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In the Shadow of the Emperor: The Ḥatam Sofer's Copyright Rulings

Roedelheim, on the outskirts of Frankfurt am Main, was a well-known seat of Jewish printing. Wolf Heidenheim published his famous prayer book there in 1800, giving rise to a controversy between two famous rabbis of the early nineteenth century. At stake in the dispute were divergent views about copyright protection.

This controversy represents the second time in the annals of rabbinic writings that sages were called upon to issue responsa regarding author's rights. The first case dates back to 1550, when R. Moses Isserles (Rama) addressed the permissibility, under Jewish law, of the Giustiniani house in Venice publishing an edition of Rambam's *Mishneh Torah* in competition with the one published earlier that same year by the rival Bragadini house, under the supervision of Rabbi Meir ben Isaac Katzenellenbogen, Maharam of Padua.¹ My colleague on the UCLA Law Faculty and I are co-authoring a book on the subject; that forthcoming volume will systematically analyze the pertinent responsa. Our study begins with that 1550 case of *Maharam of Padua v. Giustiniani* and concludes with the 1999 poster (*pashkevil*) from rabbinic leaders in Bnei Brak regarding the permissibility of copying computer software.²

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This article focuses on the multiple nineteenth century *teshuvot* arising out of publication of the Roedelheim *maḥzor*. To sketch the facts briefly, Heidenheim, together with his partner Barukh Baschwitz, published that landmark work in nine volumes.³ A number of prominent rabbis, notably Pinḥas Horowitz (1730-1805), head of the rabbinical court of Frankfurt am Main, gave their *haskamot* (approbations) to the work, as well as *ḥaramim* (bans) against anyone copying it.

A Gentile named Anton von Schmid—powerfully situated, inasmuch as he served as Hebrew printer to the imperial court in Vienna—later copied the Roedelheim *maḥzor*. Although attributing due authorship to Heidenheim, Schmid not only reproduced Heidenheim's beautiful typography, but also his Judeo-German commentary⁴ and the fruits of Heidenheim's additions as a masoretic scholar.⁵

In 1807, R. Mordekhai Banet, Chief Rabbi of Moravia, ruled in favor of copyright protection for the Roedelheim *maḥzor*, in what can be called the case of *Heidenheim v. Schmid*.⁶ But the Christian Schmid promptly hauled the Chief Rabbi before the secular authorities for flouting his imperial privileges. In the resulting case, for convenience labeled *Schmid v. Banet*, those authorities jailed R. Banet and harangued him all day for his activities, which they claimed bordered on treason. Coming on the heels of his loss in civil court to reformer Aaron Chorin, Banet did a complete *volte-face*, ruling that Heidenheim could not vindicate his copyright as a matter of Jewish law.

Following his dressing-down by the secular authorities in Bruenn, R. Banet outlined an entirely new approach. Whereas previously he had joined his rabbinic colleagues in issuing *haskamot* and *ḥaramim* for the works of others, after 1807 he refused to compose the latter.⁷ After his loss in *Schmid v. Banet*, R. Banet was still willing to issue an approbation praising a given book and its God-fearing author, but he was no longer willing to engage in his previous practice of pronouncing a ban on those who would dare to copy its contents.

R. Banet's new stance drew a quick response from a younger colleague whom he had once sponsored for his first rabbinic post in Dresnitz and who later served as Chief Rabbi of Pressburg. The eminent R. Moses Sofer, better known to history as Ḥatam Sofer, wrote his own responsum on the Roedelheim case, setting forth the contrary thesis. Each of the sages returned later to replot the same field, resulting in a flurry of writings devoted to copyright protection over the Roedelheim *maḥzor*.⁸

The multiple responsa that both rabbis issued are highly detailed. For current purposes, the following summaries suffice.

☞ In *Parashat Mordekhai*, *Hoshen Mishpat*, responsum 7 (August 22, 1822), R. Banet addresses what might be called the case of *Heidenheim v. Printers of Dyhernfurth*. His *teshuvah* adduces the various aspects of Jewish law, as exemplified in the Talmud, that could cover the issue of copyright protection: It begins with the The Case of the Mill located in an Open Alleyway (*Bava Batra* 21b), then turns to The Case of the Fisherman (also *Bava Batra* 21b); from there it moves to The Case of the Poor Man Searching for a Singed Cake (*Kiddushin* 59a) and finally to The Case of the Poor Man Who Shakes An Olive Tree (*Gittin* 5:8).⁹ He concludes that free competition should be the order of the day. In so ruling, R. Banet proceeds to the contrary of Rama's famous responsum regarding Maharam of Padua; he therefore has to interpret the logic of that previous case very narrowly. He cites various differences between the two cases, ranging from the presence of predatory pricing to the evolution over time of governmental regulation. He further concludes that a printing ban should not be put into effect regarding the Roedelheim *maḥzor*, as such a ruling would benefit only Gentile publishers, to the prejudice of their Jewish competitors.

☞ In *Hoshen Mishpat*, responsum 41 (March 7, 1823), R. Sofer retorts that, from the beginning of the era of publishing, rabbis have found it appropriate to ban unfair competition in order to protect from harm those engaged in the meritorious act of book-publishing. Given how routinely those bans have been included in Hebrew book publication, he expresses his willingness to apply the category of unfair competition (*hassagat gevul*) under these circumstances, which brings down a curse on those who cut into someone else's business (Deut. 27:17). He derives additional support for that view from the need for accurate attribution, which approbations and bans uphold; from the need to squelch the baleful multiplication of *Sifrei Hameiras* (about which more later); and from a device called the *herem ha-yishuv*, which barred non-residents from entering a new community without the consent of the local inhabitants. Contrary to R. Banet's position, R. Sofer concludes that governmental control over publishing rights exerts no effect on the viability and effectiveness of rabbinic bans set forth in approbations.

☞ In *Hoshen Mishpat*, responsum 8 (April 11, 1827), R. Banet objects to the very notion of a ban on doing something inherently

lawful. If printing a given book is not independently actionable, the rabbis cannot proscribe it through a binding ban. He further enunciates the startling proposition that written bans cannot be legally binding, but instead gain force only if pronounced orally. He also notes that one who merely republishes an old book scarcely deserves relief against newcomers who similarly republish that same old book.

☞ Finally, in *Hoshen Mishpat*, responsum 79 (undated), R. Sofer composes an entire treatise on the Jewish law governing unfair competition. In it, he draws together more talmudic considerations, augmented by his own view on the policies underlying approbations. He also uses the occasion to heap lavish praise on publishers in general, and on Wolf Heidenheim in particular.

The current article derives lessons from these events of the nineteenth century. It focuses on three areas. First, it examines the Emancipation and its effects upon Jewry. Surprisingly, the printing ban stands at the fulcrum of competition between Jewish and secular courts, the very space occupied by the contradictory rulings over the Roedelheim *mahzor*. The discussion then looks more deeply at the changes brought about by the advent of the printing press, which gave rise both to the works in question and the institution of printing bans. This will allow a new prism into the jurisprudence of R. Sofer. Third, this article categorizes R. Sofer's and R. Banet's divergent interpretations of copyright law by reference to their nineteenth century analogs in common law copyright interpretation; the parallels produce striking harmony. The article closes with some ruminations about R. Sofer's methodology.

I. Emancipation and its Discontents

A. The Hapless Judge Buffeted By Rival Courts

As noted above, R. Banet found himself in secular court twice, the second time as a result of his decision in favor of the plaintiffs in *Heidenheim v. Schmid*. In *Schmid v. Banet*, the civil officials, as he reported, "spoke harshly to me" and even went so far as to say that "I was rebelling against the government." The result was that R. Banet recanted his earlier ruling.¹⁰

Although Jewish law requires adherents to give up their lives rather than commit the three cardinal sins of murder, adultery, or idolatry, for better or worse, copyright does not fall within that enumeration. From that perspective alone, one might imagine that R. Banet bowed to gov-

ernmental compulsion by substituting a pro-Schmid conclusion for his initial pro-Heidenheim inclination. Nonetheless, on due consideration, this writer rejects that perspective, positing instead that R. Banet applied Jewish law differently once governmental forces had intervened, as the issue was no longer *en famille* but instead implicated different concerns.¹¹

More mysterious, however, is why he stayed true to that new course decades later when the case of *Heidenheim v. Printers of Dyhernfurth* arose in 1822. Certainly, R. Banet was not the first rabbi whose decisions were overborne by the force of state compulsion. Jewish history is rife with such episodes, from both previous eras (the reluctant rabbi at times ruling “with tears streaming down his face”¹²) and in later years.¹³

Far from having tears streaming down his face, by contrast, R. Banet fervently adopted the point of view that initially had been imposed on him. He proclaimed in responsum 7 that “the honor of Torah” compelled him to speak out publicly about the issue. Moreover, he maintained that stance throughout his lifetime, returing to it in responsum 8 in 1827, two years before his death.

Putting aside the explanation for R. Banet’s fervent embrace of the position that he was at first compelled to adopt,¹⁴ the historical question remains: How was it that he was brought before the civil authorities—twice, no less—because of Torah rulings? Investigation shows that he was not the freak victim of two lightning bolts, but instead part of a greater social phenomenon. To see these developments in context, we must widen our field of vision.

B. Advent of the Emperor

R. Banet was not the only decisor to find himself in trouble with the civil authorities because of his responsa. Just as R. Banet had ruled against Aaron Chorin, who then appealed to the civil authorities, R. Sofer served on a *beit din* that ruled against R. Jonathan Alexandersohn, who similarly took his grievance to the civil authorities.¹⁵

Another incident is related in two of the hagiographies devoted to Ḥatam Sofer,¹⁶ a genre that began with R. Sofer’s own grandson, whose *Ḥut Ha-Meshulash* consists of “nothing more than a fountain of uncritical praise for the Sofer family.”¹⁷ The subject tale forms part of the cycle of miracle stories that are the bread and butter of Ḥatam Sofer’s mystique.¹⁸ During the Napoleonic war, peasants stripped dead soldiers of their rifles at the behest of two Jewish businessmen, who sold the armaments to the Austrian army. The partners in that venture had a falling out, which they took to the Pressburg *beit din*. After its ruling, the dis-

gruntled litigant brought the matter to the French authorities, who promptly arrested R. Sofer as the head of that court for facilitating weapons deliveries to the enemy. When his day in court arrived, R. Sofer protested that he had no knowledge that the case before the *beit din* arose out of weaponry, as both litigants had merely characterized their dispute as one involving iron. The following colloquy then supposedly ensued with the presiding judge:

“Do you know that our great Emperor intends to bring about the emancipation of the Jews throughout the world?”

“I know it. But it is our duty to pray for the welfare of the land whose subjects we are. If it is God’s will that we should become subjects of another power, then we will be loyal to it.”

At that juncture, the judge dismissed the case—not based on legal considerations, but because of a miraculous coincidence: He revealed himself as someone from R. Sofer’s childhood in Mainz.¹⁹

Regardless of the verisimilitude of the story, it reflects a *leitmotif* that portrays both rabbis who issued responsa regarding the Roedelheim *maḥzor* as having faced civil judicial proceedings arising out of their rabbinic rulings. It is possible that their experiences are anomalies; but another possibility is that they were part of a broader experience. As we shall see, the latter explanation is closer to the mark. In fact, the French judge’s supposed reference to the Emperor’s emancipation pinpoints the cause of that phenomenon.

Throughout medieval times, host countries persecuted Jews, expelled them, or at best tolerated them as a separate presence. One need only cite the 1264 Statute on Jewish Liberties in Poland as an example.²⁰ During this era, Jews possessed their own law courts and could freely impose the ban on recalcitrant congregants.²¹

But a later era saw a new sensibility take hold, in which Jews joined their fellow nationals as citizens of the country. Even more wonderfully, from a copyright perspective, is that the device used to “normalize” the status of Jews in the eighteenth and nineteenth centuries shares roots with the sphere of patents: One of the early signposts along that route was the 1782 *Toleranzpatent*, issued by Kaiser Joseph II in Austria.²² In France, Louis XV similarly issued *lettres patentes* to the Jewish community.²³ The *Judenpatent* applicable to Bohemia also deserves mention.²⁴

The Emancipation²⁵ is normally dated to the French revolution.²⁶ More salient for current purposes is that its advent came later in Central Europe—just around the time that R. Banet and R. Sofer were issuing

their conflicting rulings.²⁷ These rabbis were writing in the ferment of Napoleonic invasions. At his advent on the Jewish stage, Jews welcomed Napoleon Bonaparte effusively as the savior from their persecution, even parsing his name as *bona parte*, which they translated as *helek tov* ("good portion").²⁸ He certainly did much to integrate Jews into the polity, giving them the same rights accorded others. At the same time, however, he wished to arrogate control to himself as emperor, with consequent hostility towards independent rights for religious orders, of whatever variety. Even before his ascendancy, Napoleon wrote: "It is axiomatic that Christianity . . . destroys the unity of the State . . . because, such as it is constituted, Christianity contains a separate body which not only claims a share of the citizens' loyalty but is able even to counteract the aims of the government."²⁹

Starting in 1806, Napoleon convened a delegation of notables, culminating in a Great Sanhedrin in Paris, as part of the process initiated by the French revolution of transmuting *les Juifs* into *des citoyens*.³⁰ Among the questions posed to the assembled rabbis was whether Jews recognized the validity of civil judgments or insisted on having recourse to their own tribunals.³¹ The collective response was that, although the Sanhedrin of old had governed Jewish affairs, latter-day rabbis were limited to "proclaiming morality in the temples, blessing marriages, and pronouncing divorces." This response simply reflected the reality that, by that juncture, Jews habitually resorted to secular courts, such that Jewish tribunals operated as arbitrators only upon the consent of all concerned.³² In any event, the political result of the answers furnished by the Great Sanhedrin was free religious exercise for Jews, but at the cost of their pledge to adhere to the principles embodied in the collective responses. To quote the lament of a contemporary (who reviewed the transformation at a later vantage point in 1870), "Napoleon gave the Jews liberty, freedom, and equal rights of citizenship, without national distinction, but he took from them their standing in Torah and their religion, leaving to their Judaism naught but the worship of God, and there is no *beit din* which will assemble and judge the nation of God by the laws of the holy Torah."³³

Naturally, among the opponents to this bargain was R. Sofer. Along with Jews all over Europe, he carefully watched the events unfolding in Paris.³⁴ R. Sofer staunchly opposed the concept of Emancipation, by which Jews would have all the rights as the other inhabitants of the country.³⁵ Far better than accepting the blandishment of Hungarian (or French or Prussian) citizenship, in his view, was to remain as Jews in

exile, focusing prayers on the ultimate redemption. Although he fully conceded the royal prerogative in such domains as military conscription, taxation, and coinage, R. Sofer adamantly opposed ceding authority to civil authorities over traditional rabbinic domains.³⁶

This perspective unlocks a deeper understanding to his conflict with R. Banet. By upholding R. Horowitz's original printing ban on the Roedelheim *maḥzor*, R. Sofer was simply adhering to the authority that rabbis had exerted since the dawn of printing.³⁷ He expressed bewilderment and surprise that R. Banet would discard such a hoary institution. In contrast, R. Banet, initially by virtue of the compulsion he was under (but later as a matter of his own halakhic analysis), fell closer, in this particular instance, to the core tenet of the Emancipation, which may be summarized as: "The Jew's sole national loyalty was to the state in which he dwelled. The state would be the ultimate determinant of what was civil and what was religious."³⁸ Thus, the "third party in the room" in the clash between these two eminent rabbis seems to have been none other than the Emperor himself.³⁹

C. Manifestations of a Judicial Arms Race

These considerations furnish the back-story to R. Banet's rulings. Initially, he sided with Heidenheim, but such exercise of authority by a rabbinic court could not pass muster with the civil authorities. Sadly, there is nothing unique in the way that this affair unfolded; in fact, it was all too typical. Even in cases of Jews against Jews, during this period, it was increasingly common for one party to seek redress in the secular courts. That phenomenon reached its crescendo in R. Sofer's native city of Frankfurt am Main, where Jews turned to the municipal counsel for redress of "any and every trifle." Naturally, the rabbis railed against such derogations of their judicial authority.⁴⁰

It should therefore occasion no surprise that when a case involved not simply *Jew v. Jew*, but instead *Jew v. Powerful Non-Jew at the Imperial Court*, an adverse rabbinic ruling was not destined to stand as unquestioned authority. Thus did R. Banet's initial decision in *Heidenheim v. Schmid* fall. After losing, the Christian Schmid did what even disgruntled Jewish litigants were increasingly wont to do:⁴¹ He brought an "appeal against [the rabbis'] verdicts to the general secular courts."⁴²

The effect on Jewish courts of these political events was incalculable. Throughout the medieval era and even the Renaissance,⁴³ rabbis pronounced the *herem* on Jews, and Christian authorities granted them the right to do so,⁴⁴ albeit not without some resistance.⁴⁵ At that stage, the

“concept of a uniform code of law, regulating human affairs regardless of race and creed, never entered the picture.”⁴⁶ Yet, by the early nineteenth century—when the responsa here under examination were issued—“governmental intervention in internal Jewish affairs had become the norm.”⁴⁷ The position as chief of a rabbinic court had undergone severe changes, from unchallenged authority in the fourteenth century to near extinction by the seventeenth, at which point no more than ten Jewish law courts were still in existence.⁴⁸ In terms of rabbinic ability to impose the ban, “the quintessence of their power since time immemorial,”⁴⁹ the fallout from the recent Napoleonic wars was still in the air.⁵⁰

With the expansion of French rule through Napoleonic victories, a new version of civil authority had come into existence: the state that embraced each and every citizen, rather than dividing them by confession.⁵¹ In pre-modern times, Jewish law courts had authority to regulate affairs; “they intervened to prevent ‘unfair’ competition among Jews,” among other purposes.⁵² But all that changed;⁵³ the all-embracing state could not countenance loss of its authority to either church⁵⁴ or synagogue.⁵⁵ Predictably, therefore, the state circumscribed the power of rabbinic courts more and more, until finally their jurisdiction applied only to disputes within the synagogue, and even then, those decisions had to be ratified by the secular authorities! Indeed, the ultimate elimination of rabbinic supervision has been labeled “a postulate of the modern state.”⁵⁶

The rabbis pushed in one direction and the state pushed back in the other, which caused the rabbis to redouble their efforts and the state to do likewise in reaction. My own label for what resulted from this clash is a “judicial arms race.” At the center of this conflict stood the *herem*.⁵⁷ In the first stage, the rabbis placed a ban on Jews who took their litigation to the secular courts. As far back as 1603, a Frankfurt synod attempted to ban Jews from taking their legal cases to Gentile courts, with limited success.⁵⁸ In response to those efforts, “the secular Gentile authorities enjoined Jewish courts from imposing or enforcing a *herem*, as for instance where it had been imposed for having recourse to non-Jewish courts.”⁵⁹

To be sure, none of these phenomena were wholly new. Already by the twelfth century, Maimonides codifies the talmudic classifications of the various sinners deserving of excommunication (*niddui*) to include a Jew who takes a fellow Jew to a Gentile court in order to extract from him a fine that is not owing under Jewish law (*Berakhot* 19a; *Hilkhot Talmud Torah* 6:14, category #9). Although Rambam’s codification in that instance emphasizes nullification of a substantive provision of Jewish law, the dominant trend condemned recourse to the Gentile

judiciary *per se*, even if those courts would reach the same result as a Jewish tribunal. Although, on sporadic occasions,⁶⁰ Jewish resort to Gentile courts did occur in medieval times,⁶¹ what the Emancipation brought to the fore was the normalization of this phenomenon, which contemporaries viewed as “nothing short of catastrophic.”⁶² The repeated and pointed fights, of the sort that embroiled both Rabbis Banet and Sofer, are emblematic.

R. Banet’s experience with the Roedelheim *maḥzor* is the perfect object lesson in the entire exercise. Like all good rabbis of the eighteenth century, he did not hesitate to issue a book ban; a good example, from 1797, applied to those who would issue unauthorized copies within ten years of *Sha’agat Aryeh*, a work authored by R. Aryeh Leib ben Asher Gunzberg. By the same token, he did not hesitate before 1807 to vindicate the ban imposed by the celebrated R. Horowitz against unauthorized copying of the Roedelheim *maḥzor*. For his fidelity to Jewish tradition, he was brought before a secular court and charged with sedition for daring to uphold the *ḥerem*. One may characterize the Moravian authorities as having imposed a secular *ḥerem* on him if he would contumaciously continue in that path. He ended up changing course, to continue on a new path for the rest of his life.

II. The Printing Press As An Agent of Change

A Challenge to Jewish Legal Categories

It is impossible to overstate the effect that the advent of the printing press exerted as an “agent of change” in the intellectual development of Western life.⁶³ Among many other upheavals, it resulted in the passage of the first copyright statute, in England in 1709.⁶⁴ Thus, the entire domain of copyright law is one daughter of the press.

Of course, printing affected Jews as extensively as everyone else. The dissemination of books led to “a new open-mindedness within traditional Jewish circles, evidenced by mounting interest in the general secular disciplines.”⁶⁵ But its influence was not only towards “outer knowledge;” it worked even more powerfully towards consolidating “inner knowledge.” It was the invention of print that led to fixed texts, such as that of the Talmud, and to correction of proofs in general.⁶⁶ Heidenheim’s handiwork in creating the Roedelheim *maḥzor* is part and parcel of that process.

Indeed, the very process of codification of Jewish law received its impetus through the development of the printing press. The *Shulḥan Arukh*, published a century after the invention of movable type, gained

normative status in a way that the *Tur* and *Mishneh Torah* never achieved. Credit goes in large part to the standardization and wide-scale dissemination made possible by the advent of the printing press, advantages its predecessors did not enjoy at their inception.⁶⁷

The opportunities afforded by printing posed concomitant risks. Not only could printed works set forth anti-Semitic calumnies, but heresy could proliferate as easily as orthodoxy through the medium of print.⁶⁸ This concern animated much early regulation of presses,⁶⁹ the example of England being particularly instructive. To achieve control, one strategy limited the works that could be printed. Censorship could succeed in a closed society, such as England in the early sixteenth century, where only four printing presses existed in the realm. Later, with the proliferation of presses, the issuance of a royal patent became a prerequisite to exercise the privilege of printing.⁷⁰

A device parallel to censorship developed in Jewish communities. The Jews of Amsterdam issued a ban on printing any book without community permission, and other locales also required advance approval. The community thereby exercised self-censorship, "to counteract kabbalistic, pseudo-messianic and Haskalah tendencies."⁷¹ Through these devices, the genie of the press could be bottled up. If successful over time, there would have been no need to place a copyright notice on secular books or a printing ban on Jewish books; instead, only "officially approved" books would ever see the light of day.

But, of course, the genie soon broke free in both Jewish and general societies, inasmuch as control over publication was less than perfect in both domains.⁷² We have previously observed how the printing ban fell afoul of the new spirit of the Emancipation. The ban equally offended Emancipation's correlative development, the Enlightenment. At a time when approbations were required for a Jewish book to be published, the rabbis thereby signaled their uncontested control "over the intellectual pursuits of Jewish society."⁷³ It is scarcely surprising, therefore, that arch-*Maskil* (proponent of Enlightenment) Moses Mendelssohn "refused to take the well-meant advice that he ask for rabbinic approbation for his translation of the Pentateuch, even though the work was intended for Jews, was printed in Hebrew characters, and provided a running Hebrew commentary."⁷⁴ His waiving of the customary approval was a slight but conscious defiance of rabbinical authority. . . .⁷⁵

Modernity views escape from the ghetto as a boon to previously confined Jews, but it is fascinating to reflect on the fact that those who actually lived within its bounds did not automatically resent their con-

finement. Instead, they viewed it as the normal state of affairs, which admirably served their social and religious needs while affording physical and spiritual security from the outside.⁷⁶ Just as R. Sofer opposed the effects of Emancipation, he was none too eager to expose Judaism to the Enlightenment spirit of critical dissection. For the *maskilim*, “the Halakha had ceased to serve as the final authority on the question of what was permissible and desirable.”⁷⁷ Instead, Reason stood supreme, meaning that “tradition would be brought before the tribunal of reason and called upon to vindicate its truths.”⁷⁸ R. Sofer wanted none of that; in his view, continued social and cultural isolation would be better. The enlightenment that he sought may be encapsulated as *Torah orah* (“the Torah is light”),⁷⁹ not the illumination cast by exterior knowledge. To him, the archetypal “Enlightenment” Jew must have been the “Light of the Exile,” Rabbeinu Gershom (940-1028?)—not Moses Mendelssohn.

Just as the foregoing appraisal discerns the positive aspects of ghetto life, a similar perspective reevaluates censorship. “While censorship did limit what Jews could read and in this sense had a negative impact, it also allowed the creation of an autonomous Jewish sphere and identity. . . .”⁸⁰ Censorship accommodates two contradictory dimensions: “separation of the Jews from Christians and integration of Jewish literature in Christian culture.”⁸¹ In some measure, censorship was a concomitant of successful dissemination of texts. As one commentator notes about the effects of sixteenth century Gentile censorship of Jewish printers,⁸² “The nature of printing itself meant that Jewish books were subject to far greater Christian scrutiny than manuscript books had been.”⁸³ The double edge of that sword should be borne in mind.⁸⁴

Copyright protection matured at the same time as the royal patent, and ultimately the familiar copyright notice became a standard device of works published in the United States. By the same token, a printing *herem* became standard in Jewish books. The first one, for a book published in Naples around 1490, bore the signature of seven rabbis. By 1518, a Roman work bore the threat of excommunication if republished within ten years. With the later introduction of title pages, the approbation was moved to the work’s front; eventually, its period of “proto-copyright” extended to 25 years.⁸⁵ Over time, various Jewish communities issued edicts (*takkanot*) that no book would receive its first printing absent an approbation signed by three rabbis of the region.⁸⁶

Typically, the approbations were accompanied by bans. Those bans, in turn, were given effect through an extension of traditional talmudic categories, as discussed at length in R. Sofer’s responsa.⁸⁷ In particular,

*hassagat gevul*⁸⁸ found itself extended far beyond its origins in the Torah to apply to copyright infringement. Justice Elon, formerly of the Supreme Court of Israel, comments that this development of *hassagat gevul* “strikingly illustrates one of the paths for the development of Jewish law, namely extension of the content of a legal principle beyond its original confines, in a search for solutions to problems arising through changes in social and economic conditions.”⁸⁹

B. Myths Regarding Innovation

The foregoing summary shows that change and innovation characterized the Jewish legal response to the printing press. This topic leads naturally to the epigram by which R. Sofer is best remembered today. In response to reformers and others who wished to institute changes or modernization, his rubric was “*ḥadash asur min ha-Torah*”—“The Torah forbids anything new.”

Although the familiar motto is habitually trotted out whenever R. Sofer comes under discussion, the circumstances of its initial articulation are typically glossed over. He actually first employed the phrase in a *teshuvah* written 18 Sivan 5579 (June 11, 1819), before returning to it many times in his subsequent writings. The subject matter of *Yoreh De'ah*, responsum 19 was a *takkanah* that allowed a Jew to sell a cattle to a Gentile before it is slaughtered, so that if the cattle were found non-kosher due to a hole in its intestines, the Gentile would be its owner. R. Sofer noted that a community *minhag* should normally be followed, even to the extent it is lenient and we wish to be more strict.

The popular mind may imagine that, when R. Sofer considered various questions, his reasoning simply consisted of a blanket denunciation of innovation, with a bald pronouncement of “*ḥadash asur min ha-Torah*” masquerading as halakhic analysis. The truth is far different. When discussing custom in the context of that *teshuvah*, R. Sofer noted that the Mishnah itself explicates the biblical verse (Lev. 23:14) prohibiting the use of new grains before Passover by enunciating the subject phrase: *he-ḥadash asur min ha-Torah* (*Orlah* 3:9). But, he further pointed out, Jews in his days did not scrupulously refrain from eating the grain in question before the Omer.⁹⁰ Thus, he adduced this topic as a way of defending a *lenient* interpretation, not as the prelude to a stringent ruling. Once his talmudic reasoning was complete, he added a tag line as a sort of mnemonic for his previous conclusions, namely a nod to the power of custom (even when seemingly afoul of mishnaic or talmudic requirements) by reiterating *he-ḥadash asur min ha-Torah be-*

khol makom ve-ha-yashan u-meyushan meshubah mimmennu (“The Torah forbids anything new in all instances, plus the old and ancient is better than it”).

So often did Ḥatam Sofer articulate this proposition that it has now become his “trademark.”⁹¹ For instance, in *Orah Ḥayyim*, responsum 28, he addressed whether the platform from which the Torah is read can be moved from the middle of the synagogue to the upper *bimah* near the Ark. Viewed strictly through the prism of precedent, there was no legal prohibition on that architectural adjustment. Yet the Talmud (*Sukkah* 51b) records that the *bimah* of the synagogue in ancient Alexandria was located in the center, and a *bimah* is likened to the altar in the Beit Hamikdash, which was located midway between the table and the menorah. Equally salient is that the move represented a change in the practice of German Jewry with which R. Sofer was familiar. Accordingly, even though moving the platform is arguably not barred on strictly legal grounds, Ḥatam Sofer ruled that it was forbidden simply because it represented an innovation from the received customs of the time.

In the popular mind, R. Sofer represents the archconservative, opposing all innovation, who took that stance as a direct outgrowth of his uncompromising fidelity to Halakhah, the system that stands supreme above all other values. Matters cannot be otherwise for true believers, this line of reasoning continues, given that traditional Jews are wedded to that system of Halakhah as a direct result of being given the Torah on Mount Sinai. As we will see, however, multiple myths actually underlie this reasoning.

In academic scholarly circles, it is routinely asserted that Jewish tradition itself did not embrace the notion, before R. Sofer, that “the Torah forbids anything new.” The consensus is that that motto itself represents the emergence of self-aware “Orthodoxy,” which is itself “a conscious decision to adhere to traditional practices and beliefs for ideological reasons,” under the pressure of modern times⁹²— and to distance oneself from any of the innovations instituted by Reform.⁹³ Indeed, the first recorded usage of the term “Orthodox” dates from this very era—it was used to describe those who resisted change during the time of the Paris Sanhedrin convened by Napoleon. In the almost two centuries since, that motto has become “the watchword of the rejectionists.”⁹⁴

The logical consequence of this academic viewpoint is that R. Sofer’s motto, forbidding innovation, is itself a startling innovation within the course of Jewish history. As one work puts it, his “unyielding self-conscious Orthodoxy . . . ironically, was itself a departure from the

more adaptive traditional Judaism of earlier times.”⁹⁵ In other words, the ultimate irony in the worldview that “there is something inherent in modernity as such which renders it prohibited” is that it is itself a modern innovation! The scholarly consensus is that prior to R. Sofer’s enunciation in 1819 of the doctrine that the Torah forbids anything new, rabbinic sages had seen nothing wrong in instituting new practices when circumstances warranted.

In contrast to that academic view, R. Sofer’s motto can be seen as harmonizing with past rabbinic practices, insofar as it accorded primacy to the lived tradition of the community. R. Jacob ben Meir Tam, popularly known as Rabbeinu Tam (1100-1171), often relied on the dictum that “the custom of our fathers is law.” As a consequence, he approved starting the evening prayers before darkness fell, even though the Babylonian Talmud was understood to embody the need to wait (*Tosafot* to *Berakhot* 2a, s. v. *me-ematai*). When R. Elijah of Paris urged his followers to adhere to talmudic law in derogation of the community’s actual practice, Rabbeinu Tam labeled his view “close to heresy.”⁹⁶ From this perspective, R. Sofer’s deference to lived practice over the letter of the law represented nothing new in the annals of rabbinic rulings.⁹⁷

The explosion of one myth leads to the decay of another. Given his adherence to a “mimetic tradition”⁹⁸ rather than complete deference to the doctrine codified in the law books, R. Sofer (like Rabbeinu Tam before him), prolific decisor that he was,⁹⁹ no longer should be viewed as a one-dimensional “replicator of received law.” In fact, he was flexible in his orientation as circumstances demanded.

That multi-dimensionality can be appreciated even with respect to his trademark motto, which typically connotes his fidelity to the lived customs of the Jewish community. Unlike the instances noted above in which he deferred to lived practice, on other occasions, R. Sofer was even willing to depart from that practice. This perspective emerges by moving away from copyright law to a deeper matter of contention in the responsa literature: the core of marking Jewish identity, *viz.* circumcision. In the early nineteenth century, two viewpoints developed. One accepted at face value the dictum of a talmudic sage that the infant’s health is protected through *mezizah*, the process by which the *mohel* sucked out some blood from the wound. Others adhered to advances in medical knowledge regarding infectious diseases—particularly in light of the death of a number of infants who all had been circumcised by one *mohel*—to adapt talmudic practices to modern exigencies. In that debate, R. Sofer actually embraced the new-fangled point of view. (So

shocking was that adoption of modernity that traditionalists claimed that the responsum issued in R. Sofer's name must have been forged.¹⁰⁰) In short, notwithstanding his billing as the arch-conservative, R. Sofer was ready, when circumstances warranted, to innovate no less than his rabbinic forebears.¹⁰¹ Thus, his trademark motto scarcely encapsulates the full range of R. Sofer's legal stances.

With specific regard to this willingness to innovate on occasion when circumstances demanded, R. Sofer actually falls within the skein of Jewish tradition, which the academic view conceptualizes him as having abrogated: "[C]ontrary to modern Orthodox theories claiming a kind of universal applicability of the Halakhah to all fields of human concern, rabbis of old recognized the limits of their capacity all too well and did not rely upon it exclusively even in the sphere of adjudication."¹⁰² Rabbis—and even talmudists—of old, rather than ruling on the basis of Halakhah alone, ruled based on *piskei ba'alei battim*, that is, "jurisdiction of householders guided by commonsense and possibly by some accumulated local precedents."¹⁰³ R. Sofer's reliance on the customs of his own community insofar as it dictated the spot on which to publicly read from the Sefer Torah is not different in kind from his predecessor's invocation of local precedents. One can therefore dispute Jacob Katz's observation:

Contrary to its self-understanding on the one hand as the bearer of the unadulterated tradition of old in its entirety—and on the other hand contrary to the designation of its opponents as a mere petrified residual of the past—post-Orthodoxy is a novel phenomenon.¹⁰⁴

It is important that the first *teshuvah* pronouncing "the Torah forbids anything new" was issued in 1819—before R. Sofer first upheld Heidenheim's position in responsum 41. What is telling for current purposes is that R. Banet's contrary ruling in 1822 actually hews closer to the spirit opposing innovation. R. Banet points to the fact that printing bans were of relatively recent origin and disapproved of them on that basis.¹⁰⁵ Had he been puckish in this regard, he could have gilded his observation by noting, "*h'dash asur min ha-Torah*." Thus, were it necessary to construct a Procrustean bed, it is actually R. Banet, not R. Sofer, who would lie down with the dictate "the Torah forbids anything new."

A final myth requires attention. Jews have been called "People of the Book." To the extent that the phrase represents an ethnic trend towards bibliophilia, it reflects contingent phenomena that arose only after invention of the printing press.¹⁰⁶ To the extent that the reference is to

the Bible, it must be noted that the authoritative basis for halakhic decisions by contrast is the Talmud, whose rulings frequently are predicated upon logic rather than biblical citations, and where biblical citations often seem to be adduced simply as *asmakhtaot*.¹⁰⁷ Yet even the statement that the Jews are the people of a book known as the Talmud is not entirely accurate; for rulings depend upon the work codified almost a millennium later, after the invention of the printing press, namely the *Shulḥan Arukh* and all subsequent halakhic literature.¹⁰⁸

Even this picture does not capture the essence of the matter. For the *Shulḥan Arukh*, composed before the printing revolution had run its course, does not give guidance as to copyright or the application of traditional rules of unfair competition to book publishing. Accordingly, when it came time to adjudicate Heidenheim's case, R. Sofer reached his ultimate conclusion not directly from the Bible (as goes without saying), nor from direct application of the Talmud, nor from the *Shulḥan Arukh* itself.¹⁰⁹ Instead, he placed primary reliance on printings in Amsterdam in 1738, plus one isolated historical precedent going back to 1602.¹¹⁰ As architect of a copyright ruling, he did not use the blueprints set forth in the Talmud except in indirect fashion. Instead, he relied on the fact that rabbis had adopted a custom during the past several hundred years. The upshot is that R. Sofer was able to innovate based on history far more recent than R. Joseph Caro's composition of the *Shulḥan Arukh*. This case study therefore bears out his fidelity to the lived customs of Jews of his era. It also shows the reliance of R. Sofer on relatively new, rather than ancient, "traditions" as the basis for his rulings.¹¹¹

It could scarcely be otherwise. Indeed, the very name "Ḥatam Sofer," which derives from the acrostic for *Ḥiddushei Torat Moshe*,¹¹² proclaims that Rabbi Moses's Torah was new.¹¹³ Even the most reactionary conservatives scarcely wish to be tarred with the label "used, has-been," but instead wish to be recognized for the novelty of their insight.¹¹⁴ It is well nigh inconceivable that R. Sofer would have rejected the proposition that his were the appropriate rulings geared for his own time and period. Indeed, one of his responsa explicitly declares, "he who would achieve piety before his Creator will be recognized by his deeds—that is, by those practices *which he originates* for the sake of heaven."¹¹⁵

One phrase from his responsa (even if repeated throughout the years) no more summarizes the man than would one isolated phrase plucked out of his copyright responsum from 1823. R. Sofer was many things: talmudic genius, Rosh Yeshivah, community leader, kabbalist,¹¹⁶ and more. We can omit from the enumeration "one-dimensional oppo-

nent of all that is new.” Indeed, as we have seen, his copyright rulings show him to be more open to innovation than R. Banet. These considerations counsel an end to the reductionism of “Ḥatam Sofer = *ḥadash asur min ha-Torah*.”

III. Visions of Copyright Law

The current investigation of the controversy arising over the Roedelheim *mahzor* constitutes an extended exercise in juxtaposing the old with the new. That juxtaposition in this context is perennial. Emblematic is the most recent brouhaha in Congress regarding copyright protection, which came in the context of the Prioritizing Resources and Organization for Intellectual Property Act of 2008 (PRO IP Act). Congress created a device for the government to unilaterally seize offensive materials, much to the chagrin of civil libertarians.¹¹⁷ But these dilemmas are nothing new under the Jewish sun; on October 13, 1478, for example, police raids on Jewish homes in Mainz resulted in the seizure of various anti-Christian tracts.¹¹⁸

In our focus on copyright issues arising out of the Roedelheim controversies, there are numerous dimensions of old versus new.¹¹⁹ We will begin by looking at why R. Sofer disagreed so fundamentally with R. Banet, and ask what this dispute tells us about current copyright doctrine.

A. Why the Disagreements?

Putting aside the external constraint from the forces of Emancipation, there was room within the halakhic framework itself for R. Banet to reach conclusions diametrically opposed to those of R. Sofer about copyright protection for the Roedelheim *mahzor*. One could write off the opposition as simply reflecting the indeterminacy of the talmudic cases that served as the building blocks for the divergent copyright rulings. After all, it could be said, the system of Halakhah as a whole is rooted in “a body of case law which does not lay down principles, but rather discusses concrete instances and the decisions pertaining to them.”¹²⁰ Absent an overarching statute setting forth the principles governing use of the printing press—not to mention that the cases themselves (involving the Open Alleyway, Shaking the Olive Tree, and the rest) were formulated before the invention of printing—it is scarcely surprising, on this view, that divergent interpretations arose. The conclusion is that the historical accidents of the late advent of printing, together with the absence of an overarching statute codifying Jewish copyright law, accounts for the dissension.

That point of view entails a conclusion that rabbinic decisions would reflect unanimous agreement, if only they were rendered under an overarching statute that was formulated after the advent of printing. Happily, a case study exists against which to test that hypothesis. England passed the Statute of Anne in 1709 as a direct response to the innovation of movable type;¹²¹ it consists of principles rather than the adjudication of specific cases. When we look to its interpretation, however, we discern no experience of harmonic convergence. To the contrary, even after that enactment had been on the books for over a century, it produced just as much disagreement as arose under Jewish law regarding the Roedelheim *maḥzor*. Indeed, we can find the same basic tensions that divided R. Banet and R. Sofer at work in nineteenth century English copyright cases—and even in twenty-first century copyright cases.

Let us start with a case from the end of the nineteenth century. *Walter v. Lane* arose over public speeches delivered by the Earl of Rosebery, who disclaimed any copyright in his composition. Nonetheless, journalists in attendance reported the speeches verbatim in the *London Times* based on their notes. After the defendant published a book including the very speeches reported in the newspaper, the *Times* alleged copyright infringement. The case thus resembles, to some extent, the dispute over the Roedelheim *maḥzor*, inasmuch as both at their core involved public domain works, which the plaintiff in each case massaged through effort and skill—investigating old texts in Heidenheim's case, using the stenographic talents of their reporters in the *Times*’.

In his responsum, R. Sofer concluded that if a decree were not issued to prevent others from engaging in unfair competition with book publishers, people would stop publishing books and book-selling would be eliminated among the Jewish people. He reserved special praise for Heidenheim himself, based on the large amount of time and money the latter had spent in preparing the *maḥzor*.¹²² Compare that formulation with Lord Halsbury's opening words in *Walter v. Lane* to rule for the plaintiff:

I should very much regret it if I were compelled to come to the conclusion that the state of the law permitted one man to make profit and to appropriate to himself the labour, skill, and capital of another. And it is not denied that in this case the defendant seeks to appropriate to himself what has been produced by the skill, labour, and capital of others. In the view I take of this case I think the law is strong enough to restrain what to my mind would be a grievous injustice.¹²³

R. Banet, on the other hand, concluded that someone laboring in

his study to produce something new and original might qualify for legal protection, but a plaintiff who merely prints an old book is no more worthy than a defendant who prints the same work.¹²⁴ Consonant with that approach is the conclusion of Lord Robertson in *Walter v. Lane*, commenting that the plaintiff's work merely presented the old, unprotected thoughts of the Earl of Rosebery, "untinctured by the slightest trace or colour of the reporter's mind."

In brief, the divergent views of R. Sofer and R. Banet in the early nineteenth century mirror the divergent views expressed in the House of Lords later in the century. We should therefore not view the rabbinic disagreement as a function of their isolation in the boondocks of outer Bohemia, far removed from the ferment of active copyright litigation. Instead, we see them rehearsing in Slovakian cadences the same rival tunes as those undertaken in major key in England, the home and heart of copyright battles.

A final parallel gilds the lily, this one drawn from recent vintage. *Qimron v. Shanks* arose as a case under the United States Copyright Act, but was filed in the District Court in Jerusalem and ultimately appealed to the Supreme Court of Israel.¹²⁵ At issue was the original text of one of the key Dead Sea Scrolls (4QMMT), as reconstructed over the course of decades by a scholar at Ben-Gurion University. Like both the text of the *maḥzor* and the Earl of Rosebery's speeches, the underlying work itself (composed 2,000 years ago by the Teacher of Righteousness) lay outside legal protection. The question arose whether the reconstructor (Qimron)—along the same lines as the compiler (Heidenheim) and the transcriber (Walters)—could vindicate legal rights. The three-judge panel of the Supreme Court ruled for plaintiff Qimron. This writer, wearing his scholarly cap, prepared a rejoinder consisting of 217 pages of law review commentary.¹²⁶ In sum, that recent case is just as contested as its predecessors.

The lesson is not that Jewish law is indeterminate; rather, it is that copyright cases are exceedingly difficult. They pose challenges whether they arise in Moravia and Slovakia where little precedent governed, under a legal framework that arose to address competing mills and fishermen,¹²⁷ or in England with almost two centuries of precedent construing a statute expressly designed for the printing press. They are difficult even when they arise in a civilized court with three centuries of copyright jurisprudence to fall back on.¹²⁸

Walter v. Lane resulted in one ruling at trial, which was reversed in the Court of Appeals, which in turn was reversed again at the highest tribunal—the same see-saw witnessed in so many copyright cases that reach

the United States Supreme Court.¹²⁹ We therefore can appreciate that the differences in viewpoint between the two distinguished decisors, R. Sofer and R. Banet, reflect not the inadequacy of Jewish law or that it is indeterminate across a range of modern human experience. To the contrary, those differences instead reflect that the issues presented in copyright cases are perennially thorny, confounding even specialists who devote their professional life to the field in legal systems that have purported to develop specific statutes and rulings dedicated to explicating the bounds of copyright protection. The fault, in short, lies not in a particularly Jewish reaction to author's rights, but rather inheres in the field itself.

B. Protection of Labor or Benefit to Society?

From a deeper perspective, what do these divergent views reveal about the purpose for which copyright protection is instituted? The view of R. Sofer and Lord Halsbury is that copyright should reward effort and expenditure. That viewpoint centers on the *process*. By contrast, R. Banet and Lord Robertson would reserve legal protection for works that qualify as new. That viewpoint centers on *product*. Each perspective enjoys an illustrious pedigree. At present, copyright protection in the United Kingdom roughly follows the first formulation,¹³⁰ in the United States, the second.¹³¹

Let us follow through on those viewpoints to observe their consequences. R. Banet's and Lord Robertson's focus on the product implies that the law should reward those products that advance human knowledge. Granted, the protection afforded to the individual is a dead-weight loss to society; as Lord Macaulay observed to the House of Commons in 1841, copyright serves as a "tax on readers for the purpose of giving a bounty to writers."¹³² That tax is warranted when all of society benefits through the production of new works; it cannot be justified when someone merely reproduces an old work, as R. Banet himself opined. Based on that rationale, copyright should last long enough to induce authors to create, but no longer.¹³³ In keeping with that sentiment, R. Banet opined in responsum 7 that it might be appropriate for a ban to apply only until the first publisher sold out his first printing, but it is inappropriate to impose a ban for a long period of time to prevent others from publishing even after the first person had sold out his works.¹³⁴

R. Sofer's focus on the process, on the other hand, led him to conclude that book sales are the only way that a printer could recoup his initial costs. That viewpoint is actually historically inaccurate, given that there existed at the time a viable alternative: one could sign up advance

subscribers (called “*praenumeranti*”)¹³⁵ and only go to press when guaranteed to cover expenses or make a profit. In fact, after R. Sofer ruled in *beit din* against R. Jonathan Alexandersohn (as noted above), the latter adopted just that methodology to fund printing of pamphlets that attacked R. Sofer’s reasoning.¹³⁶

In addition, one might inquire whether R. Sofer’s views on copyright protection depended on his precise historical circumstances and would be anachronistic if applied to today’s environment. When the framers of the United States Constitution convened, they formulated the grant of power to Congress to enact copyright legislation via an instrumental goal: “To promote the Progress of Science and useful Art.”¹³⁷ They approached that task from a humanistic standpoint, not with theological predilections.¹³⁸ The fountainhead for every rabbinic responsum, of course, is quite to the contrary. The decisor draws his very *raison d’être* from the authority conveyed on him by the Author of the Universe to bring His law down to regulate all earthly domains, which includes defining the legal bounds of authors’ rights. In R. Sofer’s world, publishers of works qualified as “agents of a *mizvah*,” who deserved protection on that basis, and Heidenheim’s publication of a *maḥzor* made him eligible for that status. Book publishing in that era focused on the goal of promoting the dissemination of Torah (*harbazat Torah*).¹³⁹ One wonders, however, how R. Sofer would treat publishers of secular textbooks rather than of prayer books,¹⁴⁰ and of harlequin novels and teen magazines. About pornographers,¹⁴¹ one need waste little time wondering.¹⁴²

C. Copying As Immoral or Laudable?

At bottom, R. Sofer objected to copying from Heidenheim. Others, he concludes, should either print different *maḥzorim* or other books, “for why should they benefit from that which he has created?” Those halakhic conclusions followed in the wake of his own moral sensibilities; he bolstered the conclusion by reference to the “Wise Men” (*hakhamim*) of old.

Remarkably, a judge, aptly named “Wiseman,” sitting in the Middle District of Florida, instantiated that same moral sentiment in a 2007 opinion. That decision opens a window to the observation that R. Sofer’s sentiment is perennial to copyright jurisprudence. At issue before Judge Wiseman was a claim that the defendant infringed the plaintiff’s architectural plans by building a tract of entry-level starter homes, for which the plaintiff sought \$92 million in damages. After trial, the court concluded that the defendant “intentionally copied” the plaintiff’s copy-

righted designs, resulting in “remarkably similar” architectural plans.¹⁴³ But given the finite ways of juxtaposing three bedrooms, two baths, a kitchen, living room, and garage, the court ultimately concluded that the modest differences between the two works mandated a ruling in favor of the defendant. That conclusion accords exactly with precedent. It is therefore noteworthy that Judge Wiseman stated that he was “constrained to conclude, *reluctantly*,” that no infringement exists.¹⁴⁴ Whence that reluctance? It arises out of an inchoate sense that “copying is bad” and that judges should stamp it out. Judge Wiseman felt constrained in a precedential system to stifle his own sense of morality, just as R. Banet was initially constrained by the civil authorities to allow copying. But no such external constraint governed R. Sofer, who was able to give legal realization to his ethical sensibilities.

Other cases are in accord. Manifesting the same reluctance as Judge Wiseman, an appellate case denied attorney’s fees to a prevailing defendant by noting that “the district court found that Corel’s use of Berkla’s nozzles to model its own Photo Paint images, while not *technically* violating the virtual identity standard of copyright infringement, nevertheless constituted a *highly questionable business practice*.”¹⁴⁵ In a judicial system in which judges are sworn to uphold the laws passed by Congress, what basis is there to denigrate the conduct of a party acting within the scope of those laws as “technical” and to label them “a highly questionable business practice”? Those considerations, it seems, arise not of legal compulsion, but instead out of the judges’ extra-legal sensibilities that something beyond “technical” adherence to law is morally demanded.

Even more striking is a case in which Joanne Pollara, an artist who “has often been asked to create banners and other installations for bar mitzvahs,” complained about the destruction of a mural that she created to protest funding cuts in legal aid.¹⁴⁶ After business hours, she installed that huge protest mural (measuring 10 feet by 30 feet) on a state plaza, without having procured the requisite permits (evidently under the misapprehension that someone else had gone through the necessary paperwork). When state officials, under the direction of Thomas Casey, discovered the unauthorized installation, they promptly removed it, irretrievably damaging it in the process. Under the portion of the Copyright Act known as the Visual Artists Rights Act (VARA), the court found Pollara’s claim fatally deficient. Precedent here, as in the preceding case, required a finding in favor of the defendant, which the court duly entered. In a system founded entirely upon law, the matter would have ended there. Yet Judge Hurd proceeded to note:

Although it is found that plaintiff has failed to state a cause of action under VARA, it is not intended to approve or condone the conduct of Casey's employees in this case. The carelessness of the employees in destroying Pollara's work was utterly deplorable and constituted a clear deviation from the type of conduct which should be expected of government employees. The defendant and his employees should be ashamed of their disregard for the obvious skill, effort and care which Pollara put into her mural.¹⁴⁷

"Deplorable," "clear deviation," "ashamed"? Those labels emerge from a domain far removed from law; the judge has turned from jurist into prophet, railing against immorality.¹⁴⁸ There is thus an uncanny resemblance between the decisions of the Article III judges in modern America and the Av Beit Din of Pressburg two centuries ago.

Yet the roots of this "Hurd mentality" must be examined. In tort law, it may be true at times that there is a line beyond which activity is culpable, but that even the legal should be morally discouraged. An assault is unconsented touching that rises to being offensive. A punch or a shove qualifies, while a brush or a light poke might be legally non-actionable. Nonetheless, there is a societal interest against even those lawful activities, and the most moral agent (a *zaddik*) would refrain from all unconsented touching. The question arises whether copyright occupies the same niche.

According to the United States Supreme Court, the answer is negative. The pertinent line in copyright law is called "substantial similarity." Copying of protected expression that goes beyond that line constitutes infringement; short of that line, it is non-actionable.¹⁴⁹ In *Feist Publications, Inc. v. Rural Telephone Service Co.*, the plaintiff put together a compilation (one of the subject matters to which copyright protection extends) consisting of the white pages of a telephone book. The defendant copied the entirety of those listings, including fictitious traps inserted precisely for the purpose of detecting copying.¹⁵⁰ Yet the Supreme Court ruled unanimously in favor of the defendant, concluding that, in terms of protected expression, the defendant had not crossed over the line. Justice O'Connor's opinion directly grappled with the inchoate moral sensibility addressed above:

It may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation. As Justice Brennan has correctly observed, however, this is not "some unforeseen byproduct of a statutory scheme." It is, rather, "the essence of copyright," and a constitutional requirement. The primary objective of copyright is not to reward the labor of authors, but "to promote the Progress of Science and useful Arts." To

this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. . . . This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.¹⁵¹

In assault cases, there may be a moral imperative against touching, even though it falls short of the magic line creating legal liability. By contrast, in the copyright domain, there is no moral imperative for author B to keep her hands off author A's handiwork. To the contrary, it is pro-social to encourage copying that falls short of the line of substantial similarity.¹⁵² Viewed in this light, that which Judge Wiseman et. al. condemned as highly questionable business practices that the law reluctantly permits because of a technicality are, in fact, nothing of the sort. As taught by the nine justices of the high court, the exoneration of those defendants is actually "neither unfair nor unfortunate." Instead, it is "the means by which copyright advances the progress of science and art," the very constitutional purpose for which copyright protection is instituted. The public benefits from a proliferation of non-infringing works to purchase.¹⁵³

Where do these considerations lead us? Wonderfully, they return us directly to R. Banet. Responsum number 8 refuses to rule in favor of the first one to print against newcomers by asking rhetorically, "for aren't the publishers that come afterwards equally doers of *mizvot* by producing books could be purchased at low cost?"¹⁵⁴ In other words, in the abstract, there is no reason to favor Maharam of Padua or Wolf Heidenheim; one could, with equal justification, applaud Giustiniani or Schmid, who, by their copying, bring the *Mishneh Torah* and the Roedelheim *maḥzor* to a wider audience. The resolution in each case must depend on extrinsic considerations, not on an appeal to the immorality of copying *per se*.¹⁵⁵ Under United States copyright doctrine, that question is resolved as a determination whether "substantial similarity" is present. Under the halakhic framework, the question is which view of The Case of the Open Alleyway should be deemed controlling.¹⁵⁶ In other words, a "doer of *mizvot*" may be just as likely to copy as to refrain from copying. Indeed, the mark of a *zaddik* could be copying the works of a predecessor in order to benefit the public at large.¹⁵⁷

R. Banet's sentiment admirably anticipates Justice O'Connor by 164 years. It could serve as a useful watchword for U.S. judges today, tempted to draw moralistic distinctions against prevailing defendants.

D. Approbations as a Barrier to "Sifrei Hameiras"

In responsum 41, R. Sofer commented that, once the practice of providing approbations fell into disuse, two negative consequences ensued: (1)

The Jewish people became inundated with *Sifrei Hameiras*,¹⁵⁸ which we will translate here as “heretical texts;” and (2) authors of new works began to publish them under the names of earlier, better known rabbis.

The first thing to note about this comment is that it leaves the time-frame unspecified during which approbations had been decreasing in prevalence. But from responsum 79, one can gather that R. Sofer was referring to the preceding decades. That aspect of his historical account rests on solid ground. The practice of writing approbations began in the sixteenth century and picked up steam in the seventeenth and eighteenth.¹⁵⁹ Writing in the first half of the nineteenth century, R. Sofer accurately characterized this aspect of Hebrew publishing history.

Focusing on “heretical texts,” the intervening centuries have only vindicated R. Sofer’s fears many times over—one need only browse any local newsstand to be inundated with the worthless to the pornographic. Going beyond beyond the theological plane, it is worth recalling that Rama railed against corrupted texts as far back as 1550 (albeit not under the specific rubric of *Sifrei Hameiras*).¹⁶⁰ Indeed, there is substance to a historical claim that printing has given rise to mistakes that are difficult to extirpate, albeit the locus of that phenomenon does not lie in the waning popularity of approbations.¹⁶¹

R. Sofer’s other claim is more difficult to evaluate. He posits that authors of new works published them pseudepigraphically under the names of famous rabbis.¹⁶² Although there may be truth to that claim,¹⁶³ it is difficult to agree with R. Sofer that its source stems from a diminution in approbations.¹⁶⁴ Right from the start, historians have realized, the information contained in approbations can be inexact and deceptive, sometimes willfully so—as when the place and date of first publication were intentionally altered.¹⁶⁵

R. Sofer took refuge in the piety of readers who would not delve into books absent the approbation of a respected rabbi. But even that device failed to serve its purpose, as authors not infrequently forged an approbation to their work “in order to deceive the pious reader.” It even developed that the rabbi giving an approbation would forthrightly admit of his desire to benefit the author financially. Other abuses also crept in, such as granting an approbation based on the author’s reputation without actually reading the volume in question.¹⁶⁶

In sum, as with every human institution, approbations can do good and yet also be abused, exert unintended side effects, and even at times fail in their basic purpose. The halcyon past in which the Jewish people was inoculated against *Sifrei Hameiras* thanks to the powerful medicine

furnished by judicious approbations, in sum, seems to be one more myth that must be dispelled.

IV. Concluding Reflections

R. Sofer's admirers claim that, for all his tremendous output, he "almost never had to rewrite anything."¹⁶⁷ The view imputed to him is that "in every generation God has His Jew to adjudicate all His queries and in this generation I am that Jew."¹⁶⁸ Purportedly, when his son asked how he could write his responsa so quickly, even about serious issues, he added, "As a result, I do not suspect God of causing me to fail. I am assured that He will agree to my decisions. . . . At times, it may even be that my proof is questionable. Nonetheless, my final decision is true."¹⁶⁹ This sentiment is in accord with what has been called the mystical belief within Orthodoxy that the words of the "pious *posek*" may supplant even the sources. In fact, it was R. Sofer himself whose works first inspired that re-appraisal.¹⁷⁰ In one measure, his task became more policymaker than *posek*.¹⁷¹

These reflections open our eyes to a perspective that *teshuvot* embody more than sterile legal analysis. Historically the Jewish community itself issued edicts (*takkanot*),¹⁷² which consist of "auxiliary legislation filling in lacunae in the law created due to changing circumstances."¹⁷³ An alternative name for those local ordinances passed by Jewish communities was *haskamot*, the very term that specifies book approbations.¹⁷⁴ Jacob Katz maintains that these local edicts, which "lay the very foundations on which the body-politic of the community rests," cannot be defended on halakhic grounds, and that their source must "be located in the concepts prevailing in the surrounding society, the economic and social conditions of which are shared by the Jewish community as well." But he further posits that "neither was it contested by the halakhic authorities; it was accepted as a part of the community's right to regulate its life according to its own understanding." He therefore concludes that the rulings in question went beyond Halakhah.¹⁷⁵

The Katzian viewpoint is thus that R. Sofer went beyond the Halakhah. Jacob Katz notes that R. Sofer wrote, "even if this was not the opinion of Rambam, if my words are true we need to reach the decision because of the reasons that I have cited, though it is our custom in this generation to be dependent on the great authorities."¹⁷⁶ One commentator, noting the irony if it is concluded that R. Sofer battled Reform by relying on the same rationale, that the times required a change in the

interpretation of the Torah, offers this tincture: He may have meant that “his rulings were designed to reach goals that he thought desirable in each particular case. Accordingly, the soundness of the legal proofs that he had cited to support his rulings did not affect the correctness of his decisions.”¹⁷⁷

Nonetheless, the viewpoint that R. Sofer went beyond the Halakhah depends on a narrow construction of Halakhah itself. Correlatively, it collapses to the extent that one takes a broader view of the framework embraced by Halakhah. Instead of resorting to a mystical belief in the pious *posek*, this viewpoint embraces an encompassing viewpoint of the Halakhah itself, in which the system as originally formulated envisioned that the sages of each generation would bring down the holy word—indeed, that heaven itself would support them in that task. As the Psalmist proclaims, “God stands in the congregation of the mighty (*el*); he judges (*yishpot*) among the judges (*elohim*)” (Ps. 82:1). A Ḥasidic contemporary of R. Sofer is no less indicative: On the verse, “They [the judges] judge the people at all times” (Ex. 18:26), R. Jacob Isaac, the Seer of Lublin (1745-1815), commented that judges must “evaluate the law according to the time and the period.”¹⁷⁸ That viewpoint roots in biblical writ the inherent need for flexibility in halakhic determinations.¹⁷⁹

The difference hinges on perspective. Given a narrow view of Halakhah, R. Sofer is viewed as transcending its boundaries (ironically casting him in the role of innovator, thus further discrediting him as the singular voice of “*ḥadash asur min ha-Torah*”). But given a broad view of Halakhah, R. Sofer emerges as its supreme expositor, even when he adverts to matters of public policy such as the need to deploy the law of *hassagut gevul* to control the dissemination of heretical texts.¹⁸⁰

Those same sensibilities surface in both legal systems. We have previously noted that American judges in copyright cases trotted out such labels as “deplorable” and “ashamed” to describe defendants’ actions when nominally doing nothing other than applying the statute. A deeper calling underlay their judicial opinions, which moved them to invoke moral categories to express their conclusions. They marched to a drummer similar to the one animating the rabbis of the Mishnah, who in the case of the Poor Man Who Shakes An Olive Tree, concluded that Torah law did not proscribe the subject conduct as theft, but that they would take it upon themselves to outlaw it by defining it as “theft because of the ways of peace.”¹⁸¹

All this brings to mind the amazing talmudic pronouncement that the Second Temple was destroyed because law courts at the time punc-

tiliously rendered judgment, *she-he'emidu dineihem al din Torah* (Bava Mezi'a 30b). One would have expected the opposite—that the *failure* to observe the law punctiliously should have occasioned that destruction. Instead, the Talmud condemns strict observance of the law out of a sense that true justice requires going beyond the letter of the law (*ve-lo avedu lifnim mi-shurat ha-din*).

R. Sofer took cognizance of all the attendant circumstances, to reach his copyright rulings, as did R. Banet to reach his contrary ruling. Both giants remained true to Halakhah in crafting their decisions. Although they were contemporaries who lived not far from each other, each was enmeshed in his own unique historical circumstances. It is fascinating to contemplate how those divergent experiences affected each in his role as *posek*.

Notes

1. See Neil Weinstock Netanel, "Maharam of Padua v. Giustiniani: The Sixteenth-Century Origins of the Jewish Law of Copyright," *Houston Law Review* 44 (2007): 821-70.
2. See Neil Netanel and David Nimmer, *From Maimonides to Microsoft* (Oxford Univ. Press, forthcoming).
3. Modern-day visitors to Roedelheim see almost no vestige of its Jewish past, apart from a Holocaust memorial and marker where the synagogue once stood. But everyone who commutes to downtown Frankfurt am Main catches the train at Baruch Baschwitz Platz, which bears a biographical sign commemorating his partnership with Heidenheim, the Orientalische und Occidentalische Buchdruckerei. Not far from there is a street named Wolf Heidenheim Strasse.
4. Heidenheim's was far from the first vernacular translation. As early as the sixteenth century, the Church limited *maḥzorim* to those printed in Hebrew, forbidding their translation into modern languages; see Fausto Parente, "The Index, the Holy Office, the Condemnation of the Talmud and Publication of Clement VIII's Index," in *Church, Censorship and Culture in Early Modern Italy*, ed. Gigliola Fragnito, trans. Adrian Belton (Cambridge, 2001), 163-93, 191.
5. Solomon Feffer, "The Literary Contributions of Wolf Heidenheim (1757-1832)," in *Jewish Book Annual* 14, ed. Solomon Grayzel (New York, 1956-1957), 73. In fact, Heidenheim wrote a dozen treatises on the subject, of which half were published. In addition, he composed "an edition of the Pentateuch [that] contained material important to the Masoretic text and commentaries." See Gertrude Hirschler, *Ashkenaz: The German Jewish Heritage* (New York, 1988), 98.

6. As in the fictive caption of *Maharam of Padua v. Giustiniani*, the heading here is anachronous. See Netanel, "Maharam of Padua." There was no formal litigation, but instead an appeal to a famous rabbi to issue a responsum. Nonetheless, for modern readers, the captions represent a convenient method of encapsulating the various disputes as they unfolded.
7. This summary derives from my prior article, which covers the terrain from the perspective of R. Banet. See David Nimmer, "Rabbi Banet's Charming Snake," *Hakirah* 6 (2009): 69-108 (hereafter, "Charming Snake"). The protagonist of the current article, in contrast, is R. Sofer.
8. Although sharply in disagreement regarding this particular subject, general relations between R. Banet and R. Sofer evidently did not suffer. Indeed, a recent article reports the depth of their ties: R. Sofer gave a *hetter* (permissive ruling) allowing the re-interment of R. Banet's bones after the deceased rabbi appeared to Hatam Sofer in a dream and instructed that the *hetter* be given for his bones to be moved. See Maoz Kahana, "Ha-Hatam Sofer: Ha-Posek Be-Einei Azmo," *Tarbiz* 76 (2007): 532.
9. A further word is required about The Case of the Poor Man Who Shakes An Olive Tree (*ani ha-menakkef be-rosh ha-zayit*), insasmuch as the considerations below return specifically to it. See text accompanying note 181 below. That case involves a poor man who climbs to the top of an ownerless tree to knock some olives to the ground so that he may collect them after he comes down. When the olives land on the ground, a second person appears on the scene to take the olives before the first man can climb down to gather them. According to the rabbis, the conduct of the second person, albeit not outright theft, is treated as such in an adjacent category, "theft because of the ways of peace." The rabbis reach that determination so as to avoid arguments, fighting, and hatred between people. See *Gittin* 5:8.
10. See Nimmer, "Charming Snake," 79-82.
11. See *ibid.*, 96-100.
12. In the previous generation, Kaiser Joseph II had constrained R. Ezekiel Landau (1713-1793), the famous *Noda Bi-Yehudah*, to bless the first Jewish conscripts—an obligation he discharged "with tears streaming down his face." See Jacob Katz, *A House Divided*, trans. Ziporah Brody (Hanover, NH, 1998), 71. (An anonymous reader of this piece for *The Torah u-Madda Journal*, however, takes the view that R. Landau wanted to do this on his own, as the city's spiritual leader, adding "That's what the rabbis always did.")
13. In the next generation, R. Sofer's son Samuel, known as Ketav Sofer, similarly acceded to governmental authorities in the matter of adding secular studies to the yeshiva curriculum (*ibid.*).
14. See "Charming Snake," *passim*.
15. Jacob Katz, *Divine Law in Human Hands* (Jerusalem, 1998), 196-97.
16. Yaakov Dovid Shulman, *The Chasam Sofer* (New York, NY, 1992); Zelig Schachnowitz, *The Light from the West* (Jerusalem, 1958, rev. 2007).
17. Katz, *Divine Law*, 404. Note that one of the works cited in the previous note (Shulman, *The Chasam Sofer*) proclaims itself on its flyleaf to be an English-language "dramatization of the events of his life" based on *Hut ha-Meshulash*.
18. See Moshe Samet, "The Beginnings of Orthodoxy," *Modern Judaism* 8 (1988): 249-69, 256. Tales of Hatam Sofer's intellectual prowess even outside the domain of Torah abound, from genius in the ways of statecraft to solving

- in minutes a complex mathematical problem that had stumped the experts. See Aaron M. Schreiber, "The Ḥatam Sofer's Nuanced Attitude Towards Secular Learning, Maskilim, and Reformers," *Torah u-Madda Journal* 11 (2003): 125.
19. Shulman, *The Chasam Sofer*, 141-43; Schachnowitz, *The Light from the West*, 188-89.
 20. See Dean Phillip Bell, *Jews in the Early Modern World* (Lanham, MD, 2008), 208.
 21. Michael Brenner, Stefi Jersch-Wenzel, and Michael A. Meyer, "Emancipation and Acculturation 1780-1871," in *German-Jewish History in Modern Times* 2, ed. Michael A. Meyer (New York, NY, 1997), 100. Jacob Katz cites the use of "all the usual means of coercion short of capital punishment: fines, imprisonment, pillory, and different grades of religiously sanctioned bans"; see Jacob Katz, *Out of the Ghetto* (Syracuse, NY, 1973), 21.
 22. Gil Graff, *Separation of Church and State: Dina De-Malkhuta Dina in Jewish Law 1750-1848* (Tuscaloosa, AL, 1985), 39. The *Toleranzpatent* in some measures favored Jews and in other respects limited them. An example of the latter is its provision, on two years' notice, that "all documents written after that period in the Hebrew language or in Hebrew or Jewish script shall be null and void." See Wilma Abeles Iggers, *The Jews of Bohemia and Moravia* (Detroit, MI, 1992), 51-53. The reason for this edict was that the civil authorities wished to audit the Jews' ledgers on legal and financial matters; see Katz, *Out of the Ghetto*, 32. Given the conflicting values that went into the *Toleranzpatent*, it ended up embodying ambiguous goals; see *ibid.*, 163-64.
 23. *Ibid.*, 11. These letters were issued in derogation of the Edict of Expulsion, which was still in force in France. The National Assembly in France granted citizenship to the Jews in 1791. That later act, together with Joseph II's Edict of Tolerance, are the two most notable signposts on the way to Emancipation; see *ibid.*, 30.
 24. *Ibid.*, 164-65. ("... in accordance with the accepted principles of Tolerance so that legislation may finally altogether abolish the difference... between Jewish and Christian subjects").
 25. As a term, "Emancipation" actually reflects a linguistic anachronism, as it was not until the "Catholic Emancipation" of the Irish in 1828 that the terminology actually arose. See *ibid.*, 190, 195.
 26. Graff, *Separation*, 4. Periodicization of history is notoriously difficult, as contemporaries are not considerate enough to signal a radical change from existing practices.
 27. Full religious freedom in Austria-Hungary was delayed until the revolution of 1848-49. See Graff, *Separation*, 5; Katz, *Out of the Ghetto*, 198 and *A House Divided*, 31. The process of modernization reached Hungary one or two generations later. Jacob Katz, "The Uniqueness of Hungarian Jewry," *Forum* 27, 2 (1977): 48, writes:

The abhorrence of contact with modern culture was based in part on the experience of Germany and France, where the entry into civic society was accompanied by the decline of traditional Jewish behavior, even among the observant. The Hungarian ultra-orthodox sought to preserve all the distinctive characteristics of small town Jewish life—dress, Yiddish, education in heder and yeshiva, and the like. This could only be accomplished by a self-withdrawal, which included organizational

- autonomy and independence from the general organizational structures of Hungarian Jewry.
28. See Graff, *Separation*, 79 and Simon Schwarzfuchs, *Napoleon, the Jews and the Sanhedrin* (London and Boston, MA, 1979), 22. As Harold Bloom remarks, "You don't have to be Jewish to be a compulsive interpreter, but, of course, it helps." See Yosef Hayim Yerushalmi, *Zakhor* (Seattle, WA, 1982, 1996), introduction, xxiii.
 29. Graff, *Separation*, 72. The emperor barred papal bulls from entering the country without governmental approval; see *ibid.*, p. 73.
 30. "Jews had to be 'emancipated,' that is, formally transformed from strangers into citizens"; see Jacob Katz, "Roots of Anti-Semitism," *Commentary* 46 (Oct. 1968): 94, 95.
 31. Graff, *Separation*, 78. This was question 8 from Napoleon to the rabbinical synod. Background instructions from the Emperor demonstrate what was truly on his mind: "When they are submitted to civil laws, they will, as Jews only, uphold dogmas and they will have left that condition where religion is the only civil law, as prevails among the Moslems, and as the case has always been during the infancy of nations." See Schwarzfuchs, *Napoleon*, 100.
 32. In that way, they reiterated the position that Moses Mendelssohn had articulated in 1783; see Jacob Katz, *Tradition and Crisis* (New York, NY, 1961, 1974), 262-63.
 33. Graff, *Separation*, 87-89, 107-08, quoting Jacob Sapir (ellipses omitted).
 34. See Schwarzfuchs, *Napoleon*, 168. Note the synchronicity with the copyright responsa at issue in our case. The first German state granted Jews citizenship in 1828; see Katz, *A House Divided*, 12. As of 1832, R. Sofer sought permission for rabbis to enlist the help of local officials to enforce Jewish law; see *ibid.*, 283 n.3.
 35. For similar reasons, another opponent of the bargain afforded by the Emancipation was R. Shneur Zalman of Liadi (1745-1812), the first Chabad Rebbe. He predicted that the victory of Bonaparte would increase the wealth of the Jews, but preferred them to remain in poverty with their eyes "fastened and tied to their Father in Heaven"; see Schwarzfuchs, *Napoleon*, 176. Other Eastern European Hasidic circles took an even more dramatic view of the Napoleonic conflicts, viewing them as the war of Gog and Magog; see Yerushalmi, *Zakhor*, 37.
 36. Graff, *Separation*, 52, 68, 110. See Ben Zion Dinur, "Emancipation," in *Encyclopedia Judaica* 6 (Jerusalem, 1972), 696, 708.
 37. R. Sofer did so in a particularly intense way, bringing his considerable charisma to bear in a single-minded devotion to the law. See Katz, *Out of the Ghetto*, 159.
 38. Graff, *Separation*, 6.
 39. Part of the difference between them may be attributed to a matter of geography. In Moravia, R. Banet was called before the civil authorities, who initially ordered him to take the stance in favor of Schmid. By contrast, R. Sofer was located farther on the outskirts, and thus was able to put up more resistance. See Katz, *Out of the Ghetto*, 158.
 40. Mordechai Breuer and Michael Graetz, "Tradition and Enlightenment 1600-1780," in *German-Jewish History in Modern Times* 1, ed. Michael A. Meyer (New York, NY, 1996), 183. For a collection of rabbinic inveighing against Jews resorting to Gentile courts, see *ibid.*, 189 n. 101. The "Revised General

- Privilege and Regulation for the Jewry of Prussia,” which Frederick II promulgated in 1750, provided for rabbinic jurisdiction—but added that litigants who remained unsatisfied with the judgment “always have the privilege of referring their case back to the ordinary judges” in the civil court. See Graff, *Separation*, 33.
41. “The resort of ‘an unruly person’ to a non-Jewish court was one of the aberrations that occurred at times even in traditional society, and the religious authorities were unable to prevent it” (Katz, *Divine Law*, 301). In a notorious incident noted earlier, R. Jonathan Alexandersohn brought his own congregation to judgment before R. Sofer; dissatisfied with the latter’s ruling, the litigant then brought the matter to the civil authorities, who disqualified the rabbinic judgment and reinstated him with his congregation; see *ibid.*, 468. There was even an aspect of this affair that threatened to put R. Sofer on the wrong side of the civil authorities; see *ibid.*, 473.
 42. Breuer and Graetz, “Tradition,” 254. See *ibid.*, pp. 378–79.
 43. Jacob Katz, *Exclusiveness and Tolerance* (London, 1961), 51–52, writes: “One of the main features of Jewish autonomy in this age was that the Jews were allowed to adhere to their own jurisdiction, which was based on talmudic law.” Given the premise that Jewish law was divine in origin, in contrast to the human construct of Gentile law, resort to secular courts challenged the most basic theological premise on which society was based. See *ibid.*, 59. See also Robert Bonfil, *Jewish Life in Renaissance Italy*, trans. Anthony Oldcorn (Berkeley, CA, Los Angeles, CA, and London, 1994), 141.
 44. Note in this regard the “ordinances designed to compel Jews to present themselves before Jewish community tribunals and accept the verdicts they handed down”; see Bonfil, *Jewish Life*, 205. As part of the general recognition of arbitration rather than magistracy when disputes arose among members of the same family, the Italian cities explicitly recognized as valid rabbinic decisions affecting Jews; see *ibid.*, 205–206.
 45. Two Jews complained to the Duke of Ferrara that his allowance of rabbinic jurisdiction entailed surrender of his own “sovereignty over a portion of his subjects, who in their turn were being deprived of a part of their freedom”; see Bonfil, *Jewish Life*, 208. In addition, “the publication of excommunications required preliminary authorization ad hoc from the Christian secular magistrates, who claimed the right to control Jewish community institutions down to the smallest detail” (*ibid.*, 204). Still, at the end of the day, Jews’ recourse in that era to Christian justice was relatively low; *Ibid.*, 209.
 46. Katz, *Tradition and Crisis*, 36. During this period, the *kehillah* itself might resort to non-Jewish courts to keep a rebellious Jew in line (*ibid.*, 97, 120).
 47. Brenner, Jersch-Wenzel, and Meyer, “Emancipation,” 101.
 48. Breuer and Graetz, “Tradition,” 203.
 49. *Ibid.*, 255.
 50. One metric defines the early modern period as ending in 1806, under the impact of the Napoleonic incursions. See Bell, *Jews in the Early Modern World*, 6.
 51. Katz, *Out of the Ghetto*, 168.
 52. Steven M. Lowenstein, “The Beginning of Integration, 1780–1870,” in *Jewish Daily Life in Germany*, ed. Marion A. Kaplan (London, 2005), 145.
 53. The upheaval was not limited to the printing ban. In seventeenth century Moravia, the *herem ha-yishuv* would prove to be a powerful force, barring

- non-residents from moving into a given locale; Katz, *Exclusiveness and Tolerance*, 161. The same forces that operated against the printing ban struck down Jewish enforcement of that settlement ban as well; see Katz, *Out of the Ghetto*, 178 (citing example of Strassbourg).
54. When the sixteenth-century Inquisition looked into the case of a peasant heretic (adjudged a heresiarch) in Friuli, "Venetian regulations require[ed] the presence of a secular official along with ecclesiastical judges in all Holy Office cases. The conflict between the two jurisdictions was of long standing." Carlo Ginzburg, *The Cheese and the Worms*, trans. John and Anne Tedeschi (Baltimore, MD, 1980), 8. The defendant in that case was a miller, leading Ginzburg to trace the sociology of mills as meeting points in preindustrial society (*ibid.*, 119-20), thus shedding further light on the talmudic case of the Mill in an Open Alleyway—the case from *Bava Batra* 21b with which R. Banet's responsum 7 begins.
 55. "Instead of being faced, as before, with Christianity as such, Judaism was now confronted with the secular State, which had absorbed Christianity into its framework as a complementary factor and was similarly prepared to absorb Judaism, provided it adapted its teachings and precepts to the interests of the State" (Katz, *Exclusiveness and Tolerance*, 187).
 56. Breuer and Graetz, "Tradition," 255. See David Ellenson, "Jacob Katz on the Origins and Dimensions of Jewish Modernity: The Centrality of the German Experience," in *The Pride of Jacob*, ed. Jay M. Harris (Cambridge, MA and London, 2002), 99, 104, 109.
 57. "The judicial authority of the rabbinate had disappeared with its recognition of the validity of national laws. This implied full recognition of French courts: no Jew could be compelled any more to be judged by the Jewish court. The religious sanction of the *herem*, the ban of excommunication, had also disappeared." See Schwarzfuchs, *Napoleon*, 187.
 58. Bell, *Jews in the Early Modern World*, 107, writes that, "for a variety of reasons, Jews believed that they would receive a fairer trial in a non-Jewish setting." A parallel situation arose in the Ottoman Empire, with Jews bringing their disputes to Moslem courts; see *ibid.*, 108, 211.
 59. Haim Hermann Cohen, "Herem," in *Encyclopedia Judaica* 8 (Jerusalem, 1972), 353.
 60. A famous memoirist of the seventeenth century refers to intra-Jewish litigation, with its threat of spilling into secular courts. See *The Memoirs of Glückel of Hameln*, trans. Marvin Lowenthal (New York, NY, 1977), 78. One case never got that far; another seems to have started in civil courts, but ended up resolved by the rabbis—the very opposite of the nineteenth century phenomena treated above. See *ibid.*, 30: "The rabbis and authorities came, they pondered the case at due length, but they accomplished nothing—except to depart with fat fees."
 61. "In most places, non-Jewish courts were also available to Jews, either in the first or second instance, and Jews sometimes availed themselves of this. Appeal to non-Jewish courts, however, was regarded by the proponents of Jewish tradition as a deviation from the prescribed religious obligation and at most suffered as a compromise under the pressure of circumstances" (Katz, *Out of the Ghetto*, 19). See M.J. Rosman, *The Lords' Jews* (Cambridge 1990), 61.
 62. "As the idea of the centralized state progressed and its instrument, the all-pervasive bureaucracy developed, the state began to intervene in the inner

- life of Jewish communities.” See Katz, *Out of the Ghetto*, 31 and *Tradition and Crisis*, 249. To traditionalists, these events “must have appeared as some kind of metaphysical debacle” (Katz, *Out of the Ghetto*, 142). From a present-day perspective as well, “the history of the Jews and Judaism took a decisive turn in the period between 1780 and 1814, for during this time the old legal edifice on which Jewish status rested trembled in the balance as though waiting to be supplanted by the absolute equality envisioned by the enlightened” (ibid., 175).
63. See generally Elizabeth L. Eisenstein, *The Printing Press as an Agent of Change* (Cambridge, 1979).
 64. Harry Ransom, *The First Copyright Statute* (Austin, TX, 1956).
 65. Breuer and Graetz, “Tradition,” 4.
 66. Bonfil, *Jewish Life*, 94.
 67. Amnon Raz-Krakotzkin, *The Censor, the Editor, and the Text*, trans. Jackie Feldman (Philadelphia 2007), 55; Bell, *Jews in the Early Modern World*, 150-51. Of course, opposition to the *Shulḥan Arukh* was widespread at its inception, including opposition from such eminent figures as R. Judah Loew ben Bezalel, the Maharal of Prague (1525-1609).
 68. Bonfil, *Jewish Life*, 27. Print media also led to messianic fervor in the seventeenth century, ranging from newspaper reports about Shabbetai Zevi to reports of finding the ten lost tribes in America. See Nils Roemer, “Colliding Visions: Jewish Messianism and German Scholarship in the Eighteenth Century,” in *Hebraica Veritas?* ed. Allison P. Coudert and Jeffrey S. Shoulson (Philadelphia, PA, 2004), 268.
 69. The push towards censorship often resulted in pushback, as occurred in Gentile circles through opposition to the *Index of Prohibited Books*, phrased as an “appeal by the booksellers and printers who feared that they would be financially ruined by the prohibition of such a large number of literary texts.” See Parente, *The Index*, 743.
 70. Lyman Ray Patterson, *Copyright In Historical Perspective* (Nashville, TN, 1968), 78-113. See Thomas F. Cotter, “Gutenberg’s Legacy: Copyright, Censorship, and Religious Pluralism,” *California Law Review* 91 (2003): 323-92.
 71. Moshe Carmilly-Weinberger, “Haskamah,” in *Encyclopedia Judaica* 7 (Jerusalem, 1972), 1451. See Yosef Kaplan, *From Christianity to Judaism: The Story of Isaac Orobio de Castro*, trans. Raphael Loewe (Oxford and New York, NY, 1989), 210 n.5 (ban directed against those lacking faith in coming of Messiah).
 72. As a tragic sequel to the 1550 case of *Maharm of Padua v. Giustiniani*, the Talmud was burned in 1553. See Raz-Krakotzkin, *The Censor*, 32-33. In 1559, the Catholic Church added the Talmud to its *Index of Prohibited Books*. See Stephen G. Burnett, “German Jewish Printing in the Reformation Era (1550-1633),” in *Jews, Judaism, and the Reformation in Sixteenth-Century Germany*, ed. Dean Phillip Bell and Stephen G. Burnett (Leiden and Boston, MA, 2006), 508. A Jew from Basel, Ambrosius Froben, went to Rome in 1581 to secure permission to publish the Talmud and ended up converting to advance his own business interests; yet the Pope dashed his hopes. See ibid., p. 513.
 73. Katz, *Out of the Ghetto*, 148-49, upholds the significance of approbations, notwithstanding that the approbation itself may have been a mere formality aimed at securing copyright protection.
 74. Mendelssohn took the position that the ban imposed by Jewish courts

- derived from imitation of the Catholic Church, causing him to call for repudiation of the current state of affairs; see Katz, *Tradition and Crisis*, 262. His position is linked to our primary topic of discussion here, “the decision of the semi-secular state to prohibit the use of the ecclesiastical ban.” See Jacob Katz, “Ideological Differences Over the Status of the Kehilla: The Jewish Community in the Age of Emancipation,” in *Perspectives on Jewish Thought and Mysticism*, ed. Alfred L. Ivry et al. (Amsterdam, 1999), 457-69.
75. Katz, *Out of the Ghetto*, 149.
 76. Katz, *Exclusiveness and Tolerance*, 132-33. See Edward Fram, *Ideals Face Reality: Jewish Life in Poland 1550-1655* (Cincinnati, OH, 1997), 22-23; Elisheva Carlebach, “Early Modern Ashkenaz in the Writings of Jacob Katz,” in *The Pride of Jacob*, ed. Harris, 70.
 77. Katz, *Tradition and Crisis*, 270.
 78. Katz, *Out of the Ghetto*, 157-58..
 79. See Prov. 6:23 (“Torah or”); Midrash Rabbah, Deut. 7:3 (“Torah orah”).
 80. Amnon Raz-Krakotzkin, “Censorship, Editing, and the Reshaping of Jewish Identity,” in *Hebraica Veritas?*, ed. Allison P. Coudert and Jeffrey S. Shoulson (Philadelphia, PA, 2004), 125-55, 142-43.
 81. *Ibid.* 126.
 82. Burnett, “German Jewish Printing,” 508-09.
 83. *Ibid.*, 518: “Printing was a Christian Hebraist praxis intended to produce texts not only for Jews (who were, naturally, its wider audience) but also for Christians.” See Raz-Krakotzkin, “Censorship,” 136.
 84. One man’s censorship is another’s improvement—and the line here does not necessarily pit Christians against Jews. It is interesting that, in many instances, editions now considered superior are those in which the level of censorship was higher and that were censored under the supervision of Jewish scholars. In fact, the Hebrew word *zikuk* (literally, *distillation*) referred both to editing and expurgation. See Raz-Krakotzkin, “Censorship,” 141.
 85. Carmilly-Weinberger, “Haskamah,” 1451, 1454. Pushing the analogy to modern books further, a rabbinic approbation at that time served the same role as that of an introduction written by a well-known person today.
 86. Burnett, “German Jewish Printing,” 519. Jewish printers would sneak in last-minute changes whenever the censor’s back was turned; that cat-and-mouse game led to demands that each newly printed page also be vetted. See *ibid.*, 520, 525-26. See Raz-Krakotzkin, “Censorship,” 141: Although Christian authorities forced the Jews to nominate rabbis to expurgate Hebrew texts, they did not see their work “as being in contradiction to their beliefs or principles.” Even in the Christian world, it was recognized that every preamble, dedication, and other paratextual addition had to be scrutinized, as such materials could alter the text’s original intention—as occurred with *The Doctrine of the Sabbath* (1634). See Cyndia Susan Clegg, *Press Censorship in Caroline England* (Cambridge, 2008), 203.
 87. A fascinating arc appears. As an indirect consequence of Maharam of Padua’s copyright lawsuit, a papal bull resulted in the wide-scale burning of the Talmud. See note 72 above. To forestall recurrence of that disastrous episode, a process of self-censorship arose, whereby every published volume would require an approbation, accompanied by a ban against republication. But now an irony develops between the first copyright case recorded in the responsa literature, *Maharam of Padua v. Giustiniani*, to the second one,

- involving the Roedelheim *maḥzor*. The first led to the institution of bans as a part of the process of Hebrew book publication, and the second produced an equal and opposite reaction—R. Banet wished to invalidate the ban that was routinely printed at the beginning of Hebrew printed volumes. See Nimmer, “Charming Snake,” 90-92.
88. The key biblical text here is: “You shall not remove your neighbor’s landmarks” (Deut. 19:14). Its simple meaning refers to moving the marker between two adjacent fields, essentially as a way of “stealing” land. But inasmuch as theft is already prohibited as part of the Ten Commandments, this particular verse may be considered otiose. Rabbinic law therefore applied it generally to every attempt to encroach unfairly on a neighbor’s property, or even his means of earning a living.
 89. Menahem Elon, “Hassagat Gevul,” in *Encyclopaedia Judaica* 7 (Jerusalem, 1972), 1459, 1466.
 90. The problem was evidently widespread and long-standing. “The scarcity of fresh produce in Polish markets during the long winters made *ḥadash* . . . a precept that Polish Jews [of the seventeenth century] could not observe.” (Fram, *Ideals*, 36.) That author adduces this circumstance as one example of how Polish jurists were sensitive to the *realia* of their age (ibid, 37).
 91. See, for example: *Orat Hayyim* #28, #148, #181; *Yoreh De’ah* #19, #286; *Even ha-Ezer* I, #69, #130; *Even ha-Ezer* II, #29. See also *Kovez Teshuvot* #58.
 92. Lowenstein, “The Beginning,” 144.
 93. “Thus, when these worked-through Orthodox tried to replicate the ways of the past, they had to reinterpret and newly legitimate everything in terms of the present, in the framework of modern consciousness. The old had to make new sense and the new had to be comprehensible in traditional ways.” See Samuel C. Heilman, “The Many Faces of Orthodoxy, Part I,” in *Modern Judaism* 2 (1982), 25.
 94. Heilman, “The Many Faces,” 35.
 95. Brenner, Jersch-Wenzel, and Meyer, “Emancipation,” 126. See Samet, “The Beginnings of Orthodoxy,” 249, who defines Orthodoxy as “an historic innovation, more a mutation than a direct continuation of the traditional Judaism from which it emerged.”
 96. Katz, *Divine Law*, 106, citing *Sefer ha-Yashar*, 97.
 97. One commentator contends, “After all, it was Katz himself who always stressed the secondary role of the great luminaries of Jewish scholarship in the development of halakhah, in contrast to the decisive role of traditional Jewish society, which, guided by an inner religious sensitivity, carefully sifted out the permitted from the forbidden, discarding some practices and admitting others, thus itself derminining halakhic norms” (Israel Ta-Shma, “Jacob Katz on Halakhah and Kabbalah,” in *The Pride of Jacob*, ed. Harris, 35).

One can trace similar developments down through the ages. For instance, halfway between the time of Rabbeinu Tam and R. Sofer, the Maharik—Joseph ben Solomon Colon Trabotto, Italy’s foremost Talmudist in the late fifteenth century—ruled that, notwithstanding the halakhic requirement that a *kohen* be called for the first segment of reading from the Torah, a recalcitrant *kohen* in Renaissance Italy could be bodily removed by the secular authorities when he refused to follow the local custom of leaving the synagogue so that the honor could be auctioned off to a non-priest for *Shabbat Bereshit*. An adjacent synagogue, which did not share that particular custom,

invited the individual in question to pray there, and even offered him the first *aliyyah* for free, no strings attached. The *kohen* rejected the offer and insisted on staying at his own synagogue and receiving the first *aliyah*, without making any donation. The responsum ruled that the synagogue had acted in a legitimate manner and that the *kohen*—although a priest who deserves honor and respect—had no reason to complain. Maharik explained that the *kohen* was obligated to respect the local custom and should have simply gone to the other synagogue that offered him the *aliyah* and not have made a scene. The responsum noted the importance of upholding customs, even if they are merely local (as opposed to widespread) and are not based on any specific *mizvah*. Once again, actual custom trumped formal legal requirements. See *She'elot u-Teshuvot Ha-Maharik*, # 9.

98. See Haym Soloveitchik, "Rupture and Reconstruction: The Transformation of Contemporary Orthodoxy," *Tradition* 28 (1994), 64-130.
99. He authored on the order of 1,400 responsa. See Kahana, "*Ha-Ĥatam Sofer*," 519.
100. Katz, *Divine Law*, 380, citing *Orient*, October 29, 1846, No. 44, 345.
101. Katz, *Divine Law*, 361-80, citing letter by Ĥatam Sofer dated January 27, 1837. See *ibid.*, p. 264: R. Sofer's responsum addressing the second day of the Shavuot festival advanced "a claim that has no precedent in earlier rabbinic rulings."
102. Katz, *Divine Law*, 176.
103. *Ibid.*
104. *Ibid.*, 190 (specifically with reference to R. Sofer).
105. In *Parashat Mordekhai*, responsum 8, ([Sziget, 1889], p. 126a) R. Banet commented, "Behold, in most of the earlier books that were published a hundred years before our time, there is no reference to a ban, and these bans [that do exist in old books] are recent, [placed] by those who 'use the Torah as a spade' [*Avot* 4:7]." That condemnation is harsh, inasmuch as Torah occupies its own supernal realm, meaning it is highly inappropriate to use it "as a spade," a mere instrument to obtain the sublunary benefit of earning a livelihood.
106. See David Nimmer, *Copyright: Sacred Text, Technology, and the DMCA* (The Hague, 2003), 21741, noting that early Jews preferred scrolls, whereas early Christians were more favorably disposed towards the codex book.
107. Katz, *Divine Law*, 340. As Katz elaborates, decisors reach halakhic rulings based on talmudic categories, not through citation to biblical verses. Of course, the Talmud itself frequently roots its conclusion in biblical verses; but its citations frequently seem to be more in the nature of finding a convenient peg on which to hang a conclusion, rather than an effort to exegetically derive the precise meaning of the text.
108. *Ibid.*, 7. The same point is made in Samet, "The Beginnings of Orthodoxy," 250. That state of affairs underwrites the jibe of R. Menahem Mendel Morgensztern, the Kotzker Rebbe (1787-1859): "A *ḥasid* fears God and a *mitnagged* fears the *Shulḥan Arukh*." See Michael Rosen, *The Quest for Authenticity* (Jerusalem and New York, NY, 2008), 82.
109. Of course, he did not ignore those traditional legal texts, and he thoroughly ventilated the relevant talmudic categories in reaching his conclusion. The point is that those categories did not mandate his conclusion, which in turn caused him to reach further.
110. In responsum 79, R. Sofer cited an eleventh century book that he saw print-

- ed in 1602, containing an approbation and ban for ten years and signed by various luminaries.
111. It can be added that in responsum 41 (a) R. Sofer analyzed the publishing bans in the context of the rulings set forth in *Bava Batra* 21b; (b) he also analogized them to the familiar *herem ha-yishuv*; and (c) another commentator finds the roots for the *herem ha-yishuv* to have sprouted directly from the soil of *Bava Batra* 21b. See L. Rabinowitz, "The Talmudic Basis of the Herem Ha-Yishuv," *Jewish Quarterly Review* 28 (1938): 217-23, 217. Had R. Sofer been similarly minded, he could have advanced the same claim, thereby characterizing his copyright ruling as germinating directly from the soil of the Talmud. Instead of doing so, he was content to rely on the force of recent history as sufficient to validate his conclusions.
 112. Joshua Block, *Hebrew Printing and Bibliography* (New York, NY, 1976), 151; Avraham Yaakov Finkel, *The Responsa Anthology* (Northvale, NJ, 1990), 126.
 113. Note that *hiddush* is the noun form of the adjective *hadash*, the very trait that the Torah supposedly outlaws. Combining *Hiddushei Torat Moshe* with the dictum that *hadash assur min ha-Torah* produces the paradox that R. Moshe was doing to the Torah what the Torah explicitly forbids by his own lights. But that viewpoint simply reflects narrow-minded literalness, which is anything but the spirit that R. Sofer brought to his Torah insights.
 114. Indeed, talmudic commentators traditionally style their commentaries *Hiddushim* (Novellae), so the usage is anything but novel.
 115. Katz, *Divine Law*, 421 (emphasis added), quoting *Orah Hayyim* 197.
 116. He scrupulously separated his esoteric knowledge from his halakic pronouncements. Interesting for current purposes, the rare exception arose regarding R. Banet when R. Sofer gave a *hetter* for re-interment of the Moravian rabbi's bones. See note 8 above.
 117. Act of Oct. 13, 2008, Pub. L. 110-403, Sec. 1(a), 122 Stat. 4256. See 18 U.S.C. §2323 (2008). "In our unbridled zeal for IP enforcement and utter indifference to the rights of users and consumers, we are losing sight of the underlying principles of our copyright system"; see 154 Cong. Rec. H10237 (daily ed. Sept. 27, 2008), statement of Rep. Lofgren.
 118. Stephen G. Burnett, "Medieval Jewish Polemicists and their Christian Readers in the Reformation Era," in *Reuchlin und Seine Erben*, ed Peter Schaefer and I. Wandrey (Ostfildern, 2005), 44.
 119. We have already met Ambrosius Froben; see note 72 above. After the pope squelched his plans to distribute the Talmud in Italy, he entered into a contract for German distribution. But his assistants packed different tractates "helter skelter into barrels for shipment." Other problems of inaccuracy proliferated when Gentile type-setters (themselves illiterate in Hebrew) worked on Saturdays, the day that Jewish correctors refused to work. See Burnett, "German Jewish Printing," 513, 523:

[T]he results were so unsatisfactory that, on 21 October 1580, Simon Jud zum Gembs rescinded the contract and sued Froben for damages. The reasons cited were that Froben had not had the volumes bound; that numerous pages were printed so faintly that they were illegible; and that the text was riddled with typographical errors. The book would therefore have been impossible to sell, causing Gembs severe economic damage.

See also Parente, "The Index," 173.

120. Katz, *Exclusiveness and Tolerance*, 31.
121. Actually, its passage in February, 1710 renders the year of its enactment ambiguous, given that the legal year began in March until England switched from the Julian to the Gregorian calendar in 1752. See Leslie Kim Treiger-Bar-Am, "Kant on Copyright: Rights of Transformative Authorship," *Cardozo Law Review* 25: (2008), 1060 n.2.
122. "And were it not for him, the *piyyutim* would have already been absorbed [in the earth and forgotten] and, as is well understood, would not have been recited by these generations." *Sefer Hatam Sofer, Helek Hoshen Mishpat*, # 79 (New York, 1957), 35a. It should be added that eliminating *piyyutim* was a practice of the early Reformers that was vehemently opposed by traditionalists such as R. Sofer.
123. [1900] A.C. 539, 545.
124. R. Banet attacked R. Sofer's position that rabbis throughout the Diaspora believed that it was appropriate to ban unfair competition in order to protect those who engage in a *mizvah* from harm. That proposition is difficult to accept, he concluded, "for aren't the publishers that come afterwards equally engaging in a *mizvah* by producing books that can be purchased at low cost?" *Parshat Mordekhai, Hoshen Mishpat* # 8, 126a. Moreover, he argues, most printers do not intend at all to engage in a *mizvah*; they intend to make a profit. One who labors to produce something new might qualify as fulfilling a *mizvah*, but if the first publisher is merely printing an old book, he no more qualifies than the second publisher (*ibid.*).
125. C.A. 2790/93, 2811/93, 54(3) P.D. 817 (2000).
126. David Nimmer, "Copyright in the Dead Sea Scrolls," *Houston Law Review* 38 (2001): 1-217. I should add that I applied to the Supreme Court of Israel to file a brief *amicus curiae* there, an application that the Court ultimately denied.
127. See text accompanying note 9 above.
128. The Supreme Court of Israel recharacterized the case as one arising under Israeli, rather than U.S., copyright law. In that vein, it applied Israel's copyright statute, which itself was inherited from the British 1911 Act, which in turn traced its roots back to the 1709 Statute of Anne.
129. David Nimmer, *Copyright Illuminated: Refocusing the Diffuse U.S. Statute* (The Hague, 2008), 385 n.95.
130. *Dun & Bradstreet Ltd. v. Typesetting Facilities Ltd.* [1992] F.S.R. 320.
131. "Without a doubt, the 'sweat of the brow' doctrine flouted basic copyright principles. . . . [T]o accord copyright protection on this basis alone distorts basic copyright principles in that it creates a monopoly in public domain materials without the necessary justification of protecting and encouraging the creation of 'writings' by 'authors.'" See *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 354 (1991), citing Melville B. Nimmer and David Nimmer, *Nimmer on Copyright* 1 (New York, NY, 1978 & rev.), § 3.04.
132. Thomas Babington Macaulay, *Speeches: With His Minute on Indian Education*, ed. G.M. Young (New York, NY, 1979), 164.
133. This sentiment underlies Lawrence Lessig, "Melville B. Nimmer Memorial Lecture: Copyright's First Amendment," *UCLA Law Review* 48 (2001): 1057-73.
134. R. Banet's letter to R. Sofer (which appears at the start of R. Sofer's response *Hoshen Mishpat* #41) relies on similar logic: "We have never seen that the first person has a right in law to impede another who follows him, espe-

- cially when the subject matter is not new and is not a part of the first person's property, but merely reflects the sweat of his brow, from which he derives his reward from his acquaintance. And inasmuch as bans on reproduction are not recognized under law, no rabbi or teacher may issue a decree in his country to be applied in another country, as is written in the responsa of the Rivash" (p. 19b).
135. See Zeev Gries, *The Book in the Jewish World 1700-1900* (Oxford, Portland, OR, 2007), 22 (the word is spelled various ways; here it is *prenumeranten*). This device is listed by a contemporary as one of four that Jewish presses could use. See Burnett, "German Jewish Printing," 522.
 136. Katz, *Divine Law*, 194, 196, 444-503.
 137. U.S. Constitution, art 1, § 8, cl. 8.
 138. Michael D. Birnhack, "The Idea of Progress in Copyright Law," *Buffalo Intellectual Property Law Review* 1 (2001): 3-58.
 139. Jewish libraries were composed overwhelmingly of "sacred literature"; see Burnett, "German Jewish Printing," 521 (chart). The dearth of historical works in Jewish libraries during centuries past was particularly pronounced; see Yerushalmi, "*Zakhor*," 40.
 140. One can find copyright cases today arising about Jewish prayerbooks; see *Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94, 97 (2d Cir. 2002). But these represent a minuscule proportion of current jurisprudence.
 141. Although we tend to view that scourge as a product of modernity, it is interesting to note that, among the Jews of Renaissance Italy, "Texts that our modern point of view would classify as nothing less than pornographic are found side by side with others that we would classify as sacred." See Bonfil, *Jewish Life*, 169.
 142. For better or worse, United States copyright protection extends to the realm of obscenities if embodied in a book or film; see *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852 (5th Cir. 1979). One may therefore hope that, in the future, society will re-evaluate the vast subsidy that the federal government currently gives to pornographers by paying the salary of judges, court reporters, and others to entertain their frequent copyright cases. See Nimmer, *Copyright Illuminated*, 155-56.
 143. *Lifetime Homes, Inc. v. Walker Homes, Inc.*, 485 F. Supp. 2d 1314, 1320, 1323 (M.D. Fla. 2007). In a previous ruling denying summary judgment, the court stated that "the floor plans of the two designs are 'strikingly similar.'" See *Lifetime Homes, Inc. v. Residential Dev. Corp.*, 510 F. Supp. 2d 794, 805 (M.D. Fla. 2007).
 144. 485 F. Supp. 2d 1325 (emphases added).
 145. *Berkla v. Corel Corp.*, 302 F.3d 909, 923 (9th Cir. 2002) (emphases added). The three judges on the Ninth Circuit panel signed on to that portion of the opinion, which in turn affirmed the finding below. Thus, no fewer than four judges aligned themselves with these sentiments.
 146. *Pollara v. Seymour*, 206 F. Supp. 2d 333, 334 (N.D.N.Y. 2002), *aff'd*, 344 F.3d 265 (2d Cir. 2003).
 147. 206 F. Supp. 2d. at 335 n.4, construing 17 U.S.C. § 106A.
 148. The same antinomies are seen in *Walter v. Lane*, the case of the London *Times* noted above. The intermediate court ruled against copyright infringement, but in that context revealed its own biases: "Although we have no

sympathy with the defendant, we are quite unable to decide in favour of the plaintiffs" ([1899] 2 Ch. 749, 772). Yet, on appeal, Lord Robertson manifested no such solicitude. His dissent took the view that the case should be decided against plaintiff, no apology added.

149. See Melville B. Nimmer and David Nimmer, *Nimmer on Copyright* 3 (New York, NY, 1978), § 13.03.
150. 499 U.S. 340, 344 (1991), construing 17 U.S.C. § 103(a).
151. *Ibid.*, 349-50 (citations omitted).
152. Accordingly, a *zaddik* would not hesitate to enter that domain. Instructive here is the allegation that *Driving Miss Daisy* infringed the copyright in the plaintiff's play, *Horowitz and Mrs. Washington*. The evidence showed that the plaintiff's dialogue included the explanation that "a *tzaddik* is a scholar, a philosopher, with enormous love of all God's creatures, even the smallest." See *Denker v. Uhry*, 820 F. Supp. 722, 733 (S.D.N.Y. 1992), *aff'd mem.*, 996 F.2d 301 (2d Cir. 1993) (internal quotations omitted). The defendant's dialogue merely included a statement that, despite what people say, Jews are quite generous (*ibid.*). On this and other like bases, substantial similarity between the plaintiff's and the defendant's works was deemed lacking.
153. Let us imagine that D has put together a copyrightable work including vast research on the demography of Los Angeles (unprotected by law) together with D's analysis and conclusion about future trends (protected). Along comes E, wishing to draw on that work. The societal interest underlying copyright law prohibits E from producing a work substantially similar to D's protected expression. Under *Feist*, it is equally apparent that the societal interest encourages E to copy D's research, as otherwise E would be forced counterproductively to repeat the very same work that D had already performed. Society benefits more by allowing both D and E to benefit from that work. To the extent that E performs new research to debunk D, then F and G may copy those aspects from E, and the progress of science marches ever forward—precisely what copyright law is designed to foster.
154. See note 124 above. In this manner, R. Banet is concerned with the policies underlying copyright protection. Of course, R. Sofer is hardly insensitive to those same concerns; he just evaluates them differently. He favors legal protection in part to spur production of books, reasoning that a period of exclusivity is needed to provide adequate incentive for the making of such editions (as it may have been, under technological and market conditions at the time).
155. Several years after *Feist*, the Supreme Court embroidered on its sentiment in another unanimous opinion. Specifically, *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), rejected the notion that prevailing plaintiffs in copyright infringement lawsuits are morally superior to prevailing defendants. See *ibid.*, 526: "The policies served by the Copyright Act are more complex, more measured, than simply maximizing the number of meritorious suits for copyright infringement." It held that "defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement" (*ibid.*, 527).
156. R. Huna opposed free competition in *Bava Batra* 21b. His antagonist, R. Joshua, took the contrary viewpoint.
157. Judge Posner explicates the Supreme Court's *Fogerty* case (discussed in note 155 above) in precisely this manner—"a successful defense enlarges the pub-

- lic domain, an important resource for creators of expressive works." See *Gonzales v. Transfer Techs., Inc.*, 301 F.3d 608, 609 (7th Cir. 2002).
158. What are these "books of Hameiras"? The name may possibly reflect a lost author named "Meiras." But, more convincing is the contention that the sources from which that phrase derives (for example, *Hullin* 60b; *Yadayim* 4:6) intended to refer to the *Iliad* and the *Odyssey* (taking the reference as a misspelling for *Sifrei Homeirus*, the "Books of Homer"). A third possibility is that the *samekh* at the end is a misreading for a final *mem* (which looks very similar), and it should read *Sifrei Himron*, "books of love," a code word for secular literature. See Avraham Shapir, *Yahasam shel Hakhamim le-Safah u-le-Sifrut ha-Yevvanit bi-Tekufat ha-Tanna'im*, <http://www.daat.ac.il/daat/history/yahasam-2.htm> (accessed May 29, 2008).
 159. Carmilly-Weinberger, "Haskamah," 1452.
 160. See Netanel, "Maharam of Padua."
 161. See Gries, 4 ("error would be permanently fixed in the collective consciousness of the readership"). At the dawn of printing, correction of errors was difficult—the publication of Martin Waldseemüller's faulty map is directly responsible for this journal being published in the United States of "America" rather of "Columbia," notwithstanding that Amerigo Vespucci was wrongly credited on that map with the discovery of this continent. See Nimmer, *Sacred Text*, 194: "As of [1507], Waldseemüller had already distributed fully one thousand copies of his printed map. Their recall was no longer humanly possible."
 162. For more on the phenomenon of pseudepigraphy and its relation to copyright law, see Nimmer, *Copyright Illuminated*, 427-99.
 163. R. Banet himself issued a responsum condemning the notorious *Besamim Rosh* as a forgery; see Louis Jacobs, *Theology in the Responsa* (London and Boston, MA, 1975), 348. That infamous episode arose when Saul Berlin (1740-1794), a rabbi in Frankfurt an der Oder, pseudepigraphically attributed a work consisting of 392 responsa (the numerical value of *besamim*) to the Rosh, (R. Asher ben Jehiel), who lived 1259 – 1328 (*ibid.*, at 347).
 164. Obviously, the problem regarding *Besamim Rosh* (see the previous note) inheres not in the approbation, but in the forgery itself. See Katz, *Out of the Ghetto*, 137-38.
 165. Carmilly-Weinberger, "Haskamah," 1453. A noted historian cites examples of false geographic imprints in the Jewish context, dating back to 1566 through modern editions filled with gross errors; see Yerushalmi, "Zakhor," 132-33 notes 1-2. Similar examples may be adduced in the Christian context: "London booksellers imported Geneva Bibles printed in Amsterdam with title pages and formats that represented themselves as a 1599 edition from the King's Printing House, as well as copies of Old and New Testaments." See Clegg, *Press Censorship*, 191, 198.
 166. Carmilly-Weinberger, "Haskamah," 1453-54.
 167. Shulman, "The Chasam Sofer," 202-03.
 168. *Chasam Sofer: Derashot* (New York., 1961), Vol. 1, introduction, *Kiryat Soferim*; quoted by Nosson Dovid Rabinowich, "Setting the Record Straight: Was the Chasam Sofer Inconsistent?" *Hakirah* 4 (2007): 241.
 169. Shulman, "Chasam Sofer," 203.
 170. Samet, "The Beginnings of Orthodoxy," 250, 267 n.3.
 171. Katz, *Divine Law*, 229 ("not a halakhic argument but a case of 'religious poli-

cymaking,' weighing the advantages gained to the cause of religion by various alternative steps"). See Ellenson, "Jacob Katz," 112.

172. "Every *kehilla* of standing boasted its own register of by-laws (*takkanot*) governing all phases of communal life" (Katz, *Tradition and Crisis*, 80).

173. Katz, *Divine Law*, 179.

174. Bell, *Jews in the Early Modern World*, 52. A *haskamah* adopted in Amsterdam threatened *herem* for non-compliance; *ibid.*, 96.

175. Katz, *Divine Law*, 179-80. One of Katz's exegetes places the matter in context:

The medieval rabbis dealt largely with manifestly halakhic issues and supported their positions by adhering closely to halakhic categories. In contrast, the Orthodox concept of *da'at Torah* granted Orthodox halakhic authorities broad, ranging powers, without requiring that they be grounded within the familiar lines of Jewish law. Orthodoxy, like its rivals, is a non-traditional modern phenomenon. It is a product of the response of halakhic authorities to a crisis in which they lost the guaranteed allegiance of members of the community to the halakhah, as well as their means of coercing obedience.

See Moshe Halbertal, "Jacob Katz on Halakhah, Orthodoxy, and History," in *The Pride of Jacob*, ed. Harris, 168.

176. Katz, *Divine Law*, 414, citing Teshuvot, part 7, 21.

177. Schreiber, "Hatam Sofer," 170 n.136.

178. Rosen, "The Quest," 64, quoting *Or le-Shamayim*, Behukotai, 140.

179. One may recall here the jibe previously quoted from the Kotzker Rebbe. See note 108 above.

180. We have already canvassed R. Sofer's opposition to *Sifrei Hameiras*, for example, as well as R. Banet's conclusion that a ruling in favor of the plaintiff would disadvantage Jewish printers while allowing Gentile printers free reign over the same subject matter.

181. See note 9 above.