



WHO OWNS MY THOUGHTS?

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A FEW YEARS AGO, THE strictly Orthodox Rabbis in Jerusalem castigated members of their community for infringing copyright by copying software. In an unprecedented halachic ruling, Rabbi Ovadia Yosef and Rabbi Shalom Elyashiv declared that copying software instead of buying licensed copies is tantamount to theft.¹ In doing so, they were maintaining Ramban's interpretation that *dina de'malchuta dina* – the law of the land is the law – applies to all just and fair legislation enacted by the government.² Halachic interpretation has also been sought on the legitimacy of downloading music from the internet and the correct way to behave when an employer expects an employee to work with 'rip-off' software. Intellectual Property Rights concern the contemporary rabbinate.

But what exactly are intellectual property rights [IPRs]? They are the product of a complicated system of international laws that allow people and organizations to trade in the output of their intellect. They include patents for inventions; trademarks; copyrights for original works, software programmes, broadcasts, films; protection of industrial designs; plant breeders rights; computer chip topographies, and geographical indications of origin. International systems exist for registering patents, trademarks and other rights. For business enterprises of all sizes, creating and owning such rights give opportunities for commercial exploitation through licences and assignments.

Trade secrets, know-how and a trading reputation also have a commercial value. IPRs can present risks as well as benefits. Using someone else's intellectual property without permission could lead to litigation. Failing to protect a right

according to law can mean there is no right to protect. Lack of understanding about the value of IPRs can lead to an ill informed business deal. Internationally, legitimate traders and consumers are at risk from counterfeiters and pirates if IPRs are not appropriately enforced.

For a vivid example of intellectual property at work, take a look at your mobile phone. It embodies patentable inventions, copyright ring tones, registered design features, trademark name and logo, copyright and possibly patentable software programming, and much more.

Intellectual property concepts can be discerned in verses of the Chumash, and have been the subject of rabbinic discourse from pre-Talmud to contemporary time. Here are a few examples from Torah. You may well find others. If you do, I'd be delighted to hear of them.

In Exodus 25:31 Moses, assisted by God, fashioned the menorah from a solid block of gold, which subsequent commentators assure us would never have stood under its own weight. The menorah was sufficiently original to be a copyright artistic work. It would have had enough individual character to qualify as registrable as a design. But, because it was impossible to make without the aid of God, it would never have been patentable. Only new inventions that can be made by industrial process qualify for patent.

In Leviticus 19:9 we read that the corner of the field should not be reaped at harvest time. The owner leaves something that has value, in a position in which it may be taken up by others, without a formal contractual arrangement. Declaring property *hefker* [ownerless], and absolving oneself of responsibility for it, has been the subject of extensive rabbinic debate. A user may take the *hefker* property and use it for his own needs, but may not impose legal rights over it, or trade in it. One cannot impose restrictions on who may acquire a *hefker* object [T.B. Bava Metziah 30b]. There is an argument that a second kind of *hefker* applies specifically to use-limited [and time-limited] rights, similar to easement, or permission, during a *shmittah* year for people to enter private land for purposes of picking *hefker* fruit [see Rashbam, Bava Batra 57b].

If you are involved with open source software, you will sense there are analogies here with the way in which its advocates are establishing a situation where source code is freely

available for use without contract or licence. Users who add value to the software waive any rights in their improvements by their implied permission [*mechillah*] to future users to benefit from them. The second kind of *hefker* might be a concept relevant to open source, copyleft or similar modern 'community ware' software mechanisms, which essentially operate on a licence, or permission, basis. Users have permission to use the material so long as they respect the licence condition that they too will not restrict its copying, modification etc.

Internet users should not assume that all material available for downloading without restriction is *hefker*, like the corner of the field left to be gleaned. Copyright materials could be declared *hefker*, if the owner gives the appropriate permissions. But copyright ownership of material posted on the internet is usually retained, whilst its benefit [to a limited extent] can be taken.³

Numbers 4:18 presents the Kehatim, the smallest family of the Levi tribe. They were tasked with protecting the holy ark, which the commentators equate to magnifying the greatness of Torah [*yagdil ha Torah*] through their teaching. If they committed any irreverent act in their work, it would lead to their death, so they were vulnerable and needed protection. Since there were no tangible outputs from their work, people might have asked why should they receive tithes just for spreading the word of Torah, which belongs to all Israel; or for teaching ideas that are part of the Torah?⁴ The commentators suggest that the teachings of the Kehatim were their property, and they shouldn't be considered paupers because they couldn't protect their property.

Rabbi Johanan in the third century accepted that the prohibition against stealing and robbing applied also to creations of the intellect, but copyright issues did not feature in talmudic discussion because it was prohibited to commit the oral law to writing. Whatever was written down was done by hand, in strict privacy and preserved as a secret scroll. The talmudic teachers would probably not have favoured protection of copyright because 'the rivalry of scholars increases learning'.⁵ However, the rabbis observed the convention that whenever they offered wisdom learned from another rabbi, they acknowledged that rabbi's name. Sometimes they must have forgotten. In Tosephta Baba Kamma⁶ it is written:

'The one who hears a lecture from the master and thereafter delivers it as his own, to him is applied the saying of the Proverbs: "Contemn not the thief because he steals when he is hungry, for he will repay sevenfold." He will eventually create knowledge himself and will make up for his thefts.'

In Deuteronomy 17:18 it is written about the king 'It shall be that when he sits on the throne of his kingdom, he shall write for himself two copies of this Torah in a book, from before the kohanim, the Levites.' One copy was to be kept in his *genizah* – library of holy texts. The other was to accompany him to battle.

The biblical requirement for the King to 'copy' the Torah suggests two things. Firstly, the very act of copying by hand is an enriching experience. We acknowledge the mastery of the *sofer's* work [likewise, the mediaeval monks who copied illustrated psalters in the monasteries]. Secondly, the copied version must be true to the original. The dedicated work of ancient copyists preserves the sacred texts even today, down to the perpetuation of textual mistakes. Acknowledgement of the supreme authorship of Torah, and fastidious protection of the integrity of the original text show how ancient Jewish tradition anticipates the modern notion of an author's moral right – to be identified as author, and to object to derogatory treatment of his work. David Nimmer, a contemporary American authority on copyright law, comments: 'Jewish law embodies the most aggressive, and successful copyright campaign in human history'⁷

In Deuteronomy 19:14 we find perhaps the most widely acknowledged Torah reference to intellectual property concepts. 'You shall not move a boundary of your fellow, which the early ones marked out, in your inheritance that you shall inherit, in the Land that the Eternal, your God gives you to possess it.' From this verse, which refers to boundary stones delineating the borders of land, the Rabbis developed the principle of *hasagat ge'vul* – the wrong of removing a neighbour's landmark. It stood originally for land theft, but was expanded to make clear that any infringement of a neighbour's right is included. Midrash forbids changing the words of a teacher, which are spoken in his name, on the basis of *hasagat ge'vul*.

More than any other verse, Deuteronomy 19:14 has been held up as the biblical precursor to intellectual property rights by the sixteenth century

rabbis, although it was never cited in Talmud in connection with intellectual property.⁸

From the requirement to respect the physical marking of a monopoly over land, the rabbis extended the concept to include the prohibition of an encroachment on another's livelihood, where there has been a financial investment in conduct of their trade.⁹ Rabbis were unlikely to be involved with patent type disputes because Jews did not participate as members of the medieval trade guilds, and so were unlikely to be involved in innovative, creative or inventive practice. However, R. Aha bar Hanina once condemned a man in very strong terms for 'encroaching upon his neighbour's trade'. In his teaching, it is possible to discern consideration of patent principles: that an inventor is allowed to enjoy a monopoly in his invention, for a limited period of time. One fisherman with a certain special contrivance in his nets, designed to catch more fish, set up his net at the riverbank. A second fisherman set up his net rather close to the first. There was discussion that the second man should remove his nets for a certain distance from the spot where the first man had already spread his net with a good chance of catching fish. R. Meir [father of the R. Tam 1060–1136] emphasized that the first man was entitled to protection of the discovery and invention intrinsic to his special contrivance designed to catch more fish.¹⁰

In Talmud Yevamot, the rabbis teach: 'If a sick person under the stress of his illness agreed to pay an exorbitant amount for healing-drugs, he is not bound by the agreement.' This resonates with the contemporary tension between the moral obligation to save life and the pharmaceutical company's insistence on receiving appropriate royalty payments for patented medications, or biotech companies for use of patented gene sequencing.

From Bible to Talmud times

In Temple times there is historic evidence of 'intellectual property rights' i.e. recognition of the innovator's monopoly where innovative individuals or families of Temple times were anxious to protect the secret processes and techniques they had perfected. Herzog mentions the House of Garmi, who had secret information in respect of the shewbread for the Temple. Likewise, the House of Abtinah had know-how relating to the mix of herbs used in the

incense offered in the inner Sanctuary of the Temple. Hygros ben Levi is credited with secret knowledge in the art of singing, and Bar Kasar in the writing of holy scrolls. Their 'trade secrets' and 'know-how' were respected.¹¹

The eleventh and twelfth century habit of song theft also affected the Jews. The poet Jonathan was the author of the *zemira* 'Yom Shabbat Kodesh Hu'.¹² He once happened to be in a gathering in an inn where a 'song thief' sang Johanan's lost poem. The acrostic [first letters of each line] spelt the name Jonathan. The wandering singer was passing it off as his own, and thereby gaining much credit. A dispute arose and Jonathan vindicated his claims by challenging the song thief to explain the acrostic. Jonathan understood the teaching of Proverbs that the prohibition against stealing and robbing applied also to the creations of the mind. When the thief was thus embarrassed in front of the gathering, Jonathan added the last stanza, which included these lines:

'Let no one move my boundary,
For in the path of song my lot has fallen;
Be wary and do not abuse
The crown of song
With which He favoured me.'

In *D'ror Yikra*, a *shabbat zemirah* by the poet Dunash ben Labrat, he made sure everyone knew who the author was. His name is spelt out acrostically in the first letter of each line of most of the verses.¹³

The printing press made the sacred texts more accessible and created the new profession of publishing. That in turn presented new issues calling for rabbinic decisions, applying halachic wisdom in a contemporary context. There are examples of intellectual property concepts being applied to specifically Jewish 'property': does the modern academic who filled in the gaps in the Dead Scrolls have copyright in his work? Should a Canadian messianic group be allowed to appropriate the menorah as its trademark? Should the discoverer of the gene sequence responsible for a 'Jewish' disease be allowed to rely on patent law to charge exorbitant test fees?

I look forward to exploring these issues in part II ■

¹ Jerusalem Report, 11 October 1999, Jerusalem Post, 14 September 1999

² Schneider, Rabbi Israel, *Jewish Law and Copyright* The Journal of Halakha and contemporary Society, no XXI, Spring 1991, Pesach 5751

³ From email exchanges with Steve Weiner, an intellectual property lawyer and talmudist, who cites the 'creative analysis of *hefker* by

an early twentieth century scholar Rabbi Shimon Schkopp, in his text *Shaarei Yosher*

⁴ Commentaries on Numbers 4:18-20, including Sforno

⁵ Talmud Baba Batra 21b

⁶ Herzog, Rabbi Dr. Isaac, *The Main Institutions of Jewish Law*, vol 1, the Law of Property, Soncino Press, second ed. 1965

⁷ Nimmer D, *Adams & Bits*, © 1998, South Calidornia Law Review, Vol 71:219

⁸ Herzog ibid

⁹ Kozinets M, University of Californai Journal of International Law and Policy, 83

¹⁰ Herzog ibid

¹¹ Herzog ibid

¹² *Some Mediaeval Hebrew Poesy*, the 9th Arthur Davis Memorial Lecture, delivered before the Jewish Historical Society at University College, July 15, 1926

¹³ Cantor Jeffery Shovitz ed. *B'Kol Echad*, United Synagogue of Conservative Judaism, Dept of Youth Activities.

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