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# 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.

**Keywords:** Marketing ethics, Indigenous people, Distributive justice, Intellectual property rights, Equity and fairness, Retailing ethics

## 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 (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.

<b><u>BP7: Protocol for Ethical Decision Making</u></b>	<b><u>Basic Perspectives</u></b>
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](#)).

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 cultural 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 Aboriginals 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* culture of their countries and cannot be linked to a minority group distinct from dominant sectors of their society.

We also would like to firmly demarcate our approach here as one that focuses on marketing manager and retailer decision making regarding their appropriation and use of IIP. Therefore, we do *not* focus on the ethics of the final product (e.g., Is it more disrespectful to use aboriginal imagery on swimsuits than with faux bark paintings?); nor do we focus on the consumer who purchases the product (Is there some consumer moral culpability if they knowing purchase misappropriated IIP products?). The genesis of such broader discussions can be found in other articles including but not limited to: Arellano, 1994 ; Seung-Eun, Littrell, 2003, and Penz and Stöttinger (2012).

What follows then is first a framing of the ethical issues or questions. Specifically, as per BP2, we look at the legalities of the use of IIP by marketers and retailers. As ethical behaviour goes beyond the law, it is important that marketers are first aware of the law surrounding IIP. Thus, it is necessary to first outline the legal requirements for marketers as many marketing managers base their ethical decision first and foremost on the law (Carr, 1968 ; Laczniak, Murphy, 2006). Marketing managers who wish to 'do the right thing' are seen as more able to do so if they are provided with clear norms

and values as well as managerial guidelines (Laczniak, Murphy, 2006 ; Murphy, 1989).

## **2. Minimal ethical standards – the legalities of the use of IIP by marketers and retailers**

International discussion of IIP greatly increased in the 1980s when the United Nations brought the topic to the fore due to its impact on economic development. The rise of knowledge based economies, the push for non-Western business philosophies, empathy for underrepresented peoples, and the increased activism of indigenous groups, were some of the leading causes of their interest (Popova-Gosart and Sharmatova, 2009). The United Nations has been involved in this issue since 1982 via the Working Group on Indigenous Populations. The drafting of the Declaration on the Rights of Indigenous Peoples started in 1985 and with 20 years of effort, it was adopted by the General Assembly on September 13, 2007. Many parties were involved in the drafting including over 100 indigenous groups as well as human rights experts. Increasing input from indigenous peoples started with the election of Chief Ted Moses, the first indigenous person elected, in 1989. He was elected to office for specific discussion of discrimination of indigenous peoples. In 1993, the second World Conference on Human Rights welcomed many indigenous groups to participate and officially stated that UN member States were responsible for their indigenous populations (United Nations Permanent Forum on Indigenous Issues, 2006).

The International Decade of the World's Indigenous People was then instigated from 1995 to 2004. This further propelled the issue into the forefront of discussion and many projects were implemented by the UN with indigenous groups. From 2005 to 2015 the Second Decade of the World's Indigenous People was introduced in order to cement the importance of indigenous people globally. Its theme is "Partnership for Action and Dignity", and there has been a strong push for policies, laws, resources and programs to ensure that theme is met for indigenous groups (United Nations Permanent Forum on Indigenous Issues, 2006). Below are some local manifestations of how this plays out in different countries and cultures. What follows is not intended to be a compendium of IIP law but rather brief illustration

that different countries reason differently in their recognition and enshrinement of indigenous rights over their intellectual property.

Specifically, IIP laws in the **Philippines** do protect indigenous traditions, arts, designs, literature and performing arts or anything which represents "the past, present and future manifestation of their cultures" (Section 32, Indigenous Peoples Rights Act, 1997). Those wishing to access this IIP must gain permission from the indigenous community in that community's customary way with restitution being given if misuse or use without consent occurs. Each indigenous group has the right to use their own IIP, to own, control, and develop it as they see fit. The IIP is seen as being owned by its indigenous community and ownership is not time bound. Policing is undertaken by each indigenous group who may then seek restitution according to their customary laws or if an agreement cannot be reached a regional office can be consulted. Registration is not needed for IIP.

Similarly, in **Panama**, the key IIP law is Law No. 20, entitled "Special IP Regime Governing the Collective Rights of Indigenous Peoples, for the Protection and Defence of their Cultural Identity and their Traditional Knowledge, and Other Provisions." This protects all IIP, as defined earlier in this article, which might be commercialised. Protection is gained through registration of the specific IIP, thereby affording the indigenous group ownership. Non-members of the indigenous group may not benefit from any IIP unless expressly wished by the indigenous group owning that IIP. Benefits are distributed within the indigenous group whether communally or as is outlined in their customary law. Reproductions are permitted only for small manufacturers who are not indigenous, and they may keep the income they generate from their reproductions. The indigenous group may also license the use of their IIP. Ownership is not time bound and enforcement is through fines.

The **United States of America** has some specific IIP laws protecting Native American Indians' IP. Art, crafts, and handcrafts specifically, are protected under the Indian Arts and Crafts Act (2000). Flags, coats of arms or other emblematic representations of Native American tribes are protected through the USPTO Database of Official Insignia of Native American Tribes which was established due to the Trademark Law Treaty Implementation Act (1998). Art and crafts must



be made by a Native American Indian, but products made before 1935 are excluded. The producer must live in the United States. The laws explicitly prevent the sale of products which falsely suggest they were made by a Native American Indian. The owner is the producer which could be an individual or group, and ownership is not time bound. Criminal proceedings can be undertaken against those accused of breaking the Act. The Indian Arts and Crafts Board register trademarks of genuineness, which can then be attached to their products, and this is the main enforcement mechanism. There is no mention of how the benefits of the sale of products should be distributed or how visual and performing arts, oral traditions, designs, literature or music are protected.

Other countries, such as **Australia and New Zealand** do not provide specific copyright laws for IIP. Their laws provide property rights to the owner of the intellectual property where the owner is seen to be the person who first fixes the intellectual property in tangible form. Australia's Copyright Act 1968 allows for 70 years of protection from unauthorised use from either the death of the owner or from the time of first publication/broadcasting. The Australia-United States Free Trade Agreement 2004 (AUSFTA) extends the Copyright Act of 1968 in a bid to combat piracy. It looks at the rights of electronic distribution for things such as computer programs, films and music. Under the AUSFTA, copyright is extended to 90 years from first broadcast/publication. Performances are protected for 50 years after the year of performance from audio releases, 20 years for audio-visual releases, and 70 years for sound recordings (Australian Government Attorney-General's Department, 2013).

New Zealand's Copyright Act 1994 is supported by the country's membership of the Universal Copyright Convention (1952), the Berne Convention for the Protection of Literary and Artistic Works (1979), and the Agreement on Trade Related Aspects of Intellectual Property Rights (1994) – TRIPs. Under the Universal Copyright Convention (1952) ownership spans 25 years after the life of the owner or first time of publication. The Berne Convention (1979) extends this to 50 years and allows protection in all member countries. Lastly the TRIPs (1994) extend copyright to computer programs and sound/visual recordings to authorise and prohibit commercial rental in a bid to combat piracy. In summary New Zealand provides copyrights for 50

years from the death of the owner or when the first broadcast/performance of the material was undertaken (New Zealand Intellectual Property Office, 2013).

In conclusion, a few moral minimums about IIP are enshrined in law; however, in most countries it is legal for a marketer or retailer (whether an indigenous person or not) to use IIP if they are seen as the owner of that intellectual property. Moving onto step 3 in our evaluation, we will now consider the stakeholders affected by retailers and marketers use of IIP – particularly the indigenous groups. In understanding more about indigenous people and their view of ownership, ethical insights can be uncovered.

### **3. Understanding the main stakeholder – the indigenous groups**

The question of ownership provides the beginning of our voyage to understand the main stakeholders of IIP – the indigenous groups themselves. Many of the expressions of culture which are seen as IIP are created through group interaction and passed down from generation to generation (Janke, 2005 ; Mittelstaedt, Mittelstaedt, 1997). Ancient peoples often view the world and their people as “integrated” – where the past and present may not be seen as separate (Janke, 2005). *The group* is seen as the owner of any expressions of the culture, which is not time bound. This is a major obstacle for current copyright law which needs to identify the owner of the IP in order to assign the person who is given credit for the work and holds rights for decisions over its sharing. When a group owns the IP, their lifetime will be more permanent than that of an individual and so current IP laws do not protect such rights of ownership (Mittelstaedt and Mittelstaedt, 1997).

The problem with all of this is that often IIP is presumptively owned by the indigenous group at focus and predates the time of protection assigned by copyright laws (Janke, 2005 ; Mittelstaedt, Mittelstaedt, 1997). Partly this means that IIP is not bound by the typical categorisations of time that Western culture imposes (Gould, 1987; Nicholas, Bannister, 2004 ; Zimmerman, 1987). This presents

problems for Indigenous groups when existing IP laws protect indigenous property only for a limited number of years.

Further, most copyright laws only protect the express manifestation of IIP, such as one particular piece of art, rather than the basic idea or theme behind it (Nill and Geipel, 2010). This means that marketers can freely incorporate IIP into their products *without* remuneration of the indigenous group (Mittelstaedt and Mittelstaedt, 1997).

There are many examples of the possible misuse of IIP. The three contemporary examples below, drawn from New Zealand, Australia, and the United States, help to illustrate the pragmatics of the issue discussed in this paper.

The unapproved use of New Zealand Maori cultural artefacts is a prime example of where Indigenous people's intellectual property is insufficiently protected under current copyright laws. For instance in 2001, Lego launched a new game entitled Bionicle. The game used Polynesian words and South Pacific myths without permission or recompense to these native people ("Lego Game Irks Maoris", 2001). In 2005, Philip Morris sold cigarettes in Israel branded "Maori" that also used a native design much to the shock and surprise of the New Zealand community (New Zealand Herald, 2005). This, along with other Maori IIP such as the Haka [dance], have been sometimes used to gain profit for businesses in a number of circumstances; Maori tribes believe they are denied their right to monetary benefits from the use of their IIP (Copyright Laws to Protect Maori Heritage, 2001).

Australian Aboriginal IP has been continually misused without acknowledgement of its ownership or sacred meaning. Tribal designs for Aboriginal people are often seen as sacred, and the religious meaning behind them is often not respected by companies that misappropriate their use for profit making purposes. Aboriginal designs have been placed without tribal permission on products such as T-shirts, carpets, and tea towels, and thereby have been used completely outside of their appropriate context (McDonald, 1997).

American Indian tribal names, personal names, and assorted indigenous songs and totems have been "borrowed" by

many organisations. For example, the labels Cherokee, Navajo and Sioux are among the most popular with over 337 registered trademarks since 1998. These names have been used for assorted products and businesses including sports teams, alcoholic beverages and cars. The use of Native American names and imagery (e.g. North Dakota Fighting Sioux, Washington Redskins), often incorporated into athletic team sportswear, has been among the most contentious of issues in the USA ([Brown, 2002](#)). Chief Crazy Horse is still used as a name of an alcoholic beverage; the Rosebud Sioux Tribe and Crazy Horse's descendants are still contesting this misuse of their IIP ([Miller, 2010](#)).

For indigenous peoples, their intellectual property is often ingrained into their heritage and issues of authenticity and "moral rights" ([Nill and Geipel, 2010](#)), which arise from the "free" incorporation of their IIP by marketers; this can jeopardise or even demean their culture ([Janke, 2005](#)). Firstly, this may occur through using IIP in a way that is offensive or disrespectful to their culture and traditions ([Janke, 2005](#)). Examples of this are the use of New Zealand Maori words and myths in a children's game brought out by Lego ([Copyright Laws to Protect Maori Heritage, 2001](#)), branding cigarettes with the name "Maori Mix" ([New Zealand Herald, 2005](#)), and the use of tribal or sacred symbols on T-shirts ([Pask, 1993](#)). For some cultures, their sacred symbols and icons have even been incorporated into swimsuits ([The Daily Mail, 2011](#)). Secondly, there is a tension between stakeholders in the use of IIP with marketers appropriating ownership rights while avoiding the distribution of remuneration from their integrated product's sales ([Nill and Geipel, 2010](#)). Therefore, the indigenous group, many of which are already at a more disadvantaged position in societies than other groups, often do not gain financial benefit from their IIP ([Hughes, 1997](#)). Finally, in many of the instances where indigenous culture is expropriated, it is not the monetary gains that the indigenous sub-cultural group is seeking but rather the ability to stop an offensive commercial application of their heritage.

A fierce battle may ensue over the ownership rights to IIP as both marketers and Indigenous groups fight over the competitive advantage that retaining the ownership rights of IIP affords ([Mittelstaedt and Mittelstaedt, 1997](#)). Examples of this have already occurred between Australian Aboriginal Tribes and tourism operators

who sell T-shirts featuring tribal designs ([Pask, 1993](#)); other instances involve the adaptation of an indigenous group's traditional songs ([Feld, 2000](#)); and the utilisation of New Zealand Maori tribe's legends in computer games ([BBC News, 2001](#)).

#### **4. Indigenous intellectual property rights: an ethical commentary based on the AMA code**

Now that we are aware of where the law stands and why the use of IIP may be an issue for its major stakeholders, we can move to step 4 and select ethical standards by which we can analyse the use of IIP by marketers. The discussion that follows is not intended to be a definitive analysis of whether the appropriation of IIP is inherently unethical; rather, the discussion is an *illustration* of the ethical perspectives that might be voiced in defence of a greater control over IIP by the indigenous peoples.

BP1 from [Laczniak and Murphy \(2006\)](#) posits that ethical marketers put people first and that (BP3) ethical decisions are those where the intent, means and expected outcomes are positive ([Garrett, 1966](#)). To enable marketers to judge whether their actions' consequences are harmful, a set of basic principles should be adopted which lay out the minimum requirements for ethical behaviour. One such set of principles which is widely accepted by marketers is the American Marketing Association's code of ethics. The code of ethics is shaped by three norms and expressed in six values. The three norms are to do no harm, foster trust in the marketing system and follow the values which ensure the previous two norms. The values espoused are honesty, responsibility, fairness, respect, openness and citizenship ([American Marketing Association, 2014](#)). These values collectively provide modest yet useful guidance for marketers and retailers offering IIP motivated products for sale.

*Honesty* implies truthfulness to both customers and other stakeholders. This not only means direct honesty in dealings but includes omission of information and accepting accountability for overt and covert expectations of the company's products. In our featured case of IIP this does not directly impact marketers' ethical decision making except as an expectation of their everyday practices. *Fairness*

builds on the principle of honesty by broadening its conceptualisation to include deceptive marketing practices which do not represent the product including misleading promotions and manipulative pricing. This aspect also does not directly affect our discussion of the ethicality of using IIP as it refers to the relationship between the buyer and seller, except when the sourcing of IIP inspired products is misleading to buyers.

*Openness* rounds out the honesty discussion by including other stakeholders in open communication. Building on the concept of honesty it provides that risks associated with product purchase and use be disclosed. While this value in itself does not particularly impact our IIP discussion, openness starts to introduce transparent communication between organisations and stakeholders, which when paired with the next three values of Respect, Citizenship and Responsibility provides more specific principles for the ethical analysis of IIP.

The value of *Respect* underscores stakeholder devotion and offers a modest amount of guidance for marketers in the use of IIP. Its definition is to do with ensuring *human dignity* for all stakeholders but its focus is mainly about primary stakeholders such as customers and employees. Avoiding negative representations of people in promotions and ensuring customer satisfaction potentially allows organisations to testify to the concept of human dignity. Acknowledging contributions from others also helps give guidance to marketers using IIP. The concept of *Citizenship* "involves a strategic focus on fulfilling the economic, legal, philanthropic, and societal responsibilities that serve stakeholders" (American Marketing Association, 2014). However, giving back to the community by volunteering and donations and protecting producers in developing countries ignores the misappropriation of IIP and provides little specific guidance concerning IIP. *Responsibility* however does give guidance for the IIP situation by "accepting the consequences of ... marketing decisions and strategies" (American Marketing Association, 2014). Avoiding coercion and acknowledging social obligations to stakeholders, especially those that are disadvantaged – such as indigenous groups – highlights the importance of an explicit duty towards indigenous groups. So, in summary, sub-principles that may be applied to an ethical analysis of the use of IIP based on the AMA code of ethics include:

Acknowledging contributions from IIP producers;  
Acknowledging social obligations to all stakeholders, including the inspiration and payment for IIP related products;  
Avoiding any negative stereotypes of indigenous groups.

Unfortunately these values still provide only the most general guidance regarding an ethical analysis of IIP usage. The problem with the AMA code of ethics is its focus on the organisation and the customer. So below we outline other ethical tenets to aid in the discussion.

## 5. Additional ethical analysis

BP1 from Laczniak and Murphy (2006) posits that ethical marketing should put people first, by being of social benefit to both customers and other stakeholders. This benefit could be created through efficient management of the marketing system (e.g., customer orientation – Drucker, 1954; Keith, 1960 ; Levitt, 1960). This could possibly justify the use of IIP as more efficiently distributing cultural artefacts to consumers who wish to purchase them. However, Kant's Categorical Imperative would suggest that people should never be treated as merely a means to an end (Kant, 1785/1981), especially not a means to only maximise profit for non-indigenous sellers. The *principle of non-maleficence* from duty based ethics (Drucker, 1974; Laczniak, Murphy, 2006 ; Ross, 1930), adds that marketers should seek to do no harm with their actions, especially harm to already disadvantaged groups such as indigenous populations (American Marketing Association, 2014 ; Murphy et al, 2005). And here Rawls' (1971) Difference Principle helps us to understand what is potentially harmful when it implies that social policy, including the laws that govern exchange, should avoid contributing to or increasing the disadvantages of a vulnerable group, a position that indigenous people often find themselves in. Considering indigenous groups in this situation, it might be deemed as unethical for marketers to use IIP if those groups wanted to use it for their own economic benefit, but ethical if they had no interest in using it in that way. However, the ethical value of Citizenship under the AMA ethical guidelines extends seller duties beyond the marketing system to societal and cultural obligations. Thus from that perspective, Garrett's Principle of Proportionality (1966) perhaps helps a marketer analyse the totality of

positive and negative consequences possible from an action and identify which of those they are responsible for.

Therefore, using proportionality, if the *intent* of a marketer creating and selling products with Maori symbols is to promote the Maori culture of New Zealand and to increase tourism revenue for New Zealand, and the outcome meets their intention, but also slightly offends certain tribes, this might be seen as ethical as long as the organisation did not legally protect the IIP so the tribe could not use it to their economic benefit. However, if the *intent* of the organisation is to save money on product development by using existing IIP without remuneration, with the same outcome, and they *also* placed legal protections over the IIP so the indigenous group could no longer use their IIP, this almost certainly would be unethical. Furthermore, if the negative consequence of this use was to mislead the consumer as to the authenticity of the origin of the product, this would also be unethical according to the honesty principal of the AMA code of ethics.

So where to from here then? This much should be clear: Marketers must acknowledge the contribution of IIP to their products according to the Respect principle of the AMA code of ethics. Further, they must acknowledge their societal obligations of Citizenship and Responsibility to not further economically deprive already disadvantaged groups. So with positive intent, as defined by the proportionality framework, it is ethical to use IIP if Respect, Citizenship and Responsibility are also taken into account. The nub of the fundamental ethical question often involves whether marketers are working with indigenous groups when marketing IIP inspired products or whether they are trying to work around them to avoid paying any benefits they might be morally owed.

## **6. Summary discussion**

Therefore, we assert that marketing ethics literature may be able to shed some light on this thorny social problem of equitably assigning rewards deriving from IIP. Obviously, the final outcome of this debate might have major financial ramifications for retailers and distributors or products incorporating indigenously derived designs. If the tide of public opinion turns towards the greater recognition of IIP – as clearly suggested by the UN pronouncement – *and* if this view is



eventually reflected in the changing law of various countries, there then will be managerial implications for retailers and distributors who handle products incorporating indigenous designs, concepts or creations. Such effects may include changes in retail strategy and tactics including the mandated payment of IIP royalties, reduced profit margins, the discontinuance of "offensive" (to indigenous culture) products, negative publicity and consumer boycotts in cases of non-compliance and possibly the opportunity to partner profitably with indigenous groups in the ratified development of their IIP.

It is recognised in the literature that the creators of IIP have some claim to receive certain remuneration for the use of their IIP by marketers ([Hughes, 1997](#)). Further, there may be legal standing that their IIP not be disrespected or misrepresented ([Nill and Geipel, 2010](#)). In this regard, the UN Declaration on the Rights of Indigenous Peoples is a giant step towards a solution for these issues. It states that Indigenous peoples have the right to retain the use and development of their IIP for economic purposes. Organisations such as the World Intellectual Property Organization also endorse the protection of IIP from non-authorised commercial development. Importantly, both of these codified opinions are non-binding and voluntary. It is left to marketers within organisations to make judgement calls on the appropriate use and remuneration level for the IIP they "borrow". Therefore, a more useful discussion for ensuring compliance with IIP protection views might be achieved through marketing ethics guidelines.

To recap some of the ethical reasoning noted above, there are several powerful ethical underpinnings for promoting a special legal consideration of IIP. For example, in numerous marketing situations, there is a case to be made for the application of distributive justice (DJ) considerations ([Laczniak and Murphy, 2008](#)). Put another way, the market for intellectual property rights "allocation" should be analysed for its efficiency *and its equity*. To select merely one DJ adjudication principle, the Rawlsian *difference principle* ([Rawls, 1971](#)) calls for the prohibition of programs, policies or procedures that further disadvantage those who are *least well off*. In the situation at hand, indigenous populations have suffered not only historical discrimination but, in their current social condition, they are often disproportionately impoverished, unemployed and/or culturally marginalised. This would

qualify them for "least advantaged" status according to the Rawlsian distributive justice ([Rawls, 1971](#)) standard and adds ethical weight for some extraordinary consideration when determining the latitude of such intellectual property rights.

But arguments from the standpoint of DJ are not unique in undergirding ethical support for a broader conception of IIP. For instance, Kantian ethics, as already argued above, might be invoked to argue that the artistic creations of indigenous people are currently being unfairly appropriated for the sole financial gain of a limited number of commercial enterprises. This would be a violation of Kant's second formulation of the Categorical Imperative which would prohibit the use of IIP as a means *merely* for the economic advantage of non-indigenous marketers. Viewing IIP as an abiding sub-cultural asset that benefits society as a whole suggests that some reinstitution should be made ([Laczniak and Murphy, 1993](#)). That is, IIP, in violation of Kantian duties, is being used purely as a means for the financial benefit of those non-indigenous sellers who expropriated those identifiable cultural concepts.

Alternatively, Virtue Ethics, especially the *virtue of beneficence* – i.e., the obligation of the powerful to aid the weak – might be used to contend that past discriminations and exploitations of indigenous peoples entitles them now to a special compensatory benefit from their native IP ([Williams and Murphy, 1990](#)). Even Catholic Social Thought, recently profiled by [Klein and Laczniak \(2009\)](#) in the marketing literature as to its possible *non-sectarian* applications to marketing ethics, might be marshalled in terms of its *preferential option for the poor* principle to support expanded and unique IIP rights. Finally, moral intuitionism, as specifically articulated by [Ross \(1930\)](#), might hold that the *principle of merit* be invoked in order to apportion unique "community royalty fees" to originators of intellectual property that ought to be understood as held in common by an indigenous people.

One ray of hope in this muddled issue of IP rights is to recall that jurisprudence changes over time, as society adjusts its evolving perceptions about what constitutes fairness. The regulatory life cycle in democratic countries is moved forward by shifting public opinion regarding the nature of ethical obligations or what social restitutions ought to be as well as how explicitly they should be codified in the

evolving body of jurisprudence ([Jennings, 2009](#)). In the case of IIP, there is an emerging view that the intellectual property of indigenous people are due a unique ethical standing that may include a novel view of both ownership and statutory longevity. When viewing the issue of IIP from the perspective of *ethical obligation*, the question of how to handle damages for the "misappropriated" use their intellectual property comes into clearer focus. Put another way, Article 11 of the UN Declaration on the Rights of Indigenous Peoples codifies the necessary *ethical* obligation required to possibly shape (and change) international copyright law. While sceptics may assert that "damages" cannot be allocated to some hypothetical denizens of yesteryear, precisely because these indigenous creators cannot ever be identified, a unique application of the law may allow for royalties or usage fees to go into a *general* fund that benefits the indigenous culture as a whole (e.g. a College scholarship fund for Inuit students or an earmarked fund for the restoration of Native American heritage sites).

## **7. Conclusion**

Technically, copyright laws do not protect the cultural ideas that are behind expressions of IIP. Thus, for example, while specific tangible expressions of IIP are protected, such as particular crafts, the folklore in which the craft is enmeshed is *not* protected and can be used in marketing ([Janke, 2005](#); [Mittelstaedt, Mittelstaedt, 1997](#) ; [Pask, 1993](#)). Added to this is the view that the specific craft, for instance, is only protected for the lifetime of the creator and, at a maximum, 95 years after their death; this time period does not acknowledge the Indigenous view of ownership and the common stewardship over their symbols and other creations that many Indigenous groups hold central ([Janke, 2005](#)). Thus, while it is legal for marketers and retailers to appropriate IIP without permission, it is likely unethical for them to do so.

In summation, following from the recent UN pronouncement on this matter and applying multiple instances of ethical theory to the question, some level of greater compensation from the commercial usage of IIP would seem morally and ethically due to Indigenous communities that hold their cultural artefacts in common. Marketers using such indigenous culture properties in their products and services

should prepare for the debate that is gaining momentum as well as greater scrutiny from both consumers and social activists. Analysis of these issues with professional codes of conduct such as the AMA code of ethics and other ethical perspectives presents a possible future path towards a grounded acknowledgement of the rights of Indigenous communities within the professional and academic marketing community.

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