

Maharam of Padua v. Giustiniani; the Sixteenth-Century Origins of the Jewish Law of Copyright

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Copyright scholars are almost universally unaware of Jewish copyright law, a rich body of copyright doctrine and jurisprudence that developed in parallel with Anglo-American and Continental European copyright laws and the printers' privileges that preceded them. Jewish copyright law traces its origins to a dispute adjudicated some 150 years before modern copyright law is typically said to have emerged with the Statute of Anne of 1709. This essay, the beginning of a book project about Jewish copyright law, examines that dispute, the case of the Maharam of Padua v. Giustiniani.

In 1550, Rabbi Meir ben Isaac Katzenellenbogen of Padua (known by the Hebrew acronym, the "Maharam" of Padua) published a new edition of Moses Maimonides' seminal code of Jewish law, the *Mishneh Torah*. Katzenellenbogen invested significant time, effort, and money in producing the edition. He and his son also added their own commentary on Maimonides' text. Since Jews were forbidden to print books in sixteenth-century Italy, Katzenellenbogen arranged to have his edition printed by a Christian printer, Alvise Bragadini. Bragadini's chief rival, Marc Antonio Giustiniani, responded by issuing a cheaper edition that both copied the Maharam's annotations and included an introduction criticizing them. Katzenellenbogen then asked Rabbi Moses Isserles, European Jewry's leading juridical authority of the day, to forbid distribution of the Giustiniani edition.

Isserles had to grapple with first principles. At this early stage of print, an author-editor's claim to have an exclusive right to publish a given book was a case of first impression. Moreover, Giustiniani, as a non-Jew, was not inherently subject to the intricate rules of Jewish law applicable to commercial relations among Jews. Isserles' resulting ruling and reasoning thus led him, remarkably, to some of the same issues that animate copyright jurisprudence today: Is copyright a property right or a limited regulatory prerogative? What is copyright's rationale? What is its scope? Which law should be applied to a copyright dispute whose litigants reside under different legal regimes? How can copyright be enforced against an infringer who is beyond the applicable legal authority's reach?

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This article includes numerous Hebrew language sources. There is no standard rule for transcribing Hebrew into the Roman alphabet. Unless the Hebrew source has provided its own transcription, I have followed the simplified version set forth in Academy of the Hebrew Language, *Rules of Transcription: Romanization of Hebrew* (2000).

This essay unfolds in three Parts. I begin with the factual and historical background to the dispute. I then analyze Rabbi Isserles' reasoning and decision. I close with a brief description of the dispute's tragic postscript.

I. Background

A. *The Maharam, Moses Isserles, and the Mishneh Torah*

Meir ben Isaac Katzenellenbogen, a leading rabbinical authority and Jewish law scholar of his day, was born in Katzenellenbogen, Germany, in 1473. After studying in Prague, he moved to Padua, located in the Republic of Venice and a seat of secular and Jewish learning that drew students from all over Europe.¹ Katzenellenbogen succeeded his father-in-law, Abraham Minz, as chief rabbi of Padua in 1525. Katzenellenbogen held the title, *Morenu ha-Rav* (literally "our teacher the rabbi"), which connoted great academic distinction and gave him authority to exercise the highest functions of rabbinical office.² As such, Katzenellenbogen served the semi-autonomous Jewish community of the Venetian Republic in a multi-faceted role of spiritual leader, judge, legislator, professor, and dean, presiding over the Jewish community court of the Venice Republic, the Venetian regional council of rabbis, and the renowned Academy of Padua until his death in 1565.³

Katzenellenbogen authored his edition of the *Mishneh Torah* in the midst of over a century of persecution and turmoil for European Jewry, unrivaled in scope until the attempted "Final Solution" of the Nazi Third Reich. The Spanish Inquisition, formally instituted in 1481, and the expulsion of Jews from Spain in 1492 was part of a tide of violence, pillage, forced conversion, and expulsion that swept through the monarchies and principalities of France, Germany, Portugal, the Low Countries, Switzerland, Austria, and Naples and that was soon followed by the further virulent anti-Semitic ferment of the Protestant Reformation.⁴ The result was a mass exodus of Jews from Western and Central Europe. By 1550, the central and northern Italian peninsula had become home to tens of thousands of Jewish refugees, and was virtually the only part of Western Europe where Jews remained.

In central and northern Italy, Jewish presence was tolerated and Jewish communities given a degree of autonomy. Yet there, too, Jews faced persecution and

¹ Shlomo Tal, *Meir ben Isaac Katzenellenbogen*, in ENCYCLOPEDIA JUDAICA; Asher Ziv, *Maharam Me-Padua*, 28 HA-DAROM 160 (1968) (Hebrew). Padua's university was the second oldest in Italy and its medical school generally regarded as the best in Europe. See DAVID B. RUDERMAN, JEWISH THOUGHT AND SCIENTIFIC DISCOVERY IN EARLY MODERN EUROPE 105-06 (Yale University Press 1995).

² See ROBERT BONFIL, JEWISH LIFE IN RENAISSANCE ITALY 137-43 (Anthony Oldcorn trans., University of California Press 1994) (discussing the power, prerogatives, and role of rabbis in Renaissance Italy). Maharam is an acronym of Morenu ha-Rav Meir.

³ Of historical interest, Katzenellenbogen's descendants are reported to include, in addition to numerous leading rabbis throughout Europe, Karl Marx, Moses Mendelssohn, and Martin Buber. BYRON L. SHERWIN, SPARKS AMIDST THE ASHES: THE SPIRITUAL LEGACY OF POLISH JEWRY 68 (Oxford University Press 1997).

⁴ See JONATHAN I. ISRAEL, EUROPEAN JEWRY IN THE AGE OF MERCANTILISM 1550-1750 4-14 (Littman Library of Jewish Civilization 3rd ed. 1998). Jews had been expelled from England in 1294, and were readmitted by Oliver Cromwell in 1656. Edward Fram, *From the Shulhan Arukh to the Enlightenment*, in AN INTRODUCTION TO THE HISTORY AND SOURCES OF JEWISH LAW 359, 362 (N.S. Hecht et al., eds, Oxford Univ. Press 1996).

periodic anti-Semitic agitation. Jews were not allowed to live in Venice until 1509 and, once admitted, were soon required to reside in a walled quarter called the “ghetto” (whence that word derives).⁵ Outside the ghetto, Jews had to wear a yellow cap to distinguish them from Christians and were forbidden from engaging in many occupations, including printing.⁶ As we will see, the persecution and forced migration of European Jews colored both Katzenellenbogen’s edition of the *Mishneh Torah* and some of Isserles’ reasoning in the copyright dispute involving that work.

Intellectual cross-currents played no lesser role in framing *Maharam of Padua v. Guistiniani*. At their epicenter stood Moses Maimonides, the twelfth-century rabbinic authority, jurist, philosopher, and royal physician, whose magnum opus, the *Mishneh Torah*, was the subject matter of the dispute.⁷ Maimonides is a central, if controversial, figure in Jewish thought, law, and religious practice. He also influenced non-Jewish thinkers, including Thomas Aquinas.⁸

Maimonides was a supreme rationalist. His principal philosophical work, *Guide for the Perplexed*, presents a far-ranging synthesis of Jewish faith, Greek-Arabic Aristotlian philosophy, and natural science. In his introduction, Maimonides argues that Judaism must be grounded in reason and that metaphysics (“divine science”) can only be successfully undertaken after studying physics (“natural science”). Elsewhere in the work, he contends that the contemporary knowledge of scientists, astronomers, and mathematicians, whether Jewish or Gentile, supercedes that of the rabbinical sages of old and should be accepted even when it contradicts the views of the rabbis.⁹ Maimonides’ emphasis on science and human reason and his express incorporation of Aristotlian thought brought a virulent reaction from those who espoused a traditionalist, mystic approach to Jewish faith and practice.

The Maimonidean controversy continued to reverbate in the sixteenth century, with Katzenellenbogen and Isserles serving as leading proponents of Maimonides’ rationalism. Katzenellenbogen virulently opposed the propagation of the mystical

⁵ BONFIL, *supra* note 2, at 56-57. Venice required Jews to live in the ghetto in 1516.

⁶ Jews were generally prohibited from joining craft and trade guilds. BONFIL, *supra* note 2, at 93. The Venice Condotte of 1548 explicitly forbade Jews from establishing printing presses or working for Christian printers. Nonetheless, Jews managed to be active in wide area of skilled occupations and commonly worked in association with or in service to Christian printers as editors, proof-readers, and investors. SHIFRA BARUCHSON, SEFARIM VE-KORIM: TARBUT HA-KREEYA SHEL YEHUDEI ITALIA BE-SHLAHEI HA-RENAISSANCE [Books and Readers: The Reading Interests of Italian Jews at the Close of the Renaissance] 71 (Bar-Ilan University Press 1993); BONFIL, *supra* note , at 93-94.

⁷ Maimonides is known in rabbinic literature as “Rambam,” the acronym for his Hebrew name, Rabbi Moses ben Maimon. Maimonides lived from 1135 to 1204. For a penetrating, comprehensive study of Maimonides’ life and work, see HERBERT A. DAVIDSON, MOSES MAIMONIDES; THE MAN AND HIS WORKS (Oxford Univ. Press 2005).

⁸ BRIAN DAVIES, THE THOUGHT OF THOMAS AQUINAS 60-61 (Oxford University Press 1992); DAVID B. BURRELL, KNOWING THE UNKNOWABLE GOD: IBN-SINA, MAIMONIDES AQUINAS (Notre Dame University Press 1986).

⁹ MAIMONIDES, GUIDE FOR THE PERPLEXED 2:8, 3:14; RUDERMAN, *supra* note 1, at 30-32.

teachings of the Kabbalah.¹⁰ And due to his intellectual prowess and commitment to the study of science, Isserles came to be known as the “Maimonides of Polish Jewry.”¹¹

Upon its completion in 1180, Maimonides’ fourteen-volume *Mishneh Torah* was no less controversial than *Guide for the Perplexed*. The *Mishneh Torah* was the first systematic codification of the entire corpus of Jewish law ever undertaken. Jewish law derives from express injunctions and subtle references in the Pentateuch as interpreted and supplemented by a dizzying array of majority and minority opinions, rabbinic judgments, and opposing arguments found in the Talmud and post-talmudic commentary, regulations, custom, and rulings. Prior to Maimonides’ work, a handful of scholars had crafted redactions of those laws relevant to their contemporary practice. But those redactions largely followed the structure of the classic sources, thus lacking the logical arrangement that would enable most users to find what they need with relative ease.¹² Maimonides sought to produce something akin to a vast Restatement of the Law; indeed “Mishneh Torah” means precisely that, restatement, or reiteration, of the law. He systematically classified the entire existing legal literature by subject matter, ranging from matters of religious practice and faith, to marriage and sexual relations, to criminal, property, and tort law. He then restated the legal doctrine in a plain language. Maimonides’ restatement covered the entire spectrum of rabbinic law, including not only laws of practical application in his time, but also those relating to life in ancient Israel, when the Temple still stood in Jerusalem.¹³

Maimonides’ grand purpose, as he stated in the introduction, was that “the entire Oral Law might become systematically known to all, without citing difficulties and solutions of different views ... but consisting of statements, clear and convincing ... that have appeared from the time of Moses to the present, so that all rules shall be accessible to young and old.” According to some commentators, Maimonides meant that Jews could henceforth rely on his code alone to determine Jewish law.¹⁴ That view finds some support in Maimonides’ wholesale omission of citations to the rabbinic authorities from which he drew in extracting legal norms.¹⁵ Indeed, even though the *Mishneh Torah* recommends that students devote substantial time grappling with Talmudic disputation, Maimonides’ letters suggest that, in his view, studying the Talmud is merely a means -- a tortuously difficult means -- to discerning the law, not an end in and of itself.¹⁶ At the very least, Maimonides seems to have intended that his opus would obviate the need to study post-Talmudic rulings and disputation.

¹⁰See Shlomo Tal, *Meir ben Isaac Katzenellenbogen*, in *ENCYCLOPEDIA JUDAICA*, noting that in 1558 he signed two bans against the study of Kabbalah; David ben Manasseh & David Darshan, *Shir Hama’ot L’David/In Defense of Preachers* 17 (Hebrew Union College Press 1984) (noting Katzenellenbogen’s opposition to the printing of the Zohar).

¹¹See RUDERMAN, *supra* note 1, at 69-77; David E. Fishman, *Rabbi Moshe Isserles and the Study of Science Among Polish Rabbis*, 10 *SCIENCE IN CONTEXT* 571 (1997); *Moshe Isserles*, in *THE OXFORD DICTIONARY OF THE JEWISH RELIGION ---* (R.J. Zwi Werblowsky & Geoffrey Wigoder, eds., Oxford Univ. Press 1997).

¹²DAVIDSON, *supra* note 7, at 193-95.

¹³Maimonides also canvassed more classic rabbinic sources in extracting legal norms than had earlier codifiers. *Id.* at 197.

¹⁴DAVIDSON, *supra* note 7, at 208-10.

¹⁵Maimonides does list his sources in the introduction, but he does not cite his authority for his enunciation of specific laws in the text.

¹⁶DAVIDSON, *supra* note 7, at 197-202, 208.

Maimonides' *Mishneh Torah* aroused a storm of opposition not only to many of his specific conclusions, which reflect the same rationalist outlook he later delineated in *Guide for the Perplexed*, but to the very nature of his project. Opponents feared that, whether Maimonides intended it or not, his code would turn students away from studying the Talmud, which the opponents viewed as the wellspring of Jewish creativity and thought. They also feared that the *Mishneh Torah* would blind judges to the contrasting opinions required to understand the law and reach a just result.¹⁷ For them, the need for careful study of the cases, parsing rabbinic argument, and wrestling with contrasting arguments was the very essence of Jewish jurisprudence, not an obstacle to be avoided.¹⁸ In that vein, they also castigated Maimonides for failing to cite authority for his conclusions. As one opponent put it: "As he does not adduce proofs from the sayings of the talmudic sages for his decisions, who is going to follow his opinion? It is far better to study Talmud."¹⁹

By the sixteenth century, the *Mishneh Torah* had earned a central place in the Jewish canon, but Maimonides had failed in his goal of providing a single authoritative code that would resolve all disputes. Maimonides' work had spawned several competing codes, each reflecting a different organization and interpretation of the law. The *Mishneh Torah* had also inspired numerous commentaries, some seeking to explicate and find Talmudic authority for Maimonides' conclusory statements of law, others aiming to refute his conclusions, and still others adding the rulings and glosses of later scholars.²⁰

In addition, several leading sixteenth-century rabbinic authorities remained fiercely opposed to the very idea of codifying Jewish law. They included Jacob Pollak, who was Katzenellenbogen's teacher in Prague, and Shalom Shakhna, who studied with Katzenellenbogen under Jacob Pollak and then went on to become Isserles' teacher in Cracow. Pollak and Shakhna posited that a judge must decide each case on its own merits, in line with his individual study of legal sources and understanding of the equities – "according to what he sees with his own eyes" and "the dictates of his own heart."²¹ The law's redaction in a codex, they argued, would necessarily deprive judges of that vital case-by-case discretion.

¹⁷ MENACHEM ELON, HA-MISPHAT HA-IVRI: TOLDOTAV, MAKOROTAV, EKRONOTAV [Jewish Law: History, Sources, Principles] 1005-17 (Magnes Press, 2d. ed., 1978).

¹⁸ The early eighteenth century movement to codify the common law in the United States also aroused fierce opposition, albeit for different reasons. See generally CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT; A STUDY OF ANTEBELLUM LEGAL REFORM (Greenwood Press 1981); Joseph Story, "A Report of the Commissioners Appointed to Consider and Report Upon the Practicability and Expediency of Reducing to a Written and Systematic Code the Common Law of Massachusetts, or Any Part Thereof" (1837).

¹⁹ Haim Hillel Ben-Sasson, *Maimonidean Controversy*, in Encyclopedia Judaica, quoting from the report of Sheshet ben Isaac Saroggosa, a Maimonides defender writing about 1200, of the opinion of a rabbinic judge who refused to rule according to Maimonides. See also DAVIDSON, *supra* note 7, at 266-67 (discussing of Maimonides' contemporaries and Maimonides' response).

²⁰ ELON, *supra* note 17, at 1011-22.

²¹ See the statements of Israel, son of Shalom Shakhna, quoted in Rema, Resp. no. 25, quoted in ELON, *supra* note 17, at 1120-21

Katzenellenbogen and Isserles rejected their mentors' uncompromising opposition to codification.²² They believed that, so long as codes are accompanied by commentary succinctly presenting alternative views, such restatements can make the law accessible while still encouraging judges and students to grapple with competing positions and interpretations. Their own projects manifest that measured view. In his edition of the *Mishneh Torah*, Katzenellenbogen added some early sources that Maimonides had expressly rejected together with subsequent commentary that took issue with Maimonides' position.²³ He also expressed sensitivity to the concern that the *Mishneh Torah* could dissuade readers from grappling with rabbinic sources. In his introduction, Katzenellenbogen states that while he provides Talmudic references for Maimonides' most obscure statements, he resisted the temptation to provide citations for all Maimonides' conclusions out of fear that some readers would then rely on his citations as a shortcut rather than searching for authority in the Talmud themselves. For his part, Isserles drafted his own code and added critical glosses to a code, Joseph Caro's *Shulhan Arukh*, which, largely because of Isserles' commentary and counterpoint, remains the principle authoritative redaction of Jewish law to this day.²⁴

Katzenellenbogen's publication of the *Mishneh Torah* also reflected his engagement with the traditions of Italy's native and Sephardic Jews. Given the mass migrations of Jews from Western and Central Europe, mid-sixteenth century Italy contained a complex mix of Jews of various geographic origins and distinct socio-legal traditions. These included a group whose presence in Italy dated back to ancient times; "Ashkenazi" Jews, those from Germany and Northern France, who began arriving in northern Italy in the second half of the fourteenth century; "Sephardic" Jews, those who came from Spain and Portugal after the Inquisition and expulsion in the late fifteenth century; and Jews who lived in regions conquered by Italian states in the Balkans and Greek Islands.²⁵ In certain matters of law and ritual Ashkenazi Jews followed different rules and customs than their co-religionists from the Iberian Peninsula, southern Europe, and the Levant. In that vein, Ashkenazi jurists generally ruled in accordance with the *Sifrei Turim*, a code of laws compiled in the early fourteenth century by Jacob ben Asher (who fled from Ashkenaz to Spain at the age of 33), while Sephardic, Italian, and Oriental Jews typically followed the *Mishneh Torah* of Maimonides (who lived in Spain

²² For his part, Katzenellenbogen might not have felt much duty of loyalty to his teacher. Some two decades previously, Jacob Pollack had issued an order excommunicating Katzenellenbogen's father-in-law, Abraham Mintz. Shomo Tal, *Jacob Ben Joseph Pollack*, *Encyclopedia Judaica*

²³ In *Sefer Ha-Mitzvot* [Book of Commandments], which he wrote as a freestanding prolegomenon to the *Mishneh Torah*, Maimonides enumerated 613 commandments that Jews are obligated to follow and set out 14 principles that guided him in identifying those commandments in Biblical narrative and Talmudic disputation. In so doing, Maimonides expressly rejected an earlier attempt to identify such commandments. Nachmanides (known in Jewish tradition as Ramban), the foremost Jewish law scholar in the generation following Maimonides, published a critique of the *Sefer Ha-Mitzvot*, called the *Hasagot* [the Criticisms], in which he defended the earlier authors against Maimonides' criticism. Katzenellenbogen included in his edition the earlier writings, Maimonides' *Sefer Ha-Mitzvot*, and Nachmanides' *Hasagot*.

²⁴ ELON, *supra* note 17, at 1131-37. "Shulhan Arukh" means "the set table." Isserles labeled his commentary, which adds Ashkenazi customs and rulings to Caro's Sephardic-oriented code, *Mappa*, or "table cloth." Louis Isaac Rabinowitz, *Shulhan Arukh*, in *Encyclopedia Judaica*.

²⁵ ELIMELECH WEISTREICH, *T'MOROT BE-MAAMAD HA-ISHA BE-MISHPAT HA-IVRY; MASA BEN MESOROT* [Transitions in the Legal Status of the Wife in Jewish Law; A Journey among Traditions] 199 (Hebrew University Magnes Press 2002).

and Egypt).²⁶ Although Katzenellenbogen was Ashkenazi, his rulings draw upon Sephardic as well as Ashkenazi authorities and he broke with Ashkenazi tradition in his Sephardic-influenced rulings in some cases.²⁷ Katzenellenbogen's edition of the *Mishneh Torah*, which his publisher, Alvise Bragadini, touted as the work of the great Maimonides "the Sephardi," exemplified the Maharam's "broad tent" approach and was likely seen as such by his contemporaries.

B. *Editing and Printing*

Printing was brought to Italy soon after Gutenberg's invention of movable type in the mid-fifteenth century.²⁸ There it flourished, supported by ecclesiastical patrons, a literate culture, and well-to-do urban centers. Venice, with its relative stability, developed mercantile system, and the leading university of Padua, was a particularly congenial setting for the new craft. By 1480, Venice had come to dominate the Italian printing industry and, indeed, had become the "capital of printing" of all Europe.²⁹

Hebrew presses were among the earliest in Italy; the first Hebrew book printed in Italy bearing a publishing date of which we have a record was produced in 1475.³⁰ Most fifteenth-century Hebrew printers were Jews, led by the Soncino family, which published books of Jewish law and liturgy as well as non-Hebrew books. By 1500, about 200 Hebrew volumes had already been printed.³¹ Readers included not just Jews, but also but also a sizable number of Christian Hebraists devoted to studying the classics of Jewish learning.³²

²⁶ Menachem Elon, *Codification of Law*, Encyclopedia Judaica; DAVIDSON, *supra* note 7, at 284-85 (noting Joseph Caro's observation, made in the sixteenth century, that the *Mishneh Torah* served as the standard law code for Jewish communities in all the Arab lands). A study of book ownership among Jews in Mantua in 1595 found, accordingly, that a considerably higher percentage of Sephardic and Italian households than Ashkenazi households owned a copy of the *Mishneh Torah*, with the results the opposite regarding ownership of the *Sefer Ha-Turim*. BARUCHSON, *supra* note 6, at 134.

²⁷ Notably, the Maharam cited Sephardic legal sources in relaxing the ban on polygamy (which had been instituted in Ashkenaz in the eleventh century and subsequently accepted in northern Italy). See Responsa Maharam of Padua, Nos. 13 and 19. For discussion, see WEISTREICH, *supra* note 25, at 208-10. Katzenellenbogen frequently cited Maimonides in his rulings. See, e.g., Responsa Maharam of Padua No. 78 (citing Maimonides in support of a ruling that portions of the Bible may be read in vernacular translation on Yom Kippur). But he also regularly cited the *Sifrei Turim* and did not always follow Maimonides' position.

²⁸ This paragraph draws upon BRIAN RICHARDSON, *PRINTING, WRITERS AND READERS IN RENAISSANCE ITALY* 3-5 (Cambridge University Press 1999).

²⁹ FREDERICK C. KILGOUR, *THE EVOLUTION OF THE BOOK* 93 (Oxford Univ. Press 1998).

³⁰ DAVID AMRAM, *THE MAKERS OF HEBREW BOOKS IN ITALY* 23-24 (Holland Press 1988). The book was Rashi's commentary on the Pentateuch, printed at Reggio di Calabria by Abraham ben Garton Isaac. *THE HEBREW BOOK: AN HISTORICAL SURVEY* 94 (Raphael Posner & Israel Ta-Shema, eds., Keter Publishing 1975).

³¹ Amnon Raz-Krakatzkin, *Print and Jewish Cultural Development*, in 3 *ENCYCLOPEDIA OF THE RENAISSANCE* 344 (Charles Scribner's Sons 1999). Although impressive, these 200 Hebrew editions were but a small fraction of the estimated 35,000 books printed in Europe during the fifteenth century. LUCIEN FEBVRE & HENRI-JEAN MARTIN, *THE COMING OF THE BOOK* 182-86 (Verso 1984).

³² See, generally, David B. Ruderman, *The Hebrew Book in a Christian World*, in *A SIGN AND A WITNESS; 2,000 YEARS OF HEBREW BOOKS AND ILLUMINATED MANUSCRIPTS* 101 (N.Y. Public Library & Oxford Univ. Press 1988).

Due to prohibitions on Jews engaging in printing and in selling books to non-Jews, Hebrew printing in the sixteenth century came to be dominated by Christian printers, who hired Jews or Jewish converts to Christianity as proofreaders, editors, and compositors. The most prominent of these printers was Daniel Bomberg, originally from Antwerp, whose high quality craftsmanship and typographical arrangement still sets the standard for Hebrew Judaic printing.³³ In 1515 the Venetian Senate granted Bomberg an exclusive privilege to print Hebrew books.³⁴ That grant followed a practice common in Venice and other Italian cities, beginning in the 1480's, of liberally granting exclusive printing privileges, generally lasting ten years, for a particular edition, typeface, or printing technique. Yet by the time the Senate granted Bomberg his privilege, there was mounting dissatisfaction with the practice of granting printing privileges, the proliferation of which had led to high prices, poor quality work, and an exodus of printers from the city.³⁵ Two years later, indeed, the Senate revoked all existing printing privileges, including Bomberg's, and provided that future privileges would be granted only for works not previously printed.³⁶ Bomberg nevertheless managed to convince the Senate to renew his printing monopoly for eight years, and then again, in 1526, for another decade, that time upon paying the sum of 500 ducats, the equivalent of several years' income.³⁷

Marc Antonio Giustiniani established a Hebrew press in Venice in 1545. The scion of a wealthy family of Venice patricians, Giustiniani emerged as a powerful, cut-throat rival to the now aged Daniel Bomberg. Giustiniani hired away some of Bomberg's key Jewish editors and compositors. He also repeatedly rushed out competing, low price editions of the same works printed by Bomberg.³⁸ As his distinguishing printer's mark, a mark that adorns his edition of the *Mishneh Torah*, Giustiniani boastfully chose a depiction of the Second Temple of Jerusalem, accompanied by the Biblical verse, "The glory of this latter House shall be greater than that of the former."³⁹ Giustiniani never achieved Bomberg's stature. But his fierce competition put the Bomberg press out of business in 1548 and for a short time Giustiniani enjoyed a de facto monopoly of Hebrew printing in Venice.⁴⁰

When Katzenellenbogen decided to publish a new annotated edition of the *Mishneh Torah*, he approached Giustiniani to handle the printing, but, for whatever reason, the two did not come to terms. It was then that the Maharam of Padua joined forces with Alvise Bragadini, another Venice patrician, who had just established a new

³³ Joshua Bloch, *Venetian Printers of Hebrew Books*, in HEBREW PRINTING AND BIBLIOGRAPHY 65, 78-79 (Charles Berlin ed., N.Y. Public Library & Ktav Publishing House 1976).

³⁴ Id. at 69.

³⁵ RICHARDSON, *supra* note 28, at 38-43. In 1469 Venice awarded John of Speyer a monopoly over all printing in the city, but the privilege never took effect because he died soon after. Id. at 39.

³⁶ Id.

³⁷ BARUCHSON, *supra* note 6, at 131-33; Bloch, *supra* note 33, at 70-72.

³⁸ MEIR BENAYAHU, HASKAMA VE-RESHUT BE-DFUSEI VENETZIA: HA-SEFER HA-IVRI MI-ET HAVATO LE-DFUS VE-AD TZATO LE-OR [loosely translated by the publisher as "Copyright, Authorization and Imprimatur for Hebrew Books Printed in Venice"] 21-24 (Machon Ben Tzvi & Mosad Rav Kook 1971); A. M. HABERMANN, PRAKIM BE-TOLDOT HA-MADPISIM HA-IVRIM VE-INYANEI SFARIM [Studies in the History of Hebrew Printers and Books] 167-68 (Rubin Mass 1978); BARUCHSON, *supra* note 6, at 34.

³⁹ Haggai 2, 9.

⁴⁰ Bloch, *supra* note 33, at 79.

Hebrew press in Venice.⁴¹ The dispute over the *Mishneh Torah* was the beginning of a bitter rivalry between the two presses, with Bragadini ultimately gaining the upper hand. Giustiniani ceased publication in 1552, while the House of Bragadini emerged to dominate Hebrew printing in Venice until well into the eighteenth century.⁴²

Instability and ruinous competition were typical of the printing industry of that era. In 1480, there were 151 printing houses in Venice; by 1500 only 10 remained. In 1588, the Venice Senate complained that only 70 printing houses remained of the 120 that had been in operation earlier in that century, and by 1596 their numbers had diminished to 40.⁴³ The precariousness of the printing business lay in the high fixed costs of labor, rent, press, and type, expense of paper, considerable delay before copies could be sold, and risks of pirated copies, real piracy, the loss of copies due to fire, warfare, or plague, and inability to collect from distant booksellers.⁴⁴ Moreover, given the small market and difficulties of distribution, the typical printing run remained just a couple thousand copies throughout the sixteenth century. Finally, even if the printer obtained an exclusive privilege, that did not prevent competition from rival editions printed in neighboring jurisdictions.

Printing could be very profitable nonetheless. Even a print run of 300 to 400 copies could eventually yield returns as high as 100 per cent, if production and sale went without a hitch.⁴⁵ Successful printers were, by and large, those with considerable capital and broad familial and social connections that could serve to build relatively efficient, secure, and geographically wide distribution networks.⁴⁶

Like today's book publishers, sixteenth century printers sought to minimize their risk by printing books that were assured considerable demand. During the first century of print, that largely meant printing classics and liturgical works written before the age of print. The first half of the sixteenth century thus saw numerous Italian editions of the works of Dante, Petrarch, and Boccaccio, just as Hebrew printers invested primarily in issuing successive editions of the Bible, Talmud, and other central texts of Jewish law, liturgy, and literature.⁴⁷ Largely as a result, ambitious printers and publishers came to view an investment in editing, including hiring a respected, celebrated editor, as a primary key to success. Editions of classic works typically featured printer's dedications and editor's introductions trumpeting the editor's arduous work and expertise in producing an accurate and complete instantiation of the original manuscript and correcting the many errors found in earlier editions. Printers and editors also sought to distinguish their editions by supplementing the text with the editor's commentary, annotations, and explanatory notes.⁴⁸

⁴¹ AMRAM, *supra* note 30, at 255-56; Jennifer Breger, *Competition in the Hebrew Book Market*, AB Bookman's Weekly, Feb. 27, 1995, at 940.

⁴² Bloch, *supra* note 33, at 86.

⁴³ BARUCHSON, *supra* note 6, at 28.

⁴⁴ RICHARDSON, *supra* note 28, at 25-38

⁴⁵ RICHARDSON, *supra* note 28, at 26.

⁴⁶ BARUCHSON, *supra* note 6, at 29.

⁴⁷ See, generally, BRIAN RICHARDSON, *PRINT CULTURE IN RENAISSANCE ITALY; THE EDITOR AND THE VERNACULAR TEXT 1470-1600* (Cambridge Univ. Press 1994); BARUCHSON, *supra* note 6, at 83 (Hebrew presses).

⁴⁸ RICHARDSON, *supra* note 47, at 7, 99-103; BARUCHSON, *supra* note 6, at 43.

The Katzenellenbogen-Bragadini edition of the *Mishneh Torah* falls squarely within that framework. Like most works that had been repeatedly hand-copied in manuscript prior to the invention of print, the manuscripts of Maimonides' *Mishneh Torah* had numerous discrepancies, partly because Maimonides himself had made emendations and corrections to some early manuscripts.⁴⁹ Moreover, by the time Katzenellenbogen embarked on his project, Maimonides' classic code had already been printed several times, the first in Rome before 1480 and the latest by Daniel Bomberg in 1524.⁵⁰ As typical of his high quality work, Bomberg had invested heavily in his edition. He employed as editor the noted Italian Talmudist and physician, David Ben Eliezer Ha-Levi Pizzighettone, and had gathered a large number of manuscripts and marginal glosses for use in the edition's preparation.⁵¹ The Bomberg edition also included leading medieval scholars' glosses and commentaries on Maimonides' work.⁵²

In the introduction to his edition, Katzenellenbogen lavishes praise on Pizzighettone and states that he initially saw little value in "gleaning the last crumbs remaining" from the great work of his predecessor.⁵³ But the Maharam emphasizes, that, through his own arduous study of the text and understanding of Talmudic and post-Talmudic commentary and with the help of his son, he has nevertheless made a number of corrections vis-à-vis the earlier edition, both in Maimonides' text and that of the medieval commentators. Katzenellenbogen also indicates that he has annotated the text with references to Talmudic sources and added some brief commentary of his own.⁵⁴ Finally, both Katzenellenbogen's introduction and Bragadini's preface announce that the Maharam has, for the first time, incorporated with the *Mishneh Torah* not only the commentaries included in the earlier edition, but also Maimonides' *Sefer Ha-Mitzvot*, a work that Maimonides wrote as a freestanding prolegomenon to the *Mishneh Torah* and in which he criticized some earlier authorities; Nachmanides' *Hasagot*, in which that medieval scholar defended the authorities that Maimonides criticized; and the writings of the early authorities at issue in the dispute.

In addition to contributing his labor and expertise, Katzenellenbogen reportedly invested much of his own fortune in the edition.⁵⁵ The project must have appeared to be a

⁴⁹ See DAVIDSON, *supra* note 7, at 269-70. Printed editions of the *Mishneh Torah* are said to still contain many mistakes. Alexander Marx, *Texts by and about Maimonides*, 25 JEWISH QUARTERLY REV. 371 (1935). On the phenomenon of textual drift in manuscripts that were copied and recopied many times by hand, see ELIZABETH L. EISENSTEIN, *THE PRINTING REVOLUTION IN EARLY MODERN EUROPE* 78-80 (Cambridge Univ. Press 1983).

⁵⁰ THE HEBREW BOOK, *supra* note 30, at 211.

⁵¹ Id; AMRAM, *supra* note 30, at 172.

⁵² These included the *Migdal Oz*, *Maagid Mishneh*, and *Haggahot Maimuniyyot*.

⁵³ Katzenellenbogen was known for his modesty and benign disposition. In addition, Pizzighettone had sided with Katzenellenbogen's father-in-law, Abraham Minz, in a vituperative early sixteenth-century dispute among Italian rabbis regarding the proper venue for deciding a major commercial dispute. It was over this dispute that Jacob Pollack, Katzenellenbogen's teacher in Prague, excommunicated Minz. Aaron Rothkoff, *Finzi-Norsa Controversy*, *Encyclopedia Judaica*.

⁵⁴ Interestingly, the commentary accompanying the 1550 Bragadini edition was printed with spaces for Ptolemaic astronomical illustrations to be added manually afterwards. In 1574 Bragadini issued a second edition of the *Mishneh Torah*. In that edition, the illustrations accompanying the text were printed mechanically for the first time. B. BARRY LEVY, *PLANETS, POTIONS, AND PARCHMENTS: SCIENTIFICA HEBRAICA FROM THE DEAD SEA SCROLLS TO THE EIGHTEENTH CENTURY* 99 (McGill-Queen's University Press 1990).

⁵⁵ Breger, *supra* note 41, at 940.

solid bet. As with many other Judaic texts printed in that era, the *Mishneh Torah* would likely have attracted as potential purchasers Jews and Christian Hebraists throughout Italy and beyond.⁵⁶ Readers throughout Europe looked to Venice as an important source of scholarly and liturgical Hebrew books. Indeed, Moses Isserles is reported to have relied on foundational texts proofread by Katzenellenbogen and printed in Venice in writing his glosses on the *Shulkhan Arukh*.⁵⁷

II. The Ruling

Giustiniani published his edition of the *Mishneh Torah* closely on the heels of Bragadini's. Giustiniani included Katzenellenbogen's source references and original commentary. In a show of denigration, however, he moved the Maharam's commentary to an appendix and, in his prefaces to the volume and the appendix, criticized the commentary as worthless – “having been written for nothing.” With bravado typical of fiercely competitive printers of that era, Giustiniani claimed that leading scholars from “Yemen to the West” had told him that Katzenellenbogen's commentary should be removed from the text because in each annotation the Maharam had either “erred” or “sought to explain things understood even by one who is one day old.”⁵⁸ The Maharam's annotations were appended, Giustiniani continued, only to give scholars the opportunity to judge their worth independently. In like vein, Giustiniani announced that leading scholars had pleaded with him to rush out an alternative to the shoddy edition of “one rabbi from Padua who aspired to stand among the greats.” Those scholars, Giustiniani touted, had also given his edition added value by providing him with additional material not found in the Bragadini, including the *Sifrei Turim* precepts corresponding to Maimonides' provisions and page references to two leading medieval commentaries on the *Mishneh Torah*, the *Migdal Oz* and *Maagid Mishneh* (which, the preface notes, had no numbered pagination prior to the print editions of those commentaries).⁵⁹

To add injury to insult, Giustiniani sold his edition at a significantly lower price than the Katzenellenbogen-Bragadini *Mishneh Torah*. Indeed, although Giustiniani had apparently spared no expense in producing a woodcut-illustrated, perfectly justified handset edition of stunningly high quality, he promised in his preface to sell the edition for a price of at least a gold coin less than that of his competitor. His intention, he proclaimed, was to enable the Jewish community to purchase books as cheaply as possible. In response, Bragadini charged in a postscript to his edition that his rival acted

⁵⁶ On the *Mishneh Torah*'s influence among Christian Hebraists and Protestant theologians, see DAVIDSON, *supra* note 7, at 289.

⁵⁷ Reponsa Rema, no. 10, pp. 45 n. 41 (A. Ziv, ed. 1970),

⁵⁸ Giustiniani's anonymous editor further charged that Katzenellenbogen had apparently failed to read Maimonides' letter to Pinḥas of Alexandria in which Maimonides had stated, basically, that his readings of the law were straightforward and needed no annotative explanation, and thus that Katzenellenbogen should have stuck to providing Talmudic sources rather than presumptuously adding his own commentary.

⁵⁹ These claims were set forth in a separate preface by an unnamed person (presumably Giustiniani's editor) labeled as Giustiniani's “small, loving, and loyal purporting to be Giustiniani's anonymous editor in his preface. The preface notes that the scholars have also provided parallel references to the *Sefer Mitzvot Gadol*, a leading supplement to the *Mishneh Torah*, containing Talmudic and post-talmudic sources for Maimonides' precepts, authored by the great thirteenth-century French rabbinic scholar, Moses ben Jacob of Coucy. See Israel Moses Ta-Shma, *Moses ben Jacob of Coucy*, in ENCYCLOPEDIA JUDAICA.

only to maintain a monopoly on Hebrew printing, and aimed to drive Bragadini out of business as he done previously to Daniel Bomberg.⁶⁰

Katzenellenbogen then appealed to Rabbi Moses Isserles of Cracow to rule the Giustiniani edition a violation of Jewish law. Isserles was only 20 years old at the time and had just been appointed Rabbi of Cracow.⁶¹ But he was already on his way to become the leading Ashkenazi juridical authority of his day, a place later cemented by publication of his glosses on the *Shulhan Arukh*. So Isserles was a natural choice for Katzenellenbogen to seek a ruling. Nonetheless, it is probably fair to say that Katzenellenbogen's turn to Isserles had elements of what we might deem forum shopping. As we have seen, the two were intellectual kinsmen in their support of Maimonides' rationalism and codification. More than that, they were actual kinsmen: second cousins once removed.⁶²

The procedural posture of "Maharam of Padua v. Giustiniani" is noteworthy in another sense as well: while I have taken poetic license in labeling the matter as one would a case heard in a U.S. court, in fact, the matter had no such appellation and, indeed, was not a "case" in the sense of consisting of a proceeding at which litigants present argument and evidence. The semi-autonomous Jewish courts of that era followed intricate rules guaranteeing each litigant a fair opportunity to present evidence and argue his case.⁶³ But the non-Jewish Venetian patrician, Giustiniani, would no doubt have refused to appear before a Jewish court. Accordingly, Katzenellenbogen followed a procedure that was often used by rabbinic judges and others seeking guidance on difficult legal questions: he posed a question of Jewish law, couched no doubt in his version of the facts, to a leading rabbinic authority. Much like the decision of a U.S. appellate court, Isserles' formal, written response, or "Responsum," presents Isserles' analysis of the law framed by the factual record before him (in this case Katzenellenbogen's *ex parte* testimonial) as well as his own assumptions and understandings of social fact (in particular, as we shall see, the high esteem in which he held the Maharam of Padua).⁶⁴

Moving to substantive law, were "Maharam of Padua v. Giustiniani" to be decided under the U.S. Copyright Act, the Maharam would almost certainly prevail. Katzenellenbogen served in a triple role of co-publisher, editor, and author. While Katzenellenbogen would enjoy no copyright in, or other exclusive right to publish, medieval texts, including Maimonides' *Mishneh Torah* and the various commentaries appended to the edition, he would enjoy an exclusive right to print and distribute his own original commentary. So long as it reflected at least some minimal judgment, skill, and originality, Katzenellenbogen's editorial selection and arrangement of Maimonides' *Sefer Ha-Mitzvot*, Nachmanides' *Hasagot*, and the writings of the early authorities that Maimonides criticized and Nachmanides defended, which the Maharam seems to have

⁶⁰ See BENAYAHU, *supra* note 38, at 24 (quoting Bragadini's postscript).

⁶¹ Elon, *supra* note 17, at 1122. Isserles is known as "the Rema," the Hebrew acronym for Rabbi Moses Isserles. He died in 1572.

⁶² Ziv, *supra* note 1, at 195.

⁶³ See Haim Hermann Cohn, *Practice and Procedure*, in ENCYCLOPEDIA JUDAICA; Menachem Elon, *Mishpat Ivri: Jewish Law – A Law of Life and Practice*, in ENCYCLOPEDIA JUDAICA.

⁶⁴ "Responsa," or in Hebrew, "She'elot u-Tshuvot" (literally "questions and answers"), have played a vital role in Jewish law for some 1,700 years. Their subject matter spans the entire spectrum of Jewish law, ranging from commercial disputes, to family matters, to questions of faith, ritual, and philosophy. For detailed discussion, see ELON, *supra* note 17, at 1213-78.

been the first to append to an edition of the *Mishneh Torah*, might also qualify as copyrightable expression.⁶⁵ So might Katzenellenbogen's choice of Talmudic references to annotate the text of the *Mishneh Torah* as well as his corrections of earlier texts in the line with his judgment, based on his extensive knowledge of the sources, of what the author must have intended to say.⁶⁶

The same would be true, with some variations, were the case decided under other national copyright regimes. U.K. and other commonwealth copyright laws would recognize the Maharam's copyright in the product of his editorial labor even absent a showing of skill, judgment, and creativity. The U.K. also accords publishers a right in new editions of public domain works, which might give the Maharam an additional claim against Giustiniani.⁶⁷ Continental European copyright laws, on the other hand, tend to require a somewhat greater showing of creativity than under the rule that the U.S. Supreme Court enunciated in *Feist v. Rural Telephone*. But all would recognize the Maharam's copyright in certain aspects of his contribution to the Bragadini edition and all would find that Giustiniani's literal or near-literal copying of that expression in his edition to be infringing. Under current copyright law, moreover, Giustiniani would likely have no defense to infringement by virtue of adding new material and value to the Bragadini and other editions.⁶⁸

Of course, none of this twenty-first century doctrine was of any relevance to Moses Isserles in August 1550 when he grappled with how to frame Katzenellenbogen's claim. At this still early stage of print, the case before Isserles was one of first impression. And Isserles had to interpret and apply Jewish law, his own legal system, in determining whether and under what theory Giustiniani should be prevented from issuing a competing edition that copied Katzenellenbogen's intellectual work product. That question was rendered all the more complex because Giustiniani, the alleged violator of Jewish law, was not a Jew.

Isserles held in favor of the Maharam. But the legal entitlement that Isserles recognized was far more limited than under today's copyright law, which accords copyright holders a bundle of exclusive rights for the author's life plus 70 years, or even early Anglo-American copyright law, which granted an exclusive right to print books for a once-renewable term of 14 years. In contrast to an exclusive right lasting for a term of years, Isserles' ruling gave Katzenellenbogen an exclusive right to sell out his already printed edition before Giustiniani or others could offer competing editions of the *Mishneh Torah*. Under Isserles' holding, Katzenellenbogen was entitled to prevent Giustiniani and

⁶⁵ Original selection or arrangement embodying at least a modicum of creativity constitutes a copyrightable compilation under U.S. law. *Feist Pubs., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991). The Ninth Circuit has held, however, that a selection of just a small number of items will generally lack the requisite creativity to qualify. *Lamps Plus, Inc. v. Seattle Lighting Fixture Co.*, 345 F.3d 1140, 1146-47 (9th Cir. 2003); *Satava v. Lowry*, 323 F.3d 805, 911 (9th Cir.2003).

⁶⁶ *Kimron v. Shanks*; *Kapes*; *Red book case*. Nimmer criticism.

⁶⁷ The United Kingdom accords publishers of new editions a 25-year right to prevent unauthorized facsimile copies of the typographical arrangement of said editions. *See* Copyright, Designs and Patents Act 1988, §§ 1(c), 15, 17(5) (Eng.).

⁶⁸ As pronounced by Judge Learned Hand, copyright law's governing premise is that "no plagiarist can excuse the wrong by showing how much of his work he did not pirate." *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2^d Cir. 1936), *cert. denied*, 298 U.S. 669 (1936). On the other hand, if Giustiniani had copied Katzenellenbogen's annotations to the extent necessary to subject them to point-by-point criticism or commentary, that copying might qualify as a fair use.

other competitors from undermining his chances of recovering the investment he had already made. But the author-editor had no enduring proprietary right in the product of his intellectual labor, expertise, and creativity.

The limited scope of Katzenellenbogen's entitlement reflects the doctrinal and theoretical premises from which Isserles crafted his decision. Much the same is true with modern copyright: its nature and scope of reflects an array of views regarding what is copyright's goal, justification, and theoretical foundation. Since Parliament enacted the first modern copyright statute, the Statute of Anne of 1709,⁶⁹ jurists have characterized copyright in many different ways. For some, copyright is a natural right, an author's property right in the fruits of his or her intellectual labor. Most famously, in his *Commentaries on the Laws of England*, William Blackstone posited, with reference to John Locke's rationale for private property, that an author enjoys a property right "in his own literary composition" by virtue of the author's "personal labour" and "exertion of his rational powers" in producing "an original work."⁷⁰ Others understand copyright more narrowly as a limited government grant designed to serve a particular public purpose: the advancement of learning. Along those lines, the United States Constitution empowers Congress to enact a copyright statute in order to "Promote the Progress of Science" and the Supreme Court has consistently referred to copyrights as a "limited . . . statutory monopoly," bestowed upon authors out of a "conviction that encouragement of individual effort by personal gain is the best way to advance public welfare."⁷¹ Still others view copyright as an author's personalist, non-economic right in creative autonomy and control. This school has origins in Immanuel Kant's argument that an author's words are a continuing expression of the author's inner self and thus that an author's right in his work is "not a right in an object, . . . but an innate right, inherent in his own person."⁷² Others variously contend that copyright is best understood as a species of trade regulation, communications law, economic efficiency, unfair competition, or free speech jurisprudence.

Jewish law contains rough analogues to several of these frameworks, presenting Moses Isserles with a range of possible tools to fashion what was to become the cornerstone of a Jewish law of copyright.⁷³ But first Isserles had to address a mixed

⁶⁹ There is confusion regarding whether the Statute was enacted in 1709 or 1710. It stems from a change in the calendar used in England. Prior to the Calendar (New Style) Act of 1750, England used the Julian calendar, pursuant to which the new year began on March 25. Under that calendar the Statute of Anne was enacted in 1709. But measured by the Gregorian calendar adopted in England in 1750, the Statute was enacted in 1710. John Feather, *The Book Trade in Politics: The Making of the Copyright Act of 1710*, 8 PUBLISHING HISTORY 19, 39 n. 3 (1980).

⁷⁰ 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 405-06 (T. Cadell and J. Butterworth and Son, 16th ed., 1825) (1765-69).

⁷¹ *Mazer v. Stein*, 347 U.S. 201, 219, reh'g denied, 347 U.S. 949 (1954).

⁷² Immanuel Kant, *Von der Unrechtmässigkeit des Büchernachdruckes*, in IMMANUEL KANTS WERKE 213, 221 (B. Cassirer 1914). Kant argued that any person who illicitly publishes or distributes a literary work infringes upon the author's freedom because he is speaking in the author's name without the author's consent. The infringer is in effect forcing the author to speak against the author's will, in a forum or through a vehicle that is not of the author's choosing. IMMANUEL KANT, THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTALS OF JURISPRUDENCE AS THE SCIENCE OF RIGHT 56-57, 129-31 (W. Hastie, trans., Clark 1887).

⁷³ See, generally, NAHUM RAKOVER, ZCHUT HA-YOTZRIM BE-MEKOROT HA-YEHUDIM [Copyright in Jewish Sources] (Jewish Legal Heritage Soc'y 1991).

choice of law/jurisdiction question, one with profound political implications: by what law and authority was he to rule on the conduct of a non-Jew?

A. Noahide Law

Jewish law contains intricate rules governing commercial, familial, and communal relations among Jews as well as conduct of Jews towards non-Jews. According to Jewish tradition, these rules were, in the first instance, given to Moses at Mount Sinai and then became the subject of further delineation and supplement by subsequent rabbinic interpretation and enactment. In principle, neither these rules nor those pertaining to matters of faith and religious ritual obligate non-Jews.

That does not mean that Jewish law is silent regarding the conduct of non-Jews, however. In what is the closest Jewish law comes to natural law, Jewish law sets forth seven “Noahide laws” (or “laws of the offspring of Noah”) that do apply to non-Jews.⁷⁴ As Maimonides wrote in the *Mishneh Torah*, six of these laws are said to have been given by God to Adam and Eve. These are the prohibitions against idolatry, blasphemy, sexual immorality, murder, and robbery and the obligation to establish a system of courts and law. The seventh was given to Noah and his offspring, the first generation to eat meat. It forbids eating a limb torn from a live animal (a cruel practice all too typical in the days before refrigeration).⁷⁵

According to tradition, the Noahide laws governed Jews and non-Jews alike until Jews were given the more extensive set of commandments at Mount Sinai.⁷⁶ Since then, the Noahide laws apply only to non-Jews,⁷⁷ who are neither required nor expected to comply with (other) Jewish law or, for that matter, convert to Judaism. A non-Jew who formally accepts the Noahide laws is entitled to the respect and material support of the Jewish community.⁷⁸ The Noahide obligations also provide the framework for the Talmudic dictum that the “righteous men of all nations have a share in the world to come.”⁷⁹ Hugo Grotius, the great Dutch philosopher of international law, analogized Noahide law to the *ius gentium* of Roman law, those laws, putatively discernable by the exercise of reason, that the Romans understood to be common to all nations and that

⁷⁴ See, generally, *Ben Noah*, 3 Encyclopedia Talmudit (Shlomo Y. Zevin ed., Sefer 1951) (Hebrew). On Maimonides’ understanding of Noahide law as natural law, a set of rules that is both revealed by God and known by all rational persons, see DAVID NOVAK, *THE IMAGE OF THE NON-JEW IN JUDAISM; AN HISTORICAL AND CONSTRUCTIVE STUDY OF THE NOAHIDE LAWS* 294-300 (Edwin Mellen Press 1983); Bleich, *supra* note 2, at 852-57.

⁷⁵ *Mishneh Torah*, Hilkhhot Melakhim 9:1.

⁷⁶ NOVAK, *supra* note 74, at 53. The first explicit enumeration of the Noahide laws is in the *Tosefta*, a work commonly believed to have been edited late in the second century. *Id.* at 3.

⁷⁷ There is a strand of rabbinic thought that views the Noahide law as providing a residual source of law for Jews, supplementing Sinaitic law. See Suzanne Last Stone, *Sinaitic and Noahide Law: Legal Pluralism in Jewish Law*, 12 *CARDOZO L. REV.* 1157, 1202-12 (1991).

⁷⁸ Steven S. Schwarzschild, *Noahide Laws*, Encyclopedia Judaica.

⁷⁹ See Stone, *supra* note 77, at 1165. According to Maimonides, a non-Jew who abides by the Noahide laws out of a belief that they were Divinely revealed, as opposed to out of rational imperative, is entitled to a place in “the world to come” (the rough equivalent of “heaven”), like a Jew who abides by and accepts the Divine revelation of Jewish law. *Mishneh Torah*, Hilkhhot Melakhim 8:11; NOVAK, *supra* note 74, at 276-78.

applied to foreigners living under Roman authority in lieu of Roman civil law and state religion.⁸⁰

There is considerable disagreement among rabbinic authorities regarding the content of each Noahide law and the role of Jewish courts in interpreting and applying them. Most basically, given that one of the Noahide commandments is the creation of a system of courts and laws, do Jews have any role in enforcing Noahide law or is enforcement an entirely non-Jewish responsibility, something that Jews believe is obligatory, but not a rule that Jews are themselves obliged to enforce?⁸¹ The *Mishneh Torah* instructs that any non-Jew living under Jewish political control who violates Noahide law is to be executed.⁸² But when Maimonides wrote, no non-Jew had lived under Jewish political control for over a millennia and no such Jewish dominion was expected until the coming of the Messiah. Rabbinic commentators have thus almost universally understood Maimonides to refer to an entirely theoretical possibility. Concomitantly, they have posited that, until the coming of the Messiah, neither Jewish courts nor Jews as individuals have any obligation to enforce Noahide law and, indeed, should not punish non-Jews for failing to abide by Noahide law.⁸³

Rabbinic jurists have also differed over the precise substance of the Noahide laws. Maimonides held, for example, that the Noahide law of “*dinim*,” the obligation that non-Jews establish a legal system is essentially a procedural requirement. It means that non-Jews must adjudicate and enforce the other six Noahide laws.⁸⁴ In contrast, the great thirteenth-century rabbinic scholar, Nahmanides, maintained that the *dinim* obligation requires in addition that non-Jews enact laws governing interpersonal and monetary matters that do not otherwise fall within the other six laws.⁸⁵ While Nahmanides did not prescribe the detailed content of those laws, he did indicate that they should include prohibitions of fraud, deceit, overcharging, and withholding wages.⁸⁶ Other scholars have insisted that the *dinim* obligation means no more than that non-Jews must obey the reasonably just laws of their own society.⁸⁷

⁸⁰ H. Grotius, *De Jure Belli ac Pacis* (F. Kelsey trans. 1964). For discussion, see Stone, *supra* note 77, at 1163-64. Grotius viewed Noahide law as an early universal law, the foundation for international law. Gidon Rothstein, *Involuntary Particularism: What the Noahide Laws Tell Us About Citizenship and Alienage*, 18 GEO. IMMIGR. L. J. 543, 548 (2004). For discussion of *ius gentium* and its relationship to natural law, see Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129 133-35 (2005)

⁸¹ NOVAK, *supra* note 74, at 53. For illuminating, in-depth discussion of this issue, see Mettatiyahu Broyde, *Hovatam Shel Yehudim Le'oded Shmirat Sheva Mitzvot B'nei Noah* Al-Yadei Nokhrim: Skira Teoretit, 19 DINEI YISRAEL 87 (1998) (Hebrew).

⁸² *Mishneh Torah*, *Hilkhot Melakhim* 9:10, 9:14.

⁸³ See Broyde, *supra* note 81, at 98-103.

⁸⁴ *Mishneh Torah*, *Hilkhot Melakhim* 9:14.

⁸⁵ See Broyde, *supra* note 81, at 93; NOVAK, *supra* note 74, at 55. Nahmanides is the common name for Moshe ben Nahman Gerondi. In rabbinic literature and Jewish tradition, he is known as “Ramban,” an acronym of his Hebrew name and title, Rabbi Moshe ben Nahman. Nahmanides lived from 1194 to 1270.

⁸⁶ Commentary to the Torah, Genesis 34.13. See also J. David Bleich, *Jewish Law and the State's Authority to Punish Crime*, 12 CARDOZO L. REV. 829, 853 (1991) (stating that “Nahmanides defines ‘*dinin*’ as commanding the establishment of an ordered system of jurisprudence for the governance of financial, commercial and interpersonal relationships”).

⁸⁷ See NOVAK, *supra* note 74, at 55. See also Bleich, *supra* note 86, at 853 (describing the positions taken by Naphtali Zvi Berlin and I. Meltzer).

Isserles generally sided with the weight of authority holding that Jews should not punish non-Jews for violating Noahide law.⁸⁸ But in ruling on the Maharam's petition, Isserles assumed without discussion that he, as a rabbinic judge, had the right and obligation to enforce Noahide law against a non-Jew in a commercial dispute with a Jew. Isserles implicitly distinguished, it seems, between levying what we might think of as criminal sanctions versus adjudicating a civil case and, further, between enforcing Noahide law against non-Jews in their commercial dealings with one another versus ruling more narrowly that a non-Jew may be held liable for failing to abide by Noahide law in dealings with Jews.

Isserles' assumption of jurisdiction to rule on whether Giustiniani had violated Noahide law in issuing his competing edition of the *Mishneh Torah* then required that Isserles determine the substantive content of the Noahide laws that might apply to Giustiniani's conduct. Which law might Giustiniani have violated? And most interesting from a copyright perspective, which of the seven Noahide laws, if any, might serve as a foundation for a law of copyright?

Before assessing Giustiniani's conduct, Isserles propounds a far-reaching proposition regarding the content of Noahide law. He holds that the laws that non-Jews must follow are, in principle, the very same laws governing the conduct of Jews. Isserles derives this proposition from contested authority holding, on the basis of Scriptural exegesis, that Noahide obligation of *dinim* means that "Noahide laws are the same as the Jews were commanded at Sinai, ... except where there is direct evidence of a difference."⁸⁹ Isserles cites the *Mishneh Torah* for further support; according to Isserles' reading, Maimonides concluded that although non-Jews need follow only the seven Noahide laws, the content of those laws are derived from Jewish law applicable to Jews.⁹⁰

For Isserles, then, "Noahide laws" are informed not simply by basic universal principles of justice and equity that lie outside the framework of Jewish law, but rather by the entire set of intricate rules governing Jews unless Talmudic authority explicitly indicates a dissimilarity. In so holding, Isserles goes even further than what he takes to be Maimonides' conclusion that each Noahide law is informed by the Jewish law in that area. Isserles posits that, at least in regards to civil law, including commercial and monetary matters, Noahide law is generally no different than Jewish law even where Jewish law does not fit within one of the remaining six categories of Noahide law.⁹¹

Isserles' interpretation of Noahide law is expansive in another sense as well. Jewish law is traditionally divided into two fundamental categories, typically labeled by the Aramaic terms *de-oraita* ("of the Torah") and *de-rabbanan* ("of the scholars").⁹² *De-oraita* law is composed of the foundational rules stated expressly in the Pentateuch or otherwise deemed to be in accordance with a tradition given to Moses at Mount Sinai. *De-rabbanan* law consists of supplemental rabbinic edicts. Even those rabbinic

⁸⁸ See Broyde, *supra* note 81, at 101-02.

⁸⁹ See Reponsa Rema, no. 10, at 45-46 (A. Ziv, ed. 1970), in which Isserles concludes that the law is in accordance with the view of Rabbi Isaac not Rabbi Yochanan. (All translations from Isserles' ruling are my own.)

⁹⁰ *Id.* But see Moses Sofer, Responsa Hatam Sofer, Likkutim, Responsum No. 14 (opining that, in contrast to Isserles' understanding, neither Maimonides nor, for that matter, Nachmanides posited that the content of Noahide law in monetary matters is equivalent to Jewish law).

⁹¹ Reponsa Rema, no. 10 at 48.

⁹² See ELON, *supra* note 17, at 194-198.

authorities who hold that Noahide law is to some degree informed by Jewish law typically limit that holding to the foundational precepts of *de-oraita* law. But in defining and applying Jewish law in the remainder of his ruling, Isserles subjects Giustiniani to the scrutiny not only of *de-oraita*, but also *de-rabbanan* law. In sum, although he does not say so explicitly, Isserles evidently posits that the requirement of *dinim* means that non-Jews must abide by Jewish law in monetary and commercial matters, including rabbinical edicts issued subsequently to and promulgating obligations that go beyond the fundamental precepts given to Moses at Mount Sinai.

In result Isserles' assertion of jurisdiction over Giustiniani and application of Jewish law to the non-Jewish printer's conduct was not unlike present day courts' repeated exercise of jurisdiction and extension of domestic law to foreign website proprietors who knowingly target infringing content at the court's country.⁹³ Isserles' ruling might also be understood in a context of rough reciprocity; under the doctrine of *dina de-malkhuta dina* ("the law of the land is the law"), the law of the state is binding within Jewish law, at least so long as not repugnant to fundamental Jewish law precepts.⁹⁴ Nonetheless, Isserles' broad interpretation of Noahide law, and in particular his evident application of commercial *de-rabbanan* law to non-Jews, was quite unprecedented and has not been generally followed since.⁹⁵ Indeed, a later rabbinic authority, Mordechai Banet, held explicitly that non-Jewish publishers are not subject to the Jewish law of copyright because the Jewish law of copyright originates in rabbinic edict, not *de-oraita* law.⁹⁶ Be that as it may, Isserles colorfully concludes his discussion of Noahide law, "We have clarified and proven that we judge non-Jews according to the laws of Israel and a dispute between a non-Jew and a Jew just like a dispute between two circumcised people."⁹⁷

B. *Gezel* or "Robbery"

Isserles then proceeds to present four rationales for ruling in the Maharam's favor under Jewish law applicable to Jews. But before doing so, and, indeed, almost as an aside during his discussion of Noahide law, Isserles frames the dispute in terms that, coincidentally, go the heart of a longstanding debate about copyright's conceptual foundation. After citing Maimonides for the proposition that the content of each Noahide law is determined by reference to Jewish law in that area, Isserles notes that "the matter before us is *gezel*, which is one of the seven Noahide commandments."⁹⁸ *Gezel* is typically translated as "robbery" or, more loosely, "theft". So if Giustiniani has engaged

⁹³ *MGM v. Grokster*; Canada S. Ct.; French Yahoo; Dow Jones; iCrave.

⁹⁴ Rabbinic jurists have proffered several alternative legal bases for *dina de-malkhuta dina*. See ELON, *supra* note 17, at 194-198, 51-59. One such rationale, advanced by the leading eleventh-century commentator, Rabbi Solomon ben Isaac (known by the Hebrew acronym, Rashi), posits a direct reciprocal relation to Noahide law: Jewish law incorporates non-Jewish law because, under the Noahide law of *dinim*, non-Jews are commanded to enact laws to preserve orderly social life. See Bleich, *supra* note 86, at 853-54; Rashi, Git. 9b.

⁹⁵ See Brody, *supra* note 81, at 94. For an effort to find plausible interpretations of Isserles' ruling that would not require an application of *de-rabbanan* law to non-Jews, see Yehuda David Bleich, *Hasagat Gvul Be-Dinei Yisrael ve-Be-Dinei B'nei Noah*, 44 OR HA-MIZRAH 42 (1995/1996) (Hebrew).

⁹⁶ Responsa Parshat Mordeckai, *Hoten Mishpat*, No. 8.

⁹⁷ Responsa Rema, no. 10, at 45.

⁹⁸ Responsa Rema, no. 10, at 45.

in “*gezel*,” does that mean that the Maharam as an author, editor, and/or publisher has a property right that Guistiniani has taken?

Common law jurists have long struggled with whether an author’s original expression constitutes “property” that can be “stolen.” Following enactment of the Statute of Anne, which granted only a short-term copyright in new works, London publishers petitioned the courts to recognize a perpetual common-law property right in authors’ literary compositions. Opponents of the common law right insisted, among other things, that intangible creations cannot be the subject of property. As Justice Joseph Yates opined in his dissent in the 1769 case of *Millar v. Taylor*: “Their whole existence is in the mind alone; incapable of any other modes of acquisition or enjoyment, than by mental possession or apprehension; safe and invulnerable, from their own immateriality: no trespass can reach them; no tort affect them; no fraud or violence diminish or damage them. Yet these are the phantoms which the author would grasp and confine to himself”⁹⁹ Proponents of a common law copyright responded by characterizing literary compositions in metaphorically physicalist terms. Blackstone, for example, grounded the author’s composition firmly in the actual language of the manuscript, portraying the author’s works as markers for the bounds of the author’s literary property: “Now the identity of a literary composition consists intirely in the *sentiment* and the *language*; the same conceptions, clothed in the same words, must necessarily be the same composition.”¹⁰⁰ We see the theoretical and doctrinal imprint of this reification as late as the 1853 case of *Stowe v. Thomas*,¹⁰¹ in which the Court ruled that Harriet Beecher Stowe’s copyright in *Uncle Tom’s Cabin* did not extend to a translation of her novel. After citing and paraphrasing Blackstone’s definition of a literary composition as “the same conceptions, clothed in the same words, the Court held: “A ‘copy’ of a book must, therefore be a transcript of the language in which the conceptions of the author are clothed; *of something printed and embodied in a tangible shape*. The same conceptions clothed in another language cannot constitute the same composition, nor can it be called a transcript or ‘copy’ of the same ‘book’.”¹⁰²

Jewish law similarly reflects a distinction and tension between rights in tangible things and rights in intangibles, but the dividing lines and issues raised differ from those of the common law. Most importantly for our purposes, while the word “*gezel*” is typically translated as robbery and at its core connotes the open, coercive taking of property, rabbinic authorities often use the term “*gezel*” to encompass a broader set of wrongs, including fraud, withholding payment from laborers, and other monetary and commercial matters. In that vein, rabbinic scholars have debated at least since the time of the Talmud whether “*oshek*,” meaning “oppressing your neighbor,” specifically by to enriching oneself or deriving material benefit from violating your neighbor’s rights, falls within the category of *gezel* or stands as a distinct offense.¹⁰³

Moreover, the Noahide law of “*gezel*,” although typically translated as robbery or theft, is understood to have an even broader meaning than the term “*gezel*” as applied in

⁹⁹ *Millar v. Taylor*, 98 Eng. Rep. 201, 233 (K.B. 1769) (Yates, J., dissenting).

¹⁰⁰ 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 405-06 (T. Cadell and J. Butterworth and Son, 1825, 16th ed.)(1765-69).

¹⁰¹ 23 F. Cas. 201 (1853).

¹⁰² 23 F. Cas. at 207.

¹⁰³ See Shalom Albeck, *Oppression*, in ENCYCLOPEDIA JUDAICA.

law governing Jews. The seven Noahide laws are more category headings than specific provisions. They refer to seven broad areas of legislation, connoted by their respective titles.¹⁰⁴ Accordingly, the Noahide law of *gezel* is commonly seen to prohibit kidnapping, coveting another's property, cheating, overcharging, using false weights and measures, repudiating debts, and forbidding one's farm laborers to eat of the fruits of the harvest, as well as conventional stealing and robbery.¹⁰⁵

Isserles' labeling of the matter before him as "gezel" under Noahide law must be understood within that broad umbrella. It means only that Isserles saw the matter as falling within the category of monetary and commercial wrongs, not that he necessarily viewed Giustiniani's conduct as a taking of property. In fact, it is quite clear that Isserles did not view Giustiniani's conduct as conventional robbery or theft and did not hold that Katzenellenbogen held a property interest in the product of his intellectual labor. Elsewhere, Isserles states that for something to constitute property, it must be tangible.¹⁰⁶ That rule is fully in accord with the *Mishneh Torah, Shulhan Arukh*, and other authority.¹⁰⁷ Nor does Isserles' ruling give any indication that a property right is at stake. As we will see, Isserles analyzes Katzenellenbogen's claim in terms akin to unfair competition and promoting narrowly defined policy goals, not as theft of property. Neither does his ruling in favor of Katzenellenbogen suggest that the esteemed author, editor, and publisher enjoyed a full property right in the sense that proponents of a common law copyright advanced in eighteenth-century Britain. Blackstone posited that an author's common law right of literary property must extend to "whatever method be taken of exhibiting [the author's] composition to the ear or the eye of another, by recital, by writing, or by printing, in any number of copies or at any period of time."¹⁰⁸ Isserles granted Katzenellenbogen only the exclusive right to sell out his already published edition.

Isserles also eschewed another application of the term, *gezel*, that arguably falls not too far from what we think of copyright and intellectual property. The Talmud enjoins plagiarism, and although it does not describe plagiarism as *gezel*, some authorities, probably stemming back to the ninth century, do.¹⁰⁹ As further enunciated by a leading rabbinic authority of the early seventeenth century, "Esteemed is one who

¹⁰⁴ See AARON LICHTENSTEIN, *THE SEVEN LAWS OF NOAH* 90-93 (Rabbi Jacob Joseph School Press, 3d ed., 1995).

¹⁰⁵ *Id.* at 18-26. *Nahmanides* might be an exception. See Moses Sofer, *Responsa Hatam Sofer, Likkutim*, Responsum No. 14 (opining that the disagreement between Maimonides and *Nahmanides* was fundamentally over whether laws regarding monetary matters are covered within the Noahide law of *gezel*, which Maimonides contended, or *dinim*, which *Nahmanides* argued.)

¹⁰⁶ In his glosses on the *Shulhan Arukh*, for example, Isserles writes: "If in a contract someone only wrote 'and he acquires from him in order to allow him to live in his house' this is not effective for the essence of the acquisition is on the right to dwell, which is not something tangible...." *Shulhan Arukh, Hoshen Mishpat, Hilkhoh Mekakh U'Memkhar* [Laws of Commercial Transactions] 212:1.

¹⁰⁷ *Cites.*

¹⁰⁸ BLACKSTONE, *supra* note 100, at 405-06.

¹⁰⁹ RAKOVER, *supra* note 73, at 20-40. The *Tanhuma Yelammedenu*, a collection of stories, homilies, and poetry, first printed in Constantinople in 1522 (and later in Venice in 1565) and first compiled in the ninth or tenth centuries, records the statement: "One who does not repeat a matter in the name of the person who said it transgresses the negative commandment, 'Rob not the weak because he is poor.' Proverbs 22:22." See J.D. Bleich, *Current Responsa*, 5 *Jewish L. Annual* 71, 72 (1985); Moshe David Herr, *Tanhuma Telammedenu*, *Encyclopedia Judaica*.

speaks the words of another in that person's name and who does not rob that person of his ideas, because that robbery is worse than robbing someone of their money."¹¹⁰ In addition, the Talmud presents an argument that a non-Jew who studies the Torah commits "gezel" because the Torah and the knowledge it contains belongs exclusively to the Jewish people.¹¹¹

It is far from clear that these uses of *gezel* connote anything like a property right, any more than when we say figuratively that besmirching another's reputation "robs" him of his good name. The prohibition of plagiarism and its concomitant requirement of source attribution, moreover, aimed as much or more at ensuring that readers could assess the accuracy and force of a proffered ruling or argument than at protecting a personal right of individual authors.¹¹² And whatever the rationale for these uses of "gezel," Isserles makes no more mention of them in his ruling than he does of the term or concept of "property". Indeed, following his cursory statement that "the matter before us is *gezel*," Isserles does not expressly refer to *gezel* again. The rationale for Isserles' ruling must be found elsewhere.

C. Unfair Competition

The primary basis that Isserles gives for his ruling is the law of unfair competition. The rabbinic literature presents extended discussion of whether competition should be restricted to protect existing suppliers.¹¹³ The question presents a difficult quandary for the rabbinic authorities. On one hand, competition benefits consumers by providing goods at lower prices. On the other, untrammelled competition can deprive suppliers of their livelihood. For the rabbis it is by no means a foregone conclusion that the former justifies the latter. Nonetheless, Jewish law ultimately comes down heavily on the side of allowing free competition, and rabbinic authorities generally decline to regulate prices or restrict entry to existing markets in order to protect incumbent suppliers. There are exceptions, however, particularly where incumbent suppliers are harmed without a clear benefit for consumers.¹¹⁴

The paradigm case is in a Mishnah, a discussion of law from the second century C.E.¹¹⁵ The Mishnah, which appears in a chapter in the Talmud concerning commercial relations and consumer protection, states:

"Rabbi Judah said: 'A shopkeeper must not distribute corn or nuts to children, because he thereby accustoms them to come to him. But the Sages permit it. [Rabbi

¹¹⁰ Isaiah Ben Avraham Ha-Levi Horowitz, *Shenei Luhot Ha-Brit* (1649), quoted in RAKOVER, *supra* note 73, at 39 (this author's translation).

¹¹¹ Sanhedrin, 59 70"1 [CORRECT CITE].

¹¹² See Sacha Stern, *Attribution and Authorship in the Babylonian Talmud*, 45 J. JEWISH STUDIES 28 (1994). On the criticism of the Mishneh Torah for Maimonides' failure to attribute sources for his conclusions and Maimonides' response, see DAVIDSON, *supra* note 7, at 266.

¹¹³ For illuminating survey and analysis, see Sinai Deutch, *Business Competition and Ethics: Predatory Pricing in Jewish Law*, 17 DINE ISRAEL 7 (1993/1994); YEHOSHUA LIEBERMAN, *TAHARUT ISKIT B'HALAHA* [Business Competition in Jewish Law] (Bar-Ilan Univ. Press 1989); SHILLEM WARHAFTIG, *DINEI MISHAR BE-MISHPAT HA-IVRI* [Jewish Commercial Law] (Zur-Ot Press 1990)

¹¹⁴ LIEBERMAN, *supra* note 113, at 34.

¹¹⁵ "C.E." means "Common Era." It is the term used in Jewish tradition and others to connote the period of time beginning with the year one of the Gregorian calendar, instead of the overtly Christian "A.D.," or "Anno Domini," meaning "in the year of the Lord."

Judah also held:] ‘Nor may he reduce the price.’ But the Sages say that he is to be remembered for good.”¹¹⁶ As is generally the case, the Sages’ view (which was the majority view) became the rule of Jewish law.¹¹⁷ It favors free competition, including through reductions in price. As Maimonides summarized, “A storekeeper ... may sell below the market price in order to increase the number of his customers, and the merchants of the market cannot prevent him.”¹¹⁸

The favorable view of competition through price reduction applies to market entry as well. As the *Mishneh Torah* states:

“If there is among the residents of an alley [what would be a neighborhood today] ... a bathhouse or a shop or a mill, and someone comes and makes another bathhouse opposite to the first, or another mill, the owner of the first cannot prevent him and claim that the second cuts off his livelihood. Even if the owner of the second is from another alley, they cannot prevent him.”¹¹⁹

The law makes an exception to this general rule of free entry when the newcomer is from another land and does not pay the taxes imposed on local residents. In that case, the newcomer has an unfair advantage over local suppliers. But even in that case, Rabbi Joseph Ibn Migash (1077-1141), whom Maimonides revered as his father’s teacher, ruled that a non-taxpaying out-of-town merchant must be allowed to enter if he sells merchandise of better quality or at a lower price than local suppliers.¹²⁰ Ibn Migash reasoned that when competition brings a direct benefit to consumers, the consumer’s interest prevails over that of the local merchants. Migash’s ruling was subject to strong criticism by Nachmanides (1194-1270). Nachmanides insisted that the law’s embrace of price competition applies only when competition can lead to a substantial, wholesale reduction in price. Absent this material benefit to consumers, competition by outside competitors should not be allowed.

Ibn Migash’s position became the majority view. It favors free competition, at least when competition benefits the consumer. The consumer’s interest prevails over that of the incumbent sellers even when the new entrant enjoys certain advantages, including size or having smaller expenses, such as by not having to pay local taxes.

In his commentary on the *Shulchan Aruch*, Moses Isserles followed that majority view. He opined that competition is permitted when outside competitors offer a lower price, even absent an indication that this will lead to a substantial market-wide price reduction.¹²¹ Isserles also cited Ibn Migash’s position in ruling on a petition by foreign merchants to invalidate a town’s regulation restricting their entry. But there Isserles qualified his support for the rule along the lines of Nachmanides’ dissent, suggesting that

¹¹⁶ Baba Mezia, 60a. See Deutch, *supra* note 113, at 15-16. Rabbi Judah Ha-Nasi lived during the latter half of the second and beginning of the third century C.E. He was the patriarch of Judea and redactor of the Mishnah, a collection of rulings, disputation, and teachings from the first and second centuries C.E.

¹¹⁷ Since the “Sages view” is the majority, it is usually the case that Jewish law follows that view.

¹¹⁸ *Mishneh Torah*, Book of Acquisition, Sales, ch. 17 sec. 4.

¹¹⁹ *Mishneh Torah*, Book of Acquisition, Neighbors ch. 6, sec. 8.

¹²⁰ See Deutch, *supra* note 113, at 25-26. On Maimonides reverence for Ibn Migash, see DAVIDSON, *supra* note 7, at 76-78, 194.

¹²¹ Hagahot Ha-Rema al Shulchan Aruch, Hoshen Mishpat, chpt. 156, para. 5-7, cited and discussed in LIEBERMAN, *supra* note 113, at 32, 38, and RAKOVER, *supra* note 73, at 247.

competition from foreign merchants and the resulting harm to local incumbents must be permitted only if it brings a substantial price reduction.¹²²

At least at first glance, Isserles' ruling in the Maharam of Padua v. Giustiniani represents a far more radical departure from Isserles' own support of the majority rule favoring competition. Isserles ruled Giustiniani's competitive conduct to be a violation of the law even though Giustiniani offered a significant price reduction.

Isserles begins his discussion of unfair competition by reference to a Mishnah in which the third century Babylonian sage, Rav Huna, held that a resident who establishes a mill for commercial purposes may prevent a competitor – even a fellow resident -- from setting up an adjacent mill on the grounds that the competitor is cutting off the first mill owner's livelihood.¹²³ Rav Huna's position was in the minority and, as indicated in Maimonides' restatement quoted above, was not accepted as the rule of Jewish law.¹²⁴

Isserles recognizes that Rav Huna's holding does not generally apply. But he finds an exception to the majority pro-competition rule in a teaching of *Avi'asaf*, a compendium of commentary and rulings of the German rabbinic scholar, Eliezer ben Joel Ha-Levi (1140-1225): "When an alleyway is closed on three sides and is open for entry on only one side and where Reuven lives [and operates a mill] on the closed end and Shimon comes to live [and erect a mill] on the open end, so that potential customers cannot enter the alleyway without passing Shimon's door, the law is that Reuven may prevent Shimon [from entering the market]."¹²⁵ In other words, when the new entrant is *certain* to damage the first comer's business, the rule is according to Rav Huna: the first may prevent entry from the competitor.¹²⁶ Isserles finds this exception directly on point: "Therefore, in our case there is also certain damage. The second printer has announced that he will sell all of his books for a gold coin cheaper than those of the *Gaon* [i.e., the Maharam].¹²⁷ Who will see this and not come to buy from him [the second printer]? And he is able to sell cheaply because he is one the wealthiest men in the country."¹²⁸

Isserles' somewhat cryptic reasoning on this point has puzzled subsequent judges and commentators. A new competitor's entry is often fairly certain to cause at least some loss to the incumbent. Why should the fact that the competitor has certain advantages, whether owing to location (erecting a mill at the open end of the alley) or great financial

¹²² Responsa Ha-Rema, no. 73, discussed in LIEBERMAN, *supra* note 113, at 32.

¹²³ Babylonian Talmud, Tractate Bava Batra, Chpt. 2, Lo Yachpor 21b. Rav Huna was one of the leaders of the second generation of Babylonian "amoraim," the scholars of the third to sixth centuries whose disputes and teachings make up the Gemara.

¹²⁴ As reflected in the Mishnah, Huna bar Joshua held at the end of the fourth century that one craftsman could not restrain a fellow craftsman and resident of the same alley from setting up business in the same alley. For discussion, see Menachem Elon, Hassagat Gevul, in Encyclopedia Judaica.

¹²⁵ Responsa Rema, no. 10, at 48-49. Rabbi Eliezer ben Joel Ha-Levi is known by the Hebrew acronym, Ravyah. His works were considered a basic source of Jewish law until the publication of the *Shulhan Arukh*. See Yehoshua Horowitz, *Eliezer ben Joel Ha-Levi of Bonn*, in Encyclopedia Judaica. The passage in his work, the *Avi'asaf*, was cited by the Mordechai, *Bava Batra* 516, and *Hag'hot Maimoniot*, *Hil. Shecheinim* 6:8.

¹²⁶ Isserles insisted elsewhere as well that the *Aviasaf* correctly opines that even opponents of Rav Huna's position agreed that a new business opened at the entrance to a dead-end alleyway would surely cripple the competing business farther inside the alley and thus may be prevented. Moses Isserles, *Darkhei Moshe* 156:4.

¹²⁷ "Gaon" means an extraordinarily wise and learned person. In modern Hebrew it is often used to mean "genius. Throughout his ruling, Isserles refers to Katzenellenbogen as the *Gaon*.

¹²⁸ Responsa Rema, no. 10, at 49.

resources (Giustiniani), make a difference in the legal rule? Moreover, the rule in *Avi'asaf* would seem to entitle the first comer to an exclusive entitlement to operate his business in the alleyway for so long as he continues in business. But Isserles ruled that the Maharam has only an exclusive right to sell out the existing edition and thus to recoup only his initial investment. If the law is in fact according to *Avi'asaf*, why shouldn't the Maharam have a continuing right to unobstructed sales, even after selling out his first printing?

Explanations center on the nature and degree, in addition to certainty, of the incumbent's harm as well as on the conduct of the competitor. Two early eighteenth-century jurists, Ephraim Zalmon Margoliot (1760-1828) and Moses Sofer (1762-1839), each read Isserles to mean that the incumbent merchant may prevent competition that is certain to cause severe harm to his business.¹²⁹ Sofer goes on to say that Isserles ruled as he did because book publishers cannot profit without making a substantial investment in printing a new edition and will not make that investment if a competitor can effectively eliminate the original publisher's ability to earn a livelihood by thwarting any expectation of profit.¹³⁰ That interpretation finds support in Isserles' assessment of what was at stake in the dispute: "It is obvious that if the *Gaon* will not be successful in selling the books, his load will be overbearing [i.e., he will be financially ruined]."¹³¹

Focusing on Isserles' reference to Giustiniani's ability to sell cheaply, Margoliot also suggests that the incumbent merchant may prevent a competitor who sells below the reasonable market price.¹³² Isserles intimates that Giustiniani has the resources and motive to sell at a loss and that doing so constitutes unfair competition where the result is to cause severe harm to the incumbent. Moreover, elsewhere in his ruling, Isserles emphasizes that Giustiniani produced his competing edition "for spite and in order to exhaust the Gaon's money."¹³³

Couched in these terms, Isserles' ruling seems to be more a narrow proscription of predatory pricing than a right of authors and publishers generally to prevent pirated or otherwise competing editions.¹³⁴ Like any merchant, a publisher may not sell at a below market price with the intent of driving a competitor out of business. And Katzenellenbogen is entitled to protection against the harm of predatory pricing, not an ongoing proprietary entitlement that would insulate him from normal competition.

The present day rabbinic scholar David Bleich suggests another possible interpretation of Isserles' ruling on this point.¹³⁵ Like the common law prior to the emergence of modern tort law in the late nineteenth century, Jewish law distinguishes between direct and indirect harm.¹³⁶ Unlike the common law, however, Jewish law holds

¹²⁹ Ephraim Zalman Margoliot, *Responsa Beit Ephraim*, *Hoshen Mishpat*, No. 27 (1810); *Hatam Sofer*, *Hoshem Mishpat* No. 41 (1823).

¹³⁰ *Hatam Sofer*, *Hoshem Mishpat* No. 41 (1823).

¹³¹ *Reponsa Rema*, no. 10, at 48.

¹³² See discussion in LIEBERMAN, *supra* note 113, at 38.

¹³³ *Reponsa Rema*, no. 10, at 48.

¹³⁴ See Deutch, *supra* note 113, at 27-28.

¹³⁵ See Bleich, *supra* note **Error! Bookmark not defined.**, at 43-45.

¹³⁶ The common law initially provided a remedy only for "trespass *vi et armis*," direct physical assault. It later found liability for conduct that indirectly or consequentially produced harm, redressable under a writ for "trespass on the case." See David W. Barnes, *An Alternative Torts Model of Secondary Copyright Liability*, 55 *Case W. Res. L. Rev.* 867, 874 (2005); Ferdinand F. Stone, *Touchstones of Tort Liability*, 2 *Stan. L. Rev.* 259, 264 (1950).

that causing harm indirectly (the Hebrew term is “*grama*”) gives rise to no legal liability, but only a moral obligation.¹³⁷ Not surprisingly, rabbinic jurists have developed exceptions to that harsh rule. One is the rule of “*garmi*.” Under the rule of *garmi*, legal liability does arise when certain conditions are met. Commentators differ on what those conditions are, but according to some early authority legal liability arises when indirect harm is accompanied by an intent to cause damage, an immediacy of harm (roughly akin to proximate cause), and a certainty of harm. Under this doctrine, Giustiniani would be liable for any real loss, but not frustration of profits, that he intentionally caused the Maharam, since that harm is a certain and immediate consequence of Giustiniani’s pirate edition. Although Isserles does not mention *garmi*, Bleich speculates that it might have been the basis of Isserles’ ruling nonetheless and that Isserles invoked *Avi’asaf* only as an example of certain harm caused by competition.¹³⁸

As understood by these commentators, Isserles’ reasoning is suggestive, but not the equivalent, of current copyright economic theory. Economic analysts teach us that copyright is necessary to prevent ruinous free riding off the author’s investment in creating original expression. If not for the author’s copyright, competitors could sell their editions of the author’s work without incurring the first copy costs of creation. While the author must price his edition high enough to recover those first copy costs, free riding competitors need only recover their marginal costs. As a result, without copyright, authors and publishers will underinvest in creating and disseminating original expression.

Katzenellenbogen had invested significant time and money in the Bragadini edition of the *Mishneh Torah*. And as under copyright’s current economic rationale, Isserles was concerned that without the legal right to prevent Giustiniani’s competing edition, Katzenellenbogen could not recover his considerable first copy costs. But Isserles’ focus is more on ruinous harm caused by predatory pricing than free riding off investment in first copy costs. As Isserles describes it, Giustiniani is able to undercut the price that Katzenellenbogen must charge to recover his investment because Giustiniani has the financial resources to absorb a loss from pricing below Giustiniani’s own profit point.

Giustiniani might have priced below Katzenellenbogen while still earning a profit simply because he did not have to recover Katzenellenbogen’s first copy costs. Yet Isserles did not mention that possibility. Perhaps that was because Giustiniani was in fact engaged in spiteful predatory pricing. Or perhaps Giustiniani did not “free ride” on Katzenellenbogen’s first copy costs in any meaningful way. It is not clear that Katzenellenbogen’s contributions as author and editor were sufficiently substantial and valuable to readers relative to typeset quality and other aspects of the competing editions such that Giustiniani’s copying of those contributions gave the non-Jewish printer a meaningful economic advantage. Maybe, then, Isserles would have ruled the same even absent Giustiniani’s copying of what we would think of today as Katzenellenbogen’s copyrightable contributions. Isserles might have ruled as he did even if Katzenellenbogen had merely invested money as a co-publisher in producing a standard edition of an old work (what we would define as a “public domain” work) and Giustiniani had issued a competing edition of that work at a low price. At that time, after all, publishing even a standard edition of an old work was a highly risky, capital-intensive enterprise, one that

¹³⁷ See Shalom Albeck, *Gerama and Garme*, in *Encyclopedia Judaica*.

¹³⁸ Bleich, *supra* note **Error! Bookmark not defined.**, at 45.

less than hardy souls were exceedingly reluctant to undertake absent some protection against ruinous competition.

D. Policy Goals

As set forth in the clause of the Constitution empowering Congress to enact a copyright law, American copyright's fundamental purpose is "Promote the Progress of Science," in the broad sense of "the advancement of learning." American copyright law serves this purpose by striking a balance between incentive and public access. To encourage authors to create and disseminate original expression, it accords them a bundle of proprietary rights in their works. But to promote public access and creative exchange, it limits the duration and scope of copyright holders' rights and invites audiences and subsequent authors to use existing works in every manner that falls outside those rights.

Jewish tradition similarly places a high value on the advancement of learning, primarily the study and teaching of Torah, i.e., Jewish thought and law. Isserles undoubtedly shared that value. In principle, therefore, he would not have taken Giustiniani's claim that providing the *Mishneh Torah* at a low price would vastly increase access to that foundational text in the Jewish community. Elsewhere, in fact, Isserles held that in a place where Torah study suffers because books are unavailable, a rabbinic tribunal may require a book owner to lend his books for study, so long as he is compensated for any wear and tear that might be caused to the books in the process.¹³⁹ Isserles also held that while a bailee may not normally open and read books in his care, when the bailee is a rabbinic scholar who lacks the volume himself, he may read and copy from such books.¹⁴⁰

While those rules favor public access by limiting the exclusive rights of owners of physical property in books, not the rights of the books' authors or publishers, they do evince Isserles' strong concern for access to books such as the *Mishneh Torah*. Nonetheless, Isserles makes no reference to these rules or to the principle of public access in *Maharam of Padua v. Giustiniani*. He evidently believed that (1) the harm that Giustiniani's inexpensive edition would cause to Katzenellenbogen outweighed the greater public access that would ensue from the unhindered sale of that competing edition, (2) to allow Giustiniani's predatory pricing would ultimately impede public access to Torah learning because it would make investment in producing new books or new editions of foundational Jewish texts untenably risky, or (3) simply that for reasons internal to Jewish law doctrine the public access limitations on book ownership do not apply to the law of unfair competition.

Isserles, moreover, sets forth three additional foundations for his ruling that, while grounded in Jewish law, serve explicit policy goals that counter the objective of providing access to Torah learning. At first glance, these are somewhat jarring to the modern reader. But they are also loosely analogous to those woven into copyright doctrine and politics today.

¹³⁹ Shulhan Arukh, Hoshen Mishpat, Hilkhoh Pikadon 292:20, Rema commentary. For discussion of this rule and its relation to public access in U.S. copyright law, see David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 677-78 (2000).

¹⁴⁰ Shulhan Arukh, Hoshen Mishpat, Hilkhoh Pikadon 292:20, Rema commentary.

1. Subsidizing Rabbinic Scholars

Roughly akin to copyright's encouragement of learning and the progress of science, Jewish law mandates the subsidization of the study and teaching of Jewish thought and law by giving rabbinic scholars preferential commercial advantages. Jewish tradition places a primacy on rabbinic scholars' study and teaching of Torah, which has paramount religious, ethical, and socio-political significance. Rabbinic scholars are said to build up and "increase peace in the world," and have historically been viewed as a kind of ideal, ethical meritocracy.¹⁴¹

In order to subsidize rabbinic scholars while still promoting broader access to the benefits of Torah study (as well as to preserve the high ideal of Torah study), Jewish law draws a balance roughly analogous to, although along an entirely different axis than, copyright's balance between access and remuneration. On one hand, rabbinic scholars are forbidden from deriving any monetary benefit from teaching Jewish law or acting as rabbinic judges. As the Talmud poetically and sternly puts it: "Whoever derives [economic] benefit from the words of Torah removes his own life from the world."¹⁴² For that reason, Maimonides insisted, following a Talmudic injunction, that rabbinic scholars must have gainful employment apart from the study, teaching, and adjudication of Jewish law.¹⁴³ But the other side of the coin, Maimonides and others held, is that the community must underwrite rabbinical scholars' gainful employment by exempting them from certain taxes, investing in their business ventures, and according them a privilege to sell their merchandise before other merchants.¹⁴⁴

Those rules present a quandary when the scholars' merchandise consists of copies of a book of Jewish law. As Isserles puts it, the *Gaon*, the wise and learned Maharam of Padua, "plainly desires life and does not wish to derive benefit from Torah."¹⁴⁵ But for Isserles, Maimonides' rule that scholars are entitled to sell their merchandise first takes precedence. The privilege, indeed, is a "just right and Divine inheritance" for the service that rabbinic scholars perform.¹⁴⁶ On that basis, Isserles holds, Katzenellenbogen is entitled to sell his books first, before Giustiniani.

2. Trade Protectionism

Isserles' second policy-directed foundation is, in essence, a form of nationalist trade protectionism or proto-mercantilism. In Isserles' day, Jews lived as separate semi-sovereign communities and often faced severe restrictions regarding which occupations they could enter. Jewish law accordingly provided for giving commercial advantages to Jewish over non-Jewish merchants.¹⁴⁷ In that vein, Isserles ruled that Jews must buy first

¹⁴¹ Louis Isaac Rabinowitz, *Talmid Hakham*, in *Encyclopedia Judaica*.

¹⁴² Mishna, Pirkei Avot 4:5.

¹⁴³ Mishneh Torah, Hilchot Sanhedrin 23:5. For discussion, see DAVIDSON, *supra* note 7, at 33-34.

¹⁴⁴ Mishneh Torah, Halachot Talmud Torah 6:10; Maimonides, Commentary on the Mishna, Avot 4:7. On rabbinic scholars' exemption from certain taxes, see, also, Menachem Elon, *Taxation*, in *ENCYCLOPEDIA JUDAICA*.

¹⁴⁵ Responsa Rema, No. 10, at 49.

¹⁴⁶ *Id.*

¹⁴⁷ Such advantages might also reflect a rough sense of reciprocity; where non-Jews need not abide by the full obligations of Jewish law, Jewish law excludes them from the law's full benefits. See Michael J.

from Jewish merchants, even when the non-Jewish competitor offers the goods at a greatly reduced price.¹⁴⁸ Hence, Isserles held, the Maharam is entitled to sell his books before the non-Jewish Giustiniani even if Jewish buyers of those books suffer a loss by having to pay a higher price.

Although for different reasons, trade protectionism among territorial nation-states has long been ubiquitous. It has loomed large in secular copyright law as well. Foreign works enjoyed no copyright protection in the United States until 1891, for example. And until 1986, copies of nondramatic literary works in the English language and written by U.S. domiciliaries generally enjoyed no copyright protection in the United States unless manufactured in the United States or Canada.¹⁴⁹ Similar provisions abounded in the early copyright law of other countries.¹⁵⁰

3. Accuracy of Printed Texts

Third, Isserles grounds his ruling on the critical importance of ensuring the accuracy of printed texts of Jewish law. His foundational source is a Talmudic injunction against keeping a Torah scroll containing scribal errors for more than thirty days. He then cites authorities that apply that early rule to other legal texts. As Isserles puts it, “If a book contains even minor printing errors, one is liable to make erroneous legal rulings: to prohibit that which is permitted, to permit that which is prohibited, to hold as ritually pure that which is impure, etc.”¹⁵¹ Indeed, Isserles continues, citing Talmudic teaching, it is far better to teach less but accurately, than to teach in greater quantity but with less accuracy and hope that students will eventually realize that some of the teachings were mistaken.¹⁵² Accordingly, Isserles concludes that a book of Jewish law should not be purchased unless it has been thoroughly and competently proofread.¹⁵³ As Isserles describes it, the Maharam diligently proofread his edition of the *Mishneh Torah*, removing errors “with his pure wisdom until there was ‘no straw remaining in the field’ and ‘no stone left in the path.’”¹⁵⁴ (Isserles evidently gave no credence to Giustiniani’s charge that Katzenellenbogen and Bragadini had produced a shoddy product.) We are thus to prefer the Maharam’s edition over Giustiniani’s even if Giustiniani’s cheaper edition would reach more readers.

An early rationale for copyright was that authors should be entitled to ensure that their publisher maintains the quality and integrity of the work. As Lord Mansfield opined in *Millar v. Taylor*, “It is fit [the author] should not only choose the time, but the manner of publication; how many; what volume; what print. It is fit, he should choose to whose care he will trust the accuracy and correctness of the impression; in whose honesty he

Broyde & Michael Hecht, *The Gentile and Returning Lost Property According to Jewish Law: A Theory of Reciprocity*, 13 JEWISH L. ANN. 31 (2000).

¹⁴⁸ Id. at 50-51.

¹⁴⁹ I thank David Nimmer for raising this point. On the manufacturing clause, see 2 David Nimmer & Melville Nimmer, *Nimmer on Copyright* §§ 7.22-7.23.

¹⁵⁰ Statute of Anne.

¹⁵¹ Reponsa Rema, no. 10, at 51.

¹⁵² Id.

¹⁵³ Id.

¹⁵⁴ Reponsa Rema, no. 10, at 49.

will confide, not to foist in additions: with other reasonings of the same effect.”¹⁵⁵ However, Isserles’ focus was quite different. His concern in this part of his ruling is with the integrity of the text as declarative of the law, not with fidelity to an author’s intention.

Isserles echoed his grave misgivings about the power of print to perpetuate and disseminate error in later writing.¹⁵⁶ Yet, his ruling in *Maharam of Padua v. Giustiniani* does not fully answer that concern. If purchasing Giustiniani’s edition is tantamount to holding an error-ridden Torah scroll, one would expect Isserles to prohibit anyone from purchasing the Giustiniani edition ever. However, Isserles rules merely that Katzenellenbogen has a right to sell out his edition before Giustiniani can enter the market with his.

E. Remedy and Order

As we have seen, Isserles held both that Jewish law governed the non-Jewish Giustiniani’s conduct and that Isserles, in his capacity as rabbi authorized to rule and settle disputes on questions of Jewish law, had jurisdiction to determine whether Giustiniani had violated Jewish law. But how was Isserles to enforce his judgment against Giustiniani? Neither he nor Katzenellenbogen, nor any other rabbinic or Jewish community authority, had any power to prevent Giustiniani from selling his edition whenever and at whatever price the Venetian patrician wished.¹⁵⁷ So Isserles directed his injunction towards those over whom he did have enforcement power: potential Jewish buyers of the Giustiniani edition. He ordered that since “the *Gaon* has prevailed on his claim that he should be granted the right to sell his books first, no person shall buy a book [of Maimonides’ *Mishneh Torah*] that has been recently reprinted unless it has been published under the auspices of the *Gaon* or his agents.”¹⁵⁸ And to enforce that injunction, Isserles further ordered that Jews are obliged to excommunicate anyone “in our country” who buys or possesses such a book.

Isserles’ order makes clear that Katzenellenbogen enjoys a broader entitlement than one grounded merely in preventing Giustiniani’s unfair competition and predatory pricing. Isserles rather grants Katzenellenbogen an exclusive right to sell his books first as against the entire world, not just against Giustiniani. For that reason, Isserles forbids the purchase of any edition of the *Mishneh Torah* that has recently been reprinted, not just the Giustiniani edition. In modern terms, Katzenellenbogen’s right is thus a limited property right, not merely a right against overreaching competitive conduct. It is also more an exclusive printing privilege than what we think of as copyright today, since it lies against any competing edition regardless of whether that edition copies Katzenellenbogen’s original contribution.

At the same time, Isserles limited the geographical scope of enforcement of his order. His order of excommunication applied only to those who buy or possess an illicit

¹⁵⁵ 98 Eng. Rep. 201, 252 (K.B. 1769).

¹⁵⁶ See Nimmer, *supra* note 139, at 678 n. 23.

¹⁵⁷ Isserles expressed acute awareness of the difficulty of enforcing Noahide law in his glosses on the Shulhan Arukh. See, e.g., Shulhan Arukh, *Hoshen Mishpat*, *Hilkhos Nizhei*, *Shkhenim* 154:19 (in which Isserles notes that the prohibition against making a window that looks into a neighbor’s yard or establishing a shop opposite the window of a person’s house applies to non-Jews as well as Jews, even though, as a practical matter, it is likely unenforceable against a non-Jew).

¹⁵⁸ *Reponsa Rema*, no. 10, at 52.

edition of Maimonides “in our country,” namely Poland. That left Katzenellenbogen with the burden of petitioning rabbinic authorities in other lands, including Venice and the rest of Italy, to adopt Isserles’ ruling and enforce it by threat of excommunication in their locations.¹⁵⁹ As a general rule a Jewish court cannot issue rulings that are binding on other jurisdictions and Isserles may have had particular concerns for comity in imposing the extreme sanction of excommunication. Nevertheless, in a later ruling on Jewish copyright law, Moses Sofer criticized Isserles for imposing excommunication only in Isserles’ land. Sofer held that cross-border rulings are proper in copyright given that the market for books transcends local borders.¹⁶⁰

III. Postscript

Mid-sixteenth century Poland was a haven for Jews. Yet, Isserles was well aware of the precarious existence of Jewish communities elsewhere and that, indeed, even in Poland, Jewish autonomy and well-being lay at the pleasure of the “king and his nobles.”¹⁶¹ Nonetheless, in assessing the Maharam’s claim, Isserles twice dismisses concern about the risk of untoward consequences from ruling against a non-Jew, especially a non-Jewish Venetian printer upon whom Jews were heavily dependant for producing liturgical and legal texts. After holding that Giustiniani should be judged to have committed unfair competition according to Jewish law, Isserles considers a rule of Jewish law forbidding taking money from non-Jews and requiring judicial leniency where necessary to preserve peace and avoid hatred, but holds the rule inapplicable to commercial matters. Accordingly, Isserles insists, there is no reason to “forego this line of justice.”¹⁶² Likewise, Isserles summarily rejects the notion that non-Jewish printers might cease printing Jewish books if subject to the strictures of Jewish law: “As a matter of common sense, those who publish do so for their own benefit, in order to profit, like those who deal in other types of commerce. Thus even if they lose on one occasion, they will not refrain from printing. On the contrary they will be even more eager to replenish their loss.”¹⁶³

Isserles (and Katzenellenbogen) grossly underestimated Giustiniani’s fury and ferocity. The Venice printer responded to Isserles’ ruling by hiring an apostate Jew to scrutinize Katzenellenbogen’s commentary on the *Mishneh Torah* for statements that could be interpreted as being objectionable to the Church and to then bring a complaint before the Papal authorities.¹⁶⁴ Bragadini defended against the charges, but as the case dragged through the pontifical courts, it became a lightning rod for those who claimed that all Jewish texts and Hebrew printing were inimical to Christianity. The result was

¹⁵⁹ Benayahu speculates that Katzenellenbogen must have planned to do just that. BENAYAHU, *supra* note 38, at --.

¹⁶⁰ Hatam Hasofer. My note 5.

¹⁶¹ See EDWARD FRAM, IDEALS FACE REALITY; JEWISH LAW AND LIFE IN POLAND 1550-1655 33-34 (Hebrew Union College Press 1997) (discussing Isserles’ awareness of Jews vulnerability); BERNARD WEINRYB, THE JEWS OF POLAND; A SOCIAL AND ECONOMIC HISTORY OF THE JEWISH COMMUNITY OF POLAND FROM 1100-1800 165-66 (Jewish Publication Soc’y of America 1973) (discussing Isserles’ awareness that Jews were more secure in Poland than elsewhere, but potentially vulnerable nonetheless).

¹⁶² Reponsa Rema, no. 10, at 49.

¹⁶³ Reponsa Rema, no. 10, at 51.

¹⁶⁴ AMRAM, *supra* note 30, at 261-66.

disastrous for Hebrew printing in Venice and the Jewish community generally. By decree of the Roman inquisition, on September 9, 1553, the Jewish holy day of Rosh Hashanah, all copies of the Talmud found in Rome were gathered and set on fire in the Campo dei Fiori.¹⁶⁵ Three days later, Pope Julius III issued a Bull sent throughout the Catholic world, directing the confiscation and burning of all copies of the Talmud. Jews were ordered to deliver their copies to Papal authorities and Christians were forbidden to read or possess them or to assist Jews in writing or printing them, upon pain of excommunication from the Church. The decree spread like wildfire throughout Italy. Hebrew books and manuscripts were burnt in public squares in Bologna, Ferrara, Mantua, Ravenna, and Romagna. In Venice, the Council of Ten issued a decree, on October 21, 1553, ordering the confiscation and burning within ten days of all copies of the Talmud, as well as “all compendiums, summaries, or other books depending on said Talmud.” Among the books confiscated and burned were numerous copies of Maimonides’ *Mishneh Torah*.¹⁶⁶

The Pope modified the severity of his decree on May 29, 1554.¹⁶⁷ He issued a new Bull allowing Hebrew books to be printed, but requiring that they first be submitted to a Papal censor and permitting their possession only after offending passages had been blotted out. In light of these developments, the rabbinic leaders of Italian Jewry convened a general synod in Ferrara. Among the synod’s prime movers was Meir Katzenellenbogen. In an act of precautionary, communal self-censorship, the first among several enactments adopted at the synod forbids the printing of any previously unpublished book without the consent of three rabbis and communal leaders, whose names must appear on the book’s title page.¹⁶⁸

Hebrew printing did not resume in Venice until 1563.¹⁶⁹ Even then, the Talmud itself remained off-limits. In one of his rulings, Katzenellenbogen warned that he referred to the Talmud by memory without being able to consult a printed copy. As late as 1638, the distinguished Venetian rabbi, Leon of Modena, wrote that the Talmud “remains prohibited; and in Italy particularly it is neither seen nor read.”¹⁷⁰ By that time, the center for printing the Talmud – and the locus of further disputes of Jewish copyright law -- had moved from Venice to Eastern Europe.

¹⁶⁵ See Bloch, *supra* note 33, at 18-19; Amnon Raz-Krakotzkin, *Censorship, Editing, and the Reshaping of Jewish Identity: The Catholic Church and Hebrew Literature in the Sixteenth Century*, in *HEBRAICA VERITAS? CHRISTIAN HEBRAISTS AND THE STUDY OF JUDAISM IN EARLY MODERN EUROPE* 125 (Allison P. Coudert and Jeffrey S. Shoulson eds., Univ. of Pennsylvania Press 2004).

¹⁶⁶ BARUCHSON, *supra* note 6, at 134 (noting inventory of books seized from the Jews of Manua).

¹⁶⁷ See Bloch, *supra* note 33, at 18.

¹⁶⁸ ELON, *supra* note 17, at 660; Ziv, *supra* note 1, at 180. The enactment is printed in full in L. FINKELSTEIN, *JEWISH SELF-GOVERNMENT IN THE MIDDLE AGES* 300-06 (2nd printing 1964).

¹⁶⁹ See Bloch, *supra* note 33, at 19.

¹⁷⁰ Quoted in Bloch, *supra* note 33, at 18 n. 66.