Is Copyright Property? — The Debate in Jewish Law

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Is copyright a property right? Common law and civil law jurists have debated that issue for over three centuries. It remains at the heart of battles over copyright's scope and duration today, even if its import lies principally in the rhetorical force of labeling a right as "property," not in any doctrinal consequence flowing directly from that label.

In parallel to their common law and civil law counterparts, present-day rabbinic jurists engage in lively debate about whether Jewish law recognizes copyright as a property right. And, as in secular law but for different reasons, that issue has significant repercussions in Jewish law. As discussed in rabbinic court decisions and writings, whether Jewish law accords authors a right of ownership in their

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This Article includes numerous Hebrew language sources. There are no standard rules for transcribing Hebrew into the Roman alphabet. We have followed the simple version adopted by Israel's Academy of the Hebrew Language in 2006, unless the Hebrew source has provided its own transcription and with the exception of some proper names commonly transcribed otherwise. *See* Ha-Akademia le-Lashon ha-Ivrit, Ta-atik Pashut le-Tsorkhei Shilut ve-Mipui [The Academy of the Hebrew Language, Simple Transcription for Signs and Maps], Nov. 2006, *available at* http://hebrew-academy.huji.ac.il/hahlatot/TheTranscription/Documents/taatiq2007.pdf (Hebrew). We also cite many Jewish law sources that give the year of publication according to the Hebrew calendar, but which we roughly translate to the Gregorian calendar. The Hebrew year begins and ends in September or October on the Gregorian calendar, and thus overlaps with only three to four months of one Gregorian calendar year, but eight to nine months of the succeeding Gregorian year. Accordingly, unless we have the specific day or month of publication, enabling us to say for certain in which Gregorian year the book was published, we identify as the year of publication the Gregorian calendar year in which the relevant Hebrew year ends.

works impacts such issues as whether it is permissible, without license from the author or publisher, to copy and distribute software and sound recordings, perform music in wedding halls, make copies for private and classroom use, and download songs from the Internet.

There are numerous, and at times profound, differences in the terminology, form of argument, doctrinal specifics, and overarching legal framework of Jewish and secular law. Nonetheless, the arguments within the Jewish law debate have some intriguing parallels with those of secular copyright law. In fact, one finds the direct, if largely unstated, influence of secular copyright just below the surface in the debate in Jewish law about whether copyright is property.

INTRODUCTION

Is copyright a property right? That question raises a host of thorny theoretical issues regarding the foundational underpinnings of both copyright and property. It has long implicated copyright doctrine as well. From the eighteenth-century "Battle of the Booksellers" to today's "Copyright Wars," maximalists have repeatedly characterized copyright as "property" in support of arguments that copyrights should be exclusive rights of broad scope and long duration.[1] By the same token, those who favor narrowly-tailored, short-term copyrights, punctuated by robust exceptions and statutory licenses, cast copyright, rather, as a limited monopoly, tax on readers, special reward, trade regulation, government entitlement, or "state measure that uses market institutions to enhance the democratic character of civil society."[2]

It should not really matter. After all, property rights come in all shapes and sizes. So merely to classify copyright as property — or, conversely, to deny that moniker — actually tells us very little about copyright's proper scope and duration.[3] Nonetheless, whether by reason of property's

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1 On property rhetoric in today's debates, see WILLIAM PATRY, MORAL PANICS AND THE COPYRIGHT WARS (Oxford Univ. Press 2009); JAMES BOYLE, THE PUBLIC DOMAIN (Yale Univ. Press 2009).

2 *See, e.g.*, Fogerty v. Fantasy, Inc., 114 S. Ct. 1023, 1029 (1994) (referring to copyright as a set of "monopoly privileges" and "special reward"); THOMAS MACAULAY, SPEECHES ON POLITICS AND LITERATURE 177 (E.P. Dutton & Co. 1924) (1841) (stating that copyright imposes a "tax on readers for the bounty of writers"); Sara K. Stadler, *Copyright as Trade Regulation*, 155 U. PA. L. REV. 899 (2007); Neil W. Netanel, *Copyright and Democratic Civil Society*, 106 YALE L.J. 283 (1996).

3 *See* Hanoch Dagan, *Property and the Public Domain*, 18 YALE J.L. & HUMAN. 84 (2006); Peter S. Menell, *The Property Rights Movement's Embrace of Intellectual Property: True Love or Doomed Relationship?*, 34 ECOLOGY L.Q. 713, 721-22

rhetorical punch or perceived doctrinal imperative, the notion that if copyright is "property," it should resemble a perpetual, absolute, pre-political property right, has repeatedly infused judicial proceedings, legislative enactments, and public debate in both common law and civil law countries.[4] In recent years, for example, the "copyright is property" trope has been invoked to insist that to copy any portion of a song, text, or movie, even to build upon it to create a new work, without a license, is nothing short of "stealing" and thus should be subject to harsh legal sanctions and moral opprobrium.[5] Likewise, maximalists apply to copyright what they claim (incorrectly) is the universal property law rule that any interference with possession absent the property owner's prior consent constitutes a trespass. The analogous rule, in their view, is that no one may copy, display, or perform a copyrighted work without the copyright holder's advance permission even when such permission is prohibitively costly to obtain or the copyright owner is unknown.[6]

Like their common law and civil law counterparts, Jewish law jurists disagree whether copyright is a property right. And as in secular law, but for different reasons, that issue exerts significant doctrinal consequences in

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(2007); *see also* Richard Epstein, *What is So Special About Intangible Property? The Case for Intelligent Carryovers* (Univ. of Chi. Law & Econ., Olin Working Paper No. 524, 2010), *available at* http://ssrn.com/abstract=1659999 (noting differences among various types of tangible property and presenting economic rationales for commonalities and differences between tangible and intangible property, including copyright); Wendy J. Gordon, *Trespass-Copyright Parallels and the Harm-Benefit Distinction*, 122 HARV. L. REV. F. 62, 62-64 (2009) (describing arguments that she and others have presented that might recognize copyright's designation as property but would reconfigure copyright infringement claims to resemble causes of action for nuisance, negligence, or unjust enrichment, rather than trespass).

4 *See* BRAD SHERMAN & LIONEL BENTLY, THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW: THE BRITISH EXPERIENCE, 1760-1911, at 11-42 (Cambridge Univ. Press 1999) (detailing the arguments in eighteenth-century Great Britain); Laurent Pfister, *Is Literary Property (a Form of) Property? Controversies on the Nature of Authors' Rights in the Nineteenth Century*, 205 REVUE INT'L DU DROIT D'AUTEUR 116, 120-21 (2005) (discussing France); Neil Netanel, *Why Has Copyright Expanded? Analysis and Critique*, *in* 6 NEW DIRECTIONS IN COPYRIGHT LAW 1 (Fiona Macmillan ed., 2007) (discussing the present-day United States).

5 *See* NEIL W. NETANEL, COPYRIGHT'S PARADOX 21 (Oxford Univ. Press 2008) (discussing court's condemnation of hip hop artist's digital music sampling as stealing); Netanel, *supra* note 4, at 11-12 (discussing copyright industry rhetoric).

6 *See* Oren Bracha, *Standing Copyright Law on Its Head? The Googlization of Everything and the Many Faces of Property*, 85 TEX. L. REV. 1799 (2007) (discussing the issue of advance permission versus post hoc "opt-out" in the context of the Google Book Search project).

Jewish law. There are numerous, and at times profound, differences in the terminology, form of argument, doctrinal specifics, and overarching legal framework of Jewish law and secular law in this area and others. Nonetheless, the arguments within the Jewish law debate have some intriguing parallels with those of secular copyright law. In fact, one finds the direct, if largely unstated, influence of secular copyright just below the surface in the debate in Jewish law about whether copyright is property.

This Article examines the debate in Jewish law regarding whether copyright is a property right. We begin, in Part I, by outlining the debate in Jewish law and setting out the primary doctrinal consequences in Jewish law of determining that authors do or do not have "property rights" in their creations. Part II then explicates the principal arguments given by rabbinic jurists for why authors do or do not have such property rights.

We note at the outset that we frame our inquiry using English language terminology that does not map precisely onto Hebrew terms used by rabbinic jurists or analogous concepts in Jewish law jurisprudence. Indeed, that incongruence impacts every legal term appearing in the title to this Article. The term "Jewish law" can connote the word "*halakha*," which incorporates legal rules, moral norms, and ritual obligations, or the term "*ha-mishpat ha-ivri*," which focuses solely on the rules and norms governing the subject areas of secular law, such as property, torts, contracts, and the like.[7] Moreover, even in "legal" subject areas, rabbinic jurists and commentators sometimes distinguish between legal and moral obligation, but more often do not, and local custom is frequently regarded as a binding source of law. Likewise, we use the term "copyright" to mean broadly the legal regime that accords authors or publishers certain exclusive rights or rights of remuneration in expressive works, but, as we will see, the rule-set and underlying premises of that regime in Jewish law differ in some fundamental respects from those of secular copyright, alongside many areas of convergence. (Of course, the same might be said in comparing common law "copyright" with civil law "authors' rights."[8]) Finally, as we discuss below, the term "property" has various meanings and connotations in Jewish law, some of which differ from prevailing conceptions of property in common and civil law.

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7 *See* Ya'akov Blidstein, *Ha-Halakha — Olam ha-Norma ha-Yehudi* [*The Halakha — Universe of the Jewish Norm*], *in* THE QUEST FOR HALAKHA; INTERDISCIPLINARY PERSPECTIVES ON JEWISH LAW 21, 22-23 (Amichai Berholz ed., 2003) (Hebrew).

8 *See* Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1 (1994) (detailing profound differences in ideology and doctrine between common law "copyright" and civil law "authors' rights").

I. THE JEWISH LAW DEBATE

Jewish law has governed much of the life of sovereign and semi-sovereign Jewish communities over the millennia, and continues to be regarded as binding among religiously observant Jews. As a result, Jewish law contains extensive doctrine concerning property, tort, inheritance, unjust enrichment, contract, competition, sales, and judicial procedure, as well as matters of religious ritual. Jewish law governing the exclusive rights of authors and publishers to print books traces its origins to the early sixteenth century, soon after the advent of print and almost 200 years before modern copyright law is typically said to have emerged with the Statute of Anne of 1709.[9] It developed through the centuries in rabbinic rulings and community enactments. Jewish copyright law also derives from exclusive printing privileges that rabbinic authorities have issued for thousands of books since the first recorded instance in 1518. These typically give the publisher the exclusive right to print the book for a period of ten to twenty years or until the first edition has been sold.

Rabbinic jurists continue to rule and opine on copyright issues through the present. Recent decades have seen numerous rabbinic court decisions, responsa (rulings in disputes or advisory opinions coupled with a lengthy exegesis on Jewish law in answer to questions posed), scholarly articles, and blog postings on such issues as whether it is permissible, without license from the author or publisher, to republish a book after the rabbinic printing privilege has expired; to copy and distribute software or sound recordings; to perform music in wedding halls; to make copies for classroom use; and to download songs from the Internet. Today's rabbinic courts generally lack the state-sanctioned jurisdiction over the Jewish community that rabbinic courts often enjoyed prior to the extension of universal rights and duties of citizenship in nineteenth-century Europe, just as Jewish communal institutions no longer have state-sanctioned powers of regulation and taxation.[10] But religiously observant Jews still widely understand rabbinic

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9 *See* NEIL WEINSTOCK NETANEL & DAVID NIMMER, FROM MAIMONIDES TO MICROSOFT; THE JEWISH LAW OF COPYRIGHT SINCE THE BIRTH OF PRINT (forthcoming Oxford Univ. Press 2011).

10 On the demise of state-sanctioned rabbinic authority and Jewish self-government, see *infra* note 75. Despite rabbinic courts' lack of state-sanctioned jurisdiction, secular laws might recognize decisions of rabbinic courts as binding arbitrations if the parties agree to that designation. *See, e.g.*, Arbitration Law, 1968, S.H. 184 (Isr.). In addition, some rabbinic jurists, particularly ultra-Orthodox jurists in Israel, continue to posit that recourse to state courts is generally forbidden by Jewish law, *see* Eliav Shokhetman, *Ma'amadam ha-Halakhti shel Batei ha-Mishpat*

pronouncements to impose binding obligations, and such pronouncements thus exert profound influence within traditional communities. As a result, even secular rights holders, including Microsoft and the Israeli association of composers and music publishers, have petitioned rabbinic courts for rulings forbidding unlicensed uses of software, sound recordings, and music under Jewish law.[11]

Among contemporary rabbinic jurists, there are two opposing schools of thought regarding the nature of authors' rights in their creations. One contends that Jewish law accords authors a right of ownership, akin to property rights in tangible chattel. We label this the "copyright-is-property school." The other views copyright under Jewish law as an amalgam of various rights arising from guild regulation, binding custom, protection against unfair competition and unjust enrichment, mass market licenses, rabbinic printing privileges, and deference to secular law insofar as commercial matters are concerned.[12] We refer to this as the "copyright-as-amalgam school."

The copyright-is-property school draws support from three leading treatises on the Jewish law of copyright.[13] It cites as its primary foundational

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be-Medinat Yisrael [*The Halakhic Status of Israeli Courts*], 13 TEHUMIN 337, 347 (1992-93) (Hebrew), although, as a number of celebrated lawsuits in Israel attest, that prohibition is not universally honored. *See also* Adam S. Hofri-Winogradow, *A Plurality of Discontent: Legal Pluralism, Religious Adjudication and the State*, 26 J.L. & RELIGION 101, 107-19 (2010) (describing longstanding ultra-Orthodox prohibitions on recourse to Israeli state courts and the more recent movement to establish *halakhic* courts as a voluntary, attractive alternative to state courts among some National Religious rabbinic jurists).

11 For a discussion of these cases, see NETANEL & NIMMER, *supra* note 9.

12 The Hebrew phrase for that rule of deference literally provides that "the law of the kingdom is the law," but most contemporary authorities substitute "land" for "kingdom" to account for contemporary political realities. Such deference is not absolute. *See* YITZHAK SCHMELKES BEIT YITZHAK, YOREH DE'AH, pt. 5, no. 75 (Pyzemsyl 1875) (Hebrew) [hereinafter BEIT YITZHAK]: "We should conclude that only if [the law of the land] negates Torah law and [also] causes financial loss, does the Torah law remain in force [regardless of the secular law]." The leading contemporary treatise on the rule is SHMUEL SHILO, DINA DE-MALKHUTA DINA (Dfus Akademi 1974) (Hebrew). *See also* GIL GRAFF, SEPARATION OF CHURCH AND STATE: DINA DE-MALKHUTA DINA IN JEWISH LAW 1750-1848 (Univ. of Alabama Press 1985).

13 The treatises all recognize that there is a split of opinion regarding whether copyright is property, but each favors classifying copyright as property. Two of the treatises are authored by contemporary rabbinic jurists within the Lithuanian ultra-Orthodox community in Israel: YAAKOV AVRAHAM COHEN, EMEQ HA-MISHPAT, VOL. 4: ZEKHUYOT YOTSRIM [VALLEY OF THE LAW, VOL. 4: COPYRIGHT] (1999) (Hebrew)

authority a ruling of the esteemed nineteenth-century rabbinic jurist, Joseph Saul Nathanson, issued in 1860. Nathanson was the rabbi of Lvov, then capital of the Austro-Hungarian Kingdom of Galicia and a major center of Hebrew book publishing.[14] Nathanson held that authors have a perpetual, exclusive, and transferable right to print their literary works, independently of any secular or Jewish communal copyright enactment or rabbinic printing privilege that might (or might not) have been issued.[15] Nathanson did not explicitly use the terms "property" or "ownership" in his ruling. Nevertheless, given the nature of the authors' right he recognized, Nathanson seems to have equated that right with the concept of property and, indeed, he did occasionally refer to an author's exclusive rights as a form of property in rabbinic printing privileges that he granted to various authors and publishers.[16] In any event, Nathanson's ruling is cited today as the leading authority for the proposition that authors have an ownership right in their works.

Despite treatise support for the idea that copyright is property, the copyright-as-amalgam school probably represents the majority view of leading contemporary rabbinic jurists who have opined on the matter.[17] Of

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and NAHUM MENASHE WEISFISH, MISHNAT ZKHUYOT HA-YOTSER; IM TSHUVOT VE-PSAKIM ME-GEDOLEI HA-DOR [THE DOCTRINE OF COPYRIGHT; WITH RESPONSA AND RULINGS OF THE LEADING RABBIS OF OUR GENERATION] (2002) (Hebrew). A third is by an expert on Jewish law who, as a National-Religious Orthodox rabbi, law professor, and attorney with Israel's Ministry of Justice, authored numerous books and articles about Jewish law and in support of the incorporation of various facets of Jewish law into modern Israeli law, which is overwhelmingly secular: NAHUM RAKOVER, ZKHUT HA-YOTSRIM BE-MEKOROT HA-YEHUDIM [COPYRIGHT IN JEWISH SOURCES] (1991) (Hebrew).

14 Lvov, which was also known by its German name, Lemberg, is now a major city, known as Lviv, in the western Ukraine. On Lvov as the center of Hebrew book publishing, see 1 YESHAYAHU VINOGRAD, OTSAR HA-SEFER HA-IVRI [THE THESAURUS OF THE HEBREW BOOK] tbl. 1 (1995) (Hebrew) (Number of Books Printed by Place and Year of Print).

15 JOSEPH SAUL NATHANSON, RESPONSA SHO'EL U-MESHIV pt. 1, no. 44 (Lvov 1865) (Hebrew). For further discussion of this ruling and its historical context, see NETANEL & NIMMER, *supra* note 9.

16 In those printing privileges, Nathanson referred to authors' rights as *kinyan* ("property") or *nahala* (an "asset"). *See* NETANEL & NIMMER, *supra* note 9.

17 *See, e.g.*, Ezra Basri, *Zkhuyot Yotsrim* [*Copyright*], *Ruling in Arbitration No. 42/3575*, 6 TEHUMIN 169 (1984-85) (Hebrew) (noting the disagreement and split of authority and thus relying on custom and "the law of the land" in forbidding copying); SHMUEL ZVI WOSNER, SHEVET HA-LEVI, PT. 4, HOSHEN MISHPAT no. 202, at 272 (3d ed. 2001) (Hebrew); YEHUDA SILMAN, DARKHEI HOSHEN, *excerpted in* WEISFISH, *supra* note 13, at 180; TSVI BEN HAYIM YITSHAK SHPITS, RESPONSA MINHAT TSVI, HALAKHOT SHKHENIM no. 18 (1987) (Hebrew), *reprinted in* WEISFISH, *supra* note 13, at 176;

special note here are the rabbinic rulings in the petitions brought by Microsoft and the Israeli association of composers, which were based, respectively, on unfair competition and deference to secular Israeli copyright law pursuant to the rule that "the law of the land is the law," not the idea that authors' creations are their property under Jewish law.[18] The copyright-as-amalgam school cites to rulings of Mordekhai Banet and Moses Sofer, two early nineteenth-century rabbinic authorities who predated Nathanson's ruling, and Yitzhak Schmelkes, a late nineteenth-century authority who explicitly called Nathanson's ruling into question.[19] Banet and Sofer engaged in a lengthy debate between themselves about the nature and scope of authors' rights.[20] In the course of that back-and-forth, each expounded a number of possible

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Haim Navon, *Zkhuyot Yotsrim be-Halakha* [*Copyright in Jewish Law*], 7 TSOHAR 35 (2001) (Hebrew); *Shlomo Ishun, Zkhuyot Yotsrim be-Halakha — Tguva le-Ma'amaro shel Haim Navon* [*Copyright in Jewish Law — Response to the Article by Haim Navon*], 7 TSOHAR 51 (2001) (Hebrew); Shmuel Baruch Ganot, *Ha'atakat Kaletot ve-Tokhniot Makhshev* [*Copying Cassettes and Computer Programs*], 9 TSOHAR 41 (2001) (Hebrew); Meir Nehurai, *Ha-Zkhut ha-Kalkalit shel ha-Yotser be-Yahas le-Yetsirato* [*The Author's Economic Right Regarding His Creation*], 27 MISHLAV GAL 51 (1994-95) (Hebrew); Yisrael Landau, *Berur Dvarim be-Din Neheneh me-Hokhmat Ḥavero (be-Inyan Ha'atakat Tokhniot ve-Kaletot le-Shimush Prati she-Lo me-Daat ha-Ba'alim)* [*Clarifying Writings Concerning the Law of Benefiting from Another's Wisdom (Regarding Copying Computer Programs and Cassettes for Personal Use Without the Owners' Permission)*], 2 BEKHORIM 809 (1998-99) (Hebrew); Int'l Beis Hora'ah of the Institute for Dayanim, Zkhuyot Yotsrim, Ha-atakat Kaletot ve-Tokhniot Mahshev [Copyright, Copying Cassettes and Computer Programs], July 7, 2010, http://din.org.il/2010/07/15 (Hebrew) [hereinafter Int'l Beis Hora'ah].

18 *See* NETANEL & NIMMER, *supra* note 9 (discussing those decisions). Israeli law is overwhelmingly secular and distinct from Jewish law. In particular, Israel's copyright law was the U.K. Copyright Law — 1911, until Israel's parliament enacted a copyright law revision with the Copyright Act, 2007, a statute that draws upon contemporary common law and civil law copyright doctrine, as well as incorporating U.S. fair use doctrine. For a comprehensive analysis, see YOTSRIM ZKHUYOT: KRIYOT BE-HOK ZKHUT YOTSRIM [AUTHORING RIGHTS: READINGS IN COPYRIGHT LAW] (Michael Birnhack & Guy Pessach eds., Nevo Press 2009) (Hebrew).

19 *See, e.g.*, SILMAN, *supra* note 17, at 180; WOSNER, *supra* note 17, at 272; Navon, *supra* note 17.

20 MORDEKHAI BANET, PARASHAT MORDEKHAI, ḤOSHEN MISHPAT, nos. 7, 8 (Sziget 1889) (Hebrew); MOSES SOFER (ḤATAM SOFER), RESPONSA ḤATAM SOFER, ḤOSHEN MISHPAT no. 41 (Budapest 1861) (Hebrew) [hereinafter ḤATAM SOFER]. For further analysis, see David Nimmer, *In the Shadow of the Emperor: The Hatam Sofer's Copyright Rulings*, 15 TORAH U-MADDA J. 24 (2008-09).

bases in Jewish law for something approximating what we call copyright. But neither even considered the possibility that authors have a perpetual, exclusive right, let alone a "property right," in their works.

Schmelkes explicitly rejected Nathanson's ruling that authors have a perpetual exclusive right in their work, although the precise doctrinal bases and breadth of his rejection are in dispute. Schmelkes conceded that an author and his heirs have an exclusive right to publish an unpublished manuscript. He held, however, that after the work has been published and the first edition sold (i.e., after the author or heirs have recovered their investment), anyone is free to print the book, subject to any rights the author or heirs may have under a rabbinic printing privilege or secular copyright law.[21] Rabbinic jurists of the copyright-is-property school contend that Schmelkes meant only to carve out an exception from the author's perpetual right of ownership for books of *ḥidushei Torah*, that is new commentary on Jewish law and religion, which we discuss below.[22] In contrast, those of the copyright-as-amalgam school read Schmelkes to hold that even the author's exclusive right to publish the manuscript and sell the first edition flows not from a proprietary copyright in the text, but only from the Jewish law of unfair competition or from the author's right to condition access and use of the physical chattel, the manuscript, in which the author holds a property right.[23]

In current common law and civil law jurisdictions, the question whether copyright qualifies as property carries virtually no immediate doctrinal consequences. With few exceptions, the copyright holder's rights are what they are under copyright law regardless of whether copyright is deemed to be a property right.[24] Rather, the spirited debate over whether copyright is

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21 BEIT YITZHAK, *supra* note 12.

22 *See infra* notes 69-71 and accompanying text.

23 In a subsequent ruling, Schmelkes reiterated his rejection of Nathanson's holding that authors have a perpetual exclusive right, but there, too, Schmelkes invoked the rule regarding *ḥidushei Torah* in a way that leaves unclear whether he meant it to illustrate why authors could not possibly have a right of ownership or merely to serve as an exception to that right of ownership applicable in the dispute before him. *See* YITZHAK SCHMELKES, BEIT YITZHAK, HOSHEN MISPHAT, Hilkhot Nezikin, no. 80 (Lvov 1905).

24 One possible exception is that if copyright is deemed "property," copyright holders might enjoy the benefit of constitutional protections against legislative enactments that substantially diminish the scope or duration of existing copyrights. But no U.S. court has ever ruled that a retroactive contraction of a copyright holder's rights is a "taking" of property under the Fifth Amendment, and European courts that have characterized copyrights as constitutionally protected "property" have qualified that protection on the grounds that, like all property rights, copyright must sometimes give way to a "fair balance" between private rights and the public interest. *See*,

"property" has import for secular copyright doctrine primarily because of the rhetorical force of labeling a right as "property" in the popular imagination and its consequent impact on legislators and judges in amending and interpreting copyright law. Contemporary political discourse typically imbues the term "private property" with a connotation of absolute right. In American culture, "property" encapsulates an individualistic, almost libertarian, vision: what's mine is mine and no one can take it away. In Europe as well, "property" has historically carried connotations of a natural, pre-political entitlement, in the German idealist sense of an object completely subject to the "will" of its owner, even if present-day European constitutions explicitly place property in the service of the public good.[25] Hence, to denote copyrights as "property" is an effective rhetorical device to override their limited reach and public benefit character. The symbolic force of the absolute dominion ideal fosters lawmakers' intuition that if copyrights are "property," they should be exclusive rights of broad scope, long duration, and relative imperviousness to exceptions and limitations, and that copyright infringements are akin to theft, even though property rights are in fact subject to numerous constitutional, regulatory, and common-law limitations.[26]

In Jewish law, the consequences of categorizing copyright as property fall along similar lines. If copyright is property, it is typically understood to be of broader scope, longer duration, and greater imperviousness to doctrinal or regulatory limitation than if it is grounded in unfair competition, trade regulation, custom, printing privilege, or some other non-property doctrine.

In Jewish law, however, the repercussions of categorizing copyright as property flow from a perceived doctrinal mandate, not the rhetorical force of an idealized model or theoretical construct of "property." Indeed, Jewish

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e.g., French Constitutional Council Decision, CC decision no. 2009-580, June 10, 2009, J.O. [Official Gazette of France], June 13, 2009, p. 9675 (Fr.); School Book [Privilege] Case (*Schulbuchprivileg*), Federal Constitutional Court, July 7, 1971, 31 Entscheidigung des Bundesverfassungsgericht [BVerfGE] 229 (F.R.G.).

25 The German Constitution provides, for example, that "Property entails obligations. Its use shall also serve the public good." GG art. 14, *translated in The Federal Republic of Germany: Constitution*, *in* CONSTITUTIONS OF COUNTRIES OF THE WORLD (Rüdiger Wolfrum & Rainer Grote eds., 2007). On the historical force of denoting authors' right as "property," see Pfister, *supra* note 4. On the German idealist view of property as an object completely subject to individual will, see JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW; PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT 55-56, 69-70 (Oxford Univ. Press 2006).

26 *See* Netanel, *supra* note 4, at 11-12; Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031 (2005).

law has no ideologically charged model, overarching theory, or even general definition of "property." As one leading commentator notes:

> "What is ownership?" is a question which is nowhere directly or abstractly put in any writings which are included under the description of Jewish law, early or late, and one will therefore search in vain in the mass of Jewish legal writings of recognized authority for a definition of ownership. Jewish jurisprudence was too pragmatic and concrete in tendency to occupy itself with the definition of legal terms without immediate reference to a practicable point.[27]

Put more broadly, unlike current secular common law and civil law, Jewish law has not undergone the fundamental conceptual transformation from a regime that provides subject-specific responses to novel problems, including reasoning by analogy from narrow, preexisting doctrinal categories, to a regime framed by abstract general categories, like property, contract, and tort, that are applied to incorporate new subject matter deemed to share essential qualifying characteristics of the pertinent general category.[28] Accordingly, much like Roman law and early common law, Jewish law has no comprehensive category of "property" into which all existing and emerging variants of rights in things are seen to fit.[29] Even the Hebrew words traditionally used to connote forms of property or assets have narrower, more particular meanings than the modern English word "property," infused as it is with the connotation of absolute dominion. For that reason, perhaps, when contemporary rabbinic jurists debate how copyright should be characterized, they generally use a term from modern Hebrew, *ba'alut*, meaning ownership in the general sense, rather than the traditional word, *kinyan*, which can connote either dominion or lesser proprietary rights and which primarily

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27 ISAAC HERZOG, THE MAIN INSTITUTIONS OF JEWISH LAW; THE LAW OF PROPERTY 71 (Soncino Press 1980). Isaac Herzog was the first Chief Rabbi of Ireland and later the first Ashkenazi Chief Rabbi of the State of Israel.

28 *See* SHERMAN & BENTLY, *supra* note 4, at 17-18 (describing the transformation of common law). The move to systematize the common law took place over the nineteenth and twentieth centuries, as the common-law writs were abolished and replaced with the general categories of property, tort, and contract. *See* GORDLEY, *supra* note 25, at 44.

29 *See* HERZOG, *supra* note 27, at 65-67, 72-74. On the absence of an overarching concept of "property" in Roman law, see Boudewijn Bouckaert, *What is Property?*, 13 HARV. J.L. & PUB. POL'Y 775, 781-84 (1990). On the particularistic, narrow forms of property in the common law that Blackstone described at length in the Commentaries, see David B. Schorr, *How Blackstone Became a Blackstonian*, 10 THEORETICAL INQUIRIES L. 103, 107-11 (2008).

refers to the mode of acquisition of an object of property rather than the right itself.[30]

In sum, the terms property and ownership in Jewish law are essentially terms of classification of sundry rights that share common doctrinal precepts. Unlike "property" in common and civil law, property in Jewish law is not an independent archetype or ideal form with a defined set of essential attributes, and certainly not one freighted with the ideology of possessive individualism as in secular Western jurisprudence. Nor, for that matter, does one find in the rabbinic debate any hint of the view, which has historically found expression in Lockean and German idealist copyright theory, that authors' works are the unique, newly-created products of mental labor, ingenuity, and personality and thus the "first and most sacred of all properties."[31] To say that an author "owns" his work in Jewish law means simply that, as a doctrinal matter, the author's rights are governed by a set of rules and precepts that are generally understood to attach to chattel, land, and other things sometimes labeled as "property."

Whatever the formalist, doctrinal character of the rabbinic debate, to classify copyright as "property" or a "right of ownership" in Jewish law typically yields the result, roughly akin to that sought by the "copyright is property argument" in common and civil law, that the rules and rights applicable to other forms of "property" also apply to copyright. The rabbinic jurisprudence contains a number of striking examples. First, following Nathanson, present-day rabbinic jurists assume that, if authors have a right of ownership in their works, that right is perpetual, descendible, and transferable.[32] In keeping with the under-theorized nature of property in Jewish law generally, rabbinic jurists do not explain why those characteristics

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30 *See* HERZOG, *supra* note 27, at 72-73 (discussing the adoption of the modern word *ba'alut* in contemporary rabbinic jurisprudence generally); George J. Webber, *The Principles of the Jewish Law of Property*, 10 J. COMP. LEGIS. & INT'L L. 82, 84 (1928) (discussing the meaning of *kinyan*). Joseph Saul Nathanson did occasionally refer to the authors' rights as *kinyan* in the exclusive printing privileges he issued to authors and publishers. *See* NETANEL & NIMMER, *supra* note 9.

31 Victor Hugo, Speech to the Conseil d'Etat (Sept. 30, 1849), *quoted in* JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 31 (Yale Univ. Press 2008).

32 *See* WEISFISH, *supra* note 13, at 33, 38-39; Asher Weiss, *Ha-Tokef ha-Hilakhti shel Patent Rashum* [*The Legal Force of a Registered Patent in Jewish Law*], ME-SAVIV LE-SHULKHAN, Feb. 19, 2009, at 1 (Hebrew); COHEN, *supra* note 13, Kitsurei Dinim le-Ma'aseh 1-2, Kuntras 1-8. Cohen ultimately concludes that copyright is not transferable given the inability to transfer incorporeal things in Jewish law, although authors may grant exclusive licenses to use their works. But the rabbis do not generally distinguish between an author's assertion of copyright and his publisher's

necessarily attach to the author's right of ownership per se. They apparently flow by analogy from rules applicable to things typically treated as property under Jewish law.

Second, also following Nathanson, an author's right of ownership is what secular scholars would term pre-political and what in Jewish law terms is "*de-oreita*," a right grounded in the Pentateuch as opposed to a subsequent rabbinic regulation. In other words, the author and his heirs have the perpetual exclusive right to print even if they have not received a rabbinic printing privilege and even in the absence of secular law providing for such a right. In that vein, for example, Yosef Shalom Eliashiv, the leading rabbinic authority for Israel's Lithuanian non-Hasidic ultra-Orthodox community, posits that the author has a right of ownership in his work that continues in perpetuity regardless of the limited copyright term prescribed under secular laws.[33]

Third, if copyright is property, the copyright holder's exclusive rights are universal, without being confined within local or national borders. In contrast, rabbinic printing privileges, guild and community regulation, custom, and whatever secular law might be recognized according to the Jewish-law rule that the "law of the land is the law" are all limited to particular territorial jurisdictions and may vary from one jurisdiction to another.[34] That limitation is of particular importance in Israel because some leading ultra-Orthodox rabbinic jurists posit that the "law of the land" rule does not apply to the laws of the State of Israel and thus cannot be relied on as a basis for copyright protection in Israel.[35]

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or another transferee's assertion. Indeed, Nathanson's seminal ruling involved a case in which the petitioner had purchased the author's rights.

33 Yosef Shalom Eliashiv, *Rulings and Answers*, *in* WEISFISH, *supra* note 13, at 115. Eliashiv is a widely respected rabbinic authority outside ultra-Orthodox circles as well and, unlike most other ultra-Orthodox rabbis of his day, he served as a *dayan* (rabbinical judge) in the Chief Rabbinate of the State of Israel, including on its Supreme Rabbinical Court, until the early 1970s.

34 For further discussion of the issue of the geographical limitations of copyright and printing privileges under Jewish law, see RAKOVER, *supra* note 13, at 393-416; Navon, *supra* note 17, at 35, 37. On the territorial limitations of the "law of the land is the law" rule, see SCHMELKES, *supra* note 23 (holding that the law of the land is in force only in the country where the law was enacted and thus that it cannot serve as a basis for forbidding reprinting in another country, at least absent custom to the contrary).

35 *See, e.g.*, SILMAN, *supra* note 17, at 180; SHPITS, *supra* note 17, at 178. Other rabbinic jurists accept that the "law of the land" rule applies in Israel, but strongly prefer to rely on internal sources of Jewish law if at all possible since reliance on

Fourth, if copyright arises from the Jewish law of unfair competition, rather than being a right of ownership, the author's exclusive rights are exhausted if and when the author recovers his initial investment in creating and distributing the work (traditionally understood as selling out the first edition).[36] The reason is that the Jewish law of unfair competition protects an incumbent only against a new entrant who would deprive the incumbent of his livelihood, not merely cause the incumbent to earn lower profits.[37] In contrast, if copyright is property, the author's exclusive rights are independent of whether unlicensed copying causes the author material monetary harm. Under Jewish law, a property owner may generally prevent conversion or unauthorized use of his property that would result even in relatively trivial monetary harm.[38] Under the copyright-is-property school, accordingly, the author may enforce his right of ownership regardless of whether he has already recovered a profit. Indeed, according to some commentators, unlicensed copying may infringe the author's right of ownership even absent any monetary harm at all.[39]

Fifth, following further from the Jewish law conception of unfair competition, if copyright is a right against unfair competition rather than a right of ownership, a number of jurists posit that it is not a violation of the author's rights for someone to engage in copying that does not cause the author material monetary harm and/or does not entail competition, even if the author has not yet recovered his investment. Under that view, the author typically has no claim against an individual who engages in private copying, a teacher who makes multiple copies for his classroom use, or even an Internet file trader or anyone else who copies a work and gives the copies

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external law suggests that Jewish law is incomplete. *See, e.g.*, Navon, *supra* note 17, at 43-44.

36 *See* COHEN, *supra* note 13, at 601; WEISFISH, *supra* note 13, at 38.

37 EFRAIM ZALMAN MARGOLIOT, RESPONSA BEIT EFRAIM, HOSHEN MISHPAT, no. 27 (Lvov 1828) (Hebrew); HATAM SOFER, *supra* note 20. For contemporary applications related to copyright, see WOSNER, *supra* note 17 (holding that an author's loss in profits resulting from multiple copying of portions of a book for classroom instruction is not sufficient harm to support a claim for unfair competition); SHLOMO TANA, RESPONSA BRAKHAT SHLOMO, HOSHEN MISHPAT, no. 26, at 189, 192 (1986) (Hebrew) (holding that sale of a rival edition of the Vilna Talmud would not be sufficiently ruinous to the business of the plaintiff publisher to constitute unfair competition).

38 *See* Shmuel Shilo, *Kofin al Midat S'dom: Jewish Law's Concept of Abuse of Rights*, 15 ISR. L. REV. 49, 51 (1980) (discussing unjust enrichment).

39 *See* Ishun, *supra* note 17, at 59 (describing but rejecting that view).

away for free, although some jurists suggest that such copying is permissible only if the copyist or recipient would not otherwise buy a copy of the work.[40] In contrast, such copying would typically be an impermissible abridgement of the author's right of ownership, regardless of its noncommercial character and, presumably, even absent monetary harm.[41]

Sixth, under Jewish law, copyright's doctrinal categorization impacts whether the author has a claim against someone who creates what U.S. copyright law terms a "derivative work," such as abridgements, simplified versions, edited versions, a movie version of a story, recordings of a song, translations, and other adaptations that are based on the author's work. If copyright is property, the author's ownership rights include the exclusive right to create such derivative works.[42] In contrast, those who posit that copyright is a right against unfair competition (or is based in custom or guild regulation) typically hold that an author has a claim against the creator of a derivative work only if the dissemination of the derivative work might harm the market for the underlying original, or if the custom in the pertinent industry

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40 *See* COHEN, *supra* note 13, Kuntras 387-90 (summarizing the contrasting approaches to private copying); *id.* at 574 (arguing that there is always a danger that private copying will deprive the author of fair profits); SILMAN, *supra* note 17, at 181 (arguing that if one copies only for oneself, that is not prohibited as "unfair competition"); WEISFISH, *supra* note 13, at 121 (quoting Shlomo Zalman Auerbach stating that it is not legally forbidden to copy a sound recording for oneself, but it is morally reprehensible to do so if one would have otherwise purchased the sound recording); Naftali Bar-Ilan, *Ha'atakat Sefarim o Kasetot* [*Copying Books or Cassettes*], 7 TEHUMIN 360, 367 (1985-86) (Hebrew) (arguing that private copying even of an entire book is permitted if the copier would not have otherwise purchased the book, since the author's right is only one against monetary harm, not an absolute property right); Int'l Beis Hora'ah, *supra* note 17 (concluding that private copying is permitted under Jewish law unless prohibited by the law of the land); *see also* Nehurai, *supra* note 17, at 50-51 (arguing that it is permissible to make a personal copy of a book or sound recording that one owns because the author's right is against unjust enrichment and only economic harm caused by commercial piracy gives rise to a claim under that right).

41 *See* Eliashiv, *supra* note 33, at 116 (stating that personal copying of a work made for purposes of profit and which bears the legend, "all rights reserved," is prohibited); MOSHE FEINSTEIN, RESPONSA IGROT MOSHE, OREKH ḤAIM, pt. 4, no. 40, para. 19 (N.Y. 1959) (Hebrew) (copying a sound recording without permission of the person who made the recording is theft); Weiss, *supra* note 32, at 1 (opining that it is theft to copy a work in which the owner has reserved for himself the right to copy).

42 *See* COHEN, *supra* note 13, Kitsurei Dinim le-Ma'aseh 103-07; WEISFISH, *supra* note 13, at 46.

is that the author's exclusive rights extend to the particular type of derivative work in question.[43]

Seventh, whether or not authors have a right of ownership may bear upon whether they enjoy protection against unlicensed copyists under the Jewish law doctrine of unjust enrichment (*ze neheneh ve-ze ḥaser*). A number of rabbinic jurists view copyright as protection against unjust enrichment in that the unlicensed copyist unfairly benefits from the author's and publisher's labor and investment. But others argue that, under Jewish law, protection against unjust enrichment can apply *only* when one person benefits from using another's property, as opposed to benefiting from another's labor or investment.[44] In this view, if the author, in fact, has no right of ownership in exploiting his work, an unlicensed copier is not unjustly enriched under Jewish law because, although he might harm the author's market, he benefits from the author's work and investment, not from using the author's property.

Finally, some jurists maintain that Jewish law does not recognize a non-Jew's claim of unfair competition or unjust enrichment and thus hold that if copyright is grounded in one of those doctrines, rather than a right against conversion of property (or secular law pursuant to the "law of the land" rule), it does not protect Gentile authors or publishers *per se*, even if Jews must compensate Gentiles where failure to do so would "desecrate God's name".[45] Such discriminatory rules are the vestige of an age in which intense inter-communal rivalry, mercantilism, and Gentile government prohibitions on Jews engaging in most trades was the norm. Yet they remain within the corpus of Jewish law. When a rabbinic court in Bnei Brak ruled, in response to Microsoft's petition, that copying and selling software for a low price is unfair competition under Jewish law, it did so only after being presented with evidence that Microsoft officer and principal shareholder, Steven Ballmer, qualifies as a Jew under Jewish law.[46]

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43 *See* COHEN, *supra* note 13, Kuntras 103-06, 269-75.

44 *See, e.g.*, Navon, *supra* note 17, at 38; *see also* Zalman Neḥemia Goldberg, *Ha'ataka me-Kaseta le-Lo Reshut ha-Ba'alim* [*Copying from a Cassette Without the Owners' Permission*], 6 TEHUMIN 185, 194-97, 207 (1984-85) (Hebrew) (noting disagreement on that issue, but ruling that unjust enrichment does apply when one benefits from another's investment).

45 *See* Landau, *supra* note 17, at 813; Goldberg, *supra* note 44, at 207 (concluding that the question of whether a non-Jew can claim unjust enrichment under Jewish law requires further examination); Int'l Beis Hora'ah, *supra* note 17.

46 Telephone Interview with Yonatan Schreiber, Microsoft Isr. Mktg. Consultant (Aug. 12, 2007). Steven Ballmer's mother is Jewish, which makes him a Jew under Jewish law. Jewish law presents diverse views, applicable in various contexts, on the legal status of corporations and the extent to which a corporation stands as an independent entity, separate and apart from the human beings who are its

Rabbinic jurists, therefore, frame their debate regarding copyright's nature, scope, and duration in terms of specific applications of rules pertaining generally to property, unfair competition, unjust enrichment, and other doctrines. In line with the legal formalist approach of Jewish law, the legal category into which copyright is placed almost entirely and invariably determines the doctrinal rule-set that applies (even if, as noted above, the legal categories in Jewish law tend to be narrower and more concretely tied to specific instances than the broad, abstract categories of common and civil law). Accordingly, with one important exception that we will shortly discuss,[47] the debate centers on how copyright should be categorized, not whether copyright is *sui generis* or a subcategory that warrants special rules. The result is that, if copyrights are categorized as "property" or a "right of ownership" under Jewish law, they encompass considerably broader rights than under the copyright-as-amalgam school.

That is not to say, however, that property or copyright-defined-as-property in Jewish law resembles the "sole and despotic dominion" that Blackstone presented as a mythic ideal of property.[48] To the contrary, in some respects, the Jewish law and understanding of property deviate even more substantially from that ideal than does the common law. According to rabbinic tradition, indeed, the primary sin committed by the people of Sodom was to insist on the absolute primacy of property, declaring that "what is mine is mine and what is yours is yours," and thus refusing to share or countenance uses of property that benefit the user but cause no harm to the owner.[49] Such spiteful, miserly behavior is regarded not merely as morally reprehensible; under certain circumstances, Jewish law affirmatively requires a property owner to allow another to benefit from using his property free of charge, so long as the property owner suffers no (other) loss from the use. Concomitantly, neither does Jewish law regard benefiting from another's property without causing any loss to the owner as unjust enrichment.[50]

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shareholders. *See* Michael J. Broyde & Steven H. Resnicoff, *Jewish Law and Modern Business Structures: The Corporate Paradigm*, 43 WAYNE L. REV. 1685 (1997).

47 The exception relates to works of Torah insight, which are particularly dear to the rabbinic tradition. *See infra* notes 65-72 and accompanying text.

48 WILLIAM BLACKSTONE, 2 COMMENTARIES *1. Despite his proverbial description, Blackstone and his contemporaries clearly understood that property rights were far from a "sole and despotic dominion" in positive law. *See* Schorr, *supra* note 29.

49 MEIR TAMARI, WITH ALL YOUR POSSESSIONS; JEWISH ETHICS AND ECONOMIC LIFE 52 (Jason Aronson 1998) (quoting Mishnah, *Avot*).

50 For a detailed discussion of that principle, see AARON KIRSCHENBAUM, EQUITY IN JEWISH LAW; FORMALISM AND FLEXIBILITY IN JEWISH CIVIL LAW 185-252 (Ktav

As applied by rabbinic jurists, the rule against acting like a Sodomite gives rise to three possible limitations on copyright, even assuming that copyright is property. First, if an author has created and disseminated his work with no intention of profiting from it, he suffers no economic loss even if another benefits from his work without paying for it, and thus such an author might be acting like a Sodomite were he to insist upon payment after the fact.[51] Second, the rule against Sodomite behavior supports the view of some rabbinic jurists that private copying is permitted so long as the copier would not have otherwise purchased the copy and thus causes the author no loss.[52] Third, the rule might be the basis for limiting copyright's duration for published works. In his seminal ruling rejecting a perpetual, proprietary copyright while conceding that authors have an exclusive right to print their unpublished manuscripts, Yitzhak Schmelkes reasoned that copying causes the author no damage (as distinct from foregone profit) once the first edition has been sold, and thus that the rule against Sodomite behavior negates any continuing claim the author might have to enforce an exclusive right to print following the first edition.[53]

In addition to the limitations imposed by the rule against acting like a Sodomite, there are other ways in which recognizing copyright as property in Jewish law yields lesser rights than those that are often understood to flow from characterizing copyright as property in secular common and civil law. First, some jurists maintain that Jewish law regarding the abandonment of property permits the unlicensed copying and distribution either of old works whose rights holders are unknown ("orphan works" in secular copyright

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Publishing 1991); Shilo, *supra* note 38; HANOCH DAGAN, UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES 112-27 (Cambridge Univ. Press 1997).

51 Cohen does not make this argument explicitly, but he treats the harm caused by unlicensed copying entirely as economic harm and distinguishes the author's desire to prevent uncompensated and unlicensed copying from the classic case of Sodomite behavior in which the property owner had no intention of making a profit, yet nevertheless extorts money from another for agreeing to allow the use of his property. *See* COHEN, *supra* note 13, Kuntras 404-06. *But cf.* TANA, *supra* note 37, no. 24, at 177 (holding that the rule against acting like a Sodomite does not apply to forbidding another to print and distribute an out-of-print book because the unlicensed use harms the author's successors' potential licensing market).

52 *See* COHEN, *supra* note 13, Kuntras 437-62 (discussing this view, but ultimately presenting a doctrinal argument to reject it); *cf.* FEINSTEIN, *supra* note 41 (holding that one who produces a cassette recording of Torah-teaching with the intent to earn a profit does not act like a Sodomite by affixing a notice that it is forbidden to copy the recording).

53 BEIT YITZHAK, *supra* note 12.

parlance) or of works that the rights holders have let fall out of print.[54] Under Jewish law, lost property is presumed abandoned, and therefore free for anyone to appropriate, either when the owner renounces ownership or under circumstances in which the owner is deemed to have given up hope of recovering the item.[55] The claim that orphan and out-of-print works are abandoned is fairly straightforward.[56] Yet some jurists apply that rule even to in-print works that are so easily and pervasively copied that copyright enforcement appears to be impossible. Such works have been held to include widely pirated software, songs broadcast on the radio, and works that are available for Internet downloading with or without the author's permission.[57] As one commentator puts it,

> because in reality there is no control over materials on the Internet nor any practical possibility of enforcing copyright, and anyone can download as he wishes, such materials resemble a lost item that is swept away in a river, and thus any person is permitted to download for himself pursuant to the law of abandoned property.[58]

Second, even if we accept that copyright is property under Jewish law, the violation of that right is not necessarily "stealing." In the secular copyright world, those who characterize copyright as property have reflexively

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54 *See, e.g.*, SILMAN, *supra* note 17, at 180 (ruling that one may distribute copies without permission when the author or publisher is neither distributing nor about to distribute the work).

55 HERZOG, *supra* note 27, at 281-98.

56 Joseph Saul Nathanson explicitly held, however, that an author does not lose his exclusive right to reprint merely because the book is out-of-print. Nathanson reasoned that the author no doubt intends to issue a new printing to meet demand for the book, but is temporarily unable to do so due to insufficient capital. NATHANSON, *supra* note 15.

57 Dov Lior, *Bama Toranit — Ha-im Mutar le-Ha'atik Tokhnot Makhshev, Diskim, ve-Kaletot?* [*Torah Podium — Is It Permissible to Copy Computer Programs, Disks, and Videos?*], 32 KOMEMIYUT (2006-07) (Hebrew), *available at* http://www.netlaw.co.il/it_itemid_3879_desc__ftext_.htm; SILMAN, *supra* note 17, at 181 (holding that one may make a personal copy of a computer program that has been "breached" and widely copied); *see also* COHEN, *supra* note 13, Kuntras 601-03 (conceding that copyright owners in musical works who allow their works to be played on the radio knowing that some listeners will record the songs might have knowingly abandoned their property).

58 Lior, *supra* note 57 (applying the doctrine of "zuto shel yam") (translation by Neil Netanel). *But see* Int'l Beis Hora'ah, *supra* note 17 (asserting that the claim of abandonment due to Internet copying applies only when the copyright owner has undoubtedly given up hope of enforcement).

labeled copyright infringement as "theft."[59] Indeed, Congress denominated legislation providing for criminal penalties for Internet file trading as the "No Electronic Theft Act,"[60] and a U.S. district court invoked the commandment, "Thou Shalt Not Steal," in an opinion announcing that it would forward for criminal prosecution the copyright infringement action against a hip hop artist who had sampled the copyright owner's music.[61] Likewise, rabbinic jurists seem typically to assume that if copyright is property, copyright infringement is tantamount to theft (*gezel*).[62] However, a couple of leading proponents of the copyright-is-property school conclude that unlicensed copying is actually an unlawful *use* of that property for the copyist's benefit, not an unlawful *conversion* of property.[63] According to this view, unlicensed copying is actionable under the Jewish law of unjust enrichment (*ze neheneh ve-ze ḥaser*), not theft (*gezel*). In turn, if unlicensed copying is unjust enrichment, Jewish law imposes doctrinal limitations to liability that do not apply to theft (or conversion), primarily the requirement that the author be harmed by the copying and the possible ineligibility of Gentiles to assert claims for unjust enrichment. In addition, the monetary remedy for unjust enrichment under Jewish law, namely disgorgement of the copyist's benefit, will often be less than that for theft (although, in various ways that we cannot address here, the civil remedies for theft in Jewish law are themselves considerably more lenient than under contemporary secular law).[64]

Finally, we reach the exception adumbrated above: some jurists posit that Jewish law circumscribes what would otherwise be an author's perpetual, proprietary copyright specifically with respect to certain expressive works

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59 That practice has a venerable pedigree, extending back to the beginning of the eighteenth century. *See* JOSEPH LOWENSTEIN, THE AUTHOR'S DUE: PRINTING AND THE PREHISTORY OF COPYRIGHT 215 (Univ. of Chicago Press 2002) (quoting Daniel Defoe's characterization, in 1704, of printing another's manuscript without permission as "a sort of Thieving").

60 Pub. L. No. 105-147, 111 Stat. 2678 (1977).

61 Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 183 (S.D.N.Y. 1991).

62 *See, e.g.*, Eliashiv, *supra* note 33, at 115; FEINSTEIN, *supra* note 41; Weiss, *supra* note 32, at 1.

63 One reason is that, under Jewish law, conversion requires physical appropriation, and these jurists are unwilling to extend physical appropriation as a metaphor for unlicensed copying. In addition, unlicensed copyists do not deprive the author of the intangible corpus of his property right, but only use it to their benefit. *See* COHEN, *supra* note 13, at 391-403; TANA, *supra* note 37, no. 24, at 172.

64 For further discussion, see NETANEL & NIMMER, *supra* note 9; Itamar Warhaftig, *D'mei Shimush be-Nekhes Gazul* [*Compensation for Use of Stolen Property*], 6 TEḤUMIN 235 (1984-85) (Hebrew).

of signal importance to traditionally observant Jewish communities. These works are books, recordings, or videos, of " *ḥidushei Torah*," i.e., new exegeses of foundational Jewish texts, often relating to how traditional rabbinic literature and doctrine apply to current issues or circumstances.[65] Rabbinic tradition recognizes a fundamental public interest in making such teachings freely available to a community in need of knowledge and guidance about how Jewish law applies to contemporary life. Partly for that reason, Jewish law has long prohibited rabbinic scholars from profiting from teaching Jewish law and religion.[66] Some jurists argue, accordingly, that authors of *ḥidushei Torah* may not assert a right to profit from their sale.[67] Others mitigate that rule by distinguishing between the intangible work, that is the actual *teaching* presented in the book or tape, on one hand, and the author's *labor and investment* in reducing his teaching to writing or other fixed form and in printing, reproducing, and distributing the copies of his work, on the other.[68] The author may not profit from, and has no property right in, the teaching itself, but is entitled to receive the full, customary salary for his labor and investment in preparing the manuscript or recording and in producing and distributing copies.

According to some modern accounts, Yitzhak Schmelkes' holding that the author's exclusive right expires after he has sold his first edition is a manifestation of this rule.[69] The work at issue in that dispute was a book of *ḥidushei Torah*, and Schmelkes invoked the rule against profiting from teaching Torah in rejecting Nathanson's position that authors have perpetual exclusive rights. As such, Schmelkes may have seen the author's exclusive right to print and sell the first edition as a rough vehicle for providing the author with the full, customary salary for his labor and investment in preparing and printing the manuscript.[70] On this reading of Schmelkes'

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65 *See* Jonathan Sacks, *Creativity and Innovation in Halakhah*, *in* RABBINIC AUTHORITY AND PERSONAL AUTONOMY 123, 146-49 (Moshe Z. Sokol ed., Jason Aranson, Inc. 1992).

66 That prohibition has been narrowly applied to enable scholars to earn a livelihood from teaching and fulfilling other rabbinic functions. For further discussion, see Neil W. Netanel, *Maharam of Padua v. Giustiniani: The Sixteenth-Century Origins of the Jewish Law of Copyright*, 44 HOUS. L. REV. 821, 862 (2007).

67 For a discussion of the various positions on this issue, see COHEN, *supra* note 13, Kuntras 43-70.

68 *See, e.g.*, TANA, *supra* note 37, no. 24, at 164.

69 *See, e.g.*, COHEN, *supra* note 13, Kuntras 30-34; TANA, *supra* note 37, no. 24, at 164. *But see* CHAIM JACHTER, GRAY MATTER; VE-ZOT LE-YEHUDA 120 n.4 (2000) (concluding that Schmelkes' rejection of authors' property right applies to all works, not just *ḥidushei Torah*).

70 We refer here to the author's exclusive right that Schmelkes seemed to recognize

ruling, it is also unclear what he would have held had the book before him been a secular work rather than one of *ḥidushei Torah*. Some jurists of the copyright-is-property school contend that Schmelkes meant only to carve out an exception from the author's right of ownership when the work is one of *ḥidushei Torah*.[71] In Schmelkes' day, however, virtually all newly authored works that rabbis considered when determining authors' rights were such *ḥidushei Torah*. With isolated exceptions, rabbinic jurists have applied Jewish copyright to secular works, such as computer programs and music, only in recent years.[72]

In sum, to categorize copyright as property in Jewish law largely determines copyright's shape and duration, and it is understood to do so as a matter of doctrinal mandate by way of application of rules that govern property generally. For example, if property is perpetual and freely transferable, but can be deemed abandoned under certain circumstances, and if copyright is property, *ergo* copyright is also perpetual and freely transferable, and can be abandoned when analogous circumstances are deemed to apply. It may take some juridical work to interpret and apply property doctrine to the subject matter of copyright law. But we need not and, indeed, may not undertake any further analysis of the particularities or special policies involving authors' expressive works to develop rules that apply specifically to copyright, for example, whether, as in secular copyright, authors' rights should be subject to various limitations, such as fair use, that do not arise from property doctrine generally.

The holding of some jurists that property rules do not apply to *ḥidushei Torah* is a notable exception to this understanding that, if copyright is property, then copyright law is a fairly direct instantiation of property doctrine. Under the *ḥidushei Torah* exception, the rule prohibiting profiting

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under Jewish law per se, not to copyrights under secular law that, according to Schmelkes, must be recognized under the "law of the land" rule. *But see* SILMAN, *supra* note 17, at 181 (contending that the author of *ḥidushei Torah* is entitled only to a set amount, not to any proceeds from book sales that might exceed that sum).

71 *See, e.g.*, COHEN, *supra* note 13, Kuntras 2; WEISFISH, *supra* note 13, at 40.

72 Historically, the principal, if only occasional, exceptions from the rabbis' singular focus on *ḥidushei Torah* have been newly authored books about mathematics, science, Hebrew grammar, or medicine. *See* SHMUEL FEINER, THE JEWISH ENLIGHTENMENT 25 (Chaya Naor trans., Univ. of Pa. Press 2004) (describing eighteenth-century rabbinic approbations issued for books of geometry, anatomy, and astronomy). Of course, as previously noted, rabbinic jurists have long granted quasi-copyright protection for new editions of old works of Jewish law, learning, and ritual as well as newly authored ones.

from teaching Torah takes precedence over property rules that would otherwise be applicable to author's expressive works. These jurists thus carve out a *sui generis* regime specifically tailored to *hidushei Torah*, in part to promote public access to new rabbinic teachings.

II. RATIONALES FOR COPYRIGHT'S CATEGORIZATION UNDER JEWISH LAW

The secular law debate over whether copyright is property presents a richly colored canvas of deontological and consequentialist arguments grounded in a broad spectrum of ideologically charged claims about the nature of creativity, authorship, human personality, democratic society, social welfare, natural justice, freedom of speech, economic efficiency, liberty, and the institution of property. Deontological arguments loomed especially large in early common-law and civil-law copyright. In eighteenth-century England and nineteenth-century France, leading jurists debated whether incorporeal creations can qualify as the subject of property and whether the dictates of moral reason and natural justice require that authors have a right of property in their expressive works.[73] While consequentialist discourse subsequently came to dominate Anglo-American copyright, deontological postulates about the nature of authorship and property continue to underlie today's aptly named "authors' rights" laws of Continental Europe.[74] Yet, in both regimes, present-day scholars present intensive, methodical argumentation regarding such issues as the desirability of enhancing public access to existing works, supporting classroom teaching, avoiding holdouts and deadweight loss, giving authors greater ability to build upon existing works in creating new ones, authors' prerogative to prevent unwanted modifications to their creations, and the value of remix culture.

As we have noted, rabbinic jurisprudence is devoid of the politically and ideologically freighted polemic regarding the meaning of authorship and property that has long marked Anglo-American and Continental European discourse. Despite the significant doctrinal consequences that flow from categorizing copyright as property in Jewish law, modern rabbinic jurists also devote remarkably little attention to weighing policy concerns when

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73 *See* SHERMAN & BENTLY, *supra* note 4, at 11-42 (discussing England); Pfister, *supra* note 4 (discussing France).

74 *See* SHERMAN & BENTLY, *supra* note 4, at 39-40 (describing the turn to consequentialist thinking in English copyright); Netanel, *supra* note 8 (describing deontological claims in civil-law copyright).

debating whether copyright should be categorized as property. Certainly, from a secular copyright scholar's perspective, the rabbinic debate is overwhelmingly characterized by formalist, doctrinal reasoning and *a priori*, essentialist supposition lacking in policy analysis and broader theoretical grounding.

Importantly, however, one should not mistake the largely formalist character of rabbinic jurisprudence for a lack of awareness of the political, social, and economic context in which Jewish law operates. Rabbinic sensitivity to the context — and consequence — of shaping copyright doctrine is particularly pronounced in rabbinic rulings and responsa from the era prior to political emancipation, when rabbinic courts and Jewish communal institutions still enjoyed a measure of lawmaking autonomy backed by the state.[75] In their extended colloquy in the early nineteenth century, for example, Mordekhai Banet and Moses Sofer raised policy arguments that would be familiar to the secular legal academy today. In arguing for a limited scope of rabbinic printing privileges and unfair competition protection for existing books, Banet assessed the relative economic interests of rival publishers and held that the first publisher's investment of labor in producing a new edition did not justify granting him an exclusive right to market his work to potential purchasers. In so holding, Banet emphasized that competition would benefit the public by bringing down the price of the book and should thus be encouraged, except in those relatively rare cases in which the rival publisher could sell at a loss to drive the first out of business.[76] In contrast, Sofer supported rabbinic authority to issue exclusive printing privileges and favored a liberal interpretation of their scope on the grounds that, if book publishers are not accorded exclusive rights to market their editions, the threat of ruinous competition would induce them to stop

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75 Until the political emancipation that made its way through European countries in the eighteenth and nineteenth centuries, rabbinic courts enjoyed juridical power, backed by the state, to govern at least some of the daily life of Jewish communities, even if rabbinic leaders also needed skillfully to negotiate not only the limits and precariousness of Jewish self-government vis-à-vis secular authorities but also the continuing authority of rabbinic courts within Jewish communities vis-à-vis the legislative and judicial bodies headed by lay leaders, which came increasingly to dominate Jewish self-government from the sixteenth century on. *See* DAVID B. RUDERMAN, EARLY MODERN JEWRY: A NEW CULTURAL HISTORY 58-59, 65-93 (Princeton Univ. Press 2010) (discussing the assertion of lay authority over the rabbis); MOSHE ROSMAN, HOW JEWISH IS JEWISH HISTORY? 71 (Litmann Library 2007) (describing the transformation of Jewish communal institutions from state-sanctioned communal self-governing bodies to voluntary organizations).

76 BANET, *supra* note 20.

publishing books, and the study of Jewish law and religion (the rough rabbinic equivalent to the "public interest" in secular law) would greatly suffer.[77]

Joseph Saul Nathanson, whose seminal copyright ruling shortly preceded full political emancipation for Austrian and Galician Jews, similarly evinced considerable sensitivity to extra-juridical context, particularly the precariousness of rabbinic authority in his day.[78] In recognizing an author's perpetual, exclusive right, Nathanson must also have drawn upon his perception of the needs of the Jewish book trade at the time. Nathanson not only served as the rabbi of Lvov, then a major center of Hebrew book publishing, but was also himself an author, editor, and active participant in establishing a number of publishing houses.[79] Yet, in contrast to Banet and Sofer, Nathanson's ruling is devoid of any explicit discussion of the potential copyright policy implications for recognizing a perpetual, proprietary copyright. He never considers, for example, what might be the impact of perpetual copyrights on continued access to decades- or centuries-old works of Jewish learning.

The primary issue before Nathanson was whether a Lvov publisher who had acquired the author's rights in a book originally published in Russia without a rabbinic printing privilege could prevent another Lvov publisher from reprinting the same book, even though the author had sold out the first edition. In ruling that the author and his transferees may prevent such reprinting even without a printing privilege, Nathanson emphasized that the Russian government had forbidden rabbis from issuing exclusive printing privileges that provided that violators would be subject to excommunication, which had traditionally been the sole effective means for rabbinic enforcement of such privileges. As a result, Nathanson noted, rabbinic printing privileges had come to be framed as requests rather than enforceable rabbinic commands.[80] Moreover, Nathanson continued, the

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77 HATAM SOFER, *supra* note 20.

78 Nathanson's ruling was issued in 1860, some seven years before Galician and Austrian Jews were granted full political emancipation and civic equality, although rabbinic courts in the region had been deprived of state-sanctioned authority to enforce their judgments long before that date, pursuant to the Edict of Toleration for the Jews of Galicia issued by Emperor Joseph II in 1789. Rachel Manekin, *Galicia*, *in* 1 THE YIVO ENCYCLOPEDIA OF JEWS IN EASTERN EUROPE 560, 561-63 (Gershon David Hundert ed., Yale Univ. Press 2008).

79 Haim Gertner, *Yosef Sha'ul Natanson*, *in* 2 THE YIVO ENCYCLOPEDIA OF JEWS IN EASTERN EUROPE, *supra* note 78, at 1253; ZEEV GRIES, THE BOOK IN THE JEWISH WORLD 1700-1900, at 117-18 (Litmann Library 2007).

80 Nathanson followed this formula in printing privileges that he issued as well. For example, in the privilege that Nathanson granted to a companion volume to the one at issue in his ruling, he stated, "I *request* of our brothers, the children of Israel, that

Austrian Empire, where Lvov was located, might well punish a publisher who sold copies of a book bearing notice of a rabbinic printing privilege (as was required by Jewish law for the privilege to take force), rather than relying on his rights under Austria's first modern copyright law, enacted some fourteen years earlier. Given that state of affairs, Nathanson lamented, "[w]hat power does a Jewish court have" to rule that reprinting a book is forbidden only on the condition that its author or publisher has obtained a rabbinic printing privilege? In contrast, presumably, a Jewish court might more discreetly issue an oral order that a Jewish publisher must desist from infringing an author's property right without running afoul of the letter of secular law or raising the ire of the government authorities.

Evidently, Nathanson also wished to maintain the direct relevance of Jewish law for Hebrew publishing. If his sole concern had been to avoid conflict with secular authorities, he could have simply applied Austrian copyright law under the hoary principle of Jewish law that "the law of the land is the law."[81] Instead, he incorporated a proprietary copyright regime within Jewish law, thereby obviating the need to make recourse to secular law. In so doing, Nathanson also established a Jewish-law foundation for uniform protection for books of Jewish learning throughout the widely dispersed communities of the Jewish Diaspora. Unlike the territorial limitations of rabbinic printing privileges and secular law, an author's property right would be universally enforceable under Jewish law.

Finally, a universal proprietary right, independent of rabbinic printing privilege, would avoid the communal strife that sometimes ensued from conflicting rabbinic privileges. As Nathanson must have been acutely aware, in the 1830s a bitter battle involving competing editions of the Talmud had rocked Eastern European Jewry and embroiled hundreds of rabbinic leaders in rancorous dispute, largely along internecine sectarian lines.[82] A perpetual, universal proprietary right, anchored in Torah law rather than rabbinic printing

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they desist, without violation, from reprinting [this volume], whether as printed or with additions, for a period of ten years from the day of its completion." (Translated by Neil Netanel.) SHULHAN ARUKH, HOSHEN MISHPAT (Avraham Yosef Madpis, Lvov 1860) (emphasis added).

81 *See supra* note 12. Nathanson unhesitatingly invoked that principle in other contexts. *See* SHILO, *supra* note 12, at 169 (questioning Nathanson's application of secular law to a contract between two Jews).

82 *See generally* SAUL MOISEYEVICH GINSBURG, THE DRAMA OF SLAVUTA (Ephraim H. Prombaum trans., Univ. Press of Am. 1991) (describing the battle of the printing privileges in light of rivalry between Hasidic rabbis and their *mitnagdim* opponents).

privilege, would accord authors and their successors with clear, unequivocal rights, no matter when or where their books were printed and sold.

Yet, despite Nathanson's grappling with the juridical and political realities of his day, his ruling presents virtually no analytical reasoning or precedential support for his holding that authors have a perpetual, exclusive right to print and distribute their works, as opposed to merely a right against unfair competition or a right derived from trade custom, both of which, following Jewish law precedent, would be limited in duration.[83] Nathanson's holding rather is based on what he presents as a self-evident conclusion: "If an author prints a new book and he merits that his words are received all around the world, he obviously has a perpetual right [to his work]."[84] Nathanson provides no reasoned explanation for why that rule is obvious. He does recount that secular law protects authors and inventors, and then insists that "common sense rejects" the possibility that Gentile authorities protect authors and inventors, but "our wholesome Torah" does not. But here, too, he provides no proof-text or precedential support beyond "common sense" for Jewish law's recognition of an author's perpetual, proprietary right. For that matter, as Nathanson was surely aware, the secular copyright law to which he refers, the Austrian Law for the Protection of Literary and Artistic Property of 1846, in fact provided for copyright of limited duration, not a perpetual right, even though it affirmed that literary and artistic creations are the "property" of their author.[85]

Nathanson also enlists prevailing practice in support of his conclusion that authors "obviously" have perpetual rights. He notes that "if someone prints or invents a new type of skilled trade, another person is not allowed to practice it without the former's consent" and, further, that "it is a daily occurrence that when one prints a work, he and those empowered by him,

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83 *See* MOSES ISSERLES (REMA), RESPONSA REMA, no. 10, at 52 (A. Ziv ed. 1970) (holding that an author-publisher had the exclusive right, pursuant to the Jewish law of unfair competition, to print the work in question until he sold out his first edition).

84 NATHANSON, *supra* note 15.

85 Under the Austrian law, the duration of the copyright term for printed works was the life of the author, plus 30 years. Austrian Copyright Act, 1846, §§ 1, 13, *in* Primary Sources on Copyright (1450-1900) (Lionel Bently & Martin Kretschmer eds., 2008), http://www.copyrighthistory.org. Nathanson does not mention that limited term in his ruling, but in the introduction to a book he co-authored, first published in Vilna in 1839, Nathanson referred explicitly to the limited copyright term under the Russian copyright law of that time — the life of the author plus 25 years. *See* MORDEKHAI ETINGA & JOSEPH SAUL NATHANSON, MEIRAT EINAYIM 3 (Vilna 1839) (Hebrew).

retain the rights."[86] But here, too, Nathanson presents no precedential support in Jewish law for the proposition that these rules and practices are or should be grounded in an author's property right as opposed to some other doctrinal basis in Jewish law. Indeed, Nathanson does not specify whether the rights of printers and inventors that he invokes in support of recognizing a perpetual, proprietary copyright derive from Jewish law or secular law, or even just local custom.[87] To the extent such rights are required by secular copyright law or by the Jewish law of unfair competition or printing privileges, or simply reflect local custom, they would not support Nathanson's holding that Jewish law accords authors perpetual, universal exclusive rights.

In short, Nathanson's analytic support for his recognition of authors' perpetual, exclusive rights reduces to the purportedly self-evident proposition that authors "obviously" have such property in their creations. That perfunctory conclusion is jarring to secular copyright scholars, for whom the answer to the question of whether copyright is property is not only far from obvious, but freighted with centuries-old theoretical and normative controversy. Yet Nathanson's unqualified invocation of "common sense" to sustain his holding follows a venerable rabbinic tradition. Jewish law has long recognized that an esteemed rabbinic judge may derive a legal rule from "*s'vara*," meaning the sheer force of logic and reason, even without any support in proof-text or precedent.[88] Nevertheless, that judicial methodology has been sparingly applied in the post-Talmudic era and, when invoked, has often been controversial.[89] Nathanson's resort to *s'vara*, in particular, has not escaped criticism. In rejecting Nathanson's ruling, Yitzhak Schmelkes chided, "with all due respect to the Esteemed Scholar, I see no proof for this."[90] Other rabbinic jurists surmise that, in the absence of a proof-text or Jewish law precedent for authors' right of ownership, Nathanson probably meant only that no one should print the author's work without permission as a

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86 NATHANSON, *supra* note 15.

87 *See* Basri, *supra* note 17, at 181 (noting that the customary practices that Nathanson invokes might have been secular law, unfair competition law, or rabbinic printing privileges, rather than the understanding that the author might have a proprietary right under Jewish law).

88 *See* MENACHEM ELON, HA-MISPHAT HA-IVRI: TOLDOTAV, MEKOROTAV, EKRONOTAV [JEWISH LAW: HISTORY, SOURCES, PRINCIPLES] 805-28 (3d ed. 1988) (Hebrew); *see also* Avi Sagi, *A Philosophical Analysis of S'vara*, 2 S'VARA 3 (1991).

89 *See* SAMUEL MORELL, STUDIES IN THE JUDICIAL METHODOLOGY OF RABBI DAVID IBN ABI ZIMRA 145 (Univ. Press of Am. 2004).

90 BEIT YITZHAK, *supra* note 12.

matter of proper and ethical behavior, not that unlicensed printing is prohibited by law.[91]

Despite the persistent doubts about Nathanson's perfunctory ruling, leading rabbinic proponents of the view that copyright is a property right echo Nathanson's *a priori* argument, while citing his responsum as supporting precedent. For example, when asked, "Does an author have ownership in his work, and what is the source for this right?," Yosef Shalom Eliashiv answers: "He has ownership, and that is very solid reasoning, something that reason requires — see [Nathanson's responsum] . . . — and thus one who harms the author's right commits theft in violation of the Torah."[92] Asher Weiss similarly concludes, citing Nathanson, that it is axiomatic that one owns what one creates.[93]

Opponents of categorizing copyright as property in Jewish law avoid the converse peremptory conclusion that reason "obviously" requires that copyright is to be construed as something other than property. They thereby escape criticism for being the mirror image of Nathanson. However, like Nathanson, their argument remains almost entirely within the strict constraints of rabbinic precedent and analogies to preexisting doctrine. Notably, their writings and rulings on the issue contain no more hint than Nathanson's of the type of normative arguments for limiting authors' rights that populate modern-day secular debate or that infused the interchange between Mordekhai Banet and Moses Sofer in the early nineteenth century.

For example, Yehuda Silman, a member of the High Rabbinical Court that ruled on Microsoft's petition, holds that copyright is a right against unfair competition, rather than a right of ownership, for the reason that the rabbinic scholars who have contended that copyright is the former are of far greater stature than those who maintain that copyright is latter.[94] Such bare reliance on the preeminence of earlier jurists, without delving into the force of their reasoning regarding the issue at hand, is not at all unusual. Indeed, it

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91 *See, e.g.*, JACHTER, *supra* note 69, at 120; Navon, *supra* note 17, at 42-43. *But see* Weiss, *supra* note 32, at 1 (suggesting that, with respect to recognizing an author's rights, the dictates of justice and honesty constitute an independent grounds for imposing an obligatory legal norm).

92 Eliashiv, *supra* note 33, at 115 (translation by Neil Netanel).

93 Weiss, *supra* note 32, at 1. Cohen concedes that Nathanson's curt reasoning is vulnerable to challenge, but principally because Nathanson does not explain how an author can acquire ownership in an intangible creation given the longstanding view in Jewish law that only tangible objects can be acquired. COHEN, *supra* note 13, Kuntras 1-7, 247-48.

94 SILMAN, *supra* note 17, at 180.

is understood to be incumbent upon rabbinic judges to weigh the stature of conflicting authorities, as well as myriad other factors, in deciding disputes.[95]

Aside from their view that precedential support for recognizing authors' right of ownership is lacking, opponents of categorizing copyright as property rely heavily on the assumption that Jewish law can never recognize an incorporeal thing as property.[96] Since Talmudic times, Jewish law has provided that a thing with no substance, such as light or the air, is not susceptible to legal acquisition or transfer of ownership except in conjunction with the land or some other corporeal object to which it is attached.[97] That provision relates to the formal requirements of acquisition and transfer, not to the nature of property per se;[98] but, given that the ability to transfer title is so central to rights in things understood to fall within the rubric of "property," rabbinic scholars often state the provision more broadly to mean that incorporeal things, including author's creations and inventor's inventions, cannot be property.[99] Others reason, in addition, that since the Jewish law of

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95 Chaim L. Waxman, *Towards a Sociology of Pesak*, *in* RABBINIC AUTHORITY AND PERSONAL AUTONOMY, *supra* note 65, at 217, 218-19.

96 *See* COHEN, *supra* note 13, at 206 (stating that this assumption is the primary argument of those who reason that copyright is not property). Opponents to classifying copyright as property in secular common and civil law have also sometimes invoked an essentialist argument that property cannot apply to intangible things. As Justice Yates famously expounded in *Millar v. Taylor*, "And it is well known and established maxim, (which I apprehend holds true now, as it did 2000 years ago,) that nothing could be object of property, which has not a corporeal substance." Millar v. Taylor, 98 Eng. Rep. 201, 232 (K.B. 1769); *see also* Epstein, *supra* note 3, at 3 (bemoaning what he deems to be the essentialist distinction between tangible and intangible property that is "almost a point of conventional wisdom" among present-day scholars and judges). On civil law's traditional restriction of property to physical things and the corresponding view that author's intangible creations cannot be objects of property, see Bouckaert, *supra* note 29, at 796-97; Pfister, *supra* note 4, at 122.

97 *See* Moses Maimonides, Mishneh Torah, *Hilkhot Mekhira* 22:13-14 (c. 1180); Joseph Caro, Shulhan Arukh, *Ḥoshen Misphat* 203:1, 213:1-2 (1565).

98 *But see* J. David Bleich, *The Metaphysics of Property Interests in Jewish Law: An Analysis of Kinyan*, 43 TRADITION 49, 58 (2010) (arguing that the formal requirements for acquisition and transfer relate directly to the metaphysical character of property rights' attachment only to choate, tangible objects and thus provide substantive support for the absence of intellectual property in Jewish law).

99 Cohen and Weiss counter the view that an author cannot acquire ownership in his intangible creations by analogy to Jewish law doctrine providing that the owner of a tree acquires ownership in the fruits of the tree and that a craftsman acquires ownership in a new object that he has created. *See* COHEN, *supra* note 13, Kuntras 1-7, 247-48, 206; Weiss, *supra* note 32, at 1.

theft and conversion applies only to depriving the owner of possession of tangible chattel and since copying an author's work does not disturb the author's possession of his copy of the work, any prohibition of copying under Jewish law must lie in some doctrine other than the prohibition against stealing property, such as unfair competition or community regulation.[100]

Finally, Haim Navon, a relatively liberal Modern Orthodox rabbi, posits that recognizing a proprietary copyright of some shape or form would be desirable, but concludes reluctantly that existing Jewish law doctrine cannot be interpreted or judicially modified to provide for it.[101] He recommends rabbinic legislation to achieve the desired result.

Those familiar with rabbinic jurisprudence would not be surprised by the fact that the rabbinic jurists conduct their debate over whether copyright is property without presenting broad policy arguments. Rabbinic jurists, to be certain, have for centuries proven adept at adapting doctrine as required by changing social, economic, political, and technological circumstances, whether in deciding particular cases or issuing regulations.[102] Nevertheless, the normative ethos of rabbinic jurisprudence, both in issuing rulings and writing commentary, is heavily tied to the integrity and coherence of the rabbinic tradition.[103] The fundamental precepts of the Torah are understood to be eternal and immutable, and yet fully capable of addressing new circumstances. As such, even the boldest rabbinic jurists almost always couch

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100 *See, e.g.*, Landau, *supra* note 17, at 810 (noting the absence of authority for recognizing a property right in an incorporeal thing and that a copier does not "steal" an author's creation because the author still has possession of it and can still use it); SHPITS, *supra* note 17, at 177 (same); Int'l Beis Hora'ah, *supra* note 17 (concluding that copying does not fall within the prohibition against stealing or conversion). As noted above, some other jurists agree that copying does not constitute stealing, but argue nonetheless that an author's creations are his property and that unlicensed copying constitutes an illicit use of that property under the Jewish law doctrine of unjust enrichment. *See supra* note 63 and accompanying text.

101 *See* Navon, *supra* note 17, at 48.

102 *See* EDWARD FRAM, IDEALS FACE REALITY: JEWISH LAW AND LIFE IN POLAND 1550-1655 (Hebrew Union Coll. Press 1997) (presenting in-depth studies of instances in which leading rabbinic jurists adapted Jewish law to pressing economic and communal issues of the day through legal fictions and reinterpretations of textual authority); JACOB KATZ, TRADITION AND CRISIS: JEWISH SOCIETY AT THE END OF THE MIDDLE AGES 52-62 (Bernard Dov Cooperman trans., Syracuse Univ. Press 2000) (discussing rabbinic rulings regulating and partly accommodating previously forbidden activities, including charging interest and dealing in non-kosher wine and food, in response to prevailing economic pressures).

103 *See generally* Sacks, *supra* note 65.

innovation firmly within authoritative precedent, proof-texts, and reasoning by analogy from traditional sources and doctrine. As a leading present-day authority observes, "[t]here is a difference between the considerations [the rabbinic jurist] may formally cite in justification of his ruling, and those that may, consciously or intuitively, play a part in his judgment that this ruling is not merely justifiable but also correct."[104] The jurist leaves himself open to substantial challenge if he departs from this model; Joseph Saul Nathanson's perfunctory recognition of authors' proprietary rights is a case in point.

Moreover, rabbinic jurists' unwillingness to engage in the policy implications of their rulings may be more pronounced today than in the era prior to political emancipation, during which rabbinic judges still had some responsibility for Jewish communities' semi-autonomous rule and thus had no choice but to weigh the consequences of their rulings.[105] As sociologists and historians of Jewish law have observed, present-day rabbinic jurists, particularly those whose authority is centered in ultra-Orthodox educational institutions, tend to follow a style of legal reasoning and ruling that focuses on foundational legal texts to the exclusion of practice and custom, which in previous generations constituted a vital source for Jewish law norms.[106] For some critics, indeed, today's ultra-Orthodox rabbinic jurists have so elevated insular textual authority that they have lost sight of the practical import of their rulings.[107]

In addition, in tandem with that turn to the stringency and insularity of authoritative text, today's rabbinic jurists exhibit at best a highly ambivalent attitude towards the Internet and digital media that so occupy secular copyright scholars. While "Modern" or "National" Orthodox rabbinic jurists generally permit Internet use,[108] many ultra-Orthodox rabbinic jurists

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104 *Id.* at 152.

105 We thank Elimelech Westreich for highlighting for us the possible significance of this phenomenon for rabbinic commentary on copyright law.

106 *See* Menachem Friedman, *Life Tradition and Book Tradition in the Development of Ultraorthodox Judaism*, *in* ISRAELI JUDAISM: THE SOCIOLOGY OF RELIGION IN ISRAEL 127 (Shlomo A. Deshen et al. eds., 1995); Haym Soloveitchik, *Rupture and Reconstruction: The Transformation of Contemporary Orthodoxy*, 28 TRADITION 64 (1994); Lawrence Kaplan, *Daas Torah: A Modern Conception of Rabbinic Authority*, *in* RABBINIC AUTHORITY AND PERSONAL AUTONOMY, *supra* note 65, at 1.

107 *See, e.g.*, Kaplan, *supra* note 106, at 8 (lamenting the ultra-Orthodox view that "it is the rabbis who are completely immersed in the world of Torah and seemingly removed from the outside world," who, alone, can "draw upon the 'spirit of tradition' in order to formulate the policies needed to meet [contemporary] challenges and needs").

108 Judy Tydor Baumel-Schwartz, *Frum Surfing: Orthodox Jewish Women's Internet*

resolutely condemn all secular entertainment as well the media platforms used to communicate it. Indeed, in January 2000, the ultra-Orthodox Council of Torah Sages, the supreme rabbinical policymaking body of Agudath Yisrael, a major coalition of ultra-Orthodox groups, issued a rabbinic ruling condemning the Internet, computers, CD players, and films as dangerous and labeling the Internet as the "world's leading cause of temptation."[109] Nonetheless, the Internet and digital media have made significant inroads in ultra-Orthodox communities, including their use in the proliferation of rabbinic texts and teaching (not to mention blogs aimed at fellow believers), a fact that even those ultra-Orthodox rabbinic jurists who oppose all Internet use cannot ignore.[110]

At bottom, despite the general trend towards insularity, ultra-Orthodox as well as Modern Orthodox rabbinic jurists regularly opine on copyright issues involving works in digital media and make numerous explicit assumptions about the markets, practices, and social norms that characterize Internet use. For example, the ultra-Orthodox rabbinic court in Bnei Brak ruled on Microsoft's petition regarding copying computer programs and, in line with that ruling, one judge on the court elsewhere opines that personal copying of programs is permitted on grounds of abandonment when the program has been "breached" and unlicensed copies are ubiquitous.[111] In like vein, as noted above, several commentators suggest that authors abandon their copyrights in works released on the Internet, with or without their permission, given the seeming insurmountable obstacles of copyright enforcement in that

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Forums as a Historical and Cultural Phenomenon, 2 J. JEWISH IDENTITIES 1, 2 (2009) (noting that Modern Orthodox rabbis permit Internet use other than visiting sites featuring pornography or other content forbidden by Jewish law). "Modern Orthodox" encompasses the "National Religious" stream of Judaism in Israel, but extends to the Diaspora as well.

109 *See* Karine Barzilai-Nahon & Gad Barzilai, *Cultured Technology: Internet and Religious Fundamentalism*, 21 INFO. SOC'Y 25 (2005). Subsequently, in 2009, leading ultra-Orthodox rabbis sought to clamp down on ultra-Orthodox Internet portals, which had previously proliferated with their qualified blessing. *See* Ben Lynfield, *Rabbis Rage Against Net "Abominations,"* INDEPENDENT, Dec. 11, 2009, at 34, *available at* http://www.independent.co.uk/news/world/middle-east/rabbis-rage-against-net-abominations-1838204.html.

110 According to a study conducted in 2007, 60 percent of the ultra-Orthodox population of Israel use computers, and among those that do, 57 percent use the Internet. *See* Azi Lev-On & Rivka Neriya Ben-Shahar, *A Forum of Their Own: Views About the Internet Among Ultra-Orthodox Jewish Women Who Browse Designated Closed Forums*, 4 MEDIA FRAMES: ISRAELI J. COMM. 67, 74 (2009) (Hebrew).

111 SILMAN, *supra* note 17, at 181.

medium.[112] In addition, Asher Weiss qualifies his conclusion that authors have a property right in their creations by stating that he has heard from experts in the field of music recordings that many artists and composers implicitly consent to having their recordings freely copied, since if they were to insist on preventing copying, consumers would just listen to the recordings of others that can be freely copied and would thus lose interest in those who seek to enforce their copyrights.[113] Similarly, Shlomo Ishun posits that copying for one's own use from the radio is permitted because radio stations pay royalties that take such private copying into account.[114] As these and numerous other examples attest, rabbinic jurists take judicial notice of contextual facts as they understand them, even if their style of argumentation is fundamentally formalist and some of them only grudgingly acquiesce in the use of digital media in their community.

Finally, contemporary rabbinic jurists evince an acute awareness of secular copyright law, even if the vast majority seem largely oblivious of, or at least to pay little heed to, the precise contours of secular law or the centuries-old, but still vociferous debate regarding whether secular copyright is in principle a robust property right or some form of entitlement of lesser scope and duration. Echoing Nathanson, present-day rabbinic commentators note repeatedly that since the nations of the world accord authors exclusive rights, then Jewish law must as well, if not by recognizing authors' ownership of their creations, then by some combination of custom, unfair competition, mass market license, rabbinic enactment, and moral dictate.[115] Perhaps some rabbinic jurists have internalized secular understandings that an author morally deserves to own what he creates, a view that entered Jewish law with Nathanson's mid-nineteenth century ruling following on the heels of the enactment of authors' rights laws in Austria and other European countries. Alternatively, perhaps contemporary rabbinic jurists view what they believe to be uniform human practice as evidence of what logic and reason must demand, at least in the absence of any venerable Jewish law norm to the

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112 *See supra* notes 57-58 and accompanying text.

113 Weiss, *supra* note 32, at 1.

114 Shlomo Ishun, *Horadat Shirim me-ha-Internet ve-Haklatat Shirim me-ha-Radio* [*Downloading Songs from the Internet and Recording Songs from the Radio*], 6 KETER 36, 44 (2007-08) (Hebrew).

115 *See, e.g.*, Navon, *supra* note 17, at 43-44, 47-48; Weiss, *supra* note 32, at 1. *But see* Nehurai, *supra* note 17, at 51 (noting that personal copying is permitted under Jewish law and that a careful examination reveals no clear rule under secular law regarding the permissibility of personal copying).

contrary. Or perhaps they simply do not wish to give non-Jews cause to view the Jewish religion as less than ethical and just.

There are suggestions of each such strand of explanation in rabbinic discourse. We leave to future study the intriguing question regarding the nature and extent of secular copyright law's impact on rabbinic thought.