COPYRIGHT AND INTANGIBLES IN HALACHA

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Just last week we read *Parshas Mishpotim* and we were reminded of our duty as Jews to raise our ethical standards. One area of challenge in our technological age is presented by the concept of copyright. Often, people ask whether they are permitted to duplicated music on a CD or a downloaded programme against the wishes of its producer.

Clearly, if the duplication is for commercial purposes, one may be undermining a *Parnasa* endeavour that rightfully belongs to someone else, which is forbidden[1]. Secondly, one may be contravening the law of the land, which one must obviously respect[2]. However, the focus of this article is to highlight the Halachic issues intrinsic to 'stealing' something intangible from another person. In that context, it seems to me that there are three major concepts that are often not properly understood.

(1) TAKING AN INTANGIBLE THROUGH UNAUTHORISED USE OF A TANGIBLE OBJECT

Suppose Reuven has a news website in which he displays photographs of current events and that he clearly forbids downloading of these photographs. If Shimon downloads these photos, he may rationalise that he is merely duplicating data.

However, this could well be an error. A website can only exist if it is maintained by a computer acting as its server. In essence, one who purchases a website from a provider is renting space, or at least an aspect of usage, from the host device[3]. Someone who then uses it in a manner that has been prohibited by those who own the rights with respect to that usage, is simply making unauthorised use of that computer. This is therefore virtually (!) tantamount to unauthorised residence in another person's house[4]!

(2) RETENSION OF PARTICULAR RIGHTS OF USAGE ON A SOLD PRODUCT

A second case is where one sells a product such as a CD with music or other data, with a proviso that one is retaining the copyright and that 'all rights are reserved'. Obviously these are standard conditions in our society and it would seem that the very meaning of the words is that one is retaining rights in the item with respect to its duplication.

If this is correct, this may be compared to a case in Choshen Mishpat 212:3 where the owner of a plot of land sells the land but retains the right to live in it, or where the owner of a tree sells the tree but retains the rights to eat its fruit. If so – as R' Moshe Feinstein states[5] in one succinct sentence with respect to an old-fashioned cassette – utilising it for the proscribed usage is simply *gezel*, theft.

(3) INTELLECTUAL PROPERTY IN HALACHA

In the above two scenarios, the essential point is that the intangible commodity is taken by illicit use of a tangible item in which it resides. Obviously, however, there are other cases where the intangible asset is entirely disembodied from a physical item ever owned by its producer. This is the case where, for example, Levi purchases a music download and then transfers it from his own computer onto storage media belonging to his friend Yehuda. Does the producer of the piece then have the right to object to this as an illicit use of his 'intellectual property'? This question – whether Halacha recognises intellectual rights in their own right (no pun intended!) – has no unequivocal answer and there is little or nothing to be found about it in terms of Talmudic precedent.

In various *teshuvos* (responsa) of the *Acharonim*, however, we do find some guidance on this matter. Ever since the printing press was invented, publishers and authors sought to protect their financial interests by appealing to Rabbinic leaders to confirm their Halachic right to assert their copyright. This led to various written statements, bans against those who disregarded the copyright of others, and *teshuvos* dealing with disputed or unclear aspects of the matter.

Does this mean that all the Rabbinic Authorities who supported various authors' claims to copyright validate the notion of intellectual property as a halachic reality? No, since they may have simply been supporting the rights of an author not to have his livelihood undermined[6]. Or, as the Chasam Sofer (Teshuvos Chasam Sofer, Choshen Mishpat 79) asserts, they may have been doing so for the sake of protecting the future of Torah publishing and not to support the individual interests of authors or publishers at all!

Nevertheless, certain sources did emerge, particularly the Shoel UMeishiv (1:44) by R' Yosef Shaul Natanson, which clearly support the notion of intellectual property rights. The Shoel UMeishiv's *teshuva* was written following a dispute surrounding an attempt by a second publisher to republish the famous Pischei Teshuva shortly after its first publishing, around 200 years ago. In a short *teshuva*, the Shoel UMeishiv firmly asserts that an author[7] has absolute and indefinite rights over his authored work. It is clear from his *teshuva* that he considers this so intuitive and straightforward that it requires no specific precedent or proof! The Beis Yitzchok, however, another Rabbinical leader of the time, specifically took issue with this position (see Teshuvos Beis Yitzchok YD 2:75 and ChM 80).

We therefore conclude that there is some Halachic support for the concept of intellectual property as a real halachic right. Hence, ephemeral and intangible as it may be, it may not be simply laid aside[8]. Having said that there may be room – in specific cases of need where it is clear that the owner of the intellectual property right would suffer no loss at all – even indirectly – from the infringement – there may be some room to be lenient[9].

1 See Beis Yosef, ChM 156; Shulchan Aruch, ChM 156:5; and Pischei Teshuva there. See also Teshuvos Chasam Sofer ChM 118; Teshuvos Remo #10; and Igros Moshe ChM 1:38.

2 Halachically, this is embodied in the principle of Dina D'Malchusa Dina, which has its own parameters and complexities. See, for example, Remo, ChM 369:8; Shach ChM 73:36; and Chazon Ish, Likkutim on Choshen Mishpat 16:5.

3 See ChM 212:1 that it is possible to own particular "rights of usage" in land or in a tree. It stands to reason that the same applies to any material asset.

4 Technically, unauthorised residence in someone else's property is classified as '*nehene*' (benefiting) rather than outright Gezel; see Bovo Kamma 20b. Presumably this is because he is not actually removing the property from the other person's possession. However, it would appear that this is also included in the prohibition of *Lo Tigzol* ("Do not steal") – see Sefer HaChinuch Mitzva 522; see also the discussion about a stolen Sukka in Sukka 31a and Rashi there.

5 Igros Moshe OC 4:40, #19. R' Zalman Nechemia Goldberg, in a full-length analysis printed in Techumin Volume 6, supports this conclusion. Likewise, the modern-day Shabsi Frankel edition of the Rambam carries letters of approbation from R' Moshe Feinstein, R' Shmuel Wosner and the Bedatz of Yerushalayim declaring it *gezel* to photocopy even a small part of the Sefer.

6 See Teshuvos Remo #10 for a clear example of this. Around 1550, the famous Maharam of Padawa published an edition of the Rambam in conjunction with a non-Jewish Italian publisher. Another publisher, by the name of Guistiniani, incensed that his rival had worked with the Maharam, decided to publish another edition of the Rambam, specifically undercutting the first to jeopardise the Maharam's sales. The Remo responded by writing a lengthy Teshuva in which he firmly asserts that the Giustiniani had no right to compete in this way, and that it was forbidden for any Jew to support this by buying his product.

7 Notably, it may be that the Shoel UMeishiv meant to give this absolute right to the author specifically, who could literally claim title to the **Intellectual** rights of the book, but not to the publisher.

8 See also Minchas Yitzchok 9:153 who gives this body of opinion considerable weight. In particular, he argues that the Chofetz Chaim was a strong proponent of this view.

9 This would be based on the Halachic concept of *Zeh Nehene v'zeh lo choser*. Generally speaking, this concept exempts one from payment after the fact, but does not permit the initial taking of the benefit. Some suggest, however, that in cases which involve infringement on Intellectual Property Rights alone, so that the producer's rights are already somewhat questionable, one could rely on an opinion – generally not considered normative – that permits utilisation for benefit of this sort even *l'chatchila*. As in all questions which require some judgment, such an issue is be best left to one's personal Rav for a decision.