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FROM MAIMONIDES TO MICROSOFT: THE JEWISH LAW OF COPYRIGHT SINCE THE BIRTH OF PRINT, by Neil Weinstock Netanel, Oxford University Press, 2016. 336 Pages, Hardcover $99.95

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COPYRIGHT, JEWISH LAW AND CREATIVITY

Not many people would link copyright with Jewish law, but this connection should not be surprising to those who know something about both areas. Jewish law, known as *halakhah*, is a legal system governing far more than Jewish religious behavior. Its scope extends to just about every area of human existence such as personal relationships, property, inheritance, sex, clothing, ethics, health concerns, and business. According to Jewish tradition, the source of *halakhah* is Divine but human beings are charged with its implementation and development. As such, *halakhah* is very much an expression of human creativity. In the secular realm, the purpose of copyright law is to protect works of authorship that are products of human creativity. When seen in this way, it is logical and fitting that Jewish law, itself a product of human creativity, has something to say about whether and how authors and their works should be protected.

This reality was not lost on Microsoft. In the 1990s, the company's Israeli subsidiary sought not only secular legal relief against software piracy in Israeli courts, but also petitioned a rabbinic court in the ultra-Orthodox enclave of Bnei Brak for a ruling that would support its position as a matter of Jewish law. Microsoft received a favorable ruling in the form of an edict labeling as "transgressors" those who copy computer disks and various programs and sell them for a low price. The ruling also stated that people who purchase these unlawful copies are "abettors of those who violate the law."

Professor Neil Netanel's new book, FROM MAIMONIDES TO MICROSOFT: THE JEWISH LAW OF COPYRIGHT SINCE THE BIRTH OF PRINT, opens with a discussion of the Microsoft ruling by the rabbinic court, a topic to which he returns in the final chapter. His book furnishes a meticulously researched and artfully presented account of the history of copyright law as it has developed under the watchful eyes of rabbinic authority. A product of decades[1] of research, percolation time, and masterful linguistic crafting, Netantel's book appears to be written with two major goals in mind. One goal is to tell the story of the development of the Jewish law of copyright as it has been formulated by rabbinic decisors since the sixteenth century. I suspect this story is one that is largely unfamiliar to many students of *halakhah,* let alone scholars of copyright law generally. The second goal is the demonstration of how the *halakhah* of copyright law has been influenced by historical and cultural factors operating both within and outside of the Jewish community.

Netanel writes in his preface that as originally conceived, this book was to be a more basic introduction to Jewish copyright law written for the purpose of providing a comparative perspective to students and practitioners of secular copyright law. As his project proceeded, he realized that if he was to do this topic justice, he had to address broader issues that surfaced during his research such as the impact of "external, non-Jewish influences" on the law's development; "the historical context in which early modern rabbis enunciated a Jewish law of copyright; and parallels between the Jewish law of copyright and its secular and papal counterparts" (Preface, *ix*). In other words, Netanel realized that the story of Jewish copyright law is not just a story about the intrinsic application of *halakhic* jurisprudence. It is also a story about how this body of *halakhah* emerged from the surrounding cultures and historical circumstances in which the Jews were living. It is a story about how the legal environment of those cultures impacted the development of *halakhah*.

Netanel's book clearly illustrates the principle that law and culture are inevitably intertwined. This is true not just for secular law but also for *halakhah*, which some regard as a completely insular legal system admitting of no outside influence. The intersection between *halakhah* and culture has been the focus of my own work on Jewish law and tradition,[2] and I was elated to see how Netanel took a specific aspect of Jewish tradition, one not related to ritual, and told a story with lessons for copyright, comparative, and Jewish law scholars.

Early on, Netanel details the development of rabbinic bans on reprinting books beginning with the first known ban issued in Rome in 1518. He illustrates how

these bans simultaneously draw from, and yet differ, from the papal bans and secular book privileges in vogue at that time. Enforcement of these bans through a decree of excommunication was common with respect to both rabbinic and papal bans. Other similarities with the secular book privileges suggest that they too served as a model for rabbinic decisors of the early modern era. These homogenous elements "reflect the confluence of shared understandings among early modern Jews and Gentiles regarding the nature of authorship" (p. 51). Yet, in fashioning these bans, the rabbis drew heavily from the intrinsic sources of the Jewish tradition such as the Torah, Talmud, and subsequent *halakhah*. This focus on Jewish tradition is evident in the first rabbinic ban given its emphasis on *halakhah's* prohibition of encroaching on someone else's livelihood. The focus of the book privileges, in contrast, was on the sovereign's discretion to reward deserving subjects.

This concept of borrowing elements from the surrounding culture and transposing these elements to suit both *halakhah's* unique framework and the diverse customs of Jews living in distinct communities has been a hallmark of Jewish law throughout the centuries. As Professor Joel Roth has observed, "borrowings from other legal systems, whether consciously or unconsciously…often incorporate the sociological reality into the Jewish legal system, sometimes intact and sometimes modified."[3] Netanel illustrates how the first reprinting ban captures the essence of this process to the extent the rabbis "took venerable Talmudic injunctions against encroaching on another's livelihood and applied them to the new business of printing and selling books, a business that the technology of the printing press made at once possible and vulnerable to ruinous competition" (p. 64). In doing so, the rabbis boldly transcended existing Jewish law (p. 64).

Although the rabbis who issued the first ban drew from Jewish legal authority in supporting their conclusion, they did not develop extensive argumentation for their *halakhic* conclusion. Netanel devotes a chapter to the subsequent *halakhic* arguments by Moses Isserles, who later became the leading Ashekanic Jewish authority of his generation. In 1550, Isserles issued his very first responsum (legal opinion), resolving a dispute between two competing editions of the *Misheh Torah*, a well-known code of Jewish law written by the celebrated medieval philosopher Moses Maimonides. The circumstances prompting this dispute required Isserles to delve into complex jurisdictional and other matters that the rabbis in Rome were able to avoid. Ultimately, Isserles issued a reprinting ban and order of excommunication, limited in scope to Poland, for those who bought or possessed an illicit edition of the work. Significantly, his reasoning focused on the harm engendered by predatory pricing rather than a concern for the copying of

subject matter that would be considered copyrightable material today (p. 99-100). For this reason, Netanel concludes that his ruling "does not sound in 'copyright,' as that term would be understood in present-day secular law" (p. 100).

Despite the limitations of the ruling issued by Isserles, it became the basis for the subsequent widespread adoption of rabbinic book bans. In the next chapter, Netanel traces the role of these bans in the development of the Hebrew book trade beginning in the late sixteenth century, and compares the operation of these bans with secular book privileges. In early modern Europe, Jewish communities enjoyed a considerable degree of autonomy, with lay authorities often maintaining a position of power superior to that of the rabbinate. With respect to the book trade, however, rabbinic authority still prevailed, as lay councils typically required rabbinic approval for printing and also honored rabbinic impositions of excommunication (p. 121). This chapter also illustrates the importance of cross-cultural influences in the developing *halakhah* concerning reprinting bans and the culture of regulation in the Jewish communities. Netanel notes that the book regulations governing the Jewish communities paralleled the regulations in force for non-Jewish communities but also "reflected the particularities of Jewish communal life, the rabbinic tradition, and the Hebrew book trade" (p. 122).

During this period, we see the emergence of a nuanced, but often contradictory, *halakhah* concerning reprinting bans. As discussed, the earlier bans focused on the venerable *halakhic* prohibition against encroaching on someone else's livelihood. In contrast, later multi-faceted rulings, both supporting and opposing these bans, were bolstered by a wide range of *halakhic* doctrine and underlying policy. Netanel devotes two chapters to these significant controversies, including a discussion of two important disputes in the early nineteenth century that laid the foundations for subsequent applications of Jewish copyright law.

The first of these chapter details the cross-border dispute over a set of holiday prayer books known as *Sefer Krovot Hu Mahzor*. This dispute involved two major jurists, Mordekhai Banet and Moses Sofer, who engaged in an extended colloquy about the theory and parameters of Jewish copyright law. Both rabbis invoked policy and current social realities to justify their contrasting views on whether reprinting bans can be justified *halakhically.* Banet's legal conclusions reflect his overarching policy perspective that reprinting bans are anti-competitive, especially when they are applied to geographical areas outside of the territory in which they are originally issued, or for a duration exceeding the time in which the petitioning publisher has recouped his investment. In contrast, Sofer sees reprinting bans in a favorable light. He believes they are supported not only

halakhah's concern for preventing wrongful competition, but also by the policy of promoting the publication of Jewish books in all potential markets of the publisher.

The second chapter continues to explore the growing body of Jewish copyright law by focusing on a major dispute involving competing editions of the Talmud. This dispute resulted in several rabbinic responses, including one from Sofer, and Netanel analyzes each of them meticulously. This diversity of views as to both the legality and appropriate scope of rabbinic printing bans foreshadows Netanel's analysis of the range of opinions on the scope of contemporary Jewish copyright law that he addresses in his final chapter.

By the middle of the nineteenth century, rabbinic reprinting bans waned in importance, a development that paralleled the disintegration of Jewish communal autonomy and rabbinic juridical authority. Jewish copyright law was shaped in the latter half of the nineteenth century by the differing opinions of Joseph Saul Nathanson and Yitzhak Schmelkes. Nathanson's approach was groundbreaking to the extent he posited that authors maintain a perpetual, exclusive right to reprint their creative works. In his view, authors enjoy a property right that is completely divorced from rights deriving from the rabbinic reprinting bans or the Jewish law of wrongful competition. Netanel explains Nathanson's ruling as not grounded in Talmudic logic or precedent but rather as a reflection of the need for Jewish law to take into account the legal norms of secular jurisprudence with respect to the rights of authors (p. 222). In contrast to Nathanson's direct incorporation of secularist copyright notions into Jewish law, Schmelkes essentially concluded that secular law governs these matters according to the *halakhic* doctrine of *dina de-malkhuta dina* (the law of the land is the law).

Netanal's final chapter is titled "The Present-Day Debate: Is Copyright Infringement 'Stealing'?." It demonstrates that although neither Nathanson's nor Schmelkes's rulings carry the day presently, their earlier opinions played a part in shaping what he sees as the two modern competing perspectives on Jewish copyright law. One perspective understands copyright as property. The other perspective, which garners more support today, sees copyright as an "amalgam" of rights arising from a multitude of sources including early rabbinic bans, binding custom, protection against wrongful competition and unjust enrichment, and deference to secular law regarding commercial matters. Netanel's analysis also demonstrates how secular copyright law has influenced both modern schools of thought.

The last chapter also returns to the significance of Microsoft's role in the narrative of Jewish copyright law. From a copyright perspective, Netanel discusses why the rabbinic edict answers raises more questions than it answers. From a socio-cultural perspective, Netanel stresses the irony of Microsoft seeking a ruling from a rabbinic court of one of Israel's most Orthodox and insular communities in which all secular entertainment, as well as the Internet, is condemned and banned. He observes that in reality, both the Microsoft ruling, and other rabbinic pronouncements "have failed to stem the tide of Internet usage" in Israel's ultra-Orthodox communities (p. 238).

Throughout his book, Netanel's focus is on how copyright law safeguards the economic interests of authors and publishers. As he acknowledges in his Introduction, however, copyright laws in most countries also incorporate protections for the personal interests of authors through moral rights laws. Netanel explains that moral rights law recognizes the "rights to claim authorship credit and to prevent distortions in the author's work even after the author has transferred to a publisher or studio her exclusive rights of copying, distribution, adaptation, and public communication" (p. 5).

Moral rights violations often arise in circumstances in which someone other than the author has the ability to publish or reproduce a copyrighted work. For example, in many countries a moral rights claim could arise if the publisher of a Jewish book removes a *haskama*, a rabbinic approbation for a particular book, without the author's permission. The basis for this claim would be that authors seek these approbations based on their judgments about the stature and credibility of these rabbinic authorities, and their unauthorized removal violates the integrity and vision of the author's work. This type of claim would not be viable in the United States, however, because here visual artists are the only authors protected by moral rights under federal copyright law.[4]

Although Netanel addresses the historical connection between rabbinic approbations and reprinting bans, he does not discuss the removal issue generally or specifically in the context of moral rights.[5] Given that his work concentrates on how the Jewish tradition protects the economics aspects of works of authorship, he should not be faulted for this omission. Still, the Jewish tradition's perspective on these personal interests furnishes a relevant backdrop to Netanel's narrative.

The story of moral rights and the Jewish tradition begins with the narrative of Adam and Eve in *Genesis*, the first book of the Torah. In chapter 2, verse 17, God commands Adam not to *eat* from the Tree of Knowledge. This verse says

nothing about refraining from touching the fruit. In chapter 3, verse 3, Eve tells the serpent that God's instructions were neither to *eat nor touch* the fruit, or else they would die.

According to the tradition of the Oral Law that rabbinic authorities invoke to understand Biblical text, Adam wanted to add a safeguard to God's commandment of not touching the fruit, so he told Eve not to eat *or* touch it. Adam did not, however, tell Eve that this addition was his own innovation. The cunning serpent then shoved Eve against the fruit, and showed her that she would not die from touching the fruit. As a result, the serpent was able to convince Eve that she could also eat the fruit without any negative consequences.[6] Based on this interpretation of the Biblical text, Adam's lack of regard for God's moral rights in His instructions caused the expulsion of the couple from Eden.

All relevant works of Jewish law on this topic cite as the direct legal source a statement from the Ethics of the Fathers, a Talmudic tractate embodying the accumulated ethical and moral wisdom of the rabbinic sages. The importance of having one's words properly attributed to the original source is emphasized here in the following verse: "Whoever repeats a thing in the name of the one who said it brings redemption to the world."[7] The commentary by Rabbi Meir Zlotowitz emphasizes that a person "must display indebtedness to a source and mention him by name,"[8] thus prohibiting taking false credit for a statement made by someone else. Implicitly, this verse also mandates a responsibility for accurate quotation.

Based on the Ethics of the Fathers, it is clear that the Jewish tradition concerning authors' personal interests is centered on the *duty* of the second speaker rather than on a *right* of the first speaker. In this way, the Jewish perspective on moral rights differs from the secular version that understands the law as a right of the author. Moreover, a duty is perpetual but a right only lasts as long as the first speaker or her representative has the ability to enforce it. This suggests that according to the Jewish tradition, those who use an author's work have a perpetual duty to safeguard the author's moral rights interests. This view contrasts with most secular moral rights laws that provide the author with a period of protection lasting for as long as the copyright is in force.[9] To illustrate this point in the context of removing *haskamot*, it seems as though Jewish tradition would say that this conduct arguably constitutes a violation of the second speaker's duty to preserve the moral rights interests of the author.

Also worthy of note is the Talmud's focus on attribution through several generations of students and teachers. When the Talmud states "Rabbi X said," it

is conventional wisdom that the Talmud does not necessarily mean Rabbi X himself but rather the school of Rabbi X. The idea of misattribution in the Talmud must be accessed within its tradition of flexible, collective authorship. Jewish Studies scholar Sacha Stern has observed that "only *deceptive* plagiarism would have constituted a breach of the practice of attribution."[10] Although authorship of material in the Talmud cannot be equated to authorship in Western terms, the concern for accurate attribution in the Jewish tradition, as well as preservation of artistic integrity, is palpable.

For copyright, comparative law, and Jewish law readers, Professor Netanel's book contains material that will fascinate and delight. Those interested in Jewish law, on both theoretical and practical levels, will be intrigued with his nuanced *halakhic* discourse and perhaps even surprised by its application to copyright law. Copyright and comparative law scholars are likely to be interested in how he situates his *halakhic* discussions within a historical, sociological, and comparative law context, and deftly illustrates how rabbinic rulings are sensitive to "context" in copyright matters. Secular legal readers will also appreciate his deep discussion of whether copyright is, and should be considered, "property" under Jewish law, as well as his analysis of the implications of this characterization.

END NOTES

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[1] Netanel acknowledges in his Preface that early on, he and David Nimmer were going to co-author the book. Although Nimmer was unable to continue in this capacity, Netanel provides touching credit to his former collaborator and indicates which portions of the book specifically were based upon his early drafts.
[2] Roberta Rosenthal Kwall, THE MYTH OF THE CULTURAL JEW (Oxford University Press, 2015).
[3] Joel Roth, THE HALAKHIC PROCESS 303, (JTS Press, 1986).
[4] See 17 U.S.C. § 106A.
[5] For a discussion of the removal issue absent a connection to moral rights, see Marc B. Shapiro, CHANGING THE IMMUTABLE: HOW ORTHODOX JUDAISM REWRITES ITS HISTORY 152 (Littman Library of Jewish Civilization, 2015).
[6] Moshe Weissman, THE MIDRASH SAYS 45-46 (Bnay Yakov Publications, 1980).
[7] PIRKEI AVOS, ETHICS OF THE FATHERS, Ch. 6, § 6, 59 (Mesorah Publications, 1984).
[8] Id. at 59 n. 6 (commentary by Rabbi Meir Zlotowitz).
[9] In some countries such as France, moral rights protection is perpetual. Many nations follow the minimum standard mentioned in the Berne Convention and terminate moral rights with copyrights. See Roberta Rosenthal Kwall, THE SOUL

OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES 46 (Stanford University Press, 2010).

[10] See generally Sacha Stern, ATTRIBUTION AND AUTHORSHIP IN THE BABYLONIAN TALMUD, 45 JOURNAL OF JEWISH STUDIES 28 (1994).