Indigenous Intellectual Property Rights: Ethical Insights

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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 creator. 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.

Introduction

There are many examples of the possible misuse of Indigenous People's intellectual property (labelled IIP in this paper). The three contemporary illustrations 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). This, along with other Maori IIP such as the Haka [dance], have been 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 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 organizations. 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. 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).

Has the tide of such easy usage now shifted? The United Nations Permanent Forum on Indigenous People drafted and debated the Declaration on the Rights of Indigenous Peoples for over 20 years and it was finally adopted by the General Assembly on 13 September, 2007. In Article 11, the statement 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 these are used without their consent, such parties are entitled to restitution (Article 11, Declaration on the Rights of Indigenous Peoples, 2007).

Current copyright laws around the world apply only partially to this call from the UN, since most copyright laws span the lifetime of the author, plus, at a maximum, 95 years (e.g. The Sonny Bono Copyright Extension Act, 1998). The problem with all this is that often IIP is owned by the indigenous group at focus and predates the time of protection assigned by copyright laws (Mittelstaedt & Mittelstaedt, 1997; Janke, 2005). Further, most copyright laws only protect the express manifestation of IIP, such as one particular piece of art, rather than the basic idea or fundamental philosophy behind it (Nill & Geipel Jr, 2010). This means that marketers can freely incorporate IIP into their products without remuneration of the indigenous group (Mittelstaedt & Mittelstaedt, 1997).

For indigenous peoples, their intellectual property is often ingrained into their heritage and issues of authenticity and "moral rights" (Nill & Geipel Jr, 2010), which arise from the "free" incorporation of their IIP by marketers, 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 the aforementioned 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 symbols on T-shirts (Pask, 1993). 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 & Geipel Jr, 2010). More often than not, the indigenous groups have not retained the ownership rights over their IIP due to the previously mentioned philosophy behind copyright laws which protects specific expressions of ideas, rather than the concepts themselves (Nill & Geipel Jr, 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).

All of this might be viewed from a distributive justice perspective—i.e., the fairness or unfairness of market outcomes and allocations--which is not addressed by copyright laws. 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 indigenous intellectual property. Obviously, the final outcome of this debate might have major financial ramifications for retailers and distributors or products incorporating indigenous derived designs.

Indigenous Groups

Indigenous group's intellectual property rights are defined as their "rights to their heritage" (Janke, 2005, p3). Heritage includes any aspect which 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 culture that binds them together, and by which they identify themselves and others (Janke, 2005). Partly this means that IIP is not bound by the typical categorisations of time that western culture imposes (Gould, 1987; Zimmerman, 1987; Nicholas & Bannister, 2004). This presents problems for Indigenous groups when existing IP laws protect indigenous property only for a limited number of years.

The question of ownership produces further issues for IIP rights. Many of the expressions of culture which are seen as IIP are created through group interaction and passed down from generation to generation (Mittelstaedt & Mittelstaedt, 1997; Janke 2005). 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 problem 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 their rights of ownership (Mittelstaedt & Mittelstaedt, 1997).

Given the less privileged place of indigenous populations within society, the retention of their IIP for commercial purposes presents a question of justice as well as a potentially profitable venture for them. However, copies of arts and crafts, or use of tribal symbols and songs in commercial goods is not prohibited under current copyright laws (Pask, 1993). In fact, current copyright practices assign the ownership of IP to the person who first records the IIP, whether it is the Indigenous people, or a marketer (Janke, 2005). As copyright laws are linked to economic development, where an increase in innovation and product development is ensured through proper protection for the creators of the IP (Kumar, 2003; May & Sell, 2006), the importance for marketers to recognize and secure IIP rights is paramount.

Current Copyright Laws

Unfortunately, there are no shared copyright laws across countries (Mittelstaedt & Mittelstaedt, 1997). Overall, copyright laws are about who controls the monopoly power over intellectual property and what they use that power to achieve is up to the owner. Thus, increasing the number of years that copyrighting applies to IP is directly beneficial for organizations who can then gain profits from the ownership for a longer period of time (Merges, 2000). There are two philosophical bases for copyright laws – moral rights and development goals (Nill & Geipel Jr, 2010).

Moral rights are the basis of most European copyright law and provide that the creator of the IP must be acknowledged. Also, the IP must not be changed in a way that would essentially misrepresent the original concept (Davies, 2002). Copyright law in the United States is focused more on the development that is afforded from IP, and so protects IP in order to facilitate increased levels of innovation and the economic benefits of sharing of IP (Davies, 2002; Kumar, 2003; May & Sell, 2006).

Generally, the stakeholders with regard IP include the creators, intermediaries such as marketers, and the consumer (Nill & Geipel Jr, 2010). Implications of the above discussion

for marketers stems from the tension which is created between the ownership claims of the IIP creators and marketers utilizing elements of the indigenous culture. 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 (Mittelstaedt & Mittelstaedt, 1997; Janke, 2005; Pask, 1993). Added to this is 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).

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 & Mittelstaedt, 1997). As noted previously, examples of this occur 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 utilization of New Zealand Maori tribe's legends in computer games (BBC News, 2001).

Towards a Solution

It is recognized in the literature that the creators of IIP have some claim to receive certain remuneration for the use of their IIP by marketers (Hughs, 1997). Further, there may be legal standing that their IIP not be disrespected or misrepresented (Nill & Geipel Jr, 2010). However, the UN Declaration on the Rights of Indigenous Peoples is a giant step toward 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. Organizations such as the World International Property Organization also endorse the protection of IIP from non authorized commercial development. Importantly, both of these codified opinions are non-binding and voluntary. It is left to marketers within organizations 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. The following expands on the debate.

Indigenous Intellectual Property Rights: An Ethical Commentary

The use of the term "rights" by the UN in discussing IIP, implies the possibility of a legal claim upon the unauthorized use of such properties, be they symbols, myths, songs or long standing artistic depictions. The heart of the contested issue lies in the extent to which *restitution* entitlement for the unauthorized use of the cultural, religious or spiritual property of indigenous people is legally "actionable". As noted in the discussion above, there are at least two obstacles to such claims from the standpoint of traditional copyright litigation. Since many of the expressions of culture were passed down by oral tradition over many generations (e.g. myths and fables), their "ownership" is held in common by the indigenous culture as a whole and not by an identifiable individual. So, exactly to whom is the financial restitution owed? Second, as these IPs involve native peoples residing in particular geographic regions, who lived in relative isolation for many millennia, the point of such "property" origination extends far back into history, prior to the recognized time frames specified in most copyright claims. Thus, what logic is it precisely that gives the intellectual property claims of indigenous people a special longevity?

In addition, despite any informal legal weight flowing from the UN Declaration concerning indigenous property rights, such petitions first would be subject to the legal precedents and regulations in force in a particular country or jurisdiction, whether in North America, Europe or the Antipodes. Thus, as things presently stand, not only are intellectual property claims by indigenous people facing a legal system not equipped to consider their unusual claims due to existing legal precedent and code, but even if the claims are viewed sympathetically, they are likely to be decided differently in different countries. Furthermore, different intellectual properties (e.g. songs vs. cave paintings vs. oral legends) may end up having varying levels of protection, if any at all.

One ray of hope in this muddle 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 by 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, 2006). 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.

Seen in this light, there are several powerful ethical underpinnings for 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 manifestation, the Rawlsian *difference principle* 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 culturally marginalized. This would qualify them for "least advantaged" status according to Rawlsian distributive justice and adds ethical weight for some extraordinary consideration when determining the latitude of their 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 might be invoked to argue that the artistic creations of indigenous people are currently being unfairly appropriated for the sole financial gain of commercial enterprise. This would be a violation of Kant's second formulation of the Categorical Imperative and clearly suggests that some reinstitution should be made (Laczniak and Murphy, 1993). That is, IIP is being used as a means merely for the financial benefit of those who expropriated those 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) as to its possible 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 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 understood to be held in common by an indigenous people.

To summarize, 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 due to Indigenous communities that hold their cultural artefacts in common. Marketers using such properties in their products and services should prepare for the debate that is gaining momentum and greater scrutiny from both consumers and regulators. Analysis of these issues with professional codes of conduct such as the AMA code of ethics presents a future path toward grounded acknowledgement of the rights of Indigenous communities."

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