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ARTICLE

**“SPIRITUAL PROPERTY, ‘INTELLECTUAL’
PROPERTY, AND A SOLUTION TO THE
MYSTERY OF IP RIGHTS IN
JEWISH LAW”**

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Anyone who studies Jewish law¹ in the hopes of distilling a “Jewish” theory of intellectual property will inevitably come to the conclusion that this quest is no more than a fool’s errand. The sources that deal with the topic are few and far between and most (if not all) of them turn out to be a legal mirage: from a distance, these sources seem to present an understanding of intellectual property, but when analyzed closely, they turn out to be anything but expressions of a theory of intellectual property. Therefore, the question that this paper will try to answer is why the traditional scholars of Jewish law have been so hesitant to recognize and protect intellectual property rights. The answer proposed here is that thought and knowledge belong to the realm of the spirit and the divine. As such, thoughts cannot be owned in the same sense that physical objects are possessed.

With the advent of the printing press, Jewish law developed mechanisms to protect authors’ rights, yet these legal devices never developed into a system of intellectual property rights per se and remained a collection of ad hoc legal artifices lacking any kind of philosophy. The Western legal traditions, by contrast, when faced with the same historical challenges, took the necessary step toward a clear field of intellectual property.

Just to give a sense of the extent of the problem: most rabbis today hold that Jewish law proper does not forbid using a pirated copy of Windows, downloading music through µTorrent, or using pictures owned by

1. Jewish law encompasses the Old Testament, the Talmudic literature, including Babylonian and Jerusalem Talmuds and their commentaries, the post-Talmudic codifications of Jewish law, and the vast responsa literature. *See generally* 1 MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES (Bernard Auerbach & Melvin J. Sykes 1994) (outlining the history and basic principles of Jewish law).

Getty images on a website.² To be sure, these rabbis might not necessarily give a *carte blanche* dispensation for software piracy, since such copying would be illegal under secular law—the law of the land is the law, after all, and Jews are obligated to follow that law. Unlike so many other prohibitions, however, the source of this law is external (the law of the land) rather than internal (Jewish law).

Developing a concept of intellectual property has been problematic for Jewish law.³ By contrast, regular property rights are very much recognized and enforced in the Jewish tradition; even a person without any background in Jewish law is aware of the biblical injunction “[t]hou shalt not steal.” Over a hundred pages of the Talmud are dedicated to property issues, and this topic has been debated and discussed for a millennium and a half since the Talmud’s redaction.⁴ If taking another’s material property without permission is theft, why should appropriating another’s creative work by reproducing it without permission be any different? Stated succinctly: why is intellectual property any less “property” than real or movable property?

The argument presented here is that the various theories of property in Jewish law present an intellectual barrier to the creation of a concept of intellectual property, the main one being that the intellect is connected with the divine and the spiritual rather than the physical and the mundane. While physical property can be rightly “owned,” thoughts and ideas, which are inherently spiritual, can never be owned.

I. REGULAR PROPERTY IN JEWISH LAW

The concept of ownership of non-intellectual property presents a certain challenge for Jewish law and any legal system that posits a Creator to whom the world belongs.⁵ If God created the world and the world is His, how can we assign property rights to individuals? This question is dealt with in a number of Jewish sources and in a variety of contexts, some of them surprising to the Western legal mind.⁶

2. Horav Yisrael Belsky, *Copyright in Halacha*, HALACHA BERURAH 1, 8–11, <http://www.torahlive.co.il/templatebild/tipsresources/Halachahbrura.pdf> (last visited Sept. 15, 2013).

3. See David Nimmer & Neil W. Netanel, *Is Copyright Property? The Debate in Jewish Law*, 12 THEORETICAL INQ. L. 241 (2011) (summarizing various approaches in Jewish law to intellectual property). See also Matthew I. Kozinets, *Copyright and Jewish Law: The Dilemma of Change*, 1 U. C. DAVIS J. INT’L L. & POL’Y 83 (1995) (presenting the problem of IP rights in Jewish law).

4. For a summary of the basic rules of property law in Jewish sources, see George J. Weber, *The Principles of the Jewish Law of Property*, in 10 J. COMP. LEGIS. & INT’L L. 82 (1928). A more in-depth treatment of Jewish property law can be found in 1 RABBI ISAAC HERZOG, THE MAIN INSTITUTIONS OF JEWISH LAW (1965).

5. For an attempt at a Jewish philosophy of property, see Yosef Yitzhak Lifshitz, *Foundations of a Jewish Economic Theory*, AZUREONLINE, <http://azure.org.il/include/print.php?id=212> (last visited Mar. 26, 2013).

6. As Menachem Elon noted, “Anyone who has participated in a Talmudic discussion will realize that there is no difference between a discussion of civil law and a discussion of the law of

A word of introduction about the sources of Jewish law is important here. The Jewish legal tradition is based upon written law (the biblical canon of the Old Testament) and the oral law (laws and sayings that were eventually compiled in what is called the Talmud).⁷ In Tractate Berakhot, the Talmud discusses the requirement of making a blessing before eating food:

R[abbi] Levi asked: It is written, “The earth is the Lord’s and the fulness thereof[.]” ([Psalms 24:1]). [However, another verse states:] “The heavens are the heavens of the Lord, but the earth hath He given to the children of men.” ([Psalms 115:16])! There is no contradiction [between the two verses]; the former passage referring to before the benediction [has been uttered], the latter to after the benediction.⁸

Rabbi Levi resolves the apparent contradiction in the Psalmist’s own words by creating a religious obligation to recite a blessing before eating anything. This statement of Rabbi Levi does not relate directly to property rights, but it sheds light on a religious philosophy of property: although all of creation ultimately belongs to God, the physical world is given to humans once there has been an acknowledgement that God is the source. The Talmud takes this idea to its logical conclusion and states that eating without reciting a blessing is a form of theft, “One who derives benefit from this world without a blessing is [similar to] one who steals from the Holy One Blessed be He.”⁹

Jewish law prohibits the use of stolen goods in ritual acts and invalidates a ceremony which used stolen property.¹⁰ In Hebrew, this is called a *mitzvah haba’ah ba’aveira* meaning, a good deed¹¹ that came through a sin.¹² One who steals a *matza*, the unleavened bread eaten at the Passover seder, and eats it at the appropriate time, has not fulfilled the Biblical obligation of eating *matza* on Passover.¹³ The prohibition on using stolen goods for religious purposes is broad and touches upon nearly every facet of Jewish ritual.¹⁴ As a consequence of this prohibition, Jewish law requires ritual

sacrificial offerings or ritual impurity, as regards the use of legal concepts and terminology or in the way the laws are discussed.” *The Legal System of Jewish Law*, 17 N.Y.U. J. INT’L L. & POL. 221, 222 (1985).

7. ADIN STEINSALTZ, *THE ESSENTIAL TALMUD* 3–4 (Chaya Galai trans., Basic Books 2006). The sections of the Talmud discussed in this article are from the Babylonian Talmud, unless otherwise specified.

8. THE BABYLONIAN TALMUD: TRACTATE BERAKHOT 35a (Rev. A. Cohen ed., 1921).

9. *Id.*

10. Palestinian Talmud *Tractate Hallah* 1:9.

11. The term *mitzvah* has been translated as good deed, although a more literal translation would be commandment. For more on the *mitzvot*, see *THE PRINCIPLES OF JEWISH LAW* 6–19 (Menachem Elon ed., 2007).

12. Palestinian Talmud *Tractate Hallah*, *supra* note 10.

13. Palestinian Talmud *Tractate Shabbat* 13:3.

14. Tosafot, *Tractate Sukka* 30a.

objects to be acquired—either by purchase or gift—before being used in a religious context.¹⁵ On the face of it, this requirement is puzzling: if God’s will is to perform certain rituals, why should the issue of ownership matter? The question becomes more perplexing when we consider that all physical objects come from God. Why would He be offended when we serve him with property that is ultimately His?

The Talmud offers a parable to answer these questions.¹⁶ When the king passed by a toll collector, he insisted on being no different than a commoner and paid the toll.¹⁷ The king’s assistants asked him why he paid since the toll collector would send the money to the royal treasury.¹⁸ The king responded that travelers should learn from his example and not avoid the toll collectors.¹⁹ Similarly, the Talmud states, God forbade the use of stolen property in religious services to teach people to stay far away from theft.²⁰

The prohibition on using stolen goods emphasizes the importance Jewish law places on establishing property rights. That the Talmud chose to reinforce property rights in this context speaks volumes about the respect accorded to property rights, which, in the end, trump religious obligations. The sages of the Talmud took respecting property rights to the next level, giving them a form of sanctity. The Babylonian Talmud cites a statement of Rabbi Yohanan: “[h]e who steals even a penny from his fellow, it is as if he took away his soul.”²¹

The Talmudic statement attributed to Rabbi Yohanan is quoted by Maimonides in the first chapter of the laws of Theft and Lost Property in his *Mishne Torah*.²² The fact that Maimonides would cite as binding law what appears to be mere Talmudic exaggeration speaks to the special status accorded to property in Jewish law. In his *Sefer Hamitzvot*, a work listing all of the commandments of the Torah,²³ Maimonides explains that the biblical injunction of “you shall not profit by the blood of your neighbor”²⁴ requires one to act to protect another person’s property from damage or theft. This is the case even though the plain meaning of the verse seems to refer to bodily harm by saying, “your friend’s blood.”²⁵ Maimonides’ inter-

15. THE PRINCIPLES OF JEWISH LAW, *supra* note 11, at 200–01.

16. Talmud *Tractate Sukkah* 30a.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. Talmud *Tractate Bava Qamma* 119a.

22. For some background about Maimonides’ *Mishne Torah*, see HERBERT DAVIDSON, MOSES MAIMONIDES: THE MAN AND HIS WORKS 189–230 (2005).

23. *Id.* at 168.

24. *Leviticus* 19:16 (NRSV).

25. SEFER HAMITZVOS Prohibition 297 (Rabbi Berel Bell trans., 2006), available at http://www.chabadoceandrive.com/library/article_cdo/aid/961927/jewish/Negative-Commandment-297.htm.

pretation might stretch the plain meaning of the verse, but it dovetails with Rabbi Yohanan's comparison of physical property to human life.

The Talmudic sources mentioned previously relate to Jewish *law*; the Jewish homiletic literature (*aggadah*) found in the Talmud²⁶ also accords great respect to property rights.

The third chapter of Exodus, presenting the episode of the burning bush, prefaces Moses' divine revelation with a curious statement: "Moses was keeping the flock of his father-in-law Jethro, the priest of Midian; he led his flock beyond the wilderness . . ." ²⁷ Moses' occupation at the time of God's revelation would seem to be irrelevant, so the Midrash *Tanhuma*²⁸ justifies the extraneous factual background by extrapolating a lesson in ethics from Moses' shepherding his father-in-law's flock. The passage states:

The Holy One, blessed be He, does not confer greatness upon a man until He tests him in lesser things. Only then does He elevate him to greatness.

. . .

[W]hen Moses tended the flock of Jethro . . . he led it to the farthest end of the wilderness in order to keep the sheep from stealing. The Holy One, blessed be He, said to him: You have been found trustworthy with regard to sheep; now I shall entrust My flock to you that you may shepherd it. . . ." ²⁹

The Midrashic homily gives an entirely different context to the story of the burning bush. Moses was chosen to lead the children of Israel, not due to his great spiritual heights, but because of his care for mundane property rights, as demonstrated by the fact that he prevented his flock from grazing on ownerless land.

Rabbinical literature does not merely glorify biblical figures who respect the property rights of *others* but also those who took care of their own property. The Talmud expands upon the biblical story of Jacob's wrestling with the angel in Genesis 32.³⁰ The Bible introduces the scene with the vague remark "Jacob was left alone."³¹ The Bible does not explain *why* Jacob was left alone leaving much to the imagination. The Talmud, in typical *midrashic*, or homiletical, fashion embellishes the biblical story and gives us the back-story. Jacob, who was traveling with his household to

26. For more on the allegorical parts of the Talmud, see H. L. STRACK & GÜNTER STEMBERGER, *INTRODUCTION TO THE TALMUD AND MIDRASH* 15–16 (Markus Bockmuehl trans. and ed., Fortress Press 1996).

27. *Exodus* 3:1 (NRSV).

28. *Midrash Tanhuma* is a collection of homiletical interpretations on the Pentateuch. For an introduction to this branch of Rabbinic literature—the *midrashim*—see STRACK & STEMBERGER, *supra* note 26, at 233–43.

29. MIDRASH TANHUMA-YELAMMEDENU: AN ENGLISH TRANSLATION OF GENESIS AND EXODUS 323–24 (Samuel A. Berman ed., Ktav Publ'g House 1996).

30. Talmud *Tractate Hullin* 91a.

31. *Genesis* 32:24 (NRSV).

meet with his twin brother—and nemesis—Esau, had forgotten a few small jugs. Concerned about the small jugs, Jacob left the safety of his encampment to find the jugs and, en route, he wrestled with an angel of God.³² The Talmud deduces from Jacob's act of retrieving the jugs—despite the risk of leaving the safety of his camp—that the righteous care about their property even more than their own life.³³ What might look like an act of recklessness is praised by the Talmudic sages as evidence of great piety.

II. ROOTS OF INTELLECTUAL PROPERTY RIGHTS IN THE TALMUD

The Talmudic statements mentioned are but a few examples of how tangible property is protected—and even sanctified—which is far from the case with intellectual property. Indeed, there are few references to what we might call intellectual property in pre-sixth century Talmudic sources. This is to be expected as a Talmudic reference to copyright, one and a half millennia before the Statute of Anne,³⁴ would be a historical anachronism. It was the rise of print, and later the industrial revolution, that necessitated a legal framework for dealing with intellectual property.³⁵ The pre-modern socio-economic context of Talmud was not the legal petri dish for the development of intellectual property theory.

However, there are sources in the Talmud that entertain the concept of authorship of ideas and possibly even the notion that ideas can be considered property. One can see the traces of a theory of authorship in a Talmudic homily, based upon a story in the Book of Esther.³⁶ The Book of Esther relates how the Jewish people were saved from Haman's plan to destroy them by the heroic efforts of Mordecai and his niece, Queen Esther, who was married to King Ahasereus.³⁷ The second chapter of the Book of Esther ends with the uncovering of a plot to assassinate King Ahasereus.³⁸ Mordecai informed Queen Esther of the plot and Esther passed the information to the king—in Mordecai's name—thus saving the king's life.³⁹

Although the fact that Mordecai saved the king's life was quickly forgotten, the matter resurfaces in the sixth chapter of Esther when the king reads the royal chronicles and discovers Mordecai's long-forgotten heroic act.⁴⁰ Since Mordecai never received any credit for his heroism, the king

32. Talmud *Tractate Hullin*, *supra* note 30.

33. *Id.*

34. Copyright Act, 1709, 8 Anne., c. 19 (Eng.) (repealed 1842). This was the first copyright act passed in England. See William Paltry, *The Role, or Not, of Ethics and Morality in Copyright Law*, 37 OHIO N.U. L. REV. 445, 456 (2011).

35. ELIZABETH L. EISENSTEIN, *THE PRINTING PRESS AS AN AGENT OF CHANGE* 120–21 (1979).

36. Talmud *Tractate Megilah* 15a, available at <http://halakhah.com/pdf/moed/Megilah.pdf>.

37. *Esther* 2 (NRSV).

38. *Id.* at 2:21.

39. *Id.* at 2:22.

40. *Id.* at 6:2.

decided to reward Mordecai for his deed by making Haman parade him around town in royal clothing.⁴¹ This proved vital to the downfall of Haman and thwarting his plan to destroy the Jewish people.⁴²

The Talmud derives a lesson in ethics from Mordecai's story in Esther: "R[abbi] Elazar further said in the name of R[abbi] Hanina: '[w]hoever reports a saying in the name of its originator, brings deliverance to the world,' as it says [Esther 2:22]: ' . . . [a]nd Esther told the king in the name of Mordecai.'"⁴³ Since the Jewish people were saved because Esther mentioned her source, the Talmudic sages stress in the Talmud that anyone who attributes an idea to its source will also bring salvation. This is a case of homiletic scriptural interpretation and not binding law, yet if we go beyond the superficial hyperbole we can distill the beginnings of a theory of authorship, if not intellectual property.

As Rabbi Isaac Herzog observes, a glimpse of a Rabbinic theory of intellectual property can be found in an unusual Talmudic passage.⁴⁴ The passage discusses a number of inventions that various individuals made to facilitate Temple worship and praises them for their creative contributions. An example of this type of invention is a special pumping system for ritual washing. The Talmud contrasts these people, who used their skills for a holy purpose, with others who keep their inventions or skills secret, ostensibly for financial gain:

And these were mentioned to their shame: They of the house of Garmu would not teach anything about the preparation of the showbread. They of the house of Abtinas would not teach anything about the preparation of the incense. Hygros, son [of the tribe] of Levi knew a cadence in song, but would not teach it; Ben Kanzar would not teach anyone his art of writing. Concerning the former it is said: The memory of the righteous shall be for a blessing; concerning the others it is said: But the name of the wicked shall rot.⁴⁵

The Talmud relates how the sages tried to bypass the various cartels by bringing in experts from Egypt who could create knockoffs of their products.⁴⁶ Unfortunately, this was not successful. No one was able to copy the special incense of the Abtinas family or able to make the showbread in quite the same way as the Garmu family. When the sages begged the cartels

41. *Id.* at 6:10.

42. *Id.* at 6:13.

43. *Tractate Megilah*, *supra* note 36. Some see this homily as an early source for copyright. See Victor Hazan, *The Origins of Copyright Law in Ancient Jewish Law*, 18 BULL. COPYRIGHT SOC'Y U.S.A. 23, 25 (1970).

44. HERZOG, *supra* note 4, at 71.

45. Talmud *Tractate Yoma* 38a.

46. *Id.*

to return, they agreed on the condition that their salaries, paid from the Temple treasury, be doubled.⁴⁷

In general, the sages' skills relate to Temple worship or other ritual matters, which complicates matters somewhat. The Rabbis' criticism of these familial guilds may stem from a desire to save public funds and not a larger comment on whether ideas should be protected as property. It should be noted, however, that these families who sought to protect their intellectual property are castigated in extremely harsh terms—even calling them wicked—where a milder comment would have sufficed. Furthermore, there is no record of similar criticism directed at those who supply the Temple with goods. For these reasons, the discussion of the Temple cartels should be viewed as a sign that the sages of the Talmud were aware—and critical—of the sequestration of intellectual property for personal use and profit.

III. THE PRINTING PRESS AND THE USE OF APPROBATIONS

The issue of intellectual property rights was largely dormant until Gutenberg.⁴⁸ With the advent of printing, the question of how to deal with intangible property became a tangible issue for the Jewish law. The general approach—used from the sixteenth century until quite recently—was for an author to seek written approbations for his work. These are known as *haskamot*.⁴⁹ The *haskamot* were much more than a blurb from a *New York Times* review printed on the back cover of a paperback; the approbations included prohibitions against reprinting the book for a limited period of time.⁵⁰ The punishment for violating the ban was excommunication.⁵¹

Perhaps the most famous legal case in Jewish history regarding approbations was the Vilna-Slavuta controversy.⁵² In 1822, a printing house in the city of Slavuta (in modern-day Western Ukraine) published an edition of the Talmud during a rabbi-led ban prohibiting the printing of the Talmud for fifteen years. The first edition sold out, and, in 1835, the printer, Moshe Shapiro, wanted to make a second printing run. Word got out that the Romm family, from the city of Vilna, Lithuania, intended to publish their own edition of the Talmud, and had already secured approbations banning anyone else from publishing a Talmud for a period of twenty years! Nearly every major scholar of Jewish law was drawn into the controversy. The issue was resolved when the most recognized authority on Jewish law,

47. *Id.*

48. ADRIAN JOHNS, *PIRACY: THE INTELLECTUAL PROPERTY WARS FROM GUTENBERG TO GATES*, 8–1 (2009).

49. Kozinets, *supra* note 3, at 93–95. For a discussion of the intimate link between the printing press and Jewish copyright law, see Neil W. Netanel, *Maharam of Padua v. Giustiniani: The Sixteenth-Century Origins of the Jewish Law of Copyright*, 44 *HOUS. L. REV.* 821, 821–70 (2007).

50. Kozinets, *supra* note 3, at 93–94.

51. *Id.* at 91.

52. Arthur Silverstein, *Copyright in Jewish Law*, 14:3 *TRADITION* 28, 29 (1974). The facts presented here follow Belsky, *supra* note 2, at 5–6.

Rabbi Akiva Eiger, ruled in favor of the Vilna edition arguing that the original ban of fifteen years was limited to the *first* printing of the Slavuta press. Therefore, since the first edition had been sold out (actually, there were forty copies unsold and the Romm family was ordered to purchase them), the copyright had expired.

As a side note, the Vilna-Slavuta polemic ended in tragedy when one of the employees of Shapiro committed suicide. The Czarist authorities blamed Shapiro's sons who were thrown in jail without due process. One can only speculate that the bitter end to the Vilna-Slavuta dispute left its mark on Jewish history and might possibly have discouraged litigation of copyright disputes.

Whatever bad taste the Vilna-Slavuta affair left with European Jewry, approbations and bans continued to be issued.⁵³ Nevertheless, the widespread use of approbations never led to the development of a theory of intellectual property. The lone exception is the opinion of Rabbi Joseph Saul Nathanson, a nineteenth century scholar of Jewish law and Chief Rabbi of the Austro-Hungarian city of Lemberg (modern-day Lviv, Ukraine).⁵⁴ Rabbi Nathanson was a prolific author, composing thousands of responsa that were ultimately printed in his massive fifteen-volume work, *Shoel Umeshiv*.⁵⁵

Rabbi Nathanson comes the closest to offering a legal Jewish theory that recognizes intellectual property rights. In *Shoel Umeshiv* he says:

Certainly an author who prints a new book has a right to it . . . and in any case, whenever anyone prints or invents a new device, no one else may do so without his permission. It is well known that Rabbi Abraham Jacob or Hrubashov invented a calculating machine and received royalties from the Czar his whole life. Therefore, our entire Torah should not become like an idle conversation of theirs.⁵⁶

Rabbi Nathanson's argument is not—as a superficial reading might suggest—that Jewish law recognizes copyright as a right per se, but given that such a right exists under non-Jewish legal systems, Jewish law must recognize this right as well. This also means if the non-Jewish legal systems were to decide to deny the protection of intellectual property rights, then Jewish law would follow suit.

To appreciate the novelty of Rabbi Nathanson's methodology, a few words about Jewish jurisprudence are in order. Rabbinical decisors anchor their opinions in precedent found within the Jewish tradition. Drawing upon

53. Israel Schneider, *Jewish Law and Copyright*, 21 J. HALACHA & CONTEMP. SOC'Y 1, 8 (1991).

54. Nimmer & Netanel, *supra* note 3, at 223.

55. Shillel Warhaftig, *Joseph Saul Nathanson*, ENCYCLOPAEDIA JUDAICA, available at http://www.jewishvirtuallibrary.org/jsource/judaica/ejud_0002_0015_0_14591.html.

56. RESPONSA SHOEL UMESHIV 1 no. 44.

an earlier source, such as scripture, the Talmud, or later Rabbinical literature, connects the rabbi deciding the case to the chain and tradition of Jewish law.⁵⁷ This approach should be familiar to the American legal community from the writings of United States Supreme Court Justice Scalia, who has openly criticized using foreign law as a basis for constitutional interpretation.⁵⁸ Regardless, Rabbi Nathanson's opinion is exceptional, as is his methodology of deriving a binding legal principle from outside the Jewish legal tradition.⁵⁹

Jewish law recognizes the principle of *dina demalkhuta dina*, meaning, "the law of the kingdom is the law," which holds that the ruler enjoys binding legal authority over his constituents.⁶⁰ Indeed, some believe this to be a possible source prohibiting infringement of intellectual property,⁶¹ as Jewish law demands that one follow local law, which has legislated protection of intellectual property. This theory, based upon *dina demalkhuta dina*, merely creates an illusion of intellectual property law, for the existence of an *in personam* obligation to follow the law of the land does not create an *in rem* right to intellectual property.⁶²

In contrast to the *dina demalkhuta dina* theory, Rabbi Nathanson's approach might actually have succeeded in creating a real live intellectual property right. The question proposed at the beginning of this article can be asked concerning Rabbi Nathanson as well: Why did he look to a foreign legal system to create that right, instead of searching for some kind of precedent in Jewish history, even a tenuous one? The "mystery" of intellectual property theory in Jewish law is not why it did not exist in the past, but why it does not exist in the present.

IV. THE ROLE OF THE INTELLECT IN THE PHILOSOPHICAL AND MYSTICAL/KABBALISTIC STREAMS OF JUDAISM

The mystery of intellectual property in Jewish law can be demystified by looking to the two main streams of Jewish thought: the philosophical/

57. Roberta Rosenthal Kwall, *The Cultural Analysis Paradigm: Women and Synagogue Ritual as a Case Study*, 34 CARDOZO L. REV. 609, 612–13 (2012).

58. *Lawrence v. Texas*, No. 02-102, slip op. at 14 (June 26, 2003) (Scalia, J., dissenting). In Justice Scalia's words, "The Court's discussion of these foreign views . . . is therefore meaningless dicta. Dangerous dicta, however, since 'this Court . . . should not impose foreign moods, fads, or fashions on Americans . . .'"

59. I know of no other source in the responsa literature where a legal principle is borrowed explicitly, from a non-Jewish source.

60. 2 GIL GRAFF, *SEPARATION OF CHURCH AND STATE: DINA DE-MALKHUTA DINA IN JEWISH LAW*, 8–29 (Leon J. Weinberger ed., 1985).

61. Nimmer & Netanel, *supra* note 3, at 222.

62. Rabenu Jonah of Gerondi, in his gloss to Talmud Tractate *Bava Bathra* 44b, indicates the principle of *dina demalkhuta dina* can only create an obligation on an individual person (that is, an *in personam* right), yet it does not give the government the power to determine property ownership.

rational and mystical/Kabbalistic schools.⁶³ Nearly without exception, the scholars of Jewish law were more than experts on Jewish law; they were steeped in one of these two traditions, and sometimes both. Thus, Maimonides—perhaps the most well-known Jewish philosopher—authored both philosophical works, such as his *Guide to the Perplexed*, and legal works, such as the *Mishne Torah*.⁶⁴

Rabbi Joseph Karo, a sixteenth-century legal scholar who was part of the circle of mystics in Safed, a city in northern Israel, authored the *Shulhan Arukh*, the code of Jewish law that is binding among all Orthodox Jews.⁶⁵

Since the jurists of Jewish law were either philosophers or mystics, the Jewish legal tradition is intimately connected to the various philosophical and mystical streams of Judaism. If we can understand the underlying worldviews of the creators of Jewish law, we will discover the philosophical roadblock to a world of intellectual property rights.

A. *The Philosophical School of Thought: The Intellect is Everything*

Maimonides states that “He, may His name be praised, and His knowledge are one,”⁶⁶ which indicates that knowledge and the divine are synonymous. It is not surprising then, that the Jewish philosophers, drawing upon schools of Aristotelian thought, saw God as the supreme intellect from which emanates lower levels of intellect.⁶⁷

The central goal of man’s existence, according to this stream, is to unify with the creator, or, at the least, to come close to him through the intellect.⁶⁸ In his introduction to the *Mishna*, which is the basis of the *Talmud*, Maimonides states this explicitly:

[Man’s] purpose is but a single activity. The other skills [man possesses] serve only the purpose of assuring his survival, to insure the [fulfillment] of that one activity. This [cardinal] activity is the following: to grasp in his mind the secrets of the fundamental truths, and to understand the verities [in life] as they are.⁶⁹

63. OLIVER LEAMAN, *JEWISH THOUGHT: AN INTRODUCTION* 81 (2006).

64. DAVIDSON, *supra* note 22.

65. Shira Schoenberg, *Luria, Isaac Ben Solomon*, *ENCYCLOPAEDIA JUDAICA*, available at <http://www.jewishvirtuallibrary.org/jsource/biography/Luria.html>. Rabbi Karo’s involvement with mysticism was more than theoretical: he wrote an entire book describing the mystical revelations he had communicated to him from a *maggid*, or angelic teacher. See R. J. ZWI WERBLOWSKY, *JOSEPH KARO: LAWYER AND MYSTIC* 22–24 (2d ed. 1962).

66. MISHNEH TORAH, *Laws of Repentance [Teshuvah]* ch. 5:5 (Moznaim Publ’ns 1990), available at http://www.chabadocandrive.com/library/article_cdo/aid/911903/jewish/Chapter-Five.htm.

67. Don Seeman, *Honoring the Divine as Virtue and Practice in Maimonides*, 16(2) *J. JEWISH THOUGHT & PHIL.* 195, 223–24 (2008).

68. Gideon Freudenthal, *The Philosophical Mysticism of Maimonides and Maimon*, in *MAIMONIDES AND HIS HERITAGE* 113, 123–24 (Idit Dobbs-Weinstein et al. eds., 2009).

69. Rav Eli Hedad, *Lecture #1: The Life of Maimonides in Light of His Writings*, THE ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH, http://vbm-torah.org/archive/rambam/01rambam.htm#_ftn4

The previous quotations are from Maimonides' legal corpus; his philosophical works, especially the *Guide to the Perplexed*, devote hundreds of pages to the place of the intellect in divine worship. Maimonides interprets the entire biblical and rabbinic canon through the prism of the intellect.⁷⁰ Prophecy, divine providence, and observance of God's commandments are the *mitzvot*: all of these are given interpretations related to the intellect.⁷¹

Maimonides goes so far as to take two mystical expressions mentioned in the Talmud—the Work of Creation (Genesis) and the Work of the Chariot (Ezekiel's vision), which were historically interpreted as mystical concepts through much of Jewish history⁷²—and translates them into the Aristotelian concepts of physics and metaphysics, respectively.⁷³ When one studies the physical and metaphysical sciences, one comes closer to God. Divine revelation is achieved, therefore, by using one's mind and enquiring into the world, whether through contemplating the natural world, the metaphysical word, or even through studying the Torah.⁷⁴ It should be emphasized that physicality and especially the body are impediments to achieving this goal: namely, to approach a transcendent God.⁷⁵

B. *The Kabbalistic Tradition: Connecting to the Intellect Through Mitzvot*

For the sake of historical accuracy, the Kabbalistic tradition was not the only mystical tradition in Judaism. But, being the dominant mystical tradition, the Kabbalah served as the primary theological framework for the rabbis who developed and advanced Jewish law in the modern period.⁷⁶

The Kabbalistic system understood the world as emanating from the *Ein Sof*, or Infinite, through four worlds: emanation (the highest), creation, formation, and action (the lowest).⁷⁷ Each world has ten *sefirot*, or divine attributes.⁷⁸ The divine influence flows through all four worlds until it reaches the final destination before our physical worlds is the attribute of

(translated by David Strauss) (translating and quoting MOSES MAIMONIDES, INTRODUCTION TO THE MISHNAH 56 (1992).

70. Arthur Hyman, *Maimonides as Biblical Exegete*, in MAIMONIDES AND HIS HERITAGE 1, 9–11 (Idit Dobbs-Weinstein et al. eds., 2009).

71. *Id.* at 2.

72. GERSHOM SCHOLEM, ORIGINS OF THE KABBALAH 19 (R. J. Zwi Werblowsky ed., Allan Arkush trans., 1987) (genesis is referred to as “bereshith”).

73. Warren Zev Harvey, *Aggadah in Maimonides' Mishneh Torah*, 24 DINE YISRAEL 197, 197 (2007).

74. Freudenthal, *supra* note 68. See also KENNETH SEESKIN, SEARCH FOR A DISTANT GOD 61–65 (2000) (framing contemplation as a religious ideal).

75. SEESKIN, *supra* note 74, at 106–07, 151.

76. David B. Ruderman, *Kabbalah and the Subversion of Traditional Jewish Society in Early Modern Europe*, 5 YALE J.L. & HUMAN. 169, 170 (1993).

77. GERSHOM SCHOLEM, KABBALAH 119 (1974).

78. DAN COHN-SHERBOK, JUDAISM: HISTORY, BELIEF AND PRACTICE 205–07 (2003).

kingship in the world of action.⁷⁹ The Kabbalah understands God's connection to the world through these ten attributes, which can be grouped into three classes: left (strict judgment and punishment), right (mercy), and middle (the combination of the two).⁸⁰ The focus in the mystical tradition is not so much on God's intellect as on the divine influence and its interaction with the physical and spiritual worlds.⁸¹

Kabbalistic scholars took their their theosophy and practice in a number of directions. The dominant approach—the Lurianic school—held that one should study the mystical meanings behind performing the commandments.⁸² While performing the commandments, one should concentrate on how the particular *mitzvah* resulted in a spiritual change in the heavenly worlds.⁸³

Where does this leave the physical world? As mentioned above, the philosophical school saw a form of divine worship in contemplating physics. Rabbi Isaac Luria, founder of Lurianic Kabbalah, proposed that the physical world was full of sparks of holiness, which are trapped in the “shells” of evil.⁸⁴ The purpose of mankind is to serve God by releasing these sparks from their “entrapment” in the physical world.⁸⁵ The uplifting of divine sparks is accomplished by using physicality in the proper way and with the proper mystical intent—in accordance with Jewish law.⁸⁶

The Kabbalistic scholars, no doubt influenced by the philosophical tradition, equated the sparks with the intellect, so that, in a sense, all of physicality is infused with the divine intellect. Rabbi Nahman of Bratzlav, a Hassidic teacher in late-eighteenth and early-nineteenth century Ukraine,⁸⁷ summarizes this stream of thought,⁸⁸

For the Jew must always focus on the inner intelligence of every matter, and bind himself to the wisdom and inner intelligence that is to be found in each thing. This, so that the intelligence which is in each thing may enlighten him, that he may draw closer to God through that thing. For the inner intelligence is a great light that shines for a person in all his ways. As it is written (Ecclesiastes 8:1), “A person's wisdom causes his countenance to shine.”

79. *Id.*

80. SCHOLEM, *supra* note 77, at 106–08 (stating that each group of *sefirot* are comprised of opposing attributes).

81. *Id.* at 382–84.

82. *Id.* at 176.

83. JOSEPH DAN, *THE TEACHINGS OF HASIDISM* 14 (1983).

84. LAWRENCE FINE, *PHYSICIAN OF THE SOUL, HEALER OF THE COSMOS: ISAAC LURIA AND HIS KABBALISTIC FELLOWSHIP* 135 (2003).

85. SCHOLEM, *supra* note 77, at 161–65.

86. *Id.*

87. For a comprehensive biography of Rabbi Nahman, see ARTHUR GREEN, *TORMENTED MASTER: THE LIFE AND SPIRITUAL QUEST OF RABBI NAHMAN OF BRATSLAV* (1979).

88. RABBI NACHMAN OF BRESLOV, *LIKUTEY MOHARAN* 17, 19 (Moshe Mykoff & Ozer Bergman eds., Moshe Mykoff & Simcha Bergman trans., 2d ed. 1995).

The effect of the theory of divine sparks, as formulated by Rabbi Nahman, is to spiritualize the intellect and to equate the holiness of the physical world with its intellectual component. Thus, service of God is discovering the intellect that is trapped in the physical world.

C. *The Spirituality of Thought*

Thought and the intellect have been equated with the spiritual in both the philosophical and Kabbalistic traditions. The claim here is that spiritual nature of thought and intellect prevented Jewish scholars from going in the direction of intellectual property rights and protection. The rabbis had no problem protecting rights over physical property through principles of tort.⁸⁹ Since physical possessions belong to humans (“the earth He has given to the children of men”),⁹⁰ it would only be natural that those rights be respected. However, when we turn to the kind of property that is essentially a thought, the idea of affording rights of ownership over thoughts was inconceivable, since any kind of intellectual property is essentially an attempt to claim ownership over that which is spiritual, and thus cannot be owned.⁹¹

For example, Jewish law prohibits charging money for spiritual services. A teacher of Jewish law is not allowed to accept payment for teaching. Just as God himself did not ask for payment when he revealed the Torah, so too humans may not charge money for spreading His teachings.⁹² Many sources even prohibit physicians from charging for their services, which are considered a *mitzvah* and thus a form of religious work.⁹³ The view that secular wisdom is a form of divine wisdom is stated explicitly by Rabbi Nahman of Bratzlav:

Concerning those inventions and devices invented by the philosophers in their wisdom, such as amazing weaponry and other instruments created through wisdom and the like and other novelties that they invented, each one with his wisdom – he said that all of this is from above, for they would never have been able to arrive at that [invention], without the spark of intellect in their wisdom, that a sparkling came from above to that particular wise man, for the time had come that the wisdom or invention should be revealed in the world . . . For certainly the scholars of previous generations also investigated these matters – why did they not arrive at the same invention or discovery . . . But the rule is that all kinds of innovations that wise men create – whether in holi-

89. For a short summary of the Jewish law of tort, see THE PRINCIPLES OF JEWISH LAW, *supra* note 11, at 319–24.

90. *Psalms* 115:16.

91. Tellingly, the term in modern Hebrew for intellectual property is *qinyan ruhani*, or “spiritual property.”

92. Talmud *Tractate Bekhorot* 29a.

93. FRED ROSNER, BIOMEDICAL ETHICS AND JEWISH LAW 31 (2001).

ness, such as explanations [of the Torah] or homilies and the like, and also, in other [secular] wisdoms – everything is passed to them from their intellect above, each one from the appropriate place.⁹⁴

This passage is noteworthy since Rabbi Nahman connects the process of innovating Jewish laws with the process of scientific invention, both of which come from “above.” In addition, Rabbi Nahman uses the exact same terminology used by Lurianic Kabbalah for the divine sparks (*nitsots*) to describe the creative impulse that leads to the discovery or invention. The word choice is not accidental and the reference to the Kabbalistic concept of sparks—which Rabbi Nahman connected elsewhere with the intellect—is deliberate. The explicit linking of mundane thought (scientific discovery) and holy thought (discoveries in Torah) demonstrates the thesis of this article, namely, that in the Jewish tradition, thought of any kind is inherently sacred.

CONCLUSION

The title of this article refers to a “mystery,” namely, a resistance among the scholars of Jewish law to allow for any sort of recognition of ownership over intellectual property. There are, no doubt, some practical explanations for why Jewish law has avoided labeling intellectual property as such.⁹⁵ The argument presented here is that a fundamental principle of Jewish law is that matters of the spirit are to remain free from ownership and commerce. The religious ramifications of defining intellectual property as property are enormous; according to both the philosophical and Kabbalistic streams, the intellect is synonymous with the divine. Once we allow for thoughts to be owned, traded, and restricted, we blur the boundaries between the sacred and profane. Moreover, intellectual property creates a theologically dangerous notion that this holiness—the divine—is for sale.

The proposal here is not that Jewish law consciously avoided creating an intellectual property theory because of theological concerns. Rather, the intellectual currents of the major philosophical and mystical streams—which located thought and knowledge in the sphere of holiness—shaped the development of Jewish law, setting it down a path along which intellectual property was inconceivable.

94. *Sihot Haran* 5.

95. For a socio-political explanation of this phenomenon, see Nimmer & Netanel, *supra* note 3, at 248.