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E nga iwi, e nga reo, e nga karanga maha o nga hau e wha, tenei te mihi atu ki a koutou katoa. Ko Takitimu te waka, ko Aoraki te mauka, ko Kai Tahu, Ngati Mamoe, me Waitaha nga iwi, ko Waihao te marae, ko Sacha McMeeking toku ingoa.

I am an emerging Maori legal researcher, nearing completion of a Master of Laws, currently employed in a research position with the Otautahi Maori Research Centre, contributing to the New Zealand Law Foundation funded Human Genome Research Project, and a lecturer of law at the University of Canterbury lecturing in the areas of Treaty of Waitangi, Maori Land Law, and Public International Law.

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***Statutory Protection of Indigenous Cultural Expressions - Defining Offensiveness***

Globally, the pandemic misappropriation of indigenous traditional cultural expressions (TCEs) continues. International resolutions, policy initiatives and work programmes, such as the Mataatua Declaration (1993), UNESCO Universal Declaration on Cultural Diversity (2001), and the extensive efforts of the World Intellectual Property Organisation, are yet to produce binding international standards and mechanisms empowering indigenous peoples to exercise effective control over third party (mis)use of TCEs. Whilst these and other suchlike efforts merit celebration and ongoing support, their potential is likely to be realised in the distant, rather than near, future. Interim defensive tools to prevent or decrease misappropriations are contained in extant domestic legislative schemes. Their value to indigenous peoples is largely dependent upon interpreting the concept, and legal definition of offensiveness.

Misappropriation most commonly occurs when a non-indigenous third party acquires some form of proprietary right or interests in a TCE, typically in the form of a state awarded monopoly, termed trade mark. Once the trade mark has been issued, the holder is entitled to use it freely, subject only to generic state codes protecting standards of public decency, trade and so forth, entirely immune from any constraints the originating indigenous peoples may wish to impose. However, many states make provision for refusing or revoking an application for a trade mark, where the imagery is deemed to be offensive, or some analogous variant, such as being scandalous, or contrary to public policy/*ordre public*. Indigenous peoples are able to utilise these provisions to object to an application containing a TCE on the grounds of offensiveness, potentially preventing misappropriation of a culturally significant image. The key issue is whether the decision-maker, administrative or judicial, reaches a finding on offensiveness concordant with indigenous ethical, cultural and spiritual perspectives and priorities.

Exploring the concept of offensiveness, this paper examines the jurisprudence arising from New Zealand, Canada, Australia and the United States. Employing case studies such as the ‘Washington Red Skins’ mark, the deliberations of the New Zealand Māori Advisory Committee to the Trademarks Commissioner, and other notable international examples, it asks: what is offensive to Māori and the international community of indigenous peoples? How do indigenous peoples go about assessing matters of offensiveness? What are the applicable legal definitions, thresholds, and their underlying reasoning? And ultimately, can a sustainable legal definition of offensiveness be reached that adopts an indigenous perspective? In conclusion, it is argued that whilst extant statutory frameworks are not a ‘cure all’, they do possess an untapped capacity to curb wilful misappropriations, and so misuse of TCEs.