



But Everyone Does It! The Ethics of Intellectual Property

Parashat Mattot-Mase'i, Numbers 30:2 – 36:13 | by Mark Greenspan

“Intellectual Property,” by Rabbi Martin Cohen, (pp. 571- 582) in *The Observant Life*

Introduction

I'm always a bit uneasy writing Torah Table Talk even though I've been producing this study guide to the weekly *parashah* for the past seven years. A big part of Torah Table Talk is quoting the classical and modern Jewish sources. Working against the clock I have to cut corners in finding quotes that offer insights on the subject at hand in English. That involves copying passages and translations from other books and sources on the Internet. Just how ethical this is? Although I always provide the source of the quote technically I have not received permission to copy the passage. Is this an infraction of secular law? How about Jewish law? I was reminded of this recently when an author wrote to me asking permission to quote Torah Table Talk in a book he is writing!

The question of intellectual property is a complicated one in Jewish law. We are living in an age when ideas have intrinsic value. While copying an article from a magazine or sharing downloaded music may seem like a victimless crime these actions have far reaching ramifications for the economy. Billions of dollars are lost each year to authors, artists, software producers, and to the American economy because of copyrighted material that is pirated.

Martin Cohen wrestles with the question of intellectual property in this chapter of *The Observant Life*. Jewish law begins with the premise that purloined property must have physical existence (digital material doesn't even exist) and must have a set monetary value of at least a *perutah* for one to be liable for its theft. While “words conceived of mentally but left unspoken have no legal importance” (BT Kiddushin 49b), in our society ideas and virtual words sometimes have greater value than objects that can be measured and touched. Discussing the ethics of intellectual property ownership challenges us to consider how technology changes how we view Jewish law. While this is not a topic in this week's parshah (not one that I found at least) it is an important issue for us to think about today. So what do you think? Am I acting in a halakhically and ethically correct way when I quote others in Torah Table Talk?

The Torah Connection

You shall not steal; you shall not deal deceitfully or falsely with one another. You shall not swear falsely by My name, profaning the name of your God; I am the Lord. You shall not defraud your fellow. You shall not commit robbery.

- Leviticus 19:11-13

1:1. Whenever a person steals property that is worth a p'rutah or more, he transgresses a negative commandment, as Exodus 20:13 states: "Do not steal." Lashes are not administered for the violation of this commandment, for one is obligated to give compensation. The Torah requires a thief to compensate the party from whom he stole, whether he be a Jew or a gentile, an adult or a minor. 1:2. The Torah prohibits stealing even the slightest amount. It is forbidden to steal as a jest, to steal with the intent to return, or to steal with the intent to pay. All is forbidden, lest one habituate oneself to such conduct

- M. Maimonides, MT, *The Laws of Theft*, G'neivah 1:1-2

22:13. *A person cannot transfer ownership - neither through a sale nor through a present - over an object unless it has substance. If it has no substance, ownership of it cannot be transferred. 22:14. What is implied? A person cannot transfer ownership over the fragrance of an apple, the taste of honey, the color of crystal or the like. Therefore, when a person desires to transfer ownership of the right to partake of the fruits of this date palm or to dwell in this home, the recipient does not acquire anything. For the transaction to be effective, the owner must transfer the house itself for the sake of dwelling in it, or the tree itself for the purpose of eating its fruit, as will be explained.*

- M. Maimonides, MT, *The Laws of Commerce*, M'khirah 22:13-14
 - a. **Martin Cohen quotes these two passages in his chapter on intellectual property as a challenge to our understanding of what constitutes 'theft.' How do we judge monetary value? If an object has no intrinsic monetary value what are the criteria for measuring worth?**
 - b. **What implications do Maimonides' statements have for defining theft for us today?**
 - c. **Why did Maimonides and the Talmud define property by physical substance? What type of property do we have that might not have 'physical substance?'**

The end of all flesh has come before me because the earth is full of violence (hamas): What is hamas (violence) and what is gezel (robbery)? Said Rabbi Hanina: Hamas refers to what is worth a perutah; gezel refers to what is of less value than a perutah. And this is what the people of the age of the flood used to do: When a person brought out a basket full of lupines for sale, one would come and seize less than a perutah's worth, so that the seller had no redress at law. Whereupon the Holy One said: You have acted improperly so I will act improperly.

- B'reishit Rabbah 31:5
 - a. **We saw above that liability in cases of theft only apply where the purloined object has specific monetary value of at least one perutah. Why then did God condemn the generation of the flood to destruction when all they did was steal an amount of less than a perutah?**
 - b. **Is picking up a grape in the market and popping it in your mouth robbery? Should one be considered liable of a crime when taking the grape?**

There is a fairly substantial body of responsa literature dealing with the issue of copyright, going back to the early days of the printing press...A change in technology – the development of the printing press – raised all sorts of new issues that need to be addressed by the law. Similarly, in our day, 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 explored in halakhic literature...

- Rabbi Barry Leff, *Intellectual Property: Can you steal it if you can't touch it?*
http://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/20052010/leff_IP.pdf
 - a. **According to Barry Leff historically technology has changed our understanding of ethics and Halakhah. What are some of the other implications of the Internet for our personal ethical and halakhic standards?**

Even if we are to assume that Torah law doesn't explicitly award exclusive proprietary rights to an author, it nevertheless enjoins us to recognize and obey the laws of the Land.

- Rabbi Israel Schneider, *Jewish Law and Copyright*, The Journal of Halakhah and Contemporary Society

In any event, since in these countries the law of the land forbids copying without permission of the author...we are obligated to strengthen the law of the land, and all the more so where a great rabbi was asked and replied that it is forbidden to (copy without permission) according to Torah Law.

- Rabbi Obadiah Yosef, *Yabia Omer, Part 7, Hoshen Mishpat 9*

- a. **One of the concepts frequently quoted in The Observant Life is *dina d'malkhuta dina*, the law of the land is the accepted law (particularly in monetary cases).
How should we view a person who faithfully follows Jewish law but does not feel bound by civil law because it is not Jewish?**
- b. **How do Rabbis Yosef and Schneider view civil law?**

Reflections

When one considers the trajectory of Jewish history and civilization he or she realizes the different circumstances under which Jewish society developed and evolved. In a pastoral society property was measured primarily by intrinsic value. It was the materiality of the object that gave it value. Even manuscripts prior to the invention of the printing press had a certain intrinsic value since a book had to be copied by hand in order to be published. With the invention of the printing press issues of ownership and intellectual property became more important. A printer invested a considerable amount of money to publish a work. If others could simply republish the same work the original publisher stood to lose money. So while *Halakhah* developed out of a pastoral world it had to address the realities of a more sophisticated society in which the printing of books was a reality.

In his responsum on intellectual property Barry Leff offers strategies through which one could secure intellectual property despite the idea that “one cannot acquire an object that does not have physical existence (*Shulban Arukh, Hoshen Mishpat 203:1*).” Rabbis would write approbations at the beginning of new publications extolling the work and prohibiting the re-publication of the work by others. It was through the authority of the scholars that a work could be protected. While a work could not be protected as property since ideas belong to the general public re-publishing a work or stealing ideas from another’s work could also be considered *hassagat gevul*, overstepping the boundaries of another’s enterprise. Just as one should not move the boundaries into one’s neighbor’s area one should not encroach on a printer’s work by stealing his labor. Some rabbis suggested that the sale of certain works included the right to fair use but not the right to do with it as one wishes – similar to the way we think of published materials today.

So what does this mean for us today? More specifically what does it mean for the publication of Torah Table Talk? Technically if I was publishing Torah Table Talk or receiving some type of monetary benefit from the publication of this work I believe I would have an obligation to receive permission to use even brief quotes within this work. Since the work always lists the source of the quote and it is usually no longer than a paragraph or two, I believe there can be some flexibility in a case such as this. Also rather than affecting the publication of the original works my hope is that people will seek out some of the contemporary and traditional books quoted herein so that Torah Table Talk will actually encourage the sale of the original

works. The material is also used in a way that it was not originally imagined so that it is not simply copying material but using it to create a discussion. Barry Leff writes in his essay: “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 rules (of fair use) usually won’t apply.” My hope is that the material quoted in Torah Table Talk falls into the category of ‘fair use.’

Adapted from Torah Table Talk by Mark Greenspan