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Employee Agreements Not To Compete in American Law, Economic Theory and Halakhah

In a “post-employment restrictive covenant,” an employee agrees, upon being employed, to conform to certain conditions following termination of employment with his present employer. Thus, for example, a restrictive covenant might include an agreement by the employee not to enter, post-employment, into the same business for a specified or unlimited time period within a specified geographic area. Other clauses of the covenant could relate to trade secrets, confidential business practices and customer lists.

Our purpose here will be to investigate how employee agreements not to compete are treated from the perspective of American law, economic theory and Halakhah.

Employee Agreements Not To Compete: American Law

American law, as John R. Boatright points out, regards non-competition agreements as inherently unfair. These agreements are almost entirely for the benefit of the employer and inflict a burden on employees that is out of proportion to any gain. At least twelve states consider them so

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unfair that they prohibit such agreements. In states that permit the agreements, a court nonetheless will outlaw a given agreement if it determines that the agreement's purpose is merely to protect an employer against competition. To be valid, the agreement must minimally meet the test that it is designed to protect the employer's legitimate entitlements, such as proprietary information or customer relations. To be sure, other tests must be met as well. These are: (1) the restrictions must not be greater than what is required for the protection of the employer's legitimate interests; (2) the restrictions must not impose undue hardships on the ability of an employee to secure gainful employment; and (3) the restrictions must not be injurious to the public.

In determining whether the restrictions in a particular agreement are greater than those required to protect the entitlement of the employer, the courts will focus on: (1) the time period specified; (2) the geographical area; and (3) the type of work that is excluded.¹

Employee Agreements Not To Compete: Their Rationale In Economic Theory

Paul Rubin and Peter Shedd offer an economic analysis of the common law treatment of employment contracts not to compete.² These authors conclude that the common law treatment of this phenomenon is efficient in that it promotes an optimal amount of investment in human capital. Standing at the core of Rubin and Shedd's analysis is Gary Becker's pioneering work on the impact of on-the-job training in the labor market.³

Becker's work stresses that there are two types of on-the-job training, which he calls general training and specific training. General training is defined as the type of training that, once acquired, is equally useful in all firms. These general skills, which include such things as typing, learning to drive, and learning how to use a computer, are found frequently in the labor market. Specific training is the type of training that enhances productivity only in the firm where it is acquired; and the value of the training is lost once the worker leaves the firm. An illustration of specific training is learning how to drive a tank in the Army or memorizing the hierarchical nature of a particular organization.

In reality, much on-the-job training is a mixture of general and specific training. Nonetheless, the conceptual separation into purely general and purely specific training is extremely useful.

The central issue Becker addresses is: who pays for general and specific on-the-job training? Is it the worker or the employer? Preliminarily,

let us note that both general and specific training increase the worker's productivity and results in the firm earning higher total revenue. In technical terms the training increases the value of the worker's marginal product (VMP) for the firm.

There is not sufficient economic incentive for a firm to provide general training. Any firm that provides this training will be forced by competitive pressures to compensate the trainee in the post-training period in accordance with his or her higher VMP. But there is no guarantee that the recipient of the general training will choose to stay with the firm that provided the training. Investing in general training exposes the firm to the prospect of incurring the cost of the training yet reaping none of its benefits.

This leads Becker to assert that a firm will not provide general training unless the worker pays for general training by accepting a lower "trainee wage" during the training period. In the second period, workers get the returns from the training by receiving a wage that equals the value of their post-training marginal product. Firms provide general training, therefore, only if they do not pay any of the costs.

There are many examples of workers paying for general training through lower wages. It is common for trainees in formal apprenticeship programs to receive low wages during the training period, and to receive much higher wages after the training is completed. Similarly, medical interns earn low wages and work long hours during their residency, but their investment pays off substantially once they complete their training.

We may now turn to the issue of who pays for specific training. The salient consideration here is that the productivity gains resulting from the training vanish once the worker leaves the firm. This means that market forces will not work to force the firm providing the training to raise the trainee's wage to his higher VMP once the training is completed. Accordingly, the firm could incur the cost of specific training and collect the returns by not raising the trainee's wage to his higher VMP in the post-training period. But, if the worker quits in the post-training period, the firm suffers a capital loss. The firm, therefore, would hesitate to pay for specific training unless it has some assurance that the trained worker will not quit.

Is there sufficient incentive for the worker to incur the cost of specific training? By making himself more valuable to a particular firm, the worker who invests in firm-specific training can count on earning a higher wage in the post-training period. But, let us not lose sight of the fact that firm-specific training is not portable. If the worker gets laid off,

he loses his investment. The worker, therefore, is not willing to invest in specific training unless he is confident that he will not be laid off.

The upshot of the above analysis is that both the worker and the firm are reluctant to invest in specific training. However, the phenomenon of specific training carries with it the potential for mutual gain for both worker and firm. Market forces will therefore work out to produce for the worker a post-training wage that is higher than his productivity elsewhere, but lower than his VMP at the firm providing the specific training. Because both the firm and the worker share the returns of the specific training, the possibility of job separation in the post-training period is eliminated.

Within the framework of Becker's analysis, there is no need for any contractual term limiting the future market behavior of the worker, as market forces will generate solutions without contracts. Yet many employment contracts do contain clauses limiting the future behavior of employees, and such contracts are common sources of legal disputes. Thus, there must be some aspects of real-world labor markets that Becker's analysis does not fully capture. The lacuna in Becker's analysis, Rubin and Shedd point out, occurs in certain types of general training for which the worker will not pay.

Assume, for example, that it takes a firm one day to teach a worker the details of a trade secret valuable to many other firms and worth \$100,000. The value of the information is so great that the worker cannot pay for it by accepting reduced wages. Moreover, because of difficulties in borrowing with human capital as collateral, there may be no other way for the worker to finance the acquisition of human capital with sufficiently high value. Human capital cannot serve as collateral for loans because of the impossibility of compelling specific performance. In this circumstance, the firm would want the worker to sign a non-competition clause, for such a clause would indicate that the worker could not use the training acquired elsewhere.

Once the worker has received this training, however, an incentive for opportunistic behavior is created. The worker has an incentive to violate the contract and then profit from the training—either by going to work for himself or by going to work for another firm, which will pay him a premium because of the value of this training. In this situation, the worker attempts to appropriate for himself the value of training for which he did not pay. Thus, if the non-competition clause is not binding, firms will be forced to use more costly methods of production in some circumstances in order to protect their proprietary information.

To be sure, court-enforced restrictive covenants forestall opportunistic behavior on the part of employees, but these covenants can be used as an opportunistic device by employers as well. Specifically, if the courts were to enforce these covenants in a blanket way, the employer would be encouraged to design the clause to maximally reduce the worker's future mobility. Against a background of severally limited alternative employment possibilities, the worker would be made to agree to "overpay" for the general training he is receiving in the form of a wage below the full value of his marginal product.

The Economic Efficiency Of Common Law

In their survey of the common law treatment of restrictive covenants, Rubin and Shedd claim that the legal rules adopted are economically efficient. Specifically, the rules operate to forestall opportunistic conduct on the part of both employer and employee, and hence promote an optimal investment in human capital.

One area Rubin and Shedd consider is the treatment of customer lists. The most important distinction in law here is the amount of effort required to develop customer lists. If the list of customers is generally available to firms engaged in a particular business or is a list of one-time customers, the courts have refused to protect the firm's property in this list. To illustrate: courts have held to be unreasonable a covenant not to compete that was signed by a real estate salesperson and also one signed by a desk clerk of a car rental agency. These covenants were declared unenforceable since the courts found that these employees had no special knowledge about the employer's past, present, or potential customers. Furthermore, in the real estate and car rental industry, the customers tended to be transient rather than repeat customers.

Conversely, if a firm can show that it spent time and resources in developing its customer list, it is entitled to protect the list, and a restrictive covenant to accomplish this is recognized.

What the above approach says, according to Rubin and Shedd, is that, if resources are required to establish a list of customers that would not be protected, there would be an incentive to invest too few resources in developing lists.

Recall that economic efficiency requires the courts to protect the interest of the employee against opportunistic behavior on the part of the employer. The courts have done this with respect to the geographic scope of restrictive covenants. Specifically, the courts will only enforce

restrictive covenants that disallow W to compete for the customers he dealt with while employed by E. But, the courts will not enforce a non-competition agreement against W when the latter is competing for customers of E outside the sales territory where W worked when he was employed by E. What this criterion does is to prevent opportunistic behavior on the part of E. Specifically, by forbidding competition with respect to former customers, the courts are probably preventing W from using capital for which he did not pay. By allowing competition in other geographic areas, the courts are allowing W to utilize the general skills he acquired during his employment that were not considered in the non-competition covenant.⁴

Trade Secrets In American Law

Another area covered by a restrictive covenant not to compete is an employer's trade secrets. The courts, as Rubin and Shedd point out, allow employers to place a much broader geographical scope on restricting the use of trade secrets than on the use of customer lists. The courts will, however, protect the information only if it is confidential, but not if it is available to the general trade. In addition, to qualify for judicial enforcement of the covenant, the employer must be careful to demonstrate the importance of the information to him by taking steps to monitor its secrecy.

The following case illustrates the approach which makes the ruling depend upon the information involved. In *Orkin Exterminating Company, Inc. v. Mills*, the State Supreme Court of Georgia enforced a restrictive covenant that applied a non-competition limitation to the entire geographical area where the company was in business. The evidence showed that the pest control business was highly competitive and secret and that it required continued changes in engineering and technical skill. Since the employee had obtained knowledge about Orkin's secret processes and the company could have sent the employee anywhere to work, the Georgia Supreme Court held that the broad geographical restriction remained reasonable and enforceable. In sharp contrast, the courts have refused to enforce covenants not to compete based on protecting the employer's confidential information in the car rental business, the real estate sales business, and the travel agency business. These latter cases involved companies that did not possess specialized information. Indeed, the courts held that what the employees had learned during their employment could have been learned from any similar company.⁵

Trade Secrets In Economic Theory

A trade secret may be original enough to qualify for copyright or patent protection. But such protection is not automatic; it must be applied for. To be sure, the law protects a trade secret less than it does a copyright. Whereas the copyright holder enjoys an exclusive property right, the possessor of a trade secret enjoys no such similar right. If a trade secret is lost and someone accidentally discovers it, no remedy is afforded to the possessor of the trade secret. Similarly, if a competitor unmask the trade secret by means of taking the product apart and figuring out how it was made (henceforth referred to as reverse engineering), no remedy obtains for the possessor of the trade secret. The law protects a trade secret only from misappropriation or from a breach in confidence.

From an economic efficiency perspective, trade secret law should encourage innovation and better methods by protecting the possessor of a trade secret against misappropriation and breach of confidence. A conflicting economic goal, however, is to discourage duplicative effort. Trade secret law promotes this value by not protecting the possessor of a trade secret against reverse engineering, independent discovery, and accidental misappropriation. Noting this balance, David Friedman, William Landes and Richard Posner posit that the current structure of trade secret law may be the best compromise among the competing economic considerations.⁶

Friedman, Landes and Posner find a distinct efficiency advantage in the American dual system of trade secret and patent protection.

Obtaining patent protection involves significant costs of preparing the patent application. Protecting a trade secret avoids these fixed costs, but adds expenditures to prevent disclosure of the secret. The latter cost should be roughly proportional to the value of the secret to prospective appropriators. Given the above trade-off, trade secret protection should not be viewed as the way the law treats lesser inventions that don't qualify for copyright protection. Instead, the dual system should be viewed as an optimal arrangement from the perspective of economic efficiency. Illustrating the optimality of the dual system are the following three cases:

(1) A has a patentable invention, and he believes that it will take as long or almost as long as the term of the patent for anyone else to invent, but the invention has only modest economic value. Here, trade secret protection may well be cheaper than patent protection, and the difference may exceed the difference in benefits arising from the fact that patent protection is broader and lasts longer.

(2) A has a patentable invention, and he believes it will take much longer than the term of the patent for anyone else to invent. Here, A will seek the trade secret route if he thinks that doing so will give him a greater return. By doing so, he will in effect be contending that the social value of the invention is greater than the patent law assumes.

(3) A has a non-patentable invention, and he expects to reap a substantial return from it only if it can be kept secret. The case assumes that the government thinks that someone else will come up with it shortly and therefore that granting the invention a patent would over-reward him. A offers to demonstrate that the invention is not obvious, and he does so by keeping it secret. Alternatively, the third case need not reflect a disagreement between the inventor and the patent authorities. It may merely reflect the fact that patent law cannot be tailored finely enough to cover every case. Everyone may agree that the invention will be duplicated in, say, five years, but since patent law contains no provision for patents that expire in five years, awarding a patent to A will substantially over-reward him. The Patent Law Office correctly refuses the patent and the inventor correctly uses trade secret protection instead.

Trade secret law hence supplements the patent system. An inventor chooses trade secret protection when he believes patent protection is too costly relative to the value of his invention, or that it will give him a reward substantially less than the benefit of his invention. The inventor reaches that conclusion either because his invention is not patentable or because the length of patent protection is insufficient. By successfully maintaining his trade secret, he provides evidence that his belief was correct.

Post-Employment Agreements Not To Compete and *Dina De-Malkhuta Dina*

From the perspective of Halakhah, perhaps the most basic issue to consider is whether Samuel's dictum of "the law of the land is law (*dina de-malkhuta dina*)"⁷ is applicable here. The dictum relates to disputes between Jews in matters of civil law. Four views regarding the scope of this rule can be identified.

(1) Taking the most narrow view on the scope of *dina de-malkhuta dina* is the author of the *Shulḥan Arukh*, R. Joseph Karo. In his view, Halakhah recognizes *dina de-malkhuta* only with respect to matters in which the government has a financial stake, such as taxes and currency regulation.⁸

(2) Adopting a much wider scope for *dina de-malkhuta* is Rama, R.

Mosheh Isserles. In his view, *dina de-malkhuta* applies to civil law generally. Conflict between Halakhah and *dina de-malkhuta*, in his view, is generally decided in favor of *dina de-malkhuta*.⁹ Exceptions to this rule, however, apply. It does not hold in relation to the law of inheritance;¹⁰ nor does it give Jews the option of taking their dispute to secular courts,¹¹ or to have the secular court's evidentiary procedure imposed on them.¹² Moreover, *dina de-malkhuta* is recognized only when the law involved either benefits the government or was enacted for the benefit of the people of the land.¹³

(3) Disputing Rama, R. Shabbetai b. Meir ha-Kohen (Shakh) avers that in litigation between Jews, the law of the land is valid only when the non-Jewish law does not contradict Halakhah, or in a case where the practical application of Halakhah is not clear.¹⁴

(4) Reacting to R. Shabbetai b. Meir ha-Kohen's line, Hazon Ish, R. Abraham Isaiah Karelitz, sharply disputes the notion that lacunae exist in Halakhah. For any issue, a halakhic position can be extrapolated from legal precedents and rules. But following Shakh, he agrees that, if *dina de-malkhuta* contradicts Halakhah, even if the Halakhah was derived by means of extrapolation, the law of the land must be set aside.¹⁵

Many decisors regard R. Isserles' position as normative.¹⁶ Now, if we adopt R. Isserles' view, the secular law treatment of post-employment covenants in a given state should prevail. The matter cannot, however, be resolved so simply. Currently, there is no legislation on this matter. Instead, the legal treatment of post-employment covenants not to compete is all a matter of common law. Judges use their discretion to decide how post-employment covenants not to compete should be treated. Common law often follows precedent, but judges are not bound by it. What, we must therefore ask, is the scope of *dina de-malkhuta*? Does it apply only to legislation or does it extend even to the common law? Addressing himself to this issue, Rama rules, quoting Rashba (R. Solomon b. Abraham Aderet), that *dina de-malkhuta* applies only to laws of the government, but does not apply to the discretionary authority of judges who make use of their own books of laws to decide cases. Giving legitimacy to the law of judges is tantamount to nullifying the law of the Torah.¹⁷ Following this line, R. Jehkhtiel Asher Zalman Zausmir describes the law of judges as discretionary decisions based on Greek and Roman law and innovations required by new conditions. In disputes between Jews, the law of judges should not be followed; instead, the law of the Torah should prevail. *Dina de-malkhuta* has its application only in laws the king directly promulgates.¹⁸ In his treatment

of this issue, the contemporary scholar R. Shlomo Dikhovsky points out that legislation is also subject to judicial interpretation. What sets common law apart is that common law is not an interpretation of the king's edict but instead gives the judge wide latitude to base his decision on other systems of law.¹⁹

The upshot of the above analysis is that in a dispute between Jews in a matter relating to a post-employment covenant not to compete, *dina de-malkhuta* does not prevail. We therefore must proceed beyond trying to resolve the issue by appeal to *dina de-malkhuta dina* and must extrapolate the halakhic perspective on the post-employment covenant not to compete.

Post-Employment Agreements Not To Compete and Halakhah

Addressing the issue of the legal status of a non-competition labor agreement is the contemporary Israeli scholar, R. Yisrael Grosman. The particulars of the case are as follows: E offered to train and hire W to work in his factory to produce good X. E stipulated further with W: "In the event you leave my employ, you may neither work for someone else to produce good X nor become yourself a manufacturer of this good. If you go into competition with me in the future I don't want to train you now." W raised no objections to these stipulations and began working for E. Ten years later W left E's employ and desired to produce good X.

In assessing whether W has a right to breach his agreement with E, R. Grosman brings to bear a number of considerations. One consideration is whether the non-competition agreement is binding by virtue of contract law. Take note that in the event W violates E's stipulation and competes with him in the future, E has no power to undo the training he provided W. E's inability to vitiate the undertaking he did for W makes any condition he attaches to the provision of this undertaking invalid in the first place. R. Grosman draws support for this contention from a comment of R. Akiva Eger at *Mishnah Pe'ah* 7:11.

One of the agricultural gifts to which the Torah entitles the poor in Israel in Temple times is *shikhḥah* (forgotten produce). This refers to sheaves forgotten in the field during the moving of the sheaves to the threshing floor, as well as to standing produce that the harvester overlooked. In regard to the farmer's *shikhḥah* obligation the *Mishnah* rules: "If someone says: 'Behold I am reaping on condition that what I forget I shall take,' he is subject to the law of *shikhḥah*." The stipulation is invalid, explains *Tiferet Yisrael*, R. Israel b. Gedalyah Lipschutz, because

of the principle that if one stipulates a condition that, if effective, would override the law of the Torah, the condition is not valid.²⁰

Commenting on R. Lipschutz, R. Akiva Eger avers that one can adduce a more fundamental reason to invalidate the farmer's stipulation. Specifically, the farmer's declaration regarding the consequence of non-fulfillment of his stipulation makes no sense. If his condition is violated and the reaping remains *shikhḥah*, the crop cannot revert to the pre-reaping condition; the reaping cannot be undone. Since the farmer cannot undo his action in the event his stipulation is not fulfilled, his stipulation is at the outset invalid.

A stipulation is valid, according to R. Akiva Eger, only when the undertaking at hand can be viewed as a legal status subject to change (*ḥalot*). In such a case, the obligator can stipulate that, in the event his condition is not fulfilled, the legal status of his undertaking should change. To illustrate: L lends B \$1,000 and stipulates that the Sabbatical year should not cancel B's obligation to pay back the \$1,000. L further stipulates that in the event the Sabbatical year cancels the debt, the original capital transfer should retroactively take on the character of a trust. Since the obligator here stipulates a retroactive change in the status of his capital transfer, the *ḥalot* condition is satisfied. Here, L's stipulation would be fully effective but for the rule that any stipulation that overrides a prohibition of the Torah is not valid.²¹

It follows from the above analysis that a post-employment agreement not to compete cannot be achieved by means of Jewish contract law.²²

This conclusion, however, can be put to question. If a conditional agreement must satisfy the *ḥalot* condition to be valid, then a post-employment agreement not to compete can be crafted so as to satisfy this condition.

Before we spell out the form the post-employment agreement could take so as to satisfy the *ḥalot* condition, let us note parenthetically that a conditional agreement, to be valid, must satisfy the *tenai kaful* (lit. "double condition") requirement. This requirement of contract law makes a conditional clause unenforceable unless the stipulations expressly spell out the consequences of both fulfillment and non-fulfillment of the clause.²³ With the aim of satisfying both the *ḥalot* requirement and the *tenai kaful* condition, the post-employment agreement not to compete could be crafted in the following manner: E agrees to teach W a trade secret or train him with a particular skill without charge. E further stipulates that in the event W reveals the trade secret or goes into competition with him, a fee of a specific amount will

retroactively be owed for the service provided. What this mechanism does is to *retroactively* change the provision of the training and/or the trade secret from a gift into a service done for a fee.

Consider a variation of the above formulation. E commits himself without charge to teach W a trade secret and/or train him with a particular skill. W agrees that in the event he reveals the trade secret or goes into competition with E he will pay a penalty of specific amount to E. This formulation does not meet the *halot* condition because non-compliance with the condition does not *retroactively* change the legal character of the transaction. Instead, non-compliance merely triggers for W a new obligation, which becomes operative at the moment he violates the non-compliance clause.

Once it is recognized that, to be valid, the non-competition agreement must retroactively call for the contract to take on the character of a sales transaction in the event of non-compliance, the price terms of the agreement will be subject to review on the basis of the law of *ona'ah* (price fraud).²⁴ This law confers upon a market participant the right to conclude his market transaction on the basis of the competitive norm.²⁵ Depending on how widely the price of the subject transaction departs from the competitive norm, the injured party may have recourse to void or adjust the transaction. Provided the discrepancy is assessed to be within the margin of error,²⁶ the plaintiff's right to void the transaction is recognized when the difference between the sale price and the competitive norm is more than one-sixth.²⁷ When the differential is exactly one-sixth, neither of the parties may subsequently void the transaction on account of the price discrepancy. The plaintiff, however, is entitled to full restitution of the *ona'ah* involved.²⁸ Finally, third-degree *ona'ah* occurs when the sale price differs from the market price by less than one-sixth. Here, the transaction not only remains binding, but, in addition, the complainant has no legal claim to the price differential.²⁹

In the case at hand, the trade secret and the training provided are both subject to a fair market evaluation. Should the price terms turn out to be excessive, the agreement is subject to adjustment and even cancellation, in accordance with the law of *ona'ah*.

Asmakhta

Another matter to consider in evaluating the validity of a post-employment agreement not to compete is the issue of whether such an agreement falls short of Halakhah's standard for a binding commitment. For

an obligation to become legally binding two critical tests must be met. First, the commitment must be made with deliberate and perfect intent (*gemirat da'at*). Second, the commitment must generate reliance (*semikhah da'at*) on the part of the party to whom it was made.³⁰ Both these related conditions may be absent in a transaction that projects the finalization of an obligation into the future, becoming operative only upon the fulfillment of a specific condition. A transaction containing these elements is referred to in talmudic literature as *asmakhta*. With the obligation becoming operative only when a condition is fulfilled, the person obligating himself may very well rely on the probability that the condition will not be fulfilled, and thus that he will not become obligated. Because the presumption of perfect intent was lacking, the presumption that the commitment generated reliance is equally lacking.

A transaction characterized as *asmakhta* is invalid *ab initio*.³¹ If a post-employment agreement not to compete is an *asmakhta*, any attempt on the part of the employer to enforce it is a form of extortion.

In the final analysis, the halakhic validity of the post-employment agreement not to compete hinges on whether it satisfies the various criteria *rishonim* have proposed as to what constitutes an *asmakhta* undertaking. In what follows we will present these various criteria and apply them to the post-employment agreement not to compete.

One school of thought, led by Rashi, takes the position that *asmakhta* obtains when A makes a conditional obligation to B, but can escape it altogether because he *partially* controls the triggering condition that makes the obligation operative. Let us illustrate this principle with a case discussed in the Talmud: A agrees to buy current vintage wine for B at the low price Belshafet marketplace. Furthermore, A stipulates that in the event he misses the window of opportunity to buy the wine while it is still cheap, he will make good to B the price differential involved. Now, if A acts quickly he can obtain the wine at the low price. If, on the other hand, A is negligent and tarrys, he will miss the window of opportunity and will be liable to B to make good on the difference in price. Since A relies on himself (*toleh be-da'at azmo*) to act quickly and avoid liability to B, he lacks firm resolve to make payment to B when it turns out that he missed the window of opportunity and faces the higher price.³²

A variation of the above case occurs when it is entirely within the control of the obligator to prevent the triggering condition. Illustrating this is the tenant farmer's (A's) stipulation to his landlord (B) that in the event he does not cultivate the field, he will make good on B's loss of a crop. Consider that whether the price of seed is high or low, it is still with-

in A's power to cultivate his field and avoid paying B for a lost crop. Because A realizes that he has no one to blame but himself if he ends up being liable to B, A resolves firmly to meet his obligation if it becomes operative. Here, A's stipulation does not take on the character of *asmakhta* unless he specifies a sum to indemnify B that is clearly in excess of B's for-gone income.

At the other extreme stands the case where the obligator has absolutely no control over the triggering mechanism. Illustrating this case is a wager in a game of chance. Since each player realizes that he has no control over the outcome of the game, each player fully and firmly resolves to turn over the pot to the winner.³³

Application of Rashi's criterion to the post-employment agreement not to compete should render this agreement null and void. Let us see why. Preliminarily, let us note that W's post-employment agreement not to compete with E may entail a considerable hardship for W if it comes to bear. This would happen if W is suddenly terminated and has no skill to enter an alternative profession. But it is partially within W's power to avoid the hardship the post-employment agreement not to compete entails. For one, W can be an exemplary worker and never give E a reason to fire him. In addition, W can pick up another skill in his spare time and avoid the dislocation effects separation from E would otherwise entail. While W has some control either to prevent the triggering of the event that signals his obligation not to compete or to ensure that if this obligation becomes operative it will not entail a hardship for him, it is not entirely within his power to prevent adverse consequences for himself in the event of his employment separation from E. W's post-employment agreement not to compete should therefore fall squarely into Rashi's *toleh be-da'at azmo* criterion for *asmakhta*.

Disputing Rashi's criterion, Rabbenu Tam regards the salient feature of *asmakhta* to consist of the circumstance where it is evident that both parties desire the completion of the underlying agreement and the conditional commitment is given merely as an assurance of good faith.³⁴

R. Tam's formulation of *asmakhta* is clearly satisfied in the post-employment non-competition case. Both E and W desire that their business tie should remain mutually satisfactory and continue indefinitely. As a matter of good faith, W agrees not to compete in the event he ends his employment tie with E.

Rashba advances still another criterion as to what constitutes *asmakhta*. Formulating an undertaking in terms of a penalty, in Rashba's view, is

what makes a conditional commitment an *asmakhta*.³⁵ Recall that formulating a post-employment agreement in terms of a penalty clause in the event of non-compliance fails the *halot* condition and hence makes the agreement invalid. Rashba's criterion for *asmakhta* hence adds no new legal impediment for the crafting of a valid post-employment agreement not to compete.

The broadest conceptualization of *asmakhta* is that of Rambam. In his view, any conditional obligation is an *asmakhta*.³⁶ Application of Maimonides' criterion to the post-employment non-competition agreement renders this clause null and void.

At this juncture, let us take note that *asmakhta* can ordinarily be counteracted by means of incorporating the phrase *me-akhshav* (lit., from now) into the agreement. To illustrate: A lends \$10,000 to B on the security of the latter's field, which has a value of \$15,000. A stipulates with B that if he is not paid in full within three years, A acquires possession of the field for the original capital transfer of \$10,000 he made to B. This arrangement is *asmakhta*. But, if B obligates himself *me-akhshav* to sell the field for \$10,000 if he does not repay the debt within three years, the agreement is fully valid. The logic of why *me-akhshav* counteracts *asmakhta* is that had B not unreservedly committed himself to A's condition, B would not have agreed to retroactively confer A title to his field from the time the loan was made.³⁷

Incorporation of the *me-akhshav* mechanism to the post-employment agreement not to compete is facilitated in consideration of the form this agreement must in any case take to conform with the *halot* caveat for conditional agreements. Specifically, at the outset, E must agree to confer W with a *gift* consisting of making him privy to his trade secret and/or furnishing him with job training. If W violates the non-competition covenant, E's gift *retroactively* reverts to a service for a specific fee.

What the above analysis has demonstrated is that the mechanism of contract has the halakhic capacity to implement a post-employment agreement not to compete. To be valid, such an agreement would have to conform to the guideposts of *halot*, *tenai kaful*, *asmakhta*, and *ona'ah*. What is legally possible is, however, not always the economically rational thing to do. Do the constraints Halakhah imposes on a post-employment agreement not to compete leave room for E and W to strike a deal of mutual advantage? Consider that E would not want to enter into such a deal unless he felt he was adequately protected in the event W breached the contract. Perhaps, E would not be satisfied with W's *me-akhshav* commitment alone, but, instead, would insist that W

deposit a specific sum in an escrow account and in the event W becomes non-compliant with the non-compete clause, this sum would automatically revert to E. If this is the type of protection E is looking for, the agreement would not get off the ground unless W could put together for the escrow account the sum E is looking for. Moreover, suppose we are dealing with a trade secret and E is convinced that the value of his trade secret will only increase in value through time. This expectation works only to increase the amount of money E would demand of W to be put up front in an escrow account.

Let us now consider the arrangement from the perspective of W. One disability for W, already noted, is that E would, in all probability, not want to rely on W's *me-akhshav* commitment alone, but, instead, insist upon an upfront escrow payment. Moreover, without guarantees for long-term job security from E, W would find the halakhically valid form of the non-competition agreement irrational from the standpoint of his economic self-interest. This is so because if W is laid off he will be forced to seek employment outside his area of specialization.

Finally, when E plans to teach W a trade secret, substantial difficulties will be encountered in setting a value on the trade secret. Consider that E does not put the trade secret up for sale; the trade secret hence has no objective value. Instead, the negotiations between E and W alone determine the value of the trade secret. We are dealing here with the classical bilateral monopoly model. Elsewhere we have demonstrated that the price terms of a bilateral monopoly agreement are not regulated by the law of *ona'ah*.³⁸ Because the parties to the negotiation are not equipped with the information they would like to know, coming to terms entails considerable difficulties.

What the aforementioned has demonstrated is that considerable difficulties surround the negotiations of a post-employment agreement not to compete. These obstacles may prove formidable to the extent of frustrating the parties from reaching an agreement.

Hin Zedek and the Post-Employment Agreement Not To Compete

Another principle R. Grosman invokes in evaluating a post-employment agreement not to compete is the ethical duty to make a commitment in "good faith." In the Talmud, Abbaye derives this duty from the biblical prohibition against false weights and measures. In this connection the Torah writes: "Just (*zedek*) balances, just weights, a just *eifah*,

and a just *hin* you shall have” (Lev. 19:36). Since the *hin* is a measure of smaller capacity than an *eifah*, its mention is apparently superfluous. If accuracy is required of a large capacity, it is certainly required in measures of small capacity. This apparent superfluity leads Abbayeï to connect *hin* with an Aramaic word for “yes,” *hen*, giving the phrase the following interpretation: Be certain that your “yes” is *zedek* (sincere) and (by extension) be certain that your “no” is *zedek* (sincere). If an individual makes a commitment or an offer, he should fully intend to carry it out.³⁹ The duty to ensure that a commitment is made in a sincere manner is referred to as the *hin zedek* imperative.

Recall R. Grosman’s conclusion that a post-employment agreement not to compete is not legally binding because it fails to meet the *halot* criterion. While the agreement lacks legal force, *hin zedek* requires W on moral grounds to abide by his commitment not to compete. Retracting from a verbal commitment brands the violator as untrustworthy, and the Jewish court will admonish and publicly reprove the offender for his misconduct.⁴⁰

R. Grosman’s contention can, however, be put to question. Breaking a promise is permissible in certain circumstances. Consider the following two scenarios:

1) A verbally commits himself to confer B with a largess. Subsequently, A has second thoughts and wishes to retract his commitment. Provided A made his commitment in “good faith,” his subsequent retraction is not unethical. Given the considerable expense involved, B presumably never relied on the promise and hence A’s retraction did not dash B’s expectations.⁴¹

2) A buyer, B, and a seller, S, commit themselves to a sales transaction. Before the transaction proceeds further to either the point of B making a deposit or the parties becoming legally bound, the market price of the item rises. On account of the price rise, S wishes to retract. Authorities dispute whether S’s retraction should be regarded as unethical.⁴² In this matter, R. Yeḥiel Mikhel Epstein, in his *Arukh ha-Shulḥan*, holds that S’s retraction would not brand him untrustworthy.⁴³

Both of the exceptions to the *hin zedek* rule have relevance to the case at hand. W’s promise to E not to compete jeopardizes his livelihood prospects. W’s promise amounts therefore to a promise to confer E with a largess. Retracting from a “good faith” promise to confer someone with a largess does not brand the obligator as untrustworthy. Moreover, if alternative employment opportunities for W shrink relative to what was available to him at the time he entered into his agreement with E, W’s retraction would not brand him untrustworthy.

Another consideration in evaluating the relevance of the *hin zedek* principle to the case at hand is the moral force this imperative exerts when the agreement at hand is an *asmakhta*. This would be the case, as discussed earlier, when the *me-akhshav* clause was not inserted. Given that the essential feature of *asmakhta* is that the obligator lacks firm resolve, entering into an *asmakhta* agreement violates *hin zedek* immediately at the moment the commitment was made. Now, if *asmakhta* violates *hin zedek*, then, the commitment has no validity on either a legal or moral level. An *asmakhta* agreement hence does not morally compel the obligator to make good on his commitment.

Lo Ta'ashok

Another legal principle R. Grosman invokes in evaluating the constraints Halakhah imposes on W in the period following his separation from E is Leviticus 18:13: "Do not [unjustly] withhold (*lo ta'ashok*) that which is due your neighbor." Included in the *lo ta'ashok* interdict is the prohibition to withhold compensation from someone who performed a service for you.⁴⁴ Let us apply this principle to the case at hand: E commits himself to teach W a skill or trade secret and stipulates no fee for this service other than that W should not go into competition with him. Because the *halot* condition is not met here, contract law cannot impose the non-competition clause on W. But, the non-competition clause should be viewed as E's stipulation of compensation for teaching W the trade secret or the skill at hand. Infraction of the non-competition clause violates for W the *lo ta'ashok* interdict.

R. Grosman finds precedent for his ruling in a similar case dealt with by Ḥatam Sofer, R. Mosheh Sofer: A granted B a certificate of qualification to engage in ritual slaughter (*sheḥitah*). A and B were in dispute whether B took upon himself an oath not to practice *sheḥitah* in A's territory. In adjudicating the dispute, R. Sofer pointed out that even if B never took an oath not to compete with A, B is nevertheless bound not to compete in A's territory. Notwithstanding that nothing explicit was stipulated in this regard, it is understood that part of A's compensation for conferring B with his certificate of qualification is that B should not practice *sheḥitah* in a manner that would undermine A's livelihood. Engaging in *sheḥitah* in A's territory hence violates for B the *lo ta'ashok* interdict. Disputing Ḥatam Sofer, R. Abraham Teomin maintains that it was not the usual practice to take a fee for conferring a certificate of qualification for *sheḥitah*. Consequently, if B goes into competition with

A, B cannot be said to violate *lo ta'ashok*. Nonetheless, it is customary, concedes R. Teomin, for A to take compensation for teaching B the skill of *shehitah*. Consequently, if A teaches B *shehitah* and nothing was stipulated regarding where B would be free to practice his skill, B is prohibited from entering into competition with A in A's territory. B is prohibited to do so on the basis of the *lo ta'ashok* interdict.

The aforementioned leads R. Grosman to the assertion that avoidance of *lo ta'ashok* forces W to adhere to the terms of the post-employment agreement not to compete.⁴⁵

R. Grosman's analysis can be put to question, as his analogy appears inapt. In the instance where A teaches B *shehitah*, the *quid pro quo* character of the agreement is clear-cut: A teaches B the skill and implicitly expects B to practice his trade in a manner that will not undermine his own livelihood. But, if W is employed by E and E teaches W a trade secret and stipulates a non-competition clause, what *quid pro quo* can W expect? Unless E promises W in the post-training period both a raise and job security for a specified time period, E's training is worthless to W. Without identifying a *quid pro quo* for W, W's violation of the non-competition clause does not infringe *lo ta'ashok*.

***Hassagat Gevul* and Competing with a Former Employer**

In this section we turn to a consideration of Halakhah's rules for fair competition in the marketplace (unfair competition is labelled *hassagat gevul*). An examination of these rules will show that, even in the absence of any agreement between E and W regarding non-competition in the post-employment period, W, is, in any case, subject to a number of restraints based on *hassagat gevul* law. Let us begin with the following dispute in the Talmud regarding freedom of entry:

R. Huna said: If a resident of an alley sets up a hand mill and another resident of the alley wants to set up one next to him, the first has the right to stop him, because he can say to him "You are interfering with my livelihood" . . .

R. Huna b. Joshua said: It is quite clear to me that the resident of one town can prevent the resident of another town [from establishing a competing outlet in his town]—not, however, if he pays taxes to that town—and that the resident of an alley cannot prevent another resident of the same alley [from establishing a competing outlet in his alley]. R. Huna b. Joshua then raised the question: Can the resident of one alley prevent the resident of another [from competing with him]? This question remains unresolved.⁴⁶

Talmudic decisors rule in accordance with R. Huna b. Joshua's view.⁴⁷ What follows from this advocacy of freedom of entry is that an established firm is entitled to protection against intrusion into its territory only when the potential entrant is an out-of-town tradesman who does not pay taxes in the complainant's town. Given the moot entry status of a resident of a different alley, the Jewish court would not enjoin him from entering the complainant's alley. (Rabbinical courts in Israel today have understood the modern "neighborhood" to correspond to the talmudic "alley."⁴⁸)

THE DEPRIVATION-GENERATING CRITERION

While R. Huna's protectionist philosophy is apparently rejected, several rulings by *rishonim* indicate that his view is not entirely discarded. R. Eliezer b. Yoel ha-Levi of Bonn confers monopoly status on a store located at the extreme end of a closed alley. Allowing another firm to locate immediately in front of the established firm would effectively ruin the livelihood of the original competitor as passersby would be blocked from its view and take all their business to the new entrant.⁴⁹

Commenting on R. Eliezer b. Yoel ha-Levi's ruling, Rama suggests that whenever the expected impact of a competitive tactic is to financially ruin an established rival, the tactic must be disallowed in accordance with the protectionist philosophy of R. Huna. Price-cutting that an established firm cannot match without undergoing financial ruin is, according to R. Isserles, analogous to R. Eliezer b. Joel ha-Levi's closed-alley case.⁵⁰

Another *rishon* following a protectionist philosophy is R. Joseph Ibn Migash (Ri Migash). His protectionist advocacy is clearly seen by his comments on the following talmudic passage at *Bava Batra* 21b:

May we say that this view [R. Huna's] is supported by the following:
Fishing nets must be kept away from [the hiding place of] a fish [which has been spotted by another fisherman] the full length of the fish's swim!
And how much is this? Rabbah son of R. Huna says: A parasang? Fish are different because they look about [for food].

Why a fisherman is conferred a territorial preserve while a tradesman is not similarly treated is explained by Ri Migash as follows: A fisherman's design to capture a large fish he sights is effectively frustrated when another fisherman places his net between this fish's hiding place and the bait. The second fisherman's action has the effect of intercepting the swarm of little fish that surround the large fish. Insofar as the large fish will change direction as soon as he notices that the small fish have been caught, the action of the intruder effectively deprives the first fisherman of his catch. In contrast, the arrival of a new firm on the competitive scene

in no way forces customers to discontinue their patronage of the entrenched firm. With the new entry generating no deprivation effects on the established firm, the latter is denied a territorial monopoly.⁵¹

The foregoing leads R. Mosheh Sofer to reconcile the dispute between R. Huna and R. Huna b. Joshua: R. Huna's protectionist philosophy is restricted to instances where the effect of the new entry would be to ruin, not merely reduce, the livelihood of the established firm. The free-entry advocacy of R. Huna b. Joshua, on the other hand, is confined to instances where the effect of the new entry would be merely to reduce the profit margin of the entrenched competitor and not deprive him of his livelihood entirely.⁵²

The complainant's wealth level and the number of his sources of livelihood are, according to R. Mosheh Sofer, irrelevant in considering the merits of a ruinous-competition case. To qualify for judicial intervention, a complainant need only demonstrate that a particular source of his livelihood is cut off as a result of his competitor's action.⁵³

Concurring with R. Sofer's deprivation-generating criterion, R. Moshe Feinstein would enjoin a new entrant whenever the latter's expected impact is to reduce the established firm's earnings below the mean earnings of his socioeconomic peer group.⁵⁴ Deprivation, in R. Feinstein's formulation, is hence not associated with below-subsistence earnings. A complainant, depending upon his socioeconomic status, may aspire for protection of an earnings floor above the margin of subsistence.

R. Feinstein's approach to ruinous competition is akin to an opportunity cost formulation. Accordingly, we formulate the distinction between deprivation of livelihood and reduction of earnings in opportunity cost terms: provided the competitive tactic does not entirely ruin a rival's particular source of income, the court will not enjoin a business initiative unless the complainant's livelihood, as a result, is driven below his opportunity cost earnings. Here, the direct impact of the rival's initiative is to force complainant to withdraw from his present enterprise. Complainant's protectionist plea would, however, be rejected when it is assessed that he can maintain his opportunity cost earnings within the framework of the new competitive environment.

SUSPENSION OF PROTECTION WHEN THE COMPLAINANT CAN BECOME MORE EFFICIENT

Protecting a competitor's opportunity-cost earnings in no way guarantees that the subject product or service will be produced at its lowest possible social cost. This clear-cut conflict between efficiency, on the one hand, and industrial justice, on the other, is somewhat lessened

by the consideration that the complainant's protectionist plea is rejected when the means are objectively available to him to counter his rival's initiative and maintain thereby his opportunity-cost earnings. This point emerges from the following talmudic passage:

Said Ravina to Rava: May we say that R. Huna adopts the same principle as R. Judah? For we have learnt: R. Judah says that a shopkeeper should not give presents of parched corn and nuts to children, because he thus entices them to come back to him. The Sages, however, allow this! You may even say that he is in agreement with the Rabbis also. For the ground on which the Rabbis allowed the shopkeeper to do this was because he can say to his rival: "Just as I make presents of nuts so you can make presents of almonds;" but in this case they would agree that the first man can say to the other: "You are interfering with my livelihood."⁵⁵

Given the permissibility of business promotional activities in Jewish law, in accordance with the Sages' view,⁵⁶ the import of the Talmud's question, "May we say that R. Huna adopts the same principle as R. Judah?" is that R. Huna's protectionist philosophy is rooted in R. Judah's minority view and should therefore be rejected. What follows is that the distinction the Talmud draws in its rejoinder between ability to counter a rival's initiative and inability to do so is critical in rationalizing R. Huna's protectionist philosophy. To qualify for protection against a competitive tactic, a complainant must demonstrate to the court's satisfaction that it is not within his means to counter the tactic without falling below his opportunity-cost earnings.

Within this framework, the court would deny a complainant protection whenever it assessed that it was within his means to reduce cost by improving the efficiency of his operation. To illustrate, suppose A and B are rival leather-bag manufacturers. A sells at a profit but his price falls below B's per unit cost. Examination of their respective enterprises reveals, however, that A's operation is much more efficient than B's. While B tolerates sloth on the production line, A does not. Similarly, B's cutting technique wastes relatively more leather than the technique A employs. Since it is within B's means to modify his operation and reduce costs, he is not entitled to price protection.

THE FREEDOM OF ENTRY POSITION

Another school of thought in Jewish law conceptualizes industrial justice in terms that call for much less insulation from unpleasantness of competition than proceeds from the deprivation-generating rule. The anti-protectionist school views the dispute between R. Huna and R.

Huna b. Joshua as irreconcilable and rules in accordance with the free-entry advocacy of R. Huna b. Joshua.

R. Eliezer b. Joel ha-Levi's view is regarded as being rooted in the protectionist philosophy of R. Huna and therefore as not consonant with mainstream thought.

Similarly, Ri Migash's explanation of the preserve rights of fishermen must be regarded as expressing a minority viewpoint since it is not in conformity with the mainstream interpretation of this right offered by Rashi and Ramban. What qualifies the first fisherman for a territorial preserve, according to Rashi, is not the deprivation effects of the interloper's action, as R. Joseph Ibn Migash would have it, but rather the *anticipation of gain* he enjoyed prior to the arrival of the interloper. Casting bait in the fish's hiding place assures the fisherman that he will be able to lure fish into his net. The anticipated gain is hence effectively at hand (*matu le-yado*). With his catch thereby assured, another fisherman may not spread his net at the same spot, since doing so would deprive the former of an anticipated gain. In contrast, a firm may locate in close proximity to another firm, since the entrenched competitor was never *guaranteed* a clientele. Each firm sets up shop on its own premises, and customers decide to patronize the firm of their choice.⁵⁷

Elaborating on Rashi's position, the twentieth century decisor R. Mordecai Jacob Breisch maintains that, even if the original firm (A) was the only firm of its kind in the entire town prior to the arrival of the new entrant (B), nevertheless, the former monopolist's clientele cannot be regarded as guaranteed. This follows from the fact that A, even in R. Huna's view, could not prevent a competing firm from locating in an adjacent alley. Hence, its clientele could have, at any time, been lured away to a distant competitor. Because A never enjoyed *absolute* protection from competition, it follows that even in the instance where A was situated in a closed alley and B locates at the opening of that alley, B cannot be said to have deprived A of a *matu le-yado* clientele. In contrast, casting bait close to the first fisherman's line deprives the later of a *matu le-yado* gain.

Another difference between the cases, according to R. Breisch, is that the anticipated gain of the fisherman, the catch of fish, is existent at the time the intruder arrives on the scene. In contrast, the anticipated gain of the entrenched competitor (A), the patronage of his long-standing clientele, is nonexistent (*davar shelo ba la-olam*) at the time the rival competitor (B) sets up shop. What A stands to lose on account of B's incursion is hence not a *matu le-yado* advantage. Accordingly, A is denied the right to treat his former clientele as his exclusive preserve.⁵⁸

Naḥmanides (Ramban) offers a different rationale for the preserve rights of a fisherman. What the second fisherman is prohibited from doing is to spread his net in close proximity to the net of the first fisherman, because such action could result in *directly* depriving the first fisherman of what is rightfully his. Fish already captured in the first fisherman's net could, at times, spring into the second fisherman's net. With only this fear accounting for the privileged status of the first fisherman, an entrenched competitor does not qualify for similar treatment unless his degree of anticipation of gain parallels the confidence level of the first fisherman. Such parallelism, obviously, cannot be demonstrated by the monopolist tradesman in presenting his case against the interloper.⁵⁹ Moreover, the fisherman case is omitted in the codes of R. Isaac Alfasi, Maimonides, R. Jacob b. Asher, and R. Joseph Karo.

Finally, an inconsistency is noted in the writings of R. Mosheh Isserles in regard to his adoption of the deprivation-generating rule. In his responsa work,⁶⁰ R. Isserles protected the right of R. Meir b. Isaac Katzenellenbogen to disseminate Maimonides' work against the encroachment of a competing publisher. R. Yoel ha-Levi's ruling is cited in support of the decision. Yet in his gloss in the *Shulḥan Arukh*, R. Isserles rejects R. Yoel ha-Levi's view.⁶¹ Noting that R. Yoel ha-Levi's ruling was only one of many factors in the R. Katzenellenbogen case and that the glosses of *Rama* is a later work, R. Breisch posits that R. Isserles, in reality, rejects the deprivation-generating rule.⁶²

Noting the controversy surrounding the deprivation-generating rule, the highest rabbinical tribunal in Tel Aviv expressed the view that it would not enjoin a religious teacher from enrolling children from the neighborhood of a competitor.⁶³ Similarly, in a case involving an alleged breach of contract between a newspaper and a publisher of Talmud, the court refused to enjoin the newspaper from entering into a distributorship agreement with a competing publisher of Talmud, notwithstanding the deprivation effects the arrangement would generate to the first publisher.⁶⁴

UNDISPUTED CASES OF PROTECTION

While the criterion for unfair competition is a matter of dispute in Halakhah, a number of instances where plaintiff is entitled to protection on the basis of both criteria discussed above can be identified. These include selling below cost, price discrimination, the hiring away of the labor force of a rival firm, and exploiting the customer relationships of a former employer.

Selling Below Cost: Halakhah regards selling below cost as predation and treats the perpetrator as a tortfeasor. The distiller-tavern case dealt with by R. Solomon Tabak in nineteenth century Hungary illustrates this principle. Distillers in the local area banded together into a cartel for the purpose of raising the wholesale price of whiskey for the tavern owners. The cartel whiskey was inferior to the cheaper alternative sources of supply. To induce local tavern owners to enter into an exclusive arrangement with them, the cartel members set up a new tavern in the area that undercut the competition by selling below cost. Noting the predatory tactics used by the cartel, R. Tabak issued a cease and desist order against them.⁶⁵

Price Discrimination: In his treatment of a price discrimination case in the nineteenth century, R. Ḥayyim Sofer prohibited A from luring customers away from a rival, B, in a different town by charging them a lower price than he charged local residents for the same item. If A, on the other hand, charges both local and non-local residents the same price for the item at hand, the practice is legitimate, even if its impact is to ruin a higher priced B located in a different town. In the latter instance, A's lower price is not directly designed to lure away customers from B, located in a different town.⁶⁶

Hiring Away A Competitor's Labor Force: In evaluating the ethics of this tactic, consider that the rationale the Talmud offers for R. Huna b. Joshua's free entry position is that the new entrant (A) can say to the established operator (B): "You do as you wish inside your property and I do as I wish inside my property."⁶⁷ Consider that hiring away B's labor force cripples the operation of the latter's business. Now, if A sets up his business by hiring away B's main employees, A is not operating within his own premises but rather is effectively entering B's premises in order to start his business. Because this tactic fails to meet R. Huna b. Joshua's rationale for free entry, it should be prohibited even if the workers hired were not under contract and were only employees-at-will.

Exploiting The Customer Relations of a Former Employer: Another stragem that amounts to effectively entering into a competitor's premises is to exploit the customer relations of a former employer. To illustrate: White Laundry provides a pick-up and delivery service to householders. The only contact customers have with the company is with Milstein, an employee of the company. Milstein makes pick-ups and deliveries and also takes payment and arranges terms with customers. Milstein ends

his employment tie with White Laundry Company and now solicits customers along his old route. In assessing the ethics of Milstein's conduct, consider that Milstein's job performance for White Laundry generated for the company goodwill in the form of a *reputation* for customer satisfaction. This goodwill takes the form of an intangible asset for the company. While no exact value can be placed on this asset as long as the company is operating under its present owners, a value can be fixed for goodwill when the company is sold. It will be equal to the excess of the price the purchaser actually pays for the company over the fair market value of the net assets of the company.

Because Milstein was White Laundry's customer relations man, the goodwill the company enjoys on account of its reputation for customer satisfaction is embodied in Milstein himself. Once Milstein leaves White Laundry's employ, he is in a unique position to exploit his former firm's reputation for customer satisfaction for his own commercial gain. Soliciting customers along his old route makes Milstein guilty of effectively conducting his business on White Laundry's premises.

An analogous case, dealt with by R. Ya'akov Yeshayahu Bloi in Israel, concerns A's infringement of B's trademark. Given that the trademark, though it is intangible, is an economic asset for B, A's infringement of the trademark makes him guilty of effectively conducting business on B's premises.⁶⁸ Similarly, for Milstein to exploit White Laundry's customer relations amounts to conducting his business on White's premises.

Another relevant principle in evaluating Milstein's conduct is the following dictum of R. Yosei:

[If] one rents a cow from another and lends it to someone else, and it dies naturally, the renter must swear that it died naturally, and the borrower must pay the renter. Said R. Yosei: How does that person do business with another's cow? Rather, the cow should be returned to the owner.⁶⁹

In the view of the first opinion expressed, when the animal dies, the renter becomes exempt from paying and acquires the animal. Since the renter is not liable for accidents, he takes an oath merely to placate the owner. Therefore, the borrower--who is responsible for accidents--must pay the renter.⁷⁰ R. Yosei, however, regards the renter who lends out the deposit as an agent of the owner. Therefore, the payment for the cow should be given to the owner, not the renter.⁷¹

While talmudic decisors follow R. Yosei's line,⁷² authorities are in disagreement regarding the conditions necessary to trigger the prohibition of doing business with someone else's property. The majority posi-

tion in this matter is to call for disgorgement whenever A makes commercial use of B's property while having no right to make use of it. The circumstance that B suffers no loss thereby is not a saving factor according to this school of thought.⁷³

How broadly does R. Yosei define an asset? If he includes in his prohibition even the misappropriation of someone's *intangible* asset, another legal basis for prohibiting Milstein's conduct will have been established. Specifically, exploiting White Laundry's customer relations amounts to expropriating someone else's asset for commercial gain and is therefore prohibited.

In his analysis and critique of secular law's treatment of employee agreements not to compete, Harlan Blake proposes a criterion for determining what constitutes a reasonable duration with respect to protecting customer relationships. In his view, the duration is reasonable only if it is no longer than necessary for the employer to put a new man on the job and for the new employee to have a reasonable opportunity to demonstrate his effectiveness to the customers.⁷⁴

From the perspective of Halakhah, an employer's customer relationships warrant protection even if the employer did not secure this restraint by means of contractual agreement with his former employee. Nonetheless, Blake's criterion for what constitutes a reasonable duration for protection should be halakhically acceptable. Let's relate the criterion to our case. What prohibits Milstein from soliciting White Laundry customers along his old route is not a blanket prohibition not to compete with his former employer, but rather a prohibition not to exploit his former firm's goodwill for his own commercial gain. Once enough time has elapsed for White Laundry to place a new man on the job and demonstrate his effectiveness to customers, the restraint on Milstein to solicit his former employer's customers should be removed. Lengthening the restraint beyond this period amounts to protecting White Laundry against competition *per se*. But Halakhah does not protect an established firm against competition *per se* unless it is determined that the competition will exert a *ruinous* impact on the established firm.

Snatching Away Another's Anticipated Gain

Another moral principle that is relevant in constraining an individual's conduct against a former employer is the prohibition against snatching away another's anticipated gain. The prototype case is *ani ha-mehappekh ba-ḥararah* (lit., a poor man (A) casting about [trying to take possession

of a certain] cake) and another person (B) comes and snatches it away from him. B's interloping conduct brands him a wicked person.⁷⁵ We will demonstrate that *ani ha-mehappekh* imposes certain constraints on an individual (B) not to solicit business from his former employer's (A's) customers, even when such solicitation does not make B guilty of expropriating goodwill that is A's rightful enjoyment. Preliminarily, let's take note of the following parameters for the *ani ha-mehappekh* interdict.

In Rashi's view, *ani ha-mehappekh* applies even when the object of contention is ownerless (*hefker*). Notwithstanding the fact that B cannot secure the article of contention from ownerless property elsewhere, his interfering with A's anticipated gain brands B a *rasha*.⁷⁶ Disputing Rashi, Rabbenu Tam takes the view that *ani ha-mehappekh* is suspended in the ownerless property case. Since the acquisition of a free good at hand cannot be said to be waiting for B elsewhere, seizing the opportunity for himself and snatching it away from A is not unethical.⁷⁷ Decisors generally follow R. Tam's view here.⁷⁸

In a sales transaction, *ani ha-mehappekh* obtains when a buyer (B) and a seller (S) reach an agreement regarding price and only the performance of a symbolic act (*kinyan*) by B is missing to make the agreement legally binding. Here, C may not interfere in this transaction by offering to purchase the item. Such action brands C a *rasha*.⁷⁹

All instances of *ani ha-mehappekh* recorded in the Talmud relate to cases where A is poised to acquire something, and B then interferes to acquire the article for himself. R. Yair Hayyim Bacharach addresses the case where seller A is poised to make a sale to B, and C interferes and offers to sell the same merchandise to B. In his case, a government official signaled horse dealer B that he was interested in buying horses. He ruled that, as long as the negotiations have not progressed to the point just prior to *kinyan*, it is not unethical for C to step in and offer his horses for sale to the government official.⁸⁰

Ani ha-mehappekh, according to the *rishon* R. Isaac b. Samuel of Dampierre, applies to the labor market. Accordingly, religious tutor B may not hire himself out to the employer (C) of a competitor (A) while A is still in the home of C.⁸¹

R. Solomon Luria of Ostrog in the sixteenth century understood R. Isaac's dictum to refer to the case where the incumbent A was not hired for any specific term. Here, since A exerted efforts to establish an employment tie with C, B may not *initiate* negotiations to hire himself out to replace A. Should A have been hired for a specific term, however, it would not be morally objectionable for B to initiate negotiations to hire himself out to replace A at the termination of A's contract.⁸²

A more stringent interpretation of R. Isaac's dictum is advanced by the Polish decisor R. Binyam Aharon Slonick. In his view, B violates *ani ha-mehappekh* even in the term contract case. Since A anticipates *renewal* of his contract, B's initiatives to replace him amount to snatching away A's anticipated gain.

A variation of the above case occurs when B's initiative succeeds in his replacing A before the latter's term of contract expires. Here, *Beit Din*, according to R. Slonick, will void B's contract and force C to allow A to return to his job.⁸³

Restriction of competition in the labor market on the basis of *ani ha-mehappekh*, according to R. Moshe Feinstein, applies only when the interloper cannot secure employment elsewhere. When this is not the case, interference prior to the stage of *kinyan* is not objectionable. This liberalization follows from R. Jacob Tam's ruling, referred to earlier, that *ani ha-mehappekh* is suspended in connection with the acquisition of ownerless property. Interference is prohibited only when the offender could have easily obtained the object at hand elsewhere. With this obviously not the case in regard to the acquisition of ownerless property, interference prior to the point when legal possession takes place is not prohibited.⁸⁴

Let us now explore the possibility that the tutor case has implications for the issue of whether it is ethical for a competitor to solicit business from the established customers of his rival. If we understand the tutor case along with R. Luria to prohibit B from initiating negotiations to hire himself out to replace someone hired for an indefinite term, extending the prohibition to the solicitation case does not follow. The difference between the two cases is clear-cut. In the tutor case, A has legitimate expectations to continue in C's employ. Though A has no contract, and C is under no legal duty to keep him, letting him go without cause is *morally* wrong. Provided that the job remains open and A does not prove unfit for the job, it is morally wrong for C to replace A with someone else.⁸⁵ Because A has legitimate expectations to remain on the job, it is morally wrong for B to offer himself to replace A. In sharp contrast, doing even repeat business with a particular seller does not legally or morally obligate the customer to continue to purchase the product at hand from the same seller. Soliciting the business of even repeat customers of a rival seller should therefore not present a moral issue. The ethics of A's soliciting the business of B's established customers comes up only in the instance where negotiations between B and the customer reached agreement and the only matter missing to consummate the deal was *kinyan*. To be sure, even in this scenario, there

would be no moral issue for A to step in and solicit the business for himself if other customers were not available to him.

The analogy between the tutor and the customer solicitation cases does, however, follow R. Slonick's understanding of the tutor case. In his understanding, the tutor case refers to the circumstance where A is under contract and B approaches C before the contract expires and offers himself to replace A when A's contract expires. Because A anticipates *renewal* of his contract, B's conduct is unethical. An analogous case in the product market obtains when C is a repeat customer of A and the viability of A's business depends on his ability to cultivate and retain repeat customers. Because A anticipates a *continuation* of his commercial relationship with his repeat customers, it should be unethical for B to *solicit* these customers.

R. Joseph Trani puts a different ethical spin on the tutor case. In his view, the ethical breach the interloping tutor violates is more severe than the ordinary *ani ha-mehappekh* case. The implication of R. Trani's analysis is to put severe limitations on expanding the tutor case to the product market. R. Trani begins his analysis by putting to question why it is unethical for B to preempt A in getting himself hired by C. Should we not consider the possibility that B assesses that the tutoring job at C represents for him the best employment opportunity for himself in respect to both salary and working conditions? If this is indeed B's assessment, the benefit he seeks is akin to the *hefker* case and the prohibition against preemptive conduct should be suspended. Notwithstanding the affinity of B's employment quest with C to the *hefker* case, the proper analogue here, according to R. Trani, is the case dealing with competition among indigents for the olives left unharvested by a farmer. (These olives are the entitlement of the poor.) Here, indigent A climbs to the top of an olive tree to retrieve *shikhḥah* olives. A manages to make the olives fall to the ground. Before A gets around to take legal possession of the olives, another qualified indigent (B) pounces upon the olives and takes legal possession of them. Because A was poised to take legal possession of the olives and B snatched away his anticipated gain, B's interloping action constitutes theft by dint of rabbinical decree (*gezel mi-divreihem*). (This is referred to as the *shikhḥah* olive case.)

B's action is morally repugnant, and he is therefore expected to restore the olives to A. Nonetheless, since B's snatching conduct is not *gezel* by dint of Torah law, a *Beit Din* will not force B to return the snatched away olives to A. In the ordinary *ani ha-mehappekh* case, however, the interloper is branded a *rasha*, while his conduct is not regarded

as *gezel mi-divreihem*. To see why B's interloping action is treated more severely in the *shikhḥah* olives case, we need only recognize that B's preemptive conduct did not consist of following A up the olive tree and pouncing on the olives before A got a chance to take legal possession of them. Instead, B positioned himself on ground level and sprung into action only after A's toil and efforts managed to dislodge the olives and cause them to fall to the ground. Because B snatches away A's anticipated gain by free riding on A's toil and effort, B's interloping action is regarded as *gezel mi-divreihem*. Similarly, B's offer to C to hire himself as tutor in place of A amounts to a maneuver to free ride on A's toil and effort. This is so because A's successful tutoring makes his pupil a better student and more receptive to learning in the future. Because B's offer free rides on A's toil and effort, B's conduct is morally repugnant.⁸⁶

R. Trani's analysis of the tutor case apparently places him at odds with R. Isaac of Dampierre. R. Isaac regards the tutor case as a straight application of the *ani ha-mehappekh* moral principle. Accordingly, B's interloping action brands him a *rasha*, but his conduct is not *gezel mi-divreihem*. In contrast, R. Trani compares the tutor case to the case of the *shikhḥah* olives. The analogy makes B's interloping action *gezel mi-divreihem*. In addition, if B's interloping action is *gezel*, the unavailability of a job opportunity elsewhere for him does not legitimize his preemptive conduct.

R. Trani's understanding of the tutor case limits its application in respect to the product market. A parallel case would feature the following elements: C is a repeat customer of A and the viability of A's business depends on cultivating and retaining repeat customers. For example, suppose A is a life insurance salesman. The viability of his business is predicated on his ability to sell life insurance policies to young families, increase the policy as the family grows in income and size, and get referrals from the customers he cultivates. Now, A expends much time and energy convincing C that life insurance should be a preferred item in his family's budget. C becomes convinced and takes out a policy. B now comes along and solicits C to switch to his company. Since it was A who convinced C to become a life insurance policy holder, it is unethical for B to free ride on A's efforts and solicit C to switch policies to his company.

Another distinctive feature of the tutor case, in the opinion of this writer, is that the tutor conducts his lessons in the *home* of his pupil. What this makes for is a *personal* as well as commercial bond with both the pupil and his parents. Now, for B to be prohibited from directly and personally approaching A's customers and soliciting business for him-

self, the case would have to be analogous to the tutor case. Specifically, the solicitation for business would have to entail not only the disruption of a commercial tie for A, but the upsetting of a personal relationship for A as well. Soliciting C's business for a particular item when C was accustomed to buying that item through either an internet outlet or a mail order house would clearly not fall into this latter category. Since the internet outlet or the mail order business provides no personal service for C other than to send him the item he ordered and charge his credit card or bill him for it, B's solicitation to C diverts business away from these outlets but disrupts no personal relationship in the process. Given the passive role the internet outlet or mail order house business plays in selling their goods, B's solicitation to C does not free ride on any investment the internet outlet or mail order house business made in C, A's conduct hence meets R. Trani's permissibility standard as well.

At this juncture, it would be useful to summarize Halakhah's attitude toward exploiting the customer relations of a former employer. This conduct breaks down into two categories. If A was himself the customer relations man for B, then A's leave from B temporarily suspends the goodwill A created for the company. Until B is given a chance to restore this goodwill by replacing A with someone else who demonstrates his effectiveness, A may not solicit B's customers. Doing so makes A guilty of expropriating B's goodwill for his own commercial gain. If A himself was not the customer relations man for B, then few restrictions would be placed on A in respect to soliciting B's customers.

Trade Secrets as Treated in Halakhah

A relevant source for extrapolating Halakhah's view on the treatment of trade secrets is the fisherman territorial preserve case discussed above. Mention earlier was made of a number of interpretations of this case. Most relevant here is R. Meir b. Samuel's exposition of this case. R. Meir understands the dictum as referring to a situation where A, in hopes of attracting large numbers of fish to the vicinity, casts a net containing a dead fish. B may not cast his net in the same vicinity because interloping actions of this sort borders on robbery. Since it is A's initiative that attracts the swarms of fish, B's interloping action effectively appropriates A's toil and effort for the purpose of commercial advantage.⁸⁷

R. Meir's dictum forms the underpinning of R. Mosheh Sofer's ruling in an infringement case involving the *Rödelheim Mahzor* (High Holy Day prayer book): Wolf Heidenheim, the publisher of the *mahzor*, had secured

a rabbinical ban against republication by other persons for a period of twenty-five years. Shortly afterward, a publisher in Dyherfürth proceeded to issue the *Rödelheim Maḥzor*. Rabbis took opposing views, but the majority upheld Heidenheim's right to the protection of his work.

After defending Heidenhem on the basis of the rabbinical notices against republication printed in the *maḥzor*, R. Sofer found an even more basic reason to restrain the publisher in Dyherfürth. Heidenheim had not reprinted an extant edition of the *maḥzor* from the public domain; rather, he had produced an improved edition of the *maḥzor*, complete with revisions, annotations, and a German translation of the Hebrew text. Since the *Rödelheim Maḥzor* entailed considerable innovation on the part of Heidenhem, its re-issuance by the firm in Dyherfürth amounted to no less than appropriating someone else's toil and effort for the purpose of commercial advantage. R. Sofer based the prohibition of such conduct on R. Meir b. Samuel's rationale for the fisherman territorial preserve case.⁸⁸

The analogue of R. Sofer's case in secular law is the 1918 case of *International News Service v. the Associated Press*. In this case the Associated Press complained that the International News Service was making verbatim use of its stories and selling them to newspapers in competition with the Associated Press. The defendant argued that the Associated Press had no property right in the stories once they were released to the public. Its actions involved the news from bulletins publicly posted. No breach of contract or of trust was involved in the International News Service's action. Because the Associated Press held no property right in the stories once they were released, International News Service could not be made to compensate the Associated Press for making commercial use of them. Justice Louis D. Brandeis agreed with the defendant's argument.⁸⁹ However, the majority of the justices, though agreeing that no misappropriation was involved, felt that the issue at bar was whether International News Service engaged in unfair competition. The majority opinion noted that the litigants were direct competitors in a business in which the major stock in trade is news, a product that requires the resources and efforts of a news gathering organization. In selling Associated Press copy to its members' newspapers, International News Service was "endeavoring to reap where it has not sown and . . . appropriating to itself the harvest of those who have sown."⁹⁰

From the perspective of Halakhah, International News Service's verbatim use of the Associated Press stories amounted to "unfair competition." The source for this prohibition is R. Meir b. Samuel's prohibition for A to expropriate B's toil and effort for commercial gain.

Reverse Engineering

Another issue the trade secret phenomenon raises is whether reverse engineering (taking the product apart and figuring out how it was made) is a permissible practice. R. Joseph Saul ha-Levi Nathanson prohibits this practice but offers no source for the prohibition.⁹¹ In searching for a source for this prohibition, we need only recognize that the creation of a new product does not take place in a vacuum, but, rather, is the result of toil and effort in the form of research and development expenditures. A's reverse engineering of B's product amounts hence to expropriating B's toil and effort for commercial gain.

Moreover, A's reverse engineering of B's product may make him guilty of *effectively* conducting his business in B's *premises*. This would be the case when A not only physically replicates B's product but mimics B's packaging and marketing techniques so that the consumer is inveigled into thinking that A's product was actually produced by B.

Let's consider a variation of the above case. Suppose A does not produce a replica of B's product, but instead produces a substantially different product, with the distinctive feature of B's product not recognizable in A's. B's research and development costs are merely the springboard for the development of A's product. Halakhah should find no objection with A's conduct here. Reverse engineering is not morally objectionable *per se*. As long as A obtains B's product in a lawful manner, he is entitled to benefit from it in any fashion he so desires, including taking it apart to discover how it was made. It is morally objectionable for A to use the knowledge he got from reverse engineering B's product to go into direct competition with him, but using the reverse engineering knowledge merely as a springboard to develop a substantially different product should be permitted. The public will not confuse A's product with B's, and A therefore is certainly not guilty of effectively producing his product on B's premises. Relatedly, given the differentiation involved, A cannot be said to be guilty of directly expropriating someone else's toil and effort for commercial gain. To illustrate: Suppose A is the first to introduce a carbonated beverage to the marketplace. A's beverage has a cola flavor and contains ten calories per a twelve-ounce bottle. By means of reverse engineering, B discovers the process of producing a carbonated beverage but comes up with a diet orange flavored soda for the marketplace. B's soda contains zero calories per twelve-ounce bottle. Since B's product is differentiated from A's, B cannot be said to be guilty of either competing head on with A or directly expropriating A's toil and effort for commercial

gain. To be sure, the appearance of B's diet orange soda in the marketplace competes for A's non-diet cola soda customers, but A is not entitled to protection against competition *per se*. B's conduct should therefore be permissible.

A variation of the above case occurs when the competitor who uses reverse engineering to introduce his product retains the distinctive feature of the original product but adds on an additional feature or component. A variant of R. Sofer's case will illustrate this point. Suppose the Dyherfürth publisher issues the *Rödelheim Maḥzor* with additional commentary or some other significant new feature, such as transliteration of the Hebrew text, that is absent in the original. Because the Dyherfürth *Maḥzor* retains the distinctive feature of the *Rödelheim Maḥzor*, the Dyherfürth publisher is guilty of expropriating Heidenheim's toil and effort for commercial gain, notwithstanding the differentiation he offers.

The Chip Act (1978)

Substantial copying of a competitor's product has always been the norm in the U.S. semiconductor industry. By 1978, when the specter of Japanese competition was perceived as a threat to their sales and market shares, domestic firms sought congressional assistance in limiting copying chip products by competition.⁹² Congress responded by passing the Chip Act.⁹³ Under this act, some copying by competitors is permitted, as long as the resulting product reflects an acceptable level of investment and innovation by the copyist competitor. Reverse engineering validates customary research and development practices in the semiconductor chip industry by creating statutory "safe harbors" for copying of chips in certain structures.

In distinguishing between legitimate reverse engineering and chip piracy, the legislation requires a two-pronged test to be applied. The first part of the test requires that the resultant chip be compared with the initial protected chip to determine whether the second is "substantially similar" as opposed to "substantially identical" to the first chip. If the second chip is entirely or substantially identical, there is a conclusive presumption of infringement. When the comparison between the chips shades away from identity to similarity, the second prong of the test comes into play. To establish non-infringing similarity in these circumstances, it must be established by competent documentary evidence that the copying competitor had expended substantial energy and resources in the development of the second chip, in addition to copying some aspects of the original.⁹⁴

The Chip Act's approach to the issue of reverse engineering generally conforms to the halakhic approach described above. Specifically, the distinction the Act draws between a "substantially identical" and a "substantially similar" chip is a difference to which the Halakhah would subscribe. Nevertheless, there are several differences between the approach of American law and that of Halakhah. In the "substantially identical" case, Halakhah would adopt a stricter standard, as B is guilty of expropriating A's toil and effort for commercial gain. Moreover, if B packages and markets his chip in a manner that confuses the public into thinking that his chip was produced by A, then B is guilty of *effectively* producing his chip in A's premises. Accordingly, A should be entitled to protection even if he did not register his chip under copyright or patent law.

Another difference obtains in the "substantially similar" case with respect to the requirement that to be free of infringement B must incur an acceptable investment in producing his chip. This proviso reflects a resolution between two conflicting concerns. On the one hand it is recognized that technical progress is severely hindered unless we allow B to build on A's discovery. Allowing B to "free ride" on A's discovery, on the other hand, creates a disincentive for A to engage in inventive activity in the first place. This disincentive is particularly acute when it is possible for B to build on A's discovery without incurring any significant new expenditures. By making B guilty of infringement in the "substantially similar" case unless he can document "an acceptable investment level," the law accomplishes something with respect to both of the above concerns.

Halakhah's approach to the above two concerns is, however, different. In the instance where B's chip is not "substantially identical" but only "substantially similar" to A's chip, B is guilty neither of unfair competition nor of *directly* diverting A's toil and effort for his own commercial gain. Because B is not guilty of infringement here, there is no basis to impose on him a burden of documented investment of an acceptable level. Halakhah is, however, not indifferent regarding B's free riding conduct. If B launches his business by free riding on A's toil and effort, A should be entitled to protection from *ruinous* competition from B. Now, B's entry into the chip market, other things equal, increases the supply of chips relative to the demand. The market price of chips should hence move lower. Given the cost advantage B enjoys over A, any given drop in price could well have the effect of ruining A while still affording B the opportunity to remain viable. But, because B launched himself into business by free riding off A's investment, B must not allow his pricing policy to ruin A. Accordingly, B must adopt a price for his chip

that will be high enough to keep A viable. Economists call this pricing policy *umbrella pricing*.

Umbrella pricing is hence Halakhah's approach to resolving the conflict between achieving technical progress by allowing B to build on A's discovery but at the same time not creating a disincentive for A to engage in inventive activity in the first place. B's umbrella price obligation does not, however, continue indefinitely. Reverse engineering is a continuous process. In due time, C will produce a chip that is substantially similar to A's and/or B's chip. At some point, it will become evident that A's chip embodies *obsolete* technology and umbrella pricing will not save him from ruination. What this points to is a responsibility for *Beit Din* to apprise plaintiff (A) in reverse engineering cases that umbrella price protection will be removed as soon as it becomes evident that A will fail even if this protection remains operative.

Wexler v. Greenberg and Halakhah

A prototype case involving a claim of infringement of a trade secret is *Wexler v. Greenberg*. Alvin Greenberg was employed as a chief chemist for Buckingham Wax Company. One of his tasks as chief chemist was to analyze the products of competitors and to use the results to develop new formulas. After eight years with the company, Greenberg left to join Brite Products, which had previously purchased exclusively from Buckingham. With the formulas that Greenberg had developed while working for Buckingham, Brite was able to dispense with Buckingham as a supplier and become a manufacturer itself. Subsequently, Buckingham sued Greenberg and his new employer, claiming that the Brite formulas were Buckingham trade secrets that Greenberg misappropriated.

In overturning a lower court ruling, the Supreme Court of Pennsylvania ruled that Greenberg was under no confidentiality obligation because the trade secrets were not disclosed by Buckingham to Greenberg. Instead, these formulas were developed by Greenberg himself. Moreover, the formulas Greenberg developed for Buckingham were not significant discoveries, but rather were routine applications of his skill as a chemist. As such, they were, in the court's view, the kinds of technical knowledge that any employee acquires by virtue of being employed. Even though the formulas are trade secrets that the Buckingham Wax Company is permitted to use, they properly belong to Greenberg, who has a right to use them in his work for a new employer.⁹⁵

From the perspective of Halakhah, the issue in *Wexler v. Greenberg* is

whether Greenberg was guilty of either diverting the goodwill of Buckingham for his own commercial gain or improperly free riding on that goodwill. Preliminarily, let us note that while Greenberg was in Buckingham's employ, he was contractually obligated to give Buckingham exclusive commercial use of the formulas. To make commercial use of these formulas while he was in Buckingham's employ makes Greenberg guilty of breach of contract. Is Greenberg permitted, however, to make commercial use of these formulas once he leaves Buckingham? One consideration here is whether Buckingham's sanitation and maintenance chemical business becomes disrupted when Greenberg leaves. Consider that the company has in its possession Greenberg's formulas, the work of producing these formulas is the routine work of chemists, and the company will hire another chemist of Greenberg's caliber to replace him. When Greenberg leaves the company, he will therefore not take with him any of the goodwill of the company, and his commercial use of the formulas will hence not constitute diverting the goodwill of the company for his own commercial gain. Greenberg's conduct is therefore not akin to the instance where A seeks to exploit B's customer relations for his own commercial advantage when A himself cultivated these relationships when he was employed by B.

Another issue is whether Brite (Greenberg's new company) is guilty of free riding on Buckingham's research and development costs. This is not the case here. The court's fact finding concluded that Greenberg's formulas were "the fruits of Greenberg's own skill as a chemist without any appreciable assistance by way of information or great expense or supervision by Buckingham, outside the normal expense of his job."⁹⁶ This judgment makes it clear that Brite did not launch its new line of products by effectively conducting its business on the premises of Buckingham.

One final caveat: the competitive presence of Brite will undoubtedly reduce Buckingham's sales and profit margin. But Halakhah does not protect an established firm from competition *per se*. Nonetheless, if the competitive presence of Brite exerts a ruinous impact on Buckingham, Buckingham will be entitled to a judicial remedy.

Patent Law and Halakhah

What emerges from the previous discussion is that the ethics of reverse engineering revolves around various nuances of the law of fair competition. The halakhic version of the Chip Act, described above, should

therefore form the Torah's perspective on the treatment of intellectual property generally and not only for the makers of chips. Within this legal framework, the government would not confer patents or copyrights. The role of the government would be merely to hear infringement cases and decide whether the conduct involved was permissible reverse engineering or constituted piracy.

In modern society, patent and copyright law is commonplace. The rationale for these laws is that inventive activity contributes significantly to economic growth and hence makes for a higher common standard of living. Without blanket government protection for qualified works for a fixed time period, there would be no economic incentive in the first place to engage in inventive activity. Does Halakhah subscribe to this argument? In addressing this issue, the most fundamental task is to identify the parameters of the legislative process in a society governed by Halakhah. This process is governed by many rules and constraints.⁹⁷ For the purpose at hand, we need only note that the basic source for the community's authority to legislate in a civil matter is the following *baraita* quoted at *Bava Batra* 8b:

The townspeople are also at liberty to fix weights and measures, prices and wages, and to inflict penalties for infringement of their rules.

Patents and copyrights pertain to the distribution of income arising out of inventive activity and hence fall squarely into the legislative prerogative of the community. The appropriateness of patent and copyright law for the Torah society follows from the rule of conduct R. Mosheh Isserles advances for voting in the political process. This voting, adjures R. Isserles, must be done *le-shem shamayim* ("for the sake of heaven").⁹⁸ As a definite matter, what R. Isserles' criterion disallows is voting on the narrow basis of self-interest. Because patent and copyright law contributes to economic growth and enhances society's standard of living, the *le-shem shamayim* criterion urges its passage.

Reinforcing the above judgment is the recognition the talmudic Sages gave to the notion that if a particular outcome is deemed socially desirable, measures must be taken to ensure that the outcome will not be undermined in the long run. This principle can be seen from the following episode in the life of R. Huna, recorded at *Ta'anit* 20b:

On the eve of every Sabbath [Friday] he [R. Huna] would send a messenger to the market and any vegetables that the [market] gardeners had left over he bought up and had them thrown in the river. Should he not rather have had these distributed among the poor? [He was afraid] lest

they would then at time be led to rely upon him. [In this case] let him not trouble to buy them at all? This would lead [the gardeners] to do wrong in the future [by not providing an adequate supply].

Proceeding from the above passage is that R. Huna understood the importance of economic incentives in ensuring the long run viability of economic activity. Since he felt that the availability of an adequate supply of vegetables for the honor of the Sabbath was a desirable outcome, he took pains to craft his subsidy to this industry in a manner that would insure its long-run viability. Relatedly, once it is recognized that inventive and innovative activities contribute significantly to enhancing the general standard of living, patent and copyright protection recommends itself as the means of keeping this activity viable in the long run.

While the promotion of society's well-being urges patent and copyright legislation, the requirement for such legislation is more compelling for certain forms of intellectual property. One area is the publication of religious work. In this regard, R. Mosheh Sofer posits that an old rabbinic edict, circa 1550, prohibited the publication of a religious work while copies of an earlier printing by another publisher was still available for sale. In the spirit of that ordinance, it became customary for prospective authors of religious works to secure from a rabbinic authority a formal ban on the publication of the same work by others for a specified period of time. The text of the ban was usually published in the preface of the work. Once conferred, the ban was effective not only within the jurisdiction of the issuing authority, but upon all of Israel. The rationale for this approach, theorizes R. Sofer, was that sufficient economic incentive would be lacking to motivate investors to undertake the publication of religious works without the expectation of monopoly status.⁹⁹

Another area where the argument for patent protection goes beyond social welfare terms is pharmaceutical drugs. We have elaborated on this theme elsewhere.¹⁰⁰

Conclusion

Common law regards employee agreements not to compete as inherently unfair. These agreements are almost entirely for the benefit of the employer and inflict a burden on employees that is out of proportion to any gain. To be valid, the agreement must minimally meet the test that it is: (1) designed to protect the employer's legitimate entitlement, such as proprietary information or customer relations; (2) the restrictions

must not be greater than what is required for the employer's legitimate interest; (3) the restrictions must not impose undue hardship on the ability of an employee to secure gainful employment; and (4) the restrictions must not be injurious to the public.

Rubin and Shedd conclude that the common law treatment of employee agreements not to compete is efficient in that it promotes an optimal amount of investment in human capital. In the absence of these restrictive covenants, certain types of general training will not take place. Why? Ordinarily, a worker will find it economically rational to pay for general training in the form of reduced wages while he is getting the training. But, suppose the employer wants to teach him a trade secret whose value is so great that the worker cannot pay for it in the form of reduced wages in the current period. Here, the employer might find the worker's offer not to compete as sufficient *quid pro quo* to teach him the trade secret. But it must be considered that restrictive covenants present opportunities for opportunistic behavior on the part of both employer and employee. Specifically, once the training is complete, the employee has the incentive to violate the contract and profit from his training—either by going to work for himself or by going to work for another firm, which will pay him a premium because of the value of the training. Relatedly, if the courts enforce these covenants in a blanket way, the employer would be encouraged to *design* the clause to maximally reduce the worker's future mobility. The role of the courts is hence to enforce the restrictive covenant in a manner that minimizes *opportunistic* behavior on the part of both parties.

In extrapolating the halakhic perspective on post-employment covenants not to compete, one cannot simply invoke the principle of *dina de-malkhuta dina*. This is so because legislation on this matter does not currently exist. Instead, the treatment of this matter is now all a matter of common law. In disputes between Jews, many decisors do not recognize *dina de-malkhuta* when the discretionary authority of judges is not only to interpret what the relevant statute says, but instead extends to decide the matter at hand by drawing upon the precedents set in various legal systems. What follows therefore is a need to extrapolate the halakhic perspective on post-employment covenants not to compete.

From the perspective of Halakhah, many technicalities must be met in crafting valid employee agreements not to compete. To be valid, the contract must meet the requirements of *ḥalot* and *tenai kaful*. It must also be free of *asmakhta* and not violate the law of *ona'ah*. The cumulative effect of these technicalities is to make the achievement of non-com-

petition through the mechanism of contract economically irrational.

While restrictions for a former employee cannot be achieved through the mechanism of contract, the former employee is, in any case, bound by the rules of fair competition. These rules afford an established firm little protection against competition *per se*, but are designed to prohibit competitors from exploiting the toil and effort of the established firm for commercial gain.

With respect to protecting a firm against competition *per se*, Halakhah insulates a firm from ruinous competition. This rule prohibits a firm from selling below the cost of a rival. Selling below its own cost is also prohibited and constitutes predation. Another form of unfair competition is price discrimination. This competitive tactic is unethical when it is designed to lure away customers from a rival located in a different geographic area.

While protection against the above conduct is helpful, the competitive threat a former employee presents is mainly conduct of other forms. These include exploiting the old employer's customer relations, hiring away his key personnel and making use of his trade secrets. These forms of conduct are generally proscribed under the rubric of the prohibition against making use of another's asset for commercial purposes. The various forms this prohibition takes includes: (1) the prohibition to [effectively] conduct business on the premises of a rival; (2) R. Yosei's prohibition not to do business with someone else's asset; and (3) *ani ha-mehappekh ba-ḥararah*. The prohibition for B to solicit his former employer's (A's) customers may extend even to instances where B was not the customer contact person when he worked for A. One qualifying circumstance obtains when A had to make an investment in company resources to convince a customer (C) that his product or service should be a preferred item in his budget. For B to solicit C to switch to him amounts to free riding on A's investment and should hence be prohibited. Another qualifying circumstance obtains when A's commercial tie with C amounts ipso facto to a personal as well as a business relationship with him. For B to solicit C to switch to him entails the disruption of a personal as well as commercial tie with A and hence should be prohibited.

In summary, the protection common law is willing to accord an employer, A, against his employee, B, once B leaves A's employ becomes operative only if A contracts for it in the form of a non-competition agreement. From the perspective of Halakhah, the mechanism of contract is futile for achieving that result. But, in any case, A is entitled to a wide range of protection against B in the form of unfair competition.

This protection certainly encompasses the very limits of what A could achieve in common law by means of a restrictive covenant with B.

Notes

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1. John R. Boatright, *Ethics and the Conduct of Business*, second edition (Upper Saddle River, NJ, 1997), 140-1.
2. Paul H. Rubin, and Peter Shedd, "Human Capital and Covenants not to Compete," *Journal of Legal Studies* 10, 1 (1981): 93-110.
3. The exposition of Gary Becker's work in the text draws from George J. Borjas, *Labor Economics* (New York, 1996), 250-7.
4. Rubin and Shedd, 102-4.
5. *Ibid.*, 105-7.
6. David D. Friedman, William M. Landes, Richard Posner, "Some Economics of Trade Secret Law," *Journal of Economic Perspectives*, 5, 1 (Winter, 1991): 61-72.
7. Samuel, *Gittin* 10b.
8. R. Joseph Karo, *Shulḥan Arukh, Ḥoshen Mishpat* 369:6-11.
9. R. Mosheh Isserles, Rama, *Shulḥan Arukh, Ḥoshen Mishpat* 369:11.
10. *Ibid.*
11. Rama, *Ḥoshen Mishpat* 26:1.
12. Rama, according to the understanding of R. Mordecai b. Abraham Jaffe, *Ir Shushan, Ḥoshen Mishpat* 369.
13. Rama, *Ḥoshen Mishpat* 369:11.
14. R. Shabbetai b. Meir ha-Kohen, *Siftei Kohen, Shulḥan Arukh, Ḥoshen Mishpat* 73, note 39. In litigation between Jew and non-Jew, *dina de-malkhuta* is operative (*Siftei Kohen*, ad loc.).
15. R. Abraham Isaiah Karelitz, *Ḥazon Ish, Ḥoshen Mishpat, Likkutim* 16, 1.
16. R. Moshe Feinstein, *Iggerot Mosheh, Ḥoshen Mishpat* 2:#62; R. Yosef Eliyahu Henkin, *Teshuvot Ivra*, vol. 2, p. 176. See also list of authorities cited by Professor Shmuel Shilo, *Dina de-Malkhuta Dina* (Jerusalem, 1974), 157, n. 26.
17. R. Mosheh Isserles, *Darkhei Mosheh, Tur*, 369 n.3
18. R. Jekutiel Asher Zalman Zausmir, Responsa *Mahariaz* 4.
19. R. Shelomoh Dikhovskiy, "Hilkhot ha-Shittuf—ha-Im Dina de-Malkhuta?," *Tehumim* 18 (1998): 18-21.
20. R. Israel b. Gedaliah Lipschutz, *Tiferet Yisrael, Mishnah Pe'ah* 7:11
21. R. Akiva Eiger, commentary at *Mishnah Pe'ah* 7:11.
22. R. Yisrael Grosman, Responsa *Nezah Yisra'el*, 42.
23. For the *tenai kaful* condition, see Maimonides, *Mishneh Torah, Hil. Ishut* 6:1-7; R. Asher b. Yeḥiel, *Rosh*, *Gittin* 6:9; R. Jacob b. Asher, *Tur, Even ha-Ezer* 38:2; R. Joseph Karo, *Shulḥan Arukh, Ḥoshen Mishpat* 207:1; R. Yeḥiel Mikhel Epstein, *Arukh ha-Shulḥan, Even ha-Ezer* 38:26-7, 46. A minority

- view holds that in monetary matters, a conditional agreement is binding without *tenai kaful* (see *Arukh ha-Shulhan*, *ibid.*, 38:46).
24. Lev. 25:24; *Baraita*, *Bava Mezi'a* 51a; R. Isaac b. Jacob Alfasi, Rif, ad loc.; Rambam, *Mishneh Torah*, *Hil. Mekhirah* 12:1; *Rosh*, *Bava Mezi'a* 4:17; *Tur*, *Hoshen Mishpat* 227:1; *Shulhan Arukh*, *Hoshen Mishpat* 227:1; *Arukh ha-Shulhan*, *Hoshen Mishpat* 227:1.
 25. For development of this point, see Aaron Levine, *Free Enterprise and Jewish Law* (New York, 1980), 105-9.
 26. *Bava Batra* 78a and Rashi, ad loc., s. v. *bi-khedei*; Rif, ad loc.; Rambam, *Mishneh Torah*, *Hil. Mekhirah*, 27:5; *Rosh*, *Bava Batra* 5:7; *Tur*, *Hoshen Mishpat* 220:5; *Shulhan Arukh*, *Hoshen Mishpat* 220:8; *Arukh ha-Shulhan*, *Hoshen Mishpat* 220:7.
 27. *Bava Mezi'a* 50b; Rif, ad loc.; Rambam, *Hil. Mekhirah* 12:4; *Rosh*, *Bava Mezi'a* 4:15; *Tur*, *Hoshen Mishpat* 227:6; *Shulhan Arukh*, *Hoshen Mishpat* 227:4; *Arukh ha-Shulhan*, *Hoshen Mishpat* 227:3.
 28. *Bava Mezi'a* 50b; Rif, ad loc.; Rambam, *Hilkhot Mekhirah* 12:2; *Rosh*, *Bava Batra* 4:15; *Tur*, *Hoshen Mishpat* 227:3; *Shulhan Arukh*, *Hoshen Mishpat* 227:2; *Arukh ha-Shulhan*, *ibid.*
 29. *Bava Mezi'a* 50b; Rif, ad loc.; Rambam, *Hilkhot Mekhirah* 12:3; *Tur*, *Hoshen Mishpat* 227:4; *Shulhan Arukh*, *ibid.*; *Arukh ha-Shulhan*, *ibid.*
 30. For a development of sources from the Talmud and *rishonim* dealing with both *gemirat da'at* and *semikhat da'at* conditions, see Shalom Albeck, *Dinei Mamot ba-Talmud* (Tel Aviv, 1976), 112-43.
 31. *Bava Batra* 168a; Rif, ad loc.; Rambam, *Hil. Mekhirah* 11; *Rosh*, *Bava Batra* 10:19; *Tur*, *Hoshen Mishpat* 207:12; *Shulhan Arukh*, *Hoshen Mishpat* 207:9-13; *Arukh ha-Shulhan*, *Hoshen Mishpat* 207:22-53.
 32. *Bava Mezi'a* 73b and *Tosafot*, ad loc., s. v. *hatam be-yado*.
 33. Rashi, *Sanhedrin* 24b, s. v. *kol ki hai*, according to the interpretation of *Tosafot*, ad loc., s. v. *kol ki hai*; Rashi's view is also held by *Tosafot*, *Bava Mezi'a* 73b, s. v. *hatam be-yado*, and 74a, s. v. *hakha lav be-yado*; Ramban, *Bava Batra* 168a; Rama, *Shulhan Arukh*, *Hoshen Mishpat* 207:13.
 34. R. Jacob Tam, quoted in *Tosafot*, *Bava Mezi'a* 74a s. v. *hakha lav be-yado* and in *Tosafot*, *Sanhedrin* 25a, s. v. *kol ki*.
 35. Rashba, quoted in *Shittah Mekubbezet*, *Bava Batra* 168a.
 36. Rambam, *Hil. Mekhirah* 11:2.
 37. *Ibid.*, 11:2,7.
 38. Aaron Levine, *Economics and Jewish Law* (Hoboken, NJ, 1987), 20-21.
 39. Abbaye, *Bava Mezi'a* 49a; Rambam, *Hilkhot De'ot* 2:6.
 40. Responsa *Nezah Yisra'el* #42.
 41. R. Yoḥanan, *Bava Mezi'a* 49a; Rif, ad loc.; Rambam, *Hil. Mekhirah* 7:8-9; *Rosh*, *Bava Mezi'a* 4:12; *Hoshen Mishpat* 204:11:12; *Shulhan Arukh*, *Hoshen Mishpat* 204:7-8; *Arukh ha-Shulhan*, *Hoshen Mishpat* 204:8-9.
 42. See R. Moshe Isserles, Rama, *Shulhan Arukh*, *Hoshen Mishpat* 204:11. R. Isserles himself rules stringently in this matter.
 43. R. Yeḥiel Mikhel Epstein, *Arukh ha-Shulhan*, *Hoshen Mishpat* 204:8. In this case R. Epstein opts for the view that not to retract would be a matter of *middat ḥasidut* (pious conduct). Note that *Tosafot* (*Bava Mezi'a* 24b, s.v. *lifnim mi-shurat ha-din*) rule that *lifnim mi-shurat ha-din* (conduct beyond the letter of the law) pertains only to making a claim on one's toil and effort, but not to the requirement of incurring financial loss. R. Epstein's mention of

middat ḥasidut here should, therefore, be understood as saying no more than that not to retract is praiseworthy conduct. A requirement not to retract does not, however, obtain here even on a *lifnim mi-shurat ha-din* level.

44. Rambam, *Hil. Gezeilah* 1:4; *Tur, Ḥoshen Mishpat* 359:8; *Shulḥan Arukh, Ḥoshen Mishpat* 359:9; *Arukh ha-Shulḥan, Ḥoshen Mishpat* 359:7.
45. R. Yisrael Grosman, *Resp. Neẓaḥ Yisra'el* #42.
46. *Bava Batra* 21b.
47. R. Isaac b. Jacob Alfasi, *Rif, Bava Batra* 21b; *Tosafot, Bava Batra* 21b, s. v. *peshita li*; Maimonides, *Hil. Shekhenim* 6:18; R. Asher b. Yeḥiel, *Rosh, Bava Batra* 2:12; R. Jacob b. Asher, *Tur, Ḥoshen Mishpat* 156:10; R. Joseph Karo, *Shulḥan Arukh, Ḥoshen Mishpat* 156:5; R. Yeḥiel Mikhel Epstein, *Arukh ha-Shulḥan, Ḥoshen Mishpat* 156:6.
48. *Piskei Din shel Batei ha-Din ha-Rabbaniyyim be-Yisrael*, 6, 3 (Jerusalem 1965), 90; see R. Nahum Rakover, *Halikhot ha-Mishor*, no. 42 (Jerusalem: Misrad ha-Mishpatim, 1976), 12.
49. R. Eliezer b. Joel ha-Levi, quoted by R. Mordecai b. Hillel, *Mordekhai, Bava Batra* 1:#516; and by R. Meir ha-Kohen, *Haggahot Maimuniyyot, Hil. Shekhenim* 6:8.
50. R. Moses Isserles, *Responsa Rama* #10; see also *Darkhei Mosheh, Tur, Ḥoshen Mishpat*, 156, #4.
51. R. Joseph Ibn Migash, *Bava Batra* 21b.
52. R. Mosheh Sofer, *Responsa Ḥatam Sofer, Ḥoshen Mishpat* 78.
53. *Ibid*, 118.
54. R. Moshe Feinstein, *Iggerot Mosheh, Ḥoshen Mishpat* 1:#38.
55. *Bava Batra* 21b.
56. Maimonides, *Hil. Mekhirah* 18:4; *Tur, Ḥoshen Mishpat* 228:16; *Shulḥan Arukh, Ḥoshen Mishpat* 228:18; *Arukh ha-Shulḥan, Ḥoshen Mishpat* 228:14.
57. See R. Ephraim Zalman Margolioth, *Beit Efrayim, Ḥoshen Mishpat* #26; R. Mordecai Ya'akov Breisch, *Responsa Ḥelkat Ya'akov* 2:#65; R. Isaac Arieli *Enayim la-Mishpat, Bava Batra* 21b.
58. *Ḥelkat Ya'akov* 2:#65.
59. *Ibid*.
60. *Responsa Rama* #10; see also *Darkhei Mosheh, Tur, Ḥoshen Mishpat* 156, n. 4.
61. *Rama, Shulḥan Arukh, Ḥoshen Mishpat* 156:5.
62. *Ḥelkat Ya'akov*, 2:65.
63. *Piskei Din Rabbaniyyim*, vol. 6, p. 90; see R. Nahum Rakover, *Halikhot ha-Mishor* no. 41 (Jerusalem: Misrad ha-Mishpatim, 1976), pp. 1-27.
64. *Piskei Din Rabbaniyyim*, *ibid.*; see *Halikhot ha-Mishor*, *ibid.*
65. R. Solomon Leib Tabak, *Teshurat Shai*, 2:4.
66. R. Ḥayyim Sofer, *Maḥaneh Ḥayyim, Ḥoshen Mishpat* 2:46.
67. *Baraita, Bava Batra* 21b.
68. R. Ya'akov Yeshayahu Bloi, *Pithḥei Ḥoshen, Hilkhot Genevah ve-Ona'ah*, 9:11, at 26.
69. *Mishnah, Bava Mezi'a* 3:2.
70. *Bava Mezi'a* 34b and *Rashi ad loc.*, s. v. *ve-ha-shoel*.
71. *Rosh, Bava Mezi'a* 3:5.
72. *Rif, Bava Mezi'a* 34b; Maimonides, *Hil. Sekhirut* 1:6; *Rosh, Bava Mezi'a* 3:5; *Tur, Ḥoshen Mishpat* 307:5; *Shulḥan Arukh, Ḥoshen Mishpat* 307:5; *Arukh ha-Shulḥan, Ḥoshen Mishpat* 307:5.
73. R. Solomon b. Abraham Aderet, *Ḥiddushei ha-Rashba, Bava Kamma* 21a; R.

Joseph Habib, *Nimmukei Yosef, Bava Kamma 2*.

A minority interpretation of R. Yosei's dictum is expressed by R. Ephraim b. Aaron Navon, *Maḥaneh Efrayim, Sekhirut 19*. Disgorgement, in R. Navon's view, is called for only when the following two conditions obtain: (1) the defendant's commercialization of plaintiff's property was unauthorized; and (2) the plaintiff suffers no loss in conjunction with the unauthorized use of his property.

74. Harlan Blake, "Employee Agreements Not to Compete," *Harvard Law Review* 73(1960): 625, 677-78 .
75. *Kiddushin 59a*; *Rif*, ad loc.; *Rosh, Kiddushin 3:2*; *Tur, Ḥoshen Mishpat* , 237; *Shulḥan Arukh, Ḥoshen Mishpat 237:1-2*; *Arukh ha-Shulḥan, Ḥoshen Mishpat 237:1-5*.
76. R. Solomon b. Isaac, *Rashi, Kiddushin 59a*, s. v. *ani ha-mehappekh*.
77. R. Jacob Tam, quoted in *Tosafot, Kiddushin 59a*, s. v. *ani ha-mehappekh*.
78. *Shulḥan Arukh, Ḥoshen Mishpat 237:2*, according to the interpretation of R. Jacob Moses Lorberbaum, *Shulḥan Arukh, Ḥoshen Mishpat*, ad. loc., note 2; *Rama, Shulḥan Arukh, Ḥoshen Mishpat 237:1*; R. Moshe Feinstein, *Iggerot Mosheh, Even ha-Ezer 1:92*.
79. R. Meir b. Barukh, quoted by R. Mordecai b. Hillel, *Mordekhai, Bava Batra 3:55*; *Rama, Shulḥan Arukh, Ḥoshen Mishpat 237:1*; *Arukh ha-Shulḥan, Ḥoshen Mishpat 237:1*.
 By dint of Torah law, money (*kinyan kesef*) effects legal transfer for movable property. Accordingly, if B gives S a deposit for an item, legal transfer has been accomplished. Now, if B leaves his purchase with S for either later delivery or pickup, S is, in the meantime, obligated to guard the item with the responsibility of a paid bailee. If an unavoidable accident (*ones*) destroys the item at hand before B takes possession, S will not be responsible to make good on the loss. Out of concern that S will not exert himself to his fullest in guarding B's item and in the event of a mishap will claim that it was an unavoidable accident, the sages ruled that money does not effect legal transfer in respect to movable property. Nonetheless, if the transaction at hand advanced beyond verbal agreement and featured a transfer of money from B to S, retraction on the part of either party is morally reprehensible to the extent that the Jewish court (*Beit Din*) imposes a special curse, called *mi she-para*, on the party that reneges. (see *Bava Mezi'a 47b, Shulḥan Arukh, Ḥoshen Mishpat, 204:1*)
80. R. Yair Ḥayyim Bacharach, Responsa *Ḥavvot Ya'ir 41*.
81. R. Isaac b. Samuel of Dampierre, quoted in *Tosafot, Kiddushin 59a*, s. v. *ani ha-mehappekh*.
82. R. Solomon Luria, Responsa *Maharshah 36*.
83. R. Binyamin Aharon Slonick, Responsa *Mas'at Binyamin #27*.
84. R. Moshe Feinstein, *Iggerot Mosheh, Ḥoshen Mishpat 1:#60*.
85. From a legal standpoint, an employee not hired for any specific period (henceforth, employee at will) is subject to discharge without cause at any time. Occupying a position for a period of time does not create for the worker a presumptive claim (*ḥazakah*) to be kept on the job as long as work is available (R. Mosheh Schick, Responsa *Maharam, Ḥoshen Mishpat 32*; R. Malkiel Tenenbaum, Responsa *Divrei Malki'el 3:151, 5:215*; R. Isser Zalman Meltzer, *Even ha-Ezel, Sekhirut 10:7*; R. Abraham Y. Karelitz, *Ḥazon Ish, Bava Kamma 23*, p. 84.

A minority view here is expressed by R. Moshe Feinstein. In his view, an employment offer for an indefinite period carries with it a commitment on the part of the employer to keep the hiree on the job as long as the job remains open. Unless expressly hired as a provisional or temporary worker, an employee hired for an indefinite period can be discharged only for cause (*Iggerot Mosheh, Hoshen Mishpat* 1:75-76).

Notwithstanding that an employee at will enjoys no claim to tenure, the employer is morally bound to keep on the worker as long as the job remains open and may not fire him without cause. Addressing himself to the moral case for retaining the employee at will, R. Mosheh Schick (*Responsa Maharam, Hoshen Mishpat*, 32) invokes several ethical norms that urge such conduct. These norms are *dina de-bar mezra* (the law of the abutter) and *makkirei kehunah* (lit. acquaintances of priesthood). For a discussion of these ethical norms as they pertain to the tenure rights of the employee at will, see Aaron Levine, "Performance Appraisal and Halakhah," in *Hazon Nahum: Studies in Jewish Law, Thought and History Presented to Dr. Norman Lamm on the Occasion of his Seventieth Birthday*, ed. Yaakov Elman and Jeffrey S. Gurock (New York, 1997), 619-26.

86. R. Joseph Trani, *Hiddushei Maharit, Kiddushin* 59a.
87. R. Meir b. Samuel, quoted in *Tosafot, Kiddushin* 59a, s. v. *ani ha-mehappekh*.
88. R. Mosheh Sofer, *Responsa Hatam Sofer, Hoshen Mishpat* #79. See also *Hoshen Mishpat* #42 and 6:57.
89. *International News Service v. Associated Press*, 248 U.S. 215, 255 (1918).
90. *Ibid.*, 239.
91. R. Joseph Saul ha-Levi Nathanson, *Responsa Sho'el u-Meshiv, Mahadura Kamma*, 1: #44.
92. 17 U.S.C. 901-914 (Supp. II 1984).
93. Leo J. Raskind, "Reverse Engineering, Unfair Competition and Fair Use," *Minnesota Law Review* 70 (1985): 385-86, 398-99.
94. *Ibid.*, 398.
95. *Wexler v. Greenberg*, 160 A.2d 430 (1960).
96. *Ibid.*, 436.
97. For a description of the roles that govern the economic public policy in the Torah society, see Aaron Levine, *Economic Public Policy and Jewish Law* (Hoboken, NJ, 1993), 3-20.
98. Rama, *Shulhan Arukh, Hoshen Mishpat* 163:1.
99. R. Mosheh Sofer, *Responsa Hatam Sofer, Hoshen Mishpat* #79. See also #41 and 6:#57. See, however, R. Mordecai Banet, *Parashat Mordekhai*, #8.
100. See Aaron Levine, "Aspects of the Firm's Responsibility to its Customers: Pharmaceutical Pricing and Consumer Privacy," in *Jewish Business Ethics: The Firm and its Stakeholders*, ed. Aaron Levine and Moses Pava (Northvale, NJ, 1999), 75-122.