ANOTHER PENNY FOR YOUR THOUGHTS

Ruth Soetendorp

In* MANNA 86 *(Winter 2005) Professor Ruth Soetendorp began a groundbreaking exploration of Judaism and intellectual property law. This article concludes her study, with its focus on the impact of the invention of the printing press.

IN A 1923 ENGLISH COPYRIGHT case[1] Lord Atkinson commented that an infringer of copyright 'disobeyed the injunction "Thou shalt not steal"'. In the 1988 House of Lords decision in CBS Songs v Amstrad[2], a case in which the record industry attempted to prevent Amstrad marketing tape to tape recorders, Lord Templeman dismissed that comment. 'My Lords, these considerations cannot enhance the rights of owners of copyright or extend the ambit of infringement… [intellectual property rights] are defined by Parliament, not by the clergy or the judiciary.'

There is no direct Talmudic reference to copyright. For centuries, Torah debate had formed the core of study, and there were inhibitions about committing the oral law to writing. Whatever was written down was done in privacy and preserved as a 'secret' scroll. There was no concept of an author's original work being protected, because that would have been in conflict with the teaching that 'the rivalry of scholars increases learning' (Babylonian Talmud Baba Batra 21 b).

The spread of printing in the sixteenth century changed things radically. Printing equipment was expensive to purchase, and only a print run of many volumes would recoup the investment. The Jewish printer was seen as the 'performer of holy work'. Hebrew poems praised the art which 'enables one man to write with many pens' (Abrams, 1993).

Realizing that economic conditions were changing, the rabbis set out to create halachic decisions that would reward investments made in printing. They were afraid that as there was now an alternative to hand written scrolls for study purposes, unless they intervened to offer protection to printers and publishers, Torah study texts might disappear altogether.

A counter argument was put by R. Schmelkes of Przemysl: 'Everyone retains the right to study and teach. Why should another not be able to benefit his fellow men and print and sell cheaply?' When Rabbi Meir Katzenellenbogen published an improved edition of Maimonides' code, a non-Jewish publisher printed the same work and sold it at a lower price. Rabbi Katzenellenbogen appealed to Rabbi Moses Isserles of Krakow to intervene. This he did by publishing a *herem*, excommunication order, forbidding Jews to purchase from the non-Jewish publisher until the Katzenellenbogen version had sold out. Interestingly, the *herem* was imposed on purchasers rather than on the printer. Rabbi Isserles' ruling was innovative but impractical. It is nowadays easier, and more economically beneficial, to enforce a copyright infringement against a publisher rather than a purchaser.

A publisher would get a written statement from a local rabbi and place it in the front of each copy, warning that any person infringing the work would be subject to a *herem*. These *haskamot* have their modern equivalent in the copyright notices found in the front of any book, like the copyright notice in the front of any ArtScroll publication. Secular copyright notices do not always refer to civil action or criminal persecution. In England, failure to alert the public to copyright in a work may prejudice an infringement claim for damages.

The enforceability of rabbinic law was based on the accepted doctrine that the territorial area of jurisdiction of any one rabbi was severely limited. This was tested in the nineteenth century Roedelheim *mahzor* case. Wolf Heidenheim published a revised text of an annotated *mahzor* in a German version, bearing a rabbinic *haskamah* banning unauthorized publication for twenty-five years – the general length of ban was between ten and twenty-five years. Publishers in Dirhenport ignored the *herem* and republished the *mahzor* arguing that the Heidenheim edition had sold out. Rabbi Mordecai Benet supported the Dirhenport publishers, on the basis that the *herem* only had binding force in the area of jurisdiction of the rabbi that issued it, and the law of the land did not forbid republication. Heidenheim won on the basis that he needed to sell multiple editions to repay his investment in the annotations (Herzog, 1965).

R. Joseph Saul Nathansohn (d.1875) said 'Jewish law, even in the absence of an express *herem*, lays down that it is unlawful to reprint an original work without permission, for the creation of the author's mind is his property.' He may have been influenced in his opinion by emerging patent law in contemporary Poland. The rabbis debated the geographic scope of a *herem* within a *haskamah* on the basis that a publisher often distributed books to many communities. In practice, it was rare for infringements to result in excommunication, as rabbis soon recognized that monetary damages were a more logical sanction.

The rabbis made clear that a publisher owned no proprietary rights in the intellectual content of their work because the intellectual content was part of the public domain, (Babylonian Talmud Ketubbot 106a). Jewish law did not permit an author to sell the fruits of his intellect, although an author was entitled to compensation for the labour invested in preparing the work. The rabbis held that a publisher may receive compensation for the work involved in editing or annotating a manuscript because book readers in Talmud times were paid. The rabbis recognized the need to protect a publisher's investment in the labour of editing and annotating. The intellectual content of *responsa*, compilations of rabbinic questions and answers, was original, but because they were always written in connection with text which was in the public domain, or published in the context of Torah study texts, they were not protected.

The nineteenth century rabbis would have been aware of secular developments in international intellectual property law[3]. On the basis of the Talmudic dictum *dina d'malchuta dina* – the law of the land is the law – they began to argue for recognition that the labour involved in authoring an original work was entitled to reward. In the Diaspora, contemporary observant communities can choose to use the secular courts to resolve disputes which would, in the nineteenth cen-

tury, have been brought to a rabbi or a *beit din*. In 2002 the U.S. 2nd Circuit Court of Appeals heard a dispute between Merkos L'Inyonei Chi and Otsar Sifrei Lubavitch[4]. Merkos claimed that Otsar's new version of the prayer book violated Merkos' copyright by slavishly copying the Merkos English translation of the prayers.

In Israel there is also a choice between consulting a *beit din* or using the Israeli national court. Israeli state legislation conforms with international standards set by the Agreement on Trade Related Intellectual Property Rights (TRIPS) and the Patent Co-operation Treaty. In 2000 the Israeli courts were required to decide whether Quimron, the academic scholar who 'filled in the gaps' between the fragments of dead sea scrolls found at Q'mran, was entitled to copyright in his work. If his work were a true reproduction of the original missing words, how could it qualify for copyright protection?

The court decided the intellectual skill and labour invested in his work was sufficient to qualify it as original in copyright terms. Copyright gave Quimron control as to who could access work, which meant, in effect, a monopoly over the use of the 'completed' scrolls[5]. This decision illustrates the difficulties encountered when one person's individual intellectual property right gives him a monopoly that limits another person's freedom of use.

There is little rabbinic discourse on trade marks or branding, even though 'trade marks' in the form of special shapes denoting origin for the shewbread were known in temple times (Herzog, 1965). This is not to say that Jewish symbols do not make attractive trade marks. That was the thinking behind a Canadian messianic Christian group, Chosen People Ministries, Inc, who chose to register a menorah as its trade mark. The registration was successfully challenged by the Canadian Jewish Congress on the grounds that no organization should be able to monopolize the menorah. It would have been ironic if the registration had been upheld. Jewish organizations would have been barred from using or adopting the menorah, which has always been associated with Jewish culture, as a mark.[6]

Sheer chutzpah can be an element of some actions. The anticipated Jewish Rock & Roll Hall of Fame virtual museum website is being challenged by the Rock and Roll Hall of Fame Museum for infringing their trademark. The museum is claiming $100,000 in respect of irreparable damage.[7] The US Patent and Trademark office has recently refused to register The Kabbalah Centre's application to trademark the term 'Kabbalah Red String' on the grounds that the group's application 'merely describes the goods/services.'

Rabbis do not appear to have been drawn into the debate concerning patentable inventions. Herzog suggests that this is because Jews were not permitted to join the mediaeval trade guilds. Nevertheless, Jews have always been inventive. The Jewish Encyclopaedia refers to the thirteenth century invention by Jacob ben Machir ibn Tibbon of the 'quadrans judaicus', the navigational tool that contributed significantly to Spanish exploration of the New World.

The Talmudic argument in support of recouping an investment could equally be applied to patented inventions where the twenty year monopoly can be justified because of the money invested in research and development. For some inventions, such as the Kosherlamp™that facilitates night reading over Shabbat, it is important the invention be certified halachically acceptable, as well as patented to ensure the inventor reaps his reward.

Patent databases are respected sources of technological information. A quick search of the European Patent Database 'espacenet' [8] using 'Jewish' or 'Kosher' will yield a number of inventions. These range from the quirky like a prayer shawl that can be worn as a scarf with the *tzitzit* – fringes – conveniently folded away[9] to the quirkier, such as a mechanism for part-printing a Torah scroll allowing for a *sofer* to complete the lettering to ensure its kashrut[10]. Patent documents give insights into a range of problems facing the Jewish community, from the design of pens to hold cattle for *shechitah*, to a method of projecting the cantillation marks onto a Torah scroll to facilitate chanting in public[11].

Patents won't be granted for discoveries of what exists in nature, which includes genes or gene sequences. But patents can be granted for inventions that disclose an industrial application of a gene sequence. Canavan disease results in brain degeneration, and occurs most frequently in Ashkenazi Jewish families. Affected Jewish families organized tissue sample donations to a doctor who, in 1993, concluded the research necessary to identify the Canavan gene. Subsequently the doctor and his hospital acquired a patent for applications of the gene, and used their patent to prohibit Canavan testing without payment of a licence fee. The families sued the patent owners. In 2003 a settlement was agreed whereby royalty-based genetic testing by certain licensed laboratories will continue alongside royalty-free research by institutions, doctors, and scientists searching for a cure[12].

Rabbis continue to explore the possibilities of applying halachic concepts to modern intellectual property dilemmas. *Hasagat ha g'vul* (the prohibition against moving a boundary stone, as in Deuteronomy 19:14) underpins rabbinic intellectual property thinking. Whilst there have been disputes as to whether the principal of *dina d'malchuta dina* applies to all secular law, contemporary conclusions are that copyright legislation which promotes social justice and fairness should be recognized by Torah law as binding.

Nonetheless, differences of opinion continue. Google 'rabbi+napster' and you will find several examples of rabbinic debate concerning whether downloading is or is not theft. Rabbi Schneider writes: 'Sometimes it may happen that one *posek*'s (authority's) mitzvah is another *posek*'s *aveirah* (sin).'

On the subject of photocopying material for a class, one twentieth century rabbi thought it acceptable for a teacher to photocopy an article for her own use, but not for classroom distribution. Whilst another suggests that a teacher who makes copies for the students is performing the mitzvah of saving the students expense.[13]

Rabbi Nechemia Zalman Goldberg[14] suggests '*shiur*' or retention could provide an opportunity for the owner of an intellectual property right to retain the right whilst giving others a licence to work the right, in exchange for royalties. He makes an analogy with the seller of sheep who retains a right over the shearings and offspring (Schneider, 1997). Rabbi J. D. Bleich[15] sees a distinction between tangible objects that can be the subject of theft, and intangibles that cannot. Taking an animal that has been sacrificed is theft, smelling the pleasing aroma of the *ketoret* (accompanying spices) used in the temple is not (*ayn meila bare'ach*).[16] Halacha has long been able to address the concept of trading in things that are not yet in being, making it possible to convey ownership *(kinyan)* in anticipated crops, or

futures, for example. A similar rule applies to copyright in future works, making it possible to pay book royalty advances.

Rabbinic law comprises a treasury of wisdom accumulated from learned teachers through the ages. No doubt it will continue to be adaptable and applicable to intellectual property disputes the future ■

RUTH SOETENDORP *is the first holder of the Chair in Intellectual Property Management at Bournemouth University. Her Jewish education began at the Welwyn Garden City Hebrew Congregation cheder, and continues through her partnership with Rabbi David Soetendorp, and includes being founder facilitator of the Bournemouth Jewish Women's Study Group and Bournemouth Limmud.*

Sources and References

Israel Abrams, *Jewish Life in the Middle Ages*, Jewish Publication Society, New York, 1993, ISBN: 827605420.

Isaac Herzog, *The Main Institutions of Jewish Law*, Vol 1 The Law of Property, Soncino Press, London, 1965

Israel Schneider, *Jewish Law & Copyright* © 1997-2003 available online http://www.jlaw.com/Articles/copyright1.html

Arthur Jay Silverstein, 'Copyright in Jewish Jaw', EDAH 1974, available at http://www.edah.org/backend/document/silverstein/silverstein2.html

Mathew I Kozinets in Journal of International Law and Policy, 1983, University of California

[1] Macmillan & Co Ltd v K & J Cooper (1923) LR 51 Ind App 109 at 118

[2] CBS Songs Ltd and others v Amstrad Consumer Electronics plc and another 1988 2 All ER 484

[3] Paris Convention for the Protection of Industrial Property 1883, The Berne Convention for the Protection of Literary and Artistic Works 1986, The Madrid Agreement for the International Registration of Marks, 1891

[4] Merkos v Otsar U.S. 2nd Circuit Court of Appeals 2002

[5] Eisenman v Qimron In the Supreme Court, sitting as a Court of Appeals C.A. 2790/93, 2811/935[1]http://lawatch.haifa.ac.il/heb/month/dead_sea.htm

[6] Canadian Jewish Congress (Applicant) v Chosen People Ministries, Inc and the Registrar of Trade-Marks (Respondents) t-3-00 2002 FCT 613

[7] cnn.com report February 9, 2005

[8] Espacenet European Patent Office database: ep.espacenet.com

[9] U.S. Patent no 2,051,274 (1936) http://ep.espacenet.com

[10] U.S. Patent application 20020116410 (2002) http://www.uspto.gov/patft/index.html

[11] U.S. Patent application 20040257301 (2004) http://www.uspto.gov/patft/index.html

[12] The Canavan Foundation, http://www.canavanfoundation.org/news/09-03_miami.php

[13] Copyright Designs & Patents Act 1988 covers acts permitted with regard to copyright works, and the Copyright Licensing Association manages licences for copying for educational purposes.

[14] Cited in Rabbi Israel Schneider, *Jewish Law & Copyright*, http://www.jlaw.com/Articles/copyright1.html

[15] J. D. Bleich Contemporary Halachic Problems, Vol 2, KTAV

[16] Cited in report of Rabbi Zev Reichman's lecture 'Would a 'Beit-din close Napster down?' http://www.ou.org/torah/articles/napster.htm