

INTELLECTUAL PROPERTY:

Achieving competitive advantage for Maori business branding



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Introduction

Use of information in the Maori business-branding programme (7931-ABEP-MANATAIAO) follows MOU agreements between businesses and researchers. The confidential nature of some information and associated intellectual property rights will affect the way the information is finally documented and used.

It was necessary at the start of the project to provide some clear explanations and guidelines to cover use of Māori knowledge (matauranga Maori) and company information. This has been achieved to some degree with memoranda of understanding (MOU) and intellectual property agreements set up during interviews with key researchers and participating organisations (Landcare Research 1998-2003). Information acquired during research should only be used in accordance with the wishes of the participating groups, especially where this involved confidentiality and sensitivity issues. Agreements signed at commencement of this research stated, for example:

Ownership of all existing proprietary data and information (including matauranga) used for the Work remains with the originating Party, and such existing data and information may only be used for the Work for which it is supplied. Further use or disclosure of such existing data and information by either Party will require the written approval of the owning Party.

Agreements went on to state there was a distinction between original information/data and new or modified data/information:

New data and information (i.e. data changed substantially in form from the original data or new methods) obtained during the Work shall be jointly owned by Mana Taiao and researchers and the 'Maori business/company/researcher'. Methodological approaches developed by either party shall be the property of the developing party. Publication of scientific papers, reports, popular articles, and any form of media release based wholly or in part on such new data and information will require written approval of Mana Taiao and the research management Komiti and the 'Maori business/participating organisation or individual. Furthermore, each Party agrees not to represent the other Party in any forum, without the express permission of the other Party.

Intellectual Property

THE TASK

Identify issues of intellectual property associated with this research and agree on management processes with the research team and key stakeholders.

ISSUES

The following issues have been identified:

1. What is intellectual property protection of a brand?
2. Who owns the intellectual property created by this research project?
3. Use of matakāwhiri Māori (Māori knowledge), both traditional and contemporary
4. Intellectual property agreements, use and content
5. Use and publication of all acquired information from this research project (published and presented information, and information released to internet sites)
6. Definitions of what constitutes intellectual property from an indigenous Māori and from a conventional/international perspective
7. Separation of public domain information from confidential or sensitive information
8. Use and understanding of Māori symbols, designs, images, words, and branding
9. Prevention of the unintentional release of commercially sensitive information
10. Intellectual property embodied in a culturally based governance and corporate strategies

Framework and Management Process

INTELLECTUAL PROPERTY

Intellectual property (IP) is most commonly defined as a 'product of the mind' and is property the owner has a right to sell, license, assign, or transfer (Pye 2003). It includes:

- Trade secrets and know-how (e.g. scientific or business expertise)
- New ideas and ways of doing things
- Inventions, software, processes and other technology capable of being patented and/or licensed

IP covers both registered and unregistered knowledge, and may therefore include inventions, product lines, images and branding, printed and electronic publications, living organisms and their products, reference collections and associated data, research proposals, data and results.

TYPES OF INTELLECTUAL PROPERTY

Automatic (Unregistered) IP Rights

- Confidential information, trade secrets, know-how
- *Protection mechanism: a non-disclosure agreement (NDA)*
- Copyright in written and graphic (including photographic) material, computer databases and programmes, computer and business models
- Goodwill, reputation, trading names

Formal (Registered) IP Rights (usually requires some form of conscious action and process)

- Patents (country-specific but PCT filing possible)
- Trade marks (use [™]symbol until registered, then use ® symbol)
- Plant variety rights (new distinctive forms, uniform and stable; not bacteria / algae)
- Designs, branding, images (protects the appearance of an article/product)

Note: geographical indications used to identify goods that have a specific geographical origin (e.g. Champagne) may be protected against use by others, see:

http://www.med.govt.nz/buslt/int_prop/info-sheets/geog-ind.html

OWNERSHIP OF INTELLECTUAL PROPERTY

To determine ownership, IP is usually characterised and separated first into types or groups, for example, IP that should be retained and kept secret or confidential, and IP that needs protection before being passed on. The question of ownership requires a conscious decision to be made and a set of actions to be carried out (e.g. ownership of the IP may need to be stated in a contract). The decision about ownership of intellectual property lies with the owners or the originating party or parties, under several mechanisms, usually where:

- IP is developed using the resources of the owners or the originating party/parties
- Agreements are in place to ensure legal ownership
- Ownership of IP arises from commercially contracted work or collaborative work
- Ownership of IP is agreed before the start of a project or the work
- Treaty Claims, such as WAI 262 (see web sites below), must be regarded

Framework and Management Process, continued

PROTECTION OF INTELLECTUAL PROPERTY

To identify whether IP needs protection and to identify the mechanisms required for that protection, a number of factors need to be taken into account. Potential IP issues are explored and acted on through:

- An education process and the raising of awareness about IP
- Regular reviews
- Mechanisms to encourage and help people identify potential IP areas
- Through copyright protection of datasets, databases and publications
- Pursuit of commercialisation of technologies in the long term where appropriate

Question	Process / Mechanism	Responsibility
1. What is it?	Need to identify and define	Staff, researchers, management
2. Who presently owns it? or Who should own it?	Whose IP is it? Freedom to operate (FTO)	Internally – employee, researchers Externally – check IP model clauses
3. How?	Nature of product What mechanisms to use Best form of IP protection	Legal advice

Within a business or company context there are several areas where protection of IP is necessary:

- An IP management process and records need to be maintained by staff working on projects likely to develop patentable IP
- Decisions on appropriate protection need to be made in consultation with senior management, legal advisors and the client, as appropriate
- All staff within a company or business need to be made aware that they have a responsibility to protect IP

Types of IP	Examples
Confidential information	Know-how / trade secrets, Maturanga, methods, processes, inventions
Patent	Products from bioprospecting
Trade Marks TM	TM or ® for unique words and / or symbols
Copyright ©	Use © Mana Taiao 2004 on written material
Registered design®	Branding, images, appearance of any original design with original IP
Geographic indications	Kapiti Cheeses use hipi iti instead of feta
Plant variety rights	Ornamental cultivars of native plants
Internet	Domain names (e.g. .com, .co.nz, include copyright statement / disclaimer)

Framework and Management Process, continued

MECHANISMS FOR COMMERCIALISING INTELLECTUAL PROPERTY

A number of situations determine the mechanism for commercialising IP. These include taking into account the need to:

- Establish whether you have freedom to operate (FTO) (e.g. by undertaking a search of the patent and trade mark databases, and by carrying out a web site and literature search)
- Protect against disclosure and/or prior publication of patentable matter
- Make sure you do not inadvertently give ownership of IP away at proposal or contract stage
- Decide on options, including outright sale of know-how/licensing of IP rights, joint ventures, and fees for service (IP usually goes to a person or an organisation paying for it, unless a contract specifies otherwise)

A number of mechanisms can be adopted for commercialising IP. The main ones are patents and licensing agreements.

PATENTS

The main features of patents are:

- Benefits, such as exclusive rights for 20 yrs; competitors are therefore deterred from infringing (i.e. those who hold a patent must be prepared to defend it actively)
- Scope, which includes a new or improved product, process or method of manufacture
- Criteria, which include industrial applicability; inventive element (non-obvious) and no prior publication or use
- The costs of preparing and lodging patents are high – in the tens of thousands of dollars

LICENSING AGREEMENTS

The main features of licensing agreements are that they:

- Grant permission to make, use and/or sell a product, process or technical expertise in return for a royalty
- Itemise important elements, including quality control, performance criteria, exclusivity, territory and grounds for termination
- Provide rights and obligations to both licensor and licensee that are negotiated and recorded in the licensing agreement

Examples for Maori Business Branding

INTELLECTUAL PROPERTY CONSIDERATIONS AND AGREEMENTS

Examples of IP considerations and agreements being used in the Maori business presented below. The table below outlines the management process followed by researchers with key stakeholders.

IP Categories / Groups	Item
1. Confidential, secret, protected, not disclosed	Interviews, designs, ideas, knowledge, Matauranga Maori
2. Confidential, limited protection, conditional access, limited, controlled publication and use	
3. IP conditions defined, protective action, conditional use and availability	
4. Public domain, unrestricted, available for publication and use	

INTELLECTUAL PROPERTY AND RESEARCH PROCESSES

Agreements with all participating organisations and individuals will cover confidentiality issues through written sections and clauses. If necessary, interviewers will provide interviewees with a non-disclosure agreement (NDA) – or obtain permission to release only information stated not to be confidential – and recorded information may have to be aggregated in a generalised form before release. Information recorded from any interview needs to be classified and organised into IP types and given IP status (see above table).

A Questionnaire developed in Objective 3 'Maori values in Maori business: Identify how Maori companies integrate their unique cultural heritage into their business approach' begins every questionnaire with the following statement:

Agreement: Release of any information from this interview will be discussed fully with the respondent prior to being published in any form, all case study information will need to be approved by the respondent and Maori business, before being used and disclosed in this research and before publication. Some material may remain confidential, or its form changed, to meet requirements under intellectual property agreements in this research.

Questions being asked of participating representatives from Maori businesses include:

- Can you outline or provide examples of your intellectual property issues?
- Is Intellectual Property (IP) of products and services an important consideration or issue in your business?
- What IP mechanisms do you have in place to protect your business knowledge, products, and services?
- What forms of IP protection are presently used in the area of cultural heritage? Matauranga? Other forms of cultural knowledge?

At the completion of each interview all sections are discussed and signed off. Participants are asked to highlight any sections of the interview transcripts that they do not wish to be disclosed.

Examples for Maori Business Branding, continued

CONFIDENTIALITY, OWNERSHIP AND USE OF INTELLECTUAL PROPERTY

Collaborative projects that divulge knowledge and information, or use Maori and business knowledge in research need to be aware of the confidential and sensitive nature of these knowledge forms. Frameworks and a management process must be in place to protect or exclude this information from the public domain or general readership. It is the intention of the Maori business-branding programme not to disclose any information that Maori businesses regard as commercially sensitive, restrictive, or confidential. The procedures for publishing results from this research are being fully discussed with participant Maori businesses, and it has been agreed that no results would be disseminated without prior consultation, approval, and the appropriate acknowledgement of those participating in the research.

Any information used through internet web sites will be used only with the express permission of individuals and groups participating in this research, or where information has been used from public domain sites, publications, and publicly accessible information such as annual reports and company web sites. All publication will be under the guidance and agreement of participating groups. All intellectual property identified in this project as confidential will have protected or limited access.

Intellectual Property Websites

INTERNATIONAL

The Intellectual Property Law server provides information about intellectual property law including patent, trademark, and copyright. Comprehensive links are given to other sites: <http://www.intelproplaw.com/>

The World Intellectual Property Organisation (WIPO) gives information on all aspects of IP and extensive links. A useful definition of IP is given at: <http://www.wipo.int/about-ip/en/overview.html>

For those wishing to copyright DNA (genetic material, gene mapping), plants, animals, and species or wishing to become a partner or know more information on the DNA Copyright Institute, an America based company: <http://www.dnacopyright.com/index.html> (May not have any legal status outside of the USA).

INTERNATIONAL TRADING:

The International Social and Environmental Accreditation and Labelling (ISEAL) Alliance is a formal association of leading international voluntary standards, certification and accreditation programs focused on social and environmental issues. The member organisations of ISEAL have a common vision of a world where ecological sustainability and social justice are the normal conditions of business. ISEAL are assisting their members to achieve this vision by supporting their standards and verification programs to attain a high level of quality and to gain public credibility, political recognition and market success. <http://www.isealalliance.org/>

The Global Ecolabelling Network (GEN). A non-profit association of third-party, environmental performance labelling organizations founded in 1994 to improve, promote, and develop the "ecolabelling" of products and services. <http://www.gen.gr.jp/>

AOTEROA-NEW ZEALAND

The Ministry of Economic Development has comprehensive information sheets about the various types of intellectual property: http://www.med.govt.nz/buslt/int_prop.html - pla

The Intellectual Property Office of New Zealand (IPONZ) is a business unit in the Ministry of Economic Development: <http://www.iponz.govt.nz/search/cad/dbssiten.main>

Trademark magazine:

<http://www.nzte.govt.nz/article/0,1973,SectionID%253D13322%2526ContentID%253D6828,00.html>

The Plant Variety Rights (PVR) office in New Zealand, is part of the Ministry of Economic Development, and administers the Plant Variety Rights Act 1987, under which grants and IP protection is issued to breeders of new plant varieties: <http://www.pvr.govt.nz/>

For advice on intellectual property and product development and marketing, New Zealand Trade and Enterprise: <http://www.nzte.govt.nz>

Intellectual Property Websites, continued

The Maori Enterprise team, located within New Zealand Trade and Enterprise, can help Maori businesses build capability and identify overseas markets:

http://www.nzte.govt.nz/article/0_1973.SectionID%253D11966_00.html

MAORI (INDIGENOUS) TRADEMARKS

The Maori trademark advisory committee, within IPONZ, has been established under the New Zealand Trade Marks Act 2002:

<http://www.iponz.govt.nz/search/cad/dbssiten.main>

Toi iho is a Maori registered trademark used to promote and sell authentic, quality Maori arts and crafts, and has been developed for Maori artists in Aotearoa-New Zealand:

<http://www.toiho.com/>

MAORI ISSUES REGARDING INTELLECTUAL PROPERTY

Many of the Maori IP issues in Aotearoa-New Zealand relate to the misuse and exploitation of Maori images, symbols, knowledge, products, trademarks, and taonga (natural resources). Such misuse and exploitation point to the need for robust systems and mechanisms to protect cultural heritage, matauranga (Maori knowledge), and cultural heritage in the public and international arena. The following sites provide some understanding of issues:

A large number of Maori issues relate to IP for cultural rights and protection over indigenous flora and fauna, and any laws relating to intellectual property rights/ownership to indigenous species, with respect to the Wai 262 claim. The claim is explained and summarised at the following sites:

<http://www.waitangi-tribunal.govt.nz/research/wai262/wai262xxxx.asp>

<http://www.wai262.co.nz/wai262.html>

The 1993 Mataatua Declaration from Aotearoa-New Zealand provides information on the cultural and intellectual property rights of indigenous people. A summary is given at:

http://www.tpk.govt.nz/publications/docs/tangata/app_e.htm

Maori biotech patenting concerns are given at:

http://www.med.govt.nz/buslt/int_prop/biotech/patentbiotech-10.html

Patenting issues:

http://www.med.govt.nz/buslt/int_prop/maoripatent/maoripatent-02.html

Biotech inventions +issues

http://www.med.govt.nz/buslt/int_prop/biotech/patentbiotech.html

http://www.med.govt.nz/buslt/int_prop/maoripatent/maoripatent.html

http://www.med.govt.nz/buslt/int_prop/maoripatent/maoripatent-03.html

Maui Solomon has a comprehensive summary of indigenous property rights and issues, and challenged the Danish company Lego over the use of Maori words and images in a bionicle game:

<http://www.inmotionmagazine.com/ra01/ms2.html>

http://www.turtletrack.org/Issues01/Co11032001/CO_11032001_Lego.htm

Intellectual Property Websites, continued

Kingi Gilbert provides a summary of New Zealand intellectual property concerns:

<http://www.scoop.co.nz/mason/stories/PO0305/S00012.htm>

...and challenged the international company Sony about the use of Maori images, words and culture in the Mark of Kri playstation game:

<http://www.aotearoa.maori.nz/viewtopic.php?t=285>

Indigenous flora and fauna

Although there are some laws about milling indigenous timber and clearing native vegetation on private land, as well as the Plants Variety Rights Act (for breeders protecting cultivars) – see <http://www.pvr.govt.nz/> – there is little protection or determination of property rights for indigenous species, unless the Treaty of Waitangi is used. However, because genetic engineering and DNA technology are increasingly used to define and classify genes, breeds, and species, it is likely this technology and its associated tools will be used in future to determine the ownership of plants, animals, bacteria, fungi, viruses, other organisms, and any products or technology derived from these.

Adapted from Catherine Iremonger, University of Waikato: "One way to define, protect, and manage specific resource taonga of flora and fauna, is to take samples of indigenous species from the environment and map the boundaries of taonga (e.g. developing a botanical or species collection, mapping the ecological extent or rohe of the species in resource inventories, and then classifying all species with Maori and scientific names).

This can be carried out through ecological surveys at the marae, whanau, hapu, or iwi level. Collect samples, such as leaves, seed, fungi, and lichen, and dry or preserve them. Record where you have taken the samples from and define the location. Catalogue and name the species you have found, and store them appropriately in botanical herbariums, scrapbooks, plates, or glass jars. For insects, birds and animals, a database can be established for your catalogue". Information on resource inventories can be found at:

<http://www.landcareresearch.co.nz/research/biodiversity/>

The National Vegetation Survey Databank run by Landcare has some good examples of how to undertake an ecological survey:

<http://nvs.landcareresearch.co.nz/>

To locate and record species information, mapping systems can be found at:

www.geosystems.co.nz

It is important to take into account the seasonality that affects species populations and distribution. Information can also be collected on flora and fauna using past records from matauranga, manuscripts, historical information from local history books, museums, and past ecological and genetic studies on species. Also soil samples (with pollen/seeds in it) and old photographs/site maps can be used to map the extent of ecosystems. From this information a rough estimate of the extent of past ecosystems and species distribution can be derived. Land Environments New Zealand (LENZ) provides a valuable historical basis or baseline for ecosystems of the New Zealand landscape:

<http://lenz.landcareresearch.co.nz/>

Intellectual Property Websites, continued

Samples can also be stored until DNA mapping or fingerprinting is more affordable. When resource taonga can be recorded using scientific and cultural classifications, supported by genetic techniques, flora and fauna can be defined accurately for IP protection. This would prescribe a method to define or compare cultural, ecological or commercial losses via loss of intellectual property and biological resources should any future genetically engineered organisms/species be released into the environment.

Other Maori sites with information on IP

Some information on intellectual property issues and Maori can be found at:

<http://www.tpk.govt.nz/>

Federation of Maori Authorities (FOMA):

<http://www.foma.co.nz/static/index-foma.htm>

The Waitangi Tribunal has comprehensive information on Treaty of Waitangi claims:

<http://www.waitangi-tribunal.govt.nz/about/treatyofwaitangi/>

<http://www.tpk.govt.nz/publications/subject/default.asp#gov>

International indigenous sites

A summary of the draft United Nations 1993 Declaration on the Rights of Indigenous Peoples is given at:

<http://www.tpk.govt.nz/publications/docs/tangata/index.htm>

Article 29 of the Declaration refers to intellectual and cultural property rights of indigenous people globally:

<http://www.tpk.govt.nz/publications/docs/tangata/rights.htm>

<http://www.tpk.govt.nz/publications/docs/tangata/draft.htm>

The World Intellectual Property Organisation (WIPO) web site provides a forum for international debate concerning the interplay between intellectual property (IP) and traditional knowledge, genetic resources, traditional cultural expressions (folklore), and is in the process of developing a range of practical tools aimed at enhancing the IP interests of the holders of such knowledge, resources and expressions. The site can be visited at:

<http://www.wipo.int/tk/en/index.html>

References

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- Pye, P. (2003). Protecting and commercialising intellectual property (IP). M. b. b. p. m. meeting. Wellington.