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The internet revolution and Jewish law

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Pittsburg, Pa., 2014

INTELLECTUAL PROPERTY IN THE DIGITAL AGE

urn:nbn:de:kobv:517-vlib-10174

INTELLECTUAL PROPERTY IN THE DIGITAL AGE

Protect or Share

Walter Jacob

"Intellectual property" as a term is a modern invention; the designation seeks to deal with the enormous expansion of products of the mind. Till quite recently virtually the only products of the mind were books and music, both occasionally protected. The technological changes of recent times have vastly expanded our understanding of intellectual property and its treatment to include all creations of the mind - major, minor, and trivial.

It is, of course, tempting to guard intellectual products like physical inventions as that area is well known and has a long legal history. There are similarities: Intellectual properties like physical properties involve power, control, and money. It after all makes no difference whether we are dealing with a new turbine, a scientific theory, a business model, a new drug, a song, or a book; nor may it matter whether the idea is ultimately expressed in a physical form, an image, musical notation, or as an abstract formula.

Protection of intellectual property, whatever form it takes raises concern about interfering with intellectual exploration of any kind as well as governmental control. We should remind ourselves that most societies have discouraged news ideas as well as unlimited creativity because they disturb the status quo, threaten those in power, and may bring social instability. All institutions, political, social or religious prefer to remain with what is known though they also realize that selective new ideas may be useful. In our age of nearly universal education, widespread democracy, and unfettered communication challenges to such conservatism are more likely to be raised and restraint becomes more difficult.

The current protection of intellectual property takes different forms and encompasses old areas as well as vast new fields. It is as if vast new territories previously unsettled have been discovered and can now

be staked out and fought over as the Americas in the fifteenth and sixteenth centuries.

In many ways the category, named intellectual property now dominates physical property, while also demanding a series of special laws, ever growing in their complexity. Yet like all property, it can be sold, leased, mortgaged, subdivided and fought over. We are in a new era of staking out territorial claims.

It is well recognized that portions of such intellectual property only represent innovations with limited potential and their protection may merely be a nuisance. However, the rest of this category may move us in a new direction and possess immediate or latent financial value. This paper will view intellectual property, in the light of Jewish tradition which has a long history of dealing with physical property, but has not treated intellectual creations in a parallel manner.

A World Without Intellectual Property Protection

As we look at the Jewish aspect of this, let us begin with the most ancient Jewish creativity, the book of the Bible. Here we see a major distinction between the Jewish and Greco/Roman world. The biblical authors had no pride of authorship. Even if a name was attached to a book, its content was attributed to God. The person who transmitted it was secondary, even in the case of Moses and clearly so with some late books, the *Song of Songs*, *Proverbs*, and *Ecclesiastes* along with some psalms. The attribution which may reflect Greek influence or simply an effort to attract readership through the attribution to a well known great individual. In other books of the Bible new ideas were introduced into older works by later writers as modern analysis has shown. This was in no way malicious as those involved wished to find a way of getting their ideas to the public and had no interest in personal identification. The ideas mattered, not their ego. Such new ideas may have conflicted with earlier passages. As we know the

Bible is full of contradictory theologies, sometimes expressed side by side beginning with the stories of creation in Genesis. Both became understood as part of the tradition.¹ Those who thought about eternal problems as well as more mundane matters were concerned with ideas not their ego and so were willing to remain anonymous. Protection of ideas did not enter their minds.

Such anonymity is also found in writings rejected by the biblical canon.² Only with Philo (20 B.C.E. - 40 C.E.), Josephus (37 C.E.-105 C.E.), the *Pirkei Avot* of the Mishnah do we see a of pride of authorship among Jewish scholars under Greek influence, but that was not a path generally taken till later.

New ideas were encouraged in the rabbinic period through the very form of the literature. The first page of the Mishnah and the subsequent Talmud begins with a question.³ In this way exploration was encouraged. The open ended discussions which followed may remain baffling and sometimes disturbing, but it stimulated new ideas.

Such discussions along with proposed solutions were understood to be in the service of God. The results whether accepted or dismissed, often led to further explorations. Efforts to curb such discussions through miraculous divine intervention or in the name of a "correct theology" were rejected as demonstrated by a well known story of R. Eliezer who wished to prove his point through several miracles. His colleagues responded with the statement: "The Law is not in heaven" (Deut. 30:12), i.e. as God has given us the Torah, it is up to us to interpret it without divine interference. The tale ends by stating "God laughed and said "My children have conquered me." (B.M. 59b).

In contrast to the Bible statements, the rabbinic literature were often attributed to a scholar, living or dead.⁴ The ideas, however, were shared and there was no thought of more than casual personal recognition. Honor was given to scholars who held different opinions and they were cited even in disagreement. Plagiarism or quoting

without attribution was considered wrong, though not a crime; it was dishonorable and to be avoided, but there was no punishment. The rabbinic literature constantly quoted statements of earlier sages, either in agreement or disagreement. Those shedding new light on some aspect of knowledge were lauded and the individual creator praised, but nothing beyond that occurred. Few efforts to ban ideas were undertaken and usually were unsuccessful.

As we have seen in both the biblical and rabbinic period no need to protect ideas was felt. Whether anonymous or attributed to an individual, the ideas were never considered personal property. Inspiration came from God and could not be personally claimed.

Most of the ideas in these rabbinic discussions had no economic value, although they provided a different intellectual understanding of Judaism. Much of our current concern with intellectual property is due to its financial value and that was not entirely absent in the past. The best known example is the *prosbul* attributed to Hillel (30 B.C.E.-20 C.E.). His idea reinterpreted a biblical law intended to help the peasant, but it had become an obstacle to all commerce. The new interpretation removed a threatened credit crunch which threatened all commerce and especially affected the poor. The Bible had mandated the cancellation of all debts through the sabbatical year. As that year approached, lenders became unwilling to extend credit. The situation became critical if a bad harvest threatened and timely repayment before the sabbatical year became extremely unlikely. This, had undoubtedly always been a problem, but in the more commercial society of the first century it threatened the Jewish economy. Commerce large and small was in danger; it affected the livelihood of poor peasants as well as the wealthy trader. Hillel's invention of the *prosbul*, a new financial tool, turned the court into an artificial person and loans deposited there were not cancelled by the sabbatical year (*Git. 36a; Shulhan Arukh Hoshen Mishpat 67*), so commerce could continue. This radical move contradicted the literal meaning of

the levitical prohibition as well as the intent of that law; Hillel, however, understood that it also destroyed the economy. A sabbatical year without a viable economy was of no use to anyone, so he preferred to create a path around the biblical injunction. Hillel possessed sufficient authority along with the will to introduce this change. It was an innovation of enormous economic value; Hillel was duly credited, but sought and received no control of his idea nor any fiscal reward.⁵

Actually similar reinterpretations of the Biblical texts occurred in the early rabbinic period although none can be precisely dated. They dealt with the sabbatical year in the rural setting (Lev 25:2 ff.). The biblical ideal mandated that the land be left idle and the population either lived off previously stored grains or consume the meager crop which grew wild (Lev. 25:18-22). The Book of Maccabees is one of the few texts which noted its observance (I Mac. 6:49, 55). The rabbinic interpretation of these measures restricted them to the land of Israel and as those boundaries were far from clear, the law became void. There was talmudic discussion about the calendar and the sabbatical years (A.Z. 9b), but little about details of observance. Some farmers in modern Israel, however, to this day continue to attempt to observe it during each sabbatical year.

Much more difficult was the Jubilee Year (Lev 25:2 ff.). Its mandate declared that all rural property be restored to the original owner after fifty years - a noble attempt to re-balance society. An anonymous author even rewrote early biblical history into fifty year cycles to emphasize this ideal (*The Book of Jubilees*); the book, however disappeared from Jewish life only to be rediscovered in the nineteenth century. Neither the biblical ideal nor the effort of its later proponent was followed. The rabbinic literature anonymously nullified the law by stating that the biblical Jewish kingdom under which they had been created no longer existed.

The nullification of the sabbatical year and the Jubilee represented anonymous new ideas as significant as Hillel's *Prosbul*. These three biblical ideas could have had enormous economic impact and more important they basically destroyed the social vision of the biblical author. What had been a mandatory re-balancing of the society was now limited to voluntary aid for the impoverished.

Similar later new economic vehicles were created to solve other economic problems connected with loans; they led to extensive laws of *rivvis* and the creation of the *heter iska*; these efforts enabled the charging of interest on loans something clearly prohibited by the Bible (Ex 22:25; Deut 23:20). Again idealism was sacrificed to economic forces. The biblical laws represented an ideal. Human nature being what it is, the ideal was lauded, but not followed. Less idealistic solutions were demanded so that commerce could continue. Society may have benefitted, but the ideal demanded by the Bible was removed and left to a weakened humanitarian impulse.

The presentation of new ideas, anonymously or by attribution to an earlier famous figure, certainly with no thought of protection, continued to a lesser degree in the Middle Ages and early modern period. The *Sefer Hassidim* of Judah Hehasid (Germany twelfth century) made it a principle to avoid citing authorities for its statements in contrast to contemporary *halakhic* works. On the other hand, Moses de Leon, most likely the author of the *Zohar*, which appeared in the thirteenth century, attributed it to Shimon ben Yochai (2nd century). Moses de Leon claimed to have rediscovered this long forgotten work of the mishnaic author. Although suspected earlier, his actual authorship has now been generally accepted. It is a revolutionary mystical work which gained enormous influence. The highly gifted inventive scholar rejected the path of personal fame and this led to the wide acceptance of his work.⁵ This path may appear strange to us in our egocentric world; however it was a path frequently taken in the broader non-Jewish world as well.⁶

The Introduction of Intellectual Property Protection

The principle which governed intellectual creativity within Judaism was that it was a gift of God and should be freely shared. Within the Jewish realm these discussions centered around books rather than the myriad of other creations which could be protected. Intellectual efforts were recognized and praised, but they were not to be translated into riches. There is no basis for any kind of payment for intellectual effort in biblical and classical rabbinic Judaism. Study and teaching were considered *mitzvot* and everyone's duty. If new ideas came through such concentrated efforts, they were praised, but nothing more. When the Talmud (Ned 37a) discussed this matter, it quoted the verse originally directed to Moses, "And God commanded me to teach you" (Deut 4.14) and went on to state "I, the Lord, taught you without pay (*behinam*), so you must teach without payment." Therefore virtually every scholar and teacher throughout the rabbinic period had another profession through which he earned his livelihood. The community in appreciation might try to ease that path by patronizing his shop or helping his efforts in some other way such as providing a partial monopoly, but there was no direct payment.

This was of course, somewhat counter-productive as the gifted scholar spent valuable time tending his crops or store. So eventually compensation for intellectual efforts became permitted. Compensation for teachers began under the guise of making up for time lost from his actual livelihood (Ned 37a, Kid 16b, B.M. 68b). The scholar R. Berab Ishmael categorized such payments as compensation for lost time (*s'char betel on hem notlin*). It took some centuries before this path became completely accepted. Another way of justifying a salary was by stating that these teachers also looked after the children beyond teaching them, or by claiming that the rabbis who taught and made legal decisions had no time to devote himself to other means of supporting himself and his family (Ber 29a). Basically it was based

upon the issue of time lost (*Mishneh Torah Hil. Talmud Torah* 3.11; *Shulhan Arukh Hoshen Mishpat* 9.5). The intellectual effort of teaching was to be compensated. The student's progress was seen as a value which demanded compensation. However, any written product created by a scholar was not protected though the author may have been paid for his effort of teaching children. The only indication of something akin to copyright was a decision by Isaac Alfasi (1013-1105) who stated that a scholar's efforts should not be copied without permission (Alfasi, *Responsa* # 133). As the rabbinate became professionalized and as his communal role expanded and left no time to earn a living through something else, thinking changes. In modern times, as we shall see, this led to compensation for the product of the intellect, usually a book; however, that road was far from direct.

A major change occurred through Gutenberg's invention of the movable type (1439) and the revolution in printing. The new technology spread rapidly and was immediately seen as an enormous step forward. Jews embraced it quickly as the Jewish tradition has always encouraged access to books, so anything which furthered this was welcome. Prior to Gutenberg's invention, every author hoped that his "intellectual property" would be widely distributed and read, but the spread of ideas both practical and theoretical had always been slow as it was limited to personal contacts, correspondence or hand copied books. The means of distribution changed only a few times in human history. The limits of oral distribution were extended through writing, first through inscriptions on stone, eventually on clay, a more readily available substance. Mass distribution awaited the use of parchment (skin) or some form of paper as papyrus. The next step was the scroll which enabled the ready distribution and storage of longer texts and then the revolution of the book with its easily handled pages. That simple invention simplified both reading and copying as various parts of a book could be copied simultaneously. There were, of course, advantages for the reader as well.

We can hardly overestimate the enormous effort needed to produce even a limited library in earlier ages. Manuscripts had to be located, borrowed, or stolen, and then copied. It was a tedious task and not as well organized among Jews as in the monastic Christian world. Jewish scribes copied Torahs and when they had time other books. A book burning as that of the Talmud in 1244 at Paris was more than a symbolic attack on Judaism, it threatened the intellectual life of the French Jewish communities.

Mass distribution of books and their ideas became possible through the invention of the movable type. Later improvements in printing made the printed book cheap and readily available.⁷ The current evolution into digital media marks a further step in access, storage and distribution of ideas unless new barriers are imposed. This trek through the millennia may now bring universal access to human knowledge with little cost - a dream come true.

As the Jewish tradition has mandated a high degree of literacy books were always especially valued and in most centuries rare in every community. Precocious youngsters in dozens of generations struggled to gain access to the library of the wealthy. Even in the age of printing, books were expensive and inaccessible. As late as the sixteenth century, Moses Isserles (1525-1572) *Shulhan Arukh, Hoshen Mishpat* 292:30) stated that if books are not available for study, the community may mandate that they be made available free of charge.

The invention of Gutenberg should have changed that, but there were economic obstacles. Printing was expensive; the equipment was costly; skilled personnel had to be engaged for typesetting in languages which they may not have known. Paper and other supplies had to be purchased in large quantities before any book appeared. The printer looked for ways of protecting his product from competition; monopoly over distribution granted by a government or consumer group was sought and provided.⁸ In the semi-autonomous Jewish

communities those in authority were asked for help, Moses Isserles (1525-1572) among them. He ruled that the first publisher of a work can stop another from reproducing the same book or selling it until the initial edition was entirely sold. (*Responsa*, # 10). This responsum is of special interest as both publishers were non-Jews, so Isserles sought to be effective by prohibiting Jews from purchasing the books of the second publisher. As the publisher, not the author faced risks, protection was invoked for him, not the author. Some printers also protected themselves through subscriptions paid in advance⁹

The problems raised by the new technologies of the 15th century led to limited rethinking of the traditional Jewish view of unrestricted publication rights of books new and old. On the one hand obstacles to republication were removed; however, the need for protecting the investment of the publisher at least for a limited time was recognized. The aim was a balance between a monopoly and absolute freedom. The goal was a wider distribution of all works both old and new.

These thoughts modified the major pattern of the Jewish tradition; these thinkers now began to understand intellectual creations akin to physical property and its history of protection. A limited group of authorities took this road; they understood the need to spread ideas, but also the importance of assisting the author with his livelihood and the publisher with his expenses.

These rabbinic authorities provided protection for printed works through an official *haskamah*, the earliest to survive was written for Jacob Landau's *Agur* (1487, Naples) and signed by seven rabbis. Another *haskamah* to Elijah Levitas' *Ha-Bachur* (Rome, 1519) is similar in style though signed by only one rabbi. All were printed at the end of the book in the years before title pages were introduced. These approbations provided protection and also attested to the correctness of the printed text, that it had been properly type-set, necessary as this may have been done by journeymen who did not

know Hebrew or knew it poorly. For an original work, it may have certified its orthodoxy which was critical for the rabbinic authorities of that period who were concerned about the spread of the Shabbatians and later other groups which they considered wrong.

These copyrights were initially limited to ten years, sometimes only five. By the middle of the sixteenth century, some rabbis of Italian cities extended the period to twenty-five years and issued a *herem* against the purchase of illegally printed similar books. Efforts in this direction can be traced through prohibitions in various responsa collections which set the limits of copyright to fifteen or twenty years.¹⁰ However, some books appeared without a *haskamah*. In Ferrara an ordinance stipulated that three rabbis had to approve any new book published in that city (1554). By the end of the sixteenth century a few rabbinic authorities took an additional step to protect authors by declaring that publication should not occur without the permission of the author (1597 Venice).¹¹ All these were efforts to establish a new pattern and each rabbinic authority took the path which seemed appropriate for the local conditions

The most widely known copyright controversy provides insights into its limits and possibilities during the last years of Jewish self-government. The controversy arose over the publication of Wolf Heidenheim's (1757-1832) edition of the prayer book. Heidenheim, a well known scholar and Hebrew grammarian, had previously published a critical edition of the Pentateuch (1797). His edition of the prayer book followed a careful study of dozens of manuscripts and the discovery of numerous errors. His prayerbook for the festivals appeared in 1800 and was followed by a daily prayer book (1806). Both appeared in beautiful typography, with a German translation in Hebrew letters and a commentary. Heidenheim's friend, Wolf Breidenbach, enabled him to establish a publishing firm in Roedelheim and the books quickly became popular. However,

another printer in Sulzbach recognized the possibilities of these books and soon printed them as well.

Heidenheim and his friends felt that his work deserved protection as he had devoted many years to this task. This was not merely the republication of a work already in the public domain. As the civil authorities in the splintered lands of Germany could not provide it, Heidenheim sought approbations from Hatam Sofer (1762-1839) and Mordecai Banet which provided twenty-five years of protection. As the period of governmental enforcement of religious authorities was largely over, these efforts made little difference, but Heidenheim was helped by the popularity of his prayerbook which quickly outsold the competition. The Roedelheim edition could claim to be the "genuine original" and sold very well. A pattern which has been repeated often with books and other commercial products. The controversy demonstrated the shortcomings of protection.¹² The Roedelheim publishing house continued to provide versions of their prayer book, eventually in more than 80 editions which continue to be published to this day.

Concern for authors proceeded, so Saul Nathanson (1808-1875) took this a step further and extended a copyright through the lifetime of the author and to his descendants. (*Helek Alef* 44); his contemporary, Joseph Margolis, agreed. He based his decision on the biblical prohibition against moving "your neighbor's border stones" (Deut. 19.14; 27.17; Is. 42.17)¹³ This responsum for the first time equated intellectual creations with physical property as it sought to protect the author.

In the nineteenth century a distinction began to be made between publication of original works and new editions of classics basic to Jewish studies. The rabbinic authorities were primarily interested in providing such works inexpensively. However, this laudable goal became problematic with the publication of the multi-volume Talmud;

all rabbinic authorities considered such a publication highly desirable, but also understood the cost and risks involved. The printers insisted that they needed protection and in Russia, where the Jewish community continued to govern itself, only rabbinic authorities could provide it. They guaranteed a fifteen year copyright for the Talmud (Edition of Slavuta 1817-22) and later for the Vilna and Horodno edition (Widow Romm 1832-1842) When the former began reprinting before the copyright of the second expired a major rabbinic controversy ensued.

Further Jewish developments in the area of copyrights ceased along with Jewish self-government. Emancipation placed this matter totally in the hands of the various European governments which considered rabbinic ordinances an infringement on the powers of the state.¹⁴

Some rabbinic authorities, however, continued to analyze the issues. They interpreted the concern of previous rabbinic authorities for the publisher as entirely commercial and it should, therefore, follow the extensive commercial Jewish law. They usually favored modifications which limited copyrights as their primary concern was the wide availability of books. Joseph Saul Nathanson (1810-1875) favored issuing an *issur* (prohibition) for Russia where the secular government had not seized jurisdiction, for a specified time to protect a first edition. After that republication without protection would assure broad distribution (*Shoel Umeshiv Mahadura Kamma* I # 44). In this period Mordecai Banet (1731-1829) refused to protect printers further as he felt that the community's interest lay in a wide, reasonably priced availability (*Perashat Mordecai* # 8) which competition would provide. Others like Hatam Sofer (1782-1869) followed the older path and would not permit republication before a copyright had expired, unless the initial edition was exhausted. (*Yore Deah* 326, also *Hoshen Mishpat* 657). He interpreted publication without permission as stealing property which was prohibited by the injunction against "moving the boundary of a field illegally."¹⁵

In recent time few responsa on this theme have appeared, among them is a statement from Moshe Feinstein (on copyrighting a cassette; he ruled that permission for use must be given and affirmed the secular law. (*Igerot Moshe Orach Hayyim* Vol.4 # 40 Section 19). Some academic discussion continues. Such discussions restricted to the world of the printed book could have been expanded to other areas which now concern us, but that did not occur.

Consumer Protection and the Poor

Statutes and copyrights shield "intellectual property" and its creator, but they do not protect the consumer. This has become especially important when we look beyond the limited realm of books which are, after all not a necessity of life. Matters are very different when we turn to medical treatments, pharmaceuticals, advanced agriculture technologies and a good deal else.

Here we must reemphasize the biblical concerns which wished to deal with the practical problems of rural poverty and as an ultimate goal sought to re-balance society through the sabbatical laws, the Jubilee, and the prohibition against taking interest. However these statements, as we have seen remained as hortatory guides, but they were never expanded into legally enforceable norms. They remained as noble goals. However, this represents a major concern for us.

The Mishnah, however, recorded a practical approach to the problems of the urban poor for whom gleanings and other efforts were meaningless. It took the path of communal legislation. When such legislation appeared, no effort was made to discover a biblical basis for it. The necessary statutes along with a vigorous enforcing mechanism were simply enacted and enforced as if they had always been there and no effort was made to discover a source for them. We therefore suddenly have a revolutionary system of governmental controls carried out for the good of the community. It provided for

the necessities of life and led to major communal legislation in the succeeding centuries.¹⁶

The path taken was highly creative and is worth outlining. At the end of the tractate *Peah*, in chapter eight, the Mishnah was revolutionary; it turned to the urban poor. None of this had anything to do with the previous legislation about “corners” and “gleanings.” The legislation was detailed and therefore enforceable and effective. I will describe it in some detail, so that we may understand how far it went, how intrusive it was, and how expensive for the upper classes.

It began by specifying a minimal support of the poor with the additional statement that it must suffice for two meals. Then follows a set of statements that established a system of dealing with both the itinerant and local poor through two collections, *tamhui* and *kupah*¹⁴ along with the regulations for distribution. *Kupah* took care of the longer term needs of the poor on a weekly basis and so dealt with the local poor. The sums were generally distributed on Friday by three officials and were intended to provide fourteen meals, two per day, for an entire week. Funds were collected by two communal officials from anyone who had been in residence for three months. *Gabbai* or *parnas* were the titles used to designate these collectors; they were leaders of the community. The task was an honor but involved much work and responsibility. The intermingling of funds as well as the exchange of coins, and so on were prohibited. Everything possible was done to raise the system above suspicion.

Tamhui consisted of daily collections, that were immediately distributed and so were largely intended for the itinerant poor; this was a kind of soup kitchen. Collection of it – in kind or moneys –, was mandatory and was gathered by two communal officials and distributed by three; in other words the equivalent of a *bet din*. The distribution was considered more difficult than the collection (B. Shab. 118a). These individuals were given absolute trust and were not

required to present an audit (B.B. 9a). Those who did not contribute were subject to fines, whipping, or the ban.

Other specifics were also included so the itinerant who could not store anything must be given a loaf of bread (defined by the value of a Roman coin), a place to sleep or funds to rent one, and three meals if he stayed over *shabbat*. Anyone who had enough for two meals could not qualify for *tamhui* distributed each evening (for the non-local poor); if he had enough for fourteen meals, he could not collect the next distribution of *kupa*, which took care of the local poor. (Peah 8:1). It was collected on a weekly, monthly, or twice annual basis. Those too proud to receive it could be forced, in a nice way, to take it. Everyone was obligated to give and should also give small amounts when a poor person appeared at the door.¹⁷

The Mishnah tried to deal separately with the special circumstance of the fallen rich who had sunk to the level of poverty. They were not to be shamed, and some effort was made to sustain them at their former level. This demonstrated concern for the psychology of the poor, a thought stressed in the Talmud Jerushalmi and in the later Code literature.

This Mishnah defined poverty as possessing less than 200 *zuzim* in money or property. The discussions indicated that the details of this eligibility test had been well worked out. If these funds were pledged to a creditor, for example, or represented a wife's marriage contract, the man was eligible. The poor person was not compelled to sell his house or his clothing; if he received an expensive gift of pottery after he had been accepted as poor, he remained eligible. He was also not considered poor if he had 50 *zuzim* in working capital. (Peah 8:8 and 9). These sums dealt with a single individual, not a family unit. This legislation had no foundation of any kind in the biblical legal sections although buttressed by strong moral injunctions.

Although this section of the Mishnah began with harvest legislation, it defined poverty and set the broad standards for welfare which were to endure through the centuries. It dealt with itinerants and local poor. This revolutionary system was presented as if it had always existed and became the foundation of all future poor relief. This followed the pattern of so much else in the Mishnah which introduced revolutionary changes. We may see this even in the opening section of *Berakhot* which dealt with the time for reading the *shemah* without any stipulation that the *shemah* had to be read at all, nor any statement of how the service was constructed. We may speculate about dating this revolutionary approach, but the texts provide no hints.

Theological foundations for such legislation were provided in many places in the Babylonian Talmud. Rabbinic commentaries on the biblical passages dealing with the poor abound in the talmudic and midrashic literature.

The rabbis of the talmudic period emphasized the temporary nature of human riches since everything belonged to God, so it should be used in part to help others. Thanks for such beneficence should be shown not only through prayers, but through the human act of *tzedakah*. Human efforts were not discounted, but the transitory nature of life was stressed.

Tzedakah provided a way through which human beings could perfect the world and bring about the Messianic Age. Here was a practical path open to everyone, not dependent upon learning or mysticism. It brought that grand vision within reach.

The talmudic discussion provided further detail, but never question the basic premise, that the market place be governed by communal concerns. They expressed it through controls placed on of the basic necessities, such as food and shelter, which in our time would extend much further.

The medieval Jewish community accepted these controls which included limitations on profits for essential items. In periods of crisis they included profits on necessities. Such items and their distribution were often strictly regulated.¹⁸

Governmental interference in the operation of the market place occurred regularly through the enactments of *takkanot*. These not only regulated prices, but also dealt with distribution. *Takkanot* which protected the community were regularly enacted through the centuries.¹⁹

Now let us return to the issue of "intellectual property." There were no discussions along those lines in the classical Jewish literature as the problems now faced had not appeared. Patent or intellectual property restrictions which govern all areas of medical, agricultural technologies, etc. now play the same role as hoarding in earlier times. They prevent people from receiving care or improving their productivity at a reasonable cost. The civil government is well aware of these problems, but has turned to their solution only very slowly.

We cannot have the slightest doubt that the Jewish community would have included all of these matters and passed legislation restricting the intellectual property rights. The cost to certain individuals would have been high, but communal needs would have prevailed.

Guided by these millennial of concerns expressed in practical ways, we should follow that path. Regulations do not lie within our power, but working for them and restricting the scope of "intellectual property" lies within our power. The long centuries of tradition urge us to move along those lines.

These precedents indicate a broad interest in social welfare and in our time would go far beyond food and shelter. They would certainly

include numerous matters which have been classified as "intellectual property" and in which the broader interests of society must remain fundamental.

Some Concluding Thoughts

The products of the mind have always been important and appreciated, but we now find them at the forefront of economic development and change. What once may only have been interesting are now major engines of commerce. A series of mathematical formulae or a similar abstract statement can be translated into an enormously valuable product. Jews along with everyone else are involved in this process and support it. We may well support some protection, but this does not excuse us from reviewing the detailed implications and concerns of the secular treatments of "intellectual property." They fence off large segments of intellectual life and prohibit access to vast new territories - something to be discussed elsewhere. Of immediate concern are the limitations placed upon new technologies in the field of medicine and agriculture. If the sole concern is economic value, then the biblical emphasis on the value of human life becomes secondary or is not considered at all.

Our discussion of the Jewish tradition shows that the possibility and perhaps the temptation of protecting mental creations may have existed earlier in our long history, but was not taken. The biblical and rabbinic tradition affirm free and open exchange of ideas. Creations of the mind were not understood as physical property. Even as we take contemporary economic developments into account, it cannot be at the price of eliminating our fundamental biblical ideals.

Notes

1. As the our text of the Bible was composed over many centuries, new segments were added to existing books from time to time. Most of this was anonymous as modern biblical scholarship has shown. The authors did not seek protection for

their work, but readership. A larger audience could be gained by assigning authorship to a famous person. This happened regularly throughout the ancient world even among the early Greeks as in the Iliad and Odyssey.

2. *Jubilees, Testament of the Twelve Patriarchs, Books of Adam and Eve, The Assumption of Moses*, and many others. Some have survived only in fragments or are known only by title.

3. The tractate *Berakhot* initiates a discussion of the worship service. Instead of beginning with an outline of the service as we might expect, it starts with a question which presupposes a good bit of earlier development and continues with the presentation of ideas new and old..

4. Discussions about authorship abound.

5. The *Zohar* remains the most widely read book of Jewish mysticism; it is presented as a commentary on the Torah and so was especially attractive as it could be studied during the annual reading cycle.

6. We see a similar phenomenon in 18th century opera in which segments of the plot as well as music were often lifted from other pieces and placed elsewhere without attribution and created a pastiche; some of these pieces became very successful. This practice was widely accepted and not considered wrong.

7 The popularity and wide distribution of the *Shulhan Arukh* rested to a large degree on the invention of movable type. It rapidly became the standard guide to Jewish life throughout the world.

8 A large number of printing houses were set up in Naples, Rome as well as northern Italian cities. Each sought and received a monopoly through their local government or in the case of Hebrew books through the rabbinic authorities of the Jewish community. A good list of printers may be found in the *Jewish Encyclopedia* (New York, 1940). It has been augmented by later monographs.

9. Subscriptions continued to be used much later also. I possess a Mishnah of my great-grandfather with a German translation in Hebrew type published in Berlin in 1832; it contains an interesting list of subscribers.

10. A very long and complete statement of prohibitions appeared in the responsa collection *Torat Emet* (Aaron Sason, Venice 1626) which tried to prohibit printing anywhere without the author's permission. (*Otzar Yisrael*). Some Ezekiel Landau in 1778 set a copyright for 20 years, others for 15 years (1799) and used the *herem* to threaten the purchase or the printer.

11. Other authors or printers sought different routes; one author in 1807 did not seek a *herem*, but appealed to both the religious and non-religious Jews to preserve the copyright of the author - basing himself not only on the talmudic injunction "not to move boundary stones" (*hasagot gevul*) and the common desire for justice. It was a quotation also used by rabbinic authorities. In northern Europe by the mid-eighteenth century, the authorities generally agreed on protection with or without a *herem* for a period of six or ten years so *Sha-agat Aryeh* printed in 1746 (Amsterdam) and 1756 (Frankfurt a.O.).

12. For a discussion of aspects of this controversy see David Nimmer *In the Shadow of the Emperor: The Hatham Sofer's Copyright Rulings* and Nimmer's numerous other writings on copyright. For a series of examples on the negative aspects of copyright, see Michele Boldrin and David K. Levine, *Against Intellectual Monopoly*, Cambridge, 2008; many other sources are cited there.

13. This was discussed and expanded in the Talmud and the later codes, but there not applied to written material (B.M. 60a-b; B.B. 21b; *Shulhan Arukh*, *Hoshen Mishpat* 156.5; *Shulhan Arukh Yore Deah* 245.22.)

14. Austria and Prussia also raised the issue of religious interference with commerce which lay in the jurisdiction of the state, not religious groups. The older system of semi-self-government continued in Russia which had not emancipated its Jewish population. Nahum Rakover dealt with this period well in his *Zhut Hayotzrim bamekorot hayehudiyim*

17. *Kupah* could refer to the general communal treasury and was often designated as *kupah shel tzedakah*. *Tamhui* means basket.

18. The mark-up on them could not exceed 1/6th (*Baba Basra* 90a; *Shulhan Arukh Hoshen Mishpat* 213.20; *Mishneh Torah, Mehirah* 16.1).

19. Louis Finkelstein, *Jewish Self-Government in the Middle Ages*, New York, 1964.