

## **Intellectual Property: Can you steal it if you can't touch it?**

HM 203:1 2007

Rabbi Dr. Barry Leff

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**Question:** Is it stealing to copy or download music, videos, software, or other forms of intellectual property without paying for it?

Many people who would never consider walking into a store and stealing something off the shelf have no qualms whatsoever about copying a friend's CD, DVD or software. Even more prolific is the practice of swapping music files on peer-to-peer ("P2P") networks. Despite famous court cases against Napster and Grokster, and lawsuits brought against individuals by the Recording Industry Association of America (RIAA), millions of people continue to swap music and video files.

The laws of the United States (and nearly all other countries around the world) are clear that such activity is illegal. So why do we need a teshuvah on the subject? Shouldn't it be enough to cite דינא דמלכותא דינא, the law of the land is the law, and leave it at that?

Many people view downloading or sharing music or video files as a form of victimless crime. They argue no one is harmed, so they are not doing anything wrong. Therefore this teshuvah is necessary to address the question beyond secular legality: is it ethically wrong within a halakhic framework to download, swap, or otherwise use music, videos, software, or other forms of intellectual property without paying? In places where secular law may allow—or at least turns a blind eye to—copying intellectual property without the author's permission, would Jewish law still prohibit the practice?

**Response:** This responsum concludes that copying, downloading or otherwise using music, videos, software or other forms of intellectual property such as patents or trademarks without paying for them is theft, not only under secular law, but under halakhah as well, and it is wrong for a Jew to engage in such behavior. The analysis will be divided into the following sections:

- 1) Background and discussion of the problem
- 2) Status of intellectual property under secular law and דינא דמלכותא דינא
- 3) The status of intellectual property under halakhah
- 4) Is it halakhically theft to steal something of small value from a large corporation?
- 5) Guidelines on the use of intellectual property for Jewish institutions
- 6) Conclusion

## **Issue 1. Background and discussion of the problem.**

Copying of software and music is a rampant problem. The Business Software Alliance estimates that worldwide 35% of all software is pirated – representing a cost to the software industry of over \$34 Billion.<sup>1</sup> In 2005, for every \$2 worth of PC software purchased legally, \$1 worth was purchased illegally. While the problem is greater in developing countries, even in America 22% of software in use is in the form of illegal copies.<sup>2</sup> The 35% figure is an improvement over 2004, when it was estimated that 39% of all software was illegally pirated.<sup>3</sup> This figure is actually a substantial improvement over 1994, when the worldwide piracy rate reached 49%.<sup>4</sup> Alas, the improvement is presumably not due to increasing public awareness and honesty; rather the improvement presumably comes from improved countermeasures the industry has taken including substantially improved copy protection and validation technology built into software.

The RIAA estimates that \$4.2 billion in revenue is lost to the music industry because of illegal copying and downloading of music.<sup>5</sup> The Seattle Post-Intelligencer estimates that 7 million households illegally download music.<sup>6</sup>

The Motion Picture Association of America (MPAA) estimates that the motion picture studios lost \$6.1 billion to piracy in 2005.<sup>7</sup> The MPAA listed three different ways their intellectual property was stolen. Of the \$6.1 billion, \$2.4 billion was lost to bootlegging (people making and packaging, on a commercial basis, copies of movies, or using a camcorder to record a movie in a theater and selling copies), \$1.4 billion to illegal personal copying (borrowing someone's legitimate DVD or tape and making a copy) and \$2.3 billion to Internet piracy (uploading and downloading copies of movies and exchanging these via the Internet). The person buying an illegal bootleg DVD may not feel like he is stealing anything – he is just paying \$4 for a DVD on a street corner, instead of the \$19 it would cost at Wal-Mart – but the loss to the movie studio is the same.

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<sup>1</sup> Third Annual BSA and IDC Global Software Piracy Study, May 2006, p. 13. published online at <http://www.bsa.org/globalstudy/upload/2005%20Piracy%20Study%20-%20Official%20Version.pdf>

<sup>2</sup> Ibid.

<sup>3</sup> Business Software Alliance website, <http://www.bsa.org/usa/>. Information was taken from their web site May 3, 2004.

<sup>4</sup> Ibid.

<sup>5</sup> <http://www.riaa.com/issues/piracy/default.asp>

<sup>6</sup> “Downloaders Face the Music as Record Industry Sues,” Seattle Post-Intelligencer, May 13, 2007, available online at [http://seattlepi.nwsourc.com/local/315599\\_music14.html](http://seattlepi.nwsourc.com/local/315599_music14.html) .

<sup>7</sup> Press release, “MPAA Issues Data from Piracy Study,” May 3, 2006, available online at [http://www.mpaa.org/press\\_releases/2006\\_05\\_03lek.pdf](http://www.mpaa.org/press_releases/2006_05_03lek.pdf)

Three industries – software, music, film – and over \$44 billion in revenue lost to various forms of intellectual property theft. It should be acknowledged that these figures may be “generous” as they come from industry sources. It is not surprising that the bulk of the research available on such issues comes from those affected by it. However, these figures do not include further losses to individuals and corporations from other forms of intellectual property theft, such as photocopying copyrighted material, or one company using another company’s proprietary technology without paying the appropriate licensing fee. While there may be room to argue about the exact figure, there is no argument that misappropriation of intellectual property is an enormous problem and cost to the business community.

Why is intellectual property theft so rampant? Perhaps because many people have a hard time seeing it as theft. Many people who would never walk into a store and slip a CD into their pocket and walk out without paying have no problem doing effectively the same thing by making a copy of a friend’s CD or downloading music files. Many people who would never sneak into a movie theater to see a movie for free have no problem doing the same thing via a computer.

When a person steals a physical object, like a CD, from a store he knows there was some cost in producing that object. The theft seems concrete and real. The thief or would-be thief knows that he is taking money out of the pocket of the owner of the store. However when making an illegal copy, nothing is obviously being taken out of anyone’s pocket. There is a big psychological difference between taking something out of someone’s pocket and not paying something to a person who is entitled to the payment. “Lost revenue” somehow does not seem to be the same thing as taking money away from someone. Even though to the person losing the revenue it very well may seem to be the same thing, as he may be counting on that revenue to feed his family.

The highest court of the land (the US Supreme Court) has acknowledged that making illegal copies (copyright infringement) is not exactly the same as theft:

“The infringer invades a statutorily defined province guaranteed to the copyright holder alone. But he does not assume physical control over the copyright; nor does he wholly deprive its owner of its use. While one may colloquially link infringement with some general notion of wrongful appropriation, infringement plainly implicates a more complex set of property interests than does run-of-the-mill theft, conversion, or fraud.”<sup>8</sup>

Another reason for the proliferation of piracy is that it is so easy. Making a photocopy of a copyrighted book is also intellectual property theft – but it’s not quite as common because it’s not so easy—it takes a lot of time at the copy machine to copy a book, and it may cost as much in supplies as it would cost to buy the book. But making a copy of a

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<sup>8</sup> U.S. Supreme Court, *DOWLING v. UNITED STATES*, 473 U.S. 207 (1985), opinion written by Justice Blackmun.

CD or a video is simple, and downloading files is literally “child’s play”—much of the illegal copying and downloading in the music world is done by young people.

Yet another reason that piracy is so common is that the person doing the thievery never encounters the person from whom he is stealing. If a person steals from a store, the owner or employees are right there. When someone downloads a music file, the artist (and record company) who are the victims are nowhere in sight. Not only that, the victim of the crime does not even know that something has been stolen from him.

In addition to the other reasons, some people will rationalize the act of making illegal copies by telling themselves they weren’t going to buy the object anyway – they would instead have simply done without it, so they are not really taking anything away from someone.

Some halakhic sources might seem to justify treating intellectual property lightly. For example in the Shulhan Arukh it says *וכן דבר שאין בו ממש אין קנין מועיל בו* -- that one cannot acquire an object that does not have physical existence.<sup>9</sup> If you can’t acquire it, it seems obvious you can’t buy or sell it. If there is nothing to buy or sell, what is there to steal? This feature of a *דבר שאין בו ממש* would seem to argue in favor of permitting unauthorized usage of intellectual property. As will be demonstrated in the section regarding intellectual property under halakhah, however, there are many arguments that favor considering intellectual property as something that should be protected.

Despite all of the rationalizations that Intellectual Property pirates might use, the costs are real, and the harm to businesses, individuals, and society is very real. The RIAA web site lists several ways in which harm is done through music piracy:<sup>10</sup>

- Consumers lose out because the shortcut savings enjoyed by pirates drive up the costs of legitimate product for everyone. The RIAA also points out that a consumer who buys a pirated tape of CD will have no luck returning the product with (sic) the quality is inferior or the product is defective, as it often is.
- Honest retailers (who back up the products they sell) lose because they can’t compete with the prices offered by illegal vendors. Less business means fewer jobs, jobs often filled by young adults.
- Record companies lose. Eighty-five percent of recordings released don’t even generate enough revenue to cover their costs. Record companies depend heavily on the profitable fifteen percent of recordings to subsidize the less profitable types of music, to cover the costs of developing new artists, and to keep their businesses operational. The thieves often don’t focus on the eighty-five percent; they go straight to the top and steal the gold.

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<sup>9</sup> SA Hoshen Mishpat 203:1

<sup>10</sup> <http://www.riaa.com/issues/piracy/default.asp>

- Finally, and perhaps most importantly, the creative artists lose. Musicians, singers, songwriters and producers don't get the royalties and fees they've earned. Virtually all artists (95%) depend on these fees to make a living. The artists also depend on their reputations, which are damaged by the inferior quality of pirated copies sold to the public. Breaking into the music business is no picnic. Piracy makes it tougher to survive and even tougher to break through. As recording artist "Tool" noted, "Basically, it's about music -- if you didn't create it, why should you exploit it? True fans don't rip off their artists."

These economic losses are the basis for intellectual property laws in the United States: "...government has created intellectual property rights in an effort to give authors and inventors control over the use and distribution of their ideas, thereby encouraging them to invest in the production of new ideas and works of authorship. Thus the economic justification for IP lies not in rewarding creators for their labor but in ensuring that they have appropriate incentives to engage in creative activities."<sup>11</sup> In Continental Europe the justification for intellectual property protection under law more commonly is based on the moral or natural rights of the author to his work.<sup>12</sup> The "moral rights" are that the author is the owner of his output, and for someone to misappropriate that output constitutes theft and the violation of the creator's rights to his own work. And of course the publishers of creative works have an interest in protecting the author's rights to his/her work because they also invest in producing and promoting the author's work, and in fact may have purchased the rights to the work from the author.

Similar arguments to those used by the RIAA apply to pirating movies or software. If piracy is rampant, in addition to lost revenue to the rightful owners of the property, incentives to develop new product offerings go down, and costs to the people who buy legitimate products go up.

Similar issues are found in the business world, relating to misuse of patents or trade secrets. Protection of the intellectual property found in patents has been a major contributor to many of the technological advances our society has made. What drug company would invest hundreds of millions of dollars in developing a new medicine if as soon as they put it on the market other people could sell the exact same thing at a cost of pennies per pill with nothing invested in research? What high tech-company would invest tens of millions of dollars in developing a new product if others could immediately copy all the fruits of their research?

A further reason to condemn casual intellectual property theft such as music or video file swapping is that it contributes to a general weakening of the moral fiber of society. If people see this form of "cheating" as being OK, other forms of cheating are also likely to be taken more lightly. The Talmud forbids us to steal, even from a thief, *בְּתֵר גִּבּוֹא גִבּוֹב*, *וְטַעַמָּא טַעִים* if you steal from a thief, you get a taste for thievery.<sup>13</sup>

<sup>11</sup> Mierges, Menell, Lemley, *Intellectual Property in the New Technological Age*, New York: Aspen Publishers, 2006, p. 13.

<sup>12</sup> *Ibid.*, p. 5.

<sup>13</sup> BT Brachot 5b

Ted Olson (former US Solicitor General) makes a similar argument in an op-ed piece he authored that appeared in the Wall Street Journal: “These systems [that allow swapping music files] also inflict immeasurable damage to our standards and morals. By enabling millions of persons, especially our children, to take property without paying for it, we are sending a potent message that it is acceptable somehow to steal music if it is done in the home with a computer rather than stuffing CDs from a store into a backpack and walking out. That is why many organizations who represent traditional values have joined in the effort to stop this systematic and widespread theft - unified by the belief in the simple and ancient principle: "Thou Shalt Not Steal".”<sup>14</sup>

## **Issue 2. Status of intellectual property under secular law and dina d’malchuta dina**

A complete treatment of intellectual property under secular law is far beyond the scope of this paper. However, for context, some background and a few highlights are necessary.<sup>15</sup>

Protection of intellectual property in the United States goes all the way back to the Constitution. Article 1, Section 8 says that Congress has the power “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

Intellectual property under US law comes in four different forms: patents, trademarks, trade secrets and copyrights. A patent grants the holder of the patent the absolute right for a certain term to determine who, if anyone, can make, use or sell the invention. In order to obtain a patent, the invention must be of a patentable subject matter, have utility, and be novel and non-obvious. These requirements are established through the patent application process.

A trademark is any letter, word, symbol or combination thereof, affixed to goods that identifies the origin of the goods.

Trade secrets are protected under state law, and most states follow the Uniform Trade Secrets Act. For information to qualify as a trade secret, the information must confer upon the owner a competitive advantage, and have been the subject of reasonable security by the owner.

The bulk of this teshuvah is focused on copyrights, since copyrights are the form of IP infringed when people copy software or music without permission.

Copyright protects the literary, dramatic, musical, artistic or computer works of the copyright owner. Copyright allows the owner to prevent others from displaying, reproducing, adapting, performing or publishing the owner's work. The protection

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<sup>14</sup> “Thou Shalt Not Steal,” Ted Olsen, Wall Street Journal, March 23, 2005.

<sup>15</sup> The author gratefully acknowledges the assistance of his wife, Lauri Donahue, visiting professor at the University of Toledo Law School and specialist in intellectual property, for her assistance with this section, especially sharing her notes from her IP Survey class.

extends for 75 years after the death of the author. When copyrightable work is created by an employee, the employer owns the copyright and the protection extends for 75 years from the date of the publication of the work.

Copyright conveys the following rights to the owner:

1. Copying (owner has the exclusive right to make copies)
2. Derivative works (owner has right to prepare derivative works such as translations, adaptations, etc.)
3. Distribution (of original and copies, but only with respect to FIRST SALE of any copy. When someone has purchased a copyrighted work, they have the right to resell what they bought—but not to sell a copy they made.)
4. Performance and display
5. Anti-circumvention (owner may use technical protection such as encryption to prevent copying)
6. Moral rights (relates to visual works like statues, movies, etc., but not to novels or other written works)

According to the US Code, copyright protects original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated. Note “now known or later developed.” A song may have been originally recorded on a vinyl disk, but it is still protected when it is converted to a digital file, even if that technology was completely unknown when the song was composed.<sup>16</sup>

It should be noted that a limited ability to make copies is included under what is known as “fair use.” The definition of “fair use” is somewhat in the eye of the beholder, but making a copy of an excerpt of a work for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, is not an infringement of copyright.<sup>17</sup> The courts have found that recording a broadcast TV program to watch it at a different time is protected under the fair use doctrine.<sup>18</sup> Similarly, a person who bought a CD may copy it to a cassette tape for personal use, but may not copy it in any form to give to a friend. When a person copies a CD to cassette format for personal use, the music is still only being enjoyed by the person who paid for it. If he makes a copy and gives it to a friend, two people are enjoying the music for the price of one – to the detriment of the artist.

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<sup>16</sup> 17 USC sect 102

<sup>17</sup> Intellectual Property in the New Technological Age, op. cit., p. 507.

<sup>18</sup> Ibid., p. 560.

Recognizing that the Internet drastically increases the potential for copyright infringement, in 1998 Congress passed the Digital Millennium Copyright Act (DMCA) of 1998, which among other things prohibits the production and dissemination of technology designed to bypass copyright protections, like encrypted DVDs.

Intellectual property is normally protected through private lawsuits. If someone infringes a patent or distributes copies of music without authorization, the owner of these rights may take them to court and sue them for damages. Egregious violators can also be subject to criminal penalties. The MPAA frequently cooperates with local legal authorities to arrest and imprison those making bootleg DVDs.

Furthermore, the DMCA provides for penalties up to a \$500,000 fine or up to five years imprisonment for a first offense and up to a \$1,000,000 fine or up to 10 years imprisonment for subsequent violations of certain provisions of the act.<sup>19</sup>

The RIAA takes illegal downloads of music very seriously. During a five-month period from September 2003 to February 2004, the RIAA sued 1,445 people. USA Today reported that earlier cases were settled for an average of \$3,000 each.<sup>20</sup> Those “free” music files could be rather costly – and it is often the parents of high school students who pay. A recent article in the Seattle Post-Intelligencer indicates that the music industry is stepping up the rate of enforcement. They cite the following statistics: 20,000 Americans threatened with suits by four major record companies, \$4,924 average paid in settlements by Western Washington residents to record companies, and \$6,100 average fine against those who fail to respond to the record companies.<sup>21</sup>

Not only is violating copyrights oneself prohibited, but one is not allowed to facilitate other people breaking the law. The most famous case of intellectual property theft in recent years involved Napster, a technology that allows users to share music files over the internet. With Napster, users would make the music files on their computer available for others to download in exchange for the same privileges on other people’s computers. As mentioned above, “fair use” would allow making a copy for one’s personal use, but it does not allow making copies for other people. You can lend a CD or an iPod to a friend, as long as you do not keep a copy of the music that you can use at the same time.

The courts ruled in favor of regulating Napster because it was facilitating theft of music in a substantial way, having a large negative impact on the sales of music CDs and revenue to the music industry.<sup>22</sup> Today the original Napster has been shut down, and the name continues as a legitimate web site where people can purchase music files for which the proper royalties are paid.<sup>23</sup>

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<sup>19</sup> THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998, U.S. Copyright Office Summary, found online at <http://www.copyright.gov/legislation/dmca.pdf>

<sup>20</sup> “Download lawsuits scare some, but song trading still popular,” USA Today, Jason Straziuso, Feb. 20, 2004

<sup>21</sup> “Downloaders Face the Music as Record Industry Sues,” op. cit.

<sup>22</sup> See web site of the Recording Industry Association of America, [http://www.riaa.com/news/filings/napster\\_faq.asp](http://www.riaa.com/news/filings/napster_faq.asp)

<sup>23</sup> See web site of Napster, Inc., <http://www.napster.com>

Intellectually property is clearly protected by secular law. But does halakhah recognize those laws? There is a principle, דינא דמלכותא דינא (*dina d'malchuta dina*), “the law of the land is the law,” which says that we are halakhically obligated to follow the laws of the land we live in.<sup>24</sup> Does that principle apply to laws regarding intellectual property?

To start with, does דינא דמלכותא דינא apply to non-Jewish kings (governments)? There is general agreement that non-Jewish kings are treated the same as Jewish kings; as stated in the Shulhan Arukh, “one who flees from paying a tax is a transgressor, בין שהיה מלך ישראל, whether the king is Jewish or an idol worshipper.”<sup>25</sup> Nowadays, of course, we do not divide the world into Jews and idol worshippers, but the principle remains – one may not flee to avoid paying taxes to the secular authorities.

Everyone agrees there are certain limits to the concept of דינא דמלכותא דינא; the question is where those limits are drawn. There is general agreement that if a secular law contradicts the Torah, the halakhah follows Torah law. Shach says that even those poskim who hold that דינא דמלכותא דינא applies to all sorts of laws agree אבל לדון בדיני הגוים בכל דבר נגד “but to apply the laws of the nations to anything that is contrary to the Torah, God forbid, would most certainly not be done among the Jews.”<sup>26</sup> As Rabbi Ovadiah Yosef put it, when there is a law based on their teachings that contradicts our teachings, “the law does not fall under this rule (דינא דמלכותא דינא), for if it did all of the laws of Israel would be nullified, God forbid.”<sup>27</sup>

There are those who maintain that דינא דמלכותא דינא only applies to the king’s ability to levy taxes. According to the Rosh, the reason for the principle of “the law of the land is the law” is “the reason his (the king’s) law is the law is because the land belongs to him.”<sup>28</sup> Beit Yosef brings an argument that דינא דמלכותא דינא הני מילי במה שהוא תועלת המלך בענייני המסים שלו ומה שהוא מחקיו אבל בדברים שבין אדם לחבירו אין דינא דמלכותא דינא “the law of the land is the law regarding things that benefit the king, matters of his taxes and his laws, but things that are between people, his law is not the law (the king’s law is not halakhically binding).” Even following the Rosh and Beit Yosef, one could argue that since the king enjoys tax revenues from sales of intellectual property they are laws that directly benefit the king, and hence are protected under דינא דמלכותא דינא.

Others disagree on limiting דינא דמלכותא דינא to taxes and other things that directly benefit the king. Ramban, quoting Rashbam, says דינא דמלכותא דינא כל מסין וארנוניות ומנהגן של משפטי המלכים שרגילי להנהיגן במלכותם דינא הוא. שכל בני המלכות מקבלין עליהם ברצונם חוקי המלך “the law of the land is the law, all levies, property taxes, and laws that are

<sup>24</sup> Bavli Gittin 10b, Bavli Nedarim 28a. See also SA Hoshen Mishpat 369:6

<sup>25</sup> Shulhan Arukh, Hoshen Mishpat 369:1

<sup>26</sup> Shach, Hoshen Mishpat 73:39

<sup>27</sup> Yabia Omer part 5, Hoshen Mishpat, 1.

<sup>28</sup> Rosh to Nedarim, 3:11 (daf 28a), d.h. ולמוכסין

judgments of the king that is customary (for kings) to impose on their kingdoms are the law, for all people in the kingdom accept the laws and statutes of the king willingly.”<sup>29</sup>

In an article on Jewish Law and Copyright that appeared in the Journal of Halakhah and Contemporary Society, Rabbi Israel Schneider cites several sources that specifically apply דינא דמלכותא דינא to copyright law. He cites *Beit Yitzchok*, “Even if we are to assume,” he writes, “that Torah law doesn't explicitly award exclusive proprietary rights to an author, it nevertheless enjoins us to recognize and obey ‘the law of the land.’” Consequently, all authorship rights provided to an author under civil law are recognized by Torah law as valid and binding.”<sup>30</sup> He also cites Rabbi Yitzchok Schmelkes and Rabbi Ezra Batzri as ruling that דינא דמלכותא דינא applies to copyright laws.

Rabbi Ovadiah Yosef rules similarly in a teshuvah written regarding whether the heirs of a Torah scholar could stop other people from making copies of their father's work. After bringing a few other arguments, Rabbi Yosef rules ומ"מ הואיל ומצד דינא דמלכותא אסור , במדינות אלו להדפיס בלי רשות המחבר , “in any event, since in these countries the law of the land forbids copying without the permission of the author...we are obligated to strengthen the law of the land, and all the more so in this case where a great rabbi was asked and replied that it is forbidden (to copy without permission) according to Torah law.”<sup>31</sup>

Since the protection of intellectual property is just and fair and benefits society, we extend the precedent and include not only copyright law but all forms of intellectual property under the protection of דינא דמלכותא דינא.

### **Issue 3. The status of intellectual property under halakhah**

As mentioned above, some halakhic sources might seem to justify treating intellectual property lightly. For example in the Shulhan Arukh it says וכן דבר שאין בו ממש אין קנין that one cannot acquire an object that does not have physical existence.<sup>32</sup> If you cannot acquire it, it seems obvious you cannot buy or sell it. If there is nothing to buy or sell, what is there to steal? This feature of a דבר שאין בו ממש would seem to argue in favor of permitting unauthorized usage of intellectual property.

Ideas in general seem to traditionally be treated as not subject to formal protection. The Tosefta brings a teaching which says that one who follows a teacher around and repeats his teachings (presumably without attribution) is called a thief; not that he actually is a thief, but he is called a thief for the practice is immoral.<sup>33</sup> A better known example is a well known teaching in the Talmud that whoever reports a saying in the name of its

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<sup>29</sup> Responsa of Ramban, siman 46, d.h. "תשובה מתוך"

<sup>30</sup> *Responsa, Yoreh Deah*, Volume 2, no. 75, cited in “Jewish Law and Copyright,” Israel Schneider, Journal of Halakhah and Contemporary Society - No. XXI, Spring, 1991, Pesach 5751.

<sup>31</sup> Yabia Omer, Part 7, Hoshen Mishpat 9, ד"ה שלום וברכה

<sup>32</sup> SA Hoshen Mishpat 203:1

<sup>33</sup> Tosefta Bava Kama 6:3.

originator brings redemption to the world—a teaching based on Esther reporting something that Mordecai said in his name.<sup>34</sup> Rabbi Martin Cohen points out “The underlying legal principle, however, is often missed by those who quote the passage: the point is not that it is specifically forbidden by the law of Torah to say something one has heard without giving the remark its correct attribution, but precisely that no such prohibition exists and that, therefore, those who scruple to do so anyway are acting *lifnim mishurat hadin* (that is, on principle and with exceptional devotion to the spirit of the law.)”<sup>35</sup>

Nevertheless, beyond דינא דמלכותא דינא there are several principles under halakhah that argue in favor of protecting intellectual property. First, relating directly to the דבר שאין בו ממש argument, the Aruch HaShulchan says מדינה דמלכותא או ממנהג הקבוע במדינה מועיל גם קנין, לדבר שאין בו ממש, in countries where it is the law or an established custom, one can acquire intangibles.<sup>36</sup> This is in keeping with the concept of הכלל כמנהג המדינה, everything goes according to the customs of the land.<sup>37</sup> It is the universal custom in America to engage in financial transactions with intangibles like patents and trademarks. If you can conduct such transactions and acquire intangible goods, it would also logically follow that you can be liable for theft for misappropriation of such intangible goods.

There is a fairly substantial body of responsa literature dealing with the issues of copyright, going back to the early days of the printing press. It is interesting to note that when books were written by hand, an expensive and laborious process, we can assume “copyright infringement” was not much of a problem because neither secular law or halakhah dealt directly with the problem. A change in technology – the development of the printing press – raised all sorts of new issues that needed to be addressed by the law. Similarly, in our time, a new technology – in our case the Internet – raises new issues that need to be addressed by the law. Technological innovation in general, however—as represented by patents—has not been much explored in halakhic literature. Presumably this is because there are many more rabbis who are authors than who are inventors! Many of the principles that apply to copyright will also apply to other forms of intellectual property such as patents and trademarks.

Two very helpful sources in summarizing the status of copyright under halakhah are Rabbi Israel Schneider's article "Jewish Law and Copyright," referenced above, and an article by Rabbi Eliezar Kwass, "Four Halakhic Models for Copyright Protection," published on the Darche Noam website.<sup>38</sup>

In addition to דינא דמלכותא דינא, there are three major justifications for copyright protection we find in the sources:

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<sup>34</sup> Bavli Megilah 15a

<sup>35</sup> From the forthcoming volume, *Living the Jewish Life*, eds., Martin S. Cohen and Michael Katz (New York: Aviv Press, [2008]).

<sup>36</sup> Arukh Hashulhan 212:3

<sup>37</sup> Bavli Bava Metzia 83a

<sup>38</sup> “Four Halakhic Models for Copyright Protection,” Eliezer Kwass, published online at <http://www.darchenoam.org/ethics/copyright/4mod.htm> .

1. השכמות (Approbations)
2. השגת גבול (Unfair competition)
3. שיעור בקנין (Limited sale)

Lastly, we will consider whether the protection afforded to IP is included under the rubric of protection from theft.

### **השכמות (Approbations)**

Approbations are a way that rabbis created an early form of copyright protection for authors/publishers of works of Torah. Going back to the 17<sup>th</sup> century, when respected rabbis would write a letter of introduction for a book, praising the virtues of the book and the author, they would often add a statement prohibiting the reprinting of the book for a specified period of time in order to allow the publishers time to print and sell enough copies of the book to recoup their costs and make a profit. The Chatam Sofer speculates that this practice goes back to the 16<sup>th</sup> century when two competing publishers were offering Rambam's Mishneh Torah.<sup>39</sup>

Originally, the approbations were put in place to protect the publisher, not the author. Hundreds of years ago typesetting a book was a very labor-intensive process. The Chatam Sofer points out that if publishers were not assured of a monopoly in the publication for fixed period of time so they would be able to recoup their costs, they would not want to publish works of Torah—and the community would be spiritually impoverished: ואי לא נסגור הדלת בעד מדפיסי אחר' א"כ מי פתי יכנוס עצמו בספק הפסד כמה אלפים ותתבטל מלאכת הדפוס ה"ו ותפוג תורה ע"כ לתקנת כל ישראל ולהרים קרן התורה הנהיגו קדמונינו "If we were not to close the door in the face of other publishers [i.e., prohibit competition], which fool would [undertake the publication of Judaica and] risk a heavy financial loss [lit., a loss of several thousands]? The publication [of Jewish works] will cease, God forbid, and Torah [study] will be weakened. Therefore, for the benefit of the Jewish people and for the sake of the exaltation of the Torah, our early sages have enacted..."<sup>40</sup>

The communal benefit argument advanced by R. Sofer is very similar to the economic justification model, cited earlier, which is the basis for IP protection in the United States: protecting creative people is good for society.

Most early approbations warned that a person making copies would be placed under the ban. An interesting case where a rabbi not only invoked a ban, but also invoked a curse is found in Jewish-Italian composer Salamone Rossi's 1623 publication of a collection of sheet music:

“We have agreed to the reasonable and proper request of the worthy and honored Master Salamone Rossi of Mantua . . . who has become by his painstaking labors the first man to print Hebrew music. He has laid out a large disbursement which has not been provided for, and it is not proper that anyone should harm him by

<sup>39</sup> Chatam Sofer, part 5, 41.

<sup>40</sup> Chatam Sofer, part 6, 57. Translation by Israel Schneider, op.cit.

reprinting similar copies or purchasing them from a source other than himself. Therefore . . . we the undersigned decree by the authority of the angels and the word of the holy ones, invoking the curse of the serpent's bite, that no Israelite, wherever he may be, may print the music contained in this work in any manner, in whole or in part, without the permission of the abovementioned author. . . . Let every Israelite hearken and stand in fear of being entrapped by this ban and curse. And those who hearken will dwell in confidence and ease, abiding in blessing under the shelter of the Almighty. Amen.”<sup>41</sup>

Rabbi Mordecai Benet argues against the rabbinical bans on publication, believing that restricting competition drives up the prices and therefore limits Torah study. This cost is also noted in secular sources: “Granting authors and inventors the right to exclude others from using their ideas necessarily limits the diffusion of those ideas and so prevents many people from benefiting from them.”<sup>42</sup> This is why there are time limits put on intellectual property protection in American law, to balance the costs and benefits.

Rabbi Benet also criticizes the copying bans on procedural grounds in that bans must be pronounced orally and only take effect within a rabbi’s particular community. The Chatam Sofer rejects Rabbi Benet’s arguments—and it seems that history supports him. Between 1499 and 1850, 3,662 letters of approbation were written and attached to books or other religious works.<sup>43</sup>

A very brief survey of the author’s library revealed that in recently published works, letters of approbation sing the praises of the work without appending a ban. Even religious books published in Israel nowadays seem to rely on דינא דמלכותא דינא, for right under the copyright symbol they usually have a statement like כל הזכויות ובכללן זכות צילום : והעתקה שמורת : “all rights, including the right to photocopy or duplicate are reserved.” It is interesting to note that this statement often even appears on traditional works written centuries ago that are in the public domain. The publishers claim that what is protected is not the material per se, but rather their new typesetting, and sometimes notes that have been added. Generally speaking, US copyright law would not recognize new typesetting as being protected, although new notes would be grounds for protection.

### **השגת גבול (Unfair competition)**

השגת גבול literally means “moving a boundary,” and the concept is rooted in a prohibition found in the Torah: “לא תסיג גבול רעך”<sup>44</sup> “do not move your neighbor’s boundary.” In other words, don’t steal his land by moving the landmarks used to delineate the boundaries of his field.

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<sup>41</sup> Salamone Rossi, *Hashirim Asher Lish'lomo*, ed. by Fritz Rikko (New York: Jewish Theological Seminary of America, 1967-73), vol. 3, p. 28, quoted in “The Choral Music of Salamone Rossi,” Joshua Jacobson, *American Choral Review* XXX (4 1988).

<sup>42</sup> *Intellectual Property in the New Technological Age*, op. cit.

<sup>43</sup> “Jewish Law and Copyright,” op. cit.

<sup>44</sup> Deuteronomy 19:14

The Talmud extends this concept to tradespeople and competition. In the Babylonian Talmud, Bava Batra 21b we find the following teaching: אמר רב הונא: האי בר מבואה דאוקי ריחיא, ואתא בר מבואה חבריה וקמוקי גביה, דינא הוא דמעכב עליוהי, דא"ל: קא פסקת ליה לחיותי. "If a resident of a cul de sac sets up a mill to grind grain for others, and then a fellow resident of the cul de sac comes and sets up a mill in the same street, the law is the first one can stop the second one, for he can say to him "you are cutting off my livelihood!"<sup>45</sup> The same discussion in the Talmud brings another example showing that fishermen have to respect each others' fishing areas, even though the fish themselves are הפקר, ownerless:

דג מרהיקים מצודת הדג מן הדג כמלא ריצת הדג "Fishing nets must be kept away from [the hiding-place of] a fish [which has been spotted by another fisherman] the full length of the fish's swim."<sup>46</sup>

The rabbis did, however, recognize that competition can be a good thing, bringing lower prices, and other people—competitors—are entitled to make a living as well. Several examples of limits to the ability to argue "you are interfering with my livelihood" are stated as well, for example: הנהו דיקולאי דאייתו דיקלאי לבבל, אתו בני מתא קא מעכבי עלויהו, אתו לקמיה דרבינא, אמר להו: מעלמא אתו ולעלמא ליזבנו. והני מילי ביומא דשוקא. אבל בלא יומא דשוקא לא. "Certain basket-sellers brought baskets to Babylon [to sell]. The townspeople came and stopped them (because they did not want the competition), so they (the basket sellers) appealed to Rabina. He said, "They have come from outside and they can sell to the people from outside." This restriction, however, applied only to the market day, but not to other days; and even on the market day only for selling in the market, but not for going round to the houses."

The Hatam Sofer specifically applies the השגת גבול to copyrights. After a lengthy discussion regarding protecting the rights of printers, he turns to the rights of authors: וא"כ בשארי מדפיסי' כ"ש במי שהוציא דבר חדש... וכגון החכם השלם מו"ה וואלף היידנהיימר... כילה כמה זמנים בהגהת הפיוטים ולתרגום בלשון אשכנז... ולמה יהנו במה שהמציא הוא וה"ל כציד דגים אליבא דר"מ אביו של ר"ת "If the case is so [that limited protection is granted] for printers of other texts [already in the public domain], so much more so for one who created a new entity... for example, the consummate scholar, Rabbi Wolf Heidenheim, who spent countless hours in the editing and translating of the piyutim... and why should others profit from his creativity? It [our case] can be compared to the case of the fisherman who by means of his actions caused the gathering of the fish."<sup>47</sup>

R. Sofer is relying on a teaching brought in Tosafot that the reason the fisherman are afforded protection is because they bait the area with dead fish, drawing the fish to the area, so they deserve protection lest others profit from their labors: שכן דרך הדייגים להשים: "for thus is the way of fishermen to put dead fish in their traps and the fish gather there."<sup>48</sup>

<sup>45</sup> BT, Bava Batra 21b

<sup>46</sup> Ibid.

<sup>47</sup> Hatam Sofer, Part 5, 79, translation by R. Israel Schneider, op.cit.

<sup>48</sup> Tosafot, Kiddushin 59a, d.h. עני המהפך

We see in this series of teachings an interesting development from the commandment “do not move your neighbor’s boundary marker” to a prohibition on unfair competition as in the case of the placing of the fishermen’s nets, to a protection for the fruits of one’s labor, as R. Sofer interprets the justification given in Tosafot.

This is similar to one of the arguments advanced by the RIAA, cited earlier: “Finally, and perhaps most importantly, the creative artists lose [from illegal copying of their music]. Musicians, singers, songwriters and producers don’t get the royalties and fees they’ve earned. Virtually all artists (95%) depend on these fees to make a living.”

The same arguments relating to השגת גבול apply equally to other forms of intellectual property. In one of the rare teshuvot that specifically reference patents, R. Ovadiah Yosef says כשאיש מדע מחדש וממציא איזה פטנט במקצוע מסויים, אין שום אדם רשאי להפיצו בלי רשות משום השגת גבול “when a person invents new technology and patents a particular subject, no one is permitted to distribute it without permission of the inventor, because of the השגת גבול.”<sup>49</sup>

### שיעור בקנין (Limited sale)

Rabbi Nechamia Zalman Golberg suggests a novel theory for protecting the rights of an author in his paper “Copying a Cassette Without the Owner’s Permission,”<sup>50</sup> Rabbi Goldberg argues that a seller can put limits (a שיעור) when he sells an item to a purchaser – in other words, he can retain certain rights for himself. He brings support for this argument from the Talmud, where in a debate over a retroactive sale and whether the purchaser should be entitled to shearings and offspring of the animal from the time the sale became effective to the present, R. Zera says נעשה כאומר לו חוץ מגיזותיה וולדותיה “consider it like a case where [the seller] said “Except its shearings and offsprings.”<sup>51</sup> No one argues with R. Zera’s proposition that the sale could be limited in this way.

A similar argument is used elsewhere in Bava Metziah: רבי שמעון בן אלעזר אומר משום רבי מאיר: הנותן דינר לעני ליקח לו חלוק, לא יקח בו חלוק, מפני שמעביר על דעתו של בעל הבית. - ודלמא שאני התם, דאתו למחשדיה, דאמרי אינשי: אמר פלניא זבנינא ליה לבושא לפלוני עניא, ולא זבן ליה, אי נמי זבנינא ליה גלימא ולא זבן ליה. - אם כן ליתני מפני החשד, מאי מפני שמעביר על דעתו של בעל הבית - שמע מינה משום דשני הוא וכל המעביר על דעת של בעל הבית נקרא גזלן “R. Simeon b. Eleazar said on R. Meir's authority: If one gives a denar to a poor man to buy a shirt, he may not buy a cloak therewith; to buy a cloak, he must not buy a shirt, because he disregards the donor's desire. But perhaps there it is different, because he may fall under suspicion. For people may say, So-and so promised to buy a shirt for that poor man, and has not bought it; or, so-and-so promised to buy a cloak for that poor man, and has not bought it! If so, it should state, because he may be suspected: why state because

<sup>49</sup> Yabia Omer, op.cit., part 7, Hoshen Mishpat 9, d.h. שלום וברכה

<sup>50</sup> “Copying a Cassette Without the Owner’s Permission,” Zalman Nechemia Goldberg, Techumin 6, pp. 185-207, cited in “Jewish Law and Copyright,” op.cit., and “Four Halakhic Models for Copyright Protection,” op.cit.

<sup>51</sup> BT Bava Metziah 34a

he disregards the donor's desire? This proves that it is [essentially] because he makes a change, **and he who disregards the owner's desire is called a robber.**"<sup>52</sup>

Rabbi Goldberg's reasoning is that by calling the poor man a thief, the implication is he took something that was owned by the giver. He reasons that the owner did not give the whole coin to the poor man: rather he held back for himself the right to determine what the coin would be spent on. He argues that similarly, when a publisher of a book or the producer of a cassette of software sells his product, he can expressly reserve the right to copy and not grant it to the purchaser.

Rabbi Moshe Phillip rejects Rabbi Goldberg's reasoning on the basis that there are numerous Acharonim who maintain that one can only retain tangible rights to the item sold.<sup>53</sup> We reject Rabbi Phillip's approach and prefer Rabbi Goldberg's because the idea of retaining tangible rights is inapplicable from the outset for intangibles.

The concept of שיוער בקנין is similar to the idea in secular law that the sale of copyrighted products includes some rights (fair use) but excludes other rights (making copies for sale).

### **Misuse of IP as theft**

Even if one concedes that intellectual property is protected under halakhah, one might argue whether its misappropriation constitutes theft. Since there is nothing that has been "taken" that the owner will miss in this case, even if one were to argue that it is not stealing, the situation could be seen as analogous to borrowing someone's property without permission, which is also forbidden. The losses from making unauthorized copies, or using a patent without permission stem not from the fact that the music or technology itself is missing (it is not), but rather from the fact that someone borrowed it without permission. According to the Shulhan Arukh, שלא מדעת הבעלים, אפילו הלוקח בשאלה, even one who takes something as a borrower, if it is without the knowledge of the owners, is called a thief.<sup>54</sup>

R. Moshe Feinstein also states that someone making copies of cassette tapes of Torah lectures without permission is stealing: שאוסר לעשות מטייפ שלו עוד טייפס ודאי אסור כי הוא ענין שוה כסף ועשה הטייפ להרויח מזה שאחרים שירצו יצטרכו לשלם לו...לעשות טייפ אחר מטייפ אחד שלא ברשות הוא איסור גזל. "It is forbidden to make from one's tape additional tapes, and it is certainly forbidden because the subject [the tape] has monetary value, and [the author] made the tape to profit from it, that if others want it, they have to pay him...to make another tape from one tape without permission is forbidden as theft."<sup>55</sup>

### **Summary**

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<sup>52</sup> BT Bava Metzia 78b

<sup>53</sup> Response to "Copying a Cassette Without the Owner's Permission," op.cit., Moshe Phillip.

<sup>54</sup> SA Hoshen Mishpat 359:5; see also Bava Batra 88a and Mishneh Torah Hilchot Gezala 3:15

<sup>55</sup> Iggerot Moshe, OH, Vol. 4, 40:19.

From the preceding sources, it is clear that virtually since the invention of the printing press, the rabbis have been concerned with the protection of intellectual property, both for the benefit of society (the fostering of the publication of works of Torah) and for the financial protection of authors and publishers. Accordingly, we find that misappropriating intellectual property – whether by copying books, tapes, CDs or other media, or by downloading and sharing music files, or by using someone else’s intellectual property, such as patents and trademarks without permission – is forbidden not only under secular law, which is also halakhically binding on us as דינא דמלכותא דינא, but as a matter of halakhah itself under the above cited principles. Misappropriation of intellectual property is halakhically found to be theft.

#### **Issue Four. Is it halakhically theft to steal something of small value from a large corporation?**

There are many cases where intellectual property is owned by a corporation, either because it purchased the rights from an individual, or because the copyrighted work was developed as a “work for hire” on behalf of the corporation. Some might question whether it is theft to steal from a corporation, as corporations were not recognized in traditional halakhic literature. If we do not recognize the corporation as a separate entity, any losses would simply be viewed as “passed through” to the individual owners. A corporation may have many thousands of owners; if the loss to each individual is less than a perutah (today generally understood to be the equivalent of a dime or a quarter) some might claim that there is no theft, but this is not the case. The Shulhan Arukh clearly states דיין תורה, אפילו כל שהוא, אסור לגנוב, “it is forbidden to steal, even the least amount, according to Torah law.”<sup>56</sup> One might be tempted to argue that if someone said “I’m just trying it, I’ll pay later” it is permissible to use an unauthorized copy; the Shulhan Arukh responds to this with ואסור לגנוב אפילו דרך שחוק ואפילו על מנת להחזיר או כדי לשלם תשלומי כפל או כדי לצער, הכל אסור, כדי שלא ירגיל עצמו בכך “it is forbidden to steal even in a joking manner, and even on condition that the object will be returned, or in order to pay the fine of double payment, or in order to aggravate someone, all of these are forbidden, in order that a person will not become accustomed to these behaviors.”<sup>57</sup>

Rabbi Yosef Shalom Elyashiv (a contemporary leading halakhic authority of the haredi community), without giving further references, says that it is obvious that stealing from a corporation is theft.<sup>58</sup> Since we have established that stealing in any amount is forbidden, this responsum does not need to address the question of the status of the corporation under halakhah. Certainly under secular law, theft from a corporation is understood to be theft, and the general principle of דינא דמלכותא דינא, the law of the land is the law, discussed above, would also apply.

## **5. Guidelines on the usage of intellectual property in Jewish institutions**

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<sup>56</sup> SA, Hoshen Mishpat 348:1

<sup>57</sup> SA, Hoshen Mishpat 348:1

<sup>58</sup> Sefer Mamon Yisrael, p. 3.

Jewish institutions such as synagogues, day schools, and Jewish-oriented non-profit organizations all encounter issues surrounding the use and protection of intellectual property on a daily basis. Since many Jewish institutions have an educational component to their work, there are many issues that arise regarding making photocopies of printed materials for classes, showing movies or clips from movies, playing recorded music, and using software on office or school computers. There are a lot of misconceptions regarding what is permissible and what is not permissible for non-profit organizations. This section does not give specific legal advice regarding particular situations – rather it is intended to highlight issues that institutions should be aware of. It is incumbent on the Jewish community that our communal institutions should have the highest standards of ethical and legal conduct so as to be a good role model and example for people with whom we interact.

This section provides some guidelines on what constitutes “fair use.” Books, music, movies, software and other forms of intellectual property are all sold with a bundle of rights known as “fair use” that defines what the buyer may and may not do with that intellectual property. This section will discuss the following types of intellectual property:

- Computer software
- Books and other printed materials
- Movies / videos
- Music

While this section is written from the perspective of US law, copyright protection is relatively standard worldwide due to international treaties, especially the Berne Convention. More than 100 countries have signed the Berne Convention, which says that each nation must provide copyright protection to authors who are nationals of any other country that has signed the convention.<sup>59</sup>

### **Computer software**

Computer software is generally sold with what in the trade is known as a “shrink-wrap license.”<sup>60</sup> By opening the packaging on a piece of software, the purchaser consents to the conditions under which the software is sold. Nowadays, a lot of software is sold over the internet, through downloading the program. Prior to downloading a program, the user generally has to click that he agrees to the conditions of sale. This is usually a large section of legalistic text that many people skip over and simply click on “accept.” It is advisable to actually take the time to read the agreement, because the rights being conveyed often vary from vendor to vendor and from program to program. Some programs give you a license to install the software on one computer for whoever uses that

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<sup>59</sup> The full text of the Berne Convention can be read at the World Intellectual Property Organization (WIPO) website: <http://www.wipo.int/treaties/en/ip/berne/>.

<sup>60</sup> Lex2k, a website by Professor John Burke, provides a good description of some of the issues surrounding “shrink wrap” and “click wrap” licenses: <http://www.lex2k.org/shrinkwrap/introduction.html>.

computer; others license a user for as many computers as he uses; others specify a particular number of computers, with the idea being one user can load the program on both a desktop computer and a laptop. Whatever restrictions the vendor puts into the license, the user is obligated to follow, both under secular law, and under halakhah following the principle of שיעור בקנין.

Complying with the terms of the license also applies in the case of “freeware,” “shareware,” and trial-period downloads. If an author freely distributes his software, he can still maintain some restrictions on other people’s ability to use the software for commercial purposes or in other ways. Sometimes software is provided with something like a “30 day free trial.” While repeatedly downloading the trial period software by figuring out ways around any restrictions on such actions might be legal under secular law, it would not be halachically appropriate as such behavior clearly circumvents the intentions of the author, and has the “taste” of a false matter. In the case of “shareware,” where the author requests a donation for the use of the software, it is proper, but not mandatory, to make a donation.

It should be noted that if the terms of the license are not printed on the outside of the package one could argue that שיעור בקנין would not apply. In a discussion regarding a situation involving a seller applying conditions to a sale, the Rosh rules מיהו, בגילוי דעת, כיון דמעשיו מוכיחים על מחשבתו, ... אבל היכא דליכא אומדנא דמוכח, וגם אין סגי, ולא בעינן תנאי (כפול), כיון דמעשיו מוכיחים על מחשבתו, ... אבל היכא דליכא אומדנא דמוכח, וגם אין סגי, ולא בעינן תנאי (כפול). “Nonetheless, if his intent is sufficiently clear no explicit condition is required because his actions prove his thoughts...but here his intentions are not clear, and there is no proof from his actions, thus an explicit condition is required.”<sup>61</sup> Accordingly, a shrink wrap license is, according to the Rosh, in a halakhic grey area where one could argue the intent of the seller is not clear. On the other hand, one could argue that since virtually all software sold today is sold with a shrink-wrap license, the intentions of the seller are clear.

Generally speaking, making a backup copy of the software in case the original disk is damaged is considered permissible under fair use; however, many software manufacturers have built in copy protection to prevent unauthorized duplication which can make it very difficult if not impossible to make copies even for this legitimate purpose. Some of the people / companies that make software that circumvents such copy protection claim that their software is being provided to allow people to make such legal copies. The Digital Millenium Copyright Act (DMCA)<sup>62</sup> makes it illegal to circumvent copy restrictions, even if it is done for a purpose that would in principle be permissible as fair use.

A synagogue or other non-profit organization is subject to the same restrictions as for profit enterprises. There are no blanket exemptions from the laws of making copies of software for schools or synagogues.

## **Books and other printed materials**

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<sup>61</sup> Responsa of the Rosh, 81:1, d.h. שאלה ראובן

<sup>62</sup> A comprehensive summary of the DMCA can be found at <http://www.copyright.gov/legislation/dmca.pdf>

A comprehensive treatment of fair use of printed materials would be very involved, confusing, and far beyond the scope of this paper. This section presents a few broad guidelines.

Only works that are under copyright are protected. There is a great deal of printed material that is in the public domain and not protected by copyright. The laws for how long copyright protection extends has changed; things published now are protected for the life of the author plus 70 years. In the past, copyright protection was shorter. The presence or absence of a copyright symbol or copyright notice does not have any real significance; copyright protection is assumed unless an author specifically frees the material to the public. For an author, the copyright notice can be significant because it can make it easier to enforce his rights in the event of a dispute. Works that lack originality – such as the white pages of the phone book, or an unaltered copy of a public domain work – are not protected by copyright, and may be copied and distributed freely, without restriction.

“Fair Use” permits limited copying of protected works. The following summary is from the Stanford University website:<sup>63</sup>

“Often, it's difficult to know whether a court will consider a proposed use to be fair. The fair use statute requires the courts to consider the following questions in deciding this issue:

- Is it a competitive use? (In other words, if the use potentially affects the sales of the copied material, it's usually not fair.)
- How much material was taken compared to the entire work of which the material was a part? (The more someone takes, the less likely it is that the use is fair.)
- How was the material used? Is it a transformative use? (If the material was used to help create something new it is more likely to be considered a fair use than if it is merely copied verbatim into another work. Criticism, comment, news reporting, research, scholarship and non-profit educational uses are most likely to be judged fair uses. Uses motivated primarily by a desire for a commercial gain are less likely to be fair use).

As a general rule, if you are using a small portion of somebody else's work in a non-competitive way and the purpose for your use is to benefit the public, you're on pretty safe ground. On the other hand, if you take large portions of someone else's expression for your own purely commercial reasons, the rule usually won't apply.”

From those guidelines, we can see that judgment is required in determining how much material one can legitimately copy. To copy an entire book, even if done one chapter at a time to give to a class, even without charge, would not be allowed as it would potentially affect the sales of the copied material: the students should be asked to buy a copy of the

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<sup>63</sup> [http://fairuse.stanford.edu/Copyright\\_and\\_Fair\\_Use\\_Overview/chapter0/0-b.html#1](http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter0/0-b.html#1)

book. To copy a portion of a chapter of a book for a one-time non-profit use in a class would generally be considered fair use and permissible. To make copies of an article in a magazine for a class would be permissible; to copy a whole magazine, or most of a magazine, would not.

There are cases where a publisher attempts to place a restriction on copying that seems to go beyond what is allowed by law. For example, the Schottenstein edition of the Talmud published by ArtScroll makes a statement that even the Hebrew/Aramaic side of the page – which is definitely material that is in the public domain – is protected by their copyright because of the effort they went through in re-typesetting the book instead of using a photo-lithograph of an existing version.<sup>64</sup> Lawyers might argue whether that change is sufficient to afford the work copy protection. However, under the halakhic principle of שיעור בקנין, ArtScroll would be in their rights to limit the sale with those conditions, and whether or not their copyright claim was enforceable under secular law, it should be honored as a matter of halakhah.

There are some additional fair use rights granted to libraries, primarily to provide for copies made for preservation and security.<sup>65</sup>

### **Movies / videos**

Many people never think about whether they need a special license to show a video in the synagogue; they assume as long as no admission is charged, it is permissible. This is not correct. If you read the fine print on a DVD box you will generally see the following statement or something very similar:

“WARNING: For private home use only. Federal law provides severe civil and criminal penalties for the unauthorized reproduction, distribution, or exhibition of copyrighted motion pictures and video formats.”

Note that the statement reads “private home use only.” And that is exactly what it means. You can invite a dozen friends over to watch a copy of “Raiders of the Lost Ark” that you rented at the local video store at your home. You cannot, however, show it to five people at the synagogue without a license.

There is a specific exemption for schools when the video is being shown for educational purposes. However, to be in compliance with this educational exemption, ALL of the following conditions must be met:

- A teacher or instructor must be present.
- The showing must take place in a classroom setting with only the enrolled students attending.

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<sup>64</sup> See for example the title page for any of the Artscroll English Babylonian Talmud volumes.

<sup>65</sup> US Code Title 17, chapter 1, paragraph 108. It can be found on the Cornell Law School web site: [http://www.law.cornell.edu/uscode/html/uscode17/usc\\_sec\\_17\\_00000108----000-.html](http://www.law.cornell.edu/uscode/html/uscode17/usc_sec_17_00000108----000-.html)

- The movie is used as an essential part of the curriculum – the instructor should be able to demonstrate how it is relevant to the course.
- The movie being used is a legitimate copy, purchased or rented. It cannot be a copy of a legitimate copy, or taped from TV.<sup>66</sup>

If a synagogue wishes to show a movie as part of a program – for example, showing movies before a selichot service is popular with many congregations – the synagogue must have a public performance license.

Fortunately, it is relatively easy to acquire an annual license that will allow a synagogue or other non-profit organization to show all the movies they want for one simple licensing fee, typically a few hundred dollars a year. There are clearinghouse organizations that work out licensing deals with all the major studios and include them as part of one annual license. CVLI (Christian Video Licensing International) provides annual licenses to religious institutions on a sliding scale, depending on the size of the congregation.<sup>67</sup> The Motion Picture Licensing Corporation provides licenses to other non-profit organizations.<sup>68</sup> Note that both the CVLI and MPLC licenses do not allow charging admission beyond what would be needed to recover direct costs (If you rent a big-screen TV for \$100 and one hundred people show up, you can only charge \$1 / person).

## **Music**

As previously mentioned, the DMCA does not allow circumventing copyright restrictions even for permitted purposes. However, a lot of music is available that is not technologically protected. What usage and copying is permissible?

It is permissible to make a copy for backup protection for yourself, or to copy music to a different media. For example, if you purchase a CD, it is OK to download it to your computer so you can either listen to it from your computer or to further download it to an iPod or other MP3 player. It is permissible to copy your CD to a cassette tape so you can listen to it in your car if you do not have a CD player in your car.

It is NOT permissible to make a copy of a CD and give it to someone else, or to download the contents of a CD to your computer and/or MP3 player, and then sell the CD; from the perspective of the copyright holder, that is the same as making a duplicate CD and keeping it. Needless to say, downloading copyrighted music using file sharing software is forbidden even if the intended use is personal or for a non-profit organization.

Playing recorded music in public, like showing movies in public, can create a situation where a public performance license is required. Fortunately for synagogues, there is a blanket exemption for playing music that does not exist for showing videos. “The

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<sup>66</sup> See Copyright Act of 1976, Public Law No. 94-553, 90 stat 2541: Title 17; Section 110(i), available online at <http://www.copyright.gov/title17/92chap1.html#110>

<sup>67</sup> See [www.cvli.com](http://www.cvli.com) .

<sup>68</sup> See [www.mplc.com](http://www.mplc.com) .

Fairness in Music Licensing Act of 1998” provides a blanket exemption for religious use of music:

Notwithstanding the provisions of section 106, the following are not infringements of copyright: ... (3) performance of a nondramatic literary or musical work or of a dramatico-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly;<sup>69</sup>

Note that the exemption is for use of music during services; to perform copyrighted music, or to play recorded copyrighted music during a concert could require a performance license. No license is required if the following three conditions are ALL met:

- 1) there is no purpose of direct or indirect commercial advantage; and
- 2) there is no payment for the performance to the performers, promoters or organizers; and
- 3) there is no direct or indirect admission charge or, alternatively, if there is an admission charge, the net proceeds are used exclusively for educational, religious or charitable purposes.<sup>70</sup>

If a performance will not meet those criteria, a public performance license should be obtained from either the publisher of the music, or one of the licensing clearinghouses such as ASCAP (the American Society of Composers, Authors, and Publishers). More information can be found on the ASCAP web site at [www.ascap.com](http://www.ascap.com). ASCAP licenses include permission both to play recorded music such as CDs, or to do live performances with musicians of copyrighted music.

And of course printed sheet music is also subject to copyright as would be books or other printed matter. Making a copy of a few pages so that a pianist does not have to flip pages during a performance is permissible; making multiple copies of a complete work for a choir is not. Even making a single photocopy for an accompanist is technically not permitted without the permission of the copyright holder. It is not onerous to get permission to make a small number of copies; many music publishers will even grant permission over the phone if the time is short.

## Conclusion

We live in the Information Age. The availability of information has never been greater; intellectual property, a דבר שאין בו ממש, an intangible substance, has never been more valuable. At the same time, advances in technology have made it easier than ever to steal intellectual property. From high-speed photocopiers to P2P networks to high speed internet connections that make downloading movies feasible, it has never been easier to make illicit copies of words, music, videos or inventions.

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<sup>69</sup> 17 U.S.C. § 110 (3), available online at <http://cyber.law.harvard.edu/is02/readings/17usc110.html>

<sup>70</sup> “The ASCAP Concert and Recital Licenses,” available online at [http://www.ascap.com/licensing/pdfs/SERIOUS\\_CONCERT.pdf](http://www.ascap.com/licensing/pdfs/SERIOUS_CONCERT.pdf)

Yet just because it is easy to steal does not mean it is right to steal. As much as the owners of intellectual property such as the recording industry and the movie industry struggle to find technological solutions to the theft of their IP, it is just as incumbent upon us, ordinary citizens, to protect the interests of society and interests of authors, musicians, artists, and inventors by respecting their rights, and by teaching our children to respect those rights.

There are those who argue that in the Information Age information should be free and open. This has led to the development of open source software, such as Linux, with the source code freely available to anyone who wants to use it. But even the free spirits of the open source movement generally make their free software subject to a license agreement which stipulates the terms under which the free software can be used. And just because one likes Linux does not mean that it is OK to steal from Microsoft.

There is a “free music” movement, composed of musicians who make their music available for free downloading over the internet. Some musicians believe that by allowing free distribution of their music, they will get more exposure and they will benefit from that exposure. However, many of the promoters of free music make it available with certain conditions—others may be required to always acknowledge the creator of the music, or may be forbidden to repackage it for sale. Creative Commons is an organization that helps musicians license their “free” music with the restrictions they prefer.<sup>71</sup> As with software, just because one supports the Creative Commons does not mean that it is OK to steal from Sony. And just because one might argue that an artist benefits from any additional distribution of his/her music, that does not mean it is OK to do that distribution without the artist’s permission. An analogy may help to illustrate this: it is still trespassing and against the law to break into someone’s home and clean his kitchen – even though it is clearly to the person’s benefit!

Both secular law and halakhah recognize two important objectives of protecting intellectual property: furthering the betterment of society by encouraging innovation, and protecting the investment of time, effort, and money that creators of intellectual property have put into their product. Both are important.

## Summary

### **Status of intellectual property under secular law and דינא דמלכותא דינא**

Intellectual property is strongly protected under secular law in almost every country in the world. 100 countries have signed the Berne Convention which provides for reciprocal protection of intellectual property of signatory nations.

Even though there are a few traditional arguments that favor limiting דינא דמלכותא דינא in various ways, we follow the opinion of Ramban and Rashbam who said דינא דמלכותא דינא כל מסין וארנוניות ומנהגן של משפטי המלכים שרגילי להנהיגן במלכותם דינא הוא. שכל בני המלכות מקבלין

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<sup>71</sup> See <http://creativecommons.org/license/index.html>

, “the law of the land is the law, all levies, property taxes, and laws that are judgments of the king that is customary (for kings) to impose on their kingdoms are the law, for all people in the kingdom accept the laws and statutes of the king willingly.”

We also agree with the many contemporary poskim who specifically apply דינא דמלכותא to intellectual property including rabbis Moshe Feinstein, Ovadiah Yosef, Israel Schneider, Yitzchok Schmelkes and Ezra Batzri.

### **The status of intellectual property under halakhah**

Even though references to intellectual property in the Torah are scant and secondary at best (for example, God seems to protect His intellectual property by ordering us not to add to or subtract from the Torah; people are forbidden to use the recipe for Temple incense at home; etc.), intellectual property has been afforded ample protection under halakha through the principles of השכמות (approbations), השגת גבול (unfair competition), שיעור בקנין (limited sale). Misuse of intellectual property is recognized to be a form of theft.

Halakha affords protection to intellectual property even in places where the secular law does not provide such protection. Rabbis going back to the 16<sup>th</sup> century protected intellectual property under halakha, including threat of *cherem*, even before secular law provided such protection.

### **Is it halakhically theft to steal something of small value from a large corporation?**

The sources unanimously state, and we agree, that to steal from a corporation is forbidden, even if the loss to any single individual is less than a perutah.

### **Guidelines on the use of intellectual property for Jewish institutions**

Jewish institutions, in particular the institutions of our movement, are called upon to familiarize themselves with the laws regarding intellectual property and to put in place guidelines for staff and students regarding the proper treatment of intellectual property. This responsa includes material that can be used in formulating such policies.

### **Piskei Halakhah (Legal Findings)**

Based on our study of halakhic precedent and the applicability of secular law we rule as follows:

1. The concept of דינא דמלכותא, the law of the land is the law, is applicable to issues surrounding intellectual property, and we are obligated halakhically to follow the laws of the country we live in or do business with as regards protection of intellectual property. Even if certain forms of copying or otherwise

reproducing intellectual property are permitted halakhically, if secular forbids the practice we are still obligated to obey the law of the land.

2. Halakhah affords protection of intellectual property that can in some cases go beyond what secular law affords. Even in countries such as Russia or China, which may have lax laws and laxer enforcement, ample halakhic precedence calls on us to protect the intellectual property of others.
3. Ignorance of the law is no excuse. Our communal institutions such as synagogues, schools, etc., are obligated to learn about proper use and protection of intellectual property and to make sure they serve as role models in complying with the law.

Simply put, even though it may at times be burdensome, we are obligated to follow the stricter of secular law or halakhah when it comes to ethical issues. As citizens, residents, or visitors to a country, we are obligated under the principal of דינא דמלכותא דינא to follow the local laws. As Jews living lives faithful to the ethical teachings of our tradition, we are obligated to follow the halakhah even if it is stricter than the secular law. Secular law can say it is permissible to steal; halakhah would still forbid us to be thieves.