Is the Jewish Tradition Intellectual Property?
Roberta R Kwall

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Introduction

Whether works of authorship should be protected from unauthorized changes and, if so, for how long, are questions of endless fascination to intellectual property scholars. At base, these types of inquiries concern whether there is a perceived societal benefit to safeguarding a work’s original authenticity and, if so, under what circumstances. If there is a perceived value to safeguarding a text’s authenticity, this benefit must be weighed against a competing social interest in fostering creativity and in developing subsequent works of authorship based on previous works.

Jewish law is not typically considered a “work of authorship” although, as will be discussed more fully in this article, in many ways it can be so viewed. Jewish religious law, known as halakha, has a dualistic quality. In one sense, halakha possesses a narrow meaning as Jewish religious law. In a much broader sense, however, halakha “provides a ‘worldview’ through which all of the world and life’s experiences are perceived.”1 Rabbi Joseph Soloveitchik, a leading modern authority on Jewish law, fittingly captured this idea when he wrote that halakha “penetrates into every nook and cranny of life.”2 Soloveitchik’s observation underscores the power of the Jewish tradition embodying the legal precepts, the narratives and folklore supporting the legal content,3 and the people’s practices. This broad tradition is known as the mesorah, and it is best understood as a cultural product of creative human activity designed to be transmitted to future generations. The mesorah takes for granted the human component in both the creation and the repudiation of laws; thus, “the human share in the making of Jewish Law is both undeniable and inevitable.”4

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3 This non-legal content, known as aggadah, includes “a widely heterogeneous body of materials that range from extra-biblical legends and tales about the rabbis to snippets of popular folklore and fully elaborated homilies.” David Stern, “Aggadah” in Arthur A. Cohen and Paul Mendes-Flohr (eds), Contemporary Jewish Religious Thought (New York: Free Press, 1987), p. 7.
Halakhah in both its narrow and broader sense has been derived through the Jewish literature, which can be analogized to a vast inverted pyramid, with the Written Torah (the Five Books of Moses) at its base. This body of literature is unique in that “it is creative, original, and vibrant, and yet it presents itself as nothing more than interpretation, a vast set of glosses on the one true book, the Torah.” The Sages who commenced the crafting of Jewish literature in the early centuries of the Common Era may have understood their mission as merely trying to ascertain the meaning of what God intended by the Torah’s words, and yet, in performing their task, they revealed the power of their own interpretative endeavors.

Moreover, human creativity is no stranger to the Jewish tradition. According to Soloveitchik, “[t]he peak of religious ethical perfection to which Judaism aspires is man as creator.” Soloveitchik claims that the Torah chose to relate to man “the tale of creation” so that man could derive the law that humans are obligated to create. The Jewish religion introduced to the world that the “most fundamental principle of all is that man must create himself.” According to Jewish law, man was not intended to be a passive recipient of the Torah, but rather “a partner with the Almighty in the act of creation.” Significantly, “[t]he power of creative interpretation is the very foundation of the received tradition.” This perspective sees creativity as rooted in inspirational elements.

The rabbinic interpretation manifested in the Jewish literature produced throughout the ages is intimately connected with the creation of halakhah in both its narrow and larger sense. Moreover, the mesorah that results from this entire enterprise—as it is embodied in both the Jewish texts and lived by the people—is what affords the Jewish people their unique identity. It is the means through which the Jewish people have exercised their particularity throughout the ages. Simply put, the mesorah is a very unique form of cultural property and one that manifests an undeniable human component.

This article is concerned with exploring the mesorah as intellectual or cultural property. In recent years, the discipline of intellectual property has become concerned with matters of cultural appropriation. With respect to intellectual property scholarship,

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“‘culture’ is a word on everybody’s lips.”

Intellectual property scholars are increasingly turning their attention to how cultural theory—or culture-based claims for intellectual property—deserve our attention. Their goal is to develop a cultural account of intellectual property that can supplement our current understanding of the law. According to this paradigm, intellectual property is understood as a legal vehicle for facilitating (or thwarting) recognition of diverse contributors to cultural and scientific discourse. In the intellectual property realm, a cultural perspective of the law empowers a new Participation Age, a peoples’ movement that democratically declares that everyone, not just the sacred few, can be a creator.

The traditional approach to intellectual property sees intellectual property rights as economically focused incentives to maintain the appropriate degree of societal creativity necessary to promote progress and disseminate knowledge. In contrast, a culturally nuanced approach to intellectual property sees intellectual property in broader terms than the conventional utilitarian justifications suggest. Thus, under a cultural analysis framework, the emphasis is on intellectual property’s relationship to a multiplicity of values, such as autonomy, culture, equality and democracy. This type of analysis urges a reconfiguration of intellectual property law to reinforce these objectives.

From this perspective, intellectual property emphasizes human input from a diverse and broad array of sources as vital to the development of the law. This view mirrors today’s reality that historically disempowered individuals are appropriating intellectual property and using it as a tool for recognition, human rights and a redistribution of resources. Thus conceived, the development of intellectual property law should reflect the “dynamic processes of shared meaning-making.” Critical to this position is the dynamic, interactive nature of culture.

The Cultural Property and Human Rights Underpinnings of Intellectual Property

An examination of intellectual property law from a culture-based perspective is related to a growing focus on the relationship between intellectual property and cultural property. In the 1980s, protection of cultural rights began to be understood as including

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not only tangibles, but also intangibles, such as modes of life, human rights and beliefs.\textsuperscript{22} The 2003 Convention for the Safeguarding of Intangible Cultural Heritage is of particular significance in that it defines intangible cultural heritage as being “transmitted from generation to generation” and is “constantly recreated by communities and groups in response to their environment, their interaction with nature and their history.”\textsuperscript{23} According to this definition, cultural heritage provides groups of people “with a sense of identity and continuity.”\textsuperscript{24} The Convention further provides that social practices, rituals and festive events gather their meaning by reaffirming the identity of their community or group, whether performed privately or publicly.\textsuperscript{25}

Moreover, intellectual property and cultural property rights are increasingly seen within the framework of international human rights.\textsuperscript{26} In the human rights arena, rights emerging in cultural terms have particular relevance for traditions whose survival historically or presently is in jeopardy.\textsuperscript{27} Further, as human rights continue to evolve and expand, there has been a growing trend to augment human rights protections to include groups rather than just individuals.\textsuperscript{28} Such an expansion is logical given the reality that “[t]he basic source of identity for human beings is often found in the cultural traditions into which he or she is born and brought up” and, therefore, “[t]he preservation of that identity can be of crucial importance to well-being and self-respect.”\textsuperscript{29} This expansionist tendency parallels the concern with how the law reaffirms the composition of groups and individual identities and values.\textsuperscript{30} Law and culture scholars focus on how law

\textsuperscript{22} The United Nations Educational, Scientific and Cultural Organization (UNESCO) was created in order to protect cultural heritage.


“simultaneously embodies the interests of particular groups and shapes those interests—and even shapes the identities of those who understand themselves as members of such groups.”31 Thus, Richard Johnson emphasizes the “who I am” and the “who we are” of culture, thereby highlighting the relevance of both individual and collective identities.32

According to some cultural property authorities, the purpose of cultural property and cultural tradition is to afford groups autonomy over their communities.33 So the operative question becomes “what does the community think is important?” A particular community may face internal conflicts with respect to this question as well as external pressures. These conflicts are the result of the dynamic nature of culture itself, which is subject to both endogenous and exogenous influences. Today, “interactions within and between groups have to be at the core of any culturally informed analysis.”34 As a result of these interactions, cultural exchange is constant and inevitable.35 These interactions are at the heart of the balance cultural traditions seek to strike between evolution and authenticity, between preservation and modernity. Indeed, a cultural product or tradition is authentic only if it “maintains a legitimate link to the community.”36

This reality necessitates grappling with the ultimate questions of whether, and how, preservation of cultural tradition aligns with modern sensibilities. Specifically, cultural dissent and evolution of the cultural tradition in pockets of the community, particularly absent a link to the tradition, can compromise traditional values and result in the loss of something perceived as valuable by other segments of the community. Thus, cultural traditions continually negotiate between preservation and modernity and between evolution and authenticity. This concern with loss of value and dilution of the tradition’s authenticity justifies a perspective that embraces a degree of selectivity with respect to implementing changes in the tradition.37

The Jewish Tradition As Cultural Property

This perspective of intellectual property, steeped in considerations of cultural property and international human rights, illustrates the potential for understanding the

mesorah. The instruments guiding the best practices for cultural property highlight the important connection between creative intellectual activity, culture and the importance of transmission from one generation to the next. Although the range of cultural affiliation continues to widen beyond ethnoracial classifications to include religiously defined cultures, virtually no attention has been paid to analyzing mainstream religion, including the Jewish tradition, through a cultural property lens. The absence of an explicit connection in the literature is surprising because Jewish law, like all law, responds to social and cultural practices.

The story of the Ethiopian Jews is a familiar one to most Jews at this point in time because the rescue efforts on their behalf in the latter half of the twentieth century have been the subject of much discussion within both Israel and the United States. More recently, however, the Igbo tribe in Nigeria has come to the attention of Jewish leaders. Whereas Ethiopian Jews have been confirmed to be fully Jewish, the status of the Igbo is more uncertain. Still, many members of the Igbo tribe believe they are descended from Israelite religions, and overall they, like the Ethiopian Jews, illustrate a useful connection between mainstream cultural property and the Jewish tradition. The belief concerning the Jewish origin of the Igbo is based on the existence of customs and practices that some tribe members are only able to explain through a link to the Jewish religion in its Biblical form. Some of the commonalities include the following cultural practices: Igbo have been practicing circumcision on the eighth day long before being exposed to the Bible by missionaries and traders; some of the men stay away from their wives’ huts two weeks out of the month; Igbo sit on the floor following the death of a close relative; and they sound a horn very similar to the shofar, which is used by Jews particularly around the time of the High Holidays. Although many Igbo are officially raised as Roman

42 This custom seems to reflect Jewish law’s emphasis on family purity and avoiding sexual relations during the time of a woman’s menstruation. These laws are derived from the Torah, see, e.g., Leviticus 15:19–33, 18:19, 18:29, 20:18, but they were developed significantly during the Talmudic period and even afterward. See, e.g., Niddah 66a (Talmud Babylonian).
Catholic, a growing number are beginning to turn to what they believe are their Jewish roots. In fact, Nigeria now has an official Chief Rabbi, Rabbi Howard Gorin, who also leads a congregation in Rockville, Maryland.45

The tribal nature of the Igbo, and Nigerian society overall, draws them to the more Biblical aspects of Judaism. For the most part, they have not been exposed to the subsequent rabbinic tradition, and to some degree, they are culturally resistant to its fluidity.46 Religious purity is a powerful component of their mentality. Contemplating the Igbo allows for a consideration of the structure of Biblical Judaism prior to the rabbinic period, during which the rabbis developed a large body of Jewish law. Moreover, to the extent the Igbo are the type of society more typically of interest to cultural property scholars, they reaffirm a connection between cultural property and the Jewish tradition.

Three reasons support examining the mesorah in its entirety in cultural property terms. First, Jewish law, especially as it has been developed through the rabbinic tradition, governs every aspect of human behavior, regulating man’s relationship to God and to fellow human beings.47 Jewish law is intended to be an organic system that is all-encompassing. In short, Jewish law exists to protect a set of practices that are integral to the survival of the Jewish people.48

Second, Jews have faced a long history of danger regarding the loss of their particularity, as is true of many groups who are the intended beneficiaries of the emerging law of cultural property. In modern times, the murder of six million Jews during the Holocaust is the paradigmatic illustration of this point. Interestingly, the current legal framework regarding international human rights “was brewed in the cauldron of World War II.”49 The Second World War and the Holocaust motivated the passage of the Universal Declaration of Human Rights (UDHR), the first document composing the International Bill of Rights, the core of the human rights framework for intellectual property.50 During the drafting process, the UDHR delegates repeatedly

48 See generally Kwall “The Cultural Analysis Paradigm” (forthcoming in Cardozo L. Rev.).
50 The framers of the UDHR often discussed these events even though the instrument itself does not refer specifically to these motivations. See Yu, “Reconceptualizing Intellectual Property Interests in a Human Rights Framework” (2007) 40 U.C. Davis L. Rev. 1039, 1050–51.
condemned forced intellectual labor, which was among the numerous atrocities committed by the Nazis against the Jews during the war.  

Third, the essence of Jewish law is similar to any type of cultural property in that it has been developed and adapted by humans throughout the ages. Judaism has evolved considerably from its Biblical origins that are so appealing to the Igbo. Although Jewish law differs from secular legal systems in that God is viewed as the ultimate Author of the laws, in practice, the operation of Jewish lawmaking historically has incorporated a pronounced human element. This human element necessarily entails both subjectivity and fluidity of interpretation. Significantly, Jewish law is a cultural product of creative human activity that represents the product of human judgment about God’s will.

**The Human Dimension of the Rabbinic Tradition**

Jewish law is characterized by a dualistic developmental framework, which concerns two distinct relationships of power. Jewish law is rooted in the concept of Divine Revelation, and this component of its framework largely embodies a vertical model with the operative power relationship existing between God and the Jews. In contrast, the development and interpretation of Jewish law is within the purview of human beings. Because humans are, in theory, equal to one another, this model essentially can be understood as a horizontal one.

The core doctrine of Jewish law under the vertical model is Revelation by God of His will to the Jewish people at Mount Sinai. Jewish tradition maintains that through this Revelation, the Divine presence permeated the earth with instructions, laws and commands. Although the exact content of this Revelation is uncertain and the subject of endless debate and discussion, it is clear that throughout history, the tradition understood the Written Law, also known as the Torah or the Five Books of Moses, “as the source of authority and the starting point for the entire Jewish legal system.” With respect to the Written Law, Steven Resnicoff, writing from the perspective of an Orthodox legal scholar, has observed that “Jewish law, as understood by a majority of its most influential authorities, assumes that the words are God’s or, at least, the ones that God wants us to have.” Thus, Jewish law is steeped in a vertical conception of Divine authority over mankind.

According to the tradition, Revelation encompassed not only the Written Law, but also the Oral Law, which provided explanations and elaborations upon the Written Law.

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51 See Roberta Rosenthal Kwall, *The Soul of Creativity: Forging a Moral Rights Law for the United States* (Stanford: Stanford Law Books, 2010), pp. 100–01, for a discussion of Dina Gottliebova Babbitt, the Auschwitz prisoner forced to paint portraits under the direction of Josef Mengele, the infamous Nazi doctor known as the Angel of Death.


The most universally well-known codification of the Oral Law is the Babylonian Talmud, which was codified around 500 C.E. and still is regarded as the central book of Jewish law and life. The conception of authority inherent in the Oral Law is both vertical and horizontal. Although the part of the Oral Law that the tradition assumes God revealed directly to Moses is a product of the same vertical paradigm as the Written Law, the Oral Law also included a pronounced horizontal paradigm that supports a rich tradition of human interpretation. That is to say, a part of the Oral Law was “committed to halakhic authorities” in every generation “to fashion and develop.” The seeds of this horizontal model for the Oral Law can be traced back to a verse in Deuteronomy, which provides that people must abide by the judicial verdicts that are announced by the Levitical priests or the judges in charge. The tradition understands this language as applying to more than judicial verdicts so that it also invests halakhic authorities in subsequent generations with the authority to solve new problems.

The concept that Jewish law is subject to human interpretation, even at the expense of the Divine, is illustrated by one of the most famous stories in the Talmud known as the Oven of Akhnai. This narrative involves a dispute between Rabbi Eliezer and the majority of Sages that purports to be about the ritual purity of a particular oven. In reality, however, the dispute is much more global. The Talmud discloses that Rabbi Eliezer invoked various miraculous events, which culminated in the appearance of a Heavenly Voice declaring that his position is the correct one. The Sages replied that the law is “not in Heaven.” Instead, after the Revelation, the law was to be interpreted by humans; thus, the Sages prevailed over Rabbi Eliezer. In discussing this narrative in an article published in the Utah Law Review, Samuel Levine has observed “the Sages followed their own opinion, based on the principle that the duty and authority to interpret the law was given to humans, and thus the law is determined according to human, rather than Divine, logic.”

A cultural property perspective emphasizes that much of the existing power dynamics between humans are a product of cultural production. In other words, the power structure in place at any given time reflects the give and take of human dynamics and relationships. This type of analysis is relevant to the horizontal model of lawmaking operative under Jewish law. The existence of the horizontal paradigm’s focus on human lawmaking authority was as palpable during the Talmudic period as it was afterward. Throughout history, the rabbis sought to establish their authority and power so they could execute their role as lawmakers. In a legal system such as Jewish law, where the root

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58 Bava Metzia 59b (Talmud Babylonian) (analyzing Deuteronomy 30:12).
source of authority is a vertically structured model based on Divine authority, this establishment of power by the rabbinic lawmakers was critical. In commenting about the Talmud’s story of the Oven of Akhnai, Menachem Elon, the former deputy president of the Supreme Court of Israel, has observed that even though “objective truth” was on the side of Rabbi Eliezer, “legal truth . . . follows the majority.”60 Elon’s commentary pointedly shows that, ultimately, Jewish law is not “objectively neutral,” but rather the product of a subjective human component. Indeed, he claims that it “would be difficult to picture a more telling illustration of the exclusive prerogative of the halakhic authorities to declare the law, and of the absolute rule of law, even, as it were, over the divine Legislator Himself.”61

A culturally sensitive perspective understands law as a product of the human condition, grounded in specific historical contexts, rather than as an objectively neutral system. Significantly, the exercise of human judgment in the application of Jewish law produces the need for this contextualization and the inevitable reality of contested interpretations. Of course, in every generation, there were always boundaries which the rabbis would not cross, no matter how much their discourse revealed significant differences of opinion and contestation. These boundaries fixed the parameters of the law in each generation. Although in certain instances the boundaries of the law were regarded as fixed and certain, more often than not, they emerged through contested discourse and in historically specific contexts. This has been true throughout Jewish law’s history and is no less true today. In short, the tradition is designed so that discontinuous, or new, elements can be embraced as long as there is an historic basis for these elements within the body of the halakhic system.62

Consistent with the presence of contestation in the Jewish tradition, the development of Jewish law has, from its earliest beginnings, embraced a multiplicity of values, which have manifested in at least three significant ways. First, the sacred texts of the tradition reveal a multiplicity of meanings on their face. With respect to the Written Torah, for example, Jewish law eschews the idea of textual fundamentalism, rejecting the view that the text itself has a fixed and determinate meaning. Even the text of the Bible itself incorporates “a number of views of God, a number of conceptions of sin, retribution, love, justice, and so forth.”63 Further, the language of the original text, Hebrew, facilitates this multivalence of expression given that its “system of grammatical roots allows for fullest and broadest expression of different ideas within a single expression or word.”64 Significantly, the consequence of a system dependent on human agency is the expectation that human agents will differ in their interpretations. Indeed, “Rabbinic discussion . . . is replete with differences of opinion and records of divergent

62 See Kwall, “The Cultural Analysis Paradigm” (forthcoming in Cardozo L. Rev.) for a discussion of issues regarding women and synagogue ritual as an example of current contestation.
64 Jay M. Harris, How Do We Know This: Midrash and the Fragmentation of Modern Judaism (Albany: SUNY Press, 1994), p. 215.
practice” and “difference of opinion and practice was a legacy” of the early rabbis and “recognized as a normal phenomenon.”

Second, the Jewish tradition has embraced a multiplicity of values through its focus on law as a product of both the people and the rabbinic hierarchy. Historically, in practice Jewish law always has blended what the rabbis taught with what the people practiced; it thus consists of both rabbinical rulings that are the product of legal interpretation by the rabbis, as well as the norms of practice by the people. Given the absence of a legislative body and a police force, the role of custom, or minhag, has a special significance in the development of Jewish law. Professor Joshua Berman, who specializes in the Old Testament, has documented how this concern for “the collective exercise of power” traces back to the book of Deuteronomy. Thus, from the beginning, the Jewish people have maintained a very democratic ideology in that the practices adopted by the Jewish people and which have become part of their lives have a special meaning and cannot be ignored by the rabbis.

Third, both the top-down and bottom-up aspects of Jewish law have been influenced by cultural developments both within the Jewish community and outside of it. Cultures are not hermetically sealed but continuously interact with the world around them. This reality is especially true with respect to Jewish law given that the history of the Jewish people is such that they have been living in foreign cultures in the Diaspora since even before the destruction of the Second Temple in 70 C.E. These cultures have exerted an enormous influence on the development and application of Jewish law throughout the centuries.

The genius of Rabbinic Judaism lies in the rabbis’ construction of an ordered legal system that was consistent with the tradition of the past, even if not completely identical with it. Thus, halakhah in its narrow sense, referring to Jewish religious law, embodies a seamless continuity of tradition, however much it has changed in form and content. As used in its broader sense, however, halakhah also has continued to evolve.

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72 See Dorff, The Unfolding Tradition (2005), p. 33 (quoting Menahot 29b (Talmud...
Just as the worldview of the people of Israel at Sinai was distinct from that of the Jews in the period of the Talmud, the same is true for Jews throughout the centuries and today. Given the development of halakhah as it is used in both of these ways, a central question emerges that has profound significance for Jews in modern times. Specifically, how much of the halakhah, as that term is used to refer to Jewish law in its narrow sense, must be preserved and followed in order to maintain the Jewish tradition characteristic of halakhah in its broader sense? This issue is of vital importance today, as the continuity of the Jewish tradition faces enormous challenges from both external as well as internal influences.

Concluding Observations

In The Idea of Authorship in Copyright, Lior Zemer posits a redefinition of authorship pursuant to which the author is defined as a joint effort by the colloquial author and the public.\footnote{Lior Zemer, The Idea of Authorship in Copyright (Surrey: Ashgate Publishing Company, 2007).} In crafting this argument, Zemer relies on the idea that both authors and copyrighted works are “social constructs.”\footnote{Zemer, The Idea of Authorship in Copyright (2007), p. 9.} A somewhat similar type of idea underscores the designation of particular rabbinical Sages quoted in the Talmud. In other words, when the Talmud states “Rabbi X said,” this does not necessarily mean “Rabbi X himself” but rather Rabbi X’s later disciples and the entire tradition that developed in Rabbi X’s name.\footnote{Kwall, The Soul of Creativity (2010), p. 139.} As William Scott Green has observed, “[t]he presence of the names of rabbinic masters, then, provides a tangible connective between the present and the past, and the demarcation of the past . . . palpably establishes the inter-generational chain of communication fundamental to a traditional culture.”\footnote{William Scott Green, “What’s in a Name?—The Problematic of Rabbinic ‘Biography’” in William Scott Green (ed.), Approaches to Ancient Judaism: Theory and Practice, vol. 1 (Missoula: Scholars Press for Brown University, 1978), p. 89.}

The notion that Jewish law can be considered the “property” of the Jewish people collectively has significant implications for how to address and balance preservation of the mesorah and the development of the tradition in modernity. This inquiry is a familiar one to those who grapple with the intellectual property issues of how, and under what circumstances, a work of authorship can be modified without the original author’s permission and under what circumstances attribution must be provided to the original author of a modified work. The intellectual property doctrine of moral rights in particular safeguards the integrity and attribution requirements for conventional works of authorship in order to foster public knowledge and awareness of the original meaning and message of the work.\footnote{See generally Kwall, The Soul of Creativity (2010).} Underlying this aspect of moral rights law is a policy judgment that a value exists to preserving to some degree the meaning and message of an original work of authorship; a similar theme underscores cultural property’s concern with preserving cultural heritage, particularly for endangered groups and traditions. Similarly, the Jewish people, especially the rabbis, of every generation must address whether the mesorah should be modified and the extent to which specific modifications will
eviscerate the original meaning and message of the tradition and threaten its continuity in the long run. This brief treatment is not the place to explore this important point further, but situating the mesorah in the context of intellectual and cultural property offers an interesting, and largely unexplored, way of approaching the fundamental issues of Jewish peoplehood and continuity.