INTRODUCTION

Susy Frankel*

Ko te waka hei hoehoenga mo koutou i muri i ahau, ko te Ture, mā te ture anō te Ture e āki.

The canoe for you to paddle after me is the Law, for only the Law can correct the Law.[1]

It is with great pleasure that I introduce this special issue of the Victoria University of Wellington Law Review containing five articles all of which discuss various aspects of mātauranga Māori and traditional knowledge (including Pasifika knowledge). All the articles in this collection discuss issues that arise with uses of that knowledge within the intellectual property system and the lack of protection for traditional knowledge. All of the articles suggest ways forward to improve the protection of mātauranga Māori and traditional knowledge. These articles are the results of research papers conducted in the 2019 research seminar, "Global Issues in Intellectual Property", which I was delighted to teach and through which I had the honour supervising many talented research students. Each of the articles in this collection undertakes detailed analysis and expresses reasoned views about an area of law that is both controversial and at times complicated. The articles also demonstrate how much less complication and how much more action is needed.

This collection begins with Isabella Tekaumārua Wilson analysing the different ways in which Ka Mate, "the most well-known haka in New Zealand and the world",[2] has been used and misappropriated by both New Zealand and foreign companies. The article details how Ka Mate Ka Mate has been misappropriated and the different types of harm, offence and cultural damage that has occurred. Isabella provides the reader with an analysis of the existing legal framework and what protection it offers Ka Mate and what it does not provide. This article illuminates the collection with

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1 A famous whakatauki (proverb) which comes from Te Kooti Arikirangi Te Turuki. See Judith Binney *Redemption Songs: A Life of Te Kooti Arikirangi Te Turuki* (Bridget Williams Books, Wellington, 1995) at 490, as quoted in Nopera Dennis McCarthy "Indigenous Customary Law and International Intellectual Property: Ascertaining an Effective Indigenous Definition for Misappropriation of Traditional Knowledge" (2020) 51 VUWLR 597 at 599, in this issue.

2 Tīmoti Kāretu *Haka! Te Tohu o te Whenua Rangatira – The Dance of a Noble People* (Reed Publishing, Auckland, 1993) at 68.

its easy to understand examples and clearly articulated issues which are followed with suggestions about how to resolve some of the difficulties that non-protection creates.

Next Purcell Filipo Siaki Salī provides an analysis of the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture.[3] This is a kind of model law which the World Intellectual Property Organization (WIPO) developed. In addition to enlightening readers about the detail of that Model Law, Purcell provides an overview of its application in various Pacific countries. He points out the problems it creates and uses examples to discuss whether the Model Law is fit for purpose. Model laws can be useful in situations where there are few resources to draft a local law from scratch but, perhaps unsurprisingly, there are many difficulties with a one-size-fits-all approach, which is much of what the Model Law offers. This article highlights how the Model Law is useful and where its application is not. Tellingly, the article shows how local peoples may benefit less from some aspects of the Model Law's application than foreigners do. Perhaps the greatest benefit of the arrival of the Model Law is it has ignited a discussion, which is both ongoing and crucial for the region. This article is an important contribution not only for its content but because there are too few publications about these issues in the Pacific.

In the third article in this collection, Nopera Dennis-McCarthy uses indigenous customary law and international intellectual property to discuss and recommend an effective indigenous definition for misappropriation of traditional knowledge. As Nopera says a "substantial aspect of this challenge is how the intellectual property regime can practically utilise or incorporate indigenous customary law as a means of protection against misappropriation, when there is an inherent tension between the former and the latter".[4] The article shows how to overcome those hurdles and make the systems more effectively work together. In a highly orignal analysis Nopera draws on tikanga Māori to show how using a localised approach, a collective approach and a holistic approach from customary law can lead to an effective way of defining misappropriation in international intellectual property. Nopera shows the reader that what makes that approach effective is how it embeds and reflects the values of indigenous peoples. The article concludes that this approach "will provide indigenous peoples with the protection they are entitled to as self-determined units within states".[5]

Next Eru Kapa-Kingi presents his view of "Kia Tāwharautia Te Mātauranga Māori: Decolonising the Intellectual Property Regime in Aotearoa New Zealand". He tackles the difficult topic of protecting traditional knowledge and empowering Māori to utilise mātauranga Māori in ways that overcome a system built on a colonial history that includes expropriating Māori culture. While acknowledging that New Zealand law has developed away from English law, Eru argues that the key

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3 Secretariat of the Pacific Community, Pacific Islands Forum Secretariat and UNESCO Pacific Regional Office *Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture* (2002).

4 Dennis-McCarthy, above n 1, at 597.

5 At 640.

to decolonising the law is addressing the extractive nature of intellectual property law. Existing intellectual property law encourages and rewards the free use of Māori culture without acknowledging its source or honoring tikanga and custom around its use. The paper uses trade mark law as its source of illustrations of the problems. The article discusses the Waitangi Tribunal's report on the issues[6] and builds on it in order to argue for a framework that is "effective in recognising and upholding the tino rangatiratanga of Māori over their own mātauranga".

In the final article in the collection Brooke Marriner undertakes a detailed analysis of the current framework and proposal for laws requiring the disclosure of origin of genetic resources in New Zealand's patent system. There is an extensive international debate about this topic that spans intellectual property and environmental law. In 2018 the Ministry of Business Innovation and Employment (MBIE) undertook the beginnings of policy development in this area.[7] This article analyses the approach and the conclusions that MBIE reached and compares them to the Waitangi Tribunal's recommendations.[8] Brooke's thorough research and precise referencing makes this an invaluable contribution to the policy making process.

Collectively these articles take readers through reasons for the protection of traditional knowledge internationally and for both the protection and the enhancement of mātauranga Māori and its interactions with intellectual property. This is a vast area of academic, practical and policy discourse in New Zealand, the Pacific and around the world. What makes this special issue important is how it unpacks huge parts of this field through the eyes of four Māori students and one Pasifika student (now graduates). In giving these papers to publication, they have given scholars, policy makers and their own people a gift. Thank you.

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6 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity: Te Taumata Tuatahi* (Wai 262, 2011) [*Ko Aotearoa Tēnei*: *Te Taumata Tuatahi*].

7 See generally Ministry of Business, Innovation and Employment *Discussion paper: Disclosure of origin of genetic resources and traditional knowledge in the patents regime* (September 2018).

8 *Ko Aotearoa Tēnei*: *Te Taumata Tuatahi*, above n 6.