

Halachah and Copyright Laws

by Rabbi Chaim Jachter

According to many authorities, Halachah accepts the concept of copyright laws, which would make them binding according to both Jewish law and civil law. A ruling of the Jerusalem Beit Din (printed in Techumin 6:169-184) illustrates this assertion. Rav Ezra Basri (a member of the Beit Din) notes that virtually all halachic authorities accept the concept of copyright laws, so the Beit Din ruled that the defendant (who violated copyright law) could not be acquitted by claiming to follow the minority opinion, which maintains that Halachah does not recognize the concept of copyright. (1)

Although many authorities recognize copyright laws, (2) there are differing opinions as to why this is so. This article outlines five approaches from some of the greatest halachic authorities of the past three-hundred years.

Rav Yosef Shaul Nathanson - Equity

Rav Yosef Shaul Nathanson (Teshuvot Sho'eil Umeishiv 1:1:44) explicitly asserts that Halachah recognizes the concept of intellectual property and copyright law. He does not offer a proof-text for this assertion, but he writes that it would be counterintuitive to claim that Halachah would fail to recognize the internationally accepted rules of copyright. It would appear that Rav Nathanson is arguing that we must accept these laws based on considerations of equity. Indeed, the Ramban, commenting on the Torah's exhortation (Devarim 6:18), "Ve'asitah hayashar vehatov be'einei Hashem" ("You shall follow what is proper and good in the eyes of God"), emphasizes the need to conduct oneself in an ethical manner. He explains that the Torah commands us to follow what is considered proper and ethical behavior even in situations that are not directly addressed in the Torah. Following copyright laws is a fulfillment of this exhortation (3).

Rav Yitzchak Shmelkes - Dina Demalchuta Dina

Rav Yitzchak Shmelkes (Beit Yitzchak, Yoreh De'ah 2:75) writes, "I am not aware of any Torah source that prohibits copying a Torah work (4) without the authority and permission of the author." However, he states that one must obey copyright laws that the civil government enacts due to the Talmudic rule of "dina demalchuta dina." This rule, literally, "the law of the government is the law," obligates Jews to follow many laws of the land in which they dwell (5).

In Jewish communities today, there is an added reason that Jews must obey the civil government's laws. Unlike previous generations, Jews today do not live in autonomous communities with their own business practices. The "local business customs" of any Jewish community are thus its local civil laws. Explaining why Halachah should recognize American rent control laws, Rav Yosef Eliyahu Henkin (Kitvei Haga'on Rav Y. E. Henkin 2:96) writes:

Since we are residents of the United States, whose laws are enacted by elected officials, chosen by citizens, to uphold justice, and we Jews do not maintain

organized communities with communal heads (tovei ha'ir), the government's laws are halachically binding because of dina demalchuta dina. Although these [laws] do not always conform to the Shulchan Aruch, if they relate to issues which depend on custom, [the civil laws] are the nation's custom. When a case comes before Jewish dayanim (rabbinical judges), they must rule according to the civil laws, except for the laws of inheritance (6), which do not depend on custom.

Rav Henkin does note that not all authorities apply dina demalchuta dina to laws that are designed to maintain order, when these laws contradict Halachah (as opposed to taxes, which all authorities consider binding) (7). Nonetheless, he claims that all would agree that when there are no Jewish courts to legislate rules for an effective society (8), the civil government's laws to maintain order must be followed (9). This reasoning appears especially true in the area of copyright law, as virtually all countries in the world maintain them, and contemporary business cannot function without them.

Chazal teach us that when government discipline is lacking, pandemonium ensues (Avot 3:2). Similarly, if copyright laws were not enacted (and obeyed), economic pandemonium would result.

Noda Biy'hudah - Making a Profit at Someone Else's Loss

Rav Zalman Nechemia Goldberg (Techumin 6:195-197) applies a responsum of Rav Yechezkel Landau as a source for recognition of intellectual property rights. Rav Landau (Noda Biy'hudah, Choshen Mishpat 2:24) adjudicates a dispute in which a Torah scholar wrote a commentary on parts of the Mishnah. He paid a publisher to print the Mishnah and his commentary together in one book. After the work was printed, the publisher discarded the characters used in printing the commentary but saved the typeset of the Mishnah's text. The publisher then printed another edition of the Mishnah without the scholar's commentary. The scholar sued the publisher for compensation, arguing that the new edition of the Mishnah would hurt sales of the edition containing his commentary. The scholar claimed that the publisher acted unfairly, as he was paid to print the Mishnah on the scholar's behalf. It would not be proper to use the fruits of this printing against him.

The publisher defended his actions by claiming that the typeset characters belonged to him, so he could use them as he pleased. Rav Landau rejected the publisher's claim, stating that he caused unfair monetary damage to the scholar. Publishing another edition of the Mishnah caused a reduction in demand for the edition with the scholar's commentary. Rav Landau ordered the publisher to compensate the scholar, as using the typeset characters constituted benefitting at the scholar's expense.

Rav Zalman Nechemia Goldberg discusses the possibility of applying this ruling to the situation of copyright law. If someone copies a computer program, for example, the copier benefits from the program and causes a loss to the producer of the program, as the copied version hurts the sales of the computer program. Copying it therefore constitutes benefitting at another's expense (zeh neheneh vezeh chaseir), so the copier must compensate the producer of the program.

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Chatam Sofer - Hasagat Gevul (Illegal Encroachment)

The Chatam Sofer (Choshen Mishpat 49, 69, 79) provides another source for the concept of ownership over intangible property. In discussing why one may not republish a prayer book set that was edited and arranged by a particular publisher, the Chatam Sofer cites a passage from the Gemara (Bava Batra 21 a-b) as a source for the prohibition. The Gemara records, "Fishing nets must be kept away from fish [which has been targeted by another fisherman] the full length of their ability to swim."

The targeted fish are ownerless until they are actually trapped. Nevertheless, Chazal require the other fishermen to distance themselves from the targeted fish. Tosafot (Kiddushin 59a s.v. Ani) cite Rabbeinu Meir (Rashi's son-in law), who explains that this Halachah applies when the first fisherman baited the particular area with dead fish, leading other fish to gather in that area. Competitors may not capitalize on the investment made by the first fisherman.

The Chatam Sofer formulates a general principle based on this case from the Gemara. He asserts that one who invested effort in attaining a certain goal (even if it is intangible) possesses an exclusive right to the resulting profits of that investment. Hence, the creator of intellectual property, such as a computer program or a music tape, may retain the exclusive rights to the profits resulting from his creation. A violation of this right encroaches on someone else's business rights.

Rav Zalman Nechemia Goldberg - Shiyur

Rav Zalman Nechemia Goldberg (Techumin 6:185-207) suggests that the concept of shiyur, that one who sells an object can retain certain rights to it, may apply to copyright laws. For example, the Gemara (Bava Metzia 34a) discusses a case in which one sells his sheep but retains the rights to the sheep's future production of wool and offspring. The original owner still owns the sheep as far as their wool and offspring are concerned (10).

Rav Goldberg argues that a store that sells a copyrighted computer program or music cassette only sells the purchaser the right to derive personal enjoyment from it. He does not sell, however, the right to copy the merchandise. The buyer cannot claim that, as the new owner, he may copy the product at will, because he does not own the right to copy the product. Copying the merchandise in such a case constitutes outright theft (11).

Conclusion

Halachic authorities offer at least five reasons to abide by civil copyright laws. Indeed, Rav Moshe Feinstein (Teshuvot Igrot Moshe, Orach Chaim 4:40:19) and Rav Eliezer Waldenberg (Tzitz Eliezer 18:80) both rule that one must follow these laws. Failure to abide by these laws can unfortunately lead to chilul Hashem (desecration of God's name), as well. Therefore, before copying cassettes, compact discs, or computer programs, one must ascertain that it is permissible to do so. Nevertheless, many authorities, most notably Rav Shlomo Zalman Auerbach, permit copying small portions of a tape or book

if one would not have otherwise bought the item (12). For a discussion of other situations in which it may be permitted to copy something, see Pitchei Choshen 4:9:11 (and note 27). This author has found that consulting with attorneys who are well-versed in copyright laws can be useful when rendering halachic decisions about these matters.

The above article is taken from, “Gray Matter: Discourses in Contemporary Halachah,” (Teaneck, NJ, 2000) by Rabbi Chaim Jachter

The book can be ordered at www.judaicahouse.net

NOTES:

- (1) For further information on this topic, see Rav Israel Schneider's essay "Jewish Law and Copyright", (The Journal of Halacha and Contemporary Society 21:84-96), the eighth chapter of Rav Aaron Levine's Economic Public Policy and Jewish Law, and the essays of Rav Zalman Nechemia Goldberg and Rav Ezra Basri in Techumin (6:169-207).
- (2) See, however, Rav J. David Bleich (Contemporary Halakhic Problems 2:121), who writes, "Jewish laws with regard to an author's proprietary interest in his published or unpublished work is far from unequivocal."
- (3) For further analysis of Rav Nathanson's approach, see Techumin (7:366).
- (4) The Beit Yitzchak 's logic presumably applies to copying anything illegally. He speaks of copying a Torah work merely because this is the case that was presented to him for adjudication.
- (5) For a summary of this topic, see Rav Hershel Schachter's essay in The Journal of Halacha and Contemporary Society (1:103-132).
- (6) Rav Henkin explains the unique status of inheritance earlier in the same chapter (paragraph 3).
- (7) See Shach, Choshen Mishpat 73:39.
- (8) See Contemporary Halakhic Problems (4:3-16), where Rav J. David Bleich laments the lack of a central, universally recognized beit din and suggests how to remedy the situation.
- (9) Nonetheless, Judah Dick (an Orthodox attorney from Brooklyn) stated (in a public lecture) that batei din in the Williamsburg section of Brooklyn, New York rule that rent control laws are not halachically binding.
- (10) For other examples of shiyur, see Gittin 82 and Bava Kama 78b.
- (11) If someone went ahead and copied something illegally under these circumstances, Rav Goldberg forbids buying the item from him. See Techumin (7:360-380) for criticism of Rav Goldberg and Rav Goldberg's response.
- (12) See Nishmat Avraham (4:204-206) and Techumin (7:367). Rav Shlomo Zalman permits copying small portions of a book even if the author explicitly writes that he explicitly forbids copying any amount. See, however, Pitchei Choshen (4:9, note 27), who prohibits disobeying the author's explicit demand.