

BUSINESS COMPETITION BETWEEN INDIVIDUALS: WHEN IS IT PROPER? PART IV

by Rabbi Doniel Neustadt

The following is a discussion of Halachic topics related to the Parsha of the week. For final rulings, consult your Rav.

There he established a decree and an ordinance (14:25)

In Mara they were given the rules of civil law... (Rashi)

QUESTION: An employer hires a worker on condition that he will not enter into competition with him at a later date. Years later, the employee wants to start a business on his own which may compete with his former employer. Does the halachah view this as "stealing" from his former employer? May *bais din* protest his behavior?

DISCUSSION: The answer to the above question depends on the specific circumstances: If the employee was hired as an apprentice and the employer trained him, then the employee may not strike out on his own if he will be competing with his former employer. If, however, the employee was not trained by the employer but was hired as an experienced worker, then it is not considered "stealing" if he decides at a later date to open his own business(1).

The difference between the two cases cited above is as follows: When an employee is hired and paid for his services, the employer does not own his services forever. Once his employment is terminated, the former employer cannot control his opportunities indefinitely, or even for a specific period of time. Even if he made a pre-condition with him, it is not halachically binding(2) and *bais din* has no right to stop him from doing as he pleases(3). If, however, the employer trained him, then he may demand payment from the employee for teaching him the trade. His "payment" could be in the form of a promise that he will not compete with him in the future. If the employee breaks his promise, then he is "stealing" a form of "payment" from his former employer. This may be stopped by a *bais din*.

QUESTION: It has become customary for Jewish book publishers and cassette tape producers to prohibit copying or otherwise reproducing any part of their materials under any circumstances. What, if any, is the halachic background for this prohibition?

DISCUSSION: The poskim, in their written works, hardly deal with this issue. It is important, therefore, to present some of the arguments that may be made on EITHER side of the question(4):

On the one hand, it may be PERMISSIBLE to copy such material based, in part, on the following arguments:

COMPLETE OWNERSHIP - When one buys a book or a tape he may do with it whatever he pleases. He may destroy it, lend it to a friend, or make a copy either for himself or for a friend. Since, after all, he paid for the item in full, he is entitled to unrestricted use(5);

INTANGIBLES - Many poskim maintain that it is halachically permissible for one to benefit from "intangibles" such as another person's idea or invention. Once the creator has committed his wisdom or talent to paper or tape, he no longer owns anything of material value. If so, nothing tangible is being taken away from the rightful owner(6).

But a strong case may be made for PROHIBITING copying and reproducing materials:

BENEFITING FROM ANOTHER PERSON'S LABOR - Although, as stated, many poskim do not expressly prohibit benefiting from another person's creativity, when creativity is one's business the rules are different. If by copying someone else's creation you are causing him a business loss, it may be prohibited according to the majority of the poskim(7). [According to a minority view, bais din even has the power to force the copier to pay the publisher whatever profit he has generated from his copying(8).]

GOVERNMENT LAW - In many countries the law prohibits copying or reproducing materials in any form. Halachah follows government law whenever the intent is to protect the safety and welfare of the citizenry(9).

RETENTION OF OWNERSHIP - The publisher may claim that his wares are for sale subject to certain restrictions on the buyer. This parallels the Talmudic case where a seller has the right to withhold certain rights from a buyer(10), provided that he does so at the time of sale. Since the publishers state explicitly that copying is forbidden, it may be argued that their statement is tantamount to a "provisional sale"(11). This is known in halachah as shiur b'mechirah, i.e., a sale with partial retention of ownership.

INTANGIBLES - Some poskim do not differentiate between tangible or intangible possessions. In their opinion, the owner of intangible items has the halachic power to prohibit others from infringing on his ownership(12).

None of the above arguments, either pro or con, are exhaustive or completely irrefutable, especially as regards copying for personal use(13). It goes without saying, however, that one who copies a published or a taped work against the wishes of the publisher or producer stands a good chance of transgressing a serious, possibly Biblical, prohibition. Indeed, Harav M. Feinstein(14) writes that one may not copy a Torah cassette tape without the explicit consent of the producer. He goes on to say

that one who does so commits a form of theft, but he does not explain the source for his ruling or the reasoning behind it(15). Other prominent rabbonim have rendered similar rulings orally.

Harav S. Wosner(16) allows copying individual pages from a published book for classroom use. A careful reading of his responsum implies, however, that this is permitted only when we can reasonably assume that the publisher would have no objection. If the publisher, however, clearly objects, it seems that it is prohibited to disregard his objection(17).

Note, however, that there are certain publishers and producers who do not object to copying or reproducing their work under certain limited conditions, such as classroom use. In any case, one must be particular to ask each company or author if and how they allow copying, for laxness could result in the violation of a serious prohibition.

A possible exception to the above is when a book is out of print and no plans for reprinting are underway. One can argue that in such a case the publisher or author has nothing to lose, for there is no possibility for making a sale. Indeed, some poskim advance the argument that the author is pleased when his work is studied or heard by additional people. A rav should be consulted.

QUESTION: When faced with a choice, is there any reason to patronize a Jewish-owned store rather than a non-Jewish-owned store?

DISCUSSION: Rashi in Parshas Behar(18) quotes Toras Kohanim that states that one should patronize a Jew when possible. Although this is not recorded as law in the Rambam and Shulchan Aruch, the Chofetz Chaim(19) rules that one should follow this policy. Even if the Jewish owned business is located a bit further away and it will take longer to shop there, it is still a mitzvah to give preference to the Jewish-owned establishment(20).

One must shop at Jewish owned store, however, only when the price is the same or slightly higher. If the price is much higher, then there is no mitzvah to patronize it. The poskim do not give a precise definition of what is considered "much higher" and what is considered "slightly higher"(21), and it may, therefore, be up to each individual to decide this for himself.

When judging what is considered much higher or slightly higher, the judgment may be based on the total outlay of money, not on the price differences per item. For instance, if shopping at the non-Jewish store will yield an overall savings of \$20, even though the savings per item is only a few cents, \$20 may be considered a significant difference and it would be permissible to shop at the non-Jewish store(22).

The same ruling applies to differences in quality of goods or service. If there is only a slight difference, then it is a mitzvah to support the Jewish businessman. If there is a great disparity, then it is not a mitzvah.

There is no mitzvah to patronize a Jew who is classified as a mumar(23).

The rules of preferring a Jew over a non-Jew apply to retail trade only, not to wholesalers(24).

FOOTNOTES

1. Teshuvos Chasam Sofer C.M. 9. See Teshuvos Minchas Tzvi (Sechirus Poalim) 10.
2. There are, however, halachic means which an employer can ensure that his employer will not compete with him in the future. For the exact method, a rav should be consulted.
3. He will, though, have to deal with the fact the he is breaking his word to the employer. We are concerned here only with the employer's legal rights, not the employee's moral obligation.
4. See The Journal of Halacha and Contemporary Society # 21, pg. 84-96, for an excellent review of this subject by Rabbi Yisroel Schneider.
5. See Chasam Sofer C.M. O.C. 2 who debates this question.
6. See Beis Yitzchok Y.D. 2:75 who discusses this theory.
7. There is a Talmudic basis for this claim based on the view of Tosfos Kiddushin 59a, in the name of R' Meir, which is endorsed as practical halachah by many of the authorities, see Rashdam 259; Chasam Sofer C.M. 79; Parashas Mordechai C.M. 67; Nachlas Tzvi C.M. 237. M'harsham 1:202.
8. Masa'as Binyomin 27.
9. Beis Yitzchak Y.D. 2:75, based on the Shach Y.D. 165:8.
10. See Bava Metzia 34a where the concept of shiur is mentioned, concerning one who sells sheep yet retains for himself its fleece and offspring. See also Bava Basra 63a. The comparison, though, is not exact, since in our case the seller retains something intangible.
11. This argument is advanced by Rabbi N.Z Goldberg in Techumin, vol. 6, pg. 181-182. See also vol. 7, pg. 360-380.
12. See Shoel u'Maishiv (Kamma, 1:44). See also Minchas Yitzchak 9:153 who proves that this was the view of the Chofetz Chaim.
13. See Pischei Choshen, Geneva, pg. 287, who tends to be lenient when copying tapes for personal use. He does not, however, issue a clear decision.
14. Igros Moshe O.C. 4:40-19.
15. It is also not clear if in the case discussed there the copier bought the tape or merely borrowed it

for the sake of copying it.

16. Shevet ha-Levi 4:202.

17. See Pischei Choshen, Geneiva, pg. 287, who disagrees altogether with Harav Vosner's lenient ruling concerning copying pages for classroom use.

18. 25:14. It is also quoted as practical halachah in Teshuvos Tashbatz 3:151 and Teshuvos Rama 10.

19. Ahavas Chesed 5:7 and Nesiv ha-Chesed 12.

20. M'haram Shick C.M. 31.

21. See Minchas Yitzchak 3:129 who remains undecided on this issue.

22. See Kol ha-Torah, vol. 42, pg. 305.

23. Teshuvos Chasam Sofer C.M. 134 - since the word "amisecha" appears in the verse which is the source of this halachah; Minchas Yitzchak 3:129.

24. M'haram Shick C.M. 31; Ahavas Chesed 5:3.

In honor of the Wedding Anniversary of HaRav Doniel and Shoshana Schur, OD MAYAH V'ESRIM SHANA, with love from their children, grandchildren and great grand children.

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