

# Scenes from the Colonial Catwalk: Cultural Appropriation, Intellectual Property Rights, and Fashion

Peter Shand

*University of Auckland, New Zealand*

## INTRODUCTION

In 1907 the English manufacturer Royal Doulton introduced porcelain featuring a design called “Maori Art”: cups, saucers and plates glazed with red, black, and white to reproduce a suite of interlocking patterns that are generically known as “koru.” From the 1930s similar patterns have appeared on New Zealand postage stamps, and the koru is currently employed in a decorative border on the two-dollar coin. Since the 1960s Air New Zealand has ferried people around the country and the globe, a koru design on its tail and until the late 1970s plastic tiki given to every passenger. In 1985 packets of New Zealand butter included a small graphic which told consumers a portion of the purchase price was going to support the America’s Cup Campaign in Freemantle, Australia. That graphic was a blue and yellow triangle containing a series of alternating bar-stop figures derived from the mature style of the modernist New Zealand painter Gordon

Walters; his style, in turn, was based on a geometric version of the koru. Currently, numerous Government departments have stylized koru or Maori weaving-derived patterns in their letterheads, and tourists clamor for Maori art products made both in New Zealand and overseas. Fashion houses, both at home and abroad, have appropriated Maori design as modish. It appears painted on the faces of famous men adorning the covers of fashion magazines, or as part of a global advertising campaign for a sporting goods manufacturer. It enters the world of the pop music market through a tattoo on Robbie Williams’ left shoulder by Maori tattooist Te Rangitu Netana. Maori intellectual property would seem from this to be global—certainly it is more widely and more casually received than it has been in the past.

In this same year, 2002, Te Waka Toi (the Maori-funding arm of the national arts funding agency) launched “Toi Iho” a Maori-made mark, which is intended

to function as a mark indicating Maori authorship of products and as a quality mark. In addition, the Waitangi Tribunal (the national body established to hear claims arising out of New Zealand's 1840 Treaty of Waitangi/Te Tiriti o Waitangi signed between the Crown and many Maori iwi) is still hearing evidence in one of the most complex claims likely to come before it: the Wai.262 claim on Matauranga Maori (knowledge) and Taonga Maori (treasures). Unlike previous claims, which have focussed on real property or specific resource rights, this claim focuses on the intellectual resources of Maori. The mark and the claim are indicative of the currency of the issues raised in this article; they also register the reality that contemporary indigenous peoples continue to engage with these issues and to develop new strategies in order to shape the manner of the reproduction of indigenous cultural heritage.

In the broadest sense, this article sits in a similar time and space inasmuch as it is a discussion of some of the ways in which Maori design has been copied and utilized by non-Maori. Its predominant focus is drawn from two fields of inquiry: cultural appropriation as this has been figured in art history and cultural studies, and the law pertaining to intellectual property. These are, of course, enormous fields in themselves, so to try to come to a closer focus, the article seeks to analyze one part of Maori intellectual property rights, those pertaining to graphic works, and position this analysis in relation to one aspect of their use, the fashion industry. In doing so I register that such a division of cultural terms (intel-

lectual from cultural, taonga from Matauranga Maori, graphic from performance) is, in some sense, artificial, for Maori culture is informed and strengthened by the interaction of its many facets. I declare, at the outset, that I am not Maori myself but claim pakeha identity – which, for me, is a specific identifying nomenclature given by Maori to people who, like myself, are of nominally European, predominantly British descent. I also register that the article is somewhat wide-ranging in its discussion. The intention of this is to try to reflect the range and interrelatedness of the many issues that emerge in any discussion of the reproduction of indigenous cultural heritage and issues surrounding its reproducibility.

#### **THE KORU: A SEMIOLOGICAL ANALYSIS**

In general terms, the koru is the design form of a curvilinear element punctuated with a circular stoppage. It serves as the central design feature of a number of modes of traditional Maori artistic practice; moko (tattooing), heke (rafter) painting, and hue (gourd) and hoe (paddle) decoration are the principal examples of these. As one part of what is often a complex interaction of attenuated and tense schemes, formally resolved within an overall compositional scheme on skin or wood, the koru is both clearly identifiable with Maori artistic practice and an indication of the formal sophistication of that practice. It speaks both of the generic identity of Maori art-makers as tangata whenua (indigenous peoples) and of either the specific individual identities of wearers of moko<sup>1</sup> or, by its inclusion in

the interior of whare runanga (meeting house; center for the community), of the collective identities of specific iwi, hapu, or whanau (tribe, sub-tribe, extended family).

W.J. Phillipps posited a definition of the koru in a 1938 article in *Art in New Zealand*. He described the design as organic in origin, referring to the apparent morphological similarity of the single koru to a curving stalk with a bulb at one end (Phillipps 1938). This interpretation linking the koru to unfolding plant growth is one which, as Roger Neich notes, “is now very strong in the Maori view” (Neich 1993, 39). This is, to some extent, the result of apprehending an apparent visual similarity between the design and flora, desiring, perhaps, some connection of human culture and the natural world and implying, positively, a sense of growth. An alternate natural form is claimed by Augustus Hamilton in *The Art Workmanship of the Maori Race in New Zealand* where he claims a connection between the koru and the form of waves beating upon the shore (Hamilton 1896). Again, the assumption seems to be based on a morphological analysis of the design and the known natural world of the artists who used it. Nevertheless, this denotational reckoning of Maori iconography is inherently misleading. What is absent from such a focus on the potential visual sources for the form in the natural world is the recognition of the important connotational significance that applies in the use of the koru. These are often complex semiological constructs that afford deeper and broader patterns of meaning to emerge than something as defined as “fern

frond” or as banal as “stalk and bulb.”

The important factor in making this distinction lies in that between denotational and connotational meaning. Roland Barthes writes of the character of connotation that it is “at once general, global and diffuse; it is, if you like, a fragment of ideology” (Barthes 1967, 151). This fragment is of considerable relevance to any analysis of Maori art, a point pursued by Neich when he writes:

[it] has limited denotative meaning but a wide, rich field of connotative meaning, which finds its reference in the total cultural ideology. Thus the signifieds of denotation are the few limited meanings that can be obtained by direct questioning, while the signifieds of connotation require a familiarity with the cultural ideology for their appreciation.

Connotation takes one away from the immediate context to the general diffuse culture. This probably explains why European investigators, lacking the conceptual tool kit for asking relevant questions about Maori art, could rarely penetrate below the superficial denoted meanings. (Neich 1993, 36)

A pertinent example of this may be found in the rafters of the meeting house and on some tombs and monuments—many of which are painted with kowhaiwhai (a system of attenuated interweaving koru elements). In the case of the meeting house, kowhaiwhai are frequently painted along the tahu (ridge-pole) and down the heke (rafters). These standard sites of kowhaiwhai significa-

tion are symbolically important to the whakapapa (genealogy) of individual tribes. The tahu, for example, refers not only to the ridgepole of the house but also to important tupuna (ancestors), starting with the original tupuna. The heke, regularly spaced rafters, symbolize the lines of descent from these tupuna or to their migration (heke as a noun means rafters and as a verb can mean both descend and migrate). In this respect, the decorative scheme takes its place within the overall symbology of the house, linking the eponymous ancestor at the front apex of the house to the subsidiary tupuna lining the walls. Within this overall system, Anne Salmond “has identified a series of associations through Maori words relating images of hill ridges, house ridges, lines and threads through a broad concept of mediation and linking, to express aspects of descent, authority and communication” (Neich 1993, 38; see Salmond 1978, 9).

Of course, the koru can communicate to other people and in other ways. In an impoverished semiological field, for example, it can refer more generically to Maori and Maori artistry. Beyond this, its increasing use by non-Maori designers and artists since the late 1920s can refer to a new signification of the koru as an important part or, indeed, basis of a nationalistic graphic enterprise. Its emergence as an important feature of currency, postage stamps, national pamphlets and magazines, or in the architecture of important institutions (the cornices of the Auckland War Memorial Museum or of the Napier Bank of New Zealand, for example) suggests it was utilized to forge a sense of design that

was unique to place. In this rubric, meaning is made over from a specific connection to the implications of individuals or individual structures to a more broad-based national identity. This strategy was adopted by a number of New Zealand pakeha artists in an attempt to develop a distinct strain of modernist practice. This was, to varying degrees, founded on a process of mutual racial assimilation with the notion of something new and different emerging from the connection. The koru, as a specific element of Maori art, served that desire for novelty and difference. This power of art to transform experience was given its most powerful and ambitious application in respect of the koru with the introduction of an education scheme in the 1950s. Initiated by Gordon Tovey, this scheme saw the introduction of koru painting as a part of the art curriculum – initially at elementary school but it now forms part of the syllabus at high school as well. The mode of expression was deliberately selected to be something that was available for those with elementary skill levels, was capable of increasing complexity, and, most importantly, spoke of local content.

The incorporation of the koru into the national art identity (in galleries and in schools) also suggested for some the emergence of a bi-cultural nation. This important connotational meaning has been seized upon, increasingly over the past two decades, by tourist operators, by corporations, and by government in an attempt to portray the divergent ethnic make-up of the country. The proliferation of Walters-inspired bar/stop derivations of the koru, in logos or on

the covers of books addressing issues of importance to Maori as well as books addressing Maori-pakeha relations, for example, is indicative of the suggestive power of a modernized, standardized formal version of the koru. In government it creates the appearance of a dualistic principle (complemented by Maori transliterations of ministry names) but which some would argue is a screen to monocultural practices and policies. Similarly, its use by corporations, smaller companies, and/or tourist operators involves the presentation of an outwardly New Zealand identity—a signification carried by the association of the koru with a specific geographical and socio-cultural location

Perhaps the most resonant example of this was in the mind of the Crown Counsel at the opening hui (meeting) of the Wai.262 claim (in Kaitaia, September 15, 1997) when he asked “who owns the koru?” in reference to the symbol of Air New Zealand. This reveals the complex interplay of issues at stake here. The logo uses an element of Maori design as if it held no intrinsic meaning of its own; even so, it originally symbolized the country. Its use on something as impressive and romantic as an airliner might seem complimentary; yet, it remains just another corporate logo. At the same time, it is a logo that carries considerable weight as an evocation of the nation as a whole—whether or not it is overlaid with images of native birds, smiling New Zealanders of all creeds, the voice of a great Maori opera singer, and the words of an iconic Maori song as in the current television advertising campaign. As Ngahua Te Awekotuku, a trenchant

critic of cultural appropriation, puts it:

[well, the koru] becomes a plastic symbol. And, admittedly, we look at the Air New Zealand tail and think “there is a koru,” and we can’t argue . . . (Te Awekotuku 1986, 52)

Interestingly, when the company went through a re-branding exercise in the mid-1990s a decision was made not to register the famous tail decoration as a trademark. Rather, the company asserted its trademark over what it calls “the Pacific wave,” a simple stylized serpentine curve in two colors that adorns the fuselage of the company’s aircrafts. This was apparently a deliberate decision made in order to maintain the goodwill of the airline’s prime consumer base (New Zealanders) and to avoid risk of engaging in any sort of conflict over asserted interests that different Maori tribal groups might claim with respect to this form of the koru.

In this way, the koru on the tail of an Air New Zealand plane, on the cover of its annual report, on the numerous promotional materials produced by the company (whether sports sponsorship or plastic give-aways), and as the name of the airline’s business class lounges is a figure of protracted ambivalence. On the one hand it is of considerable commercial value to the airline. On the other any attempt to capture the value of that symbol might well have proven alienating for a company that wished to maintain the aura of being the national carrier but was, at the time, a private company.<sup>2</sup> Indeed, the auratic value of the koru as a logo for Air New Zealand is

writ large because it seems to connote more than that of a generic corporate logo (the Nike swoosh; the roar of the MGM lion; the Coke wave). In 2002 it seems to speak of a specific, though non-ethnocentric, collective identity, of contemporary nationhood for New Zealand. Ambivalence regarding this declaration stems from the fact that it is a nation still coming to terms with its violent colonial history and the on-going implications of its past for its present citizens.

### THE APPROPRIATION OF CULTURAL HERITAGE

It is a dull fact that the initial phase of modern cultural heritage appropriation was underscored by the twinned ages of Enlightenment and Empire, during which all the world was made over to fit the intellectual, economic, and cultural requirements of first Europe, then the United States. All manner of tangible cultural heritage of indigenous peoples (from design patterns to artifacts to body parts, even the people themselves) were looted, stolen, traded, bought, and exchanged by colonials of every status (from Governors General to itinerant sealers). These were studied, admired, looked at, and forgotten; created manias of taste and connoisseurship or never saw the light of day again, whether in the private houses, the palaces, or the museums of Empire. There many, *many* remain.

Because of their display, they became available for appropriation into the cultural language of the very colonizers who had initially dislocated them. This is equally true of their use in spectacu-

lar, if bizarre, *mises en scènes* in nineteenth century anthropological museums (the Pitt Rivers Museum, Oxford, and the upper level of the museum in Adelaide, Australia, are excellent extant examples of these) or in formal isolation in houses of modern art (of which *Art of the South Pacific* curated by Rene d'Harnoncourt at the Museum of Modern Art, New York, in 1946 is a watershed in the reclassification of indigenous cultural heritage from artifact to art-object). The zenith of this approach is, famously and controversially, the 1984 exhibition "*Primitivism*" in *20<sup>th</sup> Century Art: Affinity of the Tribal and the Modern* at MoMA (Rubin 1984). Importantly, this seemingly hybrid language of the "primitive" or "tribal" and its putative other, "modern," represents one if not the key moment of cultural production in the twentieth century. It would seem, by industrial liberals' enthusiasm for "ethno-" and "eco-" tourism, "world music," debased forms of shamanism, pastiches of ritualized body marking, "third-world tat," or mystical, New Age experiences, that attraction for Otherness remains an important feature of Euro-American cultural values. Clearly there is the potential for significant, indeed, world-changing benefits from this – witness the significance of indigenous peoples' perspectives, arguments and, to a much lesser degree, claims in environmental planning; or the rise of a new dialogue in human rights, initiated by indigenous peoples of the world. Thus, in 2002, one may observe that objects are being returned, ideologies are being respected, permission is being sought – just not enough and too infrequently. With these

ideas in mind, there are three aspects of the appropriation of visual arts that I want to note: modernist affinity, postmodernist quotation, and commercial exploitation.

Modernist appropriation is seemingly straightforward. Representative artists from Paul Gauguin forward were attracted to the potential for their work they saw in indigenous cultural heritage.<sup>3</sup> They both copied individual examples into their work and emulated styles; they even presented their work as capturing the essences they asserted were present in such indigenous objects. The re-statement of this position in the “*Primitivism*” exhibition at MoMA positioned examples of indigenous cultural heritage in formal connection with modernist artworks in order to pursue the principal theses of the exhibition: that both “sets” of work revealed key expressive tendencies of humanity and that the

concerns of modernist artists squared with those asserted to be in the minds of indigenous artmakers. The accompanying advertising campaign put this in the shape of a series of crude comparisons of indigenous and modernist objects with the byline “Which is ‘primitive’? Which is modern?” as if this were somehow at issue, when very few of the “primitive” objects in the exhibition registered what might be described as overtly “modern” responses – whether in materials or subject-matter (the exhibition was the subject of intense criticism, most notably reviews such as Clifford 1985; Foster 1985; McEvelley 1985; see also Clifford 1988; Hiller 1991; Rhodes 1994; Shand 1997).

The marriage of a high-modernist abstraction with, in the present case, the koru is a complicated affair. On the one hand, with reference to a work such as, say, *Painting #1*, 1965, by Gordon Walters

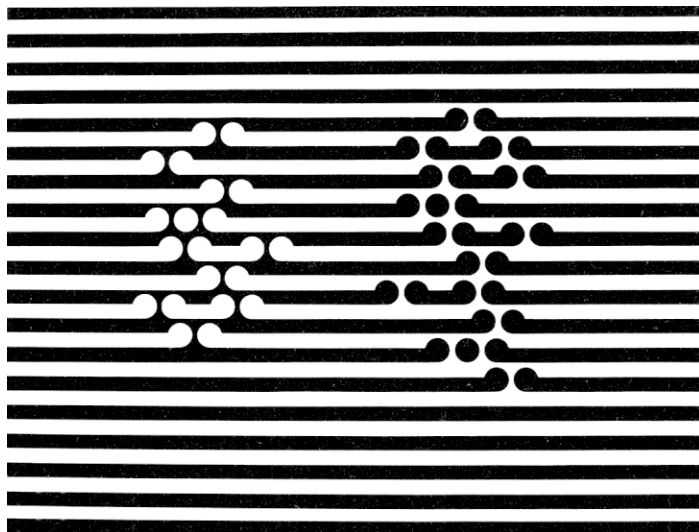


Figure 1: Gordon Walters, *Painting #1*, 1965, pva on board, Auckland Art Gallery.

(fig. 1), the original is an example of design surely at least as sophisticated as the original examples of kowhaiwhai with which he was familiar. Nevertheless, in his appropriation of the form Walters affects a dislocation of the source form from its initial cultural context. In so doing, specific meanings are erased and cultural significances shift and slide to the point that some have argued the appropriation to be an equivalent of colonial occupation of indigenous art and design, a silencing of the koru (see, e.g., Te Awekotuku 1986; Panoho 1992; Shand 1997; and compare with Bell 1989; Pound 1994). Yet, when on the cover of a book about cultural relations, images like this one garner admiring or at least accepting comment from many citizens, including Maori academics, as it seems to them to signify a “bi-cultural” national style. In a similar vein, versions of the princi-



Figure 2: Dick Frizzell, *Grocer with Moko*, 1992, 700mm x 600mm, oil on canvas, private collection.

pal design aspect (the bar and stop) crop up as logos for nationalist enterprises: from government agencies to nationalized corporations. The “affinity” here is one of visual similarity overlain with at least one layer of additional interpretation derived from the beholder.

Of course, the certainty of signs and signification is said no longer to be available—certainty itself is presented as an illusory commodity in much contemporary art. Post-modern quotation reflects a pervasive sense of contingency and dislocation in which all forms, regardless of their original cultural context, are available for re-inscription. New Zealand artist Dick Frizzell’s *Grocer with Moko*, 1992, shows an apparently humorous juxtaposition of two feted local icons (fig. 2). One is the face of the “Four Square Man,” a logo for a chain of convenience stores. The second is the ta moko (facial tattoo) of Maori warriors. This finds itself replicated in a variety of forms in the local and international context. It is still tattooed on the faces of Maori men, often as a symbol of political resistance and tribal pride as much as the personal mana of the carrier. It is drawn with marker pens or eyeliner on the faces of Maori and non-Maori performers of Maori dance and song. It is presented in the global market in pastiche on the face of the French footballer Eric Cantona on a cover of the men’s style magazine *GQ* or employed seriously in campaigns for Air New Zealand or Adidas, sponsors of the national rugby team, the All Blacks. The fusion of high and low cultures in this example is a useful illustration of the opportunities for cultural critique and revelation made possible

through dislocation. There are meshes of the authoritative and the quotidian, the “sacred” and the commercial, official and unofficial, culture and advertising, two forms of cultural specificity, and two systems of meaning. Nevertheless, the exhibition in which this and other appropriations of Maori forms appeared was a *succès de scandale* for Frizzell. He was vilified and championed, both. Importantly, these positions did not simply split along racial lines, as the catalogue contained essays by Maori writers and a few pakeha academics rose to the bite of the images (see *Dick Frizzell “Tiki”* 1992; and compare with Te Awekotuku 1992).

Many commentators draw a distinction between use of indigenous design in art and its use in commercial enterprises. This is particularly true of the instances where individuals or groups have gone to court to try to affect some protection of designs. In Australia, for example, which has the richest case law regarding cross-cultural appropriation, the instances that have occasioned litigation conspicuously have not involved the appropriation of Aboriginal Australian cultural heritage by non-Aboriginal artists for use in works of art, although this practice is widespread. There is, if you will, an invisible division that seems to have separated a commercial use with high intellectual pretensions (the fine arts market) from more base and explicitly commercial exploitation. Hence, the cases brought as a result of the unlicensed use of designs by contemporary Aboriginal artists include such items as tee-shirts (*Bulun Bulun and Another v. R & T Textiles Ltd.; Minister for Aboriginal and Torres Strait Islander Affairs, interven-*

*ing*, 175 ALR 193 [1998]) and industrially manufactured woolen carpets (*Milpurrruru and Others v. Indofurn Pty. Ltd. and Others*, 30 IPR 209 [1994]). In addition, there was a case that spoke to national identity and governmental responsibility issues when an artist sued in copyright for the unauthorized reproduction of his work on the Australian Bicentennial ten-dollar note (*Yumbulul v. Reserve Bank of Australia and Others*, 21 IPR 481 [1991]). While appropriating artists and the galleries that represent them might risk the opprobrium of some critics, they have not, as yet, been sued for breach of copyright.

In this context, an interesting legal skirmish that did not proceed to the courts occurred in New Zealand in 2000. Auckland-resident Samoan artist Fatu Feu’u threatened to bring an action against New York-based pakeha artist Max Gimblett for infringement of a “frangipani” design (*Tangata Pasifika* 2000). Feu’u states he uses it by permission of his matai (chiefs),<sup>4</sup> an authorization that Gimblett lacks if, indeed, he is using the specific design as asserted. There are important issues in this example of whether this represents a situation of cross-cultural plundering or an analysis based on pseudo-morphological analysis. It is noted here as a rare example of the debate crossing what I suspect is a divide that characterizes core assumptions about whether or not it is worth pursuing copyright infringement cases in colonial-derived legal systems. Industrial and manufacturing sectors are viable defendants, whereas cross-cultural appropriation based on Romantic notions of authorship is seldom litigated.

That this (non-litigated) example is exceptional may be due to a number of reasons. For example, it could be a recognition of the asymmetries of the relationship between intellectual property rights and customary indigenous rights (the presumption that the case could not be won or could only be won by adherence to Anglo-American codes discussed below). Alternatively, it may be because of a specific though limited preparedness not to intervene too strenuously in free intellectual exchange and/or artistic development (an adoption, to an extent, of Euro-American notions of authorship and creativity).

At play behind many of these situations is the observation that responses vary according to political interpretations of the images (and, perhaps, are unstable even then). What I might say is prescient criticism might seem censorious forms of political correctness to you; what you might regard as somewhat naïve readings of cultural symbols I might see as the potential of signs to overcome their original cultural contexts. This is the direct consequence of a hybridizing of languages. The efficacy of these connections is important to the claims of both appropriating non-indigenous artists and designers and those indigenous artists and designers who work in traditional or authentic methods—for these have as surely been affected by the contact of peoples as have their colonizing Others.

Appropriation as a mode of cultural engagement is dependent on an ability to separate a given object or design from its cultural milieu for the purposes of its employment in a different one. To that

end it is predicated on formalist assumptions as to the recognition and meaning of cultural heritage. For example, the inclusion of the koru as part of a general page in Owen Jones' *Grammar of Ornament* of 1868 betrays a reduction, isolation, and re-designation of a culturally specific design. A more violent dislocation occurs in Immanuel Kant's canonical text, *The Critique of Judgement*, from 1790. In the "Analytic of the Beautiful" he explicitly isolates the formal quality of the koru, in moko (tattoo) in this case, from its social and cultural significance for Maori. He writes: "[a] figure might be beautiful with all manner of flourishes and light but regular lines, as done by the New Zealanders with their tattooing, were we dealing with anything but the figure of a human being" (Kant 1952, 73). It is this association that prevents moko from assuming the status of *pulchritudo vaga* or free beauty in Kant's scheme. The moko is considered because of what it might mean if, and only if, it can be lifted off the person wearing it. The koru is interesting as a design feature but has no meaning attached to it other than the declaration of its formal properties.

In New Zealand, some commentators on appropriation have looked to Julia Kristeva's metaphor for language: "[every] text takes shape as a mosaic of citations; every text is an absorption and transformation of other texts" (Kristeva 1969, 146; see, e.g., Bell 1989, 16). In doing so it seems to me that they ignore two crucial issues. First, language is not static (which is her point, in part) but is also dependent on who is speaking and who is listening. In a dialogical system such as authorized cultural appropri-

tion this is extremely important. Secondly, the use of the mosaic metaphor is dependent upon the severing of language from specific meaning. It is the dominant assertion of the age that all forms of cultural production occur within a complex field of interaction, quotation, and re-quotation. In respect of this, to try to isolate the koru in any way would stifle its ability to communicate and participate in contemporary culture. This may be described as a post-modern position, not least because of its denial of truths or fixed meanings and its embracing of shifting and multiple interpretations of all aspects of contemporary culture. Whereas modernist appropriation was essentially mimetic (attempting to represent physical and/or metaphysical truths distilled from non-Western practices), post-modern reproduction is semiotic, and so appropriation is argued to carry its own validity irrespective of the meanings of the original. In this scheme, the koru is neither an original nor unique design but one caught within a complex series of textual relationships as in Kristeva's mosaic metaphor.

The difficulty here is that it potentially risks the compromising of sure or precise meaning within a specific linguistic and/or cultural *milieu*. While such an experience may well square with that of Euro-American academics, it is not clear that the languages (linguistic, artistic, symbolic) of indigenous peoples are so "cut loose." To the contrary, language is what sustains people. For Maori: "Ko te reo te mauri o te mana Maori" (The language is the life force of mana Maori); "Ke ngaro te reo, ka ngaro taua, pera I ta

ngaro o te moa" (If the language is lost, humanity will be lost, it will be as dead as the moa – an extinct large flightless bird) (Waitangi Tribunal 1986, ¶6.1.21 and 3.1.4; from oral submissions made by Sir James Henare).

It is in light of this sense of the potential for lost or erased meaning that an alternative position is sketched here. It looks to the retention of the philosophies, significations, knowledges, and strategies of indigenous peoples as being the key to any consideration of the cultural expressions of their making. More importantly, the maintenance of control over those expressions is presented as an important site of resistance to colonial, imperial or, in recent years, global capitalist assaults. The principal reason for this is founded on the idea that indigenous peoples remain at risk to new and various forms of colonial violence – physical, environmental, economic, and epistemic. More importantly, cultural resistance with respect to the arts is a means of retaining the strength and resonance of original voices and avoiding co-option into a dominant cultural ethos. As Frantz Fanon writes:

[every] colonized people – in other words, every people in whose soul an inferiority complex has been created by the death and burial of its local cultural originality – finds itself face to face with the language of the civilizing nation; that is, with the culture of the mother country. The colonized is elevated above his jungle status in proportion to his adoption of the mother country's cultural standards. (Fanon 1986, 18)

In this way, the ongoing sense that colonization is not an historical phase that has passed, the effects of which are known and finite, informs the arguments mounted by proponents of this position. This is a strategy of resistance founded on the apprehension that the loss of specific cultural knowledge or means of expression, or their being refigured in the dominant language of the colonizer, is akin to a cultural death. In maintaining an essentialist position, advocates of this position often strike out against a form of cultural genocide.<sup>5</sup>

A resonant metaphor for the competing claims sketched here is that of translation. The central concepts that govern translations from one language to another are fidelity and license. These tenets create an antagonistic but not irreconcilable tension. A translation too close to the individual meanings of words can create a dull, pedestrian text, voided of any poetic significance or emotional resonance. Too liberal a translation and any intended meanings can be obscured or lost. The genuine relationship of original to translation, as Walter Benjamin (1984a) sees it, is based on the transformation and renewal of the original rather than a replacement of it. Jacques Derrida develops this by responding to Benjamin's notion that the original demands to be translated, to be made over. Derrida argues that there is a necessary disassociation between the meaning and the letter in an original text, a "disschemination" named after the Shems who constructed the Tower of Babel: "[you] will not impose your meaning or your tongue, and I, God, therefore oblige you to submit to the plural-

ity of languages which you will never get out of" (Derrida 1985, 122). Conversely, Trinh Minh-Ha suggests that the poorest translation is the one that tries to erase from the original text its own resonances and makes the translation sound as if the original had been written in the translator's mother tongue.<sup>6</sup>

At the heart of this is the question of whether the koru has anything to fear from its potential for translation into works of art or designs that are not those for which it had traditionally been used. The "formalist" and "quotational" positions noted here would suggest not, for its involvement in the works outside of a customary frame allow it to speak of universal humanism, be appreciated for its own self, or reflect the shared cultural dilemmas of the current age. The alternative resists this sense of a collapsing view of everything necessarily being available for translation. It focuses, instead, on the specific social and political climate of indigenous experiences, which, although different, are founded on a shared experience of colonial violence. Lands, peoples, places, treasures, and resources that have been looted during the different phases of colonization suggest the need for a certain wariness when confronted by a demand for intellectual freedom and for the availability of indigenous peoples' knowledge to be served up as the latest course in the global colonial banquet. Resistance to a deconstructive model re-centers Maori perspectives. This overcomes what Rosemary Coombe gives the pertinent nomenclature "Representation without Representation: Visibility Without Voice" (Coombe 1993, 272), the idea that with-

out sufficient formal protection, indigenous arts and cultures may be made over in the mode of the dominant colonizing language and then made to speak in place of legitimate indigenous voices. At the same time, it also centers indigenous concepts in the discourse. In the case of Maori art, for example, it is crucial that all work is a reflection of cultural and spiritual values, all work is an expression of human spirituality and carries the essence of life or *mauri*.

#### **INDIGENOUS PEOPLES AND INTELLECTUAL PROPERTY RIGHTS**

The fundamental concern of intellectual property rights in an Anglo-American system at the present time is to protect the proprietary interests of identifiable authors and/or owners of identifiable material works. It serves as a partner protection to the interests in property that are protected with respect to real and personal property. It speaks, then, of ownership in a way that affects exclusive or semi-exclusive rights to particular things. In this way, the overall system of the law of property reflects a Cartesian dualism, which is to say it makes clear a split between the body and mind in respect of one's property. This is reflected in the fact that one person might own a physical object but another the intellectual property interests in that object. The specific contribution of intellectual property rights is that they protect the expression of one's ideas, the products of the mind, as it were. Importantly, the governing philosophy of its codification in the eighteenth century was a focus on the desirability of progress. It

was assumed in this period of early capitalism and nascent industrialization that society needed to move forward. Individuals needed to be encouraged to assist in that development, and it was assumed that they would only act if they were able to take the benefit of their inventiveness and their creativity. This situates early intellectual property legislation and case law within the realm of an emerging market economy.

The historical timing of the development of intellectual property rights is a pertinent element of the gaps noted above. The first English legislation, for example, was in 1709 and granted rights to the author of books in a move to circumscribe the indiscriminate printing of texts without the author's consent, a practice that was rife at the time. Importantly, then, it develops as a result of an attempt to retain the authority of the expression of knowledge for the expresser—it reveals a Foucauldian connection between knowledge and power. At the same time, the Enlightenment's philosophical focus on individualism and humanity's power over nature coincides with the growth of this set of rights. It also coincides with the escalation of colonial activities by the European superpowers of the time, through to the introduction of an imperial phase of colonization after the Battle of the Nile in 1798. Later formalization of these rights also reveals a co-incidence with the economic and political drives of Europe. The Paris Convention of 1883 (the base international document for trademark protection), for example, was signed during the Paris Exposition of that year, a marker

of economic and imperial might (Patel 1996, 311-313).

### **Foundations of indigenous peoples' critique: what intellectual property lacks**

In raising some consistent features of indigenous peoples' customary rights in cultural heritage it is beholden on me to make certain interjections by way of disclaimer. The key concepts noted derive from both specific tribal concepts of customary law and those of broader racial groups such as Aboriginal Australian, First Nations, or Maori. It is necessary to state that these generalizations are in no way intended to attempt to define indigenous cultural heritage for indigenous peoples. As Article 1.1 of the 1993 *Mataatua Declaration* states, "[in] the development of policies and practices, indigenous peoples should: Define for themselves their own intellectual and cultural property." Nevertheless, the ideas that are stated are, for the most part, assumptions broadly held by indigenous peoples. This may be witnessed in their appearance in international documents of declared understanding between indigenous peoples and in the documents issued after indigenous peoples' fora (e.g., UN's *Draft Declaration on the Rights of Indigenous Peoples* 1993; UN's *Draft Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples* 1993; *Mataatua Declaration* 1993; *Julayinbul Statement on Indigenous Intellectual Property Rights* 1993; *Final Statement of the Regional Consultation on Indigenous Peoples' Knowledge and Intellectual Property Rights*

*Statement [Suva Statement]* 1995). The principal concepts named here are the relationship to land and an holistic worldview. Together, these reflect and shape indigenous peoples' concerns.

Specific expressions of culture in narratives, fashioned objects, and performances are not easily divisible. Whereas Anglo-American law, for example, might treat tangible cultural heritage differently from knowledge, indigenous peoples resist this separation of aspects of their cultural expression because it does not conform to their sense of the interconnectedness of things. There is no taxonomic division of intellectual or other areas as is the case with Eurocentric systems since the Enlightenment. Law, science, biotechnology, culture, government, medicine, knowledge of the natural world, religion, performing arts, all are part of a matrix of mutually re-enforcing systems of knowledge and ways of living. As a result, to separate out any one area of concern for specific and/or divergent treatment is to create an artificial distinction. This can be witnessed in the growing acceptance of the term "cultural heritage" in place of "cultural and intellectual property" in the international arena (Blake 2000; Daes 1997; Janke 1998).

Yet cultural heritage is split up into numerous different rights under a parallel number of different legislative regimes. In New Zealand, for example, this can involve protective coverage under the heads "cultural" and "intellectual" property. The former category includes the Antiquities Act, 1975; the Conservation Act, 1987; the

Plant Varieties Rights Act, 1987; and the Resource Management Acts, 1991 and 1993. The latter includes the Copyright Act, 1994; the Designs Act, 1953; the Fair Trading Act, 1986; the Patents Act, 1953; and the Trade Marks Act, 1953. Such a collection of enactments might create the appearance of adequate coverage, but they do not, by and large, reflect specifically Maori concerns for cultural heritage.

This, perhaps, is why there are two significant changes on the table in New Zealand. The first is the Taonga Maori Protection Bill, a piece of proposed *sui generis* legislation that is currently being strenuously revised. The proposal seeks to provide a protective scheme for cultural heritage under one act. Significantly, in its original form the Bill reflected, almost clause for clause, the principles outlined in the *Mataatua Declaration* and would result in a significant shift in the form, objectives, and philosophy of indigenous cultural heritage protection. The name, "Taonga Maori," for example, reflects the Maori conceptualization of taonga (treasures) for cultural heritage. This is an inclusive term for both tangible and intangible aspects of Maori culture; it would, for example, bring legislative protection for a traditionally woven garment into the same arena as the Maori language and principles of environmental management. The second major development in New Zealand is the awaited findings of the Waitangi Tribunal on the Wai.262 Mātauranga Maori and Taonga Claim currently before it. This revolutionary claim brought by Maori seeks a declaration on

the position of Maori cultural heritage in its very widest sense and represents an attempt to elicit formal recognition of self-determination over cultural heritage from a government body. Both the bill and the claim represent resistance by an indigenous people to the divisionist and disempowering nature of legislative regulation of their cultural heritage. While the response of Maori might show that legal systems may change in order to accommodate alternate needs (although this has yet to be proven), it is noticeable that both endeavors reject or at least side-step traditional intellectual property classifications. This is a strategy of disordering that illustrates the depth of indigenous antipathy for the principal effects of cultural heritage regulation.

This antipathy finds a parallel in outsiders' criticisms of the failure of copyright to accommodate the particulars of indigenous perspectives. Indeed, copyright is commonly rejected as the most unpalatable form of protection of indigenous heritage rights available. For example, Erica-Irene Daes, Chairperson of the United Nations' Working Group on Indigenous Populations, declares existing forms of legal protection of intellectual property such as copyright to be "not only inadequate . . . but inherently unsuitable" (Daes 1997, ¶32) to indigenous peoples' needs. A communality of analysis holds that Eurocentric systems of intellectual property regulation fail to accommodate the unique relationship between indigenous peoples and their knowledge systems (e.g., Coombe 1997; Janke 1998; Johnson 1996; McDonald 1997; Tunney 1998; Wright 1996). Importantly, too,

there has been registration of this lack in the courts. In the “Carpets Case,” for example, Justice von Doussa stated: “[the] statutory remedies do not recognise the infringement of ownership rights of the kind which reside under Aboriginal law in that traditional owners of the dreaming stories and the imagery such as is used in the artworks of the present applicants” (*Milpurrurru and Others v. Indofurn Pty. Ltd. and Others*, 30 IPR 209, 239 [1994]). Such a failure includes the refusal to recognize and endorse the central fact of indigenous cultural heritage: that in its many forms it articulates and contributes to indigenous identity, heritage, and the relationship of different tribal and linguistic groups with the world. Instead of being commodities owned by individuals produced for potential economic benefits (as is the presumption of the Anglo-American model), indigenous heritage registers relationship, survival, struggle, and, most importantly, identity.

### **Property**

Property is arguably the dominant focus of Eurocentric legal systems. The Anglo-American notion of protecting against unauthorized infringement, for example, is a metaphorical extension of the notion of trespass of real property. Yet the same concept does not necessarily exist in all indigenous systems; certainly it does not assume central importance. As Daes articulates the issue:

indigenous peoples do not view their heritage in terms of property at all – that is, something which has an

owner and is used for the purpose of extracting economic benefit – but in terms of community and individual responsibility. Possessing a song, story or medicinal knowledge carries with it certain responsibilities to show respect to, and maintain a reciprocal relationship with, the human beings, animals, plants and places with which the song, story or medicine is connected. For indigenous peoples, heritage is a bundle of relationships, rather than a bundle of economic rights. The “object” has no meaning outside of the relationship, whether it is a physical object such as a sacred site or ceremonial tool, or an intangible such as a song or story (Daes 1997, ¶26).

Setting aside any issues of essentialism strategically adopted in Daes’ report, there are two conclusions to be drawn from this. First, indigenous “property” is not part of a Cartesian proprietary scheme – a subject does not possess an object as a sign of the subject’s domination of the object world. Secondly, and as a result of this, indigenous “property” is inalienable, unlike Eurocentric views of property (Moustakas 1989). Given the importance of the proprietary scheme for Anglo-American copyright and its delineation of economic rights over aspects of intellectual property, it is not surprising that there is no match with indigenous concepts of heritage.

### **Material form**

In a legal sense, materiality remains a fundamental presumption of a quality essential to art, as two English cases

indicate. Lord Justice Lawton in *Merchandising Corporation of America Inc. v. Harpbond Ltd.*, for example, responds to the idea that make-up could be analogous to a painting:

it seemed to me fantastic . . . a painting must be on a surface of some kind. The surface upon which the startling make-up was put was Mr. Goddard's face and, if there were a painting, it must be the marks plus Mr. Goddard's face. If the marks were taken off the face there cannot be a painting. A painting is not an idea: it is an object; and paint without a surface is not a painting. (FSR 32, 46 [1983])

Similarly, in *Creation Records Ltd. v. News Group Newspapers Ltd.*, Justice Lloyd refused the designation "sculpture" for a collection of disparate objects arranged for a photographic session with the band Oasis on the grounds of it being temporary. Having declared he did not regard the claim that the object might in fact be sculpture as "seriously arguable," Lloyd J. continues:

[this] composition was intrinsically ephemeral, or indeed less than ephemeral in the original sense of that word of living only for one day. This existed for a few hours on the ground. Its continued existence was to be in the form of a photographic image. (EMLR 444, 450 [1997])

The idea that a temporary work is somehow less of a work than one intended to last for more than a day (apparently Lloyd J.'s standard term) stretches the normal understanding of

materiality, which is a physical presence only, not a physical presence over any specific period of time. By the same token and despite what Lawton LJ. declares, make-up is a material expression of an idea once it is applied (the very term for putting one's face on charts its distance from an "idea"). As a result, it would seem that a copyright focus on material form implies more than a desire for fixedness as a purely materialist concern; it implies fixedness in the sense of stability or permanence.

Two major problems result for indigenous peoples with respect to this. First there are forms of heritage that, by these decisions, will not attract protection. Maori performers, for example, will paint designs, sometimes with specific tribal and/or familial significance, on their faces. Aboriginal Australians will on occasion have designs on their bodies as an important part of particular ceremonies. At these and other times, impermanent works will be created, earth paintings for example, which last only as long as a particular ceremony or performance. Moreover, songs, dances, temporary artistic works such as body designs, and earth paintings and artifacts do not exist in isolation from one another but form an holistic milieu of the performance. In terms of materiality, designs on the body, the performance itself, and any associated impermanent works fail a copyright test of material form. For indigenous peoples, however, there is nothing to separate these aspects of cultural heritage from the paintings, linocuts, or sculptures of the successful copyright infringement cases brought by

Aboriginal Australian artists.

Although untenable from a customary rights perspective, material form is the normative position of Anglo-American copyright, a condition closely allied with the proprietary focus of Euro-American law in general. What it ignores in terms of indigenous peoples' interests is that the "things" that most warrant protection are often not physically manifested. The ideas behind the works (performances, narratives, principles of design, the meanings of these, the secret and/or sacred nature of these interwoven concerns) can be of greater and more lasting "value" to peoples. In painting, the narratives and styles of works remain unprotected, for example. In the case of performances of oral traditions, Janke records the alarming prospect that although there are minimum standard performers' rights in Australia:

[performance] of Indigenous music, dances and stories are not eligible for copyright protection unless they are original and recorded in material form. Thus, under existing copyright legislation, traditional custodians of an important sacred dance or ceremony may not be able to stop unauthorised performances of the dance. (Janke 1998, 56)

### Authorship

The subject of Anglo-American copyright is the individual author. In the context of art making, this often squares with the naïve and Romantic image of the lone artist struggling away in a garret, wrestling with creative dæmons.

Protection for indigenous notions of authorship or creativity is not considered. This is because of three basic dissimilarities with the dominant model, presented here as questions. First, are there indigenous "artists" as such? Secondly, how do they conceptualize themselves and does that square with the demands of authorship? Finally, what happens to the indigenous artist when she stands in court? The significance of these dissimilarities is that they reveal a central asymmetry with respect to the place of indigenous artists in relation to authorship.

"Artist" (or "author") is not necessarily an indigenous conception of the role played by creative individuals. At the outset, there are etymological difficulties with the very term. As First Nations artists Lou-Ann Neel and Dianne Biin state:

[as] with many Indigenous groups throughout the world, our respective languages [of the Mamalillk<sup>u</sup>la, Da'naxda'xw, Ma'amtigila and Kwagiulth peoples for Neel; and of the Tsilqhot'in people for Biin] have no one-word for "art." We also do not have a singular word for "artist."

Instead, we have words and phrases that describe individuals or groups of individuals as being knowledgeable or skilled in a particular area of creative works—professionals who are, for example, "knowledgeable in the way of songs" (composers, singers) or "knowledgeable in the legends and histories" (storytellers, painters, carvers, etc.).

...

While we would prefer to use a more suitable designation, for ease of discussion we will use the terms “artist” and “artistic” but offer a definition of our own making to define artists as “*Trained practitioners and masters of the formal artistic and creative disciplines of our people.*”

In Kwakwaka'wakw, we would say “*Xa nax'wa ni'nogad kotla'xees dlax-wa-tla-as*” (“*those who are knowledgeable know where they stand*”). Many languages speak this same truth. (Neel and Biin 2000)

By approaching the law as artists, those who speak, sing, dance, make or otherwise create indigenous cultural heritage are having to stand as translations of themselves.

Secondly, the assumption of self-authorizing production underpins the Anglo-American conceptualization but indigenous artists manifestly do not share this experience. Their work may be subject to controls and they themselves are answerable to the people for whom they speak. In parallel, Martha Woodmansee contrasts individuated authorial responsibility with a medieval European concept of authorship wherein the author makes a contribution “as part of an enterprise conceived collectively” (Woodmansee 1994, 17). In the present context, this suggests that for indigenous artists working with traditional content and/or methodologies there is an absence of what Michel Foucault terms “the author function” (Foucault 1991). To this end, the artist is not the determining factor in the “value” or “significance” of a work nor in the way it is received. Rather, even artists of great skill may be appreciated for the way in which they

relate the content of a work. Like St. Bonaventura in Woodmansee’s example, neither Neel nor Biin acts alone. In a way, the process of authorization of indigenous art-makers through instruction and/or initiation is analogous to the training of medieval artists through long periods of apprenticeship in both methodologies of art and the Word to which they were giving form.

This is not to say that individual indigenous artists are not granted and have not found some satisfactory protection in copyright actions (the Australian case law refutes such a conclusion). Nevertheless, those appearances also see the interests of those artists and the communities of which they are a part translated into interests that would exist were the claimants non-indigenous. By this it may be that “equality before the law” results in an erasure of what may be a crucial part of an artist’s identity and the reason she might bring a claim: her indigeneity.

### Originality

Originality poses two difficulties for indigenous peoples. The first relates to whether or not indigenous cultural heritage, especially contemporary evocations of traditional narratives and/or designs, for example, may be said to be “original.” The second, significantly more subtle problem, is more structural in quality. It arises from affirmation of the first issue. Rather than offer a positive conclusion, I would contend that concern regarding originality in indigenous cultural heritage illustrates a clear

instance of the pervasive imbalance of copyright in favor of the Euro-centric conceptualization and the seductive ease with which alternate systems or positions may be incorporated within it. For many years the single “originality” difficulty for indigenous peoples’ cultural practices arose with respect to the realization of known narratives or re-articulations of established designs—copying and reproduction sanctioned and moderated by a collective. It is conceivable that any difficulty was based on one of two positions. One may have been the protectionist concern that copyright regimes were so strict that they might not extend to “known” or “traditional” elements. An alternative position is the fallacious notion that careful and exact repetition of images (and histories, narratives, and performances, which remain unprotected) was the result merely of slavish copying. This position conceives of indigenous cultures as synchronic, with peoples doomed to repeat a diminishing range of known devices (Talal Asad 1973; see also Freud 1913; Lévi-Strauss 1955).

The key decision dispelling the idea that the contemporary expression of traditional Aboriginal Australian cultural heritage might not be original is *Milpurrurru and Others v. Indofurn Pty. Ltd.*—the case of indigenous paintings copied onto industrially manufactured woolen carpets. In his decision von Doussa J. notes a series of texts such as the Working Party Report that addressed this concern and states that the problem is:

whether works incorporating [traditional narratives] satisfied the requirement of originality so as to attract copyright protection. In the present case that issue has not arisen, and by the end of the trial the copyright ownership of the artists in each of the eight works was admitted. Although the artworks follow traditional Aboriginal form and are based on dreaming themes, each artwork is one of intricate detail and complexity reflecting great skill and originality. (30 IPR 209, 216 [1994])

Even in respect of traditional methodologies, works are found to be original; it is enough that there has been some visible presence of the hand of an individual artist and the recognition by artist and community that she is responsible for a particular version of a narrative. In this respect, case law appears to have accommodated indigenous interests insofar as they are compatible with original artworks made by individual artists. Narratives do not garner protection in and of themselves, only as “original” manifestations by authors. Nevertheless, all appears well because “Aboriginal artworks,” by being declared to satisfy an origination test of originality, are not rendered ineligible for protection.

### **Reproducibility**

At this point, it is as well to identify what might be an ironic reflection of the status of original and reproduction in the context of non-indigenous legislation pertaining to indigenous art and design. A number of commentators have focused on Walter Benjamin’s text “The

Work of Art in the Age of Mechanical Reproduction” as a modern theoretical source for a defense of the uniqueness, the partiality of indigenous cultural expressions. In the introduction to the exhibition catalogue *Copyrites: Aboriginal Art in the Age of Reproductive Technologies*, for example, Vivien Johnson extends the obvious reference to Benjamin in the title by opening with a quotation: “[the] presence of the original is prerequisite to the concept of authenticity” (Johnson 1996, 3; see Benjamin 1984b, 220). The quote is used to center a discussion about the non-approved use of Aboriginal Australian art, how such practices necessarily breach both intellectual property and cultural integrity, and how this relates to the distinct understanding of authentic Aboriginal art. One of the key observations raised in the essay is that non-Aboriginal people do not understand the particular auratic qualities of the things they copy and that any reproduction should only progress from the position of informed consent. To this end it repeats some of the conclusions reached in this article in the articulation of interwoven concepts of identity, authenticity, and the specific attachment of indigenous epistemologies to particular forms of cultural expression. Johnson turns Benjamin’s phrase to make her point: “[the] presence of the Aboriginal is prerequisite to the concept of authenticity” (Johnson 1996, 3).

Interestingly, the same position that defends the need for authenticity of expression as a means of dislodging the assumption that non-indigenous people may have access to certain objects or

knowledge for exploitation will invariably register that normative rules of copyright are inherently unable to respond to the requirements of that authenticity. Indeed, these two points look as though they go hand in hand. What is potentially ironic about such a link is that the security of the first point rests in large part on the notion of originality, an issue that is, in fact, defended in particular forms by the very system that is criticized in the second point. Originality in copyright is a theoretical construct intended to establish and defend the originating author’s economic interest in the products of her labor—it establishes an original proprietary interest that the author may then use to restrict copying. “The presence of the original,” in this context original (indigenous) peoples and original (first) expressions linked to membership of that group, may, likewise, presume a proprietary interest and may well foreground that interest. Coombe, usefully, has warned against the ease with which concepts such as culture, authenticity, and identity may be posed as proprietary terms, wherein such arguments are “constructed upon the same philosophy of possessive individualism that grounds our legal categories and historically supported practices of colonial expropriation” (Coombe 1997, 80). Both originality in copyright and (Ab)originality as representative of indigenous interests in cultural heritage turn on the notion of origination—my right in my work stems from the fact that the particular expression of it originates with me as its first author; indigenous rights in cultural

systems and their expression stem from the fact that these expressions originate with them as first peoples.

My concern in raising this is to register that there is at least a split in the logic in how originality (as prerequisite to authenticity and as a basis for refusing reproducibility) operates in cultural-legal terms. Those of us who do support the notion that there ought to exist specific sets of ethical and maybe legal criteria that inform and shape the ways in which non-indigenous peoples encounter, research, and/or reproduce indigenous knowledge need to come to terms with what we think originality imputes. If by originality we wish to invoke a sense of exclusiveness for some and exclusion for others, then we must accept that this is a shared concept of that version of indigenous rights and copyright. This is not necessarily a bad thing in a practical sense, for it manages to speak the language of the colonizer in order to articulate an interest of the colonized and so may be heard. Yet herein lies a dilemma because, as Coombe goes on to argue, this effects a normalizing of discourse, one, moreover, in the language of colonization. It repeats the concern noted in this article about indigenous peoples (or in this context indigenous concepts) having to stand as translations of themselves in order to be heard, to be accepted, or to enter into discourse. In the context of cultural expressions, the translated document, artwork, or performance remains dependent on a prior document, artwork, or performance (hence it is unoriginal or inauthentic). This is why the very notion of translation of

indigenous concepts has the potential to be inherently dislocating.

At the same time, the inversion of this position bolsters an *a priori* assumption of the superiority of indigenous heritage when it is appropriated out of its cultural context. Translation in this instance recognizes that, regardless of the qualities of the derived work, it is dependent on something that went before it. Further, translation in copyright terms can produce certain positive outcomes. Indigenous authors will find protection in that different legislative systems state that originators retain adaptation rights (of which translation is one). Translation in the practical legal sense refers to cross-language translation, and adaptation does not extend beyond literary, dramatic, or musical works, which is a limited field admittedly. Nevertheless, the notion that translations and adaptations require permission of copyright owners creates the inference that translations of cultural material do not take place in an open environment without an interceding principle of authorization. Thus, the technical understanding of legal translation rights may go some way to modifying the sense that translation is quite so free and open in broader cultural terms. While translations may have their own originality or authenticity as translations (and this creates certain intellectual property rights) they are neither original nor authentic in the way Johnson, say, uses Benjamin to enunciate a conceptualizing of Aboriginality.

I am not sure Benjamin on his own is all that helpful, though. His discussion of the original's aura's dissipation by

reproduction in the context of single paintings is not necessarily borne out. Indeed I may suggest that one is more inclined to valorize the original when encountering it because of prior familiarity with its look from reproductions—thousands of visitors a day venerate the *Mona Lisa*, and cynics test their experience against its primacy in certain visual languages, but how many actually *see* it? We perform its aura by our recognition of it in any given context—in the Louvre or on a chocolate box lid. Moreover, Benjamin’s affirming discussion of film in his essay is, it should be noted, a discussion of a medium of *reproduction*, what we see are projections of prints. Is there no aura emanating from this projection, from this copy? I am unsure. When Johnson wittily interposes Aboriginality in a sentence on originality it looks like an affirmative gesture; it looks like a strategy whereby a form of primacy or prior claim is asserted. She’s fencing territory. My concern with this is not that she looks to be staking proprietary claims—Coombe’s concerns about the dominating logic of proprietary analysis are certainly not a cunning means of dispossessing indigenous peoples of their heritage by declaring property to be an ethically bankrupt basis for analysis, thereby rendering everything available for everybody, far from it. Rather, what interests me is what is consequential from the assertion of originality. This gambit can run from strategic essentialism (original as exclusive and exclusionary—like the original author’s rights) to a principle of respect, consultation, and authorization (original

as permissive—again, an author’s prerogative in copyright). In this way it looks to me increasingly less like a question of reproducibility framed exclusively by proprietary interests (legal territory) and more like one concerned with articulation (ethical and behavioral territory) (cf. Coombe 1997, 93).

### **Authenticity**

The notion of defining a specific set of conditions through which one might define what is “authentic” Maori art or language is the most serious philosophical problem in this area. As an example, the koru as a graphic is far from a unique cultural phenomenon. A curvilinear form is widely used, and spiral forms are present in the ancient and contemporary art of many cultures: one can think of ancient Greek acanthus designs, decorative markings from the Sepik, heraldic decorations surmounting shields, Lebanese iron work, Native American spiral mounds, and Renaissance Italian *voluté* as an eclectic and random selection of the form in art.<sup>7</sup> The artist, satirist, and theorist William Hogarth’s treatise, *Analysis of Beauty* (1753), asserts (in chapter X) that most elegant of lines is the serpentine line. His engraving of this involves a long gently curving line with a twist at the end to effect closure that has the same fundamental features as the koru. In specific cases of application and use, however, the particular demands of makers, users, and materials render such generic forms dissimilar beyond any but the most casual of observations. Moreover, confusion (or at least connection) of these forms based on

morphological analysis does not of itself suggest protection is unwarranted. The koru carries particular and specific connotations, which means it warrants protection. As I see it, there is sufficient distinction between the different graphic manifestations of the curvilinear pattern, and such a distinction is made plain when the koru is used in connection with associative or connotative meanings.

The second problem of definition is that it can seriously delimit notions of art. The Maori Arts and Crafts Act of 1926 attempted to define Maori art. Sub-section 4.1 established learning institutions “for the study and practice of the arts and crafts as known to and practised by the Maori people.” On the face of it there is little problem with this, but in relation to whakairo (carving), for example, there have been sweeping changes in the way in which it has been articulated in the thousand years since Maori first came to Aotearoa/New Zealand. Moreover, the principle of aesthetic faithfulness that is articulated in the Act is based on an analysis of one house, Te Hau ki Turanga from 1842, made by Raharuhi Rukupo and others, which is now in Te Papa Tongarewa, The Museum of New Zealand. The implication is that the house is treated as an idealized model of Maori artistry rather than being a specific and excellent example of work made in the Poverty Bay area in the middle of the nineteenth century. The obvious problem with this is that it normalizes one institutional style and determines it to be “authentic.” In the words of the Act, the purpose of defining the content of a Maori School of Art was to prevent new materials and

applications from leading to “the production of un-Maori works of art” (Page Rowe 1928, 60).

More recently, Hirini Moko Mead has adopted an eight-point definitional approach. Most of these are unproblematic, but when first promoted at the Toioho ke Apiti Maori Art Conference at Massey University in 1996, three of the eight conditions elicited less than unanimous support. The idea that “[the] primary purpose of Maori art is to give expression to the creative genius of Maori artists to satisfy Maori social, political, cultural, and economic needs” (Mead 1997, 231) squares with an orthodox view of Maori art making but falls short of allowing for more independent spirit within Maori visual artists. It runs the risk of introducing a prescriptive element into Maori art. The succeeding condition was to note: “Maori art is social art that is created within a cultural and social environment, such that artists are in touch with their tribal roots and with their people” (ibid.), which is prescriptive. As with the recent bout of fisheries decisions, this approach of Mead’s effectively distinguishes between urbanized Maori and rural Maori and/or those who remain in contact with their iwi or other tribally-based group. The difficulty of this means of identification is difficult to downplay, but it needs to be remembered that not all urban and/or de-tribalized Maori have selected that state. For many it is the result of decades of cultural negativism and the drift to urban centers for work which they and their families have engaged in. Mead’s point seems to try to avoid some of the painful

sociological facts of twentieth century Maori experience. The next definitional moment suggests that “[changes] in Maori art are brought about by Maori artists who employ new technologies, introduce new images, and recombine elements of Maori art in new and exciting ways that are accepted by the Maori people” (ibid.). The last clause of this is problematic, for just as a tourist public can endorse orthodoxies of style, so can a general Maori public. The risk here is of a mode of practice that is more often than not reactionary in quality. In terms of its application to a legislative approach, there is a very real danger of ensuring a regime that results in stasis for Maori arts.

#### **THE COLONIAL CATWALK: AUTHORITY, FREEDOM, AND FASHION**

One of the general principles underpinning the *Mataatua Declaration* is one of authorization. What it in part seeks to reverse is the sort of subject/object split that sees active colonizers exploiting and utilizing the cultural heritage of passive colonized in a manner that re-inscribes and thereby makes more powerful the speaking/silencing, active/passive binarism of this crude model. Active involvement, the seeking of permission, and, most importantly, a desisting from any form of involvement where permission is denied deflect the hegemonic privileges of the singular speaking subject. In the context of visual culture, where dialogue between culturally divergent parties is entered into and maintained (especially

if indigenous systems, structures, and/or restrictions shape that dialogue), there is at least the first step in dislocating the assumed authority of the colonizer to exploit whatever she might choose in respect to her own, independent intellectual creations. This discussion returns us to the question of reproducibility and the attendant questions: Is the original diminished through different forms of reproduction? Has the koru (in this example) anything to fear from its potential for translation into works of art or designs that are not those in which it had traditionally been used? Is there something integral to it that refuses the possibility of appropriate reproduction?

#### **Indigenous design and non-indigenous fashion**

In lines marketed four years ago, the New Zealand swimwear manufacturer Moontide included women’s suits made from material patterned with interlocking curvilinear koru designs (fig. 3). The managing director, Tony Hart, and the firm’s designers developed this swimwear line with a Maori entrepreneur. Buddy Mikaere, a kaumatua (elder) in the local community, negotiated the use of the koru motif. According to Hart, two concerns governed the design element’s use: commercial viability and cultural respect. In recognition of this dual aim, part of the royalty from sales goes to the Pirirakau hapu (sub-tribe) of the Ngati Ranginui people.<sup>8</sup> Not surprisingly, when the line debuted at Sydney Fashion Week in 1998 it garnered considerable



Figure 3: Moontide Swimwear, Jewel 3 piece and Willow from promotional brochure 1999/2000.

press interest for its apparently ethical handling of indigenous interests.

What this example represents is a discrete arrangement between two parties: the manufacturer and the indigenous entrepreneur acting on behalf of a tribal group with direct responsibility to that group. At first glance it would seem that any absolute sense of intellectual or creative freedom in the manner that dominates Euro-American discourse on art and design has been sublimated to some degree of duty or responsibility. More remarkably, perhaps, commercial imperatives have

also been toppled as the prime determinants of exploitation and marketability. Not unlike the Air New Zealand marketers and designers during its re-branding, there is an interesting interplay between cultural sensitivity and commercial reality – indeed, I would argue it is more finely balanced in this case because the issues at stake have been openly and frankly addressed by the company. At any rate, the independent designer and manufacturer are supposedly held accountable for the manner in which the indigenous design module is employed.

An obvious comparison may be made with the unauthorized use of indigenous Pacific and Maori graphic design in Paco Rabanne's *haute couture* line from January 1998 and Jean-Paul Gaultier's Spring/Summer 2000 lines and perfume bottling. In the former, the use of shiny black fabric cut in deliberate echo of koru design, high-cut at the hips, barely covering the breasts and coming up to the face as a mask-like accouterment, plays with a close alignment of exotic and erotic spectacle. The costume registers with some level of equivalence two primary sources and effects. First, the erotic allure for some Europeans that moko holds – think of the attraction of European seamen for tattooed Polynesian belles. Secondly, the appeal of sexually assured and/or aggressive clothing such as that associated with domination and/or sado-masochistic sexual practices – think dominatrices of sex clubs or of popular culture such as Catwoman from *Batman*. In combination these suggest a sexual *frisson* that interrogates and

extends that commonly held to be present in “the little black dress.” In this example, the dense black of the garment oscillates with the flesh of the model in an almost *fort/da* manner that can serve to heighten desire. Like the body of the Polynesian woman for non-travelers, the body of the model for fashion pundits or magazine grazers is an exotic/erotic fantasy figure. The “tattoo” marks heighten the experience and potentially suggest a libidinous puncturing of the flesh in a manner of attraction and repulsion that has a strange echo of Kant’s discussion. One may stand this interpretation of koru-derived design next to Neich’s discussion of the originating form to chart the level of dissimilarity. At the same time, however, there is not necessarily an attendant sense of indecency or inappropriateness on the part of every critic. Much as older and/or more conservative people might shy from or actively regard as wrong the body additionally sexualized by the use of the koru, younger and/or more fashion-conscious or modish types might find humor or absurdity in the use.

The Gaultier lines and marketing strategies are somewhat differently inflected. Like Rabanne, Gaultier has a reputation in both the fashion and pop culture industries for employing a knowing and often humorous sexiness in his designs. To that extent, the diaphanous printed fabrics of his shirts and sarongs may play a similar peek-a-boo game. At the same time, the sources for his quotation are wider than Rabanne’s; for these lines he appropriated images by Gauguin as well as direct images of Maori use of the koru.

This may typify the notion of the knowing Gaultier as a leading nominally post-modern designer. Not only does he register the sort of pliant sexuality that Euro-Americans continue to dream is the condition of the Pacific but he does so by utilizing the key high art formulation of this presupposition—Gauguin’s *Noa Noa* woodcuts. The images and the journal of the same name are synonymous with the sexual and artistic freedom Gauguin maintained he found in the numerous islands of the Tahiti group where he lived between 1891 and 1903. They establish his sense of a rich and magical Otherness to the “filthy Europe” he had escaped. In addition to these woodcuts, Gaultier incorporated the profile self-portrait of Gauguin and the “PGO” signature he developed. In the lightness of the fabric and the sense of the fashion season to which they relate, Gaultier imbues a sense of a similar dreamy other-worldliness of the Tahiti of popular European imagination. To be fair, this is endorsed by the local tourist trade—soft, smiling bodies are more encouraging of potential tourist dollars than the nuclear test sites that characterize a crucial aspect of the French colonization of Polynesia.

To the Gauguin mix Gaultier introduces the image of a Maori warrior with ta moko—not unlike that of Frizzell’s image. Clearly there is the sort of non-specific geography that characterizes artistic appropriation of indigenous cultural heritage, wherein the precise meanings are evaded in search for a more generalized and imagined locale. To an extent, this place is like to an imagined land, perhaps a

*nave nave fenua* (fragrant land) to utilize the term Gauguin coined. In this respect, there is a shift from a specific (often contested) location that one could align with a sense of the real to the realm of the imaginary as figured by the designer's creative inventiveness and *savoir faire*. Certainly the moko in the marketing campaigns register some degree of "Maoriness" but, at the same time, are entirely in keeping with what "Gaultierness" has come to represent in fashion – the conflation of sexiness, "bad-boyness," and inventiveness that are the hallmarks of his style are present in equal measure here.

Still, there are other problems. These are most notable in the men's swimwear of the Gaultier line, where, depending on the cut of the fabric, the warrior's face with ta moko is repeatedly situated on the ass. Whilst this might contain a sense of general insult to non-Maori it is of specific offense within Maori culture, with an entirely inappropriate confusion of the relative states of tapu (the head, and the head of a tattooed person of rank and mana in this case) and noa (the bottom). Things tapu and things noa are to be separated. One ought not to sit on a table that will take food, for example. Hence, to place a representation of the part of a person that is most important, most sacred if you will (and one that shows the status of the person through the wearing of the moko), where it will be sat on is, in Maori terms, a grave matter. It is a factor that does not seem to even enter into the ken of a blithe spirit of contemporary fashion.

### **Fashion in the field**

There is, too, a local variant on this problem. For many years the Christchurch-based sports apparel manufacturer Canterbury of New Zealand had a contract for supply with the New Zealand Rugby Football Union. Prior to the 1999 Rugby World Cup held in Britain and France, however, that contract was not renewed and the NZRFU entered into a deal with the global sporting goods manufacturer, Adidas. Importantly, both companies have subsequently used Maori design in order to further product visibility and/or desirability.

Canterbury has produced a new range of rugby boots, launched in London in 2001 and released on the New Zealand market in 2002. The promotion of these products suggests that there have been important modifications to the existing design, especially in relation to the soles of the boots and the placement of sprigs. Of more importance here is the look that has been generated in association with the new product and the nomenclatures associated with the different examples within the line. Three of the eight new boot designs incorporate explicit koru-based designs in the form of differently colored leather decoration on the outside of the boot. These were designed by a Maori designer and carver, Riki Manuel. The energy of the forms, perhaps even an intimation of wind or movement, has been carried over into the cosmetic features of the boot (fig. 4). These come to function as positive connotational meanings for rugby players. At the same time, there may be a direct appeal to a nationalistic spirit

within the local market or an exoticness or recognition of the formal appeal of the motif internationally. The company's involvement with an indigenous designer looks to bolster the appropriateness of its use and, furthermore, there is no intention by the company to assert any claim of ownership over the designs or words used (acc. to the *Sunday Star Times*, 4 Nov. 2001).



Figure 4: Canterbury of New Zealand, Moko rugby boot, 2001.

More problematic is the incorporation of words in the boot promotion. The eight names given to the range are as follows (the translations are the author's own): Rangatira (chiefly person); Tane-Toa (champion);<sup>9</sup> kaha (strength); whetu (star); moko (tattoo); toa (warrior); hiko (flash, zigzag, shine; all qualities of the good rugby player); and haka (fierce chanting dance)<sup>10</sup>. There are two problems in this. One is the potential for the trademarking of Maori words—which could amount to a ring-fencing of the language when employed overseas where the words cannot be said to have

generic use. This is an important concern in the face of global marketing, and several examples have already caused consternation.<sup>11</sup> Outside of the trademarking issue (which Canterbury has stated it will not seek), there are residual concerns regarding the tapu/noa disposition of having words such as Rangatira, in particular, for a range of footwear. The notion of stepping over or on someone of rank is culturally offensive. Hence there is a distinct tension in the naming of the product between a desire to capitalize on the positive attributes of status but, at the same time, significant questions as to the neutrality of doing so.

Eighteen months prior to the Canterbury launch, during the latter stages of the 1999 Rugby World Cup, Adidas' campaign included the image of a Maori warrior with moko filling up the billboard, page, or other site of advertisement, the company logo placed discreetly underneath. Presumably the campaign sought to connect the New Zealand All Black's reputation as rugby players of high caliber with general associations of strength, energy, and vitality that may be set alongside Polynesian warriors. Implicit in this, too, may be a certain sexualization of the powerful, aggressive indigene. In terms of the issues raised in this section, the moko on the model pulls together markers of reputation, exoticism, masculinity, physicality, and sexuality and markets these as the associated values of the brand. This may work well internationally or locally, for that matter. Although, in the latter context, it is the habit of many rugby union and rugby

league fans, both Maori and non-Maori, similarly to paint moko on their faces in support of their local or representative teams, the campaign's "exoticism" indices might not be so strongly felt outside of Europe. The others, however, remain, for the most part, intact.

The Moontide lines look to come out of these comparisons in a positive light, mostly due to the consultative process that was used prior to and during the manufacture of successive season's lines. Perhaps, too, there is a similar hint of allure and location in the use of the koru designs, and this may also speak to the development of a specific clientele—in this case New Zealand women who enjoy supporting local industry and wearing clothes that disport that enjoyment. Canterbury would seem to have the same market for rugby players of either gender. Nevertheless, there remain questions regarding the appropriateness of the authorization of this design for this purpose. In the case of a scanty bathing costume, a similar divide between conservative and more modern morality may be imputed here—certainly not everyone who sees these images is unconcerned by them. The presumption of the consultative process, though, mitigates any potential discomfort inasmuch as there is the stated position that this use has been authorized. Thus the ability to question or interrogate that use with respect to some sort of indigenous moral perspective is seemingly curtailed.

What this introduces is a more serious problem at the heart of the authorization issue. That is to ask: "who may authorize and to what end?" I should say that I do

not mean this to be a question that results in disenfranchisement or alienation of decision-making from indigenous peoples. Nevertheless, there remain open questions as to the ability and/or advisability within Maori custom for individuals to assume that they may authorize the use of designs that may more properly be considered the cultural heritage of the collective. Te Rangitu Netana working on Robbie Williams in a tattoo studio in Amsterdam may carry with him the authorization of his teachers and/or his relatives, but he will, inevitably, have to make sole judgment calls on whether or not to work on particular clients. The distance of Amsterdam from Aotearoa/New Zealand (almost the very opposite end of the earth) may suggest a sense of isolation that is as much cultural as geographical. In place of this gap, Netana may assume a self-authorizing position that bears little or no connection to those who trained him or, in a broader sense, whose designs he copies and interprets. Nor is there consensus regarding the appropriateness of the tattoo Williams now sports. The designer may speak of the specific story he designed for his client using his stylistic signature, but this becomes problematic in terms of the relationship between his own authorial signature in the sense of an individual subject-author and the signature of the people who would seek to control its disposition and dispersal. To this end, some Maori question the appropriateness of Williams wearing what is a mark of belonging and, moreover, of status when he clearly lacks the former and, to some, lacks sufficient

mana to boot. This becomes more complicated when the factor of international recognition is added to the discussion. The issue here is whether mere visibility (for those who are skeptical of the moko's appropriateness) can offset what might be seen as dislocation from or harm to the specific cultural construct in which moko holds a meaning other than mere fashion-credibility.

At the same time authorization leaves open concerns that might be raised about the ability of groups such as tribes or sub-tribes independently to sanction the use of a motif or design module or to register an interest in it as this might exclude both indigenous and non-indigenous further use. In the case of Moontide, for example, the exertion of an intellectual property interest in the fabric design, say, could be exercised against a "passing off" swimsuit by an unscrupulous, indigenous copier manufacturer; even if the manufacturer claimed a general right to that use by customary practice, for example. It may be that the quality of negotiation that initiated the Moontide collaboration might prevail, but it is also important that one registers current economic realities and their relationship with some indigenous peoples' goals, most notably self-determination. Economic exclusion and resultant disadvantage are part of the colonial experience for indigenous peoples. In the move to an assertion of rights of self-determination, economics is an important factor—so important as to raise the possibility that a capitalist mode of competition might be used by different indigenous groups to protect

what economic interests they have from unsanctioned exploitation or some other form of unfair competition. The irony here is that this could conceivably result in a delineation of intellectual property rights, the determination of which is dependent on the action of the courts.<sup>12</sup> While it is certainly a positive example in the immediate case at hand, and a useful model for artists and commercial interests, the negotiated agreement is certainly not a panacea for the difficulties of reconciling indigenous interests with differing modes of cultural appropriation and the potential intervention of intellectual property laws.

#### **Labels, authorization, and authenticity**

Since February 2002, a bureaucratic mechanism is available that might strengthen the elements of authorization, declaration of that condition, and any resultant positioning of products in the market that for the moment are covered by Moontide's arrangement with the Ngati Ranginui sub-tribe. Artists and manufacturers now have recourse to apply a label of cultural authenticity to their works. Toi Iho, the "Maori Made Mark," parallels developments in Australia (the "Label of Authenticity" developed by Australia Council, the Aboriginal and Torres Strait Islander Commission, and the National Indigenous Arts Advocacy Association), First Nations, Canadian Provinces, and US States (the New Mexico Indian Arts and Crafts Protection Law, 1988, for example).

The drive for the Aboriginal

Australian mark came from the considerable exploitation of indigenous design within the tourist industry in Australia. These examples of passing off (or rip-offs, to use the plain words of the report into the matter) are largely unregulated. Unsuspecting tourists may assume the designs on consumer products to have been knowingly made for that purpose by indigenous artists, perhaps even a substantial economic benefit accruing to them, but there is no guarantee of the veracity of such an assumption. To the casual eye, one t-shirt, for example, might look much like another, but to the indigenous producer there may well have been specific and deliberate limitations placed on the iconography applied to any design, and profits may be serving indigenous communities. Marianna Annas, one of the architects of the Australian proposal, sees it:

as a means of giving Indigenous people a marketing advantage in an environment where there is an increasing number of cultural products which are "Indigenous" in appearance, but in fact of non-Indigenous origin. The object of the Authenticity labeling system is to assist consumers in identifying authentic cultural products, and thereby improve the economic benefits flowing to Indigenous people from the commercial use of their cultures. (Annas 1997, 4)

It has the additional advantage of helping to regulate the type of imagery that is reproduced, which will be of importance to indigenous communities

as well as individual indigenous artists. Importantly, it would not, as Kathryn Wells puts it, "be a measure for what is 'real' in modern indigenous Australian culture" (Wells 1996, 38); rather, it is focused on the commercial end of the art market. To this end it parallels developments in North America. The New Mexico Law, for example:

makes it a duty of anyone who is showing or selling Indian arts and crafts to inquire into the origin of objects to determine a) if the maker was an Indian as defined by tribal enrolment or certificate of Indian blood, b) if the object is hand made or machine made, and c) if materials are authentic (naturalness) or semi-processed. If the item can meet this test, then it can be labeled as an authentic, Indian, hand made piece. (Greaves 1994, 47)

The central focus of both examples given here is the identity of the author. Although it may be focused on a collective or tribal identity (a sense of belonging to a group), the authorial focus parallels the similar presumption of an author-centric intellectual property regime. There are important flow-on benefits from the Australian mark, and the New Mexico regulation includes additional conditions of process and material, but these bolster the central concern of identification of "authentic" makers.

The New Zealand mark goes a step further, even than the New Mexico Law, because it will serve two goals. First, it serves what looks like the key objective of authenticating marks because it is a

mark denoting indigenous authenticity. To be eligible to utilize the mark, purveyors of goods will need to be able to prove their ethnic identity as Maori. This will then result in one of three levels of demarcation: the Toi Iho Maori Made Mark; the Toi Iho Mainly Maori Mark; and the Toi Iho Maori Co-production Mark. These indicate that ethnic descent is of central importance to eligibility but is not exclusive – non-Maori may be part of an enterprise awarded the second two of these three marks, but even here there must be a level of Maori involvement that imputes control or leadership.

Secondly, it is a quality mark. A regulating body of experts in different fields will have the mandate to determine whether or not an applicant's product is up to the mark, as it were. This qualitative assessment factor has been one of the most controversial aspects of the consultative meetings that Te Waka Toi engaged in to promote the idea of the Maori Made Mark. The principal problem with the quality aspect of the mark is that it does not match the criteria that are more generally applicable to marks of quality. The International Woolmark, for example, indicates that products bearing the mark are 100% wool – that is to say it is a mark descriptive of material characteristics. To place a quality mark on cultural expression, however, is not to avoid imputations of value-judgements being made. Moreover, it seems to posit a more difficult and controversial question in that in this context it asks the members of the registration board to determine what is a quality Maori cultural product. Attached to the question of quality is a

hidden question as to what Maori cultural products are – what they involve, how they may be recognized. Mead's analysis of this question, "What is Maori Art?" (1997), has been noted above and reminds one that a number of competing problems remain to be addressed. It is questionable whether a governmental bureaucracy is the appropriate forum in which to answer such questions, even if it is made up of a panel of indigenous experts. The specter of an overly deterministic approach looms over the horizon, although it is too soon in the life of the Toi Iho Mark to be able to make any concrete observations regarding its operation.

What is pertinent to the examples at hand is that the Maori Co-Production Mark is available to enterprises where Maori are working with non-Maori and where the process has been significantly guided by Maori concerns. On the face of it, Moontide or Canterbury might be eligible for such a mark because of the companies' engagement of Maori designers. Moreover, if international companies were to behave in a similar fashion, they too could meet the criteria for having the mark attached. Success in gaining it would give the product the advantage of a degree of official endorsement of the overall project. This would seem unlikely to result in short-term competitive advantage in the international market and so looks to be focused on the local and tourist markets. Nevertheless, the mark is being promoted at a time of increasing awareness of the complex issues of intellectual property and at a time when some would argue there is a new growth

market in ethical products. It may be that the confluence of indigenous marks and a possible increase in corporate awareness of the issues involved may create an environment for change.

There remain stings to this tail, however. The effectiveness of such labels in the market is dependent on their visibility to and recognition by target groups. The Aboriginal Label of Authenticity, although currently being used by some artists and manufacturers, is all but absent in such centers of the Australian Aboriginal art trade as Alice Springs. Indeed, the first time I saw the mark myself was at a presentation given by Terri Janke in July 2002 – and this was immediately upon my return from a trip to Alice Springs. Without take-up by those engaged in the market there is little hope that the mark may sustain, let alone develop, “ethical tourism.” Further, tourists have to want to change and conflicting examples from the Australian desert make this want seem fitfully observed, at best.

There are two levels to such take-up. One is to respond positively to stated indigenous peoples’ positions. Uluru, the iconic red rock in the Central Desert, is part of the Uluru – Kata Tjuta National Park, itself a World Heritage site listed with UNESCO. Management of the Park is jointly the responsibility of the Uluru – Kata Tjuta Board of Management (on which sit a majority of Aboriginal persons) and Parks Australia, both operating under methods governed by Tjukurpa, Anangu Law – Anangu being the traditional owners of the land. (Uluru – Kata Tjuta Board of Management 2000). As part of that management process,

visitors are told on their tickets “we don’t climb,” in reference to the conflict between Anangu respectfulness of the sacred site and the tourist practice of scrambling over it. They are further asked not to take stones or soil away with them. Both of these “requests” are repeatedly ignored by visitors (although there is a curious new feature in the information area with the display of letters from previous visitors apologizing for and returning stone and soil they had removed).

The second level is effectively one of self-education and a will to act ethically. There is, for example, a thriving trade in didgeridoos in Alice Springs. Many of these bear labels by the manufacturers stating the product to be “authentic.” In so doing, they refer to a list of criteria that pertain to the material characteristics – that it is of native timber, eaten-out by termites, has a bee’s-wax mouthpiece, is hand-painted, and so forth. These confirm the authenticity and quality of the instrument *qua* object but elide other “authenticities” and “qualities.” Not only do the objects feature designs based on Aboriginal models that are neither painted nor sanctioned by Aboriginal people, but the didgeridoo is not an authentic cultural item for the Alice Springs or Central Desert areas, coming, as it does, from further north. Still, they are purchased and may turn up as part of the student/hippie/New Age *milieux* of Covent Garden, Haight-Ashbury, Toronto’s Queen Street, or the pedestrian mall in Frankfurt-am-Main, played by blonde-dreadlocked “alternative lifestylers.” Authentic objects, after a fashion

perhaps, but authentic cultural objects? My concern here is not with a rigid prescription of who may or who may not play the didgeridoo; rather, I simply want to register that assumed affinities or simplistic takes on cultural universalism seem mostly to square with one party – the one clutching the tourist dollar.

Similar issues of take-up and manufacturers' subtle evasions of "authenticity" will, doubtless, present themselves to the administrators of the Maori Made Mark. At the same time, an additional issue emerges from the coverage of the mark. Even with a population that is as urbanized and in some cases as estranged from their tribal roots as the Maori population, authentication of genetic ethnicity is relatively straight-forward. Individuals can recite genealogy or, where they have lost this knowledge, their right to be declared a Maori producer can be endorsed by individual kaumatua (elder) or by the Justice Department (through birth certificates). Quality, on the other hand, could well become an extremely vexatious question. In the case of the koru on swimwear, for example, it is certainly plausible that individuals on boards determining such matters will be able to find an equivalent of Kant's *pulchritudo vaga* with respect to applied designs. Similarly, the cultural mores of individual iwi may be sufficiently divergent to suggest an incipient form of cultural relativism in an example such as this one. Quality is inherently mutable, and although it may achieve levels of certainty with respect to product finish (if the swimsuit falls apart at the beach

it's not a quality garment), qualitative assessment of design is fraught with difficulties. Even at this point there is an assumption that any assessment of the form of the design may be separated from its function—a tension that is of long standing in the fine arts and design. Whilst the process of negotiation and authorization might be above reproach, it remains likely that some individuals may dismiss the scant costume on cultural and/or aesthetic grounds, whereas others will endorse it. Is a swimsuit with this pattern on it authentic? appropriate? customary? colonizing? debased? By taking the fabric design of the line out of a discrete arrangement (which, to an extent, protects it from searching analysis and scrutiny as to its relationship with indigenous cultural heritage), large and complex questions concerning engagement, appropriation, creation, and regulation emerge to trouble those of us who consider the issues presented here.

## CONCLUSION

As noted in the introduction, this article is largely declaratory in intention. It is motivated by the observation that what might already be a certain antipathy between art (as a practice of creative freedom) and its putative other, law (with a focus on the establishment and maintenance of order), is rendered exponentially more complex by the introduction of indigenous rights in cultural heritage and any attempt to accommodate indigenous peoples' worldviews. It does not propose any radical solution or program of action

with respect to what I believe are fundamental asymmetries between intellectual property rights as they are currently theorized and how they might be developed in order better to accommodate indigenous peoples' interests. This should not, however, be taken as betraying any serious degree of ambivalence or lack of enthusiasm for large-scale solutions such as are discussed at international governmental (initiatives such as the UN *Draft Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples*, 1993) and non-governmental (the *Mataatua Declaration*, for example), municipal, and local levels. Indeed, a comprehensive revision of international intellectual property agreements and/or a new convention specifically targeted at realizing indigenous peoples' aspirations in the area may be the most profoundly significant long-term goal for intellectual property regulation. In nominally post-colonial nations, municipal programs of similar type are urgently needed in order to redress the imbalances of the past and create an equitable platform from which to move forward. Nevertheless, such goals are predominantly long-term objectives and the vicissitudes of political power mean it is unlikely that there will be any comprehensive reform in the short- to medium-term.

There is a similar potential for despondency with respect to behavioral change. First, the question of the management of reproduction of indigenous cultural heritage needs to be addressed. If there are competing (or at least divergent) interests and understandings, are there some that

assume priority? The position taken in this article is to affirm that indigenous peoples may wish to assert specific interests and this ought to be respected and supported. What is not quite so certain, however, is whether that priority (first, preferred) derives from any sense of the prior (before, original) status of indigenes. The prioritization of indigenous interests in the context of this discussion looks increasingly like the adoption of a strategic position. It registers that there may be different conceptions of art and law in terms of indigenous and non-indigenous systems and posits some of the situations in which and reasons why the indigenous ought to be preferred. Moreover, it is suspicious of the capacity for one system concerning reproducibility to be determinative in cross-cultural contexts, especially when it is predicated on a dislocation of precepts of cultural identification and expression.

In light of this and without repudiating any sense of long-term engagement with the issues raised, discrete and specific examples, such as that afforded by Moontide, offer glimpses into the possibilities and problems of how to manage these issues in the present time. They are, refreshingly, "real world" examples, ways in which essentially positivist attitudes to use and re-use can generate working solutions. While the manufacturing industry is hardly an innocent in the global economy, moments of resistance to or at least partial evasion of the dominant presumptions of that system are interesting. They are, moreover,

moments where we are forced to be self-reflexive about our roles, not only as designers and/or academics but also as consumers.

### Notes

I would like here to thank: Valdimar Hafstein for his subtle and generous editing of this piece and for his forbearance; and Tara Winters for her technical support.

<sup>1</sup> The number of rangatira (chiefs) who signed Te Tiriti o Waitangi by drawing their moko as their mark is indicative of this.

<sup>2</sup> Air New Zealand returned to 86% state ownership in September 2001 following a government bailout.

<sup>3</sup> Gauguin is simply the most significant artist in this context. Naming him here is not to claim that he was the first artist to engage in cross-cultural appropriation, as this is a practice that can be noted between even ancient trading nations. What is different about his enterprise, however, is that he characterized his successive flights from civilized Europe as an attempt to get in touch with the primitive within. As a result of that he may well represent the first systematic appropriation of non-European philosophies, narratives, and visual cultural expressions to serve a specific European aesthetic philosophy, in this case syncretism.

<sup>4</sup> Fatu Feu'u. Interview by author, Auckland, March 1992.

<sup>5</sup> If you would permit an observation regarding essentialism, which for some has become something of a *bête noir* of cross-cultural theory. There is an inherent risk in the blanket critique of essentialist positions that they are, inevitably, estranged from the

more complex (more appropriate? more intellectual? more valid?) arguments that eschew the apparent certainty and fixedness of essential claims. While this may be so, it may also be the case that in crying "essentialist" one seeks to subordinate and render ineffective both the specific claims and the underlying position of the argument or assertion so labelled. Put this way, it can come to look like a tactic of discounting contrary positions—not, I hasten to add, counter-examples or alternative factual situations, but contrary positions that might derive from a worldview that is utterly different from the dominant, nominally Euro-American one. It is plausible that in this clash of positions (assumptions? presumptions?) the dismissal of alternative (read "essentialist") worldviews acts as a screen to what is really going on—the reassertion of a dominant position that, presumably, is founded on core assumptions (presumptions? essential positions?) such as the neo-liberal intellectual tradition of Euro-American academies. At the same time, however, it is true that essentialism can also be a screen, a screen that freezes the multiple and changing worlds of those brought together under its label. Maori, with respect of this article, is a generic term that cannot convey the range of positions that best express the individuals who make up different tribal and non-tribal groups. It is impossible to state that Maori speak as one, and, to an extent, it is difficult to argue that there is such a thing as a Maori worldview (particularly for non-Maori). Nevertheless, and this is significant even if it is essentialist, Maori do in general claim an engagement with the world that is sourced from a recognition, for them, of the essential life-force of all living things, *mauri*. For many Maori, certainly all who identify culturally as Maori, understandings or beliefs such as this underpin what it means to be Maori, as much in the con-

temporary world as in the past. To this end, and as Leonie Pihama has asked, what is to be feared of such an essence that it should be decried and marginalized under the negative label “essentialist”? (the point was raised in an address to the Indigenous Art and Heritage Conference, July 2002, at Massey University, Palmerston North).

<sup>6</sup> Trinh Minh-Ha, discussion following a showing of *Shoot for the Contents*, 21 August 1993, at Auckland City Art Gallery Auditorium.

<sup>7</sup> Leonard Bell (1989) lists examples of koru-type imagery in other cultures; his intention, in part, is to de-center the meaning of the koru for Walter’s work.

<sup>8</sup> Tony Hart. Interview by author, Auckland, November 1998; see also Moontide press release, 1998.

<sup>9</sup> Tane means male and toa warrior, which, in this combination, is evocative of the champion as opposed to the warrior as such.

<sup>10</sup> Haka are performed by many sporting teams prior to a match or in celebration of a win as well as in cultural life more generally. The most well-known internationally is Te Rauparaha’s haka of the nineteenth century that precedes All Blacks games.

<sup>11</sup> The most significant of these has been the settlement of a dispute over the use of words in the Maori lexicon by the Danish children’s toy manufacturer Lego. The company had developed a computer game, *Bionicle*, where characters with names such as Toa, Whenua (land), Pohatu (stone), and Tohunga (learned person) were engaged in a struggle over the island Mata Nui (which could mean big green [island] in this context). Maori representatives met with Lego executives in 2001 and 2002 to voice their concerns at the inappropriate use of Maori language and Polynesian culture in

this game. So far, the results have been very interesting indeed, with Lego now committing itself to adopting an ethical stance with respect to such appropriation in its products.

<sup>12</sup> This has been the case in the disposition of fishing assets among Maori, for example. In the cases that were litigated, the Privy Council in London (the final authority in the New Zealand legal system) was required to define what an iwi was for the purposes of settlement. This, at the very least, is a remarkably ironic situation where an establishment of a former colonial order is required and empowered to tell contemporary Maori what one of the key determinants of Maori identity is.

### Works Cited

- Annas, Marianna. 1997. The Label of Authenticity: A Certification Trade Mark for Goods and Services of Indigenous Origin. *Aboriginal Law Bulletin* 90:4-8
- Asad, Talal. 1973. *Anthropology and the Colonial Encounter*. London: Ithaca Press.
- Te Awekotuku, Ngahuia. 1986. Interview by Elizabeth Eastmond and Priscilla Pitts. *Antic* 1:44-55.
- Te Awekotuku, Ngahuia. 1992. Interview by Peter Shand. *Stamp Magazine* 37:24.
- Barthes, Roland. 1967. *Degree Zero and Elements of Semiology*. London: Jonathan Cape.
- Bell, Leonard. 1989. Walters and Maori Art: The Nature of a Relationship. In *Gordon Walters: Order and Intuition*. Edited by James Ross and Laurence

- Simmons. Auckland: Private Press:12-23.
- Benjamin, Walter. 1984a. The Task of the Translator. In *Illuminations: Essays and Reflections*. London: Jonathan Cape:69-82.
- Benjamin, Walter. 1984b. The Work of Art in the Age of Mechanical Reproduction. In *Illuminations: Essays and Reflections*. London: Jonathan Cape:217-251.
- Blake, Janet. 2000. On Defining the Cultural Heritage. *International and Comparative Law Quarterly* 49:61-85.
- Clifford, James. 1985. Histories of the Tribal and the Modern. *Art in America* 73:164-177.
- Clifford, James. 1988. *The Predicament of Culture*. Cambridge: Harvard University Press.
- Coombe, Rosemary J. 1993. The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy. *Canadian Journal of Law and Jurisprudence* 6:249-285.
- Coombe, Rosemary J. 1997. The Properties of Culture and the Possession of Identity: Postcolonial Struggle and the Legal Imagination. In *Borrowed Power: Essays on Cultural Appropriation*. Edited by Bruce Ziff and Pratima V. Rao. New Brunswick: Rutgers University Press:71-96.
- Daes, Erica-Irene. 1997. *Protection of the Heritage of Indigenous People*. New York and Geneva: United Nations.
- Derrida, Jacques. 1985. *The Ear of the Other*. New York: Schocken.
- Dick Frizzell: "Tiki." 1992. Exhibition catalogue. Auckland: Gow Langsford Gallery.
- Draft Declaration on the Rights of Indigenous Peoples*. 1993. UN Doc E/CN.4/Sub.2/1993/29. Reproduced in *Cultural Rights and Wrongs*. Edited by Halina Nie\_. Paris and Leicester: UNESCO and Institute of Art and Law, 1998:191-197.
- Draft Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples*. 1993. UN Doc E/CN.4/Sub.2/1995/26. Reproduced in *Cultural Rights and Wrongs*. Edited by Halina Nie\_. Paris and Leicester: UNESCO and Institute of Art and Law, 1998:198-202.
- Fanon, Frantz. 1986. *Black Skin, White Masks*. London: Pluto.
- Final Statement of the Regional Consultation on Indigenous Peoples' Knowledge and Intellectual Property Rights (Suva Statement)*. 1995. <<http://users.ox.ac.uk/~wgtrr/suva.htm>>
- Foster, Hal. 1985. The "Primitive" Unconscious of Modern Art. *October* 34:45-70.
- Foucault, Michel. 1991. What is an Author? In *The Foucault Reader*. Edited by Paul Rabinow. London: Penguin:101-120.
- Freud, Sigmund. 1913. *Totem und Tabu*. Leipzig: Hugo Heller.
- Greaves, Tom, ed. 1994. *Intellectual Property Rights for Indigenous*

- Peoples: A Sourcebook.* Oklahoma City: Society for Applied Anthropology.
- Hamilton, Augustus. 1896. *The Art Workmanship of the Maori Race in New Zealand.* Dunedin: Fergusson and Mitchell.
- Hiller, Susan, ed. 1991. *The Myth of Primitivism: Perspectives on Art.* New York: Pantheon.
- Hogarth, William. 1753. *The Analysis of Beauty.* London: Hogarth.
- Janke, Terri. 1998. *Our Culture, Our Future: Report on Indigenous Cultural and Intellectual Property Rights.* Sydney and Canberra: Michael Frankel and Company and the Australian Institute of Aboriginal and Torres Strait Islander Affairs.
- Johnson, Vivien. 1996. *Copyrites: Aboriginal Arts in the Age of Mechanical Reproductive Technologies.* Exhibition catalogue. Sydney: National Indigenous Arts Advocacy Association.
- Jones, Owen. 1868. *The Grammar of Ornament.* London: B. Quaritch.
- Julayinbul Statement on Indigenous Intellectual Property Rights.* 1993. Reproduced in *Our Culture, Our Future: Report on Indigenous Cultural and Intellectual Property Rights.* Written and researched by Terri Janke. Sydney and Canberra: Michael Frankel and Company and the Australian Institute of Aboriginal and Torres Strait Islander Affairs, 1998:310-313.
- Kant, Immanuel. 1952. *Critique of Judgement.* Oxford: Clarendon Press.
- Kristeva, Julia. 1969. *Semeiotikè: recherches pour une sémanalyse.* Paris: Seuil.
- Lévi-Strauss, Claude. 1955. *Tristes Tropiques.* Paris: Plon.
- Mataatua Declaration.* 1993. Reproduced in *Our Culture, Our Future: Report on Indigenous Cultural and Intellectual Property Rights.* Written and researched by Terri Janke. Sydney and Canberra: Michael Frankel and Company and the Australian Institute of Aboriginal and Torres Strait Islander Affairs, 1998:306-310.
- McDonald, Ian. 1997. *Protecting Indigenous Intellectual Property: A Copyright Perspective.* Sydney: Australian Copyright Council.
- McEvilley, Thomas. 1984. Doctor Lawyer Indian Chief. *Artforum*, 32:54-61.
- Mead, Hirini Moko. 1997. Maori Art Restructured, Reorganised, Re-examined and Reclaimed. In *Maori Art on the World Scene.* Wellington: Matau:228-237.
- Moustakas, John. 1989. Group Rights in Cultural Property: Justifying Strict Inalienability. *Cornell Law Review* 74:1179-1227.
- Neel, Lou-Ann, and Dianne Biin. 2000. By Design: The Protection of Intellectual and Creative Rights. Paper presented at the conference, Protecting Knowledge: Traditional Resource Rights in the New

- Millennium, February 2000, hosted by the Union of British Columbia Indian Chiefs and University of British Columbia, in Vancouver, BC.
- Neich, Roger. 1993. *Painted Histories: Early Maori Figurative Painting*. Auckland: Auckland University Press.
- Nie\_, Halina, ed. 1998. *Cultural Rights and Wrongs*. Paris and Leicester: UNESCO and Institute of Art and Law.
- Page Rowe, W. 1928. *Maori Artistry*. Wellington: Board of Maori Ethnological Research.
- Panoho, Rangihiroa. 1992. Maori: At the Centre, On the Margins. In *Headlands: Thinking Through New Zealand Art*. Sydney: Museum of Contemporary Art:122-134.
- Patel, Surendra J. 1996. Can the Intellectual Property Rights System Serve the Interests of Indigenous Knowledge? In *Valuing Local Knowledge: Indigenous People and Intellectual Property Rights*. Edited by Stephen B. Brush and Doreen Stabinsky. Washington, DC: Island Press:305-322.
- Phillips, W.J. 1938. He koru. *Art in New Zealand* 11:35-40.
- Pound, Francis. 1994. *The Space Between: Pakeha Use of Maori Motifs in Modernist New Zealand Art*. Auckland: Workshop Press.
- Rhodes, Colin. 1994. *Primitivism and Modern Art*. London: Thames and Hudson.
- Rubin, William, ed. 1984. *"Primitivism" in 20<sup>th</sup> Century Art: Affinity of the Tribal and the Modern*. Exhibition catalogue. New York: Museum of Modern Art.
- Salmond, Anne. 1978. Te Ao Tawhito: A Semantic Approach to the Traditional Maori Cosmos. *New Zealand Journal of the Polynesian Society* 87:5-28.
- Shand, Peter. 1997. Adrift on an Ocean of Affinities: Modernist Primitivism and the Pacific 1891-1984. Ph.D. diss., University of Auckland.
- Tangata Pasifika*. 2000. 18 June. Auckland: Television New Zealand.
- Tunney, James. 1998. E.U., I.P., Indigenous People and the Digital Age: Intersecting Circles? *European Intellectual Property Review* 9:335-346.
- Uluru - Kata Tjuta Board of Management and Parks Australia. 2000. *Uluru - Kata Tjuta National Park Plan of Management*. Canberra: Commonwealth of Australia.
- Waitangi Tribunal. 1986. *Findings of the Waitangi Tribunal relating to Te Reo Maori and a claim lodged by Huirangi Waikerepuru and Nga Kaiwhakapumau I te Reo Incorporated Society*. Wellington: The Waitangi Tribunal.
- Wells, Kathryn. 1996. The Development of an Authenticity Trade Mark for Indigenous Artists. *Alternative Law Review* 21:38-39.

- Woodmansee, Martha. 1994. On the Author Effect: Recovering Collectivity. In *The Construction of Authorship: Textual Appropriation in Law and Literature*. Edited by Martha Woodmansee and Peter Jaszi. Durham: Duke University Press:15-28.
- Wright, Shelley. 1996. Intellectual Property and the "Imaginary Aboriginal." In *Majah: Indigenous Peoples and the Law*. Edited by Greta Bird, Gary Martin, and Jennifer Nielsen. Sydney: Federation Press:129-151.