NGĀ TOKI WHAKARURURANGA

ngatoki.nz

MĀORI CREATIVES AND FREE TRADE AGREEMENTS 101

Whakapapa and mātauranga Māori, a mātou kōrero (our stories), te reo and tā moko, waiata and haka, whakairo and raranga, taonga pūoro, toi o naianei (contemporary art), ngā rawa hoahoa (design assets) and whaikōrero and more are the essence of being Māori. Te Tiriti o Waitangi affirms our ongoing rangatiratanga over those taonga and our collective intergenerational duty as kaitiaki. But some of the world's most powerful transnational corporations with no connection to Māori have been helping themselves to our tāonga for decades, with the help of free trade agreements.

Free trade agreements (FTAs) are tools of cultural colonisation. They protect transnational corporations in the culture, entertainment, digital and media sectors from government policies and regulations that stop them helping themselves to our taonga. Their rules on intellectual property, services and digital (hardly "trade" issues!) guarantee corporate rights that are sourced in Western mindsets and commodify and monetise our taonga. These threats were recognised when the Mataatua Declaration was developed 30 years ago and the Wai 262 claim was brought to the Waitangi Tribunal.

The New Zealand Intellectual Property Office has recognised that many products referencing Māori culture are mass-produced in factories outside New Zealand, often by non-Māori. Theoretically, intellectual property rights can ensure that Māori culture and mātauranga are recognised and protected, with New Zealand law providing specific protections for mātauranga Māori. In practice though, there are limited pathways for accountability for the theft and sale of Māori culture. As Wai 262 lawyer, and Ngā Toki Pūkenga, Maui Solomon (Moriori, Ngāi Tahu) observes:

> *There are no national or international guidelines in place to govern ethical conduct around use/access of indigenous IP or traditional knowledge. There should be and it is something argued for strongly in Wai 262.*

Protection is much, much harder when these violations occur offshore. There are no equivalent protections in FTAs for Māori against the abuse and defiling of tāonga, no rights for Māori to control their use, no requirement for corporations to seek free, prior and informed consent as promised in the UN Declaration on Indigenous Rights (UNDRIP). Other international agreements, notably the UNESCO Convention on Cultural Diversity 2005, that should provide rights and protections remain subject to the more potent and enforceable obligations in free trade agreements.

Māori creatives want to take our stories to the world. But it needs to be on our terms in ways that we control. And to do this we need effective international rules that create and support these opportunities, remove the ability for powerful corporations to usurp that power, and remove the barriers that existing trade agreements put in our way.

Here are just a few ways that free trade agreements (FTAs) impact on creatives …

Trademarking Māori names and kupu

Moana Maniapoto (a co-convenor of Ngā Toki Whakarururanga) documented the rampant abuses of taonga in *Guarding the Family Silver* , which also provides a wicked short-cut description of intellectual property rights and trade agreements. Moana and Toby Mills made the doco after a German trademarked the word "Moana" for everything from CDs to cosmetics to toilet paper and threatened to sue her for 100,000 euros if she performed under her own name in Germany. They show how Lego, Sony Playstation, Ford motor cars, and others mega-corporations colonise, misappropriate and misrepresent Māori culture for profit. Then, of course, came Disney's Moana … The latest FTAs with the United Kingdom and the EU expand the trademark and copyright protections for even longer. There are no exceptions that allow Māori protect our kupu and taonga.

No local content quotas for Māori music, movies, te reo rangatira

For years Māori called for quotas to ensure some Māori music and spoken reo were on radio and TV. In 2000 Helen Clark, as Minister of Culture, tried to introduce local content quotas for broadcasting and was told that was illegal under the trade in the services agreement at the World Trade Organization (WTO) and adopting them could result in millions of dollars of trade sanctions. Only voluntary quotas were allowed. She called that "a bit ridiculous", but that WTO rule still applies today. Turns out that back in 1991 the National Government deliberately decided to make it impossible ever to have content quotas. Australia still has quotas because it hasn't made the same "trade in services" commitments. The idea of quotas may seem a bit dated in the Internet era, but it remains relevant when a government that's hostile to re reo is wiping out the gains of recent years.

Abuse of taonga like Haka Ka Mate

We've all seen the disrespect of haka by corporate sponsors and advertisers, Spice Girls, sports teams, drunken yobs, anti-vax protestors - especially Haka Ka Mate because it's famous through the All Blacks. Ngāti Toa Rangatira has been trying to protect it for years. The Haka (Ka Mate) Attribution Act 2014 was part of their settlement, but it lacked teeth. It provided for a review after 5 years, and Ngāti Toa again called for stronger protection, including internationally. The recent FTA between the UK and NZ has a side-letter that "recognises" Ngāti Toa Rangatira as kaitiaki of Haka Ka Mate and the obligations attached to that responsibility. But it doesn't provide for any real protection.

Theft of toi whakairo, ta moko

When people take toi whakairo, ta moko and graphic designs and images without permission they are stealing people's identity, whakapapa, history. Their use, and the way they are used, by fashion designers and advertisers, rich and famous celebrities, beer labels, tiktok filters, even shower curtains, does violence to the mana of those to whom they belong, often mixing tapu with noa, and ends up in places they don't belong.

There are no effective domestic protections in Aotearoa to protect taonga and roles of kaitiaki; trying to register designs, trademarks or copyright as intellectual property rights is expensive and inappropriate because there are no cultural safeguards. Free trade agreements lock in those western intellectual property rules, so anyone who has appropriated moko or toi whakairo can register it in another country if they get in first. Free trade agreements have no effective protections to stop that.

Online racist content and offensive products

Some FTAs protect operators like facebook, insta and google from being held responsible for whatever racist content, or fraudulent or offensive products, or denigration of taonga, 3rd parties post on their website, even for things like the Christchurch massacre video. So you end up with voluntary codes like the so-called "Christchurch call" and self-policing.

Usually the website providers are offshore and beyond the effective reach of domestic law as well. Recent FTAs say you can't require companies that supply their service from across the border to have a presence in your country. That leads them to claim the courts have no jurisdiction over them. We saw that with the long saga of Viagogo selling fraudulent entertainment tickets. The Commerce Commission tried to get an injunction and Viagogo, based in Switzerland, refused to accept service of the documents. Then they said they were outside New Zealand courts' powers. Viagogo finally lost in May 2024, but it wrangled an extra 6 years of profit from its activities - and it is appealing.

Shutting down culturally abusive online sales

Similar problems apply to online sales of artworks that are culturally offensive. The FTAs say you can't require an online company operating from offshore to have a legal presence in Aotearoa, or a particular form of presence that brings them under New Zealand law. That makes it almost impossible to hold them to account if they breach human rights or race relations laws or advertising codes and standards.

For example, do a google search for "Māori shower curtains" and you find Fine Art America offering an endless supply to buy online. Some claim to be by Māori artists who assert copyright over them. Some of the most deeply offensive, labelled "New Zealand Māori Chief", "Haka Dance", "old Maori woman cultural attire", "Warrior from Maori people", "Maori girl" are marketed by American company Celestial Images; some of those images are not even Māori. Images of Te Rauparaha, or Lindauer paintings, are outside any intellectual property timelines. Because the website is run from the US, its US laws that apply and they give no cultural protections for Māori. Even if there were effective protections in Aotearoa against such offensive products, companies like Celestial Images are effectively unreachable. The main remedy is to name and shame.

Royalties from resale of art works

Māori creatives rarely receive the real value of their work, especially when it is on-sold for much more than the original price. The European Union has a strong commitment to culture (even if that doesn't stretch to specific protections for Indigenous culture) and was a champion of the UNESCO Convention on Cultural Diversity. The EU requires that graphic artists or sculptors receive a share of resales. Aotearoa NZ did not, but the EU NZ FTA 2024 requires the government to introduce a law with that effect within 3 years. The UK FTA has a similar requirement. However, these only cover resales through art market professionals, such as salesrooms, art galleries and general dealers in art works, and there are limitations on that.

The Resale Right for Visual Artists Act was passed in 2023 and comes into force on 1 December 2024. The royalty will be 5% of the resale price, minus administration fees of the Copyright Licensing Agency for administering the scheme. The entitlement applies for the copyright term of the life of the artist plus 70 years. The Act is to be reviewed every three years to check on its effect. So this is a limited positive outcome of an FTA.

Māori photos, images, archives

Photographs have always been sensitive for Māori: who takes them, when and with what permissions, who has control of their use, how they relate to whakapapa. Archives that include iconic and sensitive Māori images are being sold to offshore repositories without any consent. For example, the Fairfax archives of over a million photos from 1840 to 2005 were sent overseas to be digitised a decade ago; that company went bankrupt and the photos were seized as collateral for a loan. All the photos were going to be destroyed, but now they are being auctioned off and will become the property of the overseas buyers. Imagine Moana Maniapoto's surprise to see the 30-year-old photo of her with baby Kimiora/Hikurangi for sale online as part of the auction. She had no idea what, if anything, she signed when it was taken and how to control profiteering off her image and fame. They took it down and gifted it to her after she objected; but they could just as easily have not.

The digital trade rules say we can't require information, such as digitised images, that are produced in the country to be held here. Trade in services rules, including on archives, also say you can't discriminate against foreign providers of archive services by requiring archives to be held in Aotearoa. There is some protection for measures protecting "national treasures" and "support for "creative arts of national value". But that doesn't provide protection from this kind of exploitation.

Data sovereignty and digital governance

Now that everything is digitised and can be transferred online across the border it is even harder to exercise rangatiratanga and kaitiakitanga over data, including taonga. That has become even more problematic with the advent of Artificial Intelligence (AI). The likes of ChatGPT purport to write, speak and translate te reo, compose waiata, create and narrate pūrākau, recite a hapū's whakapapa and whakatauki, present authoritative accounts of tikanga, compose poems and write novels, all based on algorithms developed from data that is scraped from online users (not just Māori). Māori digital experts like Dr Karaitiana Taiuru and Peter-Lucas Jones have rung alarm bells about unregulated AI and advocated for alternatives sourced in Indigenous data sovereignty.

Exercising sovereignty is even more difficult when FTAs prohibit requirements for data to be held within the country where it is sourced, and to disclose the source codes and the algorithms that inform codes. In the Wai 2522 claim on the TPPA, the Waitangi Tribunal found the agreement's digital rules failed to provide effective protection for mātauranga Māori. That hasn't stopped the Crown continuing to adopt such rules, with various, but still inadequate, levels of protection. Ngā Toki Whakarururanga has a series of briefing papers on how "digital trade" rules impact on Māori.

Protections and Exceptions

So, FTAs can pose additional obstacles to Māori across their intellectual property, trade in services and digital chapters. But there are no effective protections for the exercise of Māori duties and obligations as kaitiaki, or for Māori creatives to exercise control over their works outside the limits of Western intellectual property law. The Crown routinely includes a Treaty of Waitangi Exception in FTAs, which dates back to 2001. That, and some specific reservations, *may* allow for special treatment of Māori – for example, subsidies or special funding mechanisms, such as NZ on Air, or support for "creative arts of national value". But it is not designed to neutralise FTA requirements that impact negatively on Māori.

Māori creatives are not part of the decisions about what is negotiated, what rules are agreed and what trade-offs are acceptable in FTAs. It is important to build our knowledge base so we can have a more effective voice as creatives in protecting our duties and interests in this "trade" space.