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WRONGFUL COMPETITION, PRODUCT DESIGN, AND TRADE SECRETS: COMPARING JEWISH AND SECULAR LAW

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I. Introduction

Like secular common law and civil law, Jewish law generally favours free marketplace competition. Yet, both secular law and Jewish law prohibit competition that they deem wrongful. This chapter fleshes out key principles of wrongful competition and their application to prohibitions on slavish imitation of product design and misappropriation of trade secrets in both Jewish law and secular law.

In that regard, rabbinic courts have recently applied principles of wrongful competition under Jewish law in two disputes that highlight intriguing parallels with prohibitions against wrongful competition, including by way of a new entrant's slavish imitation of an incumbent's product design and misappropriation of an incumbent's trade secrets. As we will see, Jewish law likely encompasses prohibitions on slavish imitation and misappropriation of trade secrets. But it does so in the context of providing incumbents with far broader protection against potentially ruinous competition from a new market entrant than secular law doctrines would accord.

I first unpack the two recent disputes and rabbinic court rulings. I then more fully elucidate the applicable Jewish law. Finally, I compare and contrast Jewish law with secular law doctrine regarding wrongful competition, product design, and trade secrets.

II. Two Recent Disputes

A. Basil Pizza & Wine Bar v. Calabria Pizza

We first examine a dispute between the owners of Basil Pizza & Wine Bar and the owners of Calabria Pizza, eating establishments that shared the corner of Kingston Avenue and Lincoln Place in Brooklyn's Crown Heights, a neighborhood that is home to some 30,000

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religiously observant Jews.[1] The Basil Pizza & Wine Bar was an upscale kosher restaurant that opened in 2010.[2] Basil broke new ground in Crown Heights, billing itself as an Italian bistro serving a trendy rotating menu of 'wood burning oven creations' and other fare that catered to kosher, vegetarian, and non-kosher diners. It was very popular. On Saturday and Sunday nights, diners would often wait up to two hours for a table. Basil is credited with ushering in a new era of upscale, but 'chill,' kosher dining in the neighborhood, featuring a range of kosher culinary delights that attract religiously observant Jewish diners and others from all over New York.[3]

Calabria Pizza opened directly across the street from Basil in March 2017. Unlike the high-end restaurants taking part in Crown Heights' artisanal food scene, Calabria was a kosher fast-food eatery. It featured graffiti-style décor and casual, pay-at-the counter dining. Like Basil, it offered beer and wine as well as pizza.

Basil accused Calabria of copying Basil's most popular pizzas, in part through eliciting proprietary information from Basil employees about how Basil prepared its dishes, and then selling the knock-offs for a lower price.[4] Basil also accused Calabria of poaching Basil's potential customers as they waited on the sidewalk for a table at Basil.

Basil took Calabria to the Beit Din Beis Yoseph in Borough Park, Brooklyn. (The term "beit din" is Hebrew for "court" and, in the Jewish law context, typically refers to a court composed of rabbinic judges who adjudicate matters of "halakha," or Jewish law.) Both parties appeared before the rabbinic judges and entered into an agreement that provided that the rabbinic ruling would constitute a binding arbitration. The Beit Din held that Calabria's conduct fell within the ambit of 'yored le-omanut havero,' meaning 'encroaching on another's livelihood', a form of wrongful competition that, as I will shortly elucidate, has long been prohibited under Jewish law. It forbade Calabria from selling 'specialty pizza' of the type that Basil offered to its patrons. But the court held that Calabria was permitted to sell 'regular pizza' and other food.

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[1] See '2023 Community Study; Crown Heights' (*UJA Federation*) www.communitystudy.ujafedny.org/explore-data/crown-heights accessed 13 June 2025 (finding that Crown Heights is home to 41,000 people who live in Jewish households, which comprise 20% of the total households in the neighborhood, and that 70% of Jewish adults in Crown Heights are Orthodox).

[2] My description of the dispute and rulings draws on 'Rabbis Take Sides in Pizza Battle' (*COLlive*, 19 March 2017) www.collive.com/rabbis-take-sides-in-pizza-battle (describing the dispute and displaying copies of the rabbinic rulings) and Michelle Honig, 'Kosher Pizza War Simmers On After Brooklyn Rabbis Rules' (*The Forward*, 29 March 2017) www.forward.com/food/365904/kosher-pizza-war-simmers-on-after-brooklyn-rabbis-rule.

[3] Chain Levin and Hanna Dreyfus, 'Crown Heights Now Artisanal Kosher Haven' *The Jewish Week* (New York, 9 March 2017).

[4] See Neil Wilkof, 'When Today's Pizza Meets Ancient Law: How Would You Decide?' (*IPKat*, 31 March 2017) www.ipkitten.blogspot.com/2017/03/when-todays-pizza-meets-ancient-law-how.html.

The Beit Din's ruling did not settle the dispute. In its wake the parties disagreed about the definition and scope of the 'specialty pizza' that Calabria was forbidden to offer versus the 'regular pizza' that it was entitled to sell. In particular, following the ruling, Calabria continued to sell pizza cut into rectangular wedges, which it labeled 'Roman-style pizza,' rather than triangle shapes, which is typical of New York-style pizza. Basil complained to the Beit Din that that Calabria was thus not complying with the court's ruling to refrain from selling 'specialty pizza'. The Beit Din then clarified that Calabria would be permitted only to sell New York style pizza, a style of pizza that, presumably, is markedly different from Basil's 'specialty pizza' in quality as well as shape, and thus that would not directly compete with Basil's pizza.

In the meantime, Calabria turned to a different rabbinic court, the Beit Din of Agudas Ha-Rabonim, a union of ultra-Orthodox rabbis in the United States and Canada. That court concluded that Calabria was not engaged in wrongful competition with Basil because Calabria's pizza did not at all resemble Bazil's pizza and was made with a different kind of dough.

Calabria's unilateral appeal to Beit Din of Agudas Ha-Rabonim might have constituted a breach of the parties' binding arbitration agreement. Yet more generally, this kind of litigant forum shopping and resultant competing rulings of different rabbinic courts is not uncommon in the world of Jewish law. Unlike many other legal systems, there is no single overarching juridical body to apply and interpret Jewish law.[5] Indeed, there has been no central rabbinic court vested with authority to settle conflicting precedent throughout the Jewish world since the demise of the Baghdad gaonate in the eleventh century. In the millennium since then, Jewish law has evolved from a myriad of disparate, if often mutually referential, local rabbinic decisions, pronouncements, ordinances, and restatements. The temporal and geographic impact of any given ruling depends on the esteem, intellectual prowess, force of argument, and, at times, sectarian affiliation of its rabbinic author, not any formally established judicial hierarchy. While Jewish law precepts often cohere through the discursive exchange of a dispersed community of rabbinic scholars, disagreements among different rabbinic courts about how to interpret Jewish law tenets and how to resolve particular cases are quite typical, as is the absence of any supervening appellate authority to resolve such disputes.

In this case, the Beit Din of Agudas Ha-Rabonim did not dispute the Beit Din of Beis Yoseph's conclusion of Jewish law: that a new entrant who directly competes in the way that Basil alleged that Calabria was competing would engage in wrongful competition in violation

[5] This paragraph draws on Neil Weinstock Netanel, *From Maimonides to Microsoft: The Jewish Law of Copyright Since the Birth of Print* (Oxford, Oxford University Press, 2016), 8.

of Jewish law. Rather the Agudas Ha-Rabonim rabbinic court held only that Calabria was not engaged in such wrongful competition because its pizza was sufficiently different from Basil's such that, as a factual matter, Calabria could not be said to be competing in Basil's market for upscale specialty pizza.

In response, Beit Din Beis Yoseph insisted that Calabria was, in fact, 'selling pizza that it is forbidden for them to sell'. Therefore, the court declared, it is 'forbidden to shop from their establishment … and all who do so them are assisting in their transgression'.

B. 'Delicious Foods v. Good Chocolates'

In 2005, the Beth Din of America, a Modern Orthodox rabbinic court, issued a ruling involving rival confectionary stores.[6] The parties selected the court as their arbitrator pursuant to an arbitration agreement under secular U.S. law. In keeping with its confidentiality policies, the court replaced the parties' true names with pseudonyms and used fictitious dates, locations, and other identifying information in its published ruling on the dispute.[7]

The incumbent confectionary store, identified with pseudonym 'Delicious Foods' in the published ruling, owned a small candy and gift basket store. It sold nuts, dried fruits, candy and chocolate, both in bulk and as part of gift baskets. Delicious Foods operated as a retail outlet. It did not produce any of its inventory.

Some two years after Delicious Foods opened for business, the defendant, identified as 'Good Chocolates' in the published ruling, opened a chocolate store across the street. The defendant sold chocolates, specialty desserts, pancakes, and other items, all with a chocolate motif. By contrast with Delicious Foods, Good Chocolates produced all its chocolate to order and offered customers a seating area to eat in a restaurant atmosphere. Further Good Chocolates generally sold higher quality, more expensive chocolate than that offered by Delicious Foods.

Good Chocolates initially sold only chocolate that contained dairy products. That effectively limited consumer demand for the chocolate because under the Jewish dietary laws of kashrut, dairy products must be eaten completely separately from products containing meat and must be served on eating ware designated only for non-meat products. It was only when Chocolate Foods announced that it would also sell parve chocolate – meaning chocolate that contains neither dairy nor meat and that thus may be eaten with

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[6] 'Beth Din of America Reported Decision 2; Delicious Foods vs. Good Chocolates' (2012) 1 The Journal of the Beth Din of America 82.
[7] See 'Reported Decisions of the Beth Din of America' (*Beth Din of America*) www.bethdin.org/decisions accessed on 13 June 2025.

either – that Delicious Foods brought its complaint before the rabbinic court. It argued that Chocolate Foods' offering of parve chocolate would drive it out of business since parve chocolate was the most important product that Delicious Foods offered.

The rabbinic court in the chocolate case ruled much like the Agudas Ha-Rabonim court in the pizza case. It held in favour of the new entrant Good Chocolates principally because it found that Good Chocolates was selling a different product than those of Delicious Foods: high qualify, expensive, custom-made chocolate as opposed to chocolate bought in bulk from wholesalers. However, the Beth Din of America stated that in a proper case it would rule that a new entrant who brings ruinous competition to an existing business violates the Jewish law prohibition against wrongful competition. The court stated, indeed, that it would likely rule in favour of the incumbent Delicious Foods if Good Chocolates were to expand its offerings to include nuts, dried fruits, and candies in addition to parve chocolate. Unlike Good Chocolate's gourmet chocolate, the rabbinic court reasoned, those products would bring the new entrant into direct competition with the incumbent Delicious Foods.

III. Jewish Law of Wrongful Competition

The Bazil Pizza and Delicious Foods rulings would prohibit a new entrant from slavishly imitating an incumbent competitor's product or service. But the rabbinic courts reach that result by applying general principles of wrongful competition under Jewish law. Putting the rulings together, it seems that Jewish law prohibits new entrants from entering the same market, in same geographical vicinity, in direct competition with an existing business. In other words, an existing business has the right to operate free from the market entry of a new, direct competitor that threatens to draw away its customers. As we have seen in the Bazil Pizza ruling, rabbinic commentators refer to that direct competition in the same narrow market for the same customers as 'encroaching upon another's livelihood'.[8] However, the rabbinic courts limit that right to be free from competition by narrowly defining the incursion into the incumbent's protected market to include only identical or very similar products.

Further, in the paradigm case, as in Bazil Pizza and Delicious Foods, the incumbent's protected market extends only to the incumbent's immediate neighborhood, not to the sale of competing goods beyond that geographical proximity. However, as we shall shortly explore, early modern rabbis also came to apply the doctrine of encroaching upon another's livelihood to protect publishers of books of Jewish liturgy or learning against ruinous competition from rival editions of the same work, even when the rival edition is published

[8] The concept and term have origins in the Talmud, Bava Batra 21b.

abroad and/or marketed across national borders. That protection of publishers engaged in the international book trade reflected a particular desire to promote the publication and wide distribution of books of Jewish liturgy and learning. But following that precedent, a contemporary rabbinic court might conceivably apply the 'encroaching upon another's livelihood' doctrine to a geographically disperse niche market for some other type of goods or services as well, including those marketed to online consumers on e-commerce sites.

In recognizing but narrowly defining the right of an existing business to be protected against potentially ruinous competition, the Basil Pizza and Delicious Foods courts faced an issue that rabbinic authorities have long debated.[9] Indeed, the rabbinic debate about when, if ever, competition should be restricted to protect existing suppliers goes back at least to the Talmud, a compilation of rabbinic rulings, disputations, and stories from roughly 100 BCE to 500 CE. The rabbis have long recognised that competition benefits consumers. But they also grapple with the fact that untrammeled competition can cause some suppliers to lose their livelihood.

The majority rule that has emerged in Jewish law favours free competition. As Moses Maimonides summarized in the *Mishneh Torah*, his iconic restatement of Jewish law from the twelfth century: 'A storekeeper ... may sell below the market price in order to increase the number of his customers, and the merchants of the market may not prevent him.'[10] Moreover, that favourable view of competition applies to market entry as well as price reduction. As the majority view in the Talmud states, the new entrant can rightly claim, 'Whoever will come to me, will come to me, and whoever will come to you, will come to you.'[11] And as the *Mishnah Torah* recounts:

> If there is among the residents of an alley [what would be called 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.[12]

[9] In these paragraphs, I summarize my more detailed discussion in Netanel, *Maimonides to Microsoft* (n 5), 96–100. See also Yehoshua Lieberman, *Taharut Iskit B'Halakha* (Business Competition in Jewish Law) (Bar-Ilan University Press 1989); Shillem Warhaftig, *Dinei Miskhar Be-Mishpat Ha-Ivri* (Jewish Commercial Law) (Zur-Ot Press 1990); Sinai Deutch, 'Business Competition and Ethics: Predatory Pricing in Jewish Law' (1993–94) 17 *Diné Israel* 7.

[10] Maimonides, *Mishneh Torah*, Sefer Kinyan, Hilkhot Mekhira 17:4.

[11] Bava Batra 21b.

[12] Maimonides, *Mishneh Torah*, Sefer Kinyan, Hilkhot Shkhenim 6:8.

Yet rabbinic authorities have set out qualifications and exemptions to the general rule favouring free competition under various circumstances – and like so much else in Jewish law, these rulings are themselves subject to continuing debate and interpretation. Rabbis have held, for example, that competition is to be favoured only when it truly leads to substantial, market-wide reductions in price. Some rabbis have also insisted that the general rule in favour of free market entry should not apply when the newcomer is from a foreign land and does not have to pay the taxes imposed on local residents. Others have ruled that such foreign merchants should be allowed to compete so long as their competition leads to markedly lower prices overall or if they sell higher quality goods.

We also see a strong minority view, going all the way back to the Talmud that competition must be restricted when it would undoubtedly lead to the complete ruin of an existing business, thus depriving the incumbent of his livelihood. Along those lines, Eliezer ben Joel Ha-Levi (1140-1225), a German rabbinic scholar who was a contemporary of Maimonides, argued that the paradigm case of the incumbent owner of a business on an alley should not apply when the alley in question is closed on three sides and the new entrant sets up shop at the open end to compete with an existing business operating at the alley's closed end. In that event, Ha-Levi posited, the new entrant is certain to damage the first comer's business, because many potential customers will buy from the new entrant (at the open end of the alleyway) without even seeing the first comer's goods (at the closed end). Under such circumstances, Ha-Levi concluded, the first comer may prevent the new entrant from setting up shop.

Of note, Moses Isserles (1520 or 1530-1572), a preeminent sixteenth-century rabbinic authority, invoked Ha-Levi's proffered exception to the general principle of free competition in a 1550 ruling in favour of Rabbi Meir Katzenellenbogen of Padua.[13] Katzenellenbogen had invested much of his personal savings in publishing a new edition of Maimonides' *Mishneh Torah*, partnering with the nascent printing house of the Venetian patrician Alvise Bragadini. Katzenellenbogen also invested significant time and effort in producing the edition, serving as its expert editor and annotator. Immediately after the Katzenellenbogen-Bragadini edition came to print, Bragadini's competitor, Marc Antonio Giustiniani, issued his own edition of the *Mishneh Torah*. In his lavishly printed rival edition, Giustiniani both copied Katzenellenbogen's annotations and included a preface chastising them as worthless.

Giustiniani's preface also proclaims that he will sell his edition for one gold coin less than his competitors' edition, ostensibly to enable more Jewish readers to have access to Maimonides' foundational text. In response, Bragadini charged in a postscript to his edition that his rival acted only to drive Bragadini out of business in order to maintain a monopoly on

[13] I discuss this ruling and its background at length in Netanel, *Maimonides to Microsoft* (n 5), ch 4.

Hebrew printing in Venice (then the leading center of both Hebrew printing and printing in general). Giustiniani might have also sold at a loss to spite Katzenellenbogen, who had spurned Giustiniani for Bragadini after initially negotiating with Giustiniani to publish his edition.

Upon Giustiniani's publication of his rival edition, Katzenellenbogen brought a complaint before Moses Isserles, who was then the newly appointed Rabbi of Krakow, Poland, a primary market for the *Mishneh Torah*. In his ruling, Isserles declared that Katzenellenbogen had the right to sell out his first print run before facing competition from the rival printer. Isserles had no power to enjoin Giustiniani from marketing his edition since Giustiniani was not Jewish. Accordingly, Isserles issued an order forbidding Jews from purchasing any edition of the *Mishneh Torah* 'that has been recently printed unless it has been published under the auspices of [Katzenellenbogen] or his agents'. [14]

In so ruling, Isserles likened Katzenellenbogen to an incumbent shopkeeper in a closed alleyway entitled to prevent competition from a new entrant who sets up shop at the alley's entrance. For Isserles, the key to the closed alley exception to the general principle of free competition is that, in Ha-Levi's paradigm case of the closed alley, the incumbent is certain to suffer devasting harm to his business. Isserles found that exception to free competition directly on point:

> [I]n our case there is also certain damage. The second printer has announced that he will sell all his books for a gold coin cheaper than those of [Katzenellenbogen]. Who will see this and not come to buy from [the second printer]? And he is able to sell cheaply because he is one of the wealthiest men in the country.

More narrowly, some later commentators understood Isserles' ruling to set out an exception to the principle of free competition when a competitor is engaged in predatory pricing. Like any merchant, a publisher may not sell at a below-market price with the intent of driving a competitor out of business. In this case, Giustiniani had the means and motive to sell at a loss both for spite and to drive Katzenellenbogen and Bragadini out of the Hebrew publishing business. In this more narrow understanding of Isserles' ruling, Katzenellenbogen would be entitled to protection against the harm of deliberate predatory pricing, but he

[14] *Responsa Rema*, no 10. For an English translation of key sections of Isserles' ruling, see 'Rema Ruling re: Maharam of Padua, Krakow (1550)' (Neil Netanel tr) in *Primary Sources on Copyright (1450-1900)*, eds Lionel Bently & Martin Kretschmer) www.copyrighthistory.org/cam/tools/request/showRepresentation.php?id=representation_j_1550 accessed 16 June 2025.

would not have a right to otherwise be insulated from competition from a well-heeled competitor, even if that normal competition would likely drive him out of business.

Isserles' ruling also suggests that intellectual property rights might serve as a legitimate exception to the principle of free competition. The leading rabbinic authority Moses Sofer (1762-1839) surmised 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.[15] In line with that understanding, since the sixteenth century, rabbinic authorities have issued reprinting bans in favour of publishers of Hebrew-language books, primarily those of Jewish liturgy, law, or learning.[16] The reprinting bans forbid any rival publisher from issuing an edition of the same book for a period of years, typically between 10 and 25 years, designed to enable the beneficiary of the ban the time to sell out its first printing. More broadly, the preeminent Galician rabbinic scholar, Joseph Saul Nathanson (1808-1875), ruled in 1860 that authors have an inherent, perpetual exclusive right to print their books, a right that authors may transfer to their publisher. As Nathanson set out this intellectual property right exception to free competition:

> [I]f an author prints a new book and he merits that his words are received all around the world, he obviously has an eternal right [to his work], because in any case if one prints or invents some type of craft, another person is not allowed to do so without his consent.[17]

In yet another limitation on untrammeled competition, Jewish law also prohibits deception -- what is termed geneivat da'at or 'theft of the mind' -- whether in the marketplace or in personal relations.[18] The geneivat da'at prohibition most certainly applies to deceptive advertising that misleads potential customers about the quality or origins of a product or service offered to the public.[19] Jewish law would thus prohibit a new entrant's deception of consumers by passing off its own products as originating with or endorsed by the incumbent when they actually are not.[20] Accordingly, a new entrant's slavish imitation of an incumbent's

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[15] Moses Sofer, *Responsa Hatam Sofer*, Hoshen Mishpat, no 41.

[16] I discuss the rabbinic reprinting bans at length in Netanel, *Maimonides to Microsoft* (n 5), chs 3 and 5.

[17] Joseph Saul Nathanson, *Sho'el U-Meshiv*, pt 1, no 44, translated and discussed in Netanel, *Maimonides to Microsoft* (n 5), 221-26.

[18] Hershey H Friedman, 'Geneivat Da'at: The Prohibition Against Deception in Today's World' (*SSRN*, 2002) www.ssrn.com/abstract=2295182 or www.dx.doi.org/10.2139/ssrn.2295182 accessed 16 June 2025.

[19] ibid at 4-6.

[20] In a trademark law case before the Israeli Supreme Court, Judge Neil Hendel found support in the Jewish law doctrine of geneivat da'at for prohibiting a new entrant to sell goods under a trademark that is sufficiently similar to an incumbent's already registered trademark that it would mislead the consumer public regarding

product in a way that creates the false impression that the new entrant's products are those of the incumbent or are endorsed by the incumbent would run afoul of the geneivat da'at prohibition.

Further, some commentators maintain that plagiarism -- copying another's expression or teachings without crediting the source – amounts to geneivat da'at, as least in contexts in which citing one's sources would generally be expected.[21] In that view, plagiarism is wrong not because – or not only because – it deprives the original author of credit.[22] Rather, the plagiarist violates Jewish law because he wrongly deceives his readers about his expertise as a writer, scholar, and teacher, by conveying the misimpression that the words and ideas he espouses are original to him. Slavish imitation of another's unique product, whether it be that product's design or functional features, without clearly labeling that it is an imitation and identifying the original source might run afoul of the geneivat da'at prohibition on that score as well, depending on the customs and general practice in the relevant market.

IV. Wrongful Competition in the Matters of Basil Pizza and Delicious Foods

In the matters of Basil Pizza and Delicious Foods, the rabbinic courts stated that an incumbent business may prevent a new entrant from competing in the same narrowly defined market as already occupied by the incumbent. By contrast, the incumbent may not prevent a new entrant from offering products of the same general type that are deemed not to compete head on with the incumbent's products. As formulated, the courts' definition of wrongful competition would certainly encompass a new entrant's slavish imitation of the competing incumbent's products. Yet, it would also extend to entering the same market with

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the origin of the new entrant's goods. *Akisionerno Droujestvo v. Philip Morris Products S.A.*, Civ. App. 3976/10 (25 May 2011) para 4.

[21] The leading proponent of this view was Moshe Schick (1807-1879), who maintained that, while plagiarism does not constitute theft, it is nevertheless prohibited on the grounds of geneivat da'at. Maharam Schick Responsa, Yoreh Deah, no 156. See also Michael Avraham, 'Geneivat Da'at ve-Kinyan Rukhani' {Theft of the Mind and Intellectual Property], www.mikyab.net accessed 16 June 2025, text at n 30 (describing the view of Moshe Schick); 'You Can Say That Again: Plagiarism in Halacha' (*Bais Havaad Halacha Center*, 11 January 2024) www.baishavaad.org/you-can-say-that-again-plagiarism-in-halacha. Moshe Feinstein has also ruled that cheating on exams or submitting work that is not one's own misleads educators into believing that the student possesses knowledge that he does not actually have and thus constitutes geneivat da'at. Moshe Feinstein, *Igrot Moshe*, *Choshen Mishpat*, vol 2, no 30.

[22] The Talmud also espouses a moral exhortation that 'whoever repeats a teaching in the name of one who said it brings redemption to the world.' Pirke Avot 6:6. While that norm has been viewed as a source for something akin to a right of authorship credit, it seems, rather, to inform subsequent generations about which school of thought is the source of a particular teaching and thus to assess how to interpret and weigh the teaching. *See* Sacha Stern, 'Attribution and Authorship in the Babylonian Talmud' (1994) 45 *Journal of Jewish Studies* 28.

competing products of the same specific type (however defined) even if not identical to the incumbent's products.

The courts in Basil Pizza agreed that Calibri should be forbidden to offer specialty pizza of the same type as offered by Basil. Yet while they differed on the meaning of specialty pizza, neither court defined it so narrowly as to include only the specific pizza recipes that Basil used. Nor did the Beit Din Beis Yoseph rabbinic court base its ruling on Basil's allegation that Calibri had attempted to elicit what secular law might deem to be trade secret information regarding Basil's recipe and techniques for producing its most popular pizzas, as opposed to simply reverse engineering Basil's recipe and copying its pizza design.

Similarly, the Beth Din of America stated that it would likely rule in favour of the incumbent Delicious Foods if Good Chocolates were to expand its offerings to include nuts, dried fruits, and candies in addition to parve chocolate, presumably even if Good Chocolates offered products in those categories that were not virtually identical to those of Delicious Foods. Thus, while the courts' rulings suggest that a new entrant's slavish imitation would be prohibited, at least where the new entrant opens shop in close geographical proximity to the incumbent merchant, the protection they provide the incumbent is more capacious than a bare right to prevent slavish imitation. Rather the rabbinic courts would also enable an incumbent to prevent competition in a narrowly defined market: where the new entrant offers products of the same narrowly-defined type even when they do not amount to slavish imitation of the incumbent's products.

The Beth Din of America ruling provides more insight into the rationale for its holding than do the Basil pizza rulings, which simply state a perfunctory conclusion that Calibri's sale of specialty pizza akin to Basil's would constitute wrongful competition under Jewish law. The Beth Din of America explained that it was following Moses Sofer's holding that a newcomer who would effectively eliminate the incumbent's income may be prohibited from competing despite the general principle favouring free competition.[23] Going further, the court also cited a ruling of the preeminent post-World War II rabbinic authority, Moshe Feinstein (1865-1986). Feinstein expanded the incumbent's scope of protection to reach new entrant competition that would render the incumbent no longer able to maintain his accustomed standard of living even if the competition falls short of driving the incumbent to bankruptcy.[24] However, the court declined to apply Rabbi Feinstein's ruling to bar Good Chocolates from including parve chocolate among its product offerings. The court reasoned that, unlike the competition between Delicious Foods and Good Chocolates, Rabbi Feinstein's ruling involved competitors that offered virtually identical products in the same

[23] Moses Sofer, *Responsa Hatam Sofer*, Hoshen Mishpat, no 79.
[24] Moshe Feinstein, *Iggerot Moshe*, *Hoshen Mishpat I*, no 38.

market, such that a customer gained by one competitor reflects the loss of a customer to the other competitors. Finally, the Beth Din noted, both Rabbis Sofer and Feinstein would allow new competition when it would clearly benefit local consumers, notwithstanding the adverse effects it might have on an incumbent merchant. In the case before it, the court concluded, Good Chocolates offered a higher quality product that would benefit consumers who observe Jewish dietary laws.

Finally, the Basil Pizza and Delicious Foods disputes both involved competing businesses that were physically adjacent to one another. As a result, the rabbinic courts in those cases did not address – and, given the facts before them, had no need to address – the issue of geographical proximity, an issue that would likely arise with respect to the application of Jewish law to intellectual property. Like the case of the shopkeeper in the alley who faces competition from an outsider who comes to the alley to open up a shop, the paradigm cases of wrongful competition in rabbinic literature involve new entrants in close physical proximity to the incumbent merchant. It would not be wrongful competition for a new entrant to open a shop selling the same goods in a different town or remote neighborhood. Furthermore, traditionally, local rabbinic courts have had the power to enjoin illegal conduct only within the geographical area of their jurisdiction, not in territory falling within the jurisdiction of another rabbinic court.[25]

It was only with the advent of an international market in printed books that rabbinic authorities had to grapple with how to apply principles of wrongful competition to a new entrant competing in a distant territory by marketing a reprint of the original publisher's book in that territory. In the first rabbinic proto-copyright ruling of which we have record, a decree by the Rome rabbinic court in 1518, the court recognised the traditional territorial limits of the Jewish law of wrongful competition but expressly pushed beyond them.[26] It accorded Eliyahu Bakhur, the author of three books of Hebrew grammar, the exclusive right to print the books for ten years, throughout world. Distinguishing books from products created by local craftsmen, the court ordered:

> And since printed books travel from sea to sea, we have not limited our ruling to acts occurring with a territorial border, but rather simply decree: Anyone who knows of, saw, or heard this our decree prohibiting the printing of these books, and who proceeds to print them nevertheless … is a violator of the law and will be 'bitten by the snake' [of ostracism, excommunication, and anathema].

[25] See Netanel, *Maimonides to Microsoft* (n 5) 59–60.
[26] I discuss and include a full English translation of the Rome rabbis' ruling in Netanel, *Maimonides to Microsoft* (n 5) ch 3.

In the ensuing centuries, secular governments came to prohibit rabbinic authorities from issuing such reprinting bans. In response, as noted above, Joseph Saul Nathanson ruled in 1860 that authors have an inherent universal, perpetual, and fully assignable exclusive right to print and reprint their writings, wholly apart from any rabbinic regulation or reprinting ban, and stretching beyond any territorial borders.

The Rome rabbinic court and Nathanson rulings dealt expressly with rights of authors and publishers. But what about a right against slavish imitation of product quality or design in Jewish law? In today's global and digital markets, competitors engaging in slavish imitation can cause harm far from the physical location of the incumbent's business. After all, it has long been more than just printed books that 'travel from sea to sea'.

Certainly, the geneivat da'at prohibition against deceiving consumers would seem to apply wherever potential consumers are deceived. Arguably, but perhaps less certainly, the traditional wrongful competition prohibition against causing certain damage to an incumbent in a closed alleyway should also be understood today to refer metaphorically to a particular market, not just a particular neighborhood location. To the extent that Jewish law protects incumbents against a new entrant who offers the same, narrowly defined type of product in the same neighborhood, it might also protect an e-commerce incumbent against a newcomer who targets functionally equivalent products or services to the same niche group of online consumers – whether or not those products or services are slavish imitations.

V. Secular Law Compared

As a general rule, under secular law, Basil Pizza and Delicious Foods would have no right to prevent competition in their respective, narrowly defined markets for specialty pizza or confectionary goods featuring parve chocolate even if the competitor opened next door and might be expected to cause the incumbent significant loss by peeling off much of the incumbent's business. Yet secular law, too, contains various exceptions to the general rule in favour of free competition, such that the incumbent may prevent a second comer from engaging in conduct that is deemed to violate permissible rules of competitive behaviour. The exceptions that seem most pertinent to the Basil Pizza and Delicious Foods disputes are the incumbent's (1) right against malicious nuisance and unethical competition, (2) right against slavish imitation of product design or trade dress, and (3) right against misappropriation of trade secrets.

I consider each of those three exceptions in turn, while comparing them to the pertinent doctrine in Jewish law. But I first introduce the Jewish law principle, 'the law of the sovereign is the law'. Applying that principle, rabbinic courts will sometimes adopt and enforce a rule of secular law. As such, a secular law restriction on free competition might be adopted by a rabbinic court in a particular case even if it is otherwise absent in native Jewish law.

A. The Law of the Sovereign is the Law

The principle of 'the law of the sovereign is the law' (in Hebrew, 'dina de-malkhuta dina') posits that, with respect to legislation governing commercial matters, a rabbinic court should generally defer to the law of the sovereign state where it is located.[27] Under that principle, for example, a rabbinic court in the United States might recognise and enforce an author's copyright under the U.S. Copyright Act even if Jewish law would not otherwise afford such a right, or even if Jewish law would afford a far more limited right. At the same time, however, some rabbinic jurists posit that the 'law of the sovereign is the law' principle does not apply to judicially developed common law, at least unless such common law has been codified.[28]

Moreover, contemporary rabbinic jurists often prefer to find solutions for commercial matters, such as copyright piracy, within Jewish law proper rather than relying on recourse to secular law. For some rabbinic jurists, to rely entirely on the law of the sovereign state carries with it a tacit admission that native Jewish law is inadequate to address the issue or that religiously observant Jews would otherwise fail to abide by widely accepted ethical standards in commercial matters.[29] As a result, rabbinic jurists will sometimes interpret and apply Jewish law in a manner that bears the influence of the jurist's understanding of secular law norms, without explicit recourse to the principle of the law of the sovereign is the law. For example, Joseph Saul Nathanson ruled in 1860 that common sense compels the conclusion that authors have an exclusive right under Jewish law to determine whether, when, and by whom their work is to be printed because such authors' rights are the norm in secular law and it is simply inconceivable that 'our perfect Torah' would not likewise recognize such rights.[30]

B. Three Exceptions to Free Competition

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[27] The leading contemporary treatise on the 'law of the sovereign is the law' principle is Shmuel Shilo, *Dina De-Malkhuta Dina* (The Law of the Sovereign is the Law) (Jerusalem, Jerusalem Academic Press, 1974). See also Aaron Levine, 'Employee Agreements Not to Compete in American Law, Economic Theory and Halakhah' (2001) 10 *The Torah U-Madda Journal* 95, 102–03 (discussing a range of rabbinic understandings regarding how broadly the law of sovereign principle applies).
[28] See Levine, ibid 113 (summarizing rabbinic pronouncements expressing that view).
[29] See Netanel, *Maimonides to Microsoft* (n 5) 260–63.
[30] Ibid 222-223.

1. Malicious Nuisance and Unethical Competition

The common law has long prohibited malicious nuisance: conduct undertaken with the sole purpose of harming someone else's person, enjoyment of property, or business. The classic common law case was Keeble v. Hickeringill, decided in 1707.[31] In Keeble, an English court ruled that the operator of a duck decoy used to trap wild fowl had an actionable claim against a person who shot guns nearby for the malicious purpose of scaring away the wild fowl from the plaintiff's land. Of importance to that case, the defendant and plaintiff each operated duck decoys, and those decoys were in close enough proximity to compete for attracting the same birds. However, as the court described it, the defendant's actions were undertaken entirely to harm the plaintiff by scaring away the wild fowl from the plaintiff's land, not to engage in the legitimate competitive purpose of trying to attract the fowl for himself.

Later courts applied the malicious nuisance tort to seemingly competitive conduct designed entirely to harm another person. Several early twentieth century U.S. court rulings hold that an existing business has an actionable claim for malicious nuisance – or 'malicious competition' -- against a second comer who enters a market for the sole purpose of driving the incumbent to ruin.[32] In one such case, a wealthy banker with a personal vendetta against a local barber opened a barbershop directly across the street from the barber's shop. The banker then hired his own barber and offered haircuts at a loss. He did so entirely to drive the incumbent barber out of business, with no intention of continuing to maintain his own barbershop once that goal was accomplished.[33]

Importantly, these cases hold that, to give rise to an actionable claim, the second comer must be motivated entirely by vindictiveness and spite, and not any legitimate business reason.[34] If the second comer truly wishes to establish itself in the market, it is perfectly permissible under the common law to engage in predatory conduct aimed at driving the incumbent competitor out of business. As Oliver Wendell Holmes summarised in his iconic late nineteenth-century treatise on the common law: 'There are certain things which the law allows a man to do, notwithstanding the fact that he foresees that harm to another will follow from them.'[35] For example, wrote Holmes: 'He may establish himself in

[31] For discussion of the case and its context, see AW Brian Simpson, *Leading Cases in the Common Law* (Oxford, Clarendon Press, 1995) 45–65

[32] For discussion of the pertinent common law jurisprudence, see *Tuttle v. Buck*, 107 Minn. 145 (1909) (upholding claim for malicious competition against motion to dismiss complaint). See also American Law Institute, *Restatement (First) of Torts* § 709 ('Engaging in Business for Purpose of Causing Harm') (1939)

[33] Tuttle v Buck 119 NW 946 (Minn 1909).

[34] American Law Institute, *Restatement (First) of Torts* § 708, cmt e (1939).

[35] Oliver Wendell Holmes Jr, *The Common Law* (Boston: Little, Brown, and Co, 1881) 144.

business where he foresees that the effect of competition will be to diminish the custom of another shopkeeper, perhaps to ruin him.'[36]

The civil law has traditionally imposed greater restrictions on competition than has common law.[37] As such, civil law countries have prohibited various commercial practices deemed unethical. As the German Federal Supreme Court stated in a 1993 ruling, an act of competition is unfair if it 'contradicts the sense of decency of a reasonable average tradesman or if the general public disapproves [of the act] or considers it intolerable'.[38] Those civil law strictures generally prohibit acts that lack a legitimate business purpose done with intent to harm a competitor and in violation of pertinent ethical standards of good faith, fairness, honesty, and decency.[39] They would certainly prohibit malicious competition intended to bankrupt a business out of spite. They also prohibit commercial practices that would generally be permitted under common law, such as comparative advertising that disparages a competitor, even by making denigrating allegations that might well be true.[40]

The tort of malicious competition resonates with Moses Isserles' ruling that Giustiniani had violated the Jewish law of wrongful competition by engaging in predatory pricing out of spite, with the intent of causing disastrous economic harm to Katzenellenbogen to avenge Katzenellenbogen's spurning of Giustiniani in favour of Giustiniani's competitor, Bragadini. But the common law tort would arguably not apply to the extent that Giustiniani was motivated to drive his competitor to ruin for the business purpose of securing his own dominance in the market for Hebrew book printing in Venice. Nor would the common law tort of malicious competition appear to apply in the Basil Pizza and Delicious Foods cases, where the respective second comers truly operated competing businesses, even if the result of that competition might have been to cause the incumbent to lose substantial business.

Recall as well that Giustiniani engaged in what might be termed disparaging comparative advertising. In his edition of the *Mishneh Torah*, Giustiniani both copied Katzenellenbogen's annotations and criticised them as worthless – 'having been written for

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[36] ibid 144–45.
[37] See generally, Walter J. Derenberg, 'The Influence of the French Code Civil on the Modern Law of Unfair Competition' (1955) 4 *American Journal of Comparative Law* 1.
[38] German Federal Supreme Court (Bundesgerichtshof), 14 October 1993, case I ZR 40/93, 'PS-Werbung II' *Gewerblicher Rechtsschutz und Urheberrecht* 1994, 220 (222), quoted in English translation in Martin Senftleben, 'Protection Against Unfair Competition in the European Union: From Divergent National Approaches to Harmonized Rules on Search Result Rankings, Influencers, and Greenwashing' (2024) 19 Journal of Intellectual Property Law & Practice 149, 150.
[39] *See* Daniel Burkitt, 'Disloyal Competition and Common Law Liability: England and France, a Comparative Study' in Eric Barendt et al (eds), *The Yearbook of Copyright and Media Law 2001/2* (Oxford, Oxford University Press, 2002) 86–87.
[40] *See* Senftleben, 'Protection' (2024) (n 38) 153; Derenberg, 'Influence' (1955) (n 37) 8–13.

nothing'.[41] Indeed, 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 annotations should be erased from the text because in each annotation Katzenellenbogen had either 'erred' or 'sought to explain things understood even by one who is one day old'.[42] Such disparagement of a rival edition might also have been prohibited under principles of ethical competition that later came to be a part of civil law jurisprudence.

2. Slavish Imitation, Trade Dress, and Product Design

The slavish imitation of a product's nonfunctional design has long been actionable under both common law and civil law. Early civil law cases treated slavish imitation as improper free riding on the skill and labour of another.[43] But over time, in part because of the advent of statutory protections for creative and original product design, slavish imitation came to be actionable only if undertaken to mislead the public into thinking that the imitator's product was that of the original producer or had been licensed by the original producer.[44] In the common law as well, slavish imitation is actionable only when it misleads consumers regarding the origin of the copied good, although, even absent such consumer confusion, copying a product design can sometimes constitute the infringement of a design patent or copyright under those respective statutory regimes.[45]

In the United States, the tort of slavish imitation of product design has come to be incorporated within the protection of trade dress under the Lanham Act, the federal trademark and unfair competition statute.[46] The Lanham Act, enacted in 1946, was initially held to accord trademark protection only to distinctive product packaging, not product design. But since the 1980s courts have come to accept distinctive, nonfunctional product design as protectable trade dress.[47] Protection requires a showing that consumers have come to identify the product design features with a particular source, that the design features are not functional, and that the defendant's use of those features is likely to confuse

[41] See Netanel, *Maimonides to Microsoft* (n 5) 86.
[42] ibid.
[43] See Derenberg, 'Influence' (1955) (n 37) 24 (quoting an 1854 ruling of the Appellate Court of Paris).
[44] ibid 24-27; Senftleben, 'Protection' (2024) (n 38) 156–157.
[45] As the Supreme Court stated in 1989:

[T]he common law tort of unfair competition has been limited to protection against copying of nonfunctional aspects of consumer products which have acquired secondary meaning such that they operate as a designation of source. … The 'protection' granted a particular design under the law of unfair competition is thus limited to one context where consumer confusion is likely to result: the design 'idea' itself may be freely exploited in all other contexts.

Bonito Boats Inc v Thunder Craft Boats Inc 489 US 141, 158 (1989).
[46] Trademark Act of 1946, 15 U.S.C. §§ 1051 et seq. (commonly referred to as the 'Lanham Act').
[47] J Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, 5th edn, vol 1 (St Paul, MN, Thomson West, 2025) § 7:54.

consumers regarding the origins of the defendant's goods.[48] Product design that meets those requirements is effectively treated as a trademark, akin to a label or logo.

Of relevance to the Basil Pizza and Delicious Foods disputes, common law prohibitions against slavish imitation and modern trade dress law have both been applied to prevent imitations of the distinct appearance of food products. In 1908, for example, a Massachusetts court ruled that the defendant's manufacture and sale of bread in loaves of the same size, shape, colour, and general visual appearance as those of the plaintiff constituted common law unfair competition.[49] The court reasoned that those design features of the plaintiff's bread were sufficiently uncommon and unrelated to the efficiencies of bread production that they served primarily as a source identifier for the plaintiff. Further, the court held, the defendant had copied the plaintiff's design features, without clearly distinguishing its own bread, with the aim and effect of deceiving consumers into believing that the defendant's bread was that of the plaintiff.

Today, nonfunctional food product designs that consumers have come to view as source identifiers may be registered as trademarks with the U.S. Trademark Office. Examples of such trademark registrations for food product trade dress include Pepperidge Farm's Milano Cookies' oval shape and chocolate filling sandwiched between two cookies, Carvel Fudgie the Whale Ice Cream Cake's whale shape and decoration, Dairy Queen ice cream curl on top, the unique shape of Hershey's kisses, Frito Lay Sun Chips' rippled chip design and colour scheme, J. Dawgs' hotdogs with crisscross cuts, General Mills' bugle-shaped corn chips, and Magnolia Bakery's cupcakes bearing its signature swirl icing.[50]

The specific shape, design, texture, and colouring of Basil Pizza's upscale specialty pizza might qualify as protectable trade dress if consumers have come to identify those features as Basil's pizza. The same might hold for a consistent, distinctive combination of items that comprise Delicious Foods' gift baskets. If so, Calibria Pizza's and Good Chocolate's copying of those design features in competing products and sale of those products in a manner likely to confuse consumers into thinking that the products are those of Basil Pizza and Delicious Foods, respectively, might support a claim for trademark

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[48] *Wal-Mart Stores Inc v Samara Brothers Inc* 529 US 205 (2000) (holding that protection for product design requires a showing of 'secondary meaning,' that consumers have come to associate that design as a designation of origin); *TrafFix Devices Inc v Marketing Displays Inc*, 532 US 23 (2001) (reiterating that only nonfunctional trade dress is protected under trademark law).

[49] *George G Fox Co v Hathaway* 85 NE 417 (Mass 1908).

[50] Kurt M. Saunders and Valerie Flugge, 'Food for Thought: Intellectual Property Protection for Recipes and Food Designs' (2021) 19 *Duke Law & Technology Review* 159, 179–80 (setting forth trademark registration numbers for each).

infringement under U.S. law. Further, under the principle of 'the law of the sovereign state is the law,' a rabbinic court might apply and enforce U.S. trademark in a pertinent case.

However, the rabbinic court rulings in Basil Pizza and Delicious Foods do not indicate that the respective defendants copied the specific design features of particular products or that consumers were likely confused regarding the origin of the defendants' products. Rather, the rabbinic courts accorded the incumbent exclusivity in the market for a narrowly defined genre of products vis-à-vis a competing new entrant in close physical proximity. The courts' respective injunctions against marketing 'specialty pizza' or nuts, dried fruits, and candies in addition to parve chocolate would likely encompass products that confuse consumers by incorporating very similar design features. But the rabbinic courts' rulings do not appear to be limited to such products. Rather they bar competition in narrowly defined markets even absent any consumer confusion or copying of trade dress.

3. Trade Secrets

As noted above, Basil Pizza accused Calabria of copying Basil's most popular pizzas, in part through eliciting information from Basil employees about the techniques for making Basil's specialty pizza. If those techniques included confidential recipes or baking techniques for preparing Basil's specialty kosher pizzas, they might be protected as a trade secret under secular law. For such trade secret protection to apply, Basil would have to enjoy a competitive advantage from using techniques that are not generally known and must have made reasonable efforts to maintain them in secret, such as by requiring that employees sign non-disclosure agreements.[51]

Trade secrets protection has roots in English common law, originating in cases dealing with medicinal recipes.[52] That common law doctrine first found expression in the United States in an 1837 case involving the plaintiff's 'exclusive and secret art of making chocolate'.[53] Since then, many famous culinary formulas and recipes have been protected as trade secrets, including the original recipe for Kentucky Fried Chicken, the recipes for Twinkies and Krispy Kreme donuts, and the complete formula for Coca-Cola.[54] In one case bearing similarities to Basil Pizza's claim, *Magistro v. J. Lou*, a family restaurant business

[51] Uniform Law Commission, *Uniform Trade Secrets Act* § 1(4)(i)-(ii) (1985). The Uniform Trade Secrets Act is a model state law drafted in 1979 by the Uniform Law Commission. Almost every state has enacted some version of the model law. Further, the federal Defend Trade Secrets Act, enacted in 2016, largely mirrors the definitions in the Uniform Trade Secrets Act. The federal Act applies where the trade secret relates to a product used in interstate commerce. 18 U.S.C. § 1839 (2016).
[52] Melvin F. Jager and Brad Lane, *Trade Secrets Law* (Westlaw updated to 2025) § 2.2.
[53] *Vickery v Welch* 36 Mass 523, 527 (1837).
[54] Saunders and Flugge, 'Food' (2021) (n 50) 162; Camilla A Hrdy and Mark A Lemley, 'Abandoning Trade Secrets' (2021) 73 Stanford Law Review 1, 54 (discussing Coca-Cola's decades' old trade secret).

created and prepared recipes for pizza dough and tomato sauce in strict confidence and made every effort to ensure that non-family members would not learn of them.[55] The court held that the recipes were protectible trade secrets given that they were not generally known, were a source of independent economic value for the family business, and the family made reasonable efforts to maintain their secrecy. Another analogous case recognised trade secret protection in a restaurant's secret recipes for pizza crust and sauce.[56]

Trade secret protection is not absolute. Trade secrets law only makes actionable the acquisition of a trade secret through improper means, in violation of a duty to maintain the information in secret or limit its use.[57] Even if Basil's techniques are protected as trade secrets, Calabria would be entitled to lawfully acquire Basil pizzas and attempt to discern their ingredients and techniques for making them through reverse engineering.[58] But Calabria's inducement of Basil employees to reveal such confidential information in violation of their contractual or other fiduciary duty to keep it secret would constitute tortious misappropriation of Basil's trade secrets.[59]

Trade secrets protection under EU law and civil law largely mirrors that of U.S. and common law.[60] The EU Trade Secrets Directive, adopted in 2016, defines trade secrets and misappropriation along the same lines as the definitions in the Uniform Trade Secrets Act.[61] Further, the EU Directive expressly permits reverse engineering of lawfully acquired products or information.[62]

The rabbinic court rulings in Basil Pizza rule address the protection of an incumbent against ruinous competition, not Basil's charges of misappropriation of trade secrets per se. In that regard, Jewish law has no specific doctrine of trade secret protection. Indeed, to the extent that trade secret protection assumes that trade secrets constitute the property of the party that benefits from and maintains the secrecy of that information, Jewish law might present a hurdle to protection. In the view of many rabbinic scholars, the Jewish law

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[55] *Magistro v J Lou* 703 NW 2d 887 (Neb 2005). The case is summarized in Saunders and Flugge, 'Food' (2021) (n 50) 162–163.
[56] *205 Corp v Brandow* 517 NW 2d 548 (Iowa 1994).
[57] Uniform Trade Secrets Act § 1(2). See also American Law Institute, *Restatement (Third) of Unfair Competition* § 40(a) (1995) (defining misappropriation of trade secret).
[58] See *Kewanee Oil Co v Bicron Corp* 416 US 470, 476 (1974) ('A trade secret law … does not offer protection against … so-called reverse engineering, that is by starting with the known product and working backward to divine the process which aided in its development or manufacture.')
[59] See Saunders and Flugge, 'Food' (2021) (n 50) 162–163.
[60] Anand B Patel et al, 'The Global Harmonisation of Trade Secret Law: The Convergence of Protection for Trade Secret Information in the US and EU' (2016) 38 *European Intellectual Property Review* 738, 739.
[61] Directive 2016/943 of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use, and disclosure (Trade Secrets Directive) [2016] OJ L157/1.
[62] Patel et al, 'Global Harmonisation' (2016) (n 60) 740.

recognises property rights only in land and material objects, not intangibles such as commercial information.[63]

Yet, beginning in the nineteenth century other rabbinic scholars, led by Joseph Saul Nathanson, came to recognise property rights in intangible works of authorship.[64] Under that line of thought, trade secrets might qualify as 'property' that Jewish law protects against 'theft'. Alternatively, misappropriating a business's trade secrets to compete with that business might constitute a form of wrongful competition, and using subterfuge to uncover trade secrets might constitute gneivat da'at. Or, perhaps, exploiting trade secrets used in another's place of business might be seen as effectively trespassing on that place of business.[65]

Along those lines, in 1955, Yitschak Ya'akov Weiss, then the head of the rabbinic court of Manchester, England, opined that a rabbinic court may enjoin a firm's former employee from using his knowledge of the firm's customers to compete with the firm. As Weiss colourfully put it: The former employee 'has eaten of [his former employer's] bread and knows all his trade secrets, etc., so that he is even like one who takes his very soul'.[66] At the same time, Weiss would limit the injunction to a fixed period of time so as not to permanently prevent the former employee's economic advancement. Finally, as noted above, even absent a prohibition on misappropriating trade secrets under native Jewish law, a rabbinic court might apply the secular law of trade secrets pursuant to the principle of the law of the sovereign is the law.

V. Conclusion

In sum, Jewish law likely encompasses protections against malicious competition, slavish imitation of product design, and misappropriation of trade secrets that are roughly akin to those of common law and civil law. Even if native Jewish law does not extend to those areas, a rabbinic court might provide protection under the principle of the law of sovereign is the law.

At the same time, as exemplified by the rabbinic court rulings in Basil Pizza and Delicious Foods, Jewish law would accord incumbents protection against potentially ruinous competition that incumbents would have no right to prevent under secular law.

[63] Netanel, *Maimonides to Microsoft* (n 5) 7.
[64] ibid 222-27.
[65] See Aaron Levine, *Economic Morality and Jewish Law* (Oxford, Oxford University Press, 2012) 221–22 (describing a rabbinic ruling that using another's trademark is effectively conducting business on that person's business premises).
[66] See Meir Tamari, *With All Your Possessions: Jewish Ethics and Economic Life* (Northvale, New Jersey, Jason Aronson, 1998) 108-09 (discussing and quoting Weiss's responsum).

While Jewish law shares the basic secular law norm of free marketplace competition, Jewish law protects against the certain destruction of the incumbent's livelihood under various circumstances. Those may include harm caused by misappropriation of intellectual property or predatory pricing undertaken with the malicious intent of driving the incumbent out of business. But, as the rabbinic rulings in those two disputes make clear, rabbinic courts may sometimes accord protection against ruinous competition even when such competition is otherwise perfectly legitimate.