



Protecting intellectual property with a Māori cultural element

User Guide



MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

New Zealand Government

MB13524 JUNE 2016

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ISBN (online) 978 0 947497 96 5

Cover image: Spiral carving, New Zealand, credit: One Shot/PNZ/Stephen Roke

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Foreword

Intellectual property rights can be key economic assets for businesses. Used strategically, they can play a leading role in realising the full financial potential of New Zealand's creative and innovative industries.

He Kai Kei Aku Ringa, the Crown-Māori Economic Growth Partnership, sets out the government's strategy and action plan for economic development in the Māori business sector. As the government agency responsible for the granting and registration of intellectual property rights, the Intellectual Property Office of New Zealand (IPONZ) recognises the unique social and cultural significance of Māori knowledge, innovations and cultural practices. IPONZ contributes to He Kai Kei Aku Ringa by assisting Māori businesses, communities and organisations to identify, manage and protect their intellectual property.

New Zealand is internationally recognised as a leader in the area of indigenous intellectual property. The First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples was hosted in New Zealand in 1993, and nations continue to look to us for guidance as we work to protect Māori cultural heritage. Our trade mark and patent laws are recognised internationally for providing for the establishment of Māori Advisory Committees to advise the Commissioner on whether proposed intellectual property would be offensive to Māori, or contrary to Māori values, if approved.

This guide is designed to assist Māori individuals, communities, organisations and enterprises to gain an understanding of intellectual property rights in order to manage effectively the creativity and innovation taking place in the Māori economic sector.

This guide is also designed for others, both in New Zealand and internationally — who wish to register intellectual property with a Māori element, but who may lack knowledge of the cultural, spiritual and economic values associated with mātauranga Māori (Māori knowledge), and of the government policies in place to protect it.

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Commissioner of Patents, Trade Marks, Designs and Plant Variety Rights

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Chair, Trade Marks Māori Advisory Committee

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Introduction

Overview

This publication gives guidance on the special considerations in New Zealand around the use and registration of intellectual property that contains an element of Māori culture, for example, a Māori word, image, or design.

It will assist Māori communities and businesses to understand how intellectual property rights work as commercial assets, and give them guidance on how they can use unique aspects of Māori culture appropriately to create business opportunities, attract investment, and increase profits.

It also explains the purpose and role of these special considerations in the protection of mātauranga Māori — the values, concepts, meanings and traditional knowledge of Māori culture — and shows people from diverse cultural backgrounds how they can use Māori cultural elements in their intellectual property without causing offence.

Intellectual Property Office of New Zealand

The Intellectual Property Office of New Zealand (IPONZ) is the government agency that manages the granting and registration of intellectual property rights in New Zealand. IPONZ is a business unit of the Ministry of Business, Innovation and Employment (MBIE).

The IPONZ website offers extensive information on intellectual property, designed for a wide range of users, from those with little knowledge of intellectual property, to businesses already managing multiple intellectual property rights, and intellectual property professionals such as business advisors or patent attorneys.

IPONZ has made its services easy to use, and is the first intellectual property office in the world to do all of its business online, including receiving and processing applications for intellectual property rights. Once applications are received, they are assigned to an IPONZ staff member who is available to answer any questions not covered by the general information available.

This document will at times suggest that the reader go to the IPONZ website for more information on a particular topic. The IPONZ website address is www.iponz.govt.nz.

The Commissioner

New Zealand Patents, Trade Marks, Designs and Plant Variety Rights laws require the government to appoint a Commissioner to carry out specific roles in relation to these intellectual property rights. All final decisions about whether applications for intellectual property rights are approved are made by the Commissioner. The communications that tell applicants whether their intellectual property right has been granted or approved will come from the Commissioner.

Intellectual property and mātauranga Māori

Mātauranga Māori is a unique New Zealand taonga (treasure), central to our national identity. Most commonly translated as Māori knowledge, mātauranga Māori is a broad term referring to the body of traditional knowledge that was first brought to Aotearoa–New Zealand by Māori ancestors. It is a living body of knowledge passed from generation to generation, and so it may also refer to modern-day Māori values, perspectives, and creative and cultural practices, including te reo — the Māori language.

There are some aspects of mātauranga Māori, such as traditional knowledge, that are difficult to protect using registered intellectual property rights. For example, to be registered or granted, a design or a patent must be new and original, but inventions derived from traditional knowledge may have developed over centuries. Also, most intellectual property rights are owned by individuals or a commercial business, while traditional knowledge belongs to a collective group.

Despite these issues, it is possible to identify elements of Māori culture that present unique branding opportunities and potential commercial benefits that can be protected through intellectual property rights. These intellectual property rights can help Māori individuals, organisations and businesses control the commercial use of their cultural expressions and traditional knowledge, to ensure that mātauranga Māori is recognised and respected.

It is also important that people with diverse cultural backgrounds understand how they can borrow and use aspects of Māori culture in their intellectual property in appropriate and respectful ways.

New Zealand's patent and trade mark laws require the government to set up special processes for the protection of mātauranga Māori in the granting of intellectual property rights. These processes, discussed in detail in the next chapter, empower the Commissioner to prevent the registration of trade marks and designs, and the granting of patents, that would be considered offensive to Māori, or contrary to Māori values.

Māori cultural elements in intellectual property

A Māori cultural element is some aspect of the intellectual property that reflects, or is taken from, mātauranga Māori. A Māori cultural element could include:

- › a Māori word or design
- › indigenous (native to New Zealand) plants or birds
- › Māori music or dance

The Māori cultural element may be a small part of the intellectual property (such as the use of a Māori design or word on a product not specifically related to Māori culture), or it may involve the entire intellectual property (such as recording or performing a Māori song or dance).

Types of intellectual property

There are seven types of intellectual property discussed in relation to mātauranga Māori in this guide: trade marks, patents, designs, copyright, plant variety rights, geographical indications, and trade secrets.

IPONZ manages the registration of trade marks, patents, designs, and plant variety rights. The registration of geographical indications by IPONZ is scheduled to begin in 2016. Copyright and trade secrets do not need to be registered, as they belong automatically to the owner of the creation (for example, the author of a book, or the owner of a particular drink with a unique flavour).

Applications for Trade marks and patents have a special advisory process for the consideration of Māori cultural elements by a Māori Advisory Committee, discussed in the next section. Design applications may also go through the advisory process set out for trade marks.

Plant variety rights do not have a separate process for considering Māori cultural elements.

The table on the next page shows the main types of intellectual property rights, what they protect (with examples), and their duration.

	Types of intellectual property	What it protects	Duration
Registered by IPONZ May be referred to a Māori Advisory Committee for consideration of Māori cultural elements.	Trade Marks	Unique symbols, words, or names that are part of a brand or logo a business uses to identify its goods and services in the marketplace. <i>Examples:</i> logos used on goods and services	10 years (renewable indefinitely)
	Patents	New and non-obvious inventions, products, and processes. <i>Examples:</i> manufacturing processes, chemical compounds, pharmaceuticals, textiles, and food processing equipment	Up to 20 years
	Designs	Designs, including shapes, configurations, patterns or ornaments that are applied to an article by an industrial process. <i>Examples:</i> fabric, bottles, crockery, clothing	Up to 15 years
	Geographical Indications when in force	Place names used on wines and spirits from a specific location with particular qualities that are attributable to that place of origin. <i>Example:</i> the term 'champagne' can only be used in relation to wine produced in the Champagne region of France	Not yet determined
Registered by IPONZ No separate consideration process for Māori cultural elements.	Plant Variety Rights	Exclusive rights to produce a new plant variety for sale and to sell its propagating material. <i>Example:</i> new varieties of apples	20-23 years
Do not need to be registered They exist automatically.	Copyright	Exclusive right to use and distribute original literary, artistic and musical works; performances, sound recordings, film, software and broadcasts. Also moral rights for authors and directors in relation to their works and performers' rights over live communication of their performances to the public and recording of their performances. <i>Examples:</i> Waiata, kapa haka performances, koauau tunes, weaving, carvings, jewellery, books	Life of the author plus 50 years
	Trade Secrets	Confidential business information about the composition or manufacture of a product that gives a company a competitive advantage. <i>Example:</i> recipes	Not applicable



Waitangi Tribunal report Ko Aotearoa Tenei (Wai 262)

In July 2011, the Waitangi Tribunal issued a report entitled *Ko Aotearoa Tenei*, commonly referred to as the *WAI 262* report. Since its release, the *WAI 262* report has been under consideration by the Crown. The claims and report raise a wide ranging number of matters with implications for many different areas, including intellectual property.

Here are four examples of actions taken by the government in relation to intellectual property as a result of the *WAI 262* claims:

2002

New Zealand's trade mark registration rules were changed in 2002 to empower the Commissioner of Trade Marks to refuse to register a trade mark if its registration or use would be likely to offend a significant section of the community, including Māori. A Māori Advisory Committee was established to advise the Commissioner of Trade Marks on whether the registration or proposed use of a trade mark would be likely to be offensive to Māori. (Note that this was in response to claims that had been made public prior to the issuance of the report.)

A Māori Advisory Committee for patents was set up by the Commissioner of Patents under the *Patents Act 2013* to advise the Commissioner on whether an invention claimed in a patent application is derived from Māori traditional knowledge or from indigenous plants or animals, and if so, whether commercial exploitation of that invention is likely to be contrary to Māori values.

2013

The *Haka Ka Mate Attribution Act 2014* was passed, which provides a right of attribution to Ngāti Toa in respect of the haka 'Ka Mate'. Any person who publishes, broadcasts or shows a film in public featuring 'Ka Mate' must attribute it to Te Rauparaha and Ngāti Toa Rangatira. 'Ka Mate' is an example of a taonga work.

2014

The *Geographical Indications (Wine and Spirits) Registration Amendment Bill* was introduced to Parliament in November 2015. The Bill empowers the Registrar of Geographical Indications to refuse to register a geographical indication if its registration or use would be likely to offend a significant section of the community, including Māori. This effectively aligns the government's approach on geographical indications with the approach it has already taken on trade marks and patents.

2015

Māori Advisory Committees

New Zealand trade mark and patent law requires the government to set up a Māori Advisory Committee to provide advice on the registration of trade marks and granting of patents that have a Māori cultural element. There are two advisory committees:

- › Trade Marks Māori Advisory Committee
- › Patents Māori Advisory Committee

Design applications with a Māori cultural element may also be considered by the Trade Marks Māori Advisory Committee.

Māori Advisory Committee members have a deep understanding of mātauranga Māori, and tikanga Māori (Māori cultural protocol). They play an important role in ensuring that the government does not register trade marks, patents or designs that are offensive to Māori or contrary to Māori values.

Examples of the type of questions considered by the committees include:

- › whether an image in a trade mark draws from Māori culture in a manner that could be offensive to Māori
- › whether an invention claimed in a patent application is derived from Māori traditional knowledge or from indigenous plants or animals
- › whether commercial exploitation of an invention (producing, marketing and selling it) would be contrary to Māori values

Decisions on whether a trade mark or patent can be registered are made by the Commissioner of Trade Marks and Patents. The Commissioner considers the advice received from the Māori Advisory Committees in relation to an application, but is not required to agree with that advice. The Commissioner will consider the Committee's advice alongside other relevant factors that determine whether the trade mark, patent or design can be registered or granted. The advice of the Committee is shared with the applicant when the Commissioner tells the applicant whether the application has been approved.

There is no extra cost when an application for a trade mark, design or patent goes to an advisory committee.

Further information about the Māori Advisory Committees, their members and the Memorandum of Understanding and Terms of Reference for each is available on the IPONZ website.

New Zealand law setting up the Māori Advisory Committees

There are sections of the intellectual property laws (Acts) which currently provide for the Māori Advisory Committees:

TRADE MARKS ACT 2002

Section 17(1)(c) of the *Trade Marks Act* says that the Commissioner must not register a trade mark “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.”

Sections 177-178 require the Commissioner to establish a Māori Advisory Committee “to advise the Commissioner whether the proposed use or registration of a trade mark that is, or appears to be, derivative of a Māori sign, including text and imagery, is, or is likely to be, offensive to Māori.”

PATENTS ACT 2013

Section 15 of the *Patents Act 2013* says that an invention that is “contrary to public order or morality” cannot be patented, and states that the Commissioner can “seek advice from the Māori Advisory Committee” in making this determination.

Sections 225-228 require the Commissioner to appoint a Māori Advisory Committee whose members “have knowledge of mātauranga Māori (Māori traditional knowledge) and tikanga Māori (Māori protocol).” The Committee is to advise the Commissioner on whether “an invention claimed in a patent application is derived from Māori traditional knowledge or from indigenous plants or animals,” and, if so, “whether the commercial exploitation of that invention is likely to be contrary to Māori values.”

DESIGNS ACT 1953

The *Designs Act 1953* does not provide for a Designs Māori Advisory Committee, nor does it make mention of Māori directly. It contains a more general provision that prevents the Commissioner from registering a “design the use of which would, in his opinion, be contrary to law or morality.” The Trade Marks Māori Advisory Committee may be asked to consider design applications with a Māori cultural element under this provision.

The advisory committee process

When an application for a trade mark, patent, or design with a Māori cultural element is received by IPONZ, they decide whether the application needs to be considered by a Māori Advisory Committee. Some Māori cultural elements in trade marks and designs do not need Committee consideration (this is discussed in detail in the chapter *Trade marks and mātauranga Māori*).

All applications with a Māori cultural element received by IPONZ go through the same consideration process, regardless of the cultural background of the applicant.

If IPONZ decides the application needs to go to an advisory committee, the following will happen:

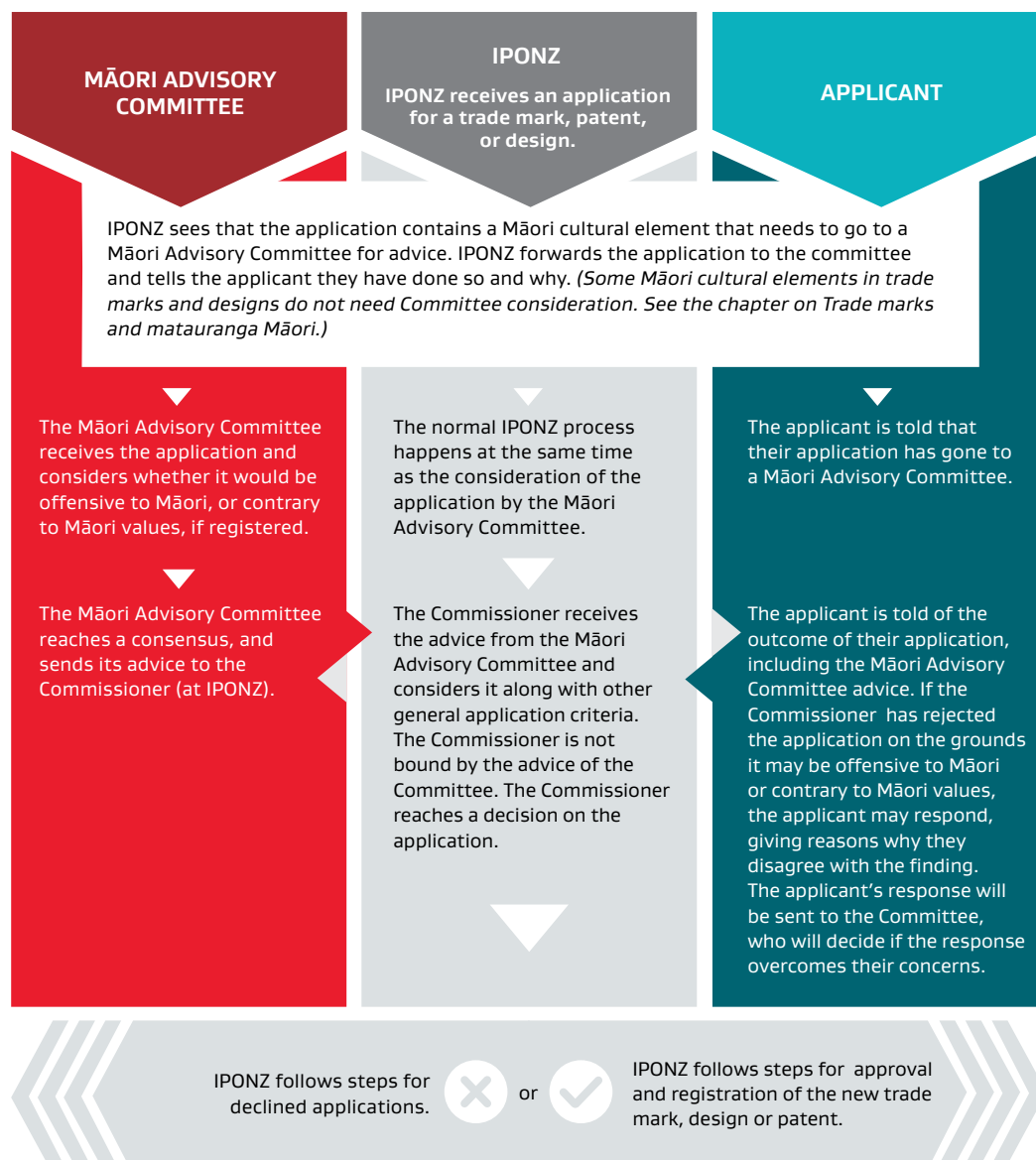
- › IPONZ will let the applicant know that the application has been forwarded to a Māori Advisory Committee.
- › The Māori Advisory Committee will consider the application in relation to mātauranga Māori at the same time that IPONZ is considering other issues that may determine whether the intellectual property can be registered or granted.
- › The advice of the Māori Advisory Committee will be sent to the Commissioner via IPONZ, who will share the advice with the applicant when the decision on the application is issued.

If the Commissioner decides that an application must be declined based on advice from a Māori Advisory Committee, the applicant will be given the opportunity to respond. The Committee will be asked to reconsider the application in light of any additional information from the applicant and give its advice to the Commissioner again.

When an application is approved, the advice of the Committee may be shared with the applicant. Its advice may provide useful insights on how a product or service might be perceived by potential consumers, or it may raise other concerns that could influence whether the intellectual property is commercially successful.

The advisory committee process is shown in the following diagram in the context of the general application process. General application process flow charts for trade marks, designs and patents are available on the IPONZ website.

MĀORI ADVISORY COMMITTEE PROCESS



Cultural considerations in relation to mātauranga Māori

Many people who apply to protect intellectual property with a Māori cultural element are familiar with Māori culture and may have chosen their intellectual property for its specific Māori meaning.

However, a growing number of products are referencing traditional Māori art and design, both in New Zealand and overseas. Many of these items are mass-produced in factories outside New Zealand, often by non-Māori artists, and few of them have an understanding of Māori culture to support them.

The general information in this section about Māori culture and protocols can help anyone owning or planning to develop intellectual property with a Māori cultural element understand the cultural reasons behind some of New Zealand's intellectual property laws and application processes.

The information could save intellectual property owners time and money in developing intellectual property that may not be able to be registered.

Recognising a Māori cultural element

It may not always be obvious, even to the owner, that their intellectual property has a Māori element. Consider the following example:

An applicant wants to register the trade mark 'Tane' for a new garden design consultancy. 'Tane' means seed in Japanese. The applicant may not realise that 'Tane' also refers to Tānemahuta, the Māori god of the forest. 'Tāne' is sacred to Māori, and the name could be offensive to Māori as a trade mark in New Zealand. The application would need to go to the Māori Advisory Committee for consideration.

The same principle may apply to Māori imagery. For example, a spiral—whether it is a koru or a Greek spiral design—is recognised as a Māori sign in New Zealand, and will be treated that way when a trade mark or design application is assessed.

For most Māori cultural elements, there is not a single set of explicit rules, or a one-size-fits-all process to follow.

Cultural significance

Certain Māori words, expressions, performances, images, places, and things have special social, cultural and spiritual significance or meaning for Māori. There are many cases where it would not be appropriate to copy or use a Māori cultural element, especially a traditional one.

Even commonplace Māori words and designs should be treated with care because of their cultural significance. They may be familiar to the public, but significant to Māori, and therefore deserve special consideration and respect. Failure to show appropriate respect may offend the public, and can impact on the sales and success of a product. Consider the hei tiki:

CULTURALLY SIGNIFICANT IMAGE: NEW ZEALAND HEI TIKI

The hei tiki is one of New Zealand's most familiar, popular and recognisable Māori symbols. The hei tiki is a small, carved ornament, usually of greenstone, worn suspended from the neck.

Hei tiki is culturally significant, as it represents the unborn child and is associated with Hineteiwaiwa, the Māori goddess of childbirth.

Using hei tiki for particular products or services may be offensive to Māori. This can be raised as an objection against an application for a New Zealand trade mark or design, and may impact market sales.

(Note that today hei tiki are often referred to simply as tiki, but this shorter word traditionally referred to the much larger human figures carved in wood guarding the entrance to a Māori pa (fortified village) and also the smaller wooden carvings used to mark a tapu (sacred) place.)



There are two objects with Māori cultural significance that are protected by law in New Zealand:

- › Ngāi Tahu's relationship with pounamu (greenstone) is protected in the *Ngāi Tahu (Pounamu Vesting) Act 1997* and the *2002 Pounamu Resource Management Plan*
- › the significance of the haka 'Ka Mate' as a taonga of Ngāti Toa Rangatira is acknowledged in the *Haka Ka Mate Attribution Act 2014*.

Intellectual property owners, no matter how familiar they are with Māori culture, may benefit from taking time to learn more about the cultural significance of the specific Māori cultural element in their intellectual property, and how it fits into their business plans. This might include contacting the appropriate Māori elders or iwi¹ representatives to discuss how they plan to use or apply the Māori cultural element. It might also be helpful to talk through the circumstances in which the product was developed and the business plan.

Applicants might also ask permission to use a particular Māori element, though in some cases it may be difficult to establish ownership and identify who has the authority to grant permission. The process of seeking permission could also work against the need to keep some intellectual property, such as a design or an invention, confidential until it has been protected.

¹ An iwi is an extended kinship group of Māori, often associated with a distinct territory. An iwi may be composed of several hapū, a family sub-group of an iwi.

The concepts of tapu and noa

Tapu is the strongest force in Māori life. It has numerous meanings and references. Tapu can be interpreted as 'sacred', or defined as 'spiritual restriction,' and can contain strong rules and prohibitions. A person, object or place which is tapu may not be touched or, in some cases, not even approached.

Noa is the opposite of tapu and includes the concept of being common. Noa also has the concept of a blessing as if it can lift the rules and restrictions of tapu from a person or object.

To associate something that is extremely tapu, with something that is noa, is offensive to Māori.

In the application to register the name 'Tane' for a new garden design consultancy, the applicant might be able to explain that the use of the word 'Tane' (meaning 'seed' in Japanese) is as a reference to man or men, and demonstrate that the designs or icons associated with the consultancy are consistent with that meaning. In this case, it would not necessarily be regarded as offensive because it does not involve anything noa. If, on the other hand, the word was to be associated with a seed cake or biscuit, then the application might be regarded as offensive because of the association of something tapu with something noa.

The association of tapu and noa in trade marks can be illustrated further:

TAPU AND NOA: PAPATŪĀNUKU CHEESE

Papatūānuku is one of the most significant Māori atua or tipuna (god or spiritual ancestor) and therefore tapu.

A trade mark containing Papatūānuku on goods (food) that are noa would be considered offensive, and could be raised as an objection against a New Zealand trade mark application.

Cultural offensiveness may also impact market sales.



Māori world view and values

Many Māori values are related to the Māori story of the origin of the world, in the relationship between Ranginui (the sky father) and Papatuanuku (the earth mother) and their children, from whom all living things are believed to descend. All plants and animals, according to the Māori world view, therefore share a sacred (tapu) origin.

The relationship between people and all living things is characterised by a shared origin or life principle referred to as **mauri**. Mauri is not limited to animate objects. A waterway, for example, has mauri, and a mountain has mauri by virtue of its connectedness to Papatūānuku.

Any act that undermines or disrespects mauri is therefore objectionable. These values are the basis for the obligation Māori feel to act as kaitiaki (guardian, custodian) of mauri.

Values that enhance and protect mauri are:

- › **Tika:** truth, correctness, directness, justice, fairness, righteousness
- › **Pono:** being true, valid, honest, genuine, sincere
- › **Aroha:** affection, sympathy, charity, compassion, love, empathy.

Inappropriate associations

Associating Māori cultural elements with some types of goods and services could be considered offensive, as they may appear to make inappropriate assumptions about Māori. For example, alcohol, tobacco, genetic technologies, gaming and gambling all have the potential to devalue Māori people, culture and values.

INAPPROPRIATE ASSOCIATION: ATUA IPA ALE

Associating Māori cultural elements with certain goods, like alcohol, could be considered offensive.



These historical examples of inappropriate association would not be acceptable today for many reasons, including the juxtaposition of noa and tapu.

HISTORICAL EXAMPLES NOT ACCEPTABLE TODAY

1914



1927



1935



Images from *Well Made New Zealand: a Century of Trademarks*. Richard Wolfe, Reed Methuen, 1987.

Māori to English translation

Some Māori words and concepts can be translated into English without risk of causing offence. However, sometimes there is another layer of meaning or understanding in relation to a Māori word that is lost when it is translated into English.

For example, the word *kuia* could be translated as grandmother. This is accurate, but the translation does not reflect its full significance for Māori as a name used to show great respect, recognising a person's achievements, wisdom and contribution. In this light, it would be offensive for *kuia* (tapu) to be associated with things like food or alcohol (noa) in a trade mark.

Māori imagery, artwork and design

Pre-colonial Māori had no written language, so traditional knowledge was passed down through the generations through stories and visual art. Full of meaning and symbolism, traditional Māori art and design form an important part of Māori identity and culture.

Large pieces, like waka (canoes) and wharenui (meeting houses), and small pieces, like weapons, vessels, tools, jewellery and clothing, all communicate a story and have meaning and significance. Each shape, colour and material was carefully selected for its cultural or spiritual meaning.

FEATURES OF MĀORI IMAGERY

The images below illustrate some of the distinctive features of Māori imagery and design, including the curvilinear designs depicted in tā moko (tattooing), kowhaiwhai (rafter patterns) and whakairo (carving), and rectilinear designs depicted in tukutuku (ornamental panelling) and taniko (embroidery).

MĀORI IMAGERY AND DESIGN

All illustrations are reproduced with permission from the Alexander Turnbull Library, Wellington, New Zealand. Reference numbers are to specific library collections.



**Meeting house Te Mana-o-Turanga,
on Whakato Marae, at Manutuke**
(date unknown) Reference number: 1/2-051434G

**Tukutuku panels,
wooden carving and
kowhaiwhai**
(ca 1930s) Reference
number: 1/2-51556



**Wooden carvings
(poupou) Interior of
Te Mana-o-Turanga
meeting house** (date
unknown) Reference
number: 1/2-051454-G



**Flax kete or woven
basket.** (Late 19th
century) Collector
Mansfield, Katherine
1888-1923; Reference
number:
Curios-018-1-003



MĀORI IMAGERY AND DESIGN



Flax piupiu or skirt and a length of taniko weaving, probably at Koroniti (1921) Reference number: PA1-q-257-43-4



Drawings of Māori rafter patterns
Godber, Albert Percy (1876-1949). 10. 13W. MA13. "Ngutukaka" 11. 19W. MA19. "Maui" and, 12. 20W. MA20. "Maui". (1939-1947). Reference num: E-302-q-1-010/012



Drawings of Māori rafter patterns
Godber, Albert Percy, (1876-1949). 19. 34W 20. 30W and, 21. 1W. MA1. "Pitaua Manaia". (1939-1947). Reference number: E-302-q-1019/021

MĀORI TIKANGA (THE 'RIGHT WAY' TO DO THINGS)

Māori artists often dedicate themselves to studying a specific art form. Part of this study includes learning tikanga, or the right way to do things (protocol). The work of these Māori artists is highly sought after and each piece is treated as a taonga (treasure).

If an intellectual property application goes to a Māori Advisory Committee for consideration, respect for tikanga may play a role in the assessment of whether it is potentially offensive to Māori. When using or commissioning Māori artwork or designs, owners should consider using an artist or designer who is familiar with traditional Māori culture and tikanga to ensure that the trade mark or design is represented correctly and is culturally appropriate.

This is also important in relation to copyright. Even though there is no advisory committee for copyright, inappropriate cultural references could affect commercial success in the marketplace.

TRADITIONAL MĀORI DESIGN ELEMENTS

Below are some examples of traditional Māori icons and their meanings. These icons may be a small part of a design, the entire design, or the inspiration for a new design.

TRADITIONAL MĀORI ICONS



Koru

The koru depicts an unfolding fern frond. It symbolises new beginnings, growth and harmony.

Pikorua
The pikorua symbolises the joining together of two people or spirits. It is also said to represent life's eternal paths.



Hei matau

The hei matau or fish hook depicts abundance, strength and determination. It is also said to be a good luck charm for those journeying over water.

Toki
The toki is a stylised adze that represents strength, control and determination.



Manaia

The manaia depicts a spiritual guardian. It has the head of a bird, the body of a man, and the tail of a fish. A manaia provides spiritual guidance and strength.

Roimata
Roimata means 'tear drop' and symbolises sadness or grief. It was sometimes given as a gift to comfort or console.



Trade marks and mātauranga Māori

Trade marks are distinctive symbols or words that help consumers identify and distinguish products and services in the marketplace. Trade marks can include logos, words, images, colours, shapes, sounds, smells — or any combination of these.

The image shows the trademark symbol, which consists of the letters 'TM' in a bold, sans-serif font.

Many trade marks in the marketplace are not registered. These unregistered trade marks (sometimes referred to as 'common law' trade marks) may carry the symbol TM.

Registration of a trade mark is evidence of ownership of the trade mark and makes it easier for owners to enforce their rights. Once registered, a trade mark can carry the ® symbol or the ™ symbol.

Registering a trade mark in New Zealand only gives protection in New Zealand. Trade mark protection in other countries requires a separate application process in that country, or use of the international trade mark system (the Madrid Protocol²).

All applications for trade mark registration in New Zealand are assessed for Māori cultural elements or features derived from mātauranga Māori. Any that need special consideration are forwarded to the Trade Marks Māori Advisory Committee.

The Trade Marks Māori Advisory Committee has issued a set of guidelines it follows when assessing applications it receives from the Commissioner. These are available on the IPONZ website.

Trade mark law in New Zealand

The *Trade Marks Act 2002* and *Trade Marks Regulations 2003* set out the legal framework for trade marks in New Zealand.

Criteria for registering a trade mark

In order for a trade mark to be registered, it must meet the detailed and specific criteria for registrability outlined in the *Trade Marks Act 2002* and the *Trade Marks Regulations 2003*.

² The *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks* (commonly referred to as the Madrid Protocol), is a filing treaty. It provides a cost-effective and efficient way for trade mark holders to apply for protection for their trade marks in multiple countries with one application and given if its one application, in one language and with one set of fees, in one currency. More information is available on the IPONZ website.

A trade mark must be distinctive in relation to the goods and services it will be applied to. A trade mark that describes or names a characteristic or quality of goods or services is not distinctive and therefore not registrable. For example, an apple (āporo in Māori) is considered distinctive if used on electronic devices, but not when used on products or services in relation to apples.

A trade mark should not:

- › be the same as or similar to other trade marks on the trade marks register which are applied to the same or similar goods and/or services
- › mislead or confuse consumers about the nature or origin of the goods
- › contain material protected or prohibited by other laws.

Benefits of registering a trade mark

A registered trade mark helps consumers distinguish between similar goods and services in the marketplace.

In addition, a registered trade mark:

- › makes the owner the only person who can legally use the trade mark throughout New Zealand to promote the goods and/or services that it covers
- › has legal protection that can be used to prevent others from trying to imitate the owner's brand, or benefit from its success
- › is listed on the publicly searchable trade mark register (administered by IPONZ), so that other businesses intending to use or register an identical or similar trade mark can see that the trade mark is registered
- › has been through a formal registration process that will assist in ensuring that the trade mark does not infringe the rights of other registered trade marks
- › is personal property that can be sold or licensed to another person or business
- › may provide information to consumers about the quality (high, low or in-between) of the goods and services on offer
- › may help to create commercial 'goodwill' (good reputation and regular, trusting customers) that can increase substantially over time as the trade mark becomes established in the market.

Ownership of a trade mark

A trade mark can be owned by one or more individuals, a company, two partners, one or more company owners, or other legal entities such as an incorporated society or a runanga (the governing council or administrative group of a Māori iwi or hapū which has been established as a legal entity). Although ownership of a trade mark can be transferred after it is registered, it is preferable to clarify in advance who will own the trade mark. It may be a good idea to get legal advice.

Unrestricted Māori words and designs

There are some Māori words and designs that the Trade Marks Māori Advisory Committee has determined are generally not considered offensive and can be freely associated with a wide range of goods and services.

The Māori words and designs that do not require assessment are:

- › Māori geographical names
- › The word 'kiwi'
- › The spiral koru design (also known as pitau).

However, applications that contain these Māori cultural elements will go to the Trade Marks Māori Advisory Committee if they also include:

- › other Māori words or images
- › anything that could be considered offensive or ambiguous in relation to the particular goods and services the trade mark represents
- › an atua (god) or tīpuna (ancestor) name or image
- › an association with wahi tapu (a place sacred to Māori in the traditional, spiritual or religious, ritual, or mythological sense)
- › a word that may be regarded by whanau (extended family group), hapū or iwi as having mana (high importance).

Statistics on trade mark applications with a Māori element

The table on the next page shows the total number of trade mark applications filed, the number of applications where a Māori cultural element was identified, the number of those applications referred to the Trade Marks Māori Advisory Committee, and the number of Māori trade marks considered to be offensive by the Committee, from 2003 to 2015.

The percentage of applications with a Māori cultural element sent to the Māori Advisory Committee has ranged from 58% to 70% over the past 11 years. (Prior to 2005, all applications with a Māori cultural element went to the Committee).

The number of applications found to have a Māori cultural element that would be offensive to Māori is generally below 3% (in 2015 it reached 5%).

602

In 2009 the Maori Advisory Committee recieved 602 (a record number) of applications with a cultural element

3%

On average 3% of applications the Maori Advisory Committee recieve annually are deemed culturally offensive

2015

In 2015 the highest number of applications in 10 years was sent to the Maori Advisory Committee

Trade Mark Māori Advisory Committee statistics

Year	Total trade mark applications filed (classes)*	Applications with a Māori cultural element	Applications sent to Committee**	Māori trade marks deemed potentially offensive by Committee
2015	22,122 (45,800)	406	301 (74%)	15
2014	20,390 (39,472)	417	244 (58%)	4
2013	18,559 (35,370)	363	210 (58%)	9
2012	17,858 (33,180)	523	343 (65%)	10
2011	17,726 (32,239)	570	402 (70%)	6
2010	17,158 (31,339)	571	407 (71%)	3
2009	16,464 (29,373)	602	416 (69%)	11
2008	18,129 (33,349)	476	316 (66%)	9
2007	20,181 (36,660)	601	404 (67%)	1
2006	19,362 (33,702)	610	427 (70%)	2
2005	16,905 (28,779)	546	426 (78%)	4
2004	16,205 (27,255)	488	488 (100%)	6
2003	19,236 (23,252)	480	480 (100%)	3

*Note: New Zealand trade mark registration uses an international classification system published by the World Intellectual Property Organisation. Trade mark applicants must classify the goods or services they intend to use the trade mark on into one or more of 45 classes. One trade mark may be applied in several classes. The 'classes' figure in the table above offers a picture of how many types of goods or services have Māori trade marks applied to them.

**IPONZ is only able to accurately count the number of trade marks with a Māori cultural element that did not go to the Māori Advisory Committee after 2012, when it introduced its online case management facility. Other figures in the table are estimates.

Application process information

Before applying for trade mark registration, applicants should make sure their trade mark is not already being used. Tools and resources are available on the IPONZ website to help:

- › the **ONE check tool** — checks the companies register, domain name register and trade marks register
- › **Trade Mark register** and search function
- › **International Trade Mark Register**

General searching on the internet may uncover competitive unregistered trade marks.

The trade mark application process must be completed online. The IPONZ website has detailed instructions on how to apply, and information on fees.

Overcoming an offensiveness objection

If the Commissioner raises an offensiveness objection to a trade mark, based on the advice of the Trade Marks Māori Advisory Committee, the applicant is entitled to respond giving reasons why they think the trade mark is not offensive.

IPONZ will send the applicant's response to the Trade Marks Māori Advisory Committee, to review and in turn advise the Commissioner if the applicant's response overcomes their original concerns.

While applicants have disagreed with the advice provided by the Committee, as at December 2015, no trade mark application has resulted in a hearing to challenge the Commissioner's decision.

There have been cases where an offensiveness objection has been overcome:

- › In one case the applicant was advised to seek consent from the relevant authority. The applicant got this and the trade mark was then accepted.
- › In another case, the trade mark was considered offensive because it contained a tapu word to be used on goods that could serve food (noa). In this case the applicant amended their trade mark specification to state *glass plates, bowls; the aforementioned goods being of a decorative nature and not for use with food*. This overcame the Committee's concerns and the objection was withdrawn.



Example case

TRADE MARKS

A local beekeeper, Pētera, decided to create a honey brand that is uniquely kiwi and references his Māori ancestry. He selected the brand Ranginui as it reflects his desire to promote an organic and delicious New Zealand honey.

Pētera decided to apply for the trade mark Ranginui, combined with a logo, on the goods honey in class 30.

After making his application, Pētera was contacted by IPONZ notifying him that because the trade mark application contained a Māori word and image, his application had been sent to the Māori Advisory Committee for their opinion.

Because he was culturally aware, and because his trade mark had been professionally designed, Pētera assumed that the application approval process would be smooth.

A fortnight later Pētera received notification from IPONZ that his trade mark was considered to be offensive to Māori. Ranginui is one of the most significant Māori atua or tipuna (a god or spiritual ancestor) and therefore tapu. The use of Ranginui in relation to honey, which as a foodstuff is considered noa, would attempt to lift the tapu from Ranginui, and would therefore cause offence.

Pētera had to decide how to proceed. He knew he could attempt to change the Committee's opinion through a written submission but there was no guarantee that this would be effective, especially given the nature of the objection raised. Alternatively he could continue without a trade mark registration but protecting his intellectual property could be more difficult and costly. He also knew that both of these options, to proceed with his proposed brand could alienate a portion of his customer base or lead to unfavourable media coverage for his business.

Finally, Pētera decided that rebranding was a better option, and would not be too costly as he had not yet sold any honey using the proposed brand or gone to the expense of investing in packaging or signage.

Not wishing to cause offence to Māori, Pētera consulted with local iwi regarding some other brand names and selected the brand name lorangi (referring to cirrus cloud, light cloud, and mares' tails), which in their opinion is not tapu and therefore not likely to cause offence.

Once his new design proof was final, Pētera made a new successful application.

Patents and mātauranga Māori

Patent law protects inventions and other new products and processes, including those based on mātauranga Māori, such as rongoā (traditional Māori medicine) or processes where the formula or use has not been previously disclosed.

IPONZ will refer applications for patents to the Patents Māori Advisory Committee if:

- › the invention is derived from Māori traditional knowledge, or
- › the invention is derived from indigenous plants or animals.

The Patents Māori Advisory Committee will consider whether commercial exploitation of the patent, (producing, marketing and selling the invention) is likely to be contrary to Māori values.

The Patents Māori Advisory Committee was established in 2013. It has not yet considered any patent applications. The Committee intends to publish guidelines to provide clear guidance on Māori cultural issues to patent applicants.



Owners of inventions who want to apply for a patent must keep the invention confidential until after the patent application has been filed.

Owners of inventions who want to apply for a patent must keep the invention confidential until after the patent application has been filed. If an invention is described, used, or displayed in public before an application for a patent has been filed, the invention will no longer be new and can no longer be granted a patent.

A New Zealand patent gives protection only within New Zealand. To get patent protection in another country, it is necessary to file a patent application in that country.

It may also be possible to file through processes established by the Patent Cooperation Treaty PCT (an international treaty with more than 145 Contracting States). The PCT makes it possible to apply for patent protection in many countries with a single international patent application. The granting of patents remains under the control of the national or regional patent offices in those countries.

Patent law in New Zealand

The *Patents Act 2013* and the *Patents Regulations 2014* set out the legal framework for patents in New Zealand.

Criteria for granting of patents

For a new product or process to be patented it must be:

- › **new** – different from anything previously known
- › **inventive** – not obvious to someone with a good knowledge of the subject
- › **useful** – has a practical application that works
- › **not otherwise excluded** from patent protection (see IPONZ website and the *Patents Act 2013* for more information on what is excluded; exclusions include methods of treatment by surgery or therapy, methods of diagnosis, plant varieties, and inventions contrary to public order or morality, such as a process for cloning human beings).

Benefits of a granted patent

A patent grants the patent owner the right to:

- › be the only person who can produce and sell the invention for up to 20 years
- › sell or license the patent
- › take legal action to prevent others from making and selling the invention without permission.

Ownership of a patent

The inventor is usually the owner of the patent. When the invention is created as part of someone's employment, the employer may instead be the legal owner of the patent (this would usually be set out in an employment contract).

Application process

Preparation of a patent application, including the specification that describes the invention or innovation, is very complex. IPONZ recommends that those interested in applying for a patent contact a patent attorney for professional assistance. A list of New Zealand registered patent attorneys is on the IPONZ website.

Anyone considering applying for a patent should refer to the IPONZ website before applying to:

- › Make sure the invention can be patented (not all inventions can be patented)
- › Find out if the invention is already known (by searching both the IPONZ and overseas patent registers) to avoid infringing someone else's patent for the same invention
- › Get information about patent attorneys
- › Prepare the technical and legal information about the invention needed to complete a specification document — a written description of the invention, which may include drawings, and may require other documentation.

The patent application must be completed online. The IPONZ website has detailed instructions on how to apply, and information on patent fees.



Example case

PATENTS

The plant poroporo, *solanum aviculare* is a New Zealand native plant used by Māori in the treatment of rheumatism.

Emma, an overseas pharmaceutical researcher, has isolated a toxic alkaloid, solasodine, from the leaves and unripe fruit of the poroporo. Emma wants to cultivate the plant overseas specifically for the production of steroid contraceptives, to be marketed and sold by her pharmaceutical company.

Emma sends an application to patent the medicine in New Zealand to IPONZ.

IPONZ staff ask the following questions when assessing the application:

Is the invention derived from Māori traditional knowledge?

Answer: Based on the facts, it is not clear; Māori have a pre-existing use for poroporo but not as a contraceptive.

Is the invention derived from indigenous plants and animals?

Answer: Yes. Consequently, the application for the commercial exploitation of the poroporo extract will be sent to the Patents Māori Advisory Committee for advice.

The Patents Māori Advisory Committee will consider whether the commercial exploitation of the poroporo-derived invention is likely to be contrary to Māori values.

The Committee would consider the wider benefits of the invention, particularly to Māori, and might also look for steps that could address any negative impact on Māori values.

Design registration and mātauranga Māori

The design of a product is what makes it visually attractive to customers and may be its strongest selling point. This makes the design of a product a valuable asset to protect.

There is no specific Designs Māori Advisory Committee. However, designs that contain a Māori cultural element may be sent to the Trade Marks Māori Advisory Committee to assess whether they may be offensive to Māori.

In rare cases, an applicant may be advised to seek the consent of the person or group who are the traditional owners of the Māori cultural element within the proposed design. If that consent is not given, then IPONZ may refuse to register the design if the Committee find that it may be offensive.

It is essential that a design not be published prior to applying for registration, as doing so will prevent registration, or mean that the registration is invalid.

Design law in New Zealand

Design protection in New Zealand is provided through the *Designs Act 1953* and the *Designs Regulations 1954*.

Criteria for registering a design

For a new design to be registered it must be:

- › **new**, or have original features of shape, configuration, pattern or ornament
- › **applied** to an article by an industrial process
- › **appealing to the eyes**, and judged solely by the eyes.

The requirement that the design is new means not just that it is freshly devised, or new to the designer, but that it is not published in New Zealand before the date of application for registration. In particular, the design must not be used on a website or in publicity pamphlets until after a design application has been made.

A design registration will not be granted for hand-crafted, one-off, or bespoke pieces.

Benefits of registering a design

Registering a design will mean the design owner is the only one who can make, import, sell or license their design for up to 15 years. Design registration offers stronger and more defensible protection than copyright.

Overseas manufacturers looking for partnership opportunities often search the New Zealand Design Register to find new designs and products.

Manufacturers and importers should check the register to see if their designs could infringe a registered design.

Ownership of a design

A registered design can be owned by one or more people, a company, two partners, one or more company owners, or other legal entities. Although ownership of a design can be transferred after it is registered, it is preferable to clarify in advance who will own the design. It may be a good idea to get legal advice.

Application process

Information on the IPONZ website will assist anyone considering registering a design to do the following before applying:

- › Make sure the design meets the legal criteria to be registered
- › Check the New Zealand Design Register to make sure the design is not similar to another registered design.

The design registration process must be completed online. The IPONZ website has detailed instructions on how to apply, and information on fees.



Example case

DESIGN

Tamati, a New Zealand small business owner, developed a new range of sandals with Māori patterns and motifs laser-cut into the soles. These sandal designs were visually unique, and were going to be sold to the public through a new business Tamati was planning to register as a company.

Tamati decided to apply for design registration for five models of sandals with the following Māori designs:

- › Koru patterns (representing peace, personal growth, new life and harmony).
- › Single Twist patterns (representing the path of life)
- › Double and Triple Twist (representing the joining of cultures, and friendship for life)
- › Hei Matau (signifying abundance, plenty, strength and determination)
- › Manaia (a spiritual guardian, provider and protector over the sky, earth and sea).

When IPONZ received the application, they saw that the proposed designs included imagery that could be of cultural or spiritual significance for Māori, so the application was sent to the Trade Marks Māori Advisory Committee for consideration. IPONZ told Tamati his application had been forwarded to the committee.

The Māori Advisory Committee returned feedback stating that the application of the koru to the footwear was acceptable, in keeping with their general guidelines on imagery that can be used freely without causing offence, and that the hei matau was also acceptable. The Committee found that the application of the other three Māori cultural elements to footwear, and the resulting association of Māori values and imagery with feet, and the significance of some imagery being walked on and engaging with earth and soil, could cause offence to Māori.

This advice was helpful to Tamati, who did not want to invest time and money in manufacturing and selling a new product that could be culturally offensive to potential customers and to the general public.

Tamati was able to remove the offensive versions of the sandals from the design application, and go ahead with registering the other two designs with confidence that they were unlikely to offend customers or other members of the public.

Plant variety rights and mātauranga Māori

New plant varieties can be protected through registration, and granting of plant variety rights. The owner of a plant variety right is the only person allowed to produce the new plant variety for sale and to sell its propagating material (e.g. seeds and cuttings).

Plant variety rights can apply to all plant varieties, but not to algae or bacteria.

Plant variety rights apply provisionally from the date of application. Once granted, a plant variety right lasts for 20 years for non-woody plants and 23 years for woody plants.

Plant variety rights apply only in New Zealand. To get protection for the plant variety in another country, the owner must apply in that country. New Zealand is a member of the International Union for the Protection of New Varieties of Plants (UPOV) which allows New Zealand plant breeders to apply for protection for their new varieties in all other member countries.

Plant variety right applications do not go to a Māori Advisory Committee, and there are no separate processes or criteria in relation to mātauranga Māori in the application process.

Plant variety law in New Zealand

The *Plant Variety Rights Act 1987* and *Plant Variety Rights Regulations 1988* set out the legal framework for plant variety rights in New Zealand.

Criteria for granting of plant variety rights

To qualify for registration, a plant variety must be all of the following:

- › **distinct** — different, in one or more ways, from all commonly known varieties at the date of application
- › **uniform and stable** — each plant needs to match the variety description, and the variety itself needs to be consistent, even after repeated propagation
- › **new** — new plant varieties must have been sold in New Zealand for less than a year, or overseas for less than six months, prior to application
- › **named** — have a proposed variety name (denomination) that conforms to internationally accepted guidelines.

Benefits of granted plant variety rights

As well as having exclusive rights to produce a new plant variety for sale and to sell its propagating material, the owner of a plant variety right can also:

- › prevent others from selling the plant variety and its propagating material
- › licence the reproduction and sale of the plant variety by others
- › sell the plant variety right to another person or business.

Note, however, that a plant variety right does not stop others from:

- › growing or using a protected plant variety for non-commercial purposes, such as in the home garden or for research purposes
- › eating a protected plant variety or using it for other non-propagating purposes
- › using a protected plant variety for plant breeding.

Ownership of plant variety rights

Plant variety rights can be owned by one or more individuals, a company, two partners, one or more company owners, or other legal entities. Legal advice may be required.

Application process

Information on the IPONZ website will help applicants prepare an application to register a plant variety.

The plant variety right registration process must be completed online. The IPONZ website has detailed instructions on how to apply and information on fees.



Example case

PLANT VARIETY RIGHT

While out running, Hamish, a nursery owner, noticed an interesting seedling of a local native plant and decided to dig it up and grow the seedling. Hamish potted the seedling in his nursery and observed it over several growing seasons. Propagation was carried out and Hamish's nursery developed the seedling into a cultivar.

Following an expression of interest in the new cultivar from another nursery, and good feedback from a garden centre, Hamish lodged an application for a plant variety right.

Because the plant variety originated from discovery and development, Hamish was required to state on the plant variety rights application where and when the original seedling had been found.

The seedling was found on land administered by the local iwi, and Hamish was requested by the Plant Variety Rights Office (a section of IPONZ) to provide evidence that the local iwi, as land owner, was aware of the plant variety right application. Hamish had been in correspondence with the iwi and was able to provide adequate documentation of this to the Plant Variety Rights Office.

If Hamish had not been able to provide the requested documentation within the requested timeframe, showing that the iwi was aware he was applying for a plant variety right, the application could have lapsed (expired) under Section 7 (3) of the PVR Act 1987.

The iwi, as landowner, could lodge an objection during the application period and after a grant is made, and possibly claim part ownership.

Copyright and mātauranga Māori

In New Zealand, copyright protects original works in one or more of the following categories:

- › **literary works** including text such as emails, training manuals, novels and song lyrics tables, and compilations including multimedia works and computer programs
- › **dramatic works** including dance, mime and film scenarios or scripts
- › **musical works** including the score and sheet music
- › **artistic works** including paintings, drawings, diagrams, maps, models, photographs and sculptures
- › **sound recordings** separate to the actual music or story
- › **performances** (of music, dance, readings, recitations, etc), live and recorded, in audio and audio-visual media
- › **films** for any genre or format, separate from the underlying script, music or broadcast
- › **communication works** including radio and television broadcasts and internet webcasts
- › **typographical arrangements** of published editions covering the layout of the edition derived from a complete or partial literary, dramatic or musical work
- › **product designs** that have been commercialised through industrial application, including product designs and casting moulds, and works of craftsmanship.

The copyright also includes moral rights for authors and directors in relation to their works (the right to have their works treated with respect), and performers' rights over live communication (e.g. television broadcast) of their performances to the public and recording of their performances.

Although copyright can be used to protect the specific physical expression of some forms of mātauranga Māori, the underlying ideas, content, or style cannot be copyrighted.

Most copyright protection lasts for the life of the creator plus 50 years. The New Zealand time limit will depend on the work involved and when it was created, published, performed and, in the case of product designs, commercialised. See the IPONZ website for further detail on copyright terms.

Copyright law in New Zealand

New Zealand's Copyright laws are contained in the *Copyright Act 1994* and the *Copyright (General Matters) Regulations 1995*.

Criteria for granting of copyright

Copyright protection is automatic. The right takes effect as soon as an original work is created, published or performed.

Benefits of copyright

Copyright owners have exclusive rights in relation to their work to:

- › **copy it** — reproduce, scan, record, download and store
- › **issue copies to the public** — publish or distribute
- › **perform, play or show** the work in public
- › **communicate it to the public** — radio and television broadcasts, internet webcasts
- › **adapt it**, including translating the work from one language to another.

Ownership of copyright

The creator of a work will usually be the owner of the copyright. There are two exceptions:

- › when the work is created in the course of employment, the employer will be the owner
- › when someone commissions a work (pays someone else to produce a photograph, painting, drawing, diagram, map, chart, plan, engraving, model, sculpture, film, sound recording or computer program), the person who commissioned the work will be the owner.

These ownership positions can be varied by agreement.



Although not required by law, it is a good idea to include a copyright indicator or notice on the work (e.g. © Manu Aroha, 2016). The copyright symbol © lets others know the work is protected by copyright, the name of the owner tells people who to contact to obtain permission to use the material, and the creation date enables people to calculate when the copyright protection will expire in New Zealand.

It is also a good idea to keep detailed records of copyrighted works. Records can include print editions, prototypes, moulds, drawings and any contracts or agreements that clarify copyright ownership.

Exceptions to copyright

There are some exceptions to the rights in the Copyright Act. These 'permitted acts' reflect situations where exceptions to usual copyright restrictions are made in the wider public interest, or in the interests of particular groups.

Permitted acts include:

- › copying or using the work for the purposes of criticism, review, news reporting, research or private study
- › limited copying or using the work for particular educational purposes
- › limited copying or using the work by librarians or archivists in specific circumstances
- › exceptions in respect of certain activities by the Crown
- › making a braille copy of the work, subject to certain conditions
- › the making of a back-up copy of a computer program
- › recording a television programme for the purpose of making a complaint or watching it at a more convenient time
- › copying a sound recording for the purpose of playing that sound recording on other devices owned by the owner of the sound recording (known as format shifting).

Copyright protection overseas

New Zealand is a party to various international agreements on copyright. This means that when an original work is created in New Zealand, it is also automatically protected in other countries that are party to those agreements.

Moral rights

A moral right is the right of the author or director to object to derogatory or disrespectful treatment of their original expression. Moral rights are based on an assumption that a creator's work is an extension of the creator's personality, and any interference with the work that offends the honour or reputation of the creator should be refrained from.

Performers' rights

Performers' rights can be used to protect the expressions of some forms of mātauranga Māori. For example, the performance of waiata and kapa haka (or the sound or visual recording of performances). Performers' rights are different and independent from any copyright that may exist in the work they perform.

Separate rights apply to each individual in a group performance. In this respect, there is no concept of group ownership of copyright, and members of a group do not have collective rights in a group's performance. For example, in a kapa haka rūpū (group) each member has individual rights in his or her performance as part of the overall kapa haka performance.

Performers' consent is required for any live broadcast of their performance and for any recording made from their performance. A recording made without consent is called an illicit recording and infringes the performers' rights when that recording is either played in public or copies are made and offered for sale.

Consent cannot be withdrawn after it has been given.

Making a recording of a performance or copying a recording of a performance is permitted in a number of situations. For example, it would not be an infringement of the performers' rights if the recording was for private and domestic use or used for educational purposes, criticism or news reporting.



Example case

COPYRIGHT

Ngahuia is the main composer of all waiata (songs) taught to her Awhina Kapa Haka group. Most of the waiata relate to stories told by her elders about her hapū and the land and resources within their rohe (territory). As the tutor of Awhina Kapa Haka, Ngahuia has recently become aware of intellectual property rights. She isn't too sure which intellectual property rights apply to her waiata, but is keen to protect the ones she creates.

The waiata will qualify for copyright protection where they are original (not copied) and put into material form like sheet music (lyrics and score) or a sound recording. Ngahuia does not need to apply for copyright, as it exists automatically when an original work is created.

As the copyright owner, Ngahuia's permission will be required to:

- › Copy her waiata (e.g. photocopying the score or lyrics)
- › Publish her waiata
- › Perform her waiata
- › Adapt her waiata (eg translating the lyrics from Māori into English)
- › Broadcast her waiata on radio, television or the internet.

Even where permission has been given to use one of Ngahuia's works, it would be expected that the moral rights of the creator would also be acknowledged and respected, meaning that use will be respectful, and not derogatory or disrespectful.

For example, if a reproduction of one of Ngahuia's original compositions was altered and used to sell a product or service that was at odds with the tikanga of her hapū, Ngahuia could claim that the song was used in a culturally derogatory manner that affected her reputation and honour among her people.

Geographical indications and mātauranga Māori

A geographical indication is an intellectual property right that identifies a product as coming from a particular location and having a particular quality, reputation or other characteristic that results from its geographical origin.

A well-known international example of a geographical indication is the name 'Champagne', which can only be applied to sparkling wine from the Champagne region in France.

The *Geographical Indications (Wine and Spirits) Registration Amendment Bill* was introduced to Parliament in November 2015. The Bill empowers the Registrar of Geographical Indications to refuse to register a geographical indication if its registration or use would be likely to offend a significant section of the community, including Māori.

This effectively aligns the government's approach on geographical indications with the approach it has already taken on trade marks and patents.

Geographical indication law in New Zealand

The *Geographical Indications (Wine and Spirits) Registration Act 2006* was enacted in 2006, but has not yet been brought into force. Work is underway to implement the Act (including the changes in the Amendment Bill), which provides a geographical indications registration regime for wine and spirits. Implementation is expected in 2016.

The IPONZ website has more information on how the new laws on geographical indications will work when they come into force.

Currently in New Zealand, geographical indications are primarily protected by the *Fair Trading Act 1986* and through the common law tort of 'passing off' (falsely representing goods or services in order to make people believe that they are the goods or services of another person or company). This is discussed in more detail in the next section on enforcement.

Some owners register their geographical indications under the *Trade Marks Act 2002* as either certification marks or collective marks.

Benefits of geographical indications

Similar to trade marks, geographical indications help brand a product. Geographical indications on products give consumers information about where the product was produced and the unique quality, reputation or other characteristics that can be attributable to the location or region where the product was produced.

Ownership of geographical indications

Unlike most other intellectual property rights, geographical indications are generally collectively owned by producers in a particular area who are entitled to use the geographical indication.

The use of geographical indications is often associated with particular rules that producers in the area must follow, such as the source of a product's essential ingredients, farming practices and manufacturing techniques.

Application process

The IPONZ website has more information on the registration of geographical indications.

Trade secrets and mātauranga Māori

A trade secret is confidential information about a product or service that gives the owner a commercial advantage. Once a trade secret becomes public knowledge, the commercial advantage may be lost.

A trade secret should not be registered, or disclosed to unauthorised personnel, especially to competitors, as its value to a business lies in it remaining a secret.

Examples of trade secrets include manufacturing processes, recipes that cannot be reverse engineered, and manuals containing confidential technical know-how about a product's composition or its manufacturing process. Industrially applied designs cannot be protected as trade secrets, but the process of applying a particular design may be.

A trade secret does not stop others from developing an identical product, independently copying a product once it is on the market, or reverse engineering a product to work out the special process or recipe from the product itself.

Protecting trade secrets

The best way to protect a trade secret is to limit the number of people who have access to the confidential information.

If it is desirable to share a trade secret with others for any reason, a confidentiality agreement or a non-disclosure agreement can be used to make sure the information shared will remain secret.

Trade secrets receive some protection under law. If a trade secret has been given to another person without permission, it may be possible to get a court order preventing its use by the other person in possession of the trade secret. It is also a criminal offence for someone to dishonestly take, obtain or copy a trade secret for the purpose of financial gain or causing financial loss.

Enforcement of intellectual property rights

The owner of intellectual property, whether registered or not, is responsible for keeping an eye on the way it is used and protecting it against unauthorised exploitation (commercial benefit without the owner's permission).

Owners should understand the rights attached to their intellectual property, safeguard its secrecy if appropriate, be able and prepared to communicate their legal rights to others, and if necessary, enforce their rights through legal action.

Not all cases of unauthorised use end up in court. Many disputes are settled through private negotiations. There are penalties for making unjustifiable threats, so it is important for owners to identify what assets they own and know their rights before sending a warning letter or threatening to sue.

In New Zealand, a number of statutes provide enforcement procedures and remedies for owners of intellectual property rights. These statutes include:

- › *Consumer Guarantees Act 1993*
- › *Copyright Act 1994*
- › *Designs Act 1953*
- › *Fair Trading Act 1986*
- › *Layout Designs Act 1994*
- › *Patents Act 1953*
- › *Plant Variety Rights Act 1987*
- › *Trade Marks Act 2002*
- › *The Crimes Act 1961*

An owner can pursue civil enforcement of their rights in court by suing any person who has infringed their intellectual property rights. Infringement may also constitute a criminal offence where, for example, the infringement is carried out in the course of business, and may carry penalties.

Depending on which intellectual property right has been infringed, and how, various New Zealand enforcement agencies may be able to assist intellectual property owners.

Before contacting any enforcement agencies, owners should consider consulting either a Patent Attorney or a legal professional specialising in intellectual property.

The Copyright Act 1994 and the Trade Marks Act 2002

The *Copyright Act 1994* and the *Trade Marks Act 2002* both contain provisions imposing civil liability for activities that constitute copyright and trade mark infringement. Civil liability refers to a court case that may result in payment of damages or other court-enforcement. Criminal liability means the person infringing another's intellectual property rights may be found guilty of a crime and punished.

Copyright and trade mark owners can enforce their rights by taking court action (suing someone) if they believe their rights have been infringed. The courts have a wide range of remedies they can use to compensate owners of copyright and registered trade marks. These include damages, injunctions, orders to account for profits, and orders to deliver up infringing goods to rights holders.

The *Copyright Act* and the *Trade Marks Act* also contain criminal penalties for wilful infringement on a commercial scale. For example, piracy of copyright and counterfeiting of registered trade marks for commercial gain. The Chief Executive of the Ministry of Business, Innovation and Employment is empowered to prosecute the offences of manufacturing, importing and selling counterfeit goods and pirated works prescribed in those Acts. A person convicted of this type of activity may be imprisoned for up to five years or fined up to NZ\$150,000.

The Fair Trading Act 1986

The *Fair Trading Act* is useful for intellectual property owners, and trade mark owners in particular, seeking to protect their rights. The Act imposes penalties for forging a trade mark or for falsely applying or using a trade mark or sign that looks similar to an existing trade mark in a way that could mislead or deceive consumers. Whether these provisions will apply to activities involving counterfeit goods will depend on the facts of the particular case.

Border enforcement measures

New Zealand also has a number of border enforcement measures in place to help copyright and trade mark owners prevent the importation of goods into New Zealand that infringe their rights. These measures allow trade mark and copyright owners and licensees to request the New Zealand Customs Service to temporarily detain goods being imported into New Zealand intended for sale that are suspected of infringing a registered trade mark or copyright. Border enforcement measures do not apply to goods that people have imported for their private or domestic use.

Intellectual property owners can ask the Customs Service for help by lodging notices of their New Zealand registered trade marks and goods subject to copyright protection. When a notice has been lodged, the Customs Service is able to hold suspected infringing copies of trade marked goods or copyright works for a period of ten working days to enable the rights holder to initiate court action against the importer for infringement of their trade marks rights or copyright. If rights holders don't initiate court action within this period, the Customs Service must release the goods to the importer.

For more information, see the New Zealand Customs Service website www.customs.govt.nz.

Passing off

Passing off is a common law doctrine that protects the right of a business to a particular name or the goodwill in that name.

The most common example of passing off is where a person claims that their products are somehow connected to another business's products, essentially 'cashing in' or 'free-riding' on the goodwill and reputation that those products may enjoy in the marketplace. If the market is confused and the fake products are inferior, the business may suffer damage, including lost sales and loss of market goodwill.

Even unregistered trade marks are in some situations protected by this passing off common law. To enforce this law, the owner of an unregistered trade mark would need to convince the courts that they own the trade mark by showing they were the first to use it, and that goodwill and a good reputation among consumers had been created through their use of the trade mark.

The owner of a trade mark (both registered and unregistered) can take someone to court to stop them from passing off trade marks and/or products.

Tips for an effective intellectual property strategy

Intellectual property, and intellectual property rights, like any business asset, should be actively managed to make them as commercially valuable as possible, to ensure that they are effective long-term, and to secure the competitive advantage they represent. Intellectual property rights should be integrated into business planning.

It may be helpful to seek advice from business advisors and/or intellectual property experts (such as a patent attorney or a lawyer specialising in intellectual property) before acting on any specific business plans in relation to intellectual property.

The tips below are designed to help intellectual property owners look after their intellectual property and develop an intellectual property business strategy.

1

Develop expertise

Intellectual property owners should take time to educate themselves and those around them about the value of intellectual property and how it can be protected. In larger business contexts, owners should clarify who is responsible for developing, maintaining and protecting the intellectual property.

2

Understand your intellectual property assets

Owners should create a business culture that identifies and captures intellectual property assets, and scans the environment for new intellectual property opportunities that can be integrated into business plans.

IDENTIFY INTELLECTUAL PROPERTY OPPORTUNITIES AND OPTIONS

Owners should consider protection options when intellectual property is first captured, and maintain up-to-date inventories of both registered and unregistered intellectual property. Records should include application and registration numbers, copyright information, record security protection and confidentiality measures. Intellectual property calendars can be developed for milestones, such as fee payments that are required to maintain intellectual property applications or registrations.

CHECK THAT THE INTELLECTUAL PROPERTY IN USE IS OWNED, OR PERMISSION TO USE IT HAS BEEN SECURED

Owners should review contracts and agreements before applying for intellectual property protection and using licensed intellectual property.

REGULARLY REVIEW INTELLECTUAL PROPERTY

Intellectual property rights can be bought, sold and licensed. Owners can sell or license intellectual property rights that are no longer core to business, and acquire new intellectual property rights to help grow business in different sectors or markets.

Review contracts

Contract law is complex. Best practice is to have legal advisors, including patent attorneys or lawyers specialising in intellectual property, review employment contracts, licenses and other intellectual property agreements before they are signed.

3

Keep records

Keep evidence that shows how a new product, process or copyright work was developed. Include for example, dated and signed drawings, project notes and drafts.

4

Use intellectual property systems effectively

Intellectual property that is considered critical to business success could benefit from a registered intellectual property right. It is worth remembering:

- › Intellectual property rights are not always appropriate for protecting traditional forms of innovation and creativity, especially if ownership is uncertain.
- › Trade mark, design and patent applications with Māori cultural elements can be assessed by the Māori Advisory Committee. Even if a trade mark or design application is not considered offensive, sometimes other concerns are raised that could impact market sales in New Zealand. It is wise to consider the Māori Advisory Committee advice, as their perspective represents how the products or services will be perceived in the marketplace. Most owners do not want to unwittingly alienate potential customers.
- › Searching the intellectual property registers will give applicants valuable information about the intellectual property of others.
- › Intellectual property protection and enforcement decisions are some of the hardest business choices owners have to make. Owners should get the best advice they can afford and take time to consider all of their options, including estimated costs and the time it can take to achieve intellectual property goals. Owners should look for business opportunities in disputes, such as settling the dispute by making the alleged infringer a business partner.
- › Intellectual property registered in New Zealand is only protected in New Zealand, so owners should look overseas and consider where their business is going and what steps might be needed to protect their intellectual property in overseas markets, (particularly potential export markets). This might include developing an intellectual property filing strategy or running clearance checks as part of general business expansion planning.

5



