

CONSUMER COMPETITION (PART 2)

by Rabbi Doniel Neustadt

A discussion of Halachic topics related to the Parsha of the week. For final rulings, consult your Rav.

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(1):

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.(2)

INTELLECTUAL PROPERTY - Some 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.(3)

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.(4) [According to a minority view, beis din even has the power to force the copier to pay the publisher whatever profit he has generated from his copying.(5)]

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.(6)

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,(7) 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." (8) 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 and intangible possessions. In their opinion, the owner of intangible items has the halachic power to prohibit others from infringing on his ownership.(9) None of the above arguments, either pro or con, are exhaustive or completely irrefutable, especially regarding copying for personal use.(10) 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(11) 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.(12) Other prominent rabbis have rendered similar rulings orally.(13)

Harav S. Wosner(14) 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.(15)

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 rabbi should be consulted.

QUESTION: Does the mitzvah of *Lo salin* - timely payment - apply to a yeshiva or other public institution?

DISCUSSION: This mitzvah requires an employer to pay his worker before the day [or night] of his employment is over, or on the day [or night] that his wages are due. But Shulchan Aruch(16) rules that *Lo salin* applies only when an employee is hired directly by an employer. If, however, an employee is hired through an agent who makes it clear that it is the employer's responsibility to pay

the employee's salary,(17) then neither the employer nor the agent transgresses Lo salin.(18) Rama adds that whenever an employee is aware that the person doing the hiring is not the actual boss, but merely a company agent, then Lo salin does not apply.(19)

A. It follows, therefore, that for the Biblical prohibition of Lo salin to apply, two conditions must be met: 1) The employee must be hired directly by the employer, not by an agent or an agency; and 2) there must be an "owner," one individual who is legally responsible for paying salaries and bills. If there is any ambiguity concerning who, exactly, is responsible, or if the person responsible for paying is not the one who actually promised the salary to the employee, then the Biblical prohibition of Lo salin does not apply.

B. Based on this definition of terms, Harav Y.S. Elyashiv is quoted(20) as orally ruling that if a public institution such as a yeshiva is late in paying its employees, the Biblical prohibition of Lo salin was not transgressed. This is because a yeshiva is not a private enterprise which has one owner who is responsible for paying the bills and salaries. Rather, a yeshiva generally has a board of directors who appoints a principal or an executive director to hire the staff. The principal or executive director are "agents" of a non-specific "owner" (the board or the institution), who, according to the above-stated guidelines set by the Shulchan Aruch, are not affected(21) by the prohibition of Lo salin.(22)

C. In addition, a separate argument can be made for exempting yeshivos and other non-profit organizations from the prohibition of Lo salin. It is all too well known that yeshivos and other public institutions are not exactly cash-flow operations. When they are forced to delay payment to their staff, it is because they lack the necessary funds. Shulchan Aruch rules decisively that an employer who has no money to pay his employee does not transgress the prohibition of Lo salin. Thus, yeshivos that are late in payment would not transgress this prohibition even if a yeshiva is considered an "employer" according to the guidelines stated above.

D. Moreover, an employee of a yeshiva knows - prior to his employment - that it is possible that he may not be paid on time. Since he took the job anyway - knowing that it was a distinct possibility that he would not be paid on time - his case is similar to that of an employee with whom the employer has made an explicit pre-condition that he will not pay on time. Such a condition is halachically valid.(23)

E. But it is important to stress that we are defining the parameters of one specific mitzvah only, that of not paying a worker exactly when his work is completed or his pay is due. This is a mitzvah with limited applications, whose purpose is to show special sensitivity to a worker's needs and expectations. This mitzvah has nothing to do with the overall obligation of paying one's bills, debts, etc. in full and as soon as possible. Anyone who deliberately and brazenly withholds a worker's salary transgresses at least two different Biblical prohibitions(24): "You shall not cheat your fellow" (by depriving a worker of his earnings; Rashi) and "You shall not rob". Even an employer who intends to pay his employee but dallies with him by making him come back several times for his wages,

transgresses a Rabbinical prohibition based on the following verse⁽²⁵⁾: Do not say to your fellow go and come back go and come back and tomorrow I will give you. This prohibition applies to everyone, even one who technically does not transgress Lo salin according to the very specific definition given above.⁽²⁶⁾

FOOTNOTES:

- 1 See The Journal of Halachah and Contemporary Society # 21, pgs. 84-96, for a review of this subject by Rabbi Y. Schneider.
- 2 See Chasam Sofer C.M. 2, who debates this question.
- 3 See Beis Yitzchak Y.D. 2:75, who discusses this theory.
- 4 There is a Talmudic basis for this claim based on the view of Tosafos Kiddushin 59a, in the name of Rabbeinu 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; Nachalas Tzvi C.M. 237. Maharsham 1:202.
- 5 Masa'as Binyamin 27.
- 6 Beis Yitzchak Y.D. 2:75, based on the Shach Y.D. 165:8.
- 7 See Bava Metzia 34a, where the concept of shiyur 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.
- 8 This argument is advanced by Rabbi Z.N. Goldberg in Techumin, vol. 6, pgs. 181-182. See also vol. 7, pgs. 360-380.
- 9 See Shoel u'Meishiv (Kamma, 1:44). See also Minchas Yitzchak 9:153, who proves that this was the view of the Chafetz Chayim.
- 10 See Pischei Choshen, Geneivah, pg. 287, who tends to be lenient when copying tapes for personal use. He does not, however, issue a clear decision.
- 11 Igros Moshe O.C. 4:40-19.
- 12 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.
- 13 See Heart to Heart Talks, pg. 54, quoting Harav C.P. Scheinberg.
- 14 Shevet ha-Levi 4:202.
- 15 See Pischei Choshen, Geneivah, pg. 287, who disagrees altogether with Harav Vosner's lenient ruling concerning copying pages for classroom use. See also Sheraga ha-Meir 4:77, who prohibits copying both published materials or tapes even for personal use as long as the item is available for

sale.

16 C.M. 339:7.

17 If, however, the agent said that he is responsible to pay, then Lo salin would apply to him.

18 For a deeper explanation of why we do not invoke shlucho shel adam k'moso concerning this halachah, see Tosafos Rid and Ritva to Bava Metzia 110b and Meshech Chochmah, Kedoshim 19:13.

19 Indeed, Shulchan Aruch Harav (Sechirus 18) rules that even l'chatchilah one may hire workers in this manner so as to sidestep the Biblical prohibition of Lo salin.

20 Avnei Yashfei 2:118.

21 Harav Elyashiv, however, was quick to point out that the reverse is not true. We have previously stated that Lo salin applies to property rentals as well. Thus, if one owes a property rental fee to a yeshiva, he would transgress Lo salin if the payment were late. Even though there is no specific "owner" who demands payment, Lo salin still applies. Apparently, the demand for payment does not have to come directly from the owner.

22 Other poskim, however, do not agree with this leniency; see Pischei Choshen, Sechirus 9, note 66, who rules that an executive director who is responsible for salary payments is considered like the owner concerning Lo salin.

23 Shach C.M. 339:2.

24 Kedoshim 19:13. An additional verse in Ki Seitzei 24:14 states: You shall not cheat a poor or destitute hired person. See Bava Metzia 61a and 111a for the Talmudic interpretation.

25 Mishlei 3:28. See Rashi ibid.

26 C.M. 339:7.

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