



Intellectual Property in the Digital Age

We are pleased to share with you the latest issue of YU Ideas, “Intellectual Property in the Digital Age,” in honor of the holiday of Sukkot. As the rabbis of the Talmud teach us, a Sukkah must be a *dirat arai*, a temporary structure. On Sukkot, we leave our permanent homes and enter structures that, despite their lack of permanence, symbolize divine protection. As we consider questions of ownership, protection and permanence, please enjoy these reflections by faculty and staff from across Yeshiva University.

What's In A Name?

SHULAMITH Z. BERGER, Curator of Special Collections and Hebraica-Judaica



Does your name belong to you? What about your photo or image? Does it matter if you're dead or alive? May your name or likeness be used for commercial purposes?

These queries fall under the question of publicity rights, defined by *Black's Law Dictionary* as “the right to control the use of one’s own name, picture, or likeness and to prevent another from using it for commercial benefit without one’s consent.”

A well-known legal case exploring this concept was *Hebrew University vs. General Motors*, regarding GM’s use of Albert Einstein’s image in an advertisement. The Hebrew University claimed exclusive rights to Einstein’s name and likeness as a beneficiary under Einstein’s will. The case was brought to the United States District Court Central District of California in 2012. The court ruled that the right of publicity lasted no longer than fifty years after an individual’s demise, thus releasing Einstein’s name and image for public use.

The Albert Einstein College of Medicine, opened by Yeshiva University not long after Einstein’s death in 1955, would not have been affected by the California court’s ruling, no matter the outcome of the case. In 1951, Albert Einstein wrote a letter to Dr. Samuel Belkin, president of the University, expressing his “great satisfaction that Yeshiva University is planning to establish a medical school.” Dr. Belkin suggested naming the medical for Einstein; Einstein countered that a Jewish medical school should be named for Maimonides. Though “Einstein resisted, Belkin persisted,” and by 1953, Einstein agreed to allow Yeshiva University to name the medical school for him.

On Einstein's 74th birthday on March 14, 1953, Belkin presented him with a model of the medical school at a press conference in Princeton, New Jersey. Many newspapers covered the event; a headline in the *New York Times* proclaimed "Dr. Einstein gives name to a college," and the article portrayed the media presence: "Amid the flashing of photographers' bulbs, the whirring of newsreel cameras, and the glare of television lights, he was notified that the Yeshiva University Medical School had been named the Albert Einstein College of Medicine." The Yeshiva University Archives holds a recording of Einstein's 1953 statement to the press: "I am grateful that Yeshiva University has honored me by using my name in connection with the new College of Medicine." No one can argue with that!

Nonetheless, the depiction of the coverage of the press conference in 1953 is relevant to the nature of publicity rights. Just imagine all the equipment needed in 1953; today, if necessary, a cell phone would suffice. Over the past century, the means of communication have progressed by leaps and bounds, and the speed and immediacy of distribution has increased exponentially. Researchers who request photographs from the archives are frequently surprised by the dearth of photos of important university personalities or events; they find it hard to picture that everyone didn't have a cell phone camera immediately at hand. Beginning with photography in the early 20th century, followed by radio, telegraph, film and television, and then the advent of digital cameras and technology—all these developments coupled with nearly instantaneous dissemination available via the internet have inexorably altered the landscape of use, and thus potentially misuse and abuse, of names and images for commercial purposes. Will the line between commercial use and other uses blur as the boundaries between commerce and social network media fray on the web? Will new methods of communication be invented? How will these developments affect or change laws of publicity rights?

Stay tuned!



Intellectual Property: Legal Right is Not Moral Right

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Let's not talk about legal ownership, copyright law or rabbinic injunctions aimed at preventing plagiarism or republication without permission. What about intellectual fairness and public benefit, regardless of legal recourse?

Say I prepare tentative notes that you publish in my name without my permission. Ideas and formulations not intended for the public are now identified as mine, misrepresenting my beliefs and conclusions, misleading readers and often holding me up to ridicule.

Or you tape a class meant for a specific audience and then disseminate my provisional discussion, complete with hesitations, casual remarks and thought experiments. Likewise, if you publish material I intended to print but in a different sequence than I planned, again, you are distorting my work without my permission.

You may claim, rightly or wrongly, that there is intellectual or moral gain from exposing my rough drafts and intimate conversations, but first and foremost you are invading my privacy. Whether I can launch injunctions or collect damages, you are treating me shabbily and interfering with my study and my work.

The next three examples are less straightforward.

Martin Buber supported World War I before he opposed it. He was not obligated to reprint his early pro-war writings. His failure to do so, even as he advertised his later criticism, encouraged the impression that he had never supported the German war effort. When Buber switched positions is significant for an understanding of his social philosophy and Zionism. I did not find out about this change until I began teaching Buber. Buber could not truthfully deny his history, and scholars were justified in unearthing it, but one can hardly insist that Buber had an obligation to reissue writings that he no longer agreed with and presumably regretted.¹

We all know that on June 6, 1958, General de Gaulle ended a speech by shouting the words *Vive l'Algérie Française* (Long live French Algeria), thus aligning himself with the Pied-Noirs who opposed French withdrawal from Algeria. His most recent major biographer, Julian Jackson, claims this is not quite right. De Gaulle shouted *Vive l'Algérie*; a moment later, after stepping back, he added *Français*, perhaps because he realized the crowd was not satisfied. If so, de Gaulle edited the rough draft out loud in public. The army finished the editing by erasing the time lag between noun and adjective. Were they entitled to do so? This point strengthens the evidence that de Gaulle was already unenthusiastic about retaining Algeria.²

As editor of *Tradition*, I was occasionally presented with statements by authoritative rabbinic figures which we could not validate. It was awkward to admit we could not give credence to the author's report, and of course we could not prevent publication on the internet or in other journals. Yet, our policy was not to reproduce such assertions without satisfactory verification. In an age of fake news and promiscuous rumormongering, we reasoned it was better to let an authentic conversation go unreported than to propagate dubious claims that take on a life of their own. Sometimes the purported information was subsequently demonstrated to be fraudulent.

References

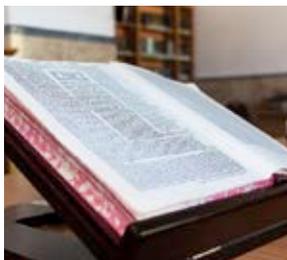
¹ For a recent survey, see Paul Mendes-Flohr, *Martin Buber: A Life of Faith and Dissent* (Yale, 2019)

² Julian Jackson, *De Gaulle* (Harvard University Press, 2018) 486.



IP Halakhah

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Values abound and intersect, combine and conflict, when considering the question of the protection of intellectual property in Jewish law. As is the case with the general legal and philosophical discussion of the topic, there is a fundamental tension at the core: on the one hand, the technical application of terms such as “ownership” and “theft” to that which is intangible is uncertain. On the other hand, the value placed upon intellectual creativity is so vast—all the more so, within the *Beit HaMidrash* [study hall]—that to leave the product of this creativity unprotected seems unthinkable.

When the content at stake is in a realm as precious as Torah innovation, another fundamental tension is amplified. The Torah is independently recognized as a gift, a transcendent intangible that is nonetheless perceived as a concrete acquisition of both the Jewish people as a whole and accomplished scholars as individuals, seemingly granting the words material status.¹

At the same time, the crucial value this content holds for the progress of mandated Torah study tempts one to paraphrase the mantra of modern computer hackers, that knowledge vital to society “wants to be free.”²

Further, these opposing ideals clash in a battlefield largely ungoverned by explicit halakhic [Jewish law] sources, forcing a recourse to broader declarations of values. Indeed, this was the approach of at least one major decisor, who simply asserted that it was inconceivable that Jewish law would not agree to a protection indicated both by common sense and universal cultural agreement and that no further source was needed.³

Others utilized terms such as “theft” as a given,⁴ perhaps understanding that the output of one’s intellect can be no less worthy than that of one’s hands, whether or not the details neatly fall into place. Perhaps, some considered, rabbinic law fostered a status of “theft” onto intellectual appropriation despite the technical mismatch as a corrective to the societal discord that could otherwise ensue.⁵

To other authorities, Jewish law governed but through other models. Some turned to the laws of tort liability, either by seeing appropriated texts as “damaged” through their reduced marketability,⁶ or, more conceptually, observing that if one is liable for the harm inflicted by his creations (such as a public hazard), by logical extension he “owns” the benefits as well.⁷ Others saw creative products as subject to conditions expressed by a creator, who sells copies but not duplication rights.⁸ Others asserted the inverse of a cherished Jewish value: it is “Sodom-like” to withhold benefit to another that inflicts no loss of the owner⁹; the implication, by inference, is that if there is any kind of loss, potential or present, the owner is justified in dictating terms of use.¹⁰

In some of the literature, the only recourse is presented as an activist legal construct: rabbinic edicts and declarations, banning, for example, the republication of a work outside the aegis of the original author.¹¹ This may create the impression that without and until such legislation, Jewish law maintained no objection.¹² However, the opposite conclusion is also possible: despite the complexity of the issue, the value system of the Torah, through the totality of its message, must respect the rights of the intellectual creator. Accordingly, the rabbis legislate to demand adherence to that which is already proper.

Ultimately, one of the most essential of Jewish values may be the most relevant. The fundamental reciprocity of the golden rule, “Love your neighbor as yourself,” commands that we show appropriate deference, in credit and in compensation, to those who have toiled to enlighten our minds and souls. As Hillel put it¹³ (to credit the source), the rest is commentary.

References

¹ See *Resp. Machaneh Chaim* CM 2:49, and the rebuttal of *Resp. Maharam Shick*, YD 156. h

² According to Wikipedia, this quote is generally attributed to Stewart Brand, who originally articulated it in balance with the opposing consideration: “On the one hand information wants to be expensive, because it’s so valuable...on the other hand, information wants to be free...” In his original formulation, the push towards “free” is reflected in the reality of ever-increasing accessibility; in usage, it is often a reference to a societal right to advances in valuable knowledge and art. Similarly, in some of the halakhic literature, Torah content is paradoxically presented as less protected, as it considered a part of the legacy of the Jewish people.

³ *Resp. Shoel U’Meishiv, kama*, 1:44. See also *Resp. Meishiv Davar*, O.C. 24. The governance of secular law would also be relevant; see *Resp. Beit Yitzchak*, YD, II, 75.

⁴ See, for example, *Resp. Iggerot Moshe*, OC V, 40 :19.

⁵ Per *Gittin*, 59a. See R. Yehoshua Chilo, *Mishnat Yehoshua: Choshen Mishpat* (who ultimately rejects this model). *Mishnat Yehoshua* is one of several contemporary works that extensively survey the issue of intellectual property; others include R. Yaakov Avraham Cohen, *Emek HaMishpat*, volume IV; R. Avraham Levi, *Zekhuyot Yotzrim: Madrikh Hilkhati*; and R. Menashe Weisfish (ed.), *Mishnat Zekhuyot HaYotzer*.

⁶ While this damage, both indirect and physically intangible, would not be recoverable in rabbinic court, it could nonetheless warrant an a priori prohibition.

⁷ See R. Shimon Shkop, *Chiddushim, Bava Kama*, 1.

⁸ See R. Zalman Nechemiah Goldberg, *Techumin*, VI, pp 370ff, per *Bava Metzia* 78b, and note the analysis of *Emek HaMishpat* IV, 37, and *Mishnat Yehoshua, Inyanei Zechuyot Yotzrim*, ch. 3.

⁹ See *Avot* 5:10 and *Bava Batra* 12b.

¹⁰ See *Resp. Noda B'Yehudah, tinyana*, C.M 24; and compare *Resp. Divrei Malkiel* III, 157

¹¹ See, for example, *Resp. Rama*, 10, and *Resp. Chatam Sofer*, C.M. 79, and VI, 56.

¹² See the discussion in *Mishnat Yehoshua*, ch. 1.

¹³ *Shabbat* 31a.



Open Educational Resources: Should Knowledge Be Free?

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A National Need

A recent institute on open educational resources convened by the [Scholarly Publishing and Academic Resources Coalition](#) observed that academic libraries have a growing opportunity to offer solutions to the exorbitant costs of college textbooks.

A national survey of college students by the [Nebraska Book Company](#) concluded that students worry more about textbook costs than about the cost of tuition. At a typical private, four-year, liberal arts college in northern New Jersey, the average cost of the required textbooks in four first-year courses (biology, art history, accounting and sociology) totals \$273, while a [College Board survey](#) concluded that students often spend as much as \$1,204 for textbooks and supplies for the academic year. The average art history textbook costs \$152. A [student PIRG](#) survey found that 65% of students simply do not purchase the course text and that, of those, 94% worry that the decision will affect their academic performance.¹

As a result, students turn to academic libraries, where budget constraints and the rapid publication rate of new editions often preclude the purchase of current course textbooks. Nevertheless, in a survey of 118 college and university libraries, one quarter of respondents reported the traditional practice of not being involved at all in textbook acquisitions.² In turn, students attempt to rely on interlibrary loan, which either by policy or demand is an unsustainable solution. A *Library Journal* survey reports that about 60% of students who use library resources for assigned reading do so to save money on textbooks.³

Power to the People (i. e., the Authors)

How can academic institutions and their libraries address this need in their efforts to help students succeed? In several [states](#), open education resources (OER) are part of a textbook revolution: faculty members create textbooks that are free and that can be edited and revised freely.

In 2009, [MIT faculty](#) were the first to adopt an open-access policy, awarding faculty the right to share their scholarly production openly and without the commercial intervention of publishers. Available in formats such as PDF and EPUB, textbooks produced as OER can also be bound and sold at nominal cost at college bookstores if there is a groundswell of demand for print versions. All this results from the premise

that knowledge and expertise are community resources, their production having been supported by institutions of higher learning for centuries. OER embrace the premise that academic knowledge and expertise in the classroom is no longer property to be guarded, re-packaged and sold by commercial publishers for profit.

But books, even if their content is uncopyrighted, do not write themselves, nor does their content appear magically. Which conditions foster the textbook revolution? Several factors need to be in place for this critical innovation to launch: institutional awareness about the need to adopt this type of resource and about the benefits of OER; financial incentives or professional development funds to potential authors; and willing partners.

In this last regard, academic libraries, as centers of content, preservation, and teaching, may take on a pivotal role in OER efforts.⁴

Typically, authors share their instructional materials as OER by selecting a Creative Commons license, which renders the work free to use. Authors can still retain copyright when they license their work with Creative Commons.⁵ Although progress has been made in large publicly supported institutions (e.g., [University of Massachusetts Amherst](#), University of Minnesota), smaller institutions may need to adopt a more incremental, grassroots approach.⁶

Digital Alternatives

Another solution to the problem of textbook affordability is digital alternatives, such as e-books and other electronic materials, resources already owned or licensed by academic libraries. In collaboration with faculty members, librarians can employ their knowledge and subject specialties to curate digital alternatives for students. Since nearly all periodical literature and a growing amount of monographic material are acquired in electronic format, this solution not only features simultaneous access but also offers the benefit of a multiplicity of voices and diversity of perspectives not possible with a single textbook. As a result, faculty members can “flip” their courses from requiring costly commercial textbooks to using subscription resources (periodical literature, electronic reference sources and relevant chapters from electronic books) commonly made available via the academic libraries of those institutions through consortial agreements.

Conclusion

Academic libraries are not only aggregators of information and knowledge. When they are at the center of OER initiatives and digital alternatives, academic libraries can also catalyze the creation and curation of new instructional materials to be shared globally and thus revolutionize student learning.

References

¹ Ethan Senack, *Fixing the Broken Textbook Market: How Students Respond to High Textbook Costs and Demand Alternatives* (Boston: The Student PIRGs, 2014).

² *Survey of Academic Library Upper Management: View of the Library Role in Providing Textbooks* (New York: Primary Research Group, 2018).

³ Library Journal, *Textbook Affordability Survey Report* (New York: Library Journal, 2019), p. 3.

⁴ Erin Davis, Dory Cochran, Britt Fagerheim & Becky Thoms, “Enhancing Teaching and Learning: Libraries and Open Educational Resources in the Classroom,” *Public Services Quarterly*, vol. 12, no. 1, p. 26.

⁵ Melissa Falldin and Karen Lauritsen, *Authoring Open Textbooks* (Minneapolis: Open Textbook Network, ca. 2018), p. 9.

⁶ Jeremy Smith, “Seeking Alternatives to High-Cost Textbooks: Six Years of The Open Education Initiative at the University of Massachusetts Amherst,” in Jonathan Lashley, Andrew Wesolek, and Anne Langley, *OER: A Field Guide for Academic Librarians* (Forest Grove, Oregon: Pacific University Press, 2018), pp. 333-350..



American Intellectual Property Law: A Brief Primer

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Intellectual property is usually divided into three main subcategories: trademarks, copyrights and patents. This essay will provide a brief overview of each area — its source, what is eligible for protection, the duration of the protection, the relevant government entity, what constitutes infringement and what defenses might be available to avoid or minimize infringers' liability.

Trademarks are used to identify the source of goods in commerce. Trademark law is codified in the Lanham Act, 15 U.S.C. §§ 1051 et seq. The basis for trademark law rests in the Commerce Clause, found in Article I, Section 8, Clause 3, of the United States Constitution. Items which most commonly function as trademarks are brand names (McDonalds), logos and symbols (the golden arches), sounds (the Tarzan yell), colors (Pepto Bismol pink, Tiffany blue, UPS brown), shapes (the Coca Cola glass bottle) and fragrances (cherry-scented transmission fluid).

Trademark registration is handled by the United States Patent and Trademark Office, a federal agency within the United States Department of Commerce. Trademarks which are found to be arbitrary, fanciful or suggestive will normally be registered without complication. Marks which are merely descriptive will not be registered unless the mark has acquired “secondary meaning” (i.e., the public associates the descriptive mark with one particular source, such as Dunkin Donuts). Any mark that is generic will be denied registration.

Trademarks are registered in connection with specific classes of goods and services. Thus, different parties could register the same trademark in different classes of goods, so long as there is no likelihood of confusion between the sources of the goods. The federal courts have identified as many as eight different factors that should be considered when evaluating the likelihood of confusion, including the similarity of the goods in question, the similarity of the marks, the channels of trade and the sophistication of the intended customers.

Trademark infringement occurs when someone creates a likelihood of confusion in the minds of consumers as to the source of the goods in question. Remedies for trademark infringement may include monetary damages, injunctive relief and seizure and destruction of the infringing goods.

The initial period of protection for a registered trademark is 10 years. So long as the trademark continues to be used in commerce, the registration can be renewed an unlimited number of times for additional 10-year periods.

Copyrights and patents are provided for explicitly in Article I, Section 8, Clause 8, of the United States Constitution, which states that Congress shall have the power “to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”

Copyright law in the United States is further codified at 17 U.S.C. §§ 101 et seq. Section 102 enumerates the different subject matter that may be eligible for copyright protection: literary, musical and dramatic works; choreographic works; pictorial, graphic and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.

Eligible subject matter qualifies for protection only if it is an original work of authorship that has been

fixed in a tangible medium of expression. Accordingly, ideas that have not been expressed in writing would not qualify for protection. Similarly, an extemporaneous speech or improvised musical performance that is not being recorded contemporaneously would not qualify. If one has eligible subject matter that is original and fixed in a tangible medium of expression, one need not engage in any formal registration process with the Copyright Office, officially part of the Library of Congress, to have copyright protection. However, there are distinct advantages to registration, and one may lose certain rights by not registering the work.

Having valid copyright in a work gives the holder certain exclusive rights, including the right to make copies, to prepare derivative works, to distribute the work and to engage in public display and public performance of the work.

Regarding infringement, it is typically rare for the plaintiff to have direct proof of copying. Far more common is for the plaintiff to raise a presumption of copying based upon the defendant's access to the work in question and the substantial similarity between the two works. The burden then shifts to the defendant to prove that the "infringing" work was not copied from the original (e.g., by establishing independent creation).

Another defense that is frequently raised is "fair use." Section 107 sets forth four factors to consider in evaluating whether a defendant engaged in fair use, including the purpose and character of the use (commercial or nonprofit educational), the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the work as a whole and the effect of the use on the potential market for the copyrighted work. Remedies for copyright infringement include monetary damages, injunctive relief, seizure and destruction of the infringing works and criminal penalties.

The duration of copyright is found in Sections 302-305 of the 1976 Copyright Act. Most works created on or after January 1, 1978, will be protected for the life of the author plus seventy years and will then pass into the public domain, while works created and copyrighted before January 1, 1978, are protected under the 1919 Copyright Act for an initial term of twenty-eight years with a possible renewal for an additional twenty years. The Sonny Bono Copyright Term Protection Act of 1998 added an additional twenty years of protection to any works still under copyright.

Patents are also administered by the United States Patent and Trademark Office. The three basic types of patents are utility patents (for scientific discoveries and inventions), design patents and plant patents. The Supreme Court has also recognized business method patents, which are used to protect unique ways of doing business, such as Amazon's "1-Click Shopping" and Priceline's "Reverse Auction."

To qualify for patent protection, the subject matter must be new, useful and non-obvious in light of the prior art (i.e., what is known at the time). The three standards are not easy to satisfy; patent protection is the most difficult (and most expensive) of the three types of intellectual property to obtain. The typical utility patent application consists of claims as to how the device functions and detailed drawings of the item. Often, the claims will be written broadly to preemptively preclude potential competitors from the marketplace and facilitate sending infringers cease-and-desist letters and initiate litigation in the future.

Should the Patent Office approve a request to register, the term of protection runs for twenty years from the date the application was filed. Previously, protection ran for seventeen years from the date the application was granted; the term was changed in 1995 to bring the United States into conformity with the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights and the practice followed by most of the European countries.

Finally, trade secret law is available to protect those who might be reluctant to engage in public disclosure of their intellectual property by filing for trademark, copyright or patent protection. The most famous trade secret would be the Coca-Cola formula, which would clearly be worth much less if it were known by everyone. Other examples of trade secrets would be confidential customer lists, proprietary business methods and so on.

Trade secrets remain protected so long as they remain secrets. When businesses need to reveal trade

secret information to employees for those people to perform their jobs, they will attempt to protect the information and restrict the workers from revealing the information by means of non-disclosure agreements and non-compete clauses. Unfortunately, as a practical matter, those are effective only so long as the subject individuals are ethical and obedient to the law. The unethical employee who has no respect for such agreements can easily cause a business to lose its trade secret protection, and financial recovery against the employee after litigation likely will not come close to making the company whole for the loss it has sustained.



Open Access Initiatives

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Open access (OA) is a publishing and distribution model that makes scholarly research literature—much of which is funded by taxpayers around the world—freely available to the public online, without restrictions (<http://opendefinition.org>). (See videos [Open Access Policies: An Introduction from COAPI](#) and [Sherpa Authors and Open Access](#)).

OA frequently refers to *journals*. Although their content is “free,” many are indeed peer-reviewed and achieve high-impact status. As OA content is not behind prohibitively expensive paywalls, readership consequently hails from all corners of the globe. (For legal access to full-text OA articles, see [Unpaywall.org](#).)

OA is also associated with **Open Educational Resources (OER)** (i.e., resources used to educate and train students). **Open Data** is a third example of OA scholarship available to scientists and students. [Open Data](#) typically applies to a range of non-textual materials, including datasets, statistics, transcripts and survey results along with the metadata associated with these objects. The data is the information necessary to replicate and verify research results.

Models of OA Journals

Green (self-archiving)—The author shares a version (usually post-print) to an OA website, often their institution’s **institutional repository**. Publishers may stipulate embargoes of 12-48 months, mandatory use of *Digital Object Identifiers* (DOI), and use of pre-print PDF (rather than the publisher’s PDF). (For more on the importance of institutional repositories, see “[Perceived values and benefits of Institutional repositories: A perspective of digital curation](#),” by S.Y. Rieh, et al. SI, U Michigan, [2007].)

Yeshiva University’s institutional repository, [YAIR \(Yeshiva Academic Institutional Repository\)](#), was established in May 2018 and so far has 4,095 items posted by 4,050 authors, encompassing 2,734 subjects. YAIR accepts research and scholarship from YU faculty, staff, and students. Examples of material on YAIR include articles, monographs, theses and dissertations, working papers, technical reports, conference papers and presentations, datasets, software code, images, video and other multimedia creations.

Gold OA articles are those whose access is immediate on the publisher’s website.

Hybrid OA refers to a journal to which a publishing fee has been paid by the author or the author’s institution.

Popular open-access websites include arXiv, ResearchGate and Academia.edu. [arXiv](#) “is a repository of electronic preprints (known as e-prints) approved for posting after moderation, but not full peer review. It consists of scientific papers in the fields of mathematics, physics, astronomy, electrical engineering, computer

science, quantitative biology, statistics, mathematical finance and economics, all of which can be accessed online. In many fields of mathematics and physics, almost all scientific papers are self-archived on the arXiv repository.”

[ResearchGate](#) is a social networking site for scientists and researchers to share papers, ask and answer questions and find collaborators. People who wish to become site members need to have an email address at a recognized institution or be manually confirmed as a published researcher to sign up for an account. The site has been criticized for generating profiles for non-users, and a study found that over 50% of the uploaded papers appear to infringe on copyright because the authors uploaded the publisher’s version (Hamid R. Jamali, 16 February 2017, [Copyright compliance and infringement in ResearchGate full-text journal articles](#), *Scientometrics*, 112(1): 241–254).

Popular among many YU faculty is [Academia.edu](#), an American social networking website for academics. The platform can be used to share papers, monitor their impact and follow the research in a field.

Academia.edu is not an OA repository and is not recommended as a way to pursue green OA. Experts such as [Peter Suber](#) invite researchers to use field-specific repositories or general-purpose repositories, such as [Zenodo](#), which “allows researchers to deposit data sets, research software, reports, and any other research related digital artifacts. For each submission, a persistent Digital Object Identifier (DOI) is minted, which makes the stored items easily citable.”

Research Guides on Open Access

[Boston College](#)

[Cornell University Library](#)

[University of Pittsburgh](#)

[William Paterson University of New Jersey](#)



Don't Let the Integrity of Your Work Be Questioned: Academic Integrity and the Library

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I recently read an enlightening series of articles in a major news magazine. In one of the articles, however, a broad historical assertion struck me as questionable. I did some research and found that the statement was inaccurate or at least debatable. There was no citation attributing the statement to a source. Because the article was an historical piece not within the first-hand knowledge of the reporter, I found the omission of a source citation, and the apparent inaccuracy, particularly troubling. My discovery tainted the rest of the reporting on an otherwise eye-opening topic.

As a librarian, part of my job is to teach students the importance of careful research, accurate reporting and appropriate citation of sources. Students need strong and honest information-seeking skills to succeed.

Yeshiva University’s [academic integrity policy](#) provides a foundation for these objectives, but the library’s goal is more robust: we want our students to become successful and productive citizens, employees and

leaders in society. An important starting point is teaching students to approach their research with rigor and integrity, enabling them to construct convincing and well-supported arguments.

Student research—like faculty research—involves aggregating information that ultimately inspires original thought. Credit must be given any time a writer cites facts or uses other people’s words or ideas. Proper citation of sources helps the reader evaluate the foundation and reliability of the facts or ideas and gives credit where credit is due, making clear which ideas the writer gathered from elsewhere and which are original. Citations also point a reader to sources for further scholarly investigation.

How do libraries help cultivate academic integrity? YU librarians are passionate about our work and enjoy helping patrons conduct research to support the best possible written product. We have created [a guide](#) that covers proper attribution of sources and includes information about avoiding plagiarism, a variety of style guides, citation generators, citation managers and more. We also teach students how to evaluate resources. In the digital age it can be easy to find information. But how can one know what is accurate and true? A librarian can help!

As a librarian, I want to help students do their best original work with the utmost honesty. The accuracy and integrity of a finished project should never be open for question.



Creating a Culture of Academic Integrity in the University

RINA KRAUTWIRTH, Research and Instruction Librarian, Hedi Steinberg Library



It is 2 a.m., the night before your research paper is due, which will determine a major portion of your grade for the course. As you do your best to stay awake to finish the paper, you find that someone has posted an essay online on your exact topic. You think about how much time it would save to hand in this essay as your own, and you begin to weigh this option against the likelihood of getting caught. This type of scenario is just one of many possible ethical dilemmas that students today during the digital age might face.¹

What is academic integrity? Academic integrity involves “[u]nderstanding what it means to be honest in the particular culture of the academic world and being able to apply the scholarly conventions of acknowledgment,” such as proper citation of sources.² Research has shown that students today, while familiar with the term academic integrity, do not have as strong of a grasp as they should of all that this concept entails. One research study found that a significant amount of plagiarism occurs simply because students lack sufficient understanding of what constitutes plagiarism,³ such as how to cite sources.

In a more extreme form, academic dishonesty in its broadest definition includes “any form of fraud in an academic setting.”⁴ Instances include plagiarism, cheating on tests, deception, fabrication, exchanging work with other students or purchasing work; the latter has its own term: contract cheating, which refers to paying contractors to write the work.⁵ Additionally, a 2015 research study showed that an estimated 17% of U.S. college students misuse ADHD drugs to enhance studying.⁶

Academic dishonesty has many negative consequences, such as cost to the individual’s learning, “misaligned instruction” and “unfair grade distribution” for others in the classroom.⁷ Several students interviewed on this topic felt that cheating lessens the value of the cheater’s college degree.⁸ In the case of study drugs, students even could face risks to their health.

Why might someone commit academic fraud? Researchers have tried to pinpoint the factors that might account for academic dishonesty. At the forefront is lack of a culture of academic integrity. A study of health profession students found that cheating “is more likely to occur when students view it as a social norm (‘everybody does it’).”⁹ Of particular concern, some research has suggested that those who cheat have a higher likelihood of unethical professional practice as well.¹⁰

Research has shown that cheating has been on the rise from the 1940s to this decade.¹¹ The advent of the digital age, while mostly positive, in some ways offers more opportunity to violate academic integrity. In part, “[r]eadily available technology may contribute to the problem because student behaviors have included cutting and pasting internet information, sharing online quizzes and texting confidential information to classmates.”¹² Regarding plagiarism, the practice “is becoming more evident as technology enables easy access to online resources.”¹³ Even more so, “[w]ith technology-assisted academic dishonesty, control of student behavior can become extremely difficult and taxing on educators.”¹⁴ As technology continues to progress, universities will need to set more measures in place to combat technology-assisted cheating.

What else might motivate a student to commit academic fraud? In the aforementioned analysis of health profession students, “[p]eer pressure, competition for high grades, heavy course demands, time management constraints, [and] dissatisfaction with faculty instruction” factored into academic dishonesty.¹⁵ Furthermore, perseverance, academic aptitude, self-discipline, life events and balancing school with other commitments also emerged from another study as reasons that students might outsource their work.¹⁶ Other reasons shown from various studies included “pressure to maintain grades, emphasis of grade over comprehension...larger classroom settings, reduced fear of getting caught, poorer self-control and higher self-oriented thoughts, small consequences attached to getting caught...and overall actions and attitudes of faculty regarding cheating.”¹⁷ Again, in the digital age, “advances in electronic technology, which make it easier to cheat” played a role.¹⁸ These considerations, exacerbated by a culture of academic dishonesty, contribute to academic fraud.

What types of interventions might resolve this issue? Keener,¹⁹ who surveyed student and faculty perceptions of academic integrity, suggests that “[e]vidence supports initiatives aimed at involving students in developing academic honesty policies.” Bealle,²⁰ a library professor who created classroom materials on the topic, has found that many advantages arise from incorporating academic integrity lessons into the classroom itself. Similarly, Smedley,²¹ a researcher in the field, studied an educational intervention for undergraduate nursing students in a private college in Sydney, Australia, and found that promoting awareness helped more in reducing plagiarism than did relying solely on plagiarism detection software. Regarding technology-driven cheating, banning cell phones, tablets and so on might serve as one effective strategy to combat this type of cheating.²²

According to Mabins,²³ “increased awareness, standardized faculty mentoring and training, and a student involved process” all together collectively contribute to a culture of academic integrity. The university can contribute to the culture of success by serving as a model of ethical decision-making and by effectively communicating academic integrity information.²⁴ Given that “[c]hanging the culture and overall environment is found to curb cheating.”²⁵ students and faculty alike can take measures to create a culture of academic integrity, particularly in the digital age when new technology offers more opportunity for academic dishonesty.

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Movies as Intellectual Properties in the Digital Age

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Movies are the most expensive works of art, with budgets that can reach hundreds of millions of dollars. Ownership of movie properties is fairly well defined, but the new digital era has completely upended the old models of valuing film properties. This valuation is crucial, both for financing the movie in the first place and for any future transactions in the completed film.

For example, our work (Palia et al, 2008) documents how studios parse the rights to show a film in various territories and venues (TV, DVD) to determine how budgets should be split among collaborating studios and production companies. Independent films often sell rights forward to finance their movies, and if the creative team and the financiers cannot agree on a price, the movie may never get made.

Valuation is also crucial when film libraries change hands. For example, the value of the film library of MGM was a big component in the discussions during the trials and tribulations of MGM during the early part of the 21st century that culminated in a bankruptcy filing in 2010. It had never been easy to estimate how many people will watch a particular film and in what venues. However, traditionally, one could value a film based on comparables or, if the film has already been made and shown, on early results (usually U.S. theatrical exhibition).

The digital age has dramatically changed these equations. The first crack in the wall appeared when piracy became an issue. First, there were grainy VHS tapes filmed during screenings and sold around the world. Piracy has graduated since to full-blown good quality copies available illegally on the internet. New valuation models must consider how much of the projected revenue may be lost to piracy. There is broad consensus that there will be a decline in revenues, but the extent is not clear (Danaher and Smith, 2017).

The second challenge to film valuation is more recent. The percentage of film revenues coming from U.S. theaters has been declining for decades. International revenues and home entertainment receipts have seen a tremendous growth (see Ravid, 1999 and our current research). The switch from VHS to DVD did not make a huge difference, except in the quality of the image, and a reasonably stable valuation model could be established.

However, in recent years, streaming has been growing in leaps and bounds. Streaming revenues are expected to surpass global theatrical revenues for the first time this year (Roxborough, 2018). Streaming is a completely different distribution mode, with different pricing structures. Whereas consumers had to rent or buy DVDs or VHS tapes, they can buy unlimited access to, say, all of Netflix content. Therefore, it is very difficult to estimate how much films are worth now as the technology and the pricing models are evolving.

Piracy and streaming have also transformed the traditional “release windows.” Films used to open in the United States, then overseas, and then would go to home entertainment. Now, films may be released on all distribution channels simultaneously or with a short delay.

For example, the Academy Award-winning movie *Roma* opened on Netflix shortly after a very limited theatrical release in 2018 and then expanded in theaters. Interestingly, streaming and theatrical release coexisted peacefully.

This profound revolution in distribution has made the valuation of film properties very difficult. Independent films, which rely on such valuations and would have been made under the old system, may not be made now as nobody will take the risk of future income. Interestingly, this may explain the large increase in production funded by streaming services, in particular Netflix. Their proprietary data allows them to best analyze the streaming value of films, and thus they can better assess the possible economic success of the properties.

This evolving process illustrates the idea that intellectual property boundaries are important, but valuation is crucial as well.

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When Technology Meets Theology

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We usually discuss issues of ownership in legal terms. This holds true whether we are talking about land, movables or intellectual property. It is important, however, especially from the perspective of Jewish law, to view the concept of ownership through a theological lens as well. Do we really own our property, or for that matter, our ideas?

The Mishnah (*Avot* 3:8) declares: "Give Him from His own, for you and your possessions are His. And so has David said, 'For everything is from You, and from Your own we have given You' (Chronicles I 29:14)." The medieval commentator R. Jonah of Gerondi explains that we do not truly own our possessions. Rather, they are given to us by God as a deposit to be guarded. Even though normally a guardian may not make personal use of a deposit, God has granted us the use of our wealth to meet all our needs.

However, the primary obligation of the guardian is to see to it that the deposit is used in accordance with the will of the depositor. It is the belief in God's absolute ownership of the material world that should engender a spirit of generosity and charity with one's wealth. If this generosity is not forthcoming, the Talmud (*Ketubot* 49b) states that the Jewish court may assess a person's property and force them to donate an appropriate amount to charity.

The spirit of generosity and charity also encompasses the conveying of knowledge and sharing of wisdom. R. Moses Isserles (*Hoshen Mishpat* 292:20) rules that the Jewish court may force someone to lend books to his neighbors when no other books for study are available. R. Elijah of Vilna (ad loc. #47) identifies the Talmudic source for this ruling. *Ketubot* 50a presents two interpretations of the verse "wealth and riches are in his house and his charity endures forever" (Psalms 112:3). Either it refers to one who learns Torah and then teaches it to others, or to one who copies Bible scrolls and lends them to others to use. R.

Elijah elaborates: since teaching and lending texts constitute forms of charity, and since it was already established that the Jewish court may compel the giving of charity, R. Isserles' ruling that we can force the owner to lend out his books follows logically.

The value of sharing knowledge with others is not limited to Torah learning. Just as the Talmud (*Berakhot* 58a) formulates a blessing upon seeing a Torah scholar (“Who apportioned of His knowledge to those who fear Him”), so, too, it formulates a blessing upon seeing a secular scholar (“Who has given of His knowledge to human beings”). All forms of wisdom emanate from God, and where the spirit of charity would be served, it follows that any form of wisdom should be shared generously.

With the advent of the digital age, the ability to make scholarly research available to a global community creates a unique opportunity for generosity. From the perspective of Jewish law, this may create a formal religious obligation as well. R. Moshe Feinstein (Introduction, *Dibrot Moshe, Bava Kamma*) writes that the mitzvah of teaching Torah obligates Torah scholars to publish their research and insights for two reasons: to spread their knowledge to the widest possible audience and to prevent their research from becoming lost or forgotten. It follows that a Torah scholar who does not make his work available via electronic media diminishes his fulfillment of the commandment to teach Torah.

Jewish legal sources address the question of intellectual property rights extensively, including important issues such as reward for effort, return on investment and scholars' need to support themselves. The Torah recognizes that it would be unfair and irresponsible to deny scholars the material benefit of their hard work.

However, Jewish law also seeks to mold attitudes and encourage positive behaviors. Acknowledging that God grants our intellectual achievements should lead to a spirit of generosity and a willingness, within reason, to share our knowledge and insight with others. Digital platforms make this generosity more attainable and more impactful.



Orphan Works

MARLENE SCHIFFMAN, Catalog Librarian, Metadata Services and Processing



An orphan work is one for which the owner of a copyrighted work cannot be identified and located by those who wish to make use of the work—typically publishers, libraries, museums, historical societies, universities or archives—in a manner that requires permission of the copyright owner. The long duration of copyrights, and the absence of mandatory registration, notice, renewal and recording of transfers have given rise to millions of orphan works.¹

Even if the user makes a reasonably diligent effort to find the owner, there is a remote risk that a copyright owner could bring an infringement action after the work is reused. Secondary users would have to initiate another search since they cannot rely on the search of a previous user. It would stifle creativity to prevent authors from remixing, sampling and otherwise building upon the works of their predecessors as raw material for new expression.²

A search may be conducted by delving deeper into copyright records at the Copyright Office.³ These records may help determine who owns the work currently through records of copyright transfers. Copyright Office renewal records will reveal if the publisher has failed to renew the copyright in the work, which puts the work in the public domain if it was published between 1923 and 1964. The three most common methods of searching Copyright Office records are hiring a search firm, paying the Copyright Office to do the search or searching the Copyright Office records using the internet. Each search requires a different

the search or searching the Copyright Office records using the internet. Each search requires a different amount of effort, and in many cases, the copyright owner still cannot be identified.

With visual or digital works, software and related tools that facilitate image recognition, fingerprinting, watermarking, audio recognition and licensing for copyrighted works are technologies already available, and startups are hoping to fill this role in assisting those who search for copyright owners.⁴

The problem with these schemes is deciding upon whom the burden would fall for creating the database; for example, who would have to register the billions of analog art works in a digital format? The creators of such works do not have the resources to engage in such a project.⁵ Mass digitization projects may serve important public benefit objectives including preservation and accessibility and providing authors and copyright holders of out-of-print works with potential new sources of revenue. How could any archives possibly locate millions of copyright holders associated with such a project? Congress has only exacerbated the problem by enacting longer and longer copyright terms, abolishing the requirement that copyright holders must renew the copyright twenty-eight years from publication and that they register their works with the Copyright Office.⁶

Potential users of orphan works contend that if users conduct a reasonably diligent search, they should be protected from excessive penalties should the owner appear. Payment should be limited to a fee as if it had been negotiated beforehand between the user and the copyright owner. Photographers have suggested that use of orphan works be limited to individuals for non-revenue producing personal or community purposes. Non-profit educational institutions might be given permission to use them in exhibits, documentaries or websites and even in souvenir sales in connection with an exhibit.⁷

Ultimately, a legislative solution needs to be addressed by Congressional action. Bills were proposed in 2006 and 2015, but they have not resulted in any concrete legislation. Comprehensive copyright revision is not expected soon. So how should libraries and archives handle orphan works in the meantime?⁸

An institution must consider the following risk factors when proceeding without permission:

- *The investment in the project using the copyrighted work.* The more money spent on the project, the greater the risk if its publication must be suspended.
- *The diligence of the copyright search.* The more diligently it has been researched in good faith, the less risk.
- *The nature of the work and the reduction of risk.* How easy will it be to remove the unauthorized material?
- *An analysis of the risk.* This will determine how hard it would be to replace the material if the owner insists that it be removed.

The likelihood of discovery depends on how widely distributed the infringement is. Liability might result only in payment to the rights holder of the standard fee within the trade for a similar use.⁹ Ultimately, stakeholders would benefit from legal clarification from Congress that would allow orphan works to be available for public use in a way that is equitable for both users and copyright holders.

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Fair Use: Breathing Space within the Confines of Copyright¹

DEENA SCHWIMMER, Archivist



The doctrine of Fair Use, which provides the framework for using copyrighted material without the copyright holder's permission, has been, at the same time and for the same reason, one of the most and least applauded components of U.S. copyright law.

It was first codified in the U.S. Copyright Act of 1976; however, its common law history in the United States dates from the earliest copyright legislation passed by Congress in 1790. In his 1841 ruling in *Folsom v. Marsh*,² Justice Joseph Story first articulated what evolved into the “four factors” to be considered in making a fair use determination,³ which have been the criteria ever since and are enshrined in the 1976 Act.

Such divergent attitudes regarding the Fair Use doctrine exist because the four factors are not applied in a formulaic manner but rather as a balance based on the full circumstances of each case. Critics of the doctrine perceive it as a muddy morass, too vague to rely upon except in proven cases. Its supporters champion it as a flexible, living system that advances creativity and innovation.

Fair Use should be viewed within the wider context of U.S. copyright law, which itself originates in Congress' power to grant time-limited, exclusive rights to creators for the purpose of promoting “Progress of Science and the useful Arts.”⁴ This limited monopoly incentivizes creativity while ensuring these works become available to society as their copyrights expire and they enter the public domain.

To further preserve this balance between the interests of creators and the public, copyright law contains other limitations to creators' exclusive rights. These consist of a set of specific, qualified uses by (primarily) libraries, archives and educators,⁵ and unspecified, unqualified uses⁶ deemed to be “fair” per the four factors, which may be asserted by all.

Understood this way, it is because of the broadness (vagueness to some) inherent in Fair Use that it contributes to preventing copyright from unreasonably suppressing the use and enjoyment of works that enrich the public. Indeed, in her majority opinion in *Eldred v. Ashcroft*, Justice Ruth Bader Ginsberg referred to Fair Use as a built-in first amendment safeguard.⁷

It can be argued that the practices and tools so integral to our current digital age would not have flour-

ished or even arisen without an extensible, flexible Fair Use framework. The doctrine’s adaptability has enabled forward-looking courts to apply it in support of uses that transform the copyrighted material’s original purpose, despite making outright and even extensive uses of it.⁸ It is due to Fair Use that we have, for example, search engines, the remix culture, appropriation art, fan fiction and anatomization of political news.

In academia, the specificity of the exclusions for libraries and educators in the Copyright Act has made them inadequate for today’s practices. Because of Fair Use, however, efforts such as digitizing archives and repurposing popular culture content for media and cultural studies curricula are widespread, and the discipline of digital humanities has emerged.

Fair use fosters the functioning and advancement of our modern society

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¹ Justice David Souter, writing for the majority in *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994).

² 9 F Cas 342 (CCD Mass 1841).

³ Those factors are: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. See 17 U.S.C. § 107 (2016).

⁴ U.S. CONST. Art. I, § 8, cl. 8.

⁵ 17 U.S.C. §108, 110, 1201(d)

⁶ The preamble to the Fair Use Exclusion provides examples of uses that were traditionally found to be fair, such as criticism and news reporting; however, these were not intended as comprehensive. See 17 U.S.C. § 107 (2016).

⁷ *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

⁸ For just a few of many examples, see *Authors Guild, Inc. v. Google Inc.*, No. 13-4829-cv (2d Cir. Oct. 16, 2015); *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006); *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994)..



Original Torah Contributions and the Public Domain

DR. JOSHUA WAXMAN



In my scholarly work in developing and applying algorithms to Jewish texts, I sometimes come across issues of copyright. In one recent example, my research group was trying¹ to train a machine learning model to recognize instances of citations (e.g., “and the Sages expounded in chapter Lulav Hagazul”) in rabbinic responsa (that is, collections of questions posed to a rabbi on matters of rabbinic law, coupled with the rabbi’s response) and use those citations to predict the topic of that responsum (e.g., blemishes on an etrog).

Our initial plan was to utilize Rav Moshe Feinstein’s *Igerot Moshe* [*Letters of Moshe*] because that would best align with work by other researchers.² Due to copyright issues, we were unable to acquire this resource and instead trained on Rav Yosef Karo’s commentary *Bet Yosef* [*House of Yosef*] and tested on the Responsa of Rabbi Solomon Luria, all taken from Sefaria.³

Sefaria's goal is to open-source a Jewish library. They have made, freely accessible, a large number of Jewish texts. In the Mi VaMi project,⁴ which highlights the social scholastic network of the Talmud, we build upon Sefaria's Hebrew, Aramaic and Hebrew Talmud text, which is the William Davidson digital edition of the Talmud, available at no charge under a Creative Commons non-commercial license. This digital edition was, in turn, acquired from the Koren Noé Talmud. Yet, one thing that the digital version lacks that the printed version has is vowel points and punctuation, which were painstakingly put into the text by Rav Adin Steinzaltz.

Outside of Sefaria, there are also many texts which are not accessible to the world at large. For example, the Talmud text on Sefaria is essentially that of the printed Vilna edition. *Hachi Garsinan*,⁵ a website from the Friedberg Jewish Manuscript Society with free registration, compares the versions from various manuscripts side-by-side. These variants are quite important for my work on the Talmudic scholastic graph, as more than half of occurrences of the names of Amoraim have variants in one of their manuscripts, and we don't want to work with erroneous data. Luckily, these variant texts are accessible at this excellent site, though it is in a "walled garden."⁶

Another example of locked-up texts are the critical editions of Onkelos' Targum (an Aramaic translation of the Pentateuch). In the Ktav edition of *Targum Onkelos*, Rabbi Dr. Israel Drazin bases his commentary on the critical edition of the Targum text created by Dr. Alexander Sperber, but because of the Sperber copyright, prints the actual text of Onkelos taken from the earlier work of Rabbi Dr. Avraham Berliner. In the later Gefen edition by Rabbi Drs. Israel Drazin and Stanley Wagner, they provide a nice text with vowel points but for "technical reasons" use neither the Berliner nor the Sperber text. This is thus another example of an important text being locked away.

Having to contend with this issue of locked texts led me to think about the nature of Jewish texts, which belong to the author who put in years of work and, at the same time, to the Jewish people at large. Please note that these are just musings rather than a deep scholarly analysis of the topic of intellectual property and *hasagat gevul*⁷ [moving of the boundary marker]. I clearly speak here not as an expert in either Jewish law or in American law.

One place to begin is Yerushalmi Peah 2:4:

Rabbi Yehoshua ben Levi said (interpreting Devarim 9:10, regarding the two tablets with the Ten Commandments): Upon them — "And upon them" — were all — "like all" — matters — "the matters/commandments." That is, (upon the narrow tablets were) Scripture, Mishna, Talmud and hermeneutic interpretations. Even that which a dedicated disciple will, in the future, innovate before his teacher was already said to Moses on Sinai. What is the source? (Kohelet 1:10) "There is a thing of which [someone] will say, 'See this, it is new.'" His fellow will respond and say to him, "It has already been for ages which were before us."

That is, based on a verse in Kohelet, even that which a student states before his teacher was already stated to Moshe on Har Sinai. One might say that the whole realm of Torah discussion is part of the inheritance of the Jewish people, or perhaps that if an innovation is indeed *true*, then it is, in some sense, not novel but part of the very Torah which existed "from time immemorial."

Yet, there is another thread, non-contradictory, that stresses the importance of attribution, which suggests an ownership of novel thoughts. In a source which, funnily enough, is most often quoted without attribution (Megillah 16a), Rabbi Eleazar (ben Pedat) citing Rabbi Chanina says, "Whoever says a matter in the name of the person who said it brings redemption to the world."

Rav Moshe Feinstein put an exceptional level of effort and expertise into his responsa, and attribution and compensation are certainly deserved. On the other hand, this is Torah and belongs to the Jewish people. Hillel HaZaken, who was poor, famously (Yoma 35b) avoided paying the entrance fee to the Bet Midrash by perching on the skylight and listening in.⁸

There is a position within the thought of the Sages that maintains that “information deserves to be free.” For example, there are the competing approaches of Rabban Gamliel II and Rabbi Eleazar ben Azaria (Berachot 28a) about having or removing the guard at the entrance to the study hall, allowing greater accessibility with the possible drawback of allowing in inappropriate students, with the Talmud’s conclusion endorsing the open-access approach as the correct one.

The Mishna and various related teachings (Yoma 38a) level criticism at certain families and individuals, who performed holy work for the Bet HaMikdash, for keeping trade secrets such as how to make the incense rise, prepare the shewbread so that it will not mold or use a particular musical and scribal technique. The ideas behind the criticism is that this knowledge shouldn’t be kept completely to themselves. Each, save the last, offered a defense that they wanted to prevent misuse.

Before Berliner and Sperber spent years and applied their expertise to write their own precise versions of Targum Onkelos, Onkelos himself wrote it and established the ground truth. These scholars own their work and deserved credit and compensation, but I just (jealously, perhaps ridiculously) wonder that, since they worked to reconstruct the *original* text and that is its essential value, how could the reconstructed yet original true text of Onkelos not be in the public domain of the Jewish people?

This ownership argument can indeed be applied to Onkelos himself, for he might have reconstructed an earlier Targumic text. In Megillah 3a, we hear of various innovations, which are nevertheless authentic because, in some real or theoretic sense, they already existed. For example, they state that Onkelos composed the Targum based on the ideas and positions of his teachers Rabbi Eliezer ben Hyrcanus and Rabbi Yehoshua ben Chanania. Thus, he deserves credit, though the Targum gains much of its authoritativeness and canonical status because it is based on existing tradition. The *stam* [anonymous stratum] of the *gemara* questions even this much ownership of the Targum. After all, a verse in Nehemiah (8:8) is interpreted to mean that a public reading included Targum, so the Targum must have predated Onkelos. The proffered answer is “they forgot it, and then returned and reestablished it.” In other words, the very same Targum was forgotten and then reestablished.

I’ll close with a nice idea from Rabbi Nechemia Ruzinsky, in his beautiful sefer *Mishnat Nechemia [The Teachings of Nechemia]*,⁹ which surveys the consistent positions of many rabbis whose views are recorded in the Talmudic literature. He notes multiple instances where Rabbi Eleazar ben Pedat angered Rabbi Yochanan and Resh Lakish for presenting halachic decisions that they believed to be their own without proper attribution.¹⁰ How could Rabbi Eleazar ben Pedat not offer proper attribution? After all, he was the one famous for stressing the importance of attribution to bring redemption to the world!

Rabbi Razinsky answers, based on Bava Metzia chapter 4, that Rabbi Eleazar ben Pedat was the master of *braytot* (literally “outside teachings”, that is, teachings of the Sages from an earlier strata called *Tannaim*, from approximately 10-220 CE, which had not been incorporated into the Mishna) which were not known to others, even to Rabbi Yochanan. There, we find Rabbi Yochanan complaining to Resh Lakish that Rabbi Eleazar was reciting halachic [Jewish legal] positions as if they were directly from the *Mouth of God*, without attribution. Resh Lakish explains that, in this case, Rabbi Eleazar was actually citing a *brayta* [outside teaching] on his own. (This *brayta* can be found in *Torat Kohanim*). Indeed, Rabbi Eleazar had learned these from Rav in Bavel, who in turn had learned them from Rabbi Chiya.

Along similar lines, after Resh Lakish’s death, when Rabbi Eleazar ben Pedat was assigned to learn in companionship with Rabbi Yochanan, he annoyed Rabbi Yochanan by repeatedly supporting him rather than attacking his position. For every novel statement Rabbi Yochanan made, Rabbi Eleazar said *tanya demasaye’a lach*, “there is a *brayta* which supports you!” Again, this was because he knew of these *braytot* [outside teachings] of Rabbi Chiya.

With this in mind, it becomes evident that Rabbi Eleazar ben Pedat was not taking illicit credit for Rabbi Yochanan and Resh Lakish’s Torah. Rather, all the times these scholars thought that Rabbi Eleazar was

plagiarizing their statements, he was actually just expounding these braytot.

At the end of the day, intellectual property, including in the Torah realm, belongs to its creators and innovators, in the sense that proper attribution should be given and copyright law should be respected. At the same time (Devarim 33:4), the Torah is an inheritance of the Jewish people. An interesting dilemma

References

¹ Adina Cohen and Joshua Waxman, 2019, *NER of Citations and Fine-Grained Classification of Responsa*, in Israeli Seminar on Computational Linguistics Conference

² Elli Fischer and Moshe Schorr, 2018, "The Shape of a Rabbinic Career: Rav Moshe Feinstein and Rav Yaakov Ettlinger", <https://blog.hamapah.org/mapping/the-shape-of-a-rabbinic-career-rav-moshe-feinstein-and-rav-yaakov-ettlinger/>

³ https://www.sefaria.org/Beit_Yosef, https://www.sefaria.org/Teshuvot_Maharshal.1

⁴ Joshua Waxman, 2019, A Graph Database of Scholastic Relationships in the Babylonian Talmud, Proceedings of the Digital Humanities 2019. <http://www.mivami.org/>

⁵ <https://fjms.genizah.org> The name is Aramaic for "So do we establish the version of the text."

⁶ A walled garden is "a restricted range of information to which subscribers to a particular service are limited."

⁷ Literally "moving of the boundary marker". This had an original, Scriptural implication of theft of land by moving a landmark but was extended in rabbinic law to restricting competition in commerce and, in the 1500's and on, to protecting printer's rights by banning others from reprinting a book for several years after the initial printing, effectively a copyright restriction.

⁸ See the Shach in Choshen Mishpat 292:35 about stealing Torah when it is not otherwise accessible.

⁹ <https://tablet.otzar.org/en/book/book.php?book=156255&width=0&scroll=0&udid=0&pagenum=1>

¹⁰ See Yerushalmi Berachot 2:5, Yerushalmi Yevamot 3:10, Makkot 5, Menachot 83, and Yevamot 96. In the last instance, several Sages attempt to placate Rabbi Yochanan, and he is eventually comforted by the idea that, just as Yehoshua stated halacha without attribution and everyone knew it came from his teacher Moshe, so does Rabbi Eleazar teach without attribution, and everyone knows it came from his teacher Rabbi Yochanan. This would not work for statements taken from Resh Lakish, however, so the problem remains.

