II. Intellectual Property

Intellectual property is the concept used to describe the rights one has to an idea that he conceived. Accepting intellectual property in full force would mean that one may not use any idea of another individual with asking him permission. Let's discuss a number of scenarios where intellectual property may be relevant but not as obvious:

Scenario #1

Shimon is in the process of producing an album of his musical compositions. In order to test his songs, he sings them at various synagogue functions but insists that nobody in the audience is permitted to sing his songs, even privately, until the album is produced. Does Shimon have the right to place such limiting restrictions on his audience members?

Scenario #2

Lisa is known throughout her community as a gourmet chef with unique recipes. On one occasion, one of her guests, Sarah asked her for the recipe of a certain dish. Lisa proceeded to tell Sarah the recipe. However, Lisa was concerned that the recipe will become widespread throughout the community so she stipulated that Sarah may never use the recipe to make that dish. Does Lisa have the right to forbid Sarah from using the recipe?

Scenario #3

After years of commuting through treacherous traffic conditions, Sam discovered a back road that cut his commute time in half. One day, Joe asked Sam for a ride into the city. Sam was hesitant to offer the ride because he did not want to reveal his secret to anyone. He decided to offer a ride to Joe on condition that he does not share this secret with anyone. Is Joe bound by Sam's restriction?

All of these scenarios may seem like extreme applications of the concept of intellectual property. What is it about these cases that differ from the classic cases of intellectual property restrictions such as copying books, software, or music? Let's examine the halachic discussion that may be relevant to intellectual property and then return to these three scenarios.

The notion of intellectual property assumes that one can own something that doesn't physically exists. Violating someone's intellectual property rights does not directly detract from anything in his possession, though it may affect his ability to profit from his idea. Nevertheless, there is no physical loss incurred from an intellectual property rights violation. Does Halacha recognize the concept of intellectual property?

The Talmudic Sources

In addressing the issue of intellectual property and copyright, rabbinic decisors present a variety of Talmudic sources to support the notion that Halacha recognizes the concept of intellectual property. We will present three of those sources. [For a more detailed discussion of these sources, see R. Ya'akov A. Kohen, *Emek HaMishpat* Vol. IV, who devotes many chapters of his book to this topic.]

Tractate Sanhedrin

R. Chaim Sofer, *Machaneh Chaim*, *Choshen Mishpat* 2:49, discusses a case where an individual was caught transcribing Torah ideas from other individuals and presenting them as his own. R. Sofer was asked whether the individual should be considered a *ganav* (thief). R. Sofer responded that this individual should be considered a *ganav*. One of the main sources he employed to present this idea is the Gemara regarding the prohibition against a non-Jew studying Torah. [The topic of a non-Jew studying Torah is beyond the scope of this work.]

1.

R. Johanan said: A heathen who studies the Torah deserves death, for it is written, Moses commanded us a law for an inheritance; it is our inheritance, not theirs. Then why is this not included in the Noachian laws? — On the reading morasha [an inheritance] he steals it.

Sanhedrin 59a

ואמר ר' יוחנן עובד כוכבים שעוסק בתורה חייב מיתה שנאמר תורה צוה לנו משה מורשה לנו מורשה ולא להם וליחשבה גבי שבע מצות מ"ד מורשה מיגזל קא גזיל לה.

סנהדרין נט.

R. Sofer states:

2.

And even though we will not lose anything if a non-Jew learns our Torah, nevertheless, since a hidden delight (i.e. the Torah) was given to us from Heaven as an inheritance, anyone [who is not Jewish] who reaches out to partake from it and enjoy it is a thief. This is also the case for any man who appropriates for himself the wisdom and Torah of his friend who had acquired his portion from Heaven – this man is an utter thief.

Machaneh Chaim, Choshen Mishpat 2:49

והגם דלא חסר לנו מאומה אם הגוי ילמד תורה שלנו אעפ"כ כיון שחמדה גנוזה נותן לנו מן השמים לירושה כל השולח בה יד ולוקחה להנות ממנה הוה גזלן וה"ה בכל איש השולח יד בחכמת תורת חבירו אשר זכה בחלקו מן השמים הוא גזלן גמור.

מחנה חיים, חושן משפט ב:מט

Does the Talmudic source presented by R. Sofer prove definitively that there is a Halachic concept of intellectual property?

There are two noteworthy points regarding use of this source as the basis for the concept of intellectual property. First, R. Moshe Schick, *Teshuvot Maharam Schick*, *Yoreh De'ah* no. 156, in a letter to R. Sofer, disagrees with R. Sofer's premise. R. Schick contends that theft is not applicable when the owner does not sustain a

physical loss. He suggests that perhaps this Gemara, which rules that a non-Jew who learns Torah is considered a thief, should not be taken literally, or alternatively, that this Gemara follows a rejected opinion. Second, R. Sofer's contention may be limited to Torah alone, and not general intellectual property. In R. Sofer's words "He acquired his portion from Heaven," - implying that this analysis may not be applicable to other forms of intellectual property.

Tractate Baba Kamma

R. Shimon Shkop, *Chiddushei R. Shimon Yehuda HaKohen*, *Baba Kamma* no. 1, compares the concept of intellectual property to the liability one has for digging a pit in a public area. Regarding the digging of a pit, the Torah, Shemot 21: 33-34, states:

3.

וכי יפתח איש בור, או כי יכרה איש בר ולא יכסנו; ונפל שמה שור, או חמור. בעל הבור ישלם, כסף ישיב לבעליו; והמת, יהיה לו.

שמות כא: לג-לד

And if a man shall open a pit, or if a man shall dig a pit and not cover it, and an ox or an ass fall therein. The owner of the pit shall make it good; he shall give money unto the owner of them, and the dead beast shall be his.

Exodus 21: 33-34

The Gemara, *Baba Kamma* 29b, comments that although a pit that is dug on public property does not belong to the digger, the Torah assigns responsibility to the digger as if he owns the pit:

4.

אמר רבי אלעזר משום רבי ישמעאל שני דברים אינן ברשותו של אדם ועשאן הכתוב כאילו הן ברשותו ואלו הן בור ברשות הרבים וחמץ משש [שעות] ולמעלה.

בבא קמא כט:

R. Eleazar said in the name of R. Ishmael: There are two [laws dealing with] matters that are really not within the ownership of man but which are regarded by Scripture as if they were under his ownership. They are: Pit in the public ground, and Leaven after midday [on Passover eve].

Baba Kamma 29b

R. Shkop explains:

5.

The same is true regarding a pit, that the Torah holds a person responsible by virtue of the fact that the damage was caused by a damaging force that is attributed to him. It belongs to him because he either dug the pit or uncovered it. He created the damaging force and therefore he is considered the owner. We find the same idea regarding intellectual property that it is accepted as Torah law as well as the laws of nations that one who invents something, he is the owner of it regarding all rights. Similarly, the Torah refers to the one who created the damaging element of the pit as the owner of the pit.

Chiddushei R. Shimon Yehuda HaKohen, Baba Kamma no. 1

וכן בבור חייבתו תורה על מה שהמזיק שלו הזיק ומה שהבור שלו זה בא לו ע"י כרייה ופתיחה, היינו שהוא הכין את המזיק ועי"ז נקרא בעלים עלי', כמו שבדברים שנוגעים לזכות האדם מוסכם ע"פ דיני התורה ודיני העמים שכל מי שממציא דבר חדש בעולם הוא הבעלים עלי' לכל דבר זכות, כ"כ קראה התורה לאיש המכין תקלה בשם בעל הבור.

חדושי רבי שמעון יהודא הכהן, בבא קמא סימן א'

Can one use the concept of damages for pits as the source for intellectual property? R. Shkop certainly recognizes the concept of intellectual property. However, his comments seem to draw a parallel between the two concepts and do not necessarily provide a proof to the concept of intellectual property. Nevertheless, one might still question on his own whether the concept of damages for pits can serve as the precedent for the idea that whatever one creates belongs to him. The challenge to this assertion lies in the comparison of ownership to liability. The fact that the Torah holds the digger of the pit liable for a pit that he created does not necessarily prove that one entirely owns his creations.

An Alternate Approach

R. Yosef S. Nathanson, *Sho'el u'Meishiv* Vol. I, 1:44, does not see the need for a source in the Talmud indicating that there is a concept of intellectual property. To him, it is obvious that one acquires ownership over one's intellectual innovations:

6.

It is obvious that when an author prints a new book and merits that his words are accepted by the world, he has rights to it forever. Regardless, if you print something new or develop a new technique, someone else is not permitted to use it without permission. And it is known that Rabbi Abraham Jacob of Harobshob, who performed arithmetic with a machine all his life received compensation from the *Kierow* (government) in Warsaw. And our complete Torah should not be like their meaningless conversations, and this is a matter that the intellect rejects, and it is a regular occurrence that the printer of a composition retains the rights.

Sho'el u'Meishiv Vol. I, 1:44

זה ודאי שספר חדש שמדפיס מחבר וזכה שדבריו מתקבלים ע"פ תבל פשיטא שיש לו זכות בזה לעולם והרי בלא"ה אם מדפיסים או מחדשים איזה מלאכה אינו רשאי אחר לעשות בלא רשותו והרי נודע שר' אברהם יעקב מהרובשוב שעשה החשבון במאשין כל ימיו קבל שכרו מהקיר"ה בווארשא ולא יהא תורה שלימה שלנו כשיחה בטילה שלהם וזה דבר שהשכל מכחישו ומעשים בכל יום שהמדפיס חבור יש לו ולב"כ זכות.

שואל ומשיב א, א:מד

Discussion and Analysis

Given that Halacha does recognize the concept of intellectual property, are there any limiting factors? Are the restrictions presented in the three above scenarios valid halachic restrictions?

A potentially limiting factor is the concept of *midat S'dom* (the character traits of the Sodomites). The Mishna, *Avot* 5:10, states:

7.

There are four types of people: One who says "What is mine is mine and what is yours is yours" – this is a median characteristic. Some say this is the character of a Sodomite. One who says "What is mine is yours and what is yours is mine" – this is a fool. One who says "What is mine is yours and what is yours is yours" – this is a pious person. One who says "What is mine is mine and what is yours is mine" – this is a wicked man.

Mishna, Avot 5:10

ארבע מדות באדם האומר שלי שלי ושלך שלך זו מדה בינונית ויש אומרים זו מדת סדום שלי שלך ושלך שלי עם הארץ שלי שלך ושלך שלך חסיד שלי שלי ושלך שלי רשע.

פרקי אבות ה:י

What's wrong with someone who says "what's mine is mine"? Rashi, *Baba Batra* 12b, s.v. *Al*, states this is someone who won't give up something of his own even if it poses no loss to him and will benefit someone else (*zeh neheneh v'zeh lo chaser*). The Gemara, *Baba Batra* 12b, states that one can force an individual to allow someone else to benefit from something if it causes him no loss. This principle is known as *kofin al midat S'dom.*

Question: If one can force another individual to allow someone else to benefit, can we now argue that the principle of *kofin al midat S'dom* dictates the parameters of intellectual property? Can someone claim that it is permissible to copy software, music, etc. because the copier benefits from something at no loss to the producer?

In order to answer this question, we must raise two more questions:

1) Does the principle of *kofin al midat S'dom* allow the one benefiting to take the initiative and "force" the owner of intellectual property into observing this principle by duplicating his work?
2) Should we assume that there is no loss to the owner of intellectual property when someone duplicates his work? What is the definition of loss for these purposes? Is it limited to monetary loss? What about potential loss of revenue? What about intangible losses that don't relate at all to money?

An Analysis of Kofin Al Midat S'dom

Let's answer these questions by analyzing the parameters of the principle of *kofin al midat S'dom*. The Gemara, *Baba Kamma* 20a, notes that one of the cases of *zeh neheneh v'zeh lo chaser* is where someone who needs a place to live moves into a vacant home that is currently not for rent. The tenant benefits from having a place to live and the landlord does not lose by having someone living on his property.

Tosafot, *Baba Batra* 12b, s.v. *K'gon* cannot imagine the possibility that one can employ *kofin al midat S'dom* to allow someone to move into a vacant home without permission of the landlord. Tosafot comment:

8.

We only use force to enforce violation of *midat S'dom* for something that poses no loss to him and will benefit someone else when the one benefiting already moved into the landlord's courtyard, and we don't allow the landlord to collect rent. However, it is obvious that the landlord can prevent the squatter from moving into the home even if the courtyard is not for rent and the squatter is not going to pay rent regardless such that the squatter benefits and the landlord does not lose.

Tosafot, Baba Batra 12b, s.v. K'gon

הא דכופין על מדת סדום בזה נהנה וזה לא חסר היינו בשכבר דר בחצר חבירו שאינו מעלה לו שכר אבל הא פשיטא שיכול למחות בו שלא יכנס לדור בביתו אפי' בחצר דלא קיימא לאגרא וגברא דלא עביד למיגר דהוה זה נהנה וזה לא חסר.

תוספות, בבא בתרא יב: ד"ה כגון

Mordechai, *Baba Kamma* no. 16, also addresses this issue:

9.

There are some who explain that we only force when there is no possibility for the landlord to rent the property. However, if there is a possibility for the landlord to rent the property, even if there are currently no renters, he cannot be forced.

Mordechai on Baba Kamma no. 16

י"מ דאין כופין אלא כגון היכא דמהני אפילו אי הוה בעי לארווחי בהא מלתא לא מצי לארווחי הלכך כייפינן ליה כיון דלא חסר מידי אבל היכא דאי הוה בעי בעל החצר לאיגורי הוה מירווח השתא נמי כי לא מוגר ליה לא לא כייפי ליה.

בבא קמא סימן ט"ז

The implications of Mordechai's comments are that there is not distinction between preventing the squatter from moving into the property and charging the squatter. Rather, there is a distinction between a home that can potentially be rented out and a home that cannot. If it cannot be rented out, we employ the principle of *kofin al midat S'dom*, and the landlord may not prevent the squatter from moving in. If it is potentially rentable, the landlord may prevent the squatter from moving in. Mordechai's comments are cited by Rama, *Choshen Mishpat* 363:6. As such, it is arguable that one can employ *kofin al midat S'dom* in a situation where there is no cause of potential loss. We find two different approaches in the Acharonim as to how to deal with the opinions of Tosafot and Mordechai.

R. Yechezkel Landa, *Noda B'Yehuda*, *Choshen Mishpat* 2:24, discusses a case where Reuven paid a printer to print the Talmud (including the comments of Rashi and Tosafot) with Reuven's commentary in the margin. After the printing was complete, the printer used the same printing plates to print his own edition of the Talmud while removing Reuven's commentary from this edition. Reuven claimed that he was entitled reimbursement for half of the cost of preparing the printing plates for press. The printer claimed that he had the option of disassembling the plates and therefore, was entitled to use the printing plates for his own benefit.

R. Landa denies the printer's claim that he is entitled to use the printing plates for his own benefit since it causes no loss to Reuven. He notes that according to Tosafot, *kofin al midat S'dom* is only applied in specific cases where the rabbis deemed it necessary. Although Mordechai disagrees, R. Landa sides with the

opinion of Tosafot. Therefore, R. Landa concludes that the printer is prohibited from using the plates without Reuven's permission.

R. Malkiel Tannenbaum, *Divrei Malkiel* 3:157, discusses the case of an individual, Levi, who received government approval to sell a certain type of medicine. The approval process involved an investment of capital. After his product hit the market, Yehuda began selling the same medicine using Levi's letter of approval as his license to sell the medicine. R. Tannenbaum was asked whether Yehuda must compensate Levi.

R. Tannenbaum takes the opposite approach of R. Landa. He claims that Tosafot only limit the principle of *kofin al midat S'dom* to situations where there is a loss to the provider. If, for example, a squatter moves into a home and lives there, he will inevitably cause wear-and-tear to the home and devalue the home, albeit minimally. However, if there is no way to devalue the object that one is benefiting from, which is true of a license, Tosafot agree that one may take the initiative and use the item so long as there is no loss to the provider. Therefore, R. Tannenbaum concludes that when the one benefiting is not using an actual object of the provider, he may "force" the provider and use his product without permission.

Nevertheless, both R. Landa and R. Tannenbaum note that if the one benefiting would have paid for his benefit (if there was no way to procure the benefit for free), it can no longer be considered *zeh neheneh v'zeh chaser* since the provider is losing potential revenue.

R. Tannenbaum supports this idea from a ruling of *Shulchan Aruch*, *Choshen Mishpat* 363:8:

10.

There are those who say that the rule that a squatter does not have to pay rent when the property was up for rent only applies when there was no indicator from the squatter that he is willing to pay rent. However, if the squatter indicates that he would pay rent if the alternative is eviction, then he must pay rent.

Shulchan Aruch, Choshen Mishpat 363:8

יש אומרים דהא דאמרינן דכשהחצר אינו עומד לשכר אינו צריך להעלות לו שכר דוקא שלא גילה בדעתו שהיה רצונו ליתן לו שכר אם לא יניחנו לדור בו בחנם אבל אם גילה בדעתו כן, צריך ליתן לו שכר.

שלחן ערוך, חושן משפט שסג:ח

R. Landa cites a similar proof from a comment of the Gemara, *Baba Kamma* 20b. The Gemara states that if there are two neighbors and neighbor A installs a fence that benefits neighbor B, neighbor B is not required to split the cost of the fence with neighbor A. However, if neighbor A's fence is insufficient in totally enclosing neighbor B's property and neighbor B completes the enclosure, neighbor B must split the cost of the joint portion of the fence with neighbor A. Rashi, ad loc., s.v. *Ad Heichan*, explains:

11.

[By completing the fence on his own] he has revealed that he is interested in the installation [of the fence] of Reuven and he must therefore split the entire cost [with Reuven].

Rashi, Baba Kamma 20b. s.v. Ad Heichan

גלי אדעתיה דניחה ליה בהקימו של ראובין ומגלגלין עליו את הכל.

רש"י בבא קמא כ: ד"ה עד היכן

In R. Landa's case, the printer invested additional capital to produce his edition of the Talmud. By doing so he has exhibited his interest in investing money in such a project and therefore, R. Landa rules that the printer must split the cost of preparing the printing plates for press. Similarly, R. Tannenbaum rules that Yehuda must split the cost of obtaining approval with Levi.

Applications of this Discussion

We can now return to the three scenarios presented at the beginning of this section. As we have seen from the comments of R. Landa and R. Tannenbaum, "loss" is not limited to actual monetary loss. Even potential loss of revenue is considered loss for these purposes. However, in all three scenarios, there is no direct monetary consequence of violating the intellectual property holder's request. Yet, in each scenario, the IP holder can claim that he is losing something when his IP is violated.

1) In the first scenario, Shimon may lose potential sales of his album, should someone else produces an album containing one or more of his songs. Would you consider this a "loss" on his part?
2) In the second scenario, Lisa stands to lose her reputation as the best gourmet chef in town. Would you consider this a "loss" on her part?
3) In the third scenario, there may be two reasons why Sam is reluctant to reveal his secret. He may be concerned that if too many people find out about this route, it will become congested and he will not save any time on his commute. Alternatively, he may simply be interested in his own pride as the fastest commuter in town, which he does not want to share with anyone else. Would you consider this a "loss" on his part?

If any of these scenarios represent a bona fide loss on the part of the IP holder, one can no longer claim *zeh neheneh v'zeh lo chaser*. Therefore, if IP is a valid halachic concept, the IP holder should be able to restrict someone else from using the intellectual property.

If these scenarios do not represent a bona fide loss, one must then analyze whether one can apply *zeh neheneh v'zeh lo chaser* and the principle of *kofin al midat S'dom*. According to R. Landa, the principle of *kofin al midat S'dom* does not allow one to actively "enter" the property of the provider. According to R. Tannenbaum, one may do so if there is no tangible loss to the provider. [Additionally, splitting the costs is not relevant to this discussion because the IP holders did not invest any money into the idea and the "violator" exhibited no interest in paying for an alternative were this option not available.]

Now, let's try to apply some of the principles discussed to modern day questions of intellectual property. In a situation where someone wants to duplicate software, music, etc., simply because he does not want to pay for it, one cannot apply *zeh neheneh v'zeh lo chaser*. The copier would have purchased the product himself and therefore, the producer loses revenue from the copier. This point is made by R. Moshe Feinstein, *Igrot Moshe*, *Orach Chaim* 4:40 (19):

12.

Regarding one who produced a cassette of Torah thoughts and printed on the cassette that it is prohibited to duplicate the cassette it is certainly prohibited [to duplicate the cassette] because [the cassette] has monetary value and the cassette was produced in order that those who wish to listen will pay. Therefore, *midat S'dom* does not apply… Duplicating a cassette without permission constitutes a violation of theft.

Igrot Moshe, Orach Chaim 4:40 (19)

בדבר אחד שעשה טייפ מדברי תורה וכותב שאוסר לעשות מטייפ שלו עוד טייפס ודאי אסור כי הוא ענין שוה כסף ועשה הטייפ להרויח מזה שאחרים שירצו יצטרכו לשלם לו שא"כ ליכא משום מדת סדום, ... לעשות טייפ אחר מטייפ אחד שלא ברשות הוא איסור גזל.

אגרות משה, אורח חיים ד:מ

However, there are certain situations which are more ambiguous:

Situation #1

A teacher would like to present a handout of various sources of photocopied texts. Some of the books state that it is prohibited to photocopy any portion of the book, even for educational purposes. Is the teacher permitted to ignore the restrictions listed in the book? Should the teacher be required to purchase a copy of each and every text for each and every student? [Keep in mind that according to U.S. law, there is no legal basis to these restrictions if the photocopying constitutes "fair use".]

Situation #2

A person purchases software that he would like to install on multiple computers in his home, for the benefit of his family. Is he permitted to do so or must he purchase multiple copies of the software?

Situation #3

There is a certain software product that is very expensive and is generally purchased for business purposes. Steve would never entertain purchasing the software, but it would be beneficial to him to install it on his computer in order to restore some old family photos. Is Steve permitted borrow the installation disk from his friend and install the software on his computer?

Situation #4

Is it permissible to transfer music from a CD onto an MP3 player or should one purchase a separate license for the music on one's MP3 player?

In these situations, the producer is not necessarily losing when the product is duplicated. It can only be considered a loss if the copier entertained purchasing the product and then decided to copy it. Nevertheless, according to R. Landa, the fact that there is no loss to the producer does not allow one to take the initiative and violate the rights of the producer. However, it is possible that R. Landa will agree that if the claim of the producer is entirely unreasonable (such as the case of the teacher who is producing a source book) that one may take the initiative and duplicate the work. [R. Tannenbaum himself suggests that R. Landa may agree on this point.] Furthermore, it is arguable that if the specific action is permissible according to U.S. law, the producer's restrictions are not meant to create further restrictions but to deter those who actually violate the copyright law.

Additional Restrictions on the User

In the first section, we discussed the halachic status of intellectual property and its limitations. Some producers of original content are not satisfied with the restrictions that IP law (and Halacha) place on the consumer and therefore place their own restrictions on the use of the product. In this section we will discuss the halachic status of some of these additional restrictions.

Condition of Sale

One method used by producers to deter duplication and distribution of their work is making the sale conditional on not duplicating or distributing the protected content. There are two questions that must be asked regarding these conditions. First, is the condition effective if the buyer is not aware of the condition at the time of purchase? Second, what are the consequences if the conditions are violated by either party?

Any condition that is placed inside a package or a software package is called a "shrink-wrap license" or a "box-top license." In U.S. law, courts have offered varying rulings regarding the legality of these conditions. In *Step-Saver Data Sys., Inc. v. Wyse Tech.*, the Third Circuit Court of Appeals ruled that shrink-wrap licensing does not bind the consumer to the conditions that are placed in the package. In *M.A. Mortenson Co. v. Timberline Software Corp.*, the Washington State Supreme Court upheld the conditions placed in the package.

What is the halachic status of a shrink-wrap license? The Gemara, *Kiddushin* 49b, states:

1.

A certain man sold his property with the intention of emigrating to the land of Israel, but when selling he said nothing. Said Raba: That is a mental stipulation, and such is not recognized.

Kiddushin 49b

ההוא גברא דזבין לנכסיה אדעתא למיסק לארץ ישראל ובעידנא דזבין לא אמר ולא מידי אמר רבא הוי דברים שבלב ודברים שבלב אינם דברים.

קידושין מט:

Rashi, ad loc., explains that this individual intended to sell the land on condition that he, the seller, moves to Israel. However, at the time of the sale, he didn't explicitly state his intentions. Therefore, we don't bind the buyer to this condition.

Rabbeinu Asher, in his responsa, 81:1, rules that the nature of the situation will dictate how explicit the condition must be:

2.

There are three levels regarding this matter. If the situation is such that his intentions are clear, even if he does not indicate that the sale is under these conditions, the conditions are binding. Then there is a situation where an explicit condition is required, such as the case of the individual who sold his property intending to relocate to Israel. The rule is that unless he explicitly indicates what the conditions of the sale are, the conditions are ignored, as per the rule that 'matters in the heart (i.e. thoughts) do not have legal status'. However, if there is sufficient indication of a condition to a sale, no explicit condition is required, because his actions dictate his intentions … Nevertheless, when his intentions are not obvious and there is no indication in his actions of an implied condition, an explicit condition is required.

Responsa of Rosh 81:1

ושלשה חילוקין יש בדבר כל כי האי גונא דאפי' לא התנה אנן סהדי דדעתו לכך אפי' גלוי דעת לא בעינן ויש מקומות דבעי גילוי דעת כההיא דזבין נכסי אדעתא למיסק לארעא דישראל ואם לא גלה דעתו אמרינן דברים שבלב אינן דברים ומיהו בגילוי דעת סגי ולא בעינן תנאי כיון דמעשיו מוכיחים על מחשבתו דאין דרך בני אדם למכור כל נכסיו אבל היכא דליכא אומדנא דמוכח וגם אין הוכחה במעשיו בעינן תנאי כפול.

שו"ת הרא"ש פא:א

Rabbeinu Asher's ruling is codified by Rama, *Choshen Mishpat* 207:4. As such, shrink-wrap licenses or similar conditions would not be binding unless the buyer received some indication that purchasing the product binds the buyer to certain conditions. It would not help to print the conditions in fine print on the package, nor would it help to place the conditions on a paper inside the package. The only way these conditions would be binding is if the conditions were prominently displayed on the package so that every purchaser notices the conditions.

Assuming that the conditions are binding on the buyer, one must still address the consequences if the buyer violates the conditions of the sale. In a normal case of conditional sale, when the conditions are violated, the sale is cancelled, the buyer returns the product to the seller and the seller refunds the money.

R. Ya'akov A. Kohen, *Emek HaMishpat*, Vol. IV, 37:4, notes that the following problem arises when the sale is only valid on condition that the work is not duplicated: Suppose someone duplicates the work. He now has a duplicate copy and the sale of the original copy is null and void. The buyer now has the legal right to return the original copy and receive a refund while still holding on to the duplicate copy. It is almost certain that the producer would never agree to refund the money. This proves that the condition of sale was not meant as an actual legal condition. Rather, the condition was meant solely to convey to the buyer another level of moral responsibility.

Limited Sale

R. Zalman Nechemiah Goldberg (*Techumin* Vol. VI, pp. 370-1) presents a novel approach to limit the rights of one who purchases a duplicable product. He basis his approach on a *Beraita* cited in *Baba Metzia* 78b:

3.

This agrees with R. Meir, who ruled: Whoever disregards the owner's stipulation is treated as a robber. Which [ruling of] R. Meir [shows this opinion]? Shall we say R. Meir? … Rather, it is the dictum of R. Meir. For it has been taught: R. Simeon b. Eleazar said on R. Meir's authority: If one gives a *denar* to a poor man to buy a shirt, he may not buy a cloak therewith; to buy a cloak, he must not buy a shirt, because he disregards the donor's desire.

Baba Metzia 78b

רבי מאיר היא דאמר כל המעביר על דעת של בעל הבית נקרא גזלן הי רבי מאיר ... אלא הא רבי מאיר דתניא רבי שמעון בן אלעזר אומר משום רבי מאיר הנותן דינר לעני ליקח לו חלוק לא יקח בו טלית טלית לא יקח בו חלוק מפני שמעביר על דעתו של בעל הבית.

בבא מציעא עח:

R. Goldberg suggests that although we don't follow the opinion of R. Meir, the rabbis who disagree with R. Meir are of the opinion that there is nevertheless a prohibition against violating the will of the owner. The issue is whether it is

considered theft to violate the will of the owner. According to R. Meir it is considered theft and according to the other rabbis it is not considered theft, just inappropriate behavior. Furthermore, if the contributor specifically states that the recipient may not use the money to buy clothing, then all agree that using it for this purpose is considered theft.

Based on this assertion, R. Goldberg claims that a producer can sell a product specifically for the purpose of normal use and exclude duplication rights from the sale. This applies even if the buyer is unaware that this is the intention of the sale. In this respect, a limited sale differs from a sale on condition. Regarding a sale on condition, the sale is a complete sale and therefore, the buyer must have an indication that the sale has a condition attached. However, if the sale is such that the seller is only interested in selling a portion of the use of the product, the seller does not have to know that these are the terms of the sale. He merely has to know that the seller does not want the buyer to duplicate his work. If the buyer is aware that the seller does not want his will violated and the buyer violates his will, R. Meir considers the buyer a thief and the other rabbis consider it inappropriate behavior.

Following R. Goldberg's article, a rejoinder was written by R. Ya'akov A. Kohen, op. cit., chapter 38. One of the problems that he finds with R. Goldberg's approach is that he assumes that one can limit the sale of an item to retain non-tangible rights to the item. However, there are numerous Acharonim who are of the position that one can only retain tangible rights to the item sold. For example, *Chazon Ish*, *Even HaEzer* 73:18, states:

4.

One who sells property while limiting the rights to sell the property to someone else or to place a lien on it, the limitation is not binding because the seller did not retain anything for himself. Rather, he is dictating what can be done and what cannot be done and the statement is meaningless.

Chazon Ish, Even HaEzer 73:18

המשייר שלא יוכל למכור לפלוני ולשעבדה ודאי אין זה שיור דלא שייר לעצמו כלום אלא שיעשה ולא יעשה ופטומי מילי נינהו.

חזון איש, אבן העזר עג:יח

As such, one cannot sell a product and still own the rights to sell it or duplicate it, as such a condition attempts to retain a say for the seller in the disposition of the product, even though none of the product remains in his ownership. [This

argument addresses the actual product. This does not relate to the discussion of intellectual property.]

Licensed, not Sold

Many software companies include an end-user license agreement (EULA) that a user must agree to prior to using the software. The agreement is physically placed in the packaging of the software, or alternatively, it is displayed to the user on his computer screen prior to installation. The EULA will generally state that the software is licensed, not sold. What this means is that the user does not actually own the product. He is merely using a product that belongs to the software company and is paying royalties for the use of their software. The software company considers the transaction a lease rather than a sale.

Softman v. Adobe involved a case where SoftMan Products was purchasing bundled software from Adobe and reselling the individual components. Adobe claimed that this violated the terms of the EULA which specifically prohibits the resale of individual components of the package. This assertion alone would have been insufficient to make their case because of the "first sale doctrine" of the U.S. Code (Title 17 § 109). This section states that "the owner of a particular copy . . . lawfully made under this title . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy." This doctrine applies only to goods that are sold, and therefore, Adobe claimed that the software was licensed, not sold, and therefore was not subject to the "first sale doctrine."

The U.S. District Court Central District of California ruled that:

> The circumstances surrounding the transaction strongly suggest that the transaction is in fact a sale rather than a license. For example, the purchaser commonly obtains a single copy of the software, with documentation, for a single price, which the purchaser pays at the time of the transaction, and which constitutes the entire payment for the "license." The license runs for an indefinite term without provisions for renewal. In light of these indicia, many courts and commentators conclude that a "shrinkwrap license" transaction is a sale of goods rather than a license.

As in the case of the conditional sale, the primary argument against the claim that the product is "licensed and not sold" is that the buyer thought that he was entering into an agreement of sale and not of a lease. The halachic discussion that relates to condition of sale should apply here as well. If there is some

indication that the "buyer" is aware that he is not actually purchasing the product, one can argue that it is legally binding as a lease. However, if there is no indicator, and the buyer was under the assumption that he was purchasing the product, then the fine print or terms inside the package would not be binding on the individual.

If in fact the license is halachically valid, what are the ramifications? *Shulchan Aruch* 307:1 (based on R. Yehuda's opinion) rules:

5.

One who rents from his friend an animal or utensils is adjudged a paid guardian and is responsible for theft or loss (i.e. an object that goes missing) but not accountable for accidents.

Shulchan Aruch Choshen Mishpat 307:1

השוכר מחבירו בהמה או כלים דינו כשומר שכר להתחייב בגניבה ואבידה וליפטר באונסין.

שלחן ערוך חושן משפט שז:א

If one who purchases software is only considered a lessee, then if the disk is accidentally damaged, the "lessee" should be able to either get a refund or procure a replacement for the damages disk from the software distributor, who, as the lessor, is responsible for accidental damages. In actuality, many EULAs only have a limited warranty on the actual disk. From a halachic perspective, this is inconsistent with the laws of renters.

Piggybacking on a Wi-Fi Connection

Over the last few years, many homes and businesses have installed wireless routers that allow users to access a computer network using radio signals. Access to the network means that the wireless user can potentially access the internet, access the files stored on the network, and use the network's printers or other accessories. The network administrator has the option of securing the router using encrypting technology so that only authorized users can access the network. However, many times the network is not secured and anyone within range of the radio signal can access the network using a laptop computer and wireless Ethernet card. The question then arises: Is it permissible to access an open (unsecured) network without permission in order to check one's e-mail, visit a webpage or download a file? [It is quite obvious that one is not permitted to enter the network and procure sensitive or potentially confidential information that is stored on the network.]

It should be noted that accessing an open network potentially leaves one's own computer vulnerable to unauthorized access by other network users.

There are two components to this question:

Question #1

When someone accesses an open network, he is using the services of the internet service provider (ISP) without any payment to the ISP. The ISP normally charges for internet service. Is using an internet connection through an open network considered a theft of service from the ISP? Is such a user causing the network owner (the person who contracted with the ISP for internet service) to violate his terms of service with the ISP?

Question #2

When someone uses an open wireless connection, he is basically using someone else's router and/or computer without permission. Is this permissible?

The Internet Service Provider

Every ISP has its own unique terms of service. Some ISPs limit the number of computers that may be connected to the internet via wireless router to only one. Many ISPs will charge an additional fee to the user for the right to connect additional computers beyond the first to the internet. Other ISPs don't place any restrictions on internet sharing as long as the users don't perform any illegal activities, and many advertise this as a value-added feature of their service.

If the ISP places no restrictions on sharing of internet access, then sharing the connection is certainly not stealing from the ISP. If the ISP does place restrictions, one must then address the following questions:

1) Is the user bound by the terms of service provided by the ISP?
2) Is there a distinction between a passerby using the service and a neighbor who regularly uses the open connection rather than paying for his own service?
3) In many areas there are multiple ISPs, all of whom have different terms of service. What are the ramifications for a user who is unsure of which service he is using when accessing the open network?

The discussion of *zeh neheneh v'zeh lo chaser* (see section II of this booklet) is relevant to this discussion. After all, one might argue that the ISP does not lose anything when the wireless user accesses the internet. At the same time, the user benefits from the free internet access. Is this a logical claim?

At first glance, one can counter this argument by stating that the ISP does in fact lose by the user accessing the internet because he is using services that he would have otherwise had to pay for. However, two factors must be considered.

First, many internet plans are priced based on the speed of the connection. The subscriber is then paying for a certain amount of bandwidth. If the subscriber chooses to allow others to use the bandwidth, it is his prerogative, as that use is limiting his own service. No matter how many users take advantage of the open network, the ISP will never be forced to deliver more bandwidth than it has already contracted to provide.

Second, there is a difference between a resident who is using his neighbor's wireless network and a traveler who is using the service on a one-time basis. The ISP can reasonably expect the neighbor to purchase his own subscription plan. Therefore, the ISP can claim a potential loss from the wireless user's decision to piggyback on someone else's network. However, the ISP cannot reasonably

expect a passerby to purchase a plan for the one time that he is using the internet in that location. Therefore, one can apply *zeh neheneh v'zeh lo chaser*.

There are ISPs that offer a service that provides national internet access through cellular networks. If the local ISP provides a cellular service, they can claim that instead of piggybacking, one should purchase national access. However, the cellular plans are currently very expensive, and are primarily suited for those who travel frequently - for business travelers, not the occasional traveler. Thus, the ISP's claim may be unreasonable, at least with regards to the occasional traveler. This may change as prices for national access decline. One must keep in mind that even if *zeh neheneh v'zeh lo chaser* is applicable, there is a dispute between R. Landa and R. Tannenbaum as to whether the one benefiting can take the initiative in procuring his own benefit.

If there are multiple ISPs in an area and one cannot determine what the restrictions are vis-à-vis the ISP, the question can be reformulated as: May one use an object or service without permission if there is a doubt over whether the owner minds? This question will be addressed later in this section.

Accessing the Network without Permission

Accessing an open network is similar to using someone's computer without permission. The Gemara, *Baba Batra* 88a, states:

1.

The argument is about one who borrows without the knowledge of the owner. One is of the opinion that such a person is legally considered a borrower, and the others are of the opinion that he is a robber.

Baba Batra 88a

בשואל שלא מדעת קא מיפלגי מר סבר שואל הוי ומר סבר גזלן הוי.

בבא בתרא פח.

Shulchan Aruch, *Choshen Mishpat* 292:1, rules in accordance with the opinion that one who borrows something without permission (*sho'el shelo mida'at*) is considered a thief.

Does this mean that one can never use the property of someone else without permission? There may be two limitations to this principle. First, Ritva, *Baba Metzia* 41a, s.v. *U'Shlosha* states:

2.

ומיהו בתשמיש שהוא עושה יש קלקול לממונם של בעלים ואע"פ שאינו מתחסר בתשמיש אפשר היה דאיידי דמטלטל לה תשבר או יארע בה נזק, דאלו בדבר שא"א לבא לידי נזק בטלטולו ליכא למ"ד דשואל שלא מדעת גזלן הוי דהא לא עביד ולא מידי, וכל זה מיסודו של הרמב"ן.

ריטב"א בבא מציעא ד"ה ושלשה

And in the usage that he makes of it is there a monetary loss to the owners? Even though he is not losing out from the usage, it is possible that it will break in handling or some damage will occur to it, for regarding an object which cannot be damaged by handling, one cannot say that one who borrows without knowledge of the owner is a thief, for he did not do anything, and all this is based on the foundation of the Ramban.

Ritva, Baba Metzia 41a, s.v. U'Shlosha

Ramban is of the opinion that one is not considered a thief for using someone's object without permission unless it is something that can potentially be devalued through its use. Borrowing something without permission would not render one a thief if there is a guarantee that its use will not affect the object whatsoever. Nevertheless, R. Efraim Navon, *Machaneh Efraim*, *Hilchot Gezeilah* no. 20, contends that Ritva, as quoted by *Nimukei Yosef*, *Baba Batra* 44b, s.v. *Amar HaMechaber*, disagrees:

3.

The composer said that since we already know that the rule is according to the Sages, who say that he is a thief, it would appear that it is prohibited for a man to lay his friend's *tefillin* or to wrap himself in his friend's *tallit* without his friend's knowledge. But my master says that the case of performing a mitzvah is different, because people want others to perform a *mitzvah* with their money. These are the words of Ritva.

Nimukei Yosef, Baba Batra 44b, s.v. Amar HaMechaber, qtg. Machaneh Efraim, Hilchot Gezeilah no. 20

אמר המחבר כיון דקי"ל כרבנן דאמרי גזלן הוי היה נראה שאסור לאדם להניח תפילין של חברו או להתעטף בטליתו שלא מדעתו אבל מורי נר"ו אומר דבדבר מצוה שאני דניחא ליה לאיניש דליעבדו מצוה בממוניה עכ"ל הריטב"א.

נמוקי יוסף, בבא בתרא מד: ד"ה אמר המחבר, א"פ מחנה אפרים, הלכות גזילה סימן כ

According to Ritva, use of someone's *tefillin* without permission would be prohibited, if not for the fact that we assume that the owner would want someone to use his *tefillin* in order to perform the mitzvah. *Tefillin* are not generally subject to wear-and-tear, but nevertheless, were it not for the fact that we assume the owner does not mind someone borrowing *tefillin* without permission, it would be considered theft.

R. Navon notes that the comments of Ritva regarding *tefillin* are not necessarily a direct contradiction to the comments of Ramban regarding using something that cannot be devalued. He does not provide the rationale for this distinction. Perhaps the distinction is that *tefillin* can potentially be damaged through misuse. If the *tefillin* are dropped, one of the corners can chip. If the *tefillah shel rosh* is placed on wet hair, the moisture can damage the leather. Therefore, it would be prohibited to borrow *tefillin* without permission, absent the assumption that the owner would want to lend out his *tefillin* to enable others to fulfill the *mitzvah*. Ramban's comments are limited to a case where it is virtually impossible to devalue the object through that particular use.

Assuming this distinction is correct, one must ask the following question regarding accessing an open network: When one accesses the network, it is virtually impossible to cause any physical damage to the router (except for some very minor wear-and-tear, which will be addressed later in the section). At the same time, the act of accessing a network certainly creates the possibility of

damaging the network either intentionally or unintentionally. Should one view a user of an open Wi-Fi network as someone who is merely accessing the internet and who cannot cause any damage to the system, or should one view him as accessing the entire network and potentially endangering the entire system? This is a difficult question to answer.

There is a second limitation to the principle of *sho'el shelo mida'at*. As was mentioned previously, if it is assumed that the owner doesn't mind if someone else uses his object, it is not considered theft. There are two questions that must be addressed in determining whether one can assume that the network administrator does not mind if someone accesses the network to use the internet. First, does the fact that the network is left open indicate that the administrator does not mind other people accessing the network? Second, may one assume that the network administrator does not mind if someone uses his network to access the internet simply because it does not affect him?

In analyzing whether the open, non-secure status of the network serves as an indicator that the administrator does not mind if others access the network, one must understand the various reasons why a network might be left unsecured:

1) The administrator purposely left the network unsecured in order to provide free access to those who are passing by.
2) The default status of the router is unsecured. The administrator is aware that others can access his network, but securing the router is not a high priority of his.
3) The administrator is totally unaware that his network is unsecured.

If the network is left open for one of the first two reasons, one may access the network because the administrator does not mind. If the network is open because the administrator is not even aware that it is not secured, it is impossible to know whether he would or would not mind if other people use the network.

The passerby who locates the open network has no way of knowing why it not secured. Absent a survey of administrators who leave their network unsecured, it is difficult to state definitively that the administrator does not mind if someone accesses his network.

Assuming that such a survey were conducted and the results were that most people don't mind if their network is accessed for the purposes of using the internet, but some people do mind, would that be sufficient to allow someone to assume that any given network is administered by one of the majority of people who don't mind?

The Talmud Yerushalmi, *Demai* 3:2, states:

4.

R. Shimon b. Kahana was being serviced by R. Elazar. They passed a vineyard. R. Shimon said "bring me a splinter [from the fence] so that I may use it as a toothpick." He then retracted and stated "don't bring me anything. If every individual would do this, the entire fence would be destroyed."

Talmud Yerushalmi, Demai 3:2

רבי שמעון בר כהנא הוה מסמיך לרבי לעזר עברון על חד כרם אמר ליה אייתי לי חד קיס מיחצד שיניי חזר ואמר ליה לא תיתי לי כלום אמר דאין אייתי כל בר נש ובר נש מיעבד כן הא אזיל סייגא דגוברא.

תלמוד ירושלמי, דמאי ג:ב

Maggid Mishneh, *Hilchot Gezeliah* 1:2, comments on the Yerushalmi's statement:

5.

It is a Biblical prohibition to steal even the smallest amount … Nevertheless, some commentators wrote that this only applies to an amount that some people are particular about. However, to take a splinter from a bundle or from a fence in order to pick one's teeth is permitted since nobody minds if such a small amount is taken. And even this the Yerushalmi prohibits as a matter of piety.

Maggid Mishneh, Hilchot Gezeliah 1:2

ואסור לגזול כל שהוא דין תורה ... מיהו כתבו קצת מן המפרשים ז"ל דדוקא כשיעור מאי דקפדי ביה קצת מן האנשים אבל ליטול מן החבילה קיסם או מן הגדר לחצוץ בו שיניו דליכא איניש דקפיד ביה בכי האי שרי ואף זה אסרו בירושלמי ממדת חסידות.

מגיד משנה, הלכות גזילה א:ב

Maggid Mishneh's comments are codified by *Shulchan Aruch*, *Choshen Mishpat* 359:1. There are two points that can be learned from *Maggid Mishneh*'s comments. First, *Maggid Mishneh* states explicitly that if the majority of people don't mind if a certain quantity is stolen, but there are a few people who do

mind, one may not take it. One can apply this rule regarding use of a router without permission if the assumption is that majority of people don't mind but a minority do mind.

Second, if the quantity that is "stolen" is so minimal that nobody would mind it is permissible to "steal" that small amount. Nevertheless, it is still improper to do so because if everyone does the same, it will have a significant effect. How does this apply to using an unsecured network to access the internet? How does this apply to the minimal wear-and-tear caused to the router?

One variable that must be addressed in dealing with this question is the location of the network. If the network is located in a heavily populated area, one can apply the Talmud Yerushalmi's concern that when multiple people take advantage, it can collectively cause a loss to the owner. If many people access the network, it can slow down the network significantly. If the network is located in a suburban area, it is unlikely that other people are also accessing the network and there is much less of a concern for collective cause of loss.

Another variable to consider is the amount of bandwidth used by the wireless user. If he plans on browsing standard websites, the amount of bandwidth required is minimal and will probably go unnoticed by others using the network. If the user is downloading multimedia content, onto his computer, more bandwidth is used and it is more likely to affect the speed of the rest of the network.

There are two final items to consider before one assumes that the administrator does not mind that his network is being used without permission. Both are based on the comments of *Shulchan Aruch*, *Orach Chaim* 14:4:

6.

It is permitted to take the *tallit* of a friend and make a blessing over it, so long as the borrower folds it after use, if he found it folded.

Shulchan Aruch, Orach Chaim 14:4

מותר ליטול טלית חבירו ולברך עליה ובלבד שיקפל אותה אם מצאה מקופלת.

שלחן ערוך, אורח חיים יד:ד

First, R. Yoel Sirkes, *Bach*, *Orach Chaim* no. 14, comments on this ruling:

7.

And this was not permitted because it is a mitzvah [to put on a *tallit*]. Rather it was permitted because it is a happenstance. And we learn from this that it was only permitted as a happenstance [and not for regular use].

Bach, Orach Chaim no. 14

ולא התירו משום מצוה אלא באקראי והכי נקטינן דלא נהגו היתר אלא באקראי.

ב"ח, אורח חיים סימן יד

R. Sirkes draws a distinction between regular use and occasional use. Perhaps the reason for this distinction is that if the *talit* is being borrowed on a regular basis, the owner might expect the borrower to purchase his own *talit*. This distinction is significant regarding accessing a wireless network. Even if one assumes that a network administrator doesn't mind occasional use, if the user uses the service on a regular basis, one can assume that the network administrator would not be as forgiving knowing that he is paying for a service that the wireless user should also be paying for.

Second, R. Yosef Teomim, *P'ri Megadim*, *Orach Chaim*, *M.Z.* 14:6: states:

8.

And it is obviously appropriate to ask permission if the owner is with him… and we do not rely on presumption when there is an opportunity to find out explicitly.

P'ri Megadim, Orach Chaim, M.Z. 14:6

וראוי ודאי כשבעליו עמו שישאל לו ... ואין סומכין על חזקה במקום דאפשר לברורי בקל.

פרי מגדים, אורח חיים מ"ז יד:ו

According to *P'ri Megadim* one can never rely on the assumption that the owner does not mind if one can easily ask the owner if he minds. In suburban areas, it is usually easy to figure out whose network is open in order to ask the administrator if he minds if someone accesses the internet through his network. In urban areas it is virtually impossible to locate the administrator.