

Encroaching on Someone in Judaism

by Rabbi Dr. Nachum Amsel

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In the capitalist free enterprise system, all competition is generally encouraged. But the competition must be fair in order for the system to work. That is why the government monitors the system to insure that one competitor does not gain any unfair advantage, such as a monopoly. For this reason, for example, the United States government restricted the competition of certain industries and companies, beginning with the railroads in the nineteenth century and including Microsoft and IBM in the twentieth century. The antitrust laws in the United States or the Competition Law in Europe ensure that all competitors "play by the same rules." Generally, if the competition is fair, the more competition there is in any given market, the better it is for the consumer. But what happens to the seller? If one seller comes to an area first and carves out a market for a particular product or service, but then a competitor sets up shop across the street, is that fair? Won't it cut into the profits of that first seller who put in the time and effort to establish the market in the first place? The second seller may even put the first seller out of business, even though the first person should have certain rights to keep his customers. What is indeed fair in this situation? Is it encroachment for a second merchant to sell identical items near that first seller? Is it ethical? What does Judaism say about this?

Before delving into Jewish sources on this issue, we can benefit from examining the classic case about the rivalry between MacDonald's and Burger King (even though these businesses are not Kosher except in Israel). It has been reported that MacDonald's spent millions of dollars investigating the best location in each city before opening a branch there. Then Burger King merely decided to open up across the street from MacDonald's, wherever it happened to be located in any city. It is generally agreed that through this tactic, Burger King rose to become number two in the fast food industry, right behind MacDonald's. However, is what Burger King did fair? Ray Kroc, the founder of MacDonald's once remarked, "I am not in the restaurant business. I am in the real estate business." In fact, MacDonald's today makes more profits from its real estate franchising than its hamburgers. But this does not answer whether or not what Burger King did is ethical. There are those who say it is immoral to try to take away customers from a competitor in such close proximity to an established store. On the other hand, others believe that MacDonald's and Burger King each benefitted by having their stores near each other. Game Theory seems to suggest that each store will sell more, not less, if they are located near each other than if they are far apart, since more people will go to that area to eat if there are more stores open in the area. That explains why all over the United States many gas stations are located right near each other, and apparently the companies do not mind. What, then, is ethical and just, especially if the first seller at a particular location does indeed mind when new competition opens up too close to his or her business's location? This chapter will investigate this question from the Jewish perspective.

THE GENERAL VIEW OF JUDAISM TOWARDS ENCROACHMENT

In the Torah, the prohibition of encroachment is called "*Lo Tasig Gevul* – One may not change the boundary." This principle technically refers to illegally extending one's land ownership

by changing the boundary marker dividing the land with one's neighbor's land.¹ However, already by The Middle Ages this phrase also referred to encroaching on the business of someone else. Maimonides uses this phrase when discussing a *Mohel*, someone who performs ritual circumcision, in a case where someone tried to replace the "usual" person in the community who performed a Bris, and was even willing to give away his payment to charity.² Maimonides called this encroachment, prohibited the second *Mohel*, and labeled the attempt to donate the funds received as payment to charity as a "mitzvah-commandment that came about through a sin." The phrase is used once again in the Torah,³ which curses the one who practices encroachment on the field of a neighbor, as Rashi explains.⁴

When King David tries to reduce the 613 commandments to a few basic principles, one of the eleven fundamental concepts in Judaism is based on the verse "not to do harm to one's fellow man,"⁵ and the Talmud states that this refers to the prohibition of "going down (to interfere) with the livelihood of one's fellow Jew" – i.e., the prohibition of encroachment in business.⁶ Similarly, based on a verse in Ezekiel,⁷ the Talmud prohibits encroachment, which is understood to prohibit the taking away of business from someone who is already established in that business.⁸ What is prohibited precisely, when is setting up a rival business forbidden, and other aspects and ramifications of this prohibition are discussed in detail in the Talmud, its commentaries and the Rabbis until today.

TENSION BETWEEN FREE COMPETITION AND PROTECTING THE ORIGINAL SELLER

In dealing with specific cases outlining the conflict between free enterprise and encroachment, the Talmud's first scenario is about a fisherman who has set up his nets in a place where he found fish normally swimming.⁹ It is forbidden for another fisherman to set up his nets to catch fish right near that first fisherman, and must distance himself a *parasang* (more than a mile) – i.e., enough space so that he does not interfere with the business and the fish of the first fisherman. Rashi explains that all opinions agree to this principle in this case since the second fisherman's nets will inevitably take away all the fish from the first fisherman, and, thus, shut down the first "business" completely.¹⁰ This scenario is not brought down later in normative Jewish law (the Code of Jewish Law) since this is not the usual case where there is competition between two people (i.e. one person takes away the entire business of the second person), but by the fish it is an either/or situation, where only one person can possibly trap all the fish. Thus, it is forbidden to place one's nets near the first fisherman because by doing so, the second fisherman is completely denying all income to the first person. What about the more practical case of a second seller challenging the first seller for a share of his or her profits?

The Talmud on that same page discusses the case where a one person is operating a mill or store in an alley or neighborhood, and a second person wishes to enter the same profession right

¹ Deuteronomy 19:14 and Rashi commentary

² Responsa of Maimonides 273

³ Deuteronomy 27:17

⁴ Rashi commentary on Deuteronomy 27:17

⁵ Psalms 15:3

⁶ Makkot 24a

⁷ Ezekiel 18:6

⁸ Sanhedrin 81a

⁹ Bava Batra 21b

¹⁰ Rashi commentary Bava Batra 21b

there.¹¹ Can the first miller or storekeeper prevent the opening of the second mill or store? Rav Huna says that indeed the second person cannot set up shop if the first seller objects. Rav Huna the son of Rabbi Yehoshua (a different Rav Huna) disagrees and says it is indeed permitted for the second person to compete. The reasoning to permit this, says Rashi, is that the second seller can claim, “Whoever comes to me will buy from me, and whoever comes to you will buy from you¹²” – i.e., let the customers decide who to buy from. This argument is based on a disagreement in a Mishna between the Rabbis who permit a local competitor to set up shop, while Rabbi Shimon ben Gamliel forbids this encroachment in the same neighborhood. But all seem to agree in the Talmud that if the second seller comes from a different city, he may not come in and set up shop next to the first seller. If the second seller is from a different neighborhood in the same town, the Talmud is undecided whether Jewish law would permit him to set up a competing store or not.

There seems to be some disagreement among the commentaries about which opinion is more correct. Ri Migash, for instance, says that in the case of the fish, the second person completely cuts off the income from the first fisherman, while with regard to the shop, since there is enough income for both sellers to make a living, it is permitted.¹³ Tosafot, on the other hand,¹⁴ seem to say that within one neighborhood, the local merchant can prevent a competitor from stepping in because his income will be limited. Meiri states an important caveat: this entire argument assumes that the product in both stores is equal in quality and in price. However, if the price is cheaper at the second store or the quality is superior, then it is certainly permitted for the second seller to come in and compete with the first one.¹⁵

HOW DOES JEWISH LAW RULE WHEN A SECOND SELLER IS TRYING TO COMPETE?

After all the Talmudic disagreements in the commentaries, how does Jewish law rule about encroachment in one neighborhood – i.e., setting up a similar store next to an existing store? Tosafot rules that we follow the opinions of the Rabbis and Rav Huna son of Rabbi Joshua because this Rav Huna is a later Rabbi and we generally follow a later Rabbi.¹⁶ Thus, it would be permissible to set up a second store if both merchants lived in the same neighborhood, but not if the second merchant came from a different city. Nachmanides rules the same way, and seems to say the reason is that we follow the majority of Rabbis – i.e., the opinion of the Rabbis vs. Rabbi Shimon.¹⁷ Maimonides rules in the same manner.¹⁸ However, we must remember that this ruling states that only a person in the same neighborhood can legitimately set up a competing store, but one from a different city may not do so.

There is a lone opinion, brought by Mordechai,¹⁹ that of Aviasaf, who disagrees. He states that the only time that a second person cannot open up a competing store in a courtyard is when the second store makes it physically impossible to reach the first store without passing by the second store. Only in such a situation can the first storeowner prevent another from opening up a competing enterprise, since it is patently unfair and will ruin the original shopkeeper’s business as

¹¹ Bava Bata 21b

¹² Rashi commentary Bava Batra 21b

¹³ Ri Migash commentary on Bava Batra 21b

¹⁴ Tosafot on Bava Batra 21b s.v. “*Ve-r*”

¹⁵ Meiri commentary on Bava Batra 21b

¹⁶ Tosafot on Bava Batra 21b s.v. “*Peshita*”

¹⁷ Nachmanides commentary on Bava Batra 21b

¹⁸ Maimonides, Hilchot Shechainim 5:8

¹⁹ Mordechai commentary on Bava Batra 617

customers will never even see the original store. In any other circumstances, however, Aviasaf rules that all competition is legitimate, and the second person can open up a similar business as the first unimpeded. How, then, does the Code of Jewish Law, Rabbi Yosef Caro, rule?

In his Beit Yosef commentary,²⁰ Rabbi Caro brings the opinion of Aviasaf, but in the Shulchan Aruch itself²¹ he rules like Tosafot, Nachmanides and Maimonides (which all support the opinion of Rav Huna son of Rabbi Joshua) that within the same neighborhood a second merchant can open up a competing store, but not from one neighborhood to another and not from one city to another. Rabbi Moshe Isserles, the Ashkenaz ruling component of the Shulchan Aruch, also brings in his commentary²² the view of Aviasaf – i.e., that the only time a competitor cannot open up a similar business is if he physically blocks passage to the first store. Then, in the Shulchan Aruch itself, Rabbi Isserles also brings this view of Aviasaf as Jewish law (quoting Rabbi Caro's Beit Yosef, in fact), but also writes that “many say” the other opinion as well – i.e., that within a neighborhood, the first merchant can block a second from opening.²³ So we are left with both opinions: within a neighborhood, all agree that a second merchant can open up a second store, but not a merchant from another city. The more liberal opinion is that competition is open for all at any time except when the second store physically prevents customers from seeing or getting to the first store, which is an unfair advantage.

Later authorities qualify and modify the rulings of Rabbi Caro and Rabbi Isserles. Rabbi Avraham Eisenstadt²⁴ (1813-1868) favors the more open competition espoused by Aviasaf, as long as the competition is fair. Thus, when one store prevents equal entrance to the other store, it is unfair and not permitted. Rashba, five hundred years earlier, stated²⁵ that it was unfair for the second storekeeper (a tailor, actually) to approach customers and try to lure them way from the first person to himself (comparing this case to the second man with the fish nets). Nevertheless, he allowed the second tailor to open up a shop directly competing with the first tailor. Chatam Sofer, while ruling on a case where one Rabbi tried to take away the Kosher supervision of an existing Rabbi, rules that if the second storeowner (or Rabbi) will eliminate the livelihood of the first store, then it is forbidden to open up a second store or business. But if the second person will only decrease profits of the first person, then it is permitted.²⁶ Rabbi Yechiel Michel Epstein (1829-1908) writes²⁷ that this entire discussion about limiting competition is legitimate when the items sold by both stores and service providers are identical and the prices are identical. But if the second store opens up and the merchandise is superior (at the same price) or the price is lower (for the same merchandise or service), then it is perfectly legitimate to open up a competing store, even from a different city. But then he adds that all this is so provided that the competition is equitable – i.e., that the original store owner may also sell the items and services at the lower price and still make a profit (albeit smaller). But if the second store had access to goods at cheaper prices that the first store owner cannot obtain (like a monopoly), then it is unfair practice and they cannot open up shop.

²⁰ Beit Yosef commentary on Tur, Choshen Mishpat 156

²¹ Shulchan Aruch, Choshen Mishpat 156:5

²² Darchei Moshe 4 on Tur, Choshen Mishpat 156

²³ Rema in Shulchan Aruch, Choshen Mishpat 156:5

²⁴ Pitchei Teshuva 3 on Shulchan Aruch, Choshen Mishpat 156

²⁵ Responsa Rashba 3:83

²⁶ Responsa Chatam Sofer, Section 5, Choshen Mishpat 118

²⁷ Aruch HaShulchan, Choshen Mishpat 156:11

THE NATURE OF THE PROHIBITION OF ENCROACHMENT

When Judaism forbids the opening of a second store or service where a similar one already exists, what is the nature of that prohibition? Is it forbidden by the Torah, by the Rabbis or because of some other reason? It turns out that, as often happens, there is a conceptual argument even about this aspect of the prohibition. Rabbi Yosef Caro²⁸ believes that the prohibition is only from the Rabbis (as are most practical Jewish laws today), and not a Torah prohibition. Rabbi Moses Sofer²⁹ believes that indeed it is the Torah prohibition. A modern Rabbi, Menachem Tzvi Weider, writes³⁰ that the prohibition is neither Rabbinic or from the Torah, but, rather, as an ethical super-meta Jewish law. Thus, while it is technically permitted to open up a competing enterprise in almost every case, when Jewish law decrees not to do so, it should be observed as the “right thing to do,” in accordance with the verse (Psalms 86:3) suggesting not to do evil to one’s fellow Jew.

WHEN IS COMPETITION AND ENCROACHMENT LEGITIMATE IN JUDAISM?

The Talmud brings one area in which competition is encouraged and there is no concept of encroachment: the learning and teaching of Torah. Thus, it is permitted for one teacher to set up Torah classes right next to another teacher who has already been teaching Torah classes there.³¹ The reason cited is that “jealousy (in Torah learning) increases Torah wisdom.” Therefore, since the goal is to have as much Torah learning and wisdom as possible, all forms of “competition” in this area are legitimate. Rema, in the Shulchan Aruch, brings this concept down as normative Jewish law.³² The implication of this idea is that a Jewish school that teaches Torah can open next to another existing Jewish school without the violation of any Jewish law or ethic. Orchot Tzadikim explains³³ that when one Jew sees another Jew learning Torah better than he is, and that person becomes jealous, it will push him to learn more Torah or to learn it qualitatively better. This type of jealousy and “encroachment” is therefore permitted.

In a situation where two similar stores are already competing (either they are far enough apart from each other or both are there legitimately within Jewish law), there are certain practices that are permitted and that are not called immoral or encroachment. Maimonides rules³⁴ that a storekeeper can give out free samples (nuts to children, for example) in order that customers should frequent his store more than the other store. So, too, it is permitted to have sales on certain items in order to draw people in. This assumes the competition is fair and the other storekeeper can do the same. Shulchan Aruch codifies these concepts as normative Jewish law.³⁵

Rabbi Moses Feinstein, a twentieth century expert in Jewish law, rules in a complicated case that a competing synagogue may indeed be set up, only if it is a far enough distance away from the original synagogue where the walk there is already difficult and inconvenient for some Jews who pray there.³⁶ Rabbi Moshe Sternbuch, a contemporary Israeli expert in Jewish law, rules that a competing restaurant or store may open up without any conditions, providing that the second establishment does not attempt to lure individual customers to switch stores. However, placards

²⁸ Beit Yosef commentary on Tur, Choshen Mishpat 156, section 3

²⁹ Responsa Chatam Sofer, Section 5, Choshen Mishpat 79

³⁰ Minchat Tzvi, Sechirut Poalim 5

³¹ Bava Batra 21b

³² Rema in Shulchan Aruch, Choshen Mishpat 156:5

³³ Orchot Tzadikim, Gate 14, “*Kinah*”

³⁴ Maimonides, Hilchot Mechira 18:4

³⁵ Shulchan Aruch, Choshen Mishpat, 228:18

³⁶ Responsa Igrot Mishpat, Choshen Mishpat 1:38

and advertisements announcing the new store are perfectly legitimate.³⁷ Another contemporary Rabbi, Menachem Weider, rules³⁸ that as long as the second store will not cause great damage to the first store's income, but only lessen the profit (so that the first storekeeper can still make a living), the second store can open. He also rules that a one-time big sale by the competing store is legitimate as a means to attract new customers, since a one-time activity, by itself, will not put the other store out of business. Rabbi Elazar Needham agrees with this general approach, and permits a competitor to open up a store without hesitation,³⁹ but with two caveats: The second store cannot be situated, as mentioned above, in a place where it will prevent clean access to the first store, thereby unfairly crushing the competition. Second, if the store is located in a residential area, the neighbors can complain and prevent the store from opening if they object to the extra traffic and noise that this store will bring.

CURRENT ISSUES AND SPECIFIC CASES REGARDING ENCROACHMENT IN JUDAISM

As marketing and business have changed, there are always new situations and conditions that need to be addressed by contemporary Rabbis. They use the principles in Jewish law established previously and apply them to the new realities in the marketplace. Below are a few examples of potential encroachment situations that contemporary Rabbis of the 20th and 21st centuries have discussed.

Rabbi Moshe Feinstein, as noted above, addressed the issue of forming a new, rival synagogue in close proximity to a previously established synagogue, which he forbids as a violation of encroachment.⁴⁰ In the process of explaining that it is forbidden because that particular neighborhood was not large enough to support two synagogues, Rabbi Feinstein establishes a principle about how much encroachment is permitted or forbidden by a new competitor who will decrease the income of the first establishment. He says that if the second institution will hurt the income of the first establishment to the point that it will "destroy" that person's income, then it is clearly forbidden to open up a competing institution. He then defines what is considered "destroying" the income of the first owner: it is when the average income for a person of his or her social standing is adversely affected. Thus, if the amount of profit of a first store will be lowered to the degree that the owner's profit will now not be viable for him to live on as an average person in his community and standing, then the second store or service may not open up, as it is considered encroachment. In another Responsum, Rabbi Feinstein speaks of the case where a Kosher slaughterhouse is under the supervision of one Rabbi, and another Rabbi (or organization) intentionally casts aspersion upon that Rabbi's reliability, in order to take over the supervision of that plant.⁴¹ Rabbi Feinstein states that is practice a violation of encroachment, no different from establishing a second store next to an existing store when the second store will completely eliminate the income from the first store.

Regarding the opening of a restaurant next to an existing restaurant, Rabbi Shternbuch permits this⁴² as long as the prices are reasonable (and not made too low in order to intentionally put the other establishment out of business), and will not necessarily completely destroy the income of the first restaurant (agreeing with Rabbi Feinstein's approach). Even if the opening of the

³⁷ Responsum Teshuvot VeHanhagot 1:400

³⁸ Minchat Tzvi, Sechirut Poalim 5

³⁹ Darchei Mishpat, chapter 10

⁴⁰ Responsa Igrot Mishpat, Choshen Mishpat 1:38

⁴¹ Responsa Igrot Mishpat, Choshen Mishpat 2:40

⁴² Responsum Teshuvot VeHanhagot 1:400

second restaurant will eventually attract all the customers from the original restaurant (due to tastier food, greater cleanliness, etc.) and this forces the first restaurant to close, it is permitted to do this.

After establishing the same basic principles as discussed above (it is forbidden to open a second store if it will definitely severely damage the viability and profit of the first store), Rabbi Weider then discusses⁴³ the more modern phenomenon whereby customers can order from a store by phone (Internet, Ed.) or drive to the supermarket. If so, then it should make no difference where the second store opens up, even on the other side of the city, and this might be as forbidden as opening a competing store next door to an existing store, which is forbidden in the specific situations described above. He then concludes that since people generally prefer to examine the items they buy for themselves, rather than order by phone, and since driving a short distance from one's home is still preferable to driving to a similar store further away, there is no encroachment if the store is sufficiently far away from the first one, despite the possibility of phone orders and driving there. Rabbi Weider then discusses a series of other modern situations mentioned below, and determines whether these would violate the Jewish laws of encroachment.

For example, if there an existing kindergarten, can a second kindergarten open up right next door? Is this the same as opening a store that sells the same items or not? Rabbi Weider rules⁴⁴ that two kindergartens are not considered in the same category as two stores (even if they do not teach Torah) and do not violate the Jewish concept of encroachment. This is because in a store, the competition for the same items rests on one or two factors: price and quality. Thus, the two may be compared and contrasted and are in direct competition with each other. But in the case of kindergartens, there are many more factors besides price to determine which one is a better educational institution for one's needs. The quality of education, the philosophy of education at each institution, which educational materials are used and which teachers are employed may not be compared or contrasted in the same way as items in a store or other services. The physical qualities of the school, the meals, and even the school's style of teaching are all factors in the consideration of sending a child to one kindergarten or another. Therefore, writes Rabbi Weider, there is no violation of encroachment when two kindergartens are set up side by side. He says the same applies to hotels situated side by side. There are so many factors in selecting one hotel over another, such as décor, quality of food, etc., that two hotels standing side by side are not competing in the way that two stores side by side compete. In both the cases of kindergartens and hotels, price is only one factor among many for the selection.

There is the situation of an established bus stop, such as in Israel, where use of buses is the main mode of transportation for many people. If someone is waiting for a bus at a bus stop, and a taxi or *Sherut* comes by (which follows almost the identical route of the bus, charges almost the same as the bus, and travels when it fills up with passengers), is this encroachment by the *Sherut* or taxi forbidden or not? On the surface, the drivers of the *Sherut* are indeed encroaching on the income of the bus company, says Rabbi Weider, like the second man who casts fishing nets and prevents the first man from catching fish.⁴⁵ However, since today it is common practice for taxi companies to send a *Sherut* to bus stops, many people already go to these places specifically in order to take the taxi if it comes along first, and, thus, there is no encroachment by offering the

⁴³ Minchat Tzvi, Sechirut Poalim 5:13

⁴⁴ Minchat Tzvi, Sechirut Poalim 5:17

⁴⁵ Minchat Tzvi, Sechirut Poalim 5:40

same service. Also, passengers waiting for a bus are often worried that the bus may be too full and not even stop for them (that can happen during peak times in Israel), and thus, the taxis are the only service at that time. Therefore, this is not the same as the case of the second fisherman coming with the nets to catch the fish. However, at locations where taxis are forbidden to take passengers, or at the airport where only licensed taxis are permitted, the taxi drivers who may not legally pick up people in these venues but nevertheless try to pick up passengers, would indeed be guilty of encroachment according to Jewish law. In contrast, certainly a friend in a car who spots someone waiting for a bus would be able to pick up that individual without any ethical concerns, since he or she does not charge the friend for that service, and, therefore, this would not be considered encroachment at all.

Rabbi Dr. Nachum Amsel currently works with Rabbi Berel Wein and the Destiny Foundation as the Director of Education, whose mission is “to bring Jewish history to life in an exciting, entertaining and interactive way.” Rabbi Amsel has also served as a teacher, a school principal, and an adjunct professor. He has also taught over 2000 educators how to teach more effectively. Rabbi Amsel has worked in all areas of formal and informal Jewish education and has developed numerous curricula including a methodology how to teach Jewish Values using mass media. Recently, he founded the STARS Program (Student Torah Alliance for Russian Speakers), where more than 3000 students in 12 Russian speaking countries learn about their Jewish heritage for five hours weekly. Rabbi Amsel previously served as the Educational Director of Hillel in the Former Soviet Union. He lives in Jerusalem with his wife and has four children and four grandchildren.