Jewish Contemporary Ethics Part 36: Business Ethics 3 – Copyright and Intellectual Property

by Rabbi Dr. Moshe Freedman, New West End Synagogue

Intellectual property has been recognised and protected by UK law since the beginning of the 18th century. The current legislation is the Copyright, Designs and Patents Act 1988, which protects authors and artists of a range of creative arts – including literary works, drama, music, art or film – to maintain the rights to control the ways in which their material can be used.

Yet the question of copyright and intellectual property in Jewish law is far from straightforward. Generally speaking, using someone else's property without their permission is considered stealing (see Shulchan Aruch – Code of Jewish Law – Choshen Mishpat 359:5), unless it is an item such as tefillin or a tallit, provided that one could reasonably assume that the owner wouldn't mind helping a fellow Jew to perform a mitzvah (ibid. Orach Chaim 14:4). With respect to copyright laws and intellectual property, on the one hand the Mishnah highlights the importance of recognising authorship (Pirkei Avot 6:6). Yet on the other hand, there is discussion among the rabbinic authorities regarding the most relevant legal elements in defining the actual prohibition of infringing copyright or stealing intellectual property.

Rabbi Yechezkel Landau of Prague (1719-1793), author of the influential *Nodah Biyhudah responsum*, cites the issue of potential lost earnings if someone uses someone else's intellectual property or copies their work for commercial purposes. However, this would restrict the prohibition of copying another person's work to cases when an actual loss is caused. Thus if someone copied a music file and shared it with others online, allowing them to download it for free, this would constitute a loss to the artist. Yet what if someone who had bought the music legitimately had a friend who would never have bought the music in the first place? Copying the music and giving the friend a copy would be an infringement of copyright law, but would not in fact cause a loss to the artist.

The Talmud (Bava Kamma 20a-21a) discusses a case involving squatters' rights, where someone is living in another person's yard. The owner of the yard would not normally charge rent for its use and so the squatter benefits from the use of the yard without causing the owner a financial loss. This is called *zeh neheneh, v'zeh lo chaseir* – this one (the squatter) benefits and the other (the owner) does not lose out. There is significant discussion as to whether the squatter owes any rent. The Shulchan Aruch rules that the squatter does not need to pay rent because the owner did not rent the yard in the first place; if he had previously rented the yard, the squatter would owe the rent (Choshen Mishpat 363:6).

The main reason that rabbinic authorities debate the factors underlying the prohibition of infringing copyright and ultimately identify (in many cases) the factor of financial loss, is that intellectual property is a non-physical entity, unlike other possessions. Nevertheless, Rabbi Yitzchak Shmelkes (d. 1906) applies the principle of *dina d'malchuta dina* – "the law of the land is our law", which means that halacha binds us to adhere to the law of our host country, regardless of the reason and this is a significant factor in applying intellectual property law in halacha too.

Answer: day 3 and day 7