

# Indigenous intellectual and cultural property rights

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## Abstract

1999 heralds the beginning of the United Nations Decade for Indigenous Peoples. A number of issues will be highlighted throughout the decade and new opportunities will emerge. In recent years both Australia and New Zealand have witnessed a rebirth of interest in indigenous issues. One of the more complex issues that has emerged has been that of cultural and intellectual property rights. Assertion of property rights over traditional forms of knowledge will become one of the leading challenges for indigenous peoples during this decade. Indigenous intellectual and cultural property rights do not fit neatly into western legal frameworks and this therefore leaves the knowledge of indigenous peoples vulnerable to exploitation. Indigenous peoples are establishing their own networks and working through international organisations such as the United Nations Working Group on Indigenous Populations to identify sectors where cultural and/or intellectual property rights are being compromised. Libraries and information centres store and provide access to a variety of resources that fall into the category of intellectual and cultural property and this will subject our sector to intense scrutiny. This paper will identify what constitutes cultural and intellectual property rights, how it conflicts with western law, and what the implications for libraries and information centres are.

## Introduction

Intellectual property rights are defined as the rights that people (individuals or institutions) have over their intellectual creations (ie. the creations of their minds). This ownership can exist over new inventions, trademarks, music, literature, designs and plant varieties. Intellectual property ownership rights are normally controlled by legislation, and international conventions and agreements that relate to this area.

Cultural property relates to the physical evidence of a particular cultures development, such as works of arts or archaeological and historical objects. The term cultural property is therefore normally linked with items that can be seen and touched as opposed to intellectual property which can be described as intangible (cannot be seen or touched).

In most Western cultures there is a distinction made between intellectual and cultural property rights. However indigenous peoples do not tend to make this same distinction because they view the two as being inextricably intertwined and one influences the other. Therefore it should be understood that when indigenous peoples are referring to their

intellectual property rights that they are being inclusive of their cultural property rights as well.

Indigenous peoples have a number of concerns with current intellectual property laws.

### **These include:**

#### **Ownership**

Most of the concerns relate to the fact that legislative frameworks do not provide sufficient protection for their property. Intellectual property rights require that individual or joint authorship be clearly established before protection will be granted.

In indigenous societies it is not always possible to establish ownership of traditional knowledge or to determine who created cultural works. Traditional knowledge or cultural works are more likely to have been created over many generations and are deemed to be owned collectively by the tribal or family group.

#### **Protection**

Another concern relates to the fact that most intellectual property laws offer limited periods of protection (Copyright normally exists for the life of an author plus fifty years). Limited protection allows the limitation of the scope and length of monopolies. Indigenous peoples do not subscribe to this view as they believe that they are the guardians of their property for future generations. Once the protection period of intellectual property rights legislation lapsed there would be no guarantees that the intellectual and cultural property would remain in the domain of indigenous peoples.

#### **Self-determination**

Indigenous peoples wish to define the scope and nature of their intellectual and cultural property and to have their definitions recognised by governments, industry and key international organisations such as the United Nations. In New Zealand, Maori have based the exertion of their intellectual and cultural property rights on the guarantees made in the Treaty of Waitangi which was signed by Maori and representatives of the British Crown in 1840. Article Two of the Treaty guaranteed to Maori "the unqualified exercise of their chieftainship over their lands, villages and all their treasures" (see [appendix one](#)). This has been carried further through the registration of a claim to the Waitangi Tribunal (a statutory board established by the New Zealand Government in 1975 to investigate grievances resulting from breaches of the Treaty of Waitangi). The claim relates to the ownership of indigenous flora and fauna and that the Crown has denied Maori proprietary interests by granting plant variety rights in relation to indigenous flora and permitting and encouraging extensive land clearance and habitat destruction, which has detrimentally affected indigenous species.

## **Mataatua Declaration on Cultural and Intellectual Property of Indigenous Peoples**

In June 1993 over 150 delegates from fourteen countries attended a conference in Whakatane focusing on cultural and intellectual property rights of indigenous peoples. Delegates to the conference issued a declaration which made recommendations to all nation states, the United Nations and indigenous peoples. This declaration has become known as the Mataatua Declaration on Cultural and Intellectual Property Rights (see [appendix two](#))

The key themes in the declaration are:

- Indigenous peoples are the exclusive owners of their customary knowledge, cultural and intellectual property rights and are entitled to protect and direct the dissemination of that knowledge
- Existing international protection mechanisms are woefully inadequate of indigenous peoples cultural and intellectual property rights
- Indigenous peoples should define for themselves their own intellectual and cultural property
- Commercialisation of any traditional plants and medicines of indigenous peoples should be directed only by those who have inherited such knowledge
- Museums and other institutions provide an inventory of any indigenous cultural objects held in their possession and these objects should be offered back to their traditional owners.

The Mataatua Declaration and annual sessions of the United Nations Working Group on Indigenous Populations (WGIP) have helped to establish an international forum for indigenous intellectual property rights. The Working Group on Indigenous Populations has been involved in drafting a Universal Declaration on the Rights of Indigenous Peoples. The draft declaration contains references to cultural and intellectual property rights in at least four articles. References to indigenous intellectual property rights were also made at the United Nations Conference on Environment and Development (aka Earth Summit).

Other international agreements and projects have made indigenous peoples suspicious of the actions of their individual government's commitments to protecting their cultural and intellectual property rights. The Uruguay Round of the General Agreement on Tariffs and Trade signed in 1994 made it possible for biodiversity mining to take place. The major beneficiaries of biodiversity mining are multinational pharmaceutical companies who exploit local indigenous knowledge to identify plants that have medicinal value and thus are attractive for their commercial marketability and profit potentials.

The GATT agreement has also made it possible to patent human genetic materials. The Human Genome Diversity Project also known as the 'Vampire Project' involves the taking of genetic samples from communities. Many of these are indigenous communities and are obvious targets due to the fact that in many cases they are considered to be unique or in danger of extinction. The major concern is that these genetic samples can be modified and patented, and might lead to the development of new products. A cure for cancer or AIDS will be of major benefits worldwide including indigenous communities but there are serious ethical issues at stake here which are of major concern to advocates of indigenous intellectual property rights.

Having put intellectual and cultural property rights into context we will now turn our attention to the role of knowledge centres. It is also necessary to look at the position of museums on this issue.

## **The implications for knowledge centres**

Knowledge centres worldwide contain a variety of items that can be considered to be classified as cultural and intellectual property of interest to indigenous peoples.

These items include manuscripts, diaries, oral history recordings, video recordings, photographs, artworks, archaeological artefacts, human remains, and examples of material culture (eg. weapons, clothing, cooking utensils, etc.) These items were acquired by a variety of methods including purchase or donation. The major issues that indigenous peoples wish to address to knowledge centres and museums are ownership and access.

## Ownership

### **Who owns indigenous property held in knowledge centres**

Although institutions may have paid for cultural or intellectual artefacts or had them bequeathed by a donor, indigenous peoples believe that the knowledge within these items belongs to them collectively. It must also be recognised that most indigenous societies are tribal in their nature. Basically speaking this means that in indigenous people's eyes, different items will belong to different groups. For example in New Zealand, Maori is the generic name given to the indigenous peoples. However the concept of the Maori race is a post-European discovery concept. Maori before this and to this day identify themselves to their individual iwi (tribe) and hapu (sub-tribe). Although all tribes share common traits they are each unique in their own way, for example each tribal area has a distinctive carving and artistic style, its own dialect of Te reo Maori (Maori language), different stories of their origins and historic feats, unique waiata (sung poetry) and kapa haka (action songs), and a distinctive whakapapa (genealogy) line. Each iwi considers this to be their property which they are obliged to protect and to pass onto the next generations. The knowledge contained within these items is on the whole vital to the identity of their iwi and should in some circumstances not be shared with those outside the group.

### **Access**

Knowledge centres are full of the resources ripe for exploitation by those wishing to use indigenous information to their own advantage

The Mataatua Declaration insisted that the first beneficiaries of indigenous knowledge (cultural and intellectual property rights) must be the direct indigenous descendants of such knowledge.

Indigenous peoples worldwide however have witnessed the exploitation of their knowledge by others wishing to profit from it. Profiteers range from individuals building their own academic careers by using and interpreting indigenous knowledge in their research to pharmaceutical companies using indigenous medicinal remedies as the basis for their commercial drugs or fashion designers using indigenous art forms as a template for their designs.

Limiting access to knowledge is a foreign concept to many of those in the library and information industry, although those that work in the special library arena are aware that there are times that commercially sensitive information must not be shared beyond the organisation or even with other parts of the organisation.

Indigenous peoples ask that their ownership over these resources be recognised and that their requests to have access to some or all of these resources be respected.

## **Advancing the relationship between the knowledge profession and indigenous peoples**

Australia and New Zealand have become more conscious in the last two decades of the rights of their respective indigenous peoples. In both countries indigenous peoples have become more active in their political aspirations and in the assertion of ownership rights over land and natural resources. Success in these activities has given indigenous peoples the confidence to flex their muscles in other areas such as cultural and intellectual property rights. Although knowledge centres are yet to become a specific target it is a matter of 'when it happens' rather than 'if' it will happen.

It is therefore essential for knowledge centres that have items that can be classified as cultural and intellectual property to become aware of the issues surrounding these materials. It is essential that these centres be pro-active in developing a harmonious working relationship with the relevant indigenous group they belong to.

The development of this relationship will in most cases be a slow process. Both parties will need to become familiar with the cultural practices of the other. Trust is an important element. Indigenous peoples are conscious of the process of consultation. In New Zealand, Maori have been "consulted" on a range of issues by successive governments but with the Government having an agenda that has been pre-set. Knowledge centres should avoid falling into this trap.

Do not consult with just any member of the indigenous group. It is important to ensure that the persons that you are consulting with have the authority to negotiate on behalf of the group. Conflicts are just as likely to exist in indigenous societies as they do in other sectors of society.

Knowledge centres must learn to be flexible and respectful of the cultural practices of the indigenous group. It is becoming normal in the New Zealand sector for Maori cultural practices to precede and close formal proceedings such as meetings, conferences, business deals. Such occasions will normally include karakia (prayers), Whaikorero (formal speeches) and waiata (sung poetry). It is also possible for there to be cultural restrictions as to how cultural and intellectual property items can be stored or held by centres in order to protect their tapu (sacredness) nature.

Representatives of the indigenous group may be happy for their treasures to be retained by appropriate institutions, although they may wish to retain the rights of ownership and the right to restrict the access to these materials. Such restrictions may include only making their property available to members of their group, or to not allow the copying and distribution of the material to other knowledge centres without the permission of the owners.

## **Conclusions**

This paper has addressed the major differences in interpretation of intellectual property rights by Western and indigenous cultures. Knowledge centres are sitting on a timebomb

which must be defused by knowledge workers seeking a proactive relationship with the indigenous owners of the cultural and intellectual property rights.

## Appendix 1

### Treaty of Waitangi 1840

[Translation of the Maori text of the Treaty, by Prof. Sir Hugh Kawharu]

Victoria, the Queen of England, in her concern to protect the chiefs and the subtribes of New Zealand and in her desire to preserve their chieftainship and their lands to them and to maintain peace and good order considers it just to appoint an administrator one who will negotiate with the people of New Zealand to the end that their chiefs will agree to the Queen's Government being established over all parts of this land and (adjoining) islands and also because there are many of her subjects already living on this land and others yet to come. So the Queen desires to establish a government so that no evil will come to Maori and European living in a state of lawlessness. So the Queen has appointed "me, William Hobson a Captain" in the Royal Navy to be Governor for all parts of New Zealand (both those) shortly to be received by the Queen and (those) to be received hereafter and presents to the chiefs of the Confederation chiefs of the subtribes of New Zealand and other chiefs these laws set out here.

#### **The first**

The Chiefs of the Confederation and all the Chiefs who have not joined that Confederation give absolutely to the Queen of England for ever the complete government over their land.

#### **The second**

The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures. But on the other hand the Chiefs of the Confederation and all the Chiefs will sell land to the Queen at a price agreed to by the person owning it and by the person buying it (the latter being) appointed by the Queen as her purchase agent.

#### **The third**

For this agreed arrangement therefore concerning the Government of the Queen, the Queen of England will protect all the ordinary people of New Zealand and will give them the same rights and duties of citizenship as the people of England.

[signed] William Hobson Consul and Lieut. Governor

So we, the Chiefs of the Confederation of the subtribes of New Zealand meeting here at Waitangi having seen the shape of these words which we accept and agree to record our names and our marks thus.

Was done at Waitangi on the sixth of February in the year of our Lord 1840.

## Appendix 2

## **The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples**

First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples, Whakatane 12-18 June 1993 Aotearoa New Zealand. In recognition that 1993 is the United Nations International Year for the World's Indigenous Peoples: The Nine Tribes of Mataatua in the Bay of Plenty region of Aotearoa New Zealand convened the First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples, (12-18 June 1993, Whakatane).

Over 150 delegates from fourteen countries attended, including indigenous representatives from Ainu (Japan), Australia, Cook Islands, Fiji, India, Panama, Peru, Philippines, Surinam, USA and Aotearoa.

The Conference met over six days to consider a range of significant issues, including; the value of indigenous knowledge, biodiversity and biotechnology, customary environmental management, arts, music, language and other physical and spiritual cultural forms. On the final day, the following Declaration was passed by the Plenary.

### **Preamble**

Recognising that 1993 is the United Nations International Year for the World's Indigenous Peoples:

Reaffirming the undertaking of United Nations Member States to:

"Adopt or strengthen appropriate policies and/or legal instruments that will protect indigenous intellectual and cultural property and the right to preserve customary and administrative systems and practices." - United Nations Conference on Environmental Development: UNCED Agenda 21 (26.4b)

Noting the Working Principles that emerged from the United Nations Technical Conference on Indigenous Peoples and the Environment in Santiago, Chile from 18-22 May 1992 (E/CN.4/Sub.2/1992/31)

Endorsing the recommendations on Culture and Science from the World Conference on Indigenous Peoples on Territory, Environment and Development, Kari-Oca, Brazil, 25-30 May 1992.

### **We:**

Declare that Indigenous Peoples of the world have the right to self determination, and in exercising that right must be recognised as the exclusive owners of their culture and intellectual property;

Acknowledge that Indigenous Peoples have a commonality of experiences relating to the exploitation of their cultural and intellectual property;

Affirm that the knowledge of the Indigenous Peoples of the world is of benefit to all humanity;

Recognise that Indigenous Peoples are capable of managing their traditional knowledge themselves, but are willing to offer it to all humanity provided their fundamental rights to define and control this knowledge are protected by the international community;

Insist that the first beneficiaries of indigenous knowledge (culture and intellectual property rights) must be the direct indigenous descendants of such knowledge;



Declare that all forms of discrimination and exploitation of Indigenous Peoples, indigenous knowledge and indigenous cultural and intellectual property rights must cease.

## **1. Recommendations to Indigenous Peoples**

In the development of policies and practices, Indigenous Peoples should:

- 1.1** Define for themselves their own intellectual and cultural property.
- 1.2** Note that existing protection mechanisms are insufficient for the protection of Indigenous Peoples' Intellectual and Cultural Property Rights.
- 1.3** Develop a code of ethics which external users must observe when recording (visual, audio, written) their traditional and customary knowledge.
- 1.4** Prioritise the establishment of indigenous education, research and training centres to promote their knowledge of customary environmental and cultural practices.
- 1.5** Reacquire traditional indigenous lands for the purpose of promoting customary agricultural production.
- 1.6** Develop and maintain their traditional practices and sanctions for the protection, preservation and revitalisation of their traditional intellectual and cultural properties.
- 1.7** Assess existing legislation with respect to the protection of antiquities.
- 1.8** Establish an appropriate body with appropriate mechanisms to:
  1. preserve and monitor the commercialism or otherwise of indigenous cultural properties in the public domain
  2. generally advise and encourage indigenous peoples to take steps to protect their cultural heritage
  3. allow a mandatory consultative process with respect to any new legislation affecting Indigenous Peoples Cultural and Intellectual Property Rights.
- 1.9** Establish international indigenous information centres and networks.
- 1.10** Convene a Second International Conference (Hui) on the Cultural and Intellectual Property Rights of Indigenous Peoples to be hosted by the Co-ordinating Body for the Indigenous Peoples Organisations of the Amazon Basin (COICA).

## **2. Recommendations to States, National and International Agencies**

In the development of policies and practices, States, National and International Agencies must:

- 2.1** Recognise that indigenous peoples are the guardians of their customary knowledge and have the right to protect and control dissemination of that knowledge.
- 2.2** Recognise that indigenous peoples also have the right to create new knowledge based on cultural traditions.
- 2.3** Note that existing protection mechanisms are insufficient for the protection of Indigenous Peoples Cultural and Intellectual Property Rights.
- 2.4** Accept that the cultural and intellectual property rights of Indigenous Peoples are vested with those who created them.
- 2.5** Develop in full co-operation with Indigenous Peoples an additional cultural and

intellectual property rights regime incorporating the following: collective (as well as individual) ownership and origin retroactive coverage of historical as well as contemporary works protection against debasement of culturally significant items co-operative rather than competitive framework first beneficiaries to be the direct descendants of the traditional guardians of that knowledge multi-generational coverage span.

### **Biodiversity and customary environmental management**

- 2.6** Indigenous flora and fauna is inextricably bound to the territories of indigenous communities and any property right claims must recognise their traditional guardianship.
- 2.7** Commercialisation of any traditional plants and medicines of Indigenous Peoples, must be managed by the Indigenous Peoples who have inherited such knowledge.
- 2.8** A moratorium on any further commercialisation of indigenous medicinal plants and human genetic materials must be declared until indigenous communities have developed appropriate protection mechanisms.
- 2.9** Companies, institutions both governmental and private must not undertake experiments or commercialisation of any biogenetic resources without the consent of the appropriate indigenous peoples.
- 2.10** Prioritise settlement of any outstanding land and natural resources claims of indigenous peoples for the purpose of promoting customary, agricultural and marine production.
- 2.11** Ensure current scientific environmental research is strengthened by increasing the involvement of indigenous communities and of customary environmental knowledge.

### **Cultural Objects**

- 2.12** All human remains and burial objects of Indigenous Peoples held by museums and other institutions must be returned to their traditional areas in a culturally appropriate manner.
- 2.13** Museums and other institutions must provide, to the country and Indigenous Peoples concerned, an inventory of any indigenous cultural objects still held in their possession.
- 2.14** Indigenous cultural objects held in museums and other institutions must be offered back to their traditional owners.

## **3. Recommendations to the United Nations**

In respect for the rights of Indigenous Peoples, the United Nations should:

- 3.1** Ensure the process of participation of Indigenous Peoples in United Nations fora is strengthened so their views are fairly represented.
- 3.2** Incorporate the Mataatua Declaration in its entirety in the United Nations Study on Cultural and Intellectual Property of Indigenous Peoples.
- 3.3** Monitor and take action against any States whose persistent policies and activities damage the cultural and intellectual property rights of Indigenous Peoples.
- 3.4** Ensure that indigenous peoples actively contribute to the way in which indigenous cultures are incorporated into the 1995 United Nations International Year of Culture.
- 3.5** Call for an immediate halt to the on-going 'Human Genome Diversity Project' (HUGO) until its moral, ethical, socio-economic, physical and political implications have been thoroughly discussed, understood and approved by Indigenous Peoples.

## 4. Conclusion

**4.1** The United Nations, International and National Agencies and States must provide additional funding to indigenous communities in order to implement these recommendations.

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