices/processes is not inherent in IP rules, leading to culturally inappropriate creation:
  - "Once you're dead, you're a taonga to be bought and sold."
- Stories like this were gathered through the Wai 262 inquiry.

- We heard about how the lack of adequate legal protection for mātauranga and taonga Māori can be seen in different contexts.
  - For example, information provided to the Waitangi Tribunal becomes part of the public record and publicly available. Similarly, if you want local councils to protect anything in the environment, you have to tell them your mātauranga. Then it's public information, but there is no tikanga or kawa around the sharing of those stories. So people can go and use them as tourism opportunities.
- The international dimension of the lack of protection for mātauranga and taonga Māori was discussed.
  - We heard about cultural appropriation in the entertainment industry internationally (for example, in video games and film).
    - "Everyone is making money off of our IP."
  - A lack of domestic policy affects the ability of Māori, and New Zealand generally, to seek protection for mātauranga and taonga Māori overseas.
  - We discussed the possibility of creating a new regime that could be used by other indigenous peoples as a blueprint for protecting their knowledge both in their own countries and internationally (while acknowledging that we cannot assume what is good for Māori will be appropriate for other indigenous peoples).
- We also heard about Māori businesses and other organisations putting tikanga at the centre of what they do.
  - We heard from publishers about how they incorporate tikanga into their work. For example, Huia Publishers always gets consent of an iwi before publishing anything about them, even if the writer is of that particular iwi.
  - We heard about the development of a video game, Titans of Aotearoa, which seeks to present mātauranga respectfully, and authentically.

[1] **Note following the hui**: what is appropriate will be context-specific, and that context will often be unknown to potential users. They should always err on the side of caution and ask for permission. This is also a matter of common courtesy and politeness.

- Recognising their role as kaitiaki, cultural institutions are constantly working out how to manage works coming out of copyright that may have mātauranga in them.
- We heard that it can be difficult as Māori businesses in some industries (for example, the fashion industry) to operate in such a way as to "thrive in your Māoriness".
- Key individuals in larger corporates are often the key to ensuring a tikanga-consistent approach to mātauranga and taonga Māori.

On solutions

On the general approach to the Treaty of Waitangi

- There was a strong sense that the Treaty/te Tiriti should be at the centre of, and guidance for, this kaupapa.
  - There was also a question as to how the Wai 262 claimants are to be involved in this work?
- We heard that any new policy framework to protect mātauranga and taonga Māori should accommodate and cover all layers: lore, law, practice and understanding.
- There was discussion about thinking "outside of the square, but inside our own paradigm", putting tikanga and wellbeing at the centre.
  - We heard about the tikanga and kawa surrounding tohunga as a potential framework for a new, principles-based framework.
  - Contemporary examples of this approach through partnership were also raised, like the Hauraki Gulf spatial plan. Tikapa Moana is perceived as a living entity and the strength of its mauri and overall wellbeing is how success is measured in the plan.
- Key concepts require clarification:
  - MBIE has adopted the terms "taonga works" and "taonga-derived works" as used in the Waitangi Tribunal Wai 262 report. Are these the right concepts? What do they mean?
    - We need to be careful not to draw arbitrary lines.
  - Who are kaitiaki?
    - The Wai 262 report focused heavily on traditional works. Who are the kaitiaki of contemporary works that express mātauranga? Is it practitioners? What is their status?
    - One participant emphasised the importance of taking a future-focused, inclusive approach to the concept of "kaitiaki", pointing out the mokopuna who are not connected to their whakapapa and should not be deterred from engaging with their culture if it is tightly controlled by mana whenua.
- This work will need to purposefully consider and navigate the fundamental tensions at play: eg paradigmatic models of control and protect versus liberate and exploit; Māori and

non-Māori; traditional vs contemporary approaches; and commercial vs private/recreational use.

On the connection of the taonga works kaupapa with the Copyright Act review

- In general, participants felt a more holistic approach to protecting mātauranga and taonga Māori was needed, rather than MBIE's approach which stems from a copyright-specific perspective.
    - One participant noted that the Copyright Act review is very narrow. The Crown should take a holistic view of the IP laws, including patents, designs etc.
    - A comment was made that by just reviewing copyright, the government may be at risk of creating a situation that is worse than the one we find ourselves in.
- Others pointed out the parallels in issues with the protection of taonga works, as MBIE is looking at them, and how others are dealing with the protection of taonga Māori in other contexts – suggesting that an IP system lens is still too narrow.
    - We heard from Archives New Zealand and the Turnbull Library about wanting to facilitate the use of data generally to enable accessibility, and the tension this creates, as re-use of mātauranga Māori may lead to misuse and misappropriation.
    - Data sovereignty issues are taonga works issues and they should be discussed at the same time.
- There were tensions with how people perceived how copyright specifically needed to change and what protections were needed for taonga Māori.
    - One participant acknowledged some tensions inherent in his views about copyright. He believed the review should aim to relax copyright protections to facilitate greater access to copyright works, pointing to the way that open sourcing allows works to be used so that others can make new things. But when it came to protecting taonga Māori, he felt differently about the direction the law needed to go (i.e. providing more control for Māori):
        - We heard that a similar theme came out of Creative New Zealand's engagement with Ngā Toi Māori in relation to updating copyright exceptions/permitted uses for educational, social and cultural reasons.
- There were queries about the limits of the copyright/IP regimes and what could be changed.
    - One participant asked whether copyright law could be changed so that non-Māori could not hold copyright over works with Māori elements.
    - There was also a proposal to remove all taonga Māori from the public domain.

On pursuing new, unique legal protections for taonga works

- Some were doubtful about the potential for law to address the issues.
    - Some felt law change would not be a 'silver bullet' or long-term solution to protect taonga works. As one participant pointed out, legislation comes from Parliament, which means it can be changed, "but we need protection that is enduring. Future governments shouldn't be able to undo any changes to the system we implement now."

- Others felt legal protection could be effective, if it was visionary, permissive, and principles-based:
    - "The vision should come from Māori, and then be implemented by the Crown. We challenge you to be visionary."
    - The National Library Act was cited as an example of permissive legislation, where there is latitude for interpretation.
- Suggestions included a Māori Information Act, to prevent the misuse of publicly available mātauranga and taonga Māori.

On non-legal mechanisms for protecting taonga works

- There was discussion about whether protection requires "ownership" and legal remedies, and whether "softer" solutions could be used (for example, proactive prevention, self-regulation, education and embracing te ao Māori in society).
    - One participant suggested a National Policy Statement might be appropriate.
- There was strong interest in the idea of a commission, as recommended by the Waitangi Tribunal.
    - The role of the Commission would be to address the question: is it tika?[2]
    - We heard about the possible enforcement role that the commission could play, similar to what one participant referred to as 'indigenous trolls?' (ie people who, via social media, seek to stop the production and sale of items that are appropriative of indigenous culture).
    - Education would be an important part: "people don't know what they don't know".

On the work ahead

- There is some distrust that work to protect taonga Māori will not go anywhere useful if it is Crown-led.
    - One participant asked, "why do we have to wait for the Crown to bring us together?" There was a view that it is for Māori to manage their own system of protection, and for the Crown and potential users to operate by standards set by Māori. "We ought to be doing this our own way."[3]
- From a practical perspective, the Crown should aim not to lead, but to enable; it should provide resources for Māori to develop solutions amongst themselves.
    - The Crown should provide a platform for Māori to continue the conversation.
    - This should be done in a way that is inclusive of iwi, hapū, whānau; kaumātua, pakeke, rangatahi and practitioners (both traditional and contemporary).
- There was also discussion about the way that we talk about this kaupapa. One participant noted the use of deficit model language, and suggested we need to shift this narrative going forward.

[2] Note added following the hui: Could look here at Te Mātāwai and/or Rūnanga Reo as examples. While not perfect, they at least empowered Māori to 'elect' their representatives.
[3] Note added following the hui: An example is Ngāi Tahu Pounamu.

- There was also an observation that the rhetoric and messaging around this work needs to be carefully managed; there was distrust of the media in the way it might report on it.