



Indigenous intellectual property rights: Ethical insights for marketers

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ABSTRACT

Present copyright laws do not protect Indigenous intellectual property (IIP) sufficiently. Indigenous cultural artefacts, myths, designs and songs (among other aspects) are often free to be exploited by marketers for business' gain. Use of IIP by marketers is legal as intellectual property protection is based on the lifetime of the person who has put the IP in tangible form. However, Indigenous groups often view ownership in a very different light, seeing aspects of their culture as being owned by the group in perpetuity. Misuse of their cultural heritage by marketers in products often denies the Indigenous group a monetary benefit from their use and is frequently disrespectful. This article discusses ethical insights that might shed moral weight on this issue.

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CHINESE ABSTRACT

现行的著作权法无法充分保护原住民知识产权(IIP)。原住民的文化艺术品、神话故事、设计图案与歌曲等，通常被营销商免费利用而谋取商业利益。营销商使用原住民知识产权属于合法行为，因为知识产权的保护是根据将知识产权付诸于具体形式的产权人的寿命而定。然而，原住民对所有权的看法截然不同，他们将自己的文化视为全民族永久拥有的产物。营销商在其产品中滥用原住民文化传统，通常剥夺了原住民对其文化遗产的经济权益，也常表现为对原住民文化的不尊重。本文从道德角度阐述原住民知识产权所涉及的伦理规范。

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1. Introduction

The plight of indigenous peoples in this day and age is well recognised (United Nations Permanent Forum on Indigenous Issues, 2006). Indigenous peoples are most often in a weaker economic position in societies than the non-indigenous majority. They suffer higher levels of discrimination and inequality in rates of pay, distribution of resources, education, and health. A larger number of indigenous people are illiterate, poor or destitute (United Nations Department of Economic and Social Affairs, 2009). Statistics for Australia and New Zealand show that their indigenous peoples (the Australian Aboriginals and New Zealand Maori) are consistently in the lowest income brackets, receive the highest amounts of welfare benefits and have the highest rates of unemployment in their respective countries (Australian Bureau of Statistics, 2012; Statistics

New Zealand, 2012). However Indigenous peoples are rich in potentially revenue creating intellectual property (Mittelstaedt and Mittelstaedt, 1997). Some countries have biologically related Indigenous Intellectual Property (IIP) specific laws. These protect and enable indigenous peoples to profit from biologically specific IIP such as natural remedies. There is much less protection for non-biologically related IIP such as designs, traditions, myths, art and songs (Pask, 1993). Copyright laws in Australia (Copyright Act, 1968) and New Zealand (Copyright Act, 1994) assign ownership (and thus rights to revenue produced) to the person who first fixes the IP in tangible form. This is more often a marketer or retailer than the Indigenous group itself (Janke, 2005).

In this paper we explore a normative approach to the ethical issue of IIP for marketers and retailers. In so doing, we outline possible guidelines for marketers and retailers when considering the use of IIP that go beyond those guidelines espoused by the law and international, non-binding agreements. In order to discuss this issue thoroughly, we will be using the protocol for ethical decision making outlined by Laczniak and Murphy (2006). Laczniak and Murphy

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<u>BP7: Protocol for Ethical Decision Making</u>	<u>Basic Perspectives</u>
1) Creating awareness and sensitivity to ethical issues.	BP1) Ethical marketing puts people first.
1) Framing and defining the ethical issues.	BP2) Ethical marketers must achieve a behavioural standard in excess of the law.
2) Identification of relevant stakeholders.	BP3) Marketers are responsible for whatever they intend as a means or ends with a marketing action.
3) Selecting an ethical standard to base the decision on.	BP4) Marketing organisations should cultivate better (i.e. higher) moral imagination in their managers and employees.
4) Ethical analysis.	BP5) Marketers should articulate and embrace a core set of ethical principles.
5) Decision regarding ethical issues.	BP6) Adoption of a stakeholder orientation is essential to ethical marketing decisions.
6) Evaluation of outcomes of the ethical decision.	BP7) Managers should follow seven steps for moral reasoning in the Protocol for Ethical Decision Making.

Fig. 1. The protocol for ethical decision making and basic perspectives for ethical marketing (Laczniak and Murphy, 2006).

(2006) developed these basic normative propositions for ethical marketing after reviewing 50 years of business ethics literature. To guide this discussion, the basic perspectives from that article will be intertwined along with further ethical perspectives. The steps are outlined in Fig. 1, column 1.

In conjunction with this decision making protocol Laczniak and Murphy (2006) identify seven Basic Perspectives (BP) which help guide ethical marketing decisions. BP7 is the protocol above which is joined by the six other BPs (See Fig. 1, column 2).

Step 1 of the decision making protocol – ethical awareness and sensitivity – hopefully will be further cultivated through marketing management and academic discussion following dissemination of this article. Steps 6 and 7 – the decision and evaluation of the decision – need to be undertaken by marketing managers within their organisation upon reflection about the issue of IIP. What we wish to provide is a discussion of steps 2–5 to aid in marketing managers' decision making surrounding the topic. Thus within step 2 – framing and defining the ethical issue – we focus on BP2 to provide the minimum standards for ethical behaviour outlined by IIP laws around the world. In step 3 the main stakeholders, the indigenous peoples, are described. In line with BP6, this section gives an overview of ownership within indigenous groups to help marketing managers better understand the potential ethical dilemma stemming from BP1, BP3 and the AMA code of ethics. These principles are applied in step 5 in an ethical analysis of the situation, using especially Distributive Justice (DJ) to give recommendations for ethical behaviour in using IIP. It is hoped that this article will cultivate a more refined moral imagination in marketing managers (BP4).

The major contribution of the paper is to provide marketers and retailers with a fundamental understanding of the issues and laws surrounding the use of IIP, as well as the ethical insights for doing so. The importance of this discussion is highlighted by the UN Declaration on the Rights of Indigenous Peoples which establishes the right of Indigenous Peoples to “practice and revitalize their cultur-

al traditions and customs” which includes the development of their own “cultural, intellectual, religious and spiritual property.” If IIP is used without the Indigenous Peoples consent, such parties are entitled to restitution (Article 11, Declaration on the Rights of Indigenous Peoples, 2007). However, this moral exhortation is not widely understood by marketers. Put another way, many marketers and retailers may not comprehend that the use of IIP involves a set of special ethical considerations owing partly to the historical disadvantages suffered by many indigenous populations. This short paper does not pretend to settle the thorny issue of IIP rights claims but rather hopes to sensitise marketers to *some* of the key legal and ethical considerations that are inherent in selling products based on IIP. What follows are the definitions used throughout this paper for Indigenous People and IIP.

We define Indigenous People as those communities which are pre-colonial cultures and have a long historical continuity with their territories. Typically, such communities also consider themselves to be distinct from other sectors of society now prevailing in that territory. Finally, they are non-dominant in their current society but are trying to maintain a cultural identity, heritage and history (See United Nations Department of Economic and Social Affairs, 2004 for a full definition). Examples of indigenous people would be the Ab-origines of Australia, Maori people of New Zealand, Inuit people of Canada, the Sami natives of Finland and the Mayans of Mexico.

Indigenous group's intellectual property rights are defined as “rights to their heritage” (Janke, 2005, p. 3). Heritage includes any aspect that is used to record or express the culture of the group. Expressions include songs, arts and crafts, symbols, practices, resources, knowledge and folklore (Janke, 2005). These are used to reinforce the link between the present group, past members, and the essential culture that binds them together, and by which they identify themselves and others (Janke, 2005). The definition given in this paper of Indigenous Peoples seeks to separate IIP from a country's cultural heritage. For example Greek or Norwegian myths are not seen as IIP here because these are within the public, *dominant*

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