

Product Law: Dina Demalchusa Dina in Intellectual Property

Adapted from the writings of Dayan Yitzhak Grossman

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Our previous article discussed the fundamental dispute between R' Yosef Shaul Natanson, who asserts that it is self-evident that authors and inventors have exclusive rights to their work, and R' Yitzchak Shmelkes, who challenges this assumption as lacking a source. As noted there, Rav Shmelkes limits his rejection of such rights to a case where the inventor has no patent from the government granting him the exclusive right to his invention in perpetuity. Indeed, he proceeds to argue that halacha does consider governmental prohibitions against infringing upon intellectual property to be binding under the principle of *dina demalchusa dina* (the law of the government is the law). He explains that although (in his view^[1]) *dina demalchusa dina* does not generally apply to laws that contradict the Torah, where the prevailing custom follows the law, the law must be obeyed. Accordingly, since people (at least in his time) refrain from flouting intellectual property law out of fear of the government, one is obligated to obey the law.

Additionally, Rav Shmelkes says the category of “laws that contradict the Torah” to which *dina demalchusa dina* does not apply is limited to laws that deprive people of property that they already own (*hefsed*), but it does not extend to laws that merely deny people the opportunity to generate profit (*menias harevach*), and the Torah does require obedience to such laws. Rav Shmelkes proceeds to argue that this certainly applies to intellectual property law, which according to Rav Natanson is the law of the Torah as well, and he additionally invokes a doctrine of the Chasam Sofer that any governmental regulation for the benefit of the members of a particular profession must be obeyed.^{[2],[3]}

Rav Shmelkes’s *teshuvah* was addressed to R' Shimon Sofer of Erlau, who had also addressed the question of the application of *dina demalchusa dina* to intellectual property law in the *teshuvah* he sent to Rav Shmelkes. Like Rav Shmelkes, Rav Sofer argues that although *dina demalchusa dina* does not generally apply to laws that contradict the Torah, it nevertheless does apply to intellectual property law. He offers an alternate reason to that of Rav Shmelkes for this, that when secular law mandates conduct that is inherently a moral imperative and thus included in the exhortation of *ve’asisa hayashar vehatov* (you shall do what is straight and good),^[4] then despite the fact that the Torah does not strictly mandate such conduct, *dina demalchusa dina* nevertheless applies to such laws. Since *seichel hayashar* dictates that one who toils to innovate something^[5] is entitled to the benefits of his labor—and the proof is that the law considers this a fundamental matter of fairness, which it codifies as law—“it is obvious that *dina demalchusa* applies here.”^[6] R' Moshe Zev Zorger articulates a similar position, that *dina demalchusa dina* does apply to laws that “the spirit of the Torah and the spirit of the Sages” approve of, despite the fact that the Torah itself does not consider the conduct mandated by the law to be obligatory and enforceable, and he explains that intellectual property law is

certainly in this category for a variety of reasons.^[7]

Other authorities as well accept, for various reasons, the basic principle that *dina demalchusa dina* applies to intellectual property law,^[8] and although there is a dissenting view,^[9] it seems to be a minority opinion. Another important early discussion of the right of an innovator to his innovation appears in the work Amudei Aish of R' Avraham Shmuel Rabinowitz of Eyshishok, regarding the case of someone who expended a great deal of money in the study of dyeing techniques and recorded his expensively acquired knowledge in a book. Someone stole the book, copied it, and studied its contents, then returned the original to its owner. The owner sued the thief on the grounds that he had spent a great deal of money in the acquisition of the information in the book and that the thief was improperly interfering with his business activities (*yored le'umanuso*), and he additionally demanded that the copy be turned over to him. Rav Rabinowitz's correspondent, R' Shimon of Ofina, tentatively suggests that the thief might be obligated to return the copy on the grounds that the plaintiff has an ownership right in the information in question. (This is apparently similar to the position of Rav Natanson discussed in the previous article.)

Rav Rabinowitz himself rejects this approach, and he begins his analysis by insisting that the halachos of theft require only the return of the stolen property, but not the return of any copy made of it, nor the payment of any compensation for the use of the stolen property. Subsequently, however, he considers the possibility of an obligation to compensate the author of the book under the doctrine of *neheneh* (benefiting)—similar to the legal concept of unjust enrichment.^[10]

Note that there is a great deal of halachic literature on the general topic of intellectual property, mostly regarding authors and their work. Our articles have merely provided a limited introduction to some aspects of this literature, focusing on inventors and inventions.

[1]This assumption is actually the subject of considerable dispute among the *Acharonim*; see Rama C.M. 73:14; Shach *ibid. s.k.* 39 (and *siman* 356 *s.k.* 10); Chazon Ish C.M. *likutim siman* 16 *os* 1 (and cf. Bava Kama *siman* 23 *os* 2 s.v. *Vechol zeh*); Amud Hayemini *siman* 8 from *os* 7 (p. 45); Shu"t Maharam Brisk *cheilek* 1 *siman* 85 p. 84b and *siman* 108 *os* 2; Shu"t Mishnas R' Aharon C.M. *siman* 71 s.v. *Vehinei bedin davar ha'avud*; Shu"t Minchas Asher *cheilek* 2 *siman* 121.

[2]Shu"t Chasam Sofer C.M. *siman* 44 s.v. *Ne'ayel leha didan*.

[3]Shu"t Bais Yitzchak Y.D. *cheilek* 2 *siman* 75 *os* 5.

[4]Devarim 6:18.

[5]Rav Sofer is referring to Torah novellae, but his reasoning would seem to apply equally to other forms of innovation.

[6]Hisorerus Teshuvah *cheilek* 1 *siman* 232.

[7]Shu"t Vayashev Moshe *cheilek* 1 *siman* 2 *os* 12.

[8]Shu"t Sha'arei Ezra *cheilek* 2 end of *siman* 147 s.v. *Od yesh ladun mitzad dina demalchusa dina* (p. 390).

Shu"t Shem Aryeh C.M. *siman* 20 *os* 6 applies *dina demalchusa dina* to

government grants of exclusive printing rights, although he is discussing a scenario where the government charged the printers for these rights, so the law in question is similar to taxation, an undisputed legitimate prerogative of government. Cf. the analyses of the Shem Aryeh's position in Shu"t Divrei Malkiel *cheilek* 3 end of *siman* 157 s.v. *Ve'af shemitzad pisuk chiyusa*; Shu"t Be'er Sarim *cheilek* 6 *siman* 80 os 6, and cf. R' Nir Aviv, *Dina Demalchusa Dina Bizchuyos Yotzrim*.

[9]Shu"t Vaya'an Dovid *cheilek* 2 C.M. *siman* 226 os 6.

[10]Shu"t Amudei Aish pp. 132-34. Cf. Shu"t Divrei Malkiel *cheilek* 3 *siman* 157.