"Corporations, Competition, and Copyright: How Economic Theories and Halakhah Interact"

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Igrot Mosheh Even HaEzer 1:7 (Rabbi Moshe Feinstein z"l, 1895-1986)
26 Iyyar 5720 = 1960
To His Honor my friend Rabbi Nachman Yosef Goldstein the Gaon Av Beit Din of Montreal . . .
Regarding whether to buy shares of companies that do work and business on Shabbat –
we see that permission has spread
and the reason is obvious, that we should not consider those who buy a share, which is just a smidgen of the business, and (the buyers) have no say even regarding their own share, as owners
because this is not like a partial partnership in which they have a say like owners,
and also the ones who buy shares do not want to be owners of the business, and do not want to buy any of the business, rather they are as-if buying the profit or loss of the business in proportion to the amount they bought,
and it seems more likely that halakhically this is not acquisition at all, as it is acquisition of something not-yet-in-the-world (which halakhah has no mechanism for), rather only in terms of the law of the state.
As for the terms of the sale giving the buyer a say in the election of the president (of the corporation) – this is mere word-dressing, because in practice they leave themselves more than the majority (of the voting shares), so that it's not possible for the shareholder to have a say
and also the buyers do not want a say, and their intention isn't to buy this (right to elect the president).
Therefore, in my impoverished opinion
there is no need to be concerned for what the owners of the companies do, because this has no relevance to (the shareholders).
Even if there are Jews among the owners –
do not consider (a shareholder) as 'assisting the hands of transgressors'
because they will do the same business even if he does not buy shares from them, as there is no shortage of buyers, and buyers buy shares only for their own benefit
therefore there is nothing prohibited about this at all, as we see many Jews including sin-fearers buying.
However, certainly to buy so many shares that they would consider (the buyer's) opinions –
this should be forbidden even with regard to non-Jewish factories and businesses
since (the buyer) did not make the stipulations necessary when a Jew partners with a Gentile, which are set out in Shulchan Arukh OC 345.
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שו"ת אגרות משה אבן העזר חלק א סימן ז
כ"ו אייר תש"כ. מע"כ ידידי הרה"ג מוהר"ר נחמן יוסף גאלדשטיין שליט"א הגאב"ד מאנטענדיל . . .
ובדבר ליקח שערס מקאמפאניעס שעושין מלאכה ומסחר בשבת
הא חזינן שנתפשט להיתר
והטעם פשוט שאין להחשיב את הקונים שערס, שהוא רק משהו מהמסחר שאין להם שום דעה בהמסחר אף לענין חלקם, לבעלים
של"ד לשותפות במקצת שיש לו דעה כבעלים,
וגם אין הקונה שערס רוצה להיות בעלים בהמסחר ואינו רוצה לקנות כלום בהמסחר אלא הוא רק כקונה ריוח והפסד שיהיה בהמסחר לפי סך כך וכך שקנה,
ויותר נראה שאין בהם גדר קנין בדינא שהוא לקנין דבר שלא בא לעולם, רק מצד קניני דיני המדינה.
ומה שלפי תנאי המכירה יש לבעל השערס דעה לבחירת פרעזידענט /נשיא/ -
הוא רק פטומי מילי בעלמא
כי למעשה משאירין לעצמן יותר מהרוב שלא שייך שיאמרו דעה,
וגם הקונים אין רוצים לומר דעה בזה, כי אין כוונתם לקנות זה,
ולכן לע"ד
אין לחוש למה שעושים הבעלים דהקאמפאניעס שאינו נוגע להם.
ואף אם יש גם יהודים בהבעלים –
אין להחשיב מסייע לעוברי עברה,
שהמסחר יעשו גם כשלא יקנה שערס מהם, כי לא חסר מי שיקנה שערס והקונה קונה רק לטובת עצמו
ולכן אין בזה שום איסור, וכמו שנוהגין הרבה בנ"א ואף יראי חטא לקנות.
אבל ודאי לקנות מדה מרובה כ"כ עד שיתחשבו בדעתו - יש לאסור אף בפעקטערע /בבית חרושת/ ומסחר של עכו"ם
כיון שלא התנו כמו שצריכין להתנות כשעושה ישראל שותפות עם עכו"ם, כדאיתא בש"ע או"ח סימן רמ"ה.
והנני ידידו מוקירו, משה פיינשטיין

Minchat Asher 105-6 (R. Asher Weiss shlita)

The Status of a Limited Liability Corporation in Halakhah

Regarding your question as to whether it is permitted to acquire the majority of the voting shares in a bank in the United States

when a percentage of the borrowers are Jewish, so it turns out apparently that (the majority shareholder) is lending at interest (to Jews)

The foundation of this question is embedded in classifying the halakhic status of the modern economic body called a "limited corporation", because as we come to classify from a halakhic perspective who is considered the owner of this body, we stand before a great difficulty, because in general human ownership over something of value is expressed in three ways:

a) A financial right to the profits that emerge from this thing of value. Just as the owner of a tree eats its fruit, so too the owner of money has a right to its profits
b) A right to determine the ways in which the thing of value is used
c) A right to transfer or sell the thing of value to someone else

In a limited corporation, these three rights are divided among three authorities:

the shareholders, the board of directors, and the "general manager" (=CEO).

The shareholders exclusively have the financial rights in the corporation. This right is expressed in their receipt of dividends from the profits of the corporation in the course of its activities and in their ownership of the assets of the corporation should it be disbanded.

The day-to-day management of the corporation is under the exclusive authority of the CEO (and the CEO is not a mere agent of the directors, because they have no authority to manage the corporation, and "anything which a person cannot do, they cannot appoint an agent to do"). The directors have the authority to appoint the CEO (and other senior appointments), and they establish he general policies of the corporation and its methods of operation, and this includes the sale of property under its ownership.

The decision whether to dissolve the corporation is in the exclusive purview of the shareholders.

So you see that characteristics of ownership in a corporation are divided among three different authorities.

Another detail which characterizes a limited corporation and separates it from ordinary ownership is of course the fact that neither the shareholders, the CEO, nor the directors have any personal liability for the debts of the corporation and these cannot be collected from them at all.

A. The status of the shareholders

According to modern law the corporation is an independent legal and economic person and none of the three authorities is considered an owner . . .

Igrot Mosheh EH 1:7 agreed that shareholders are legal owners, but he extremely creatively said that only those who hold the majority of shares are considered owners, while owners of a minority are not considered as owners because in practice they have no say and influence on corporate matters.

But in my impoverished opinion this is very unlikely reasoning and my heart cannot be reconciled to it, because it is implausible that owners of the same right, when they contract among themselves and become a majority are considered owners, but when the wheel turns and they find themselves in the minority even though they have the same acquired rights, since their influence is gone – they are no longer categorized as owners, because is it influence that generates ownership?! . . .

מנחת אשר א:קה-קו

בדבר שאלתו האם מותר ליהודי לרכוש רוב מניות השליטה בבנק בארה"ב
והרי חלק מן הלווים הם יהודים ונמצא לכאורה שהוא מלוה בריבית
יסודה של שאלה זו נעוץ בהגדרת מעמדו ההלכתי של הגוף הכלכלי המודרני הקרוי "חברת בע"מ", דהנה בבואנו להגדיר מבחינה הלכתית מי נחשב לבעלים על גוף זה ניצבים אנו בפני קושי גדול, שהרי בדרך כלל בעלות האדם בממון מסוים באה לידי ביטוי בשלשה דברים:

א. זכותו הממונית ברווחים שהופקו ממון זה. וכשם שבעל האילן אוכל את פירותיו – כך בעל הממון זוכה ברווחיו.
ב. זכותו להחליט על אופני השימוש בממון
ג. זכותו להעביר או למכור את הממון לאדם אחר

ב"חברה בע"מ" שלש הזכויות הנ"ל נתחלקות בין שלשה גורמים:
בעלי המניות, חברי הדרקטוריון (=מועצת המנהלים), והמנכ"ל.
בעלי המניות הם לבדם בעלי הזכויות הממונית בחברה. זכות זו מתבטאת בקבלת דיבידנדים מרווחי החברה במהלך פעילותה ובבעלות על הון החברה לשהתפרק.
הניהול השוטף של החברה נמצא בסמכותו הבלעדית של המנכ"ל, (ואין המנכ"ל כשליח בעלמא של הדירקטורים, שהרי אין להם כל סמכות לנהל את החברה וכל מילתא דאיהו לא מצי עביד לא משוי שליח). הדירקטורים הם אלה אשר בסמכותם למנות את המנכ"ל (ומינויים בכירים אחרים) והם הקובעים את המדיניות הכללית של החברה ודרכי פעולתו ובכלל זה גם מכירת נכסים שבבעלותה.
ההחלטה על פירוק החברה נתונה רק ביד בעלי המניות.
הרי לך שמאפייני הבעלות בחברה מתחלקים בין שלשה גורמים שונים.
פרט נוסף המאפיין חברה בע"מ ומבדיל אותה מבעלות רגילה הוא כמובן העובדה שאין לבעלי המניות למנכ"ל ולחברי הדירקטורין כל אחריות אישית לחובות החברה ואי אפשר לגבות מהם כלל.

א. מעמדם של בעלי המניות

ע"פ החוק המודרני החברה הינה אישיות משפטית וכלכלית בפני עצמה ואף אחד משלשת הגורמים אינו נחשב לבעלים . . .
גם האג"מ אה"ע א:ז הסכים שלבעלי מניות יש דין בעלים אך הפליג לחדש דרק אותם המחזיקים ברוב מניות השליטה נחשבים כבעלים אבל בעלי המיעוט אינם כבעלים כיון שבפועל אין להם כל דעה והשפעה בעניני החברה.
אך לענ"ד סברא זו רחוקה מאד ואינה מתישבת על הלב, דלא יתכן שבעלי אותה הזכות לכשיקשרו ברית ביניהם ויהיו הרוב יהיו כבעלים, וכשיתהפך הגלגל וימצאו עצמם במיעוט אע"פ שעדיין אותן הזכויות הקיניניות בידם, כיון שאבדה השפעתם יפקע מהם שם בעלים, דאטו ההשפעה היא שיוצרת הבעלות?! . . .

https://www.promarket.org/2020/11/22/transaction-man-book-excerpt-adolf-berle/
https://www8.gsb.columbia.edu/richman/sites/richman/files/Nicholas%20Lemann%20_%20Berle%20%2B%20Political%20Economy%20_%202.pdf

Institution Man *by Nicholas Lemann*

The Modern Corporation and Private Property (by Adolf Berle) had two central arguments: first, that a relatively small number of corporations had rapidly come to dominate the American economy, and second, that because these corporations had so many shareholders (the biggest one, American Telephone and Telegraph, had more than half a million of them), **they represented a historically new kind of economic institution that was not under the control of its owners** . . . Adam Smith's conception of the market no longer applied, because the owners of businesses were no longer vigorous entrepreneurs, they were passive and distant from the enterprise. **Control lay in the hands of managers and directors who were not significant owners. There was not yet a theory or practice of economics or government big enough to encompass these developments.** . . .

The one immediate challenge to Berle's big ideas about corporations came from a Harvard law professor named **E. Merrick Dodd** . . . (Dodd) thought Berle was looking for a way to restore the shareholders' power over management—to reclaim their rights as owners. Understanding this to be Berle's position, Dodd then argued against it: he **said corporations had a broad "social responsibility" to their employers, their communities, their customers, and the public, not merely an economic responsibility to their shareholders. The executives of the great new corporations should see that "they are guardians of all the interests which the corporation affects and not merely servants of its absentee owners,"** and the law should see to it that they be permitted to follow this impulse even if their shareholders objected.

But by the time Berle was writing The Modern Corporation and Private Property, he had moved away from any concern he may have had for shareholders. Their disempowerment was merely a piece of evidence that Berle used to sound the alarm about the excessive power of the men who were running corporations—and therefore, really, the country. (It also differentiated his theories from those of the thinkers he thought of as his competition, Adam Smith and Karl Marx, since they both had posited that capital controlled capitalism, but Berle was saying that was no longer the case.) He believed that the big corporation itself was the problem, and that government had to be empowered to counteract it . . .

Some people start out as optimists, seeing the world as a shimmering field of unrealized possibilities, and as they age they become pessimistic, preoccupied with everything that can go wrong. Adolf Berle had an opposite progression . . . In his thirties, in New York, he perceived in the rise of the corporation a basic threat to American democracy. But in his fifties and sixties, he believed he was living under a strong, benign, lasting social order, one he had helped to create: **domestically and economically, the tamed, socialized corporation** . . .

Berle still firmly believed in the central finding of The Modern Corporation and Private Property: that because the corporation's stockholders were so widely dispersed (by now AT&T had more than a million shareholders), there was no relationship between ownership and control . . . **Berle recalled his pre-New Deal argument with Professor Merrick Dodd of Harvard Law School, and magnanimously acknowledged that Dodd had won: "stockholders do not hold the center of the corporate stage right now." Corporations safely could, and had, become socially responsible in the way Dodd had envisioned.**

Sentiments like Berle's were everywhere in the 1950s . . . One of Berle's many friends . . . was John Kenneth Galbraith . . .

YERUSHALMI BAVA METZIA 6:2
(Presumptive context: A statement that workers may back out of contracts without penalty)
Rav said:
"*because the Children of Israel are avadim* (slaves/servants) *to Me*" – Israelites cannot/must not acquire each other.
Said Rav Yochanan:
The text is about an *eved ivri* (Jewish slave/indentured servant).

According to Rav's opinion –
the worker and the householder are each able to back out;
According to Rav Yochanan's opinion –
the worker is able to back out, but not the householder;

רב אמר:
כי לי בני ישראל עבדים - אין ישראל קונין זה את זה.
א"ר יוחנן:
עבד עברי היא מתני'.

על דעתיה דרב -
בין פועל בין בעל הבית - יכול לחזור בו
על דעתיה דרבי יוחנן -
פועל יכול לחזור בו ולא בעל הבית:

YEDID NEFESH (Commentary on Jerusalem Talmud; R. Yechiel Avraham Barlev, contemporary)
According to Rav's opinion . . .
just as the worker isn't bound to the householders, so too the householders aren't bound to the worker.
According to R. Yochanan's opinion . . .
that learns from *eved ivri* that a worker can back out (but not the employer),
(the logic is:)
just as the *eved* may leave in the middle of the six years, but not the householder;
just as the *eved ivri* may not be sent away in the middle of his six years.

RESPONSA OF R. MEIR OF ROTHENBERG (Sefer Sinai veLikkutim #640)
We find this difficult:
But a worker has the legal status of *eved ivri*,
since the reason we say that "a worker can back out even in midday" is that we derive this from the rule that an *eved ivri* leaves his servitude by paying back his purchase price with a proportional deduction, because we give all the leniencies of an *eved ivri* to a worker via *kal vachomer*:
If an *eved ivri,* who violated a prohibition and transgressed "*because the Children of Israel are avadim to Me* – and not *avadim* to *avadim"*, and whose body is acquired – and yet we are lenient with him,
all the more so a worker!? . . .

"The Ethics of Competition: A Comparison Between Jewish and Antitrust Law"
by Mark Katz, Davies Ward Phillips & Vineberg LLP
Jewish Lawyers Network Law Conference: Comparing Modern & Talmudic Law Systems
December 9, 2013

GUIDING PRINCIPLES OF MODERN COMPETITION LAW
1. Competition enhances consumer welfare and leads to economic efficiency
2. Ease of entry is a fundamental component of competitive markets
3. The goal of the law is to protect competition and not competitors

THE "ETHICS" OF COMPETITION
*In contrast to the "modern approach", competition is suspect from a Jewish ethical/moral perspective
Yevamot 78b – Eliminating an individual's ability to earn a livelihood is the equivalent of murder
Makot 24a – According to David HaMelech, one of the eleven principle of halakhic life is that one should not compete with another's business

"RUINOUS COMPETITION: EXAMPLES"
The Aviasaf: It is forbidden to open a store at the entrance of a *mavoi satum* (dead-end alley) if a similar store is already located further inside the alley
The *Rama*: rival publisher of the *Mishneh Torah* is prohibited from competing against the original publisher because this would ruin the latter's business
*Mas'at Binyamin:*A new entrant cannot start up a business where it is clear that the community can only support one business of this kind

"WHAT IS RUINOUS COMPETITION?"
The Broad View:
Rav Moshe Sofer: It is only necessary to demonstrate that a particular line of business or source of revenue is ruinously affected, not the business/livelihood as a whole
Rav Moshe Feinstein: Not limited to destroying the original business owner's livelihood – extends to taking away his/her ability to afford as much as an average person in that socioeconomic class

The Narrower View:
The *Rama*: Prohibition does not apply if the new merchant is offering better prices or better quality of merchandise
Rav Ezra Basri: One can open a competing business but not solicit existing customers (no advertising)
Chavot Yair: Competing is technically permitted (for local residents) but it is a sign of piety not to do so
*(Rav Dr.) Aaron Levine (z"l): Prohibition does not apply if the original business has the ability and resources to modify its operations in order to compete

"2015 SUMMER BEIT MIDRASH RESPONSUM", *by Rabbi Aryeh Klapper*

What are the ends of halakhic competition law?

The standard presentation[1] contrasts Halakhah with a hypothetical free market position. The assumption behind this presentation is that the free market maximizes economic growth and overall economic wellbeing, but that halakhah sometimes has moral values that take precedence over economic growth or personal economic interest.

While researching this subject, I discovered that time and time again I mistakenly conflated free markets with competitive and efficient markets. Free, that is to say unregulated, markets, are often rapidly dominated by the powerful and converted into monopolies. Regulation is necessary to maintain competitive and efficient markets, which are economically superior.

The assumption that halakhic regulations have moral rather than economic purposes[2] is therefore unwarranted. Halakhic regulations may have economic purposes. Furthermore, while competitive markets generally serve the overall economic good, this is not necessarily the case for specific economic subsectors, whose interests may be better served by protectionism. Put most strongly, there is no compelling evidence that halakhic regulation is ever intended to run counter to the economic interest of the Jewish community, and we should be open to viewing halakhic disputes as grounded in disparate economic viewpoints rather than in differing moral viewpoints or differing balances of morality and economics.

Speaking very broadly, it is possible to say that there are two worldviews regarding appropriate Torah commercial policy, each of which can be rooted in Scripture.

1) Immediately after Adam and Eve were banished from the Garden, there were no rules and regulations for commerce. Rather, all transactions were freely negotiated, and the invisible hand of the Market created optimal efficiency, economic growth, and consumer satisfaction. Regulation was introduced only when Nimrod began his totalitarian reign. Since then, regulation has been necessary to overcome the market distortions introduced by political power.
   BOTTOM LINE: The goal of regulation should always be the restoration of an undistorted market.
2) When human beings were expelled from Eden, they had no experience creating a society. The first attempt to negotiate a private transaction – Cain and Abel trading wool for grain – ended in murder. Education and other collective goods could not happen until the establishment of the עיר/*polis*, i.e. of collectivities with the power to coerce their members.
   BOTTOM LINE: Fair economic arrangements are possible only under the umbrella of state power, and the state must maintain unlimited regulatory authority to counteract the inevitable injustices and undesirable outcomes created by private power imbalances.

[1] See inter alia: Tamari, Levine, Jachter, Katz
[2] I use the opposition in its conventional sense, not to imply that economic growth is not itself a moral good.

<u>From Maimonides to Microsoft: The Jewish law of copyright since the birth of print</u>

by Neil Weinstock Netanel and David Nimmer

(from Chapter 2) Rabbinic authorities have, indeed, expounded upon the nature of authors' and publishers' rights under Jewish law, or "halakha," since the early sixteenth century, some 200 years before modern copyright law is typically said to have emerged full-grown from Parliament's brow with enactment in 1710 of the United Kingdom's Statute of Anne. Our exploration spans from 1518, when a Rome rabbinical court prohibited reprinting a trilogy of Hebrew grammar books without permission of their author or publisher, to the lively debates over private copying and Internet downloading among rabbinic jurists in Israel today . . . Among those rulings, we begin with Moses Isserles' seminal dictum on Jewish copyright law, issued in Krakow, Poland, in 1550, in a bitter dispute over rival print editions of Moses Maimonides' iconic code of Jewish law, the *Mishneh Torah*. As we shall see, Isserles' reasoning reverberates in the ultra-Orthodox court's ruling on Microsoft's petition . . .

In fashioning a Jewish copyright law, the rabbis have grappled with many of the same issues that have long animated secular copyright jurisprudence: How long should copyrights last? Should copyright consist only of the exclusive right to print and reprint a book's original text, or should it include the exclusive right to make translations, abridgements, and new, modified editions as well? For that matter, should authors (or publishers) always have an exclusive right, or should they sometimes have only a right to receive reasonable compensation, perhaps just enough to cover their investment in creating the work, but no more? In that regard, is copyright a broad property right or, rather, a more limited form of protection sounding in trade regulation, unfair competition, unjust enrichment, state-awarded privilege, or a combination of those doctrines? Which law should be applied to a copyright dispute whose litigants reside in different countries? Should copyright extend to non-commercial copying, including Internet downloading for personal use and copying for classroom instruction? If copyright law allows individuals to make copies for their own use, can authors prohibit copying anyway by distributing their work subject to some form of "shrink wrap" mass market contract that obligates the recipient not to copy?

. . . Jewish and secular copyright law share common origins. Both grew from early efforts of jurists and ruling authorities to grapple with a central challenge posed by the technology of print: how to give publishers of worthy books sufficient security for them to undertake the significant investment required to bring a book to print without being undercut by a rival publisher who reprints the same book. Prior to the advent of print, Jewish law saw no need to recognize an exclusive right of authors or scribes in their manuscripts. Indeed, Jewish law at that time encouraged the widespread copying, sharing, and dissemination of works of Jewish learning and liturgy. **But with the invention of printing technology, rabbinic decisors, like their secular and papal counterparts, sought to carve out a legal regime that would encourage the printing and widespread dissemination of books of Jewish learning and liturgy, a regime that required a balance between enabling the first to print a particular book to recover his investment in that printing while still fostering the availability of books at a reasonable price, typically by allowing others to print and sell the book after a certain period of time.**

Yet, despite the commonalities between Jewish and secular law in regulating the book market, when we refer to rabbinic rulings and pronouncements on questions of publisher's and authors' rights as "Jewish copyright law," we do so somewhat loosely. Rabbinic commentators have not actually used the term "copyright," or its modern Hebrew equivalent, "zkhut ha-yotsrim," until the last couple of decades. Further, the halakhic principles, methods of analysis, and doctrinal rules . . . often diverge sharply from those of Anglo-American and Continental European copyright law . . .

Questions:
Is the Jewish/Torah interest fostering more books, or more intellectual creativity?
More popular education, or a more learned scholarly elite?
Authors who can support themselves, or an economy in which scholars presumptively have other jobs?