

Legal Protection for Traditional Knowledge

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Recently, New Zealanders have expressed outrage at the unauthorised use of Maori symbols in relation to commercial products. Of particular note in recent weeks are HEITIKI infant formula and Mike Tyson's instantly recognisable tattoo design, as featured in the blockbuster movie *The Hangover Part 2*.

HEITIKI infant formula is manufactured in New Zealand and sold both domestically and internationally by Kiaora New Zealand International. In its usual context, HEITIKI is said to be a Maori cultural icon, designating a particular style of ornamental pendant.

Some have described the HEITIKI infant formula as "cultural misappropriation", "disrespectful", and "representing the theft of cultural knowledge".

Similarly, many Maori have criticised former tattoo artist S Victor Whitmill's claims to copyright in Tyson's facial tattoo design. Mr Whitmill has filed a copyright claim against the film studio releasing *The Hangover Part 2*, claiming that he designed the tattoo and that the film-makers have used his copyright without permission.

New Zealand Professor Ngahuia Te Awetuku, author of *Mau Moko: The World of Maori Tattoo*, has labelled Mr Whitmill as arrogant, stating "The tattooist has never consulted with Maori, has

never had experience of Maori and originally and obviously stole the design that he put on Tyson.”

So what rights do cultural or traditional knowledge holders have in preventing commercial traders from using that cultural or traditional knowledge?

Trade Mark Protection

Generally speaking, trade marks provide exclusive rights to the registered owner. The registration of cultural or traditional knowledge, where possible, may assist in preventing the misappropriation by others.

In New Zealand, trade marks can also be refused if the use of the trade mark would be offensive to Maori.

The Heitiki trade mark was considered and approved by the Maori Advisory Committee in December 2010, despite some describing use of Maori words and imagery as cultural misappropriation. The Maori design for Mike Tyson’s tattoo on the other hand, is not the subject of any registered trade mark.

In both the HEITIKI and Mike Tyson tattoo examples, unless someone else had relevant earlier trade mark registrations, nothing could be done under trade mark law to prevent the HEITIKI infant formula or Mike Tyson’s tattoo.

The trade mark registration system only protects items of cultural or traditional knowledge if they are registered in the first place, which means they have to meet all the criteria for registration as a trade mark.

Copyright Protection

In relation to the Heitiki example, copyright law provides no assistance because there is no allegation that the producers of HEITIKI infant formula have copied anyone else's copyright works. In the case of the Tyson tattoo, while the idea is clearly Maori, unless Mr Whitmill copied an earlier original copyright work, there is nothing that Maori can do, at least under copyright law, to prevent either the creation of the tattoo in the first place, or Mr Whitmill's allegation of copyright infringement.

Patent Protection

There are also concerns that traditional knowledge is being used and patented by international traders and inventors without the consent or recognition of traditional knowledge holders. For this reason, traditional knowledge has been widely debated by the World Intellectual Property Organization (WIPO), although no definitive solution has been proposed.

To date, India is the only country in the world to have set up an institutional mechanism termed the "Traditional Knowledge Digital Library" (TKDL). The TKDL has enabled the cancellation or withdrawal of numerous patents attempting to claim the right to traditional knowledge.

The New Zealand Waitangi Tribunal will shortly issue a report on a claim relating to inappropriate use of indigenous flora and fauna. The claim has been pending for over 20 years. It is anticipated that the report may include recommendations to the Government on changes to intellectual property legislation and the treatment of traditional knowledge under those laws.

The use of traditional knowledge in trade raises more questions than answers. It would be difficult for a report such as the Waitangi Tribunal report to address all of the issues.

It is possible that further WIPO discussions lead to a similar global system or resolution. In the meantime, traditional knowledge holders can only attempt to rely on the narrow provisions of domestic intellectual property laws to prevent misappropriation.

[1] “Hei-tiki” is a Maori ornamental pendant, “hei” meaning to wear around one’s neck, and “tiki” being a mythical figure, a sacred or religious carving.