

Lessons from Maharam Banet's Clash With the Hatam Sofer Over Copyright in the Roedelheim Mahzor

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

Copyright law looms large today as a subject of academic examination. Scholars in the law reviews published in the United States investigate it from every angle—economic,² cultural,³

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Note that quoted materials have been altered for the sake of consistency with the transliteration scheme followed in the balance of this article.

² See, e.g., Paul Heald, *Property Rights and the Efficient Exploitation of Copyrighted Fiction Bestsellers*, 92 Minn. L. Rev. 1031 (2008); Michael Abramowicz, *An Industrial Organization Approach To Copyright Law*, 46 WM. & MARY L. REV. 33 (2004); William Landes & Richard Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 325-27 (1989).

³ See, e.g., Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151 (2007); David Nimmer, *Back from the Future: A Proleptic Review of the DMCA*, 16 BERKELEY TECH. L.J. 855 (2001); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 288 (1996). An additional dimension here concerns the preservation of cultural assets. See Patty Gerstenblith, *From Bamiyan to Baghdad: Warfare and the*

historical,⁴ philosophical,⁵ feminist,⁶ religious.⁷ Within the latter domain, one can find Islamic⁸ and Christian⁹ ruminations, as well as Jewish reflections.¹⁰ But missing from that latter discourse has been an intensive excavation of the rich responsa literature that rabbis, starting in the sixteenth century and proceeding until today, have devoted to the subject of author's and printer's rights.

It is not hard to discern why the responsa have previously failed to attract interest among copyright scholars. Their historical circumstances can be opaque,¹¹ their language a daunting mixture of Hebrew and other Semitic tongues,¹² and the chains of logic therein intricate and

Preservation of Cultural Heritage at the Beginning of the 21st Century, 37 GEO. J. INT'L L. 245 (2006).

⁴ See, e.g., Lionel Bently, *Different Layers of Lawmaking: National, Regional, and International: Copyright, Translations, and Relations Between Britain and India in the Nineteenth and Early Twentieth Centuries*, 82 CHI.-KENT. L. REV. 1181 (2007); Mark Rose *Public Domain: Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain*, 66 LAW & CONTEMP. PROB. 75 (2003); Russ VerSteege, *The Roman Roots of Copyright*, 59 MD. L. REV. 522 (2000).

⁵ See, e.g., Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988); Kim Treiger-Bar-Am, *Kant on Copyright: Rights of Transformative Authorship*, 25 CARDOZO ARTS & ENT. L. J. 1059 (2008); Jean-Luc Piotraut, *An Author's Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared*, 24 CARDOZO ARTS & ENT. L. J. 549 (2006).

⁶ See, e.g., Dan L. Burk, *Copyright and Feminism in Digital Media*, 14 AM. U. J. GENDER SOC. POL'Y & L. 519, 521-22 (2006); Debora Halbert, *Feminist Interpretations of Intellectual Property*, 14 AM. U. J. GENDER SOC. POL'Y & L. 431, 433-34 (2006); Ann Bartow, *Women in the Web of Secondary Copyright Liability and Internet Filtering*, 32 N. KY. L. REV. 449, 449-50 (2005).

⁷ See, e.g., Thomas F. Cotter, *Gutenberg's Legacy: Copyright, Censorship, and Religious Pluralism*, 91 CAL. L. REV. 323 (2003); Walter A. Effross, *Owning Enlightenment: Proprietary Spirituality in the "New Age" Marketplace*, 51 BUFF. L. REV. 483 (2003).

⁸ See, e.g., Heba A. Raslan, *Shari'a and the Protection of Intellectual Property—The Example of Egypt*, 47 IDEA 497 (2007); Amir H. Houry, *Ancient and Islamic Sources of Intellectual Property Protection in the Middle East: A Focus on Trademarks*, 43 IDEA 151 (2003).

⁹ See, e.g., Roger Syn, *Copyright God: Enforcement of Copyright in the Bible and Religious Works*, 14 REGENT U.L. REV. 1 (2002).

¹⁰ See, e.g., Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945 (2006); David Nimmer, *Adams and Bits: Of Jewish Kings and Copyrights*, 71 S. CAL. L. REV. 219 (1998).

¹¹ See *infra* n.236.

¹² See text accompanying note 216.

drawn from a cloth vastly different from that sewn together in the usual copyright cases.¹³ Yet the reward is commensurate with the labor.¹⁴ Indeed, some remarkable parallels will be developed below, across legal cultures and across centuries.¹⁵

To introduce the domain matter briefly, *responsa* consist of “collections of questions on Jewish law asked by individuals or groups, and the responses given by rabbis”¹⁶ or, even more briefly, “written answers by particularly learned scholars to written questions regarding religious law.”¹⁷ Even those definitions may be too narrow, however, as some of the materials that follow evidence a *sua sponte* disquisition by the rabbi in question, rather than strictly an answer to a question.¹⁸ But the Hebrew name for a responsum, *tshuva*, at root connotes an “answer” (offered in “return” to an inquiry), so it serves for current purposes. The subject matter of *tshuvot* can be as broad as human experience itself.¹⁹ A 2008 book, subtitled “*Responsa on Sephardic Life in the Early Modern Era*,” ranges from the obligation to care for the poor in the lazaretto that the Venetian Republic maintained across the Adriatic Sea to the interest charged by those raising civet cats in Egypt to myriad questions regarding marital and family status, wherever Spanish Jews had been dispersed.²⁰

The deficit in the copyright scholarly literature about rabbinic *responsa* addressing author’s rights is exactly what this article aims to redress. Neil Netanel, my colleague on the UCLA School of Law faculty, and I have set out to systematically analyze the pertinent

¹³ See text accompanying note 237.

¹⁴ As one eminent historian comments,

These many thousands of rabbinical *responsa* do not strike modern scholars—disinclined as they are to venture into the thicket of technical disquisitions that were the bread and butter of the scholars of the fifteenth and sixteenth centuries, and which call for a technical training no longer easy to come by—as particularly inviting. And yet it is precisely these texts that give us an idea, not only of the kinds of problems that occupied the minds of the day, but also of their approach to the problems, their points of views, and the solutions they put forward.

ROBERT BONFIL, *JEWISH LIFE IN RENAISSANCE ITALY* 149 (Anthony Oldcorn trans., U.C. Press 1994).

¹⁵ See text accompanying note 587.

¹⁶ MATT GOLDISH, *JEWISH QUESTIONS* xi (Princeton Univ. Press 2008).

¹⁷ DEAN PHILLIP BELL, *JEWES IN THE EARLY MODERN WORLD* 151 (Rowen & Littlefield 2008).

¹⁸ See text accompanying note 333.

¹⁹ MATT GOLDISH, *supra* n.16, at xlix (“hygiene, diet, sexual relations, finances, religious activities . . . almost anything at all can be the subject of a question referred to a rabbi”).

²⁰ See generally MATT GOLDISH, *supra* n.16. The purpose of this work is historical, the author noting that *responsa* “contain a great deal of material for the historian.” *Id.* at xlix.

responsa, in a forthcoming book to be published by Oxford University Press.²¹ Professor Netanel has already produced the first installment, treating R' Moses Isserles' famous responsum regarding the permissibility, under Jewish law, of the Giustiniani house in Venice publishing an edition of the 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, the Maharam of Padua.²² The Rema in that seminal ruling upheld copyright protection.

This article analyzes the next salient episode of a publishing clash that gave rise to a tshuva—in this instance, multiple tshuvot. Arising out of publication of the Roedelheim maḥzor, the case of interest is *Heidenheim v. Schmid*. In this instance, the claimant published a holiday prayer book, which a Gentile rival later copied. In 1822, a responsum by R' Mordekhai Banet favored the defendant; but, six months later, the Ḥatam Sofer issued a contrary opinion. The matter continued to brew, and in 1827, R' Banet reaffirmed the bases for his earlier ruling. Yet the Ḥatam Sofer, in an undated ruling, went on at very great length to validate his own stance. Finally, R' Banet recanted—and in the process opened a window into the sequence of events that seemed to have initially forced his hand, making him issue an opinion against what he initially believed.

Before delving into the details, a timeline is invaluable:

1800-1802	Publication of Roedelheim maḥzor, subject to 25-year ban signed by R' Horowitz against republication
August 22, 1822	R' Banet, in tshuva 7, rules against copyright protection for the Roedelheim maḥzor.
March 7, 1823	R' Sofer, in tshuva 41, disagrees with R' Banet and upholds copyright protection for the work.
April 11, 1827	R' Banet, in tshuva 8, underlines his previous conclusions from tshuva 7.
Undated (but after April 1827)	R' Sofer, in tshuva 79, writes a lengthy disquisition about unfair competition, in which he again sides with Heidenheim.

This article unfolds in four parts. The first part details the historical circumstances and the various players in the copyright drama. It focuses on the four players whose interactions form the drama: Heidenheim, Schmid, R' Banet, and R' Sofer. The cross-currents between each were surprisingly substantial. From this rich history, many lessons will follow.

The second part investigates in detail the four responsa described above, two by R' Sofer and two by R' Banet. To set the stage, those rulings may be summarized as follows:

²¹ See NEIL NETANEL & DAVID NIMMER, FROM MAIMONIDES TO MICROSOFT (Oxford Univ. Press, forthcoming).

²² See Neil Weinstock Netanel, Maharam Of Padua v. Giustiniani: *The Sixteenth-Century Origins of the Jewish Law of Copyright*, 44 HOUS. L. REV. 821 (2007).

- In responsum 7, R' Banet covered many different terrains. After adducing the various aspects of Jewish law, as exemplified in the Talmud, that could cover the issue of copyright protection, R' Banet concluded that free competition should be the order of the day. In so ruling to the contrary of R' Isserles' famous responsum regarding the Maharam of Padua, R' Banet had to understand the logic of that previous case very narrowly. He cited various differences to that effect, ranging from predatory pricing to the evolution over time of governmental regulation. He further concluded that a printing ban should not be given effect as to the Roedelheim maḥzor, as such a ruling would only benefit Gentile publishers, to the prejudice of their Jewish competitors.
- In responsum 41, R' Sofer retorted that, from the beginning of the era of publishing, rabbis have held it appropriate to ban unfair competition in order to protect from harm those engaged in the meritorious act of book-publishing. Therefore, those bans—which have been included in every publication—should be upheld. He derived additional support for that view from the need for accurate attribution, which approbations and bans uphold, and from an ancient device called the *ḥerem 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 concluded that governmental control over publishing rights exerts no effect on the viability and effectiveness of rabbinic bans set forth in approbations.
- In responsum 8, R' Banet objected to the very notion of a ban on doing that which it is lawful to do—if printing a given book is not independently actionable, the rabbis cannot proscribe it through a binding ban. He further enunciated the startling propositions that written bans cannot be legally binding, but instead gain force only if pronounced orally.
- In responsum 79, R' Sofer composed an entire treatise on the Jewish law governing unfair competition. In it, he drew together more Talmudic considerations, augmented by his own view on the policies underlying approbations. He also used the occasion to heap lavish praise on publishers in general, and on Wolf Heidenheim in particular.
- Lastly, the start of responsum 41 contains correspondence between R' Banet and R' Sofer. The brief letter set forth there sets up an unusual antinomy—between approbations, which rabbis habitually appended to books, and the bans contained therein, which bar newcomers from copying the work's content. R' Banet's words are enigmatic, but he seemed to subscribe only to the former policy of offering words of approval to the book's author and assurances to readers that the content is fit, not warnings to competing publishers that they must refrain from putting our rival versions of the same work.

The third part is a coda to part two, containing yet more writings of R' Banet, but outside the four corners of the four responsa just quoted. The historical investigation here centers on the approbations that R' Banet composed for other works. Their timing reveals that, early in his career, R' Banet personally subscribed to printing bans. Later, however, R' Banet radically

altered his practice. The turning point was his personal involvement with the secular judicial authorities, as a direct outgrowth of his initial copyright ruling against Schmid. From that time forward, he scrupulously refrained from issuing any more such bans. He still reviewed the works of others to offer his endorsement as to the value of its content, but declined in that context to add any imputation that others are banned from copying it.

Finally, part four derives the lessons for current copyright doctrine from that nineteenth century episode. It focuses on four areas. The first examines the Emancipation, and its effects upon Jewry. Surprisingly, the ban stands at the fulcrum of competition between Jewish and secular courts—the very space occupied by the contradictory rulings over the Roedelheim maḥzor. The second looks even deeper, at the changes instituted by the advent of the printing press, which gave rise both to the works in question and the institution of printing bans. This innovation allows a new prism into the jurisprudence of R' Sofer. The third categorizes R' Sofer's and R' Banet's divergent interpretations of copyright law into their nineteenth century analogs in common law copyright interpretation. The parallels produce surprising harmony. Last, the fourth reconciles R' Sofer with twentieth century American legal realism—the results here being even more striking.

THE STORY

I. The Litigants

A. Wolf Heidenheim and the Roedelheim Maḥzor

In 1270, three years before becoming Holy Roman Emperor, Rudolf II allowed six Jews to move to Roedelheim.²³ From that modest beginning, a community emerged on the outskirts of Frankfurt am Main.²⁴ By the early nineteenth century, about a third of Roedelheim's 1200 inhabitants were Jewish.²⁵ Among their number was Wolf Heidenheim (1757-1832), whose name reveals that he was born in Heidenheim, Germany. In his youth, he studied with R' Nathan Adler in Frankfurt am Main.²⁶ His portrait is pictured on the next page.

Heidenheim achieved fame as a Hebrew grammarian and commentator.²⁷ As a master of the tradition, Heidenheim was “the first to undertake a scientific investigation of the development of the points and accents” inserted into Hebrew grammar by the medievals known

²³ Editor, “Roedelheim,” 14 *Encyclopedia Judaica* 219 (1972). See Joseph Jacobs & Schulim Ochser, “Rödelheim,” 10 *The Jewish Encyclopedia* 439 (1905).

²⁴ Today, Roedelheim is located within the municipal limits of a greatly expanded Frankfurt. German Jewry started out very diffuse; on the outskirts of Frankfurt were 36 Jewish settlements. DEAN PHILLIP BELL, *supra* n.17, at 71.

²⁵ Editor, *supra* n.23, at 220. As of a century later, the town had a total population of 6,492, of whom 130 were Jewish. Joseph Jacobs & Schulim Ochser, *supra* n.23, at 439.

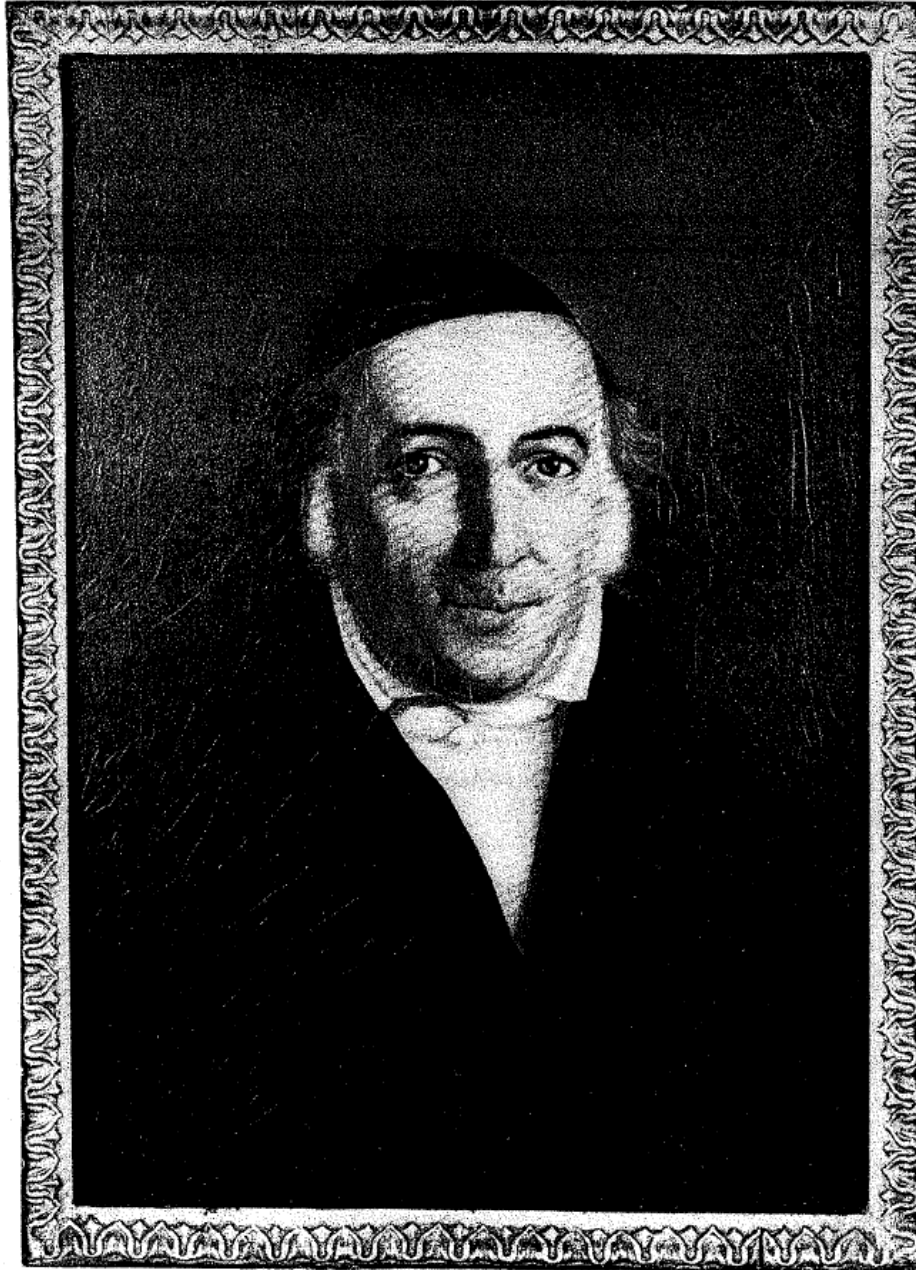
²⁶ Max Seligson, “Wolf Heidenheim,” 6 *The Jewish Encyclopedia* 319 (1904); Sefton D. Temkin, “Wolf Heidenheim,” 8 *Encyclopedia Judaica* 763 (2007).

²⁷ Sefton D. Temkin, *supra* n.26, at 763.

as the Masorettes.²⁸ His scholarly contributions continue to be cited to this day—a search of the CD-ROM containing responsa over the centuries reveals numerous hits for his name.²⁹

²⁸ Solomon Feffer, *The Literary Contributions of Wolf Heidenheim (1757-1832)*, in SOLOMON GRAYZEL, 14 JEWISH BOOK ANNUAL 73 (New York 1956-1957). In fact, Heidenheim wrote a dozen treatises on the subject, of which half were published. *Id.* In addition, he composed “an edition of the Pentateuch [that] contained material important to the Masoretic text and commentaries.” GERTRUDE HIRSCHLER, ASHKENAZ: THE GERMAN JEWISH HERITAGE, 98 (Yeshiva Univ. Museum 1988).

²⁹ To cite one example, the scholarly commentary for a fifteenth century authority’s reference to “all the sages of the land” inserts a twentieth century note, “see what R’ Wolf Heidenheim wrote in his introduction to *Kol Nidrey*.” BAR-ILAN UNIVERSITY GLOBAL JEWISH DATABASE (RESPONSA PROJECT), SHE’A LOT U-TSHUVOT HA-RIVASH, # 394, *d’h u-tshuvot resh-tav*.



PORTRAIT OF WOLF HEIDENHEIM (1757-1832). Oil on canvas. Artist: Moritz Oppenheim (1799-1882).
Courtesy of Ernest and Erica Michael.

In 1798, Heidenheim went into partnership with Baruch Baschwitz,³⁰ who has been characterized as “an energetic business man.”³¹ The pair received a license under advantageous

³⁰ There is an early encyclopedia entry for a printing family by the name of Baschwitz during this era, which hails from Frankfurt. But, interestingly, that family comes from Frankfurt an der Oder and does not include Baruch. See Richard Gottheil & A. Freimann, “Baschwitz,” 2

terms from the local count, Graf Vollrath of Solms-Roedelheim, to establish a Hebrew in his domain.³² By that time, Roedelheim was already an established center of Hebrew publishing.³³ Because the law of Frankfurt am Main then prohibited Jews from owning any printing house,³⁴ the needs of that free city for Jewish books were supplied by its “neighboring towns and villages, such as Hanau, Homburg, Offenbach, and Roedelheim, the last-named place being specially notable.”³⁵

Heidenheim and Baschwitz called their publishing house the Orientalische und Occidentalische Buchdruckerei.³⁶ They began publication in 1800 of their most famous work, *Sefer Ha-Qrovot*.³⁷ That work is a maḥzor (“cycle”), the prayer-book used for holiday worship over the annual cycle of the Jewish calendar. Inasmuch as there are numerous Jewish holidays, Heidenheim & Baschwitz embarked on the path of preparing numerous separate volumes.

To compile his maḥzor, chief editor Heidenheim did not simply rely on prior sources or on the custom of his community. Instead, he produced a critical edition by scouring previous volumes³⁸ and going back to the most ancient manuscripts he could locate, including one dating back to 1258.³⁹ Eventually, the project grew to nine volumes.⁴⁰ It expanded beyond Frankfurt to

The Jewish Encyclopedia 566-67 (1902). By the 2007 *Encyclopedia Judaica*, there is no entry at all.

³¹ Max Seligson, *supra* n.26, at 320.

³² Solomon Feffer, *supra* n.28, at 72; Max Seligson, *supra* n.26, at 320.

³³ ARON FREIMANN, A GAZETTEER OF HEBREW PRINTING 62 (1946).

³⁴ Much earlier, the first Hebrew book was printed in Frankfurt am Main in 1512. MOSHE ROSENFELD, HEBREW PRINTING FROM ITS BEGINNING UNTIL 1948 79 (self-published, Jerusalem 1992).

³⁵ Richard Gottheil et al., “Frankfort-on-the-Main,” 5 *The Jewish Encyclopedia* 484, 491 (1903). “In a measure the presses of the above four towns were really intended to supply the fair trade of Frankfort.” *Id.* at 491.

³⁶ Joseph Jacobs & Schulim Ochser, *supra* n.23, at 439. It should be noted that the house published on a variety of subjects; in 1807, for instance, it produced a collection of new poems by Shalom Cohen, teacher of the future composer Giacomo Meyerbeer. J.L. LANDAU, SHORT LECTURES ON MODERN HEBREW LITERATURE FROM M.H. LUZZATTO TO S.D. LUZZATTO, 115 (Longmans, Green & Co., Johannesburg 1923).

³⁷ Solomon Feffer, *supra* n.28, at 72; Joseph Jacobs & Schulim Ochser, *supra* n.23, at 439.

³⁸ Much can be learned by reviewing maḥzorim from years past, a practice that has an illustrious pedigree. See JACOB KATZ, DIVINE LAW IN HUMAN HANDS 15 (Hebrew Univ. Press 1998).

³⁹ Max Seligson, *supra* n.26, at 320.(recounting that Heidenheim also looked at “the earliest Italian and German editions”). As one source notes, “Heidenheim devoted great care to typographical setup as well as to the restoration of the correct text of the prayers. With this

include the traditions of Ashkenazic congregations throughout the world. “The prominent rabbis of his time approved of Heidenheim’s work and also contributed notes and comments to many piyyutim.”⁴¹

Even though the maḥzor represents Heidenheim’s crowning gift to history, it was not the most successful of his commercial endeavors. His prayer book for times other than holidays, the siddur *Sefat Emet*, went through more than 150 printings, and was long “distinguished for its correctness and typographical beauty.”⁴²

B. Anton Schmid, Christian Printer of Hebrew Books

Anton Schmid (1765-1855) was born in Zwettl, Austria. Put into a convent while a youth, Schmid (sometimes spelled “Schmidt”)⁴³ emerged at the age of 20 to serve as an apprentice⁴⁴ to the court printer, Joseph Edler von Kurzbeck.⁴⁵ From an early age, he “had a great predilection” for Hebrew typesetting.⁴⁶ Eventually, he bought von Kurzbeck’s Hebrew types to establish himself as a printer and publisher; but through the intrigues of the Vienna printers he was unable to obtain from the government the requisite permission to pursue that calling. Thereupon he presented a petition to Emperor Francis II, who granted him the privilege on the condition that he would present a copy of each book printed by him to the imperial library.

Schmid’s great success soon enabled him to buy Kurzbeck’s entire printing establishment.⁴⁷ Over time, he became a titan of Hebrew printing.⁴⁸ Reproduced below is the printer’s mark⁴⁹ that Schmid used.⁵⁰ It features an eagle above a monogram with his initials, A

objective, he drew on manuscripts and occasionally on old printed texts.” Sefton D. Temkin, *supra* n.26, at 763.

⁴⁰ Sefton D. Temkin, *supra* n.26, at 763.

⁴¹ Sefton D. Temkin, *supra* n.26, at 763..

⁴² Sefton D. Temkin, *supra* n.26, at 763.

⁴³ Michael Brenner, Stefi Jersch-Wenzel & Michael A. Meyer, *Emancipation and Acculturation 1780-1871*, in 2 GERMAN-JEWISH HISTORY IN MODERN TIMES 94 (Michael A. Meyer ed., Colum. Univ. Press 1997).

⁴⁴ S. Mannheimer, “Anton von Schmid,” 11 *The Jewish Encyclopedia* 105 (1905).

⁴⁵ Israel O. Lehman, “Vienna,” 16 *Encyclopedia Judaica* 122, 131 (1972). Kurzbeck employed the fonts of Joseph Proops from Amsterdam, who had gained fame for printing the first Hebrew sales catalog in 1730. Editor, “Proops,” 16 *Encyclopedia Judaica* 1554, 1555 (1972).

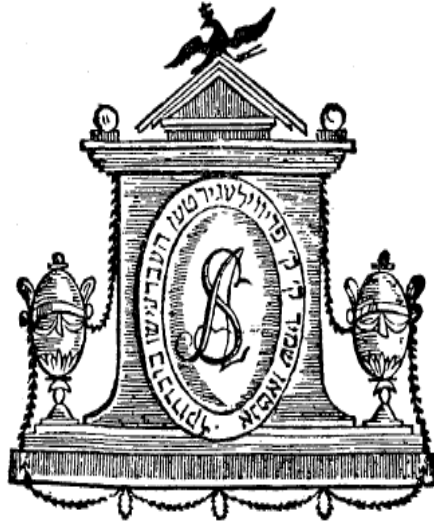
⁴⁶ S. Mannheimer, *supra* n.44, at 105.

⁴⁷ *Id.*

⁴⁸ Henry Wasserman, “Anton von Schmid,” 18 *Encyclopedia Judaica* 145, 145 (2007).

⁴⁹ Soon after the invention of printing, printer’s marks appeared, to indicate the owner’s distinctive press. They serve as the lineal forebears of trademarks. See AVRAHAM YA’ARI,

and S, intertwined. The text spells out German words with Hebrew characters, as follows: *Anton Schmid k.k. [= kaiserlich und königlich] privilegierten hebräischen buchdrucker*,⁵¹ meaning “Anton Schmid, imperially and royally licensed Hebrew book printer.”



Source: AVRAHAM YA'ARI, *DIGLEI HA-MADPISIM HA-IVRIYYIM* 97

Anton Schmid was a lifelong Christian. It bears mention that there is nothing anomalous about the juxtaposition of his religion with his vocation. Christian interest in Hebrew texts, sparked by humanists,⁵² dates back at least to the early sixteenth century.⁵³ It has already been noted that the free city of Frankfurt am Main barred Jews from owning printing houses.⁵⁴ Accordingly, from 1677 onwards, two Christian establishments had dominated the printing of

DIGLEI HA-MADPISIM HA-IVRIYYIM vii (Jerusalem 1944). The first printer's mark on a Hebrew book appeared in 1475. *Id.*

⁵⁰ *Id.* at 174. The particular mark reproduced above appeared in a Passover haggada printed around 1794. *Id.*

⁵¹ *Id.* at 174-75.

⁵² See GERTRUDE HIRSCHLER, *supra* n.28, at 79.

⁵³ Mordechai Breuer & Michael Graetz, *Tradition and Enlightenment 1600-1780*, in 1 *GERMAN-JEWISH HISTORY IN MODERN TIMES* 72 (Michael A. Meyer, ed., Colum. Univ. Press 1996). For a rundown on the scholarship of Christian Hebraism, see DEAN PHILLIP BELL, *supra* n.17, at 263-64. Note that “Hebrew printing found a ready market among Jews but also a growing market among Christian scholars interested in a wide range of Hebrew texts.” *Id.* at 150.

⁵⁴ Mordechai Breuer & Michael Graetz, *supra* n.53, at 222 (all Hebrew printing in Frankfurt am Main was undertaken by Christians, until emancipation of the Jews).

Jewish books in that town.⁵⁵ The motivations for such bans may have been various—from simple anti-Semitism to a desire to favor cronies with a lucrative monopoly to the theological sensibility that depriving Jews of their sacred volumes would inevitably lead them to lose their distinctive identity.⁵⁶ Of course, the motivations for allowing Jews to engage in printing could be equally varied, ranging from the desire to find an outlet for a ruler’s paper mill⁵⁷ to an interest in giving vent to his own mystical leanings⁵⁸ (and, in the case of Dyhernfurth, described below, to develop the town itself).

In 1800, another in a long series of ordinances went into effect, prohibiting the import of Hebrew books by Jews, who themselves were excluded from the publishing business.⁵⁹ That situation worked “to the great advantage of Schmid,” who thereby “became more and more prosperous.”⁶⁰

By the year 1816 he had presented to the imperial library eighty-six works comprising 200 volumes; and his great merit was acknowledged by a gold medal from the emperor. He then enlarged his establishment, printing Arabic, Persian, and Syriac books also, and upon the donation of 17 new Oriental works in 44 volumes to the court library he received a title of nobility.⁶¹ A few years later he made a third donation of 148 works in 347 volumes, presenting a similar gift to the Jewish religious school of Vienna.⁶²

The Jewish community was lavish in its praise of Schmid. A lengthy three-part *Selbstverlag der Historischen Kommission* (Self-Publication of the Historical Commission)

⁵⁵ Richard Gottheil, *et al.*, *supra* n.35, at 492 (“though the proprietors of the presses were Christians, the publishers were often Jews”).

⁵⁶ The apostate Johannes Pfefferkorn (1469-1522) assured his patrons that his former co-religionists would convert *en masse* once deprived of their sacred books. Mordechai Breuer & Michael Graetz, *supra* n.53, at 60. Interestingly, the opposition to Pfefferkorn came from a Christian Hebraist. DEAN PHILLIP BELL, *supra* n.17, at 228.

⁵⁷ The Count of Hohenlohe gave permission to a Jewish master printer to open up a press “since he needed a potential buyer for the output of the paper mills in the territory.” Mordechai Breuer & Michael Graetz, *supra* n.53, at 223.

⁵⁸ The Duke of Sulzbach encouraged production of the *Zohar* for that reason. Mordechai Breuer & Michael Graetz, *supra* n.53, at 223.

⁵⁹ Henry Wasserman, *supra* n.48.

⁶⁰ S. Mannheimer, *supra* n.44, at 105.

⁶¹ Schmid was ennobled in 1823 (becoming “von Schmid” at the age of 58). Henry Wasserman, “Anton von Schmid,” 14 *Encyclopedia Judaica* 978 (1972). According to one source, “the Austrian Emperor, in recognition of his great service to the Jewish community for decades, raised him to the nobility.” J.L. LANDAU, *supra* n.36, at 123.

⁶² S. Mannheimer, *supra* n.44, at 105.

setting forth the history of *Hebrew Journalism in Vienna* offers kind words about him.⁶³ Describing that “gracious patron of modern Jewish writers, Anton Schmid,”⁶⁴ it details that he had established himself as an entrepreneurial publisher in Vienna by 1819⁶⁵ and explains that the Schmid Press held a monopoly to supply all Hebrew publications for the whole Austrian empire.⁶⁶ The work chiefly recalls Schmid for his supervision of the annual publication in Vienna of *Bikurei ha-’Ittim* (First Fruits of the Times).⁶⁷ Included in early editions of that yearbook were such items as a family tree of the Austrian imperial royal family, an overview of the crowned heads of Europe, and tables of weights and measures.⁶⁸ Schmid proclaimed on the work’s title page that it consists of “a New Year’s present for refined Israelites.”⁶⁹ Such yearbooks were a staple of nineteenth century Jewry wherever German was spoken.⁷⁰

If the Jewish community’s own Historical Commission had kind words to say about Schmid, later accounts are more glowing still. Consider what the Chief Rabbi of South Africa had to say about him in 1923:

When our nation will once again be re-established in the land of its ancestors and monuments will there be erected to the memory of distinguished non-Jews deserving of the deep gratitude of our people, the name of Anton Edler von Schmid will deserve to be imprinted upon one of those marble blocks in lasting and blazing letters.⁷¹

⁶³ *Die Hebräische Publizistik in Wien—In Drei Teilen* (Adolf Holzhausens Nachfolger, Vienna 1930). All the comments about Schmid are found in the “Einleitung” (Introduction) to volume I, by Dr. Bernhard Wachstein.

⁶⁴ *Id.* at xxviii. History adds an irony: During the Holocaust, an Viennese Sergeant serving in the Wehrmacht named “Anton Schmid” distinguished himself by helping many Jews in Lithuania escape their fate, a moral act of defiance for which he paid with his life. See WALTER B. MAASS, *COUNTRY WITHOUT A NAME: AUSTRIA UNDER NAZI RULE, 1938-1945* (1979), at 49.

⁶⁵ Bernhard Wachstein, *supra* n.63, at xvi.

⁶⁶ *Id.* at xv.

⁶⁷ See also J.L. LANDAU, *supra* n.36, at 120; 3 MEYER WAXMAN, *A HISTORY OF JEWISH LITERATURE 158-60* (Thomas Yoseloff, New York, London, 1936, 1960) (calling this journal “the seminary in which the early writers, poets, and scholars . . . were nourished, trained, and prepared for their future activity”).

⁶⁸ Bernhard Wachstein, *supra* n.63, at xvi.

⁶⁹ *Id.* at xxi.

⁷⁰ Michael Brenner, *et al.*, *supra* n.43, at 335.

⁷¹ J.L. LANDAU, *supra* n.36, at 96. To this writer’s knowledge, no monument in Medinat Israel yet fulfills R’ Landau’s *diktat*.

Schmid continued the yearbook project for about a dozen years. Previously, he “had gained wealth from printing the Talmud and many editions of liturgical works.”⁷² But the enlightenment spirit of *Bikurei ha-’Ittim* proved a harder sell.⁷³ After the twelfth installment, it folded.⁷⁴ Nonetheless, during that interval he was able to obtain special residence permits in Vienna for “many luminaries of Haskalah literature.”⁷⁵

Some years later, in 1833, Schmid published a collection of essays under the title of *Kerem Hemed* (A Delightful Vineyard).⁷⁶ A second volume came out in 1836. That work has been called “the most important scholarly journal of the time.”⁷⁷

Relevant for copyright purposes is Schmid’s solicitation in the yearbook that he published for submissions to be made to future volumes: “When contributions are found suitable for acceptance, requests for payment will be honored.”⁷⁸ That statement portrays Schmid as respectful of the author’s due. Emblematic of a very different sensibility, however, is the characterization that Schmid “without hindrance reprinted the works issued by Wolf Heidenheim in Roedelheim.”⁷⁹ Thereby arises our copyright suit.

C. *Silesian Detour*

Thus far, we have confronted the presses in Roedelheim and Vienna.⁸⁰ One more place must be added to gazetteer: Dyhernfurth, located in Lower Silesia. In contrast to Roedelheim, where Hebrew printing began only in 1751,⁸¹ Dyhernfurth saw its first press in 1689⁸² when the local magnate allowed Shabbetai Bass to open a Hebrew printing house in order to develop that

⁷² *Id.* at xxxviii. Schmid’s publication of the Babylonian Talmud, *Shulhan Arukh*, and works of Jewish philosophy “gained a deservedly high reputation” and “were bought in the Jewish centers of Galicia and Hungary, as well as abroad.” Henry Wasserman, *supra* n.48.

⁷³ Bernhard Wachstein, *supra* n.63, at xxxviii.

⁷⁴ *Id.* at xxxviii-xxix.

⁷⁵ Henry Wasserman, *supra* n.48.

⁷⁶ Bernhard Wachstein, *supra* n.63, at xli.

⁷⁷ Henry Wasserman, *supra* n.48.

⁷⁸ Bernhard Wachstein, *supra* n.63, at xxii. True to his word, Schmid “encouraged Jewish scholars to write new books, or to revise and to annotate old works which had been out of print, for which he paid very generously.” J.L. LANDAU, *supra* n.36, at 97.

⁷⁹ S. Mannheimer, *supra* n.44, at 105.

⁸⁰ The earliest mention of metallic Hebrew types dates back to Avignon in 1444. See ADA YARDENI, *THE BOOK OF HEBREW SCRIPT: HISTORY, PALEOGRAPHY, SCRIPT STYLES, CALLIGRAPHY* 102 (British Library 1997).

⁸¹ ARON FREIMANN, *supra* n.33, at 62. The title page of Jacob Samosc’s 1751 publication in Roedelheim is reproduced in MOSHE ROSENFELD, *supra* n.34, at 441. See *id.* at 81

⁸² ARON FREIMANN, *supra* n.33, at 30. The title page is reproduced in MOSHE ROSENFELD, *supra* n.34, at 388. For a description, see *id.* at 70.

recently founded town.⁸³ Bass brought his family with him, along with Jewish journeyman printers.⁸⁴ Not only Bass, but a host of other Jewish presses centered in Dyhernfurth.⁸⁵ “The Dyhernfurth press published hundreds of Hebrew and Yiddish works of all kinds over the many years of its existence.”⁸⁶ As we shall see, copies of the Roedelheim maḥzor made their way to Dyhernfurth, whose rabbi then launched the inquiry that gave rise to the rival responsa considered below.⁸⁷

Located not far from Wroclaw (formerly Breslau), Dyhernfurth today is known as Brzeg Dolny in southwestern Poland. But in terms of linguistic orbits,⁸⁸ Dyhernfurth, at the time of our case, was located in the Germanic, rather than the Polish sphere.⁸⁹

II. The Works in Suit

A. *The Roedelheim Maḥzor*

Sefer Ha-Qrovot has been praised above for its liturgical value to contemporaries. In particular, Heidenheim’s maḥzor featured numerous innovations and other user-friendly features:

- the prayer liturgy type-set in very readable format;⁹⁰
- the first German translation⁹¹—written in Hebrew characters—to be published of the service;⁹²

⁸³ The printer’s mark used by Bass are reproduced in AVRAHAM YA’ARI, *supra* n.49, at 48, and are described at 151.

⁸⁴ Mordechai Breuer & Michael Graetz, *supra* n.53, at 223-25.

⁸⁵ For an enumeration, see Editor, “Dyhernfurth,” 6 *Encyclopedia Judaica* 330 (1972).

⁸⁶ Mordechai Breuer & Michael Graetz, *supra* n.53, at 225. It is to be added that the *Dyhernfurth Privelegierie Zeitung*, a German-language journal printed in Hebrew script, was published in 1771-1772. Baruch Yaron, “Press,” 13 *Encyclopedia Judaica* 1023, 1032 (1972).

⁸⁷ See text accompanying note.

⁸⁸ Until the advent of modern times, Ashkenazic Jewry could be treated as a unified whole. But, by the time the controversy over the Roedelheim maḥzor erupted, already a century had elapsed in which German Jews distinguished themselves increasingly from those of the east. MICHAEL A. MEYER, *JUDAISM WITHIN MODERNITY* 76 (Wayne State 2001).

⁸⁹ See AVRAHAM YA’ARI, *supra* n.49, at x.

⁹⁰ One source calls these nine volumes “a monumental landmark in literary scholarship and Hebrew typography.” Solomon Feffer, *supra* n.28, at 72. Another reproduces the typeface from the very readable Roedelheim maḥzor, and also praises the Heidenheim Torah, published in Roedelheim, as “the most accurate version of the Bible.” ADA YARDENI, *supra* n.80, at 117.

⁹¹ Over two centuries before Heidenheim, the need for vernacular translations of liturgical material was intense, owing to declining fluency in Hebrew. Mordechai Breuer & Michael Graetz, *supra* n.53, at 219.

- Heidenheim’s own commentary, extending both to substantive explanations and descriptions of textual variations that he had found;
- correcting the text itself, to conform to proper form, based on an historical investigations of old Italian and German editions;⁹³
- at the end of the volume devoted to Shmini Aẓeret appears a scholarly article composed by Heidenheim, entitled *Ha-piyyut ve ha-paytanim* (The Hymn and the Hymnists). Heidenheim there offers the reader valuable insights about the various poets whose works are collected in the traditional holiday liturgy.⁹⁴

B. Approbation and Ban

Of special note, in addition, is the approbation that accompanied the work’s publication. Set forth below is the exemplar that accompanied the Yom Kippur volume of the Roedelheim maḥzor. It is entitled *haskama* (approbation)⁹⁵ and *ḥerem* (ban).

Judaism provides multiple instantiations of a whole host of phenomena, and excommunication is among them. For current purposes, the focus is on the species called *ḥerem* (ban). But there are other species as well,⁹⁶ notably *shamta* (desolation, curse)⁹⁷ and *niddui* (ostracism). Later, all three forms will become pertinent to the discussion.⁹⁸

The root meaning of *ḥerem* is to keep something separate from common use.⁹⁹ It is therefore cognate with the Arabic *harem*, where women are kept segregated.¹⁰⁰ It refers to a rabbinic ordinance that excommunicated individuals be separated from the community—they had to live in confinement and not have social intercourse with members in good standing.¹⁰¹

⁹² Max Seligson, *supra* n.26, at 320.

⁹³ Solomon Feffer, *supra* n.28, at 72 (“truly a pioneering achievement”).

⁹⁴ Five years after Heidenheim’s death, this work was republished as a stand-alone volume. Solomon Feffer, *supra* n.28, at 73.

⁹⁵ It should be added that the same word is often used to refer to local ordinances passed by Jewish communities. DEAN PHILLIP BELL, *supra* n.17, at 52. In fact, a *haskama* adopted in Amsterdam in threatened *ḥerem* for non-compliance. *Id.* at 96.

⁹⁶ For a general discussion, see Haim Hermann Cohen, “Ḥerem,” 8 *Encyclopedia Judaica*, 344, 350-51 (1972).

⁹⁷ This form was later analogized to death, by the transformation *sham mitah*. *Id.* at 351.

⁹⁸ See text accompanying note 399.

⁹⁹ In earliest biblical usage, the ban referred to items totally devoted to the Deity or those to be utterly destroyed. Kaufmann Kohler, 2 *The Jewish Encyclopedia* 487 (1902). Already by late biblical times, its meaning had changed to “a means of ecclesiastical discipline to keep the community clear of undesirable, semi-heathenish elements” *Id.* at 489.

¹⁰⁰ Haim Hermann Cohen, *supra* n.96, at 344.

¹⁰¹ *Id.* at 13.

The ban is a hoary device, consisting of progressive stages of depriving the affected person of various ritual and religious requirements.¹⁰² “The final and ultimate punishment was the denial of a Jewish funeral to the recalcitrant and his family.”¹⁰³

But its efficacy was contingent on the banned individual’s dependence on receiving those requirements—which itself was in decline¹⁰⁴ by the early nineteenth century¹⁰⁵ (and has only sunk still lower in the intervening two hundred years).¹⁰⁶ Indeed, during this era, the secular government forbade the Jewish community from invoking the ban against individuals.¹⁰⁷ It survived, therefore, as a kind of generalized spiritual malediction, calling down the wrath of the Almighty on the class (as opposed to named malefactors) of those who would ignore its command.¹⁰⁸ That role seems to be precisely the one played by the ban printed here.

¹⁰² JACOB KATZ, *supra* n. 38, at 197.

¹⁰³ JACOB KATZ, *supra* n. 38, at 174.

¹⁰⁴ In earlier centuries, “Jewish society had no more effective means of coercion than excommunication.” ROBERT BONFIL, *supra* n.14, at 199. “Most [Jews] obeyed an excommunication decree, with its injunctions to have no social or business contact with those under the ban.” DEAN PHILLIP BELL, *supra* n.17, at 147 & 103.

¹⁰⁵ JACOB KATZ, *supra* n. 38, at 174, 202-07. Even back in 1790, one rabbi complained bitterly of the scoffers who now constituted a group, rather than isolated backsliders. *Id.* at 214. “The seventeenth century is the last in which the Rabbinic tradition with its biblical and Talmudic foundation uncontestedly prevailed in Jewish society.” *Id.* at 171.

¹⁰⁶ “*Herem* and *niddui* became so common in later centuries that they no longer made any impression and lost their force. They became the standard rabbinic reaction to all forms of deviation and non-conformity considered incompatible and dangerous to Orthodoxy.” Haim Hermann Cohen, *supra* n.96, at 355.

¹⁰⁷ JACOB KATZ, *supra* n. 38, at 223 (“a prohibition which the Hatam Sofer interpreted stringently”).

¹⁰⁸ JACOB KATZ, *supra* n. 38, at 183.

וזאת ההסכמה וההרם

להרב הגאון המפורסם אדונינו מורינו ורבינו, מופת דורנו וכלילה הפארתנו,

מוהר"ר פינחס הלוי איש הורוויץ נר"ו
אב"ד ור"מ דק"ק פ"פ דמייץ יע"א.

אף ידי תכון עם כבוד הרבנים הגאונים אשר כתנו עדיהם וילדקו
ויעלו בהסכמה על דפוס המחזורים של המדכיסי' המשותפי' ה"ה התורני
הרבני המדקדק הישיב הדק כהר"ר וואלף היידנהיים ומשותפו כהר"ר
ברוך בשוויץ, ומה נעים פרי הילולים, בתכלית יופי מכלולים, נמלאכת
שמים שאין בה דופי ותעלולים, נכן זרועי תאמן גזירת נח"ש שלא יסיג
שום אדם גבולס לדפוס או להדפיס המתזורים עם הביאור ופירוש אשכנזי
שיסד התורני כהר"ר וואלף הכ"ל, ואף לא הביאור לבד או הפירוש
אשכנזי לבד, לא כולו ולא מקצתו באופן ובמשך הזמן שקבעו הרבנים
הגאונים שקדמוכי בהסכמות שלהם, ולהשומעים יונעם.

היום יום ג' י"ב אלול תקס"ג לפ"ק • פ"פ דמייץ יע"א •

הק' פינחס הלוי איש הורוויץ •

The page is dated in Hebrew as Tuesday, 12 Elul 5563, corresponding to August 30, 1803.¹⁰⁹ The approbation extends to both Wolf Heidenheim—referred to as a “very punctilious rabbi”¹¹⁰—and his partner, Baruch Baschwitz. It forbids anyone from trespassing on their domain (*hassagat g’vul*)¹¹¹ by printing or causing to be printed their maḥzorim, with the

¹⁰⁹ This copy actually comes out of a facsimile edition printed by Feldheim Publishers in New York in 2005.

¹¹⁰ On the subject of Rabbi Heidenheim, it remains to note “the great esteem with which he is held by all Orthodox German Jews to this very day.” Nossan Dovid Rabinowich, *Setting the Record Straight: Was the Chasam Sofer Inconsistent?*, 4 HAKIRAH 239, 261 (2007).

¹¹¹ In more modern terms, *hassagat g’vul* could be translated as “unfair competition.” See text accompanying note 287.

commentaries and German translations, or even the commentaries by themselves or the German translations by themselves, whether in whole or in part. In terms of how long it lasts, the approbation simply recites that it is operative “in the same manner and for the length of time that the distinguished rabbis who preceded me set forth in their own approbations.”¹¹² (Although that term lasted ten years in the earliest proto-copyright notices¹¹³ and later fluctuated from three to fifteen years,¹¹⁴ we shall see that that term amounted to twenty-five years.¹¹⁵) The approbation and ban is set forth in the name of Pinḥas Horowitz (1730-1805), chief of the rabbinical court of Frankfurt am Main.

Rabbi Horowitz was best known as the author of *Sefer Hafla'ah*,¹¹⁶ novellae on the *Ketubot* tractate of the Babylonian Talmud.¹¹⁷ He served as chief rabbi in Frankfurt until his death.¹¹⁸ For about a year, he served as teacher to the young Moses Sofer, one of the rabbis later called upon to adjudicate our copyright dispute.¹¹⁹

Notwithstanding Rabbi Horowitz's ban forbidding reprinting of the Roedelheim maḥzor, pirate copies abounded in the nineteenth century.¹²⁰ The sources identify the miscreant in

¹¹² In an earlier century, approbations in Frankfurt lasted only ten years. An example comes from the pen of Yosef Shmuel, a rabbi transplanted to that city from Crakow:

The high costs of printing are well known, and the Rav—the author—has invested a great amount of effort. If by some small chance a man (whoever he be) who did not put in the effort would like to take his portion of it and print it himself, the Rav will incur a great loss. Is this the reward of his Torah? Therefore we decree, invoking the ban of excommunication for the transgressor, that no man should lift up his hands to reprint this book for a period of ten years after this printing. This applies whether the transgressor does it himself, through another, or through any other means. It will be pleasant for those who listen to our words. Writing for the honor of Torah and its students

<http://www.darchenoam.org/ethics/copyright/4mod.htm> (visited May 27, 2008).

¹¹³ Richard Gottheil, “Colophon,” 4 *The Jewish Encyclopedia* 171, 174 (1903) (citing work published in Venice in 1602).

¹¹⁴ Menaḥem Elon, “Hassagat Gevul,” 7 *Encyclopedia Judaica* 1459, 1464-65 (1972) (citing work published in 1518).

¹¹⁵ *Id.* at 1465. See text accompanying notes 228, 541.

¹¹⁶ Though not attested anywhere that I could find, it is apparent that the title of the work is an acronym of his name. See the final line of the approbation reproduced above (with the sole alteration that the pronoun drops out from the front of “ha-Levi.”

¹¹⁷ See GERTRUDE HIRSCHLER, *supra* n.28, at 66; Yehoshua Horowitz, “Phinehas (Pinhas) Ben Zevi Hirsch Ha-Levi,” 9 *Encyclopedia Judaica* 540, 540 (2007).

¹¹⁸ See http://en.wikipedia.org/wiki/Pinchas_Horowitz (visited May 6, 2008).

¹¹⁹ *Id.*

¹²⁰ Sefton D. Temkin, *supra* n.26, at 763.

question as Anton Schmid.¹²¹ We have already seen the characterization that Schmid “without hindrance reprinted the works issued by Wolf Heidenheim in Roedelheim.”¹²² The account of J. David Bleich, rabbi and professor at Cardozo Law School, is in accord.¹²³

The economic stakes were high. Prayer books of all types made up about half of the historic production of Hebrew presses in Germany.¹²⁴ The Roedelheim maḥzor went through numerous printings,¹²⁵ and its popularity has continued almost until the present day.¹²⁶ In terms of how many copies were made each time, it is difficult to say with any certainty, although the figure of thousands makes sense by analogy to earlier print runs.¹²⁷

C. *In Search of Schmid’s Maḥzor*

It therefore becomes a matter of considerable interest to locate the maḥzor printed by Schmid, in order to compare it to *Sefer Ha-Qrovot*. Although today one would not expect Christian printers to be deep into the maḥzor trade, investigation in this instance uncovers a very different story. In particular, Schmid’s publication of prayer books formed a significant part of his business; his editions of the maḥzor turn out to be varied and numerous.

Here is the title page from one such volume.

¹²¹ See, e.g., MOSHE CARMILLY-WEINBERGER, *CENSORSHIP AND FREEDOM OF EXPRESSION IN JEWISH HISTORY* 196 (Sepher-Hermon Press, Yeshiva Univ. 1977)

¹²² See text accompanying note 79.

¹²³ J. DAVID BLEICH, *2 CONTEMPORARY HALAKHIC PROBLEMS* 125 (Yeshiva Univ. 1983).

¹²⁴ Mordechai Breuer & Michael Graetz, *supra* n.53, at 226.

¹²⁵ Sefton D. Temkin, *supra* n.26, at 763.

¹²⁶ Colleagues in their 50s or 60s have informed me that they grew up using the Roedelheim maḥzor. See also Editor, “Roedelheim,” 17 *Encyclopedia Judaica* 366 (2007) (“The clear Roedelheim texts were still being reproduced more than a hundred years later.”).

¹²⁷ Presumably, a maḥzor was more popular than an edition of the Talmud. It is therefore worthwhile to note that “the first edition of the Talmud in Frankfurt an der Oder—some five thousand copies—was soon sold out and that the Talmud was reprinted ten times during the eighteenth century, each printing numbering several thousand copies.” Mordechai Breuer & Michael Graetz, *supra* n.53, at 226.



מחזור
חלק ראשון
 והוא חלק
ראש השנה

כטזנהג

פיהם פולין ומעחרן

באותיות נאות ויפות וזייר לכן ודיו שמור במכלית
 היופי, מתוקה ומסוקל ומתוקן מכל טעות ושגיאות
 ודופי, ע"י הכהם מדויקת היטב דק, לסקל
 המטייה ולחזק כל דק, דגשיים ורפויים, נחיים ונעים,
 בדעת טעמים, מתוקנים ונאים, און ומקד ומקן,
 שוקל וסופר ומונה, עד כי מערות נמקן, ומסרן
 נמנה, ויף צנלו על כל אשר הוה לפניו, בהגמור
 נמוקו ונציונו צהדרו וקלסמר פניו, ובכל עניניו:
רוספנו צו תפלות נאות מהאר"י ז"ל מספר
 שערי ציון להתפלל יום יום, והלכות משונה ועצודת
 יו"ה לכ להרמב"ם וספר מהלים אשר כל נדדי ומשניות
 מס' יומא וגם מנהגים כל"ה סק וצ"ל א' חלק
 סני' למשן דעת איש האמוני לעצוד
 מת צוראו יתעלה:



ויין

נעדרוקט בי"א אנטאן שמיד
 ק' פ' פריוויליגירטן העברעישן בוכדראקער

It will be immediately observed that that woodcut, featuring Moses and Aaron with insets of famous biblical scenes, bears little resemblance to Schmid's earlier printer's sign, reproduced above.¹²⁸ But, by itself the disparity is not surprising, given that Schmid used that first printer's mark at the outset of his career in 1793, and in later years (lasting until 1839) used a different mark.¹²⁹

In terms of date, it is uncertain when this particular volume was published.¹³⁰ But, in any event, its content of this volume is wholly distinct from the Roedelheim maḥzor. Moving onward, we encounter another Schmid maḥzor:

¹²⁸ See text accompanying note 51.

¹²⁹ AVRAHAM YA'ARI, *supra* n.49, at 174. Still, the textual description of the later printer's mark has nothing to do with what is pictured here; it was supposed to feature a double-headed Austrian eagle and books with a monogram of A E V S (for Anton Edler von Schmid). *Id.* at 175.

¹³⁰ Stamped on the cover of this volume is the Hebrew date tav-quf-nun-bet (5552), corresponding to 1791. But the volume in question is a reprint produced in 2000, rather than an original antique; accordingly, that stamp appears to emanate from either the new printing house or the library (Cornell University) in which this exemplar is housed, rather than having been affixed contemporaneous with the work's original publication.

Obviously, Schmid cannot have infringed on the Roedelheim maḥzor, first printed after 1800, by having printed a book nine years earlier. So the validity of that 1791 date is suspect. For, as of two years later, Schmid (then age 28) was still an apprentice to court printer von Kurzbeck, when they produced their first joint work, an edition of the Mishnah (1793). Israel O. Lehman, *supra* n.45, at 131. Also in 1793, Schmid, along with Samuel Romanelli, printed "*Alot ha-Minḥah* for Charlotte Arnstein's fashionable marriage." *Id.* It was only much later, from 1806 to 1811, that Schmid matured to producing volumes of the Talmud on his own. *Id.* The date of Schmid's production of a maḥzor is not listed.

It is therefore impossible to believe that, in 1791 at age 26, apprentice Schmid produced a maḥzor, the title page of which includes the grandiloquent woodcut reproduced above. In short, the date stamped upon republication of the work appears unreliable. Moral: Don't judge a book by its cover.

מחזור

Mahzor

כמנהג

פולין, רייסן, ליטא, פיהם, מעהרין ואונגרין

כולל תפלות

שלש רגלים

הוסדר

מחדש בסדר נאה ויפה

וכל עניני התפלות והמנהגים הנהוגים בימי מועדים האלה
כלם נקבצו וכאו הנה על מקומם הראוי להם מבלי קדימה ואיחור. למען ירוץ
הקורא בו ולא יתבלבל בתפלתו בחיפוש וחיבור הנה והנה.

ולתועלת המון עם והנשים הצגנו התרגום אשכנזי על כל התפלות והפיוטים, וגם הסימנים
והתיקונים בל"א, למען יבי את תפלתו ויוכל לכוון בכל לבו את הדברים אשר בפיו דבר.

חלק שני

MACHSOR Tom. II.

ווי"ען

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גשרוקט ב"א אנטאן ערלען פון שמיד, ק' ק' בוכדרוקער אונד בוכהענדלער.

WIEN, gedruckt bey ANTON Edlen von SCHMID, kaiserl. königl. privilegirten
Buchdrucker und Buchhändler 1835.

This work follows the rite of Poland, Belorussia, Lithuania, Bohemia, Moravia, and Hungary. It is printed in Vienna in 1835. But it does not reproduce the distinctive elements of the Roedelheim mahzor. Onward again:

~~Jews. Liturgy and ritual. Festival~~
~~prayer~~
Mahzor. Festival ספר Prayers Polish
(site). Judaea-German & Hebrew, 1840.
קרובות הוא מחזור

מדויק היטב

עם

ביאור ותרגום אשכנזי

מאת

החכם מו"ה וואלף היירענהיים ז"ל.

הוצאה החמישית

כרך שמיני

Mahzor Tom. VIII.

Wien, 1840.

Druck und Verlag des Franz Eden von Schmid
und J. J. Busch.

This mahzor corresponds, in rough measure, to the one in suit. It is entitled *Sefer Qrovot*, thus matching the moniker that Heidenheim gave to the Roedelheim mahzor. The next line confirms the presence of explanations and a German-language commentary. The line after that ascribes authorship to "Our teacher, the rabbi Wolf Heidenheim, may his memory be a blessing."

Of course, that final comment is the tip-off that this particular volume could not be the precise one that set off the controversy. For its reference to the "memory" of Heidenheim means it was produced after his death in 1832. Given that Heidenheim obviously filed suit based on a work published during his lifetime, this precise work cannot be the culprit. Sure enough, the

Latin letters below the line confirm that this particular book was published in Vienna in 1840, eight years after Heidenheim's demise.¹³¹

But what does that circumstance mean about the initial infringing publication? Besides reciting that this work constitutes the "eighth volume" (recall that the Roedelheim maḥzor was issued in nine volumes),¹³² the title page here reveals that this particular work represents the "fifth edition." It therefore represents a lineal descent—at a certain point after Heidenheim published his works but before the various rabbis were called to rule upon the case starting in 1822, Schmid produced the first edition that landed him in court. Over the years, he produced another four editions, leading to this fifth printing in 1840.

According to Prof. Rakover, the 1816 edition that Anton Schmid published in Vienna includes a personal letter by R' Benet to Schmid, memorializing the fact that Schmid had purchased the half-share in the Roedelheim maḥzor from Baruch Baschwitz, Heidenheim's erstwhile partner.¹³³ That recitation helps to fill in the chronology:

1800-1802	Publication of Roedelheim maḥzor, subject to 25-year ban signed by R' Horowitz against republication
<i>By 1816</i>	<i>Schmid brought out rival version of Roedelheim maḥzor, including letter from R' Banet.</i>
August 22, 1822	R' Banet, in tshuva 7, rules against copyright protection for the Roedelheim maḥzor.
March 7, 1823	R' Sofer, in tshuva 41, disagrees with R' Banet and upholds copyright protection for the work.
April 11, 1827	R' Banet, in tshuva 8, underlines his previous conclusions from tshuva 7.
Undated (but after April 1827)	R' Sofer, in tshuva 79, writes a lengthy disquisition about unfair competition, in which he again sides with Heidenheim.

Indeed, Baschwitz had withdrawn from the partnership in 1806.¹³⁴

¹³¹ In addition, it should be noted that the formula characteristic of Schmid's printing house—"Anton Schmid, imperially and royally licensed Hebrew book printer"—is missing here. Instead, the Latin letters below the line in this instance indicate "Published by Franz Edlen von Schmid." Franz, the son of Anton, continued his father's business. Henry Wasserman, *supra* n.48, at 145. The son evidently dispensed with his father's emblem in these later editions.

¹³² See text accompanying note 37.

¹³³ NAḤUM RAKOVER, *ZEKHUT HA-YOẒRIM BEMEQROT HA-YEHUDI'IM 173-74* (Sifri'at Ha-mishpat Ha-'ivry 1991).

¹³⁴ Max Seligson, *supra* n.26, at 320.

I. The Decisors

A. Rav Banet

Mordekhai Banet (1753-1829)¹³⁵ was born to poor parents, who sent him, at the age of five, to live with his grandmother in Nikolsburg, Moravia (today, Mikulov, Czech Republic).¹³⁶ In 1789, still living in Nikolsburg, Banet (also commonly spelled “Benet”)¹³⁷ became Chief Rabbi of Moravia.¹³⁸ In contrast to such giants as R’ Moses Sofer and his father-in-law R’ Akiva Eiger (though friends with both), R’ Banet “avoided casuistry in discussing involved halakic questions; gaining his ends by means of a purely critical explanation and a systematic arrangement of the matter.”¹³⁹ His knowledge of modern thought afforded him an independent position between strict traditionalists and those who championed the spirit of enlightenment.¹⁴⁰

B. The Hatam Sofer

In the mid-eighteenth century, Samuel and Raizel, had a son in the crowded¹⁴¹ Judengasse¹⁴² of Frankfurt am Main, whom they named Moses.¹⁴³ Given that Samuel served as the scribe for the community, his German surname was “Schreiber,” in Hebrew, “Sofer.” We thus reach the famous personality destined to become chief rabbi of the towns of Mattersdorf and

¹³⁵ Michael Brenner, *et al.*, *supra* n.43, at 113.

¹³⁶ Louis Ginzberg, “Mordecai B. Abraham Benet,” 3 *The Jewish Encyclopedia* 14 (1903); Moshe Nahum-Zobel, “Mordecai Ben Abraham Banet (Benet),” 3 *Encyclopedia Judaica* 107 (2007).

¹³⁷ Other variants appear, such as “Banitt.” MICHAEL ROSEN, *THE QUEST FOR AUTHENTICITY* 49 n.9 (Urim Publ’ns, Jerusalem & New York 2008). Regardless of the spelling, he served as a “profound influence” on R’ Simḥah Bunim (1766-1827), the chief exponent of Przysucha Ḥasidism. *Id.*

¹³⁸ Louis Ginzberg, *supra* n.136, at 14.

¹³⁹ Louis Ginzberg, *supra* n.136, at 14.

¹⁴⁰ Louis Ginzberg, *supra* n.136, at 14. But note that he “declared every reform in religious observance to be wrong and harmful.” *Id.* at 15.

¹⁴¹ See Steven M. Lowenstein, *The Beginning of Integration, 1780-1870, in JEWISH DAILY LIFE IN GERMANY, 1618-1945* 98 (Marion A. Kaplan ed., Oxford U. Press, 2005).

¹⁴² Jews were confined to “a single dark lane, the Judengasse, foul-smelling and dank, sunless because of its tall, overcrowded houses.” AMOS ELON, *THE PITY OF IT ALL* 26 (Metropolitan Books, New York 2002).

¹⁴³ When Moses Sofer grew up there, Frankfurt was “perhaps the most oppressive place for Jews in Western Europe.” *Id.* at 25, 93. Only in 1811 (near the end of his life), was the Jewish community of Frankfurt able to buy its freedom from the municipality, for a sum roughly equivalent to \$30 million in today’s currency. *Id.* Beforehand, a Jew who met any street urchin had to doff his hat in response to the cry, “Jud, mach Mores!” *Id.* at 133. A spa at Nenndorf at the time featured a sign: “No admission to Jews and pigs.” Steven M. Lowenstein, *supra* n.141, at 164.

later Pressburg (now Bratislava, capitol of Slovakia) and a major influence not only on all Hungarian Jewry but throughout the ḥareidi world.

Moses Sofer (1762-1839) is a towering figure. Countless scholarly books and articles detail his life and thought.¹⁴⁴ Given the reverence felt for him over the last two centuries, continuing until today,¹⁴⁵ he has also inspired numerous hagiographies.¹⁴⁶ That genre¹⁴⁷ 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."¹⁴⁸ Miracle stories¹⁴⁹ are also bread and butter of the Ḥatam Sofer's mystique,¹⁵⁰ and tales of his intellectual prowess (even outside the domain

¹⁴⁴ See, e.g., Meir Hildesheimer, *The Attitude of the Ḥatam Sofer Toward Moses Mendelssohn*, in 60 PROCEEDINGS OF THE AMERICAN ACADEMY FOR JEWISH RESEARCH 141 (1994); Moshe Samet, *The Beginnings of Orthodoxy*, in 8 MODERN JUDAISM 249 (1988); JACOB KATZ, *supra* n. 38.

¹⁴⁵ Of course, a scholar can also feel reverence for the man. A case in point is Nosson Dovid Rabinowich, *supra* n.110. The point is that those who write with a critical stance, testing the evidence under consideration as to each proposition, are here labeled "scholarly," in contrast to those who take R' Sofer's greatness on faith, here labeled "hagiographic." But the former, at the end of their investigation, may share the latter's conclusion regarding the man's greatness.

¹⁴⁶ Emblematic here are ZELIG SCHACHNOWITZ, *THE LIGHT FROM THE WEST* 59 (Feldheim Publishers 1958, rev. 2007) and YAAKOV DOVID SHULMAN, *THE CHASAM SOFER* (C.I.S. Int'l 1992). These accounts lack a single instance, throughout his lifetime, of the Ḥatam Sofer getting annoyed, raising his voice, or in any way acting intemperately. Others are not so reticent. For instance, Jacob Katz recounts episodes of the great man losing his temper. *Id.* at 441, 473. From such instances emerges a fuller picture. Cf. Barry Wimpfheimer, "*But It Is Not So*": *Toward a Poetics of Legal Narrative in the Talmud*, 24 PROOFTEXTS 51 (2004) (exploring the "affective registers" manifested in a Talmudic episode in which the sage Rava first becomes angry at his students and later is ashamed).

¹⁴⁷ Even copyright scholars eschewing religious norms recognize the genre. See David Vaver, *Some Agnostic Observations on Intellectual Property*, 6 I.P.J. 125, 138 (1991) ("the sort of hagiography that passed for much historical and biographical writing in the 19th century). Of course, that same Oxford professor commented that the spur for copyright protection lay far from "Moses, however postmodern an exegesis one imposes on the Seventh Commandment." David Vaver, *Creating a Fair Intellectual Property System*, 10 OTAGO L. REV. 1, 6 (2000). Obviously, the good don never heard of the copyright tshuvot to be discussed at length below!

¹⁴⁸ JACOB KATZ, *supra* n. 38, at 404. Note that after one of the works just cited proclaims itself an English-language "dramatization of the events of his life" based on *Ḥut Ha-meshulash*. YAAKOV DOVID SHULMAN, *supra* n.146, at flyleaf.

¹⁴⁹ It is one thing to claim that R' Sofer, over the long course of his life, never contradicted himself in the writings that he committed to paper. See Nosson Dovid Rabinowich, *supra* n.110. It is quite another to maintain that he "almost never had to rewrite anything." YAAKOV DOVID SHULMAN, *supra* n.146, at 202-03.

¹⁵⁰ See Moshe Samet, *supra* n.144, at 256 ("many legends have been propagated").

of Torah) abound, from genius in the ways of statecraft¹⁵¹ to solving in minutes a complex mathematical problem that had stumped the experts.¹⁵²

The present article mines those hagiographic presentations when appropriate. Interestingly, at times they appear more accurate than the scholarly sources themselves.¹⁵³ They also lend a more human element to the recitation, framing the way that contemporaries viewed R' Sofer. Moreover, the mirror reflects in both directions—sometimes, incidents that the hagiographers consider flattering reveal more about themselves than the subject of their biography.¹⁵⁴

Without doubt, R' Sofer was a master of the halakhic process; the great historian of halakha, Jacob Katz,¹⁵⁵ calls him “an inexhaustible spring.”¹⁵⁶ At the same time, R' Sofer had a mystical side,¹⁵⁷ which however he rigorously excluded from his legal discourse.¹⁵⁸

¹⁵¹ One episode puts in the mouth of the gentile Count Affani the following words:

“No, no, do not answer me. I know only too well what you mean. You want to persuade me that this chief rabbi of yours is some benighted man of no consequence. Allow me to enlighten you, gentlemen. After your chief rabbi came to Pressburg, we monitored his mail for a year. We were amazed at his brilliance and at how in a mere few lines he was able to solve problems relating to state matters that our greatest legal authorities had been unable to determine for years. So I will thank you, gentlemen, not to speak ill of this great man. I believe this interview is over.”

YAAKOV DOVID SHULMAN, *supra* n.146, at 168-69.

¹⁵² See Aaron M. Schreiber, *The Hatam Sofer's Nuanced Attitude Towards Secular Learning, Maskilim, and Reformers*, 11 TORAH U-MADDA J. 123, 125 (2003).

¹⁵³ See text accompanying note 205.

¹⁵⁴ A case in point is the following exchange, recorded with approval:

“Why are you so harsh, Rabbi?” one of the Reform leaders, Aaron Horin, asked sarcastically. “Is it not written that one must pray for the sinners in Israel.”

“Indeed we do! And we have a special prayer for you and your like—*Ve'lemalshinim*, ‘For the slanderers,’” Rabbi Moshe replied, referring to the prayer that God uproot and humble heretical sinners!

ZELIG SCHACHNOWITZ, *supra* n.146, at 218. Another version goes even further, ascribing strange deaths to the various reformers, including Horin himself. YAAKOV DOVID SHULMAN, *supra* n.146, at 223. Although those accounts may be apocryphal, there is no doubt that R' Banet sought to have Horin's works banned as heretical, as described below. See text accompanying note 420.

¹⁵⁵ This article places especial emphasis on his oeuvre. See *supra* n. 38, *infra* ns 172, 461. Although he is certainly not beyond criticism as an historian, his particular reliance on the genre of rabbinic responsa literature makes him the most suitable authority for current purposes.

R' Sofer was a prolific decisor.¹⁵⁹ Among his 1200 written responses,¹⁶⁰ over seven volumes of his responsa having been published to date.¹⁶¹ “The learning displayed in the Responsa is amazing. His knowledge of the entire field of Talmudic and Rabbinic literature is overwhelming and also his keen-mindedness in finding analogies to legal problems presented by life is very impressive.”¹⁶² Those rulings were eventually become collected under the title, “Ḥatam Sofer,” meaning “Seal Of The Scribe.” The Hebrew word ḤaTaM forms an acrostic for *Ḥiddushei Torat Moshe*, meaning “Novellae of the Teachings of Moses.”¹⁶³ As a result, R' Sofer became known throughout Jewry under that appellation.

The corpus of the Ḥatam Sofer's responsa ranges across the gamut of human experience. Examples include whether Gentiles may rebuild houses on the Sabbath that were destroyed in the Napoleonic wars,¹⁶⁴ when not to force a woman to emigrate to the land of Israel,¹⁶⁵ prohibition of autopsies,¹⁶⁶ whether stone houses are likely to be occupied by spirits,¹⁶⁷ evaluating leniently

Paula E. Hyman, *Jacob Katz as Social Historian*, in *THE PRIDE OF JACOB: ESSAYS ON JACOB KATZ AND HIS WORK* 85, 88, 91 (Jay M. Harris ed., Harvard Univ. Press 2002).

¹⁵⁶ JACOB KATZ, *supra* n. 38, at 419.

¹⁵⁷ “At the turn of the nineteenth century kabbalah was part of the intellectual baggage of every literate Jew” MICHAEL ROSEN, *supra* n.137, at 85. R' Sofer's grandson records that R' Sofer married his third wife only “after his second wife appeared in a dream, saying that the home must be cared for.” JACOB KATZ, *supra* n. 38, at 423 n.112. It will be seen below that R' Sofer was a loyal acolyte to R' Adler, whose mystical tendencies were even more pronounced.

¹⁵⁸ ZELIG SCHACHNOWITZ, *supra* n.146, at __. Other decisors, by contrast, have allowed kabbalistic doctrines to influence their legal rulings. See JACOB KATZ, *supra* n.38, at 31-87.

¹⁵⁹ One commentator labels him “more prolific than any other rabbi going back six hundred years,” noting that only R' Yosef Shaul Nathanson is known to have composed more responsa. Nosson Dovid Rabinowich, *supra* n.110, at 239 n.1.

¹⁶⁰ YAAKOV DOVID SHULMAN, *supra* n.146, 103-04. Note that he refused to publish during his own lifetime. “Anyone who wants can come to my house and read my writings or copy them as he wishes. This was how things were done in the generations before the invention of printing, and I am not obligated to do any more.” *Id.* at 205.

¹⁶¹ ZELIG SCHACHNOWITZ, *supra* n.146, at viii.

¹⁶² 3 MEYER WAXMAN, *supra* n.67, at 725.

¹⁶³ JOSHUA BLOCK, *HEBREW PRINTING AND BIBLIOGRAPHY* 151 (1976); AVRAHAM YAAKOV FINKEL, *THE RESPONSA ANTHOLOGY* 126 (Jason Aronson, New Jersey, London 1990); 3 MEYER WAXMAN, *supra* n.67, at 725.

¹⁶⁴ YEHUDA NACHSHONI, *RABBEINU MOSHE SOFER, HA”HATAM SOFER”* 159 (Keren Zichron LeTarbut Yehudit 1981).

¹⁶⁵ *Id.* at 172.

¹⁶⁶ *Id.* at 160

¹⁶⁷ *Id.* at 163.

Jewish men who had shaved their beards out of business necessity,¹⁶⁸ the reason behind the priestly benediction,¹⁶⁹ and on and on. Some of his rulings are particularly apropos to judges, such as whether a Jewish decisor must specify the reasoning underlying his decision¹⁷⁰ and whether a Jew may bribe the judge in a secular court.¹⁷¹ As to that last issue, the Ḥatam Sofer disapproved of bribes—unless the Christian judge would have a predilection for the Gentile opponent, in which case the Jew’s bribe simply “levels the playing field,” thereby allowing the judge to fulfill his Noahide obligation of obeying the commandment to establish just courts.¹⁷² Indeed, when R’ Sofer himself was charged with a crime, the story is told that his congregants raised 10,000 guilden to bribe the prosecutor.¹⁷³

C. *Intersection of the Principals*

We have already noted personal correspondence from R’ Banet to Anton Schmid.¹⁷⁴ More will be adduced below.¹⁷⁵ In addition, when R’ Sofer applied for his first rabbinic post in Dresnitz, he needed the approval of the Chief Rabbi of Moravia. R’ Banet, writing in 1793, responded warmly.

He has learned deeply and he can deal with all problems. He is a master of the goodly merchandise of Torah. [¶] I have tested him and found that is he is a master of Torah, knowing *Orekh Ḥaim* and *Yorah De’ah*¹⁷⁶ by heart and with the

¹⁶⁸ *Id.* at 165. On the general impermissibility under Jewish law of using a razor, see Steven M. Lowenstein, *supra* n.141, at 149, 411 n.28.

¹⁶⁹ YEHUDA NACHSHONI, *supra* n.164, at 170.

¹⁷⁰ *Id.* at 179.

¹⁷¹ *Id.* at 164.

¹⁷² *Id.* Note that the history of Jews bribing Christian judges hearing suits against non-Jews has a long pedigree. JACOB KATZ, *EXCLUSIVENESS AND TOLERANCE* 135 (Oxford Univ. Press 1961).

¹⁷³ YAAKOV DOVID SHULMAN, *supra* n.146, at 142-43. The bribe is just the prelude to a much more elaborate story. See text accompanying note 458.

¹⁷⁴ See text accompanying note 133.

¹⁷⁵ See text accompanying note 431.

¹⁷⁶ *Orekh Ḥaim* (laws of everyday behavior) and *Yorah De’ah* (laws separating permitted from forbidden foods and other subjects) form two of the four pillars underlying both *Tur* by Jacob ben Asher (1270-1340), later adopted by the standard corpus of Jewish law, the sixteenth century *Shulhan Arukh*. The other two pillars are *Even ha-ezer* (women and marriage) and *Ḥoshen Mishpat* (financial responsibility and business). Traditionally, responsa collections are likewise divided into those four categories. MATT GOLDISH, *supra* n.16, at liv. Inasmuch as copyright rulings fall predominantly into that fourth category, the rulings from R’ Sofer and R’ Banet treated at length below are gathered into their respective collections of responsa under the heading *Ḥoshen Mishpat*.

ability to apply Torah reasoning as well. * * * [¶] Everyone is admonished to honor and love him, and not to contradict any of his words.¹⁷⁷

The close affiliation among R' Banet and R' Sofer continued over the course of many years.¹⁷⁸ The pair united in their opposition to reformer Moses Mendelssohn (1729-1786),¹⁷⁹ to the innovations of the Hamburg Temple,¹⁸⁰ and on many other issues of the day. (Indeed, as part of his mystical side,¹⁸¹ R' Sofer even recorded a posthumous visit from R' Banet.)¹⁸² But it is not only his fellow decisor that R' Sofer personally knew. As we shall see, he had a relationship with each of the principals in this case. First, let us back up to limn his biography more fully.

At the age of nine, young Moses went to study in the yeshiva of Rabbi Nathan Adler (1741-1800). While there, the boy showed special brilliance—so much so that he questioned the validity of one of his great-grandfather's teachings. For that act of chutzpah, his father slapped him.¹⁸³ The teacher sided with his young student and ordered Moses never to speak to his father again. From that time on, the young Moses revered R' Adler as a spiritual mentor and surrogate father.¹⁸⁴ Indeed, the main influence in his life was R' Adler, although he also spent one year of his youth learning from R' Pinchas Horowitz¹⁸⁵ (who authored the approbation to Heidenheim's

¹⁷⁷ YAAKOV DOVID SHULMAN, *supra* n.146, at 98.

¹⁷⁸ ZELIG SCHACHNOWITZ, *supra* n.146, at 177; YAAKOV DOVID SHULMAN, *supra* n.146, at 151, 155, 182, 201. The pair reportedly went through both Talmuds, the midrash and the mystical writings of the R' Isaac Luria during weeks in retreat at Baden. *Id.* at 216.

¹⁷⁹ JACOB KATZ, *supra* n. 38, at 191.

¹⁸⁰ Both contributed essays to the celebrated volume on the subject published in Altona in 1819, *Eleh Divrei Ha-brit*. See 3 MEYER WAXMAN, *supra* n.67, at 411-12; JACOB KATZ, *supra* n. 38, at 216-54. Note that this collection marks the turning point of R' Sofer as the eminent rav of his generation, outshining even his elders such as R' Banet. *Id.* at 403-04, 437-38. See GIL GRAFF, *SEPARATION OF CHURCH AND STATE: DINA DE-MALKHUTA DINA IN JEWISH LAW 1750-1848* (1985), at 113-14.

¹⁸¹ See *supra* n.157.

¹⁸² JACOB KATZ, *supra* n. 38, at 423 n.112.

¹⁸³ ZELIG SCHACHNOWITZ, *supra* n.146, at 35-36.

¹⁸⁴ Citing the “deep attachment between rabbi and student,” one account relates how, when R' Adler was forced to leave Frankfurt, his pupil “departed the city of his birth without saying farewell to his mother and without visiting the grave of his father” JACOB KATZ, *supra* n. 38, at 411.

¹⁸⁵ R' Sofer is said to have “revered [R' Horowitz] for his talmudic genius and halakhic authority.” Yehoshua Horowitz, *supra* n.117, at 540. He called R' Horowitz, “the Master of all the sons of the Diaspora.” JACOB KATZ, *supra* n. 38, at 407. Note that R' Sofer took up the anti-Mendelssohn campaign from R' Horowitz, who had been one of the primary opponents of the previous generation. *Id.* at 191.

maḥzor, reproduced above).¹⁸⁶ Given that R' Banet's ruling set at naught the directives of R' Horowitz, solely from this perspective it might be expected that R' Sofer would uphold his teacher's edict and rule to the contrary of R' Banet.

But we must dig more deeply. The most famous story of Moses Sofer's youth arises out of a boisterous bachelor party that took place in the apartment below R' Adler's Frankfurt house of study. When the revelry grew loud, R' Adler sent young Moses to ask the celebrants to calm down. The entreaty failed, as did another and yet another. Eventually, threats were exchanged, and then a blow landed on Moses' face; in response, R' Adler and his students pronounced a ban of excommunication on the rowdy couple whose antics had made Torah study impossible that evening, finishing it off with long wails from a shofar blast.¹⁸⁷ Whether from those celestial causes or from a simple excess of alcohol consumption, the bridegroom-to-be stumbled out of the party and slipped on the stones in the alley, incurring a fatal head injury.¹⁸⁸

The Jewish population of Frankfurt blamed R' Adler for the tragic death. Only the intervention of Pinḥas Horowitz, Chief Rabbi of Frankfurt, prevented the crowd from turning on him at the young man's funeral.¹⁸⁹ As star pupil, Moses stood to share the blame, being the student who had intoned the ban and/or blown the shofar. The next day, R' Adler, with the concurrence of R' Horowitz,¹⁹⁰ ordered Moses to leave Frankfurt and continue his studies in neighboring Mayence¹⁹¹—where he taught German to Lt. de Monfort, a billeted French officer whom he befriended¹⁹² (whose significance returns later).¹⁹³

¹⁸⁶ See text accompanying note 109. In 1831, R' Sofer himself wrote an approbation for his student's German-language book, brought out for the benefit of those who did not read Hebrew. YAAKOV DOVID SHULMAN, *supra* n.146, at 242 ("Rabbi Sofer pointed out that before giving his approval, he had read through the entire work").

¹⁸⁷ To anathemize an individual, it was traditional to sound blasts from a ram's horn. Haim Hermann Cohen, *supra* n.100, at 16.

¹⁸⁸ Note that the versions slightly differ in SCHACHNOWITZ, *supra* n.146, at 43-47, and YAAKOV DOVID SHULMAN, *supra* n.146, at 51-55.

¹⁸⁹ ZELIG SCHACHNOWITZ, *supra* n.146, at 49. In a different telling, R' Horowitz actually excommunicated R' Adler and all who continued to pray with him, which did not dissuade Moses from remaining steadfast by his teacher's side. YAAKOV DOVID SHULMAN, *supra* n.146, at 54. As early as six weeks later, the ban of excommunication was lifted. *Id.* at 55. Alternatively, the ḥerem against Rabbi Adler was lifted only a few weeks before his death. GERTRUDE HIRSCHLER, *supra* n.28, at 66. A third version has it lasting ten years, but being lifted eleven years before R' Adler died. JACOB KATZ, *supra* n. 38, at 410.

¹⁹⁰ The two great teachers in R' Sofer's life were Rabbis Adler and Horowitz. YAAKOV DOVID SHULMAN, *supra* n.146, at 202; JACOB KATZ, *supra* n. 38, at 406.

¹⁹¹ Today, the city is known as Mainz, located in Germany.

¹⁹² ZELIG SCHACHNOWITZ, *supra* n.146, at 54; YAAKOV DOVID SHULMAN, *supra* n.146, at 46.

¹⁹³ See text accompanying note 458.

Meanwhile, nasty rumors continued to swirl against R' Adler. It was said that he changed the liturgy and adopted all manner of apostasies in the spirit of infamous false messiah Shabbetai Zevi.¹⁹⁴ An anonymous pamphlet appeared, running 30 pages printed in cramped Rashi script, *Ma'aseh Ta'atu'im* ("A Tale of Errors," or "The Deceitful Act"). Though rhymed in classic Hebrew style and filled with Talmudic allusions, it was at base a venomous assault on R' Adler and all he stood for.¹⁹⁵

Whoever wrote that anonymous pamphlet attacking his beloved teacher could expect to incur R' Sofer's implacable enmity. Thus, it would be highly relevant to the copyright drama if Wolf Heidenheim were the miscreant in question. Over a century ago, the *Jewish Encyclopedia* drew exactly that conclusion.¹⁹⁶ Although the 1972 *Encyclopedia Judaica* was more circumspect, omitting any such attribution,¹⁹⁷ the 2007 *Encyclopedia Judaica* reverted to form, again crediting Heidenheim with authorship of the scurrilous pamphlet.¹⁹⁸

There is some superficial appeal in that paternity. After all, Heidenheim is known to have dabbled in publishing rhymed verse.¹⁹⁹ Nonetheless, one of the hagiographies²⁰⁰ altogether debunks that attribution.²⁰¹ Written by a traditional Frankfurt Jew born in 1874,²⁰² this account

¹⁹⁴ ZELIG SCHACHNOWITZ, *supra* n.146, at 61-62.

¹⁹⁵ ZELIG SCHACHNOWITZ, *supra* n.146, at 62.

¹⁹⁶ Max Seligson, *supra* n.26, at 320.

¹⁹⁷ Sefton D. Temkin, "Wolf Heidenheim," 8 *Encyclopedia Judaica* 258-59 (1972).

¹⁹⁸ Sefton D. Temkin, *supra* n.26, at 763.

¹⁹⁹ Heidenheim "tried his hand at imitating the popular eighteenth-century genre of rhymed ethical fables. Solomon Feffer, *supra* n.28, at 70.

²⁰⁰ See *supra* n.146.

²⁰¹ A slim, haggard man with a bony, intellectual face and veiled eyes who was called Wolf Heidenheim denied absolutely the rumors that it was he. Such controversies interested him only when they were three hundred years old; then he could write books about them. His farsighted eyes could not focus on the petty quarrels of the day. Besides, he had other things to worry about. He had to establish when and where the liturgical poet Rabbi Elazar Hakalir had lived, so that he could defend him against Rabbi Abraham ibn Ezra's criticisms. He was also working on an exegetical edition of the Pentateuch, a treatise on the tone accents, a new edition of the prayer book, and a hundred other things.

His work indeed brought him in contact with Rabbi Nathan [Adler]. He came and went there, for Rabbi Nathan had the rarest treasures in his library, all the ancient manuscripts and texts that Wolf Heidenheim needed for his scholarly research. Why should he be concerned with the controversy about Rabbi Nathan? A pamphlet? What pamphlet? Let's see it! Heidenheim declared. Why, this man rhymes without any idea of rhyme or rhythm, the laws of scanning, foot and meter. What does this say? That in Rabbi Nathan's house of prayer they have their own order of prayers, their own liturgy? Well, I must look into this right

ascribes authorship of the attack not to Heidenheim but instead to Loeb Wetzlar.²⁰³ Which view is accurate, the encyclopedists' or the hagiographer's? In this instance, it is the latter. Proof for that proposition comes in two forms. First, no less a specialist than Jacob Katz ("the most venerated Jewish historian of his age")²⁰⁴ has concluded that Wetzlar was indeed the pamphlet's author.²⁰⁵ Second is the "testimony" of R' Sofer himself. There is no doubt that he was personally acquainted with Heidenheim, not only as residents of Frankfurt but as a fellow student of R' Adler (Heidenheim being but five years older).²⁰⁶ The two were "on friendly terms ... since their youth,"²⁰⁷ and R' Sofer continued to speak highly of Heidenheim as late as 1836.²⁰⁸ In one of the copyright responsa to be quoted below, R' Sofer actually praises Heidenheim to the sky.²⁰⁹ For all these reasons, R' Sofer cannot have accepted any imputation that Heidenheim was the infamous slanderer of his sainted teacher.²¹⁰

Not only did R' Sofer have personal dealings with publisher Heidenheim, and his approbationist R' Horowitz, but he had every reason to come into contact with the defendant as well. R' Sofer's grandson relates an improbable tale of the pair's encounter, culminating in

away! Must see what they have there of Abudarham and Maharil, Vitry and Rabbeinu Amram, the Babylonian Gaon.

Three-hundred-year-old controversies kept this man awake at night, but he avoided the conflicts under his nose.

ZELIG SCHACHNOWITZ, *supra* n.146, at 62-63.

²⁰² ZELIG SCHACHNOWITZ, *supra* n.146, at xi.

²⁰³ ZELIG SCHACHNOWITZ, *supra* n.146, at 63.

²⁰⁴ David N. Myers, *Rebel in Frankfurt: The Scholarly Origins of Jacob Katz*, in *THE PRIDE OF JACOB* 9, 27 (Jay M. Harris ed., Harvard Univ. Press 2002).

²⁰⁵ JACOB KATZ, *supra* n. 38, at 408 (attributing authorship to Judah Wetzlar).

²⁰⁶ A fascinating chart graphs the development of Orthodoxy. It lists Nathan Adler at the apex and, underneath him, both Wolf Heidenheim and Moses Sofer. Samuel C. Heilman, *The Many Faces of Orthodoxy, Part I*, in *2 MODERN JUDAISM* 23, 33 (1982). According to the authors' typology, the former was an open syncretist, the latter dean of the rejectionists. *Id.* at 34-35. Note that Heidenheim published the Pentateuch with the German translation by R' Sofer's arch-rival, Moses Mendelssohn. Aaron M. Schreiber, *supra* n.150, at 159 n.86. R' Banet objected to the appearance of God's ineffable name in that publication. Meir Hildesheimer, *supra* n.144, at 171.

²⁰⁷ Aaron M. Schreiber, *supra* n.150, at 146.

²⁰⁸ Aaron M. Schreiber, *supra* n.150, at 137-38.

²⁰⁹ See text accompanying note 356.

²¹⁰ "Nothing could sway him [Moses Sofer] to believe anything disparaging about his great rabbi [R' Adler], whose piety and holiness Moshe saw at every moment." YAAKOV DOVID SHULMAN, *supra* n.146, at 55.

R' Sofer's permission to engage in printing the Talmud.²¹¹ Regardless of the story's veracity, R' Sofer's later double-barreled ruling against Schmid shows that no notion of repaying any unwitting debt entered into his jurisprudence.²¹²

²¹¹ The quotation below comes from the English-language "dramatization" of *Hut Ha-meshulash*. See *supra* n.148.

Late one night, there was a knock at Rabbi Sofer's door. The servant opened the door.

"There is a man who came to see you," he reported to Rabbi Sofer.

"At this hour? It must be urgent. Let him in."

"He is a gentile. He says his name is Anton Schmid."

"I have heard the name. Let him in."

A few moments later, a well-dressed forty-five-year-old man stepped into Rabbi Sofer's room.

"How do you do? Forgive me for intruding at this late hour."

"Not at all. I am sure that the matter is urgent or you would not have come at this time."

"That is exactly so."

"You are Anton Schmid, the well-known publisher?"

"I am flattered that your honor has heard of me."

"Non-Jewish printers generally do not publish works of Torah. We are thankful—and believe that it shall accrue to your merit."

Anton Schmid pulled a letter from his breast pocket and placed it on Rabbi Sofer's desk. "I have come to deliver this."

Rabbi Sofer glanced at the letter. "But this is a letter that I myself sent out." He ripped open the letter and glanced at the first page. "I mailed it this afternoon."

"Yes, and I had the devil of a time retrieving it."

"What is the meaning of this? Someone asked me a *halachic* question, and he is awaiting my reply."

"Rabbi Sofer, you have enemies. You have apparently been giving people advice in Jewish law that contravenes the new fiscal regulations of King Francis. Someone happened to find out that you had written a letter today dealing with the government evaluation, and he informed the government. Well, it so happens that I have sources of information as well. When I learned of this, I immediately ran out to get a hold of your letter before the government could. And at last, here it is!"

Nonetheless, there is little reason to doubt the part of the story in which Schmid sought Rabbi Sofer's permission to print the Talmud. Not only did R' Sofer avidly read Schmid's journal, *Bikurei ha-'Ittim*,²¹³ but in 1833 Schmid purchased a Hebrew press in Pressburg, which his sons operated through 1849.²¹⁴ Schmid's business interests in Pressburg inevitably must have brought him into contact with city's chief rabbi, the Ḥatam Sofer.

THE DECISIONS

It is time now to turn to how the two eminent authorities noted above, R's Banet and Sofer, treated this copyright dispute. Each of them actually wrote about it on multiple occasions. To give more depth to the definition offered at the outset for "responsa," the genre consists of "[w]ritten answers on questions of Jewish law and learning from rabbinic scholars to queries from lay people, communities, or other rabbis."²¹⁵

The central theme of the Responsa literature is the discovery of the right way for a Jew to behave; what it is that God would have him do. With their mastery of sources, especially in the Talmud (the major fount of wisdom for those engaged in this task), the famous Respondents were able to give advice on all the practical problems that were the concern of their questioners; most of their replies came to enjoy authority in subsequent Jewish law.²¹⁶

From earliest times to the present, responsa have traditionally been composed in Talmudic language (a mélange of Hebrew and Aramaic, with Greek and other loan words thrown in), regardless of the vernacular spoken by their authors. For that reason, a decisor in Slovakia or

"I cannot thank you enough, Herr Schmid. One day, I will perhaps be empowered to return the favor."

In the coming years, Anton Schmid published many *sefarim*, including the *Shulḥan Arukh*, as well as works of the Haskalah movement. Once, when he wanted to undertake the project of publishing the Talmud, he sought Rabbi Sofer's permission. Rabbi Sofer granted this, and so paid back the debt that he had unwittingly incurred.

YAAKOV DOVID SHULMAN, *supra* n.146, at 167-68. Taking this story at face value, it reflects events that took place around 1810 (when Schmid would have been 45 years old). The upshot would be that, eight years before evaluating the merits of Schmid's defense in the Roedelheim copyright case, R' Sofer had "unwittingly incurred" a debt to him.

²¹² See text accompanying note 356.

²¹³ Aaron M. Schreiber, *supra* n.150, at 125.

²¹⁴ Samuel Weingarten-Hakohen, "Bratislava," 4 *Encyclopedia Judaica* 1309, 1312 (1972).

²¹⁵ Marion A. Kaplan, ed., *supra* n.141, at xi.

²¹⁶ LOUIS JACOBS, *THEOLOGY IN THE RESPONSA* ix (Routledge & Kegan Paul, London and Boston 1975). Although that excerpt highlights that the primary concern of responsa is practical, at times they can trench on the theoretical. Indeed, Jacobs devotes over 350 pages to that aspect of the responsa literature.

Scotland has full access to the responsa literature from Italy or Poland or Egypt, from whatever century. That process continues unabated to the present, whether in Argentina, the United States, or elsewhere. The responsa treated in this article indeed appear not in the German or Czech that R's Sofer and Banet may have spoken, but instead in Talmudic argot, printed in Hebrew characters.

It bears mention that, over the course of the centuries, responsa matured from being terse directives²¹⁷ to the opposite—lengthy, even bloated disquisitions, written for an audience steeped in the niceties of Talmudic dialectic. The period into which the instant batch falls (1822-1827) fits squarely into that mold—these responsa are most challenging to the uninitiated.²¹⁸ They contain a wealth of acrostics,²¹⁹ for example, that at times can be interpreted in a variety of fashions.²²⁰ They can also proceed at tremendous length,²²¹ at times resembling the Talmud itself as being “composed in a style resembling stream of consciousness.”²²² Still, at the end of the day, these responsa constitute the “body of case law precedent”²²³ for the system of Jewish law that frames the way future rabbis would handle copyright cases.

I. R' Banet's First Published Responsum

A. *Confronting the Case*

In his ruling regarding the Roedelheim maḥzor, dated Thursday, 5 Elul 5582 (August 22 1822),²²⁴ R' Banet took a decidedly narrow view of the protection to which Heidenheim was entitled under Jewish law.²²⁵ He reached that decision, moreover, notwithstanding what he acknowledged as the maḥzor's protective ban in favor of Heidenheim, issued by the Av Beit Din of Frankfurt am Main, R' Pinḥas Horowitz.

²¹⁷ Shlomo Tal, “Responsa,” 14 *Encyclopedia Judaica* 83, 84 (1972).

²¹⁸ Prof. Ḥaim Soloveitchik told his students of medieval responsa, “If the words do not jump off the page and dance for you, you are not getting it.” MATT GOLDISH, *supra* n.16, at l. That standard is indeed high, and one that I can only pray to have occasionally achieved.

²¹⁹ An entire article examines an acrostic contained in R' Sofer's will—going so far as to take the original to the Laboratory for Criminal Investigation of the Israeli Police—to determine whether it actually means, as is commonly assumed, that he forbade his descendents from reading the works of Moses Mendelssohn. Meir Hildesheimer, *supra* n.144 (debunking common assumption about *resh-mem-dalet*).

²²⁰ For an example, see *infra* n. 290. Another is contained in NAḤUM RAKOVER, *supra* n.133, at 173.

²²¹ See text accompanying note 337.

²²² MATT GOLDISH, *supra* n.16, at li.

²²³ MATT GOLDISH, *supra* n.16, at li.

²²⁴ Note that Hebrew printing was already well established in Nikolsburg, dating back to 1767. See MOSHE ROSENFELD, *supra* n.34, at 77.

²²⁵ SEFER SHE'A LOT WE-TSHUVOT PARSHAT MORDEKHAI, ḤOSHEN MISHPAT # 7 (Von Mendel Vider, Sziget 1889).

The brief factual summary set forth in the first paragraph of R' Banet's ruling described Heidenheim²²⁶ as "wise and pure," then explained that he had come out with new maḥzorim—but described neither their contents nor the work undertaken to have them published. Therefore, the reader of R' Banet's responsum is not informed that Heidenheim had invested a significant amount of time and money gathering different manuscripts of maḥzorim, editing and translating the text, and then printing a multi-volume set. R' Banet noted only that these maḥzorim included approbations from the "wise men of the land and the great scholars of the generation" that others not engage in unfair competition²²⁷ with Heidenheim for a period of 25 years.²²⁸ R' Banet neither identified the particular rabbis who had issued the approbation nor quoted its language. Nor did he elaborate on his understanding of exactly what conduct was prohibited under the terms of the ban.

After that extremely terse description of Heidenheim's maḥzor, R' Banet went on to say that other publishers had begun to print these works and had already completed several volumes. R' Banet did not identify Schmid by name in his ruling—and in fact, used the nomenclature of "first printer" and "second" throughout. Even more pointedly, the outset of the responsum specifies that it was written in response to a question posed by the head rabbi in Dyhernfurth and continues that the printers in Dyhernfurth have started to typeset the volume in question and have already completed a small percentage of the printing. According to R' Banet, the first publisher had attempted to stop these newcomers by invoking the ban found in the Roedelheim maḥzor. In response, the second publishers had attempted to appease Heidenheim by offering him a monetary settlement of an unidentified amount, without success. R' Banet noted that the Chief Rabbi of Kempen²²⁹ had sided with the second publishers because they already had finished several volumes of their work and would suffer great loss if forbidden from selling their product. R' Banet added that it was not his normal practice to answer questions outside the area where he lived, particularly given that many wonderful rabbis were located there.²³⁰ Nevertheless, R' Banet stated that he was driven to answer the question because of the positive commandment

²²⁶ R' Banet identified him as "Wolf Roedelheim" after his place of residence rather than of birth.

²²⁷ R' Banet describes the ban in terms of *hassagat g'vul*. See text accompanying note 287.

²²⁸ R' Banet himself refers to the ban lasting 25 years. It was noted above that R' Horowitz himself did not specify a set term in the ban, only referring to "the same manner and for the length of time that the distinguished rabbis who preceded me set forth in their own approbations." See text accompanying note 112.

²²⁹ Formerly part of the Polish-Lithuanian Commonwealth, that town is called Kepno in modern-day Poland. Like Dyhernfurth (the printing hub mentioned above), it is located in the vicinity of Breslau

²³⁰ R' Banet does not supply any names. The *Av Bet Din* at Kempen during that time may have been either Rabbi Ya'akov Simḥa Rehfisch or Rabbi Yosef Shmuel Landa. See *infra* n.303. In any event, given that Moravia is located adjacent to Silesia, when R' Banet referred to "wonderful rabbis" in Dyhernfurth or its vicinity, it seems likely that he spoke from personal acquaintance.

to provide honor to the Torah, and also in recognition of the honor of the rabbi who posed the question to him.²³¹

Beyond that very terse factual summary of the case, the responsum never attempted to describe exactly what defendant had copied from the Roedelheim maḥzor, how the copying had occurred, what causal damage resulted, or the other pertinent details that lawyers would wish to adduce in order to characterize this case. Instead, R' Banet proceeded to offer his resolution based on general Talmudic principles, discussed below in detail.²³²

It is difficult to fit all the facts together to determine exactly what fact pattern elicited R' Banet's response. Evidently, not only did Schmid engage in unauthorized publication in Vienna of the Roedelheim maḥzor,²³³ but thereafter a printing house in Dyhernfurth independently reproduced it as well.²³⁴ On this supposition, R' Banet was not addressing Schmid's conduct at all. Yet the end of his responsum shows that he well knew about the "printer in Vienna."²³⁵ Parts of the responsum are obscure. As is so often the case, a mass of reasoning set forth in the tshuva overwhelms the she'aila, *i.e.* the precise question that inspired it.²³⁶

B. *The Talmudic Cases*

R' Banet's proceeded with deliberate awareness that he was not writing on a clean slate. His responsum reviewed the various Talmudic and rabbinic rulings involving the conflicting rights at issue here:

1) **The Case of the Open Alley ("mavoy"):** This case²³⁷ involves a resident of an alleyway²³⁸ who establishes a mill for commercial purposes. According to Rav

²³¹ Note the tension between R' Banet's volubility here and his later supposed reticence. See *infra* n.277.

²³² See text accompanying note 237 *et seq.*

²³³ See text accompanying note 131.

²³⁴ J. DAVID BLEICH, *supra* n. 123, at 125. Without mentioning Schmid, another account is that "a Jewish publishing house located in a different city did not adhere to the ban and subsequently published the same maḥzor utilizing Rav Heidenheim's works." YISRAEL BELSKY, 9 HALACHA BERURA No. 4, at 3 (no date).

²³⁵ As already noted, the responsum addresses at great length the conduct of the "first printer" and "second," so the reference towards the end to the "printer in Vienna" comes out of the blue.

²³⁶ One commentator notes that queries in the responsa tend to be "jagged, odd, repetitive, incomplete, and complex." MATT GOLDISH, *supra* n.16, at li.

²³⁷ BT BAVA BATRA 21b. North American law reviews contain only two references to this pericope. One arises to explicate Jewish law. See Dennis W. Carlton & Avi Weiss, *The Economics of Religion, Jewish Survival, and Jewish Attitudes toward Competition in Torah Education*, 30 J. LEG. STUD. 253, 271 (U. Chi. 2001). The other, by contrast, forms part of the feminist school, noted *supra* n.6. See Steven F. Friedell, *The "Different Voice" in Jewish Law:*

Huna (216-297),²³⁹ a Babylonian amora, the mill owner was entitled to prevent a competitor, even a fellow resident of the same alleyway, from opening an adjacent mill, inasmuch as the competitor would cut off the first mill owner's livelihood.

Nonetheless, Rav Huna's ruling banning the subject behavior as unfair competition under these circumstances is a minority position;²⁴⁰ most of the Talmudic authorities instead recognize free competition, holding that the first mill owner cannot prevent a resident of the same alleyway²⁴¹ from opening up a competing mill.²⁴² Ironically, Rav Huna's disputant shared his unusual name—he is known as Rav Huna son of R' Joshua.²⁴³

Some Parallels to a Feminist Jurisprudence, 67 IND. L.J. 915, 936 (1992) (“Jewish law considered the value to the community of lower prices that might result in allowing new competitors to enter the market. But it balanced this need against the desire to protect existing relationships and the desire to protect the livelihood of existing sellers. Jewish law was sensitive to the concern that new competition could cause real harm to people within the community.”).

²³⁸ In the relevant times, residences typically were such that several houses opened up to a courtyard, and several courtyards in turn led into an alley, from which the public domain of the street became accessible. ARTSCROLL BAVA BASRA 20b¹ n.10 (Mesorah Publ'ns 1992).

²³⁹ Although both are from Tikrit, one imagines that he had little in common with Saddam Hussein, who lived there 1700 years later.

²⁴⁰ The Talmud itself does not overtly take sides between Rav Huna and Rav Huna son of R' Joshua. But Asher ben Jehiel, known as Rabbenu Asher or the “Rosh” (1259 – 1328), wrote his commentary on *Bava Batra* 21b to codify the position of Rav Huna son of R' Joshua as normative. See R' Chaim Jachter, *Hasagat Gevul: Economic Competition in Jewish Law*, <http://jlaw.com/Articles/hasagatgevul.html> (visited May 18, 2008) (“virtually all *Rishonim* follow Rav Huna the son of Rav Joshua's view, as do the *Shulḥan Arukh* (*Hoshen Mishpat* 156:5) and most of its commentaries (see *Arukh Hashulḥan*, *Hoshen Mishpat* 156:6-7)”).

²⁴¹ If a competitor comes from another town, by contrast, Rav Huna son of R' Joshua would rule the opposite. But what if the new competitor came from a different alleyway of the same town? There, the situation is clouded—it is uncertain how he would resolve that wrinkle, so the Talmud says to “let it stand” (*teyqu*). When Elijah the Prophet returns to earth, tradition holds that he will solve this conundrum, along with other similar unresolved puzzles of the Gemara. See LOUIS JACOBS, *TEYKU: THE UNSOLVED PROBLEM IN THE BABYLONIAN TALMUD* 168-69 (1981) (“it appears from his statement regarding the resident of a different *town* that he is in doubt regarding the resident of a different *alley!*”).

²⁴² As Rashi explains *ad loc.*, the competitor may simply shrug off the established merchant's complaint with, “Whoever comes to me, let him come; whoever comes to you, let him come.”

²⁴³ Compounding the confusion is that the same passage elucidates the next law (about how far fisherman must separate their nets) in the name of “Rabbah son of Rav Huna.”

2) **The Case of the Fish Who Lock Their Sight on the Bait (“sayyara”):** This case (which appears in the same Talmudic pericope as the one discussed above)²⁴⁴ involves two fishermen, each casting a net in order to catch fish. The Talmud rules that the second fisherman must keep his fishing nets away from a fish that has been targeted by the first fisherman for the full length of the fish’s swim.²⁴⁵ The reason is *sayyara* (they have set their “sight” on the food.).

Rabbinic commentators provide different explanations for why this case differs from The Open Alley. Rashi, Rabbi Solomon Yizḥaḳi of Troyes, France (1040-1105),²⁴⁶ explains that a fish has the tendency to go after the first thing that it sees. Therefore, when the first fisherman targets the fish, he can be justifiably confident that he will catch it, meaning that the fish is treated as if it already has been caught by the first fisherman. As a result, if the second fisherman interferes and deflects the fish, it is as if he has damaged the first fisherman by literally taking away his fish. By contrast, in The Open Alley, the potential customers of the mill are not considered to be “captured” by the first mill owner, but can go to whichever mill they choose.

Of course, every explanation generates its own controversy.²⁴⁷ The foregoing interpretation attributed to Rashi is not universally shared. In particular, R’ Banet noted that the Rema (see case 6 below) understood Rashi differently. Under the Rema’s interpretation, the difference between The Fisherman, in which one could justifiably limit competition, on the one hand, and The Open Alley, in which competition could not be stopped, on the other, does not result from the confidence of the first fisherman that he will capture the fish. Rather, the distinction between the two cases involves the certainty of the damage to be caused to the first actor. Because potential mill customers are able to choose to return to the first mill even after the rival mill has opened, damage is not certain; hence, it is not proper to limit competition.²⁴⁸ By contrast, because fish essentially have no choice regarding being captured by the fishnets, damage is certain and competition properly may be limited.

²⁴⁴ BT BAVA BATRA 21b.

²⁴⁵ BT BAVA BATRA 21b.

²⁴⁶ As foremost among the rishonim, it is not surprising that the works of Rashi, with the advent of print, were among the first Hebrew works to be published. DEAN PHILLIP BELL, *supra* n.17, at 149.

²⁴⁷ “[M]ost *Rishonim* rule against Rav Huna (in favor of Rav Huna the son of Rav Joshua). Rav Karo thus ignores the *Aviasaf*’s view . . . and rules that all local competitors are unrestricted in their ability to open rival businesses.” Chaim Jachter, *supra* n.240. Of course, the Rema ruled to the contrary, relying on the *Aviasaf* when ruling in favor the Maharam of Padua. Neil Weinstock Netanel, *supra* n.22.

²⁴⁸ Let us say that Reuven operates the first mill and Shimon opens a rival shop. Customers can still go to Reuven. Even if they switch over to Shimon, nothing prevents them from returning to Shimon.

R' Banet in addition adduced the view of Mordekhai ben Hillel (1250-1289), who invoked the doctrine of *ma'arufia* on this point. Dating from France and Germany in the tenth century, that concept refers to a recurrent Christian client.²⁴⁹ It prohibits one Jew from attempting to “steal” another’s established commercial client. The rationale for this principle is that the first Jew has invested time, money and effort in order to achieve the special business ties that he has nurtured with his *ma'arufia*, and thus no one else should be permitted to interfere with the relationship.²⁵⁰ According to Mordekhai ben Hillel, those Jewish communities that follow the doctrine of *ma'arufia* (the custom is not universal) consider the Gentile client’s patronage to be “certain,” akin to a “fish that has set its eye on the bait,” as it were.

3) **The Case of the Dead End Alley (“*mavoy satum*”):** This case is a variant of The Open Alley, offered by the Aviasaf, a compendium of commentary and rulings from German scholar Eliezer ben Joel Ha-Levi (1160-1235).²⁵¹ It involves the resident of a community who operates a mill at the terminus of a dead-end alleyway. According to many rabbinic authorities²⁵²—even those who reject Rav Huna’s minority position regarding The Open Alley—the first mill owner here can prevent a competitor from opening up a new mill near the open end of the dead-end alleyway. These authorities explain that, because the two mills are located in an alleyway with only one entrance, customers cannot reach the first mill without passing by the door of its newly-opened competitor, and therefore will end up doing business with this competitor rather than continuing on to the first mill. Under these circumstances, the first mill owner located inside the alleyway may prevent his competitor from entering the market and opening another mill closer to the entrance of the alley, given that damage to the first mill owner as a result of such competition is certain. In this case, the second mill owner is infringing upon another’s business practices.²⁵³

To summarize, the damage that occurs to the first fisherman when the second fisherman uses his nets to try to catch the same fish is considered “certain,” because

²⁴⁹ Editor, “Ma’arufya,” 13 *Encyclopedia Judaica* 307 (2007). The etymology of the term is Arabic. JACOB KATZ, *supra* n.172, at 58.

²⁵⁰ Enforcement of a *ma'arufia* came through the ban. *Id.* at 307. “It is possible that this usage originated in the privileges granted to merchants by the municipal councils of various European towns during the 10th and 11th centuries guaranteeing them trade monopolies.” *Id.* If so, the parallel to the Merchant Guild is apparent, which lead to the *herem ha-yishuv*. See text accompanying note 250.

²⁵¹ The direct writings of the Aviasaf have been lost; we know of his ruling only from reading later commentators who record his views. In this instance, Mordekhai ben Hillel, who has been introduced immediately above, attributes this point of view to the Aviasaf.

²⁵² HAGAHOT MAIMONIOT, HILKHOT SHEKHAYNIM, pt. 6; BEIT YOSEF, HOSHEN MISHPAT, # 156; DARKHEI MOSHE (ad loc.). Evidently, this basket of privileges applies to those who live in an enclosed area, and hence can justifiably expect non-intrusion from outsiders.

²⁵³ R' Banet’s phraseology here, *yored letokh umanuto shel h'aver*, forms the subject matter of responsum 79 of the Hatam Sofer. See text accompanying note 333.

otherwise the fish would have automatically gravitated to the first fisherman's net. By contrast, in The Open Alley, the damage to the first mill owner is speculative, because a potential customer might choose to return to the equally proximate first mill owner after doing business with the new, competing mill.²⁵⁴ In the case of the Dead End Alley, however, inasmuch as every customer of the first mill now has to pass by the new shop, the damage becomes certain again.²⁵⁵

4) The Case of the Poor Man Searching for a Singed Cake (“*ani mehapekh ba-harara*”): This case involves a poor man who finds a singed cake²⁵⁶ that is ownerless²⁵⁷ and tries to take it.²⁵⁸ A second man comes along and usurps the opportunity. The Talmud explains that, in this case, the second man is considered to be an “evildoer.”

That phraseology is deliberate. Let us imagine, by contrast, that A owns a cake outright and B comes along to take it. In that instance, B is a “thief” and subject to the full force of Torah law, including restitution and a fine [EXOD. 22:3]. Reverting to the instant case, by contrast, the Second Man who obtains the cake that was sought by the Poor Man is called an evildoer by analogy to a thief, but is not *actually* a thief. The difference, in practical terms, is that the Second Man is subject to moral condemnation, but does not incur the monetary consequences that would attend outright theft.

²⁵⁴ The issue reverberates into modern times. Rav Yosef Dov Soloveitchik (1903-1993), the doyen of Modern Orthodoxy in the United States, adopted a similar approach when he ruled against an established kosher pizza store in Bergen County, New Jersey that wished to block a rival from opening up in the same locality. “The Rav insisted that in America there are no restrictions on competition, although he did not explain his reasoning.” R’ Chaim Jachter, *supra* n.240.

²⁵⁵ The alleyways appear to differ based on the numbers. In the case of the Open Alley, some customers are bound to still come to Reuven, whereas others might go to Shimon; but given that Reuven will remain closer to some passersby, he will not lose all the business. In the Dead End Alley, by contrast, *all* the customers must pass by Shimon’s new mill at the alleyway’s entrance in order to get to Reuven’s established mill at its far end; accordingly, Reuven stands to lose everything.

²⁵⁶ Although it may seem strange to refer to a food item by its burnt character, consider today that one can order *blackened cod* in a restaurant, followed by *crème brûlée* for dessert.

²⁵⁷ The explication here follows Rashi’s understanding. His descendents, the French and German tosaphists, took the contrary view that the singed cake was not ownerless, but instead was about to be acquired by the poor man in a business transaction, which is preempted by the second man.

²⁵⁸ BT KIDDUSHIN 59a. The larger discussion at play here is whether a delayed betrothal takes effect. In that context, a story is brought down how Rav Gidel wished to purchase a field, but R’ Abba bought it out from under him. To condemn the latter’s conduct, the Gemara adduces the analogous case of The Poor Man Searching for a Singed Cake.

5) **The Case of the Poor Man Who Shakes An Olive Tree (“*ani ha-menaqef be-rosh ha-zayit*”)**: This 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 [MISHNAH GITTIN 5:8]. When the olives land on the ground, a second person appears 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 once again, 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.

Under the minority view of Rabbi Jose,²⁵⁹ the second person, pursuant to Rabbinic law, is treated no differently from an actual thief. Accordingly, the court may order the olives to be removed from the second person and returned to the poor man who shook the tree. Nevertheless, the majority view does not go that far. It disallows the poor man from affirmatively going to court to reclaim the olives; as a practical matter, therefore, it merely treats the second man as the same type of “evildoer” noted in the previous case.²⁶⁰

6) **The Case Previously Adjudicated Regarding the Maharam Of Padua v. Giustiniani**: Our last case is not Talmudic at all, but instead a predecessor’s effort to grapple with Talmudic authority. R’ Banet treated as the starting block the Rema’s famous ruling involving the Maharam of Padua from three centuries earlier.²⁶¹ As explained below, R’ Banet attempted to distinguish R’ Isserles’ ruling in favor of the Maharam of Padua and to explain why that ruling did not require a pro-plaintiff judgment in this case.²⁶²

C. *Aligning Precedent*

How should that wealth of authority apply to the instant case? R’ Banet concluded that one could learn from The Poor Man Who Shakes The Olive Tree that the second publisher should be liable for “theft because of the ways of peace,” giving due consideration to the toil and effort undertaken by the first publisher to produce his set of maḥzorim. R’ Banet explained that the first publisher had toiled hard to put together a Hebrew translation and to copy the text of the maḥzor into the vernacular and now the second publisher had come along in an attempt to benefit from the first person’s effort.

²⁵⁹ R’ Jose ben Halafta, is typically mentioned in the Talmud without any patronymic. He was a tana who lived in the second century.

²⁶⁰ In this context, R’ Banet also tries to reconcile the various interpretations of MISHNAH BAVA MEZIA 1:4 (“One saw a found object and fell on it, then another person comes along and grabs it—the person who grabs it acquires it”) and MISHNAH PE’AH 4:3 (“One who takes a portion of [unowned grain available to the first comer] and throws it on the rest of the pile, he doesn’t acquire anything. If he falls on it or spreads his cloak over it, the court removes it from him.”).

²⁶¹ Neil Weinstock Netanel, *supra* n.22.

²⁶² See text accompanying note 265.

Despite that wind-up, R' Banet concluded that this case was not like *The Olive Tree* and therefore did not implicate “theft because of the ways of peace.” R' Banet noted that, in both that case and *The Poor Man Searching for a Singed Cake*, the second person wanted to take the exact item that the poor man had toiled to obtain. By contrast, in the case of the publishers, the second was not taking from the first the same exact set of maḥzorim that the first had worked so hard to produce. Rather, the second was printing his own set of maḥzorim, meaning that the first publisher’s customers—or potential customers—instead were purchasing books from the second publisher. Where have we ever seen, asked R' Banet rhetorically, that a person who works hard to produce an item acquires the *purchasers* of that item as a result of his hard work, such that another cannot come along and try to convince those purchasers to acquire a competing item from him, rather than from the first actor? According to R' Banet, the notion that an individual has certain rights with respect to an item merely because of the effort he undertook in connection with that item applies only to the very item itself and not to prospective purchasers of that item. Therefore, this case is not like *The Singed Cake* or *The Olive Tree*—for, in both those instances, the very cake or olives that A desired were scooped up by B. In this case, however, the very maḥzorim published by A would not be sold by B, as B had instead printed up rival maḥzorim that customers might purchase.

In addition, R' Banet noted that this case did not involve certain damages or clear profit to the first publisher, who could not say with certainty that the public would buy his maḥzor, particularly inasmuch as Heidenheim sold his maḥzor at an expensive price. For that reason, “the fish had not set their eye on the bait,” as it were, allowing R' Banet to conclude that this case also was not like *The Fisherman*.

R' Banet also adduced another reason to distinguish the case before him from *The Fisherman* and *The Olive Tree*. He explained that the concept that the second person should not benefit from the first person’s toil applied to those cases because, in each, the first person did not receive any benefit whatsoever from his efforts: *The Fisherman* lost out when the fish swam into the nets of the rival angler, and the *Poor Man* likewise came up empty when the second person gathered up all the olives knocked off the tree. Here, by contrast, the first publisher already had benefited from his effort by selling out his first edition of the maḥzor. Why, R' Banet asked, should that first publisher be able to work to produce his first set of maḥzorim, profit from that work, and then profit again with later editions without any further work on his part, thereby causing a loss to others, *i.e.*, the second publisher, who would be barred from selling his own set of maḥzorim, which he had invested a significant sum to publish?

D. *Respecting the Rema*

Of course, the reasoning recounted thus far put R' Banet on what appears to be a collision course with the famous ruling of the Rema in favor of the Maharam of Padua who published the *Mishneh Torah* by the most famous rabbi of all, Moses ben Maimon (1135-1204). Therefore, R' Banet attempted to distinguish the case before him from the case in which R' Isserles had decided in favor of the plaintiff. First, R' Banet asserted that once the Maharam of Padua received the right to publish the works of Maimonides, the Maharam was confident that others would purchase these works because they were dear to all. Therefore, the case was similar to

Rashi's explanation of The Fisherman—meaning that the Maharam was entitled to prevent his competitor, Giustiniani, from publishing an infringing version.²⁶³

Second, R' Banet asserted that R' Isserles had ruled in favor of the Maharam because Giustiniani had announced in advance that he intended to sell his competing version of the *Mishneh Torah* for one gold coin less than the Maharam, and Giustiniani, according to the Rema's ruling, had the financial resources to sell his version at that cut rate. Therefore, R' Banet explained, the Rema could bar Giustiniani's publication of his competing version because it involved "certain damage" to the Maharam of Padua. In general, however, a competitor should be allowed to enter the marketplace and sell his competing product at a lower price. As R' Banet noted, in The Open Alley case, the Talmud permitted a competing resident to open up a second mill and was not concerned with the possibility that the second mill owner would sell his products at a lower price, thereby causing damage to the first mill owner.

Third, R' Banet contended that, in the case before R' Isserles, Giustiniani adopted the expedient of publishing his competing version of the *Mishneh Torah* at a lower price with the specific aim of injuring the Maharam of Padua; Bragadini, the Paduan's publisher, in turn, would be unable to lower his price because such a decrease would result in "close to a loss." Therefore, the Rema's ruling can be conceptualized as providing protection to the Maharam against predatory pricing.²⁶⁴ R' Isserles was holding only that a publisher, like any other merchant, could not sell his works at below market price with the intent to drive his competitor out of business. Here, R' Banet contended that the second publisher had no intent to harm the first publisher, but merely was seeking to benefit himself. Therefore, the second publisher would not lower the price of his competing maḥzor if it would result in him suffering a loss (in contrast to Giustiniani). Alternatively, if the second publisher were able to lower his price, then the first publisher would also be able to reduce his price (in contrast to Bragadini), thereby reducing the overall market price for maḥzorim and "may a blessing come upon both publishers" for such conduct!²⁶⁵ R' Banet therefore concluded that, in this case, where the second publisher actually sought to publish his competing maḥzor without reducing his price, that attempt to enter the market did not result in "certain damage" to the first publisher and therefore should be permitted.

Fourth, R' Banet attempted to distinguish the two cases by comparing the case before him to The Open Alley and the case before R' Isserles to The Dead End Alley. According to

²⁶³ Neil Weinstock Netanel, *supra* n.22.

²⁶⁴ Perhaps R' Banet believed that the Rema had made a mistake, but was unwilling to cast aspersions on his illustrious predecessor. He therefore avoided rejecting precedent by reinterpreting it as limited to a special case. See text accompanying note 323.

²⁶⁵ The language here plays off of the following: "Rabbi Judah says the store keeper should not distribute roasted grain or nuts to children because he accustoms them to come to his store, but the sages permit him to do so. Also, one should not sell below the market price, but the sages say 'he is remembered for good' . . ." MISHNAH BAVA MEZIA 4:12. Right after discussing the cases of The Open Alleyway and the Fisherman, the Talmud explains that particular Mishnah as follows: Distributing favors is permitted because the store-owner can say to other sellers, "I am giving out nuts, you give out plums." BT BAVA BATRA 21b (also translated as contrasting "walnuts" with "almonds").

Rav Huna's minority view, a resident of an open alleyway can prevent both a resident of a different alleyway and a resident of his own alleyway from opening up a competing business in the first resident's alleyway. However, even according to Rav Huna, a resident of one community could not prevent a resident of a different community from opening up a competing business in that second community. According to R' Banet, it is "possible" that the Rema's ruling was based on the fact that both the Maharam of Padua and Giustiniani were located in the same "alleyway" (the province of Veneto).²⁶⁶ Alternatively, R' Banet posited that, because both the Maharam and Giustiniani were sending their competing versions of the *Mishneh Torah* to the same places where potential customers were located, it was *as if* both were located in the same alleyway. By contrast, what right does a person in one city have to prevent a person in different city from engaging in a competing business? If a person possessed such a right, then all commerce would be nullified and the first person who engaged in a particular business and sent his products to the marketplace would be able to bar all others from engaging in a similar business.

Finally, R' Banet asserted that the two cases were distinguishable because government regulation was different in his own day than those extant three centuries earlier when R' Isserles ruled. R' Banet noted that governments in his own time gave permits to those who want to engage in publishing and other forms of commerce. Through this system, the king collected taxes, people made a living from one another, and the world was able to function. Therefore, how would it occur to someone that one person would be able to prohibit another from competing with him? Such a prohibition would violate the "law of the land" permitting such competition.²⁶⁷ It had to be, in R' Isserles' time, that kings did not oversee printing at all, and publishing was undertaken without permission or permits.²⁶⁸ Now, however, when everything is done with permission of the king, a person in one city does not have the right to prevent someone in a different city from engaging in competition.²⁶⁹

E. *The Policy of Approbations*

²⁶⁶ Although the Maharam was in Padua and Giustiniani was in Venice, the former was within the latter's political orbit. Neil Weinstock Netanel, *supra* n.22.

²⁶⁷ A common trope in rabbinic literature at this juncture (as well as both before and after it) is the requirement that Jews comply with the law of the land in which they reside. BT BAVA QAMA 113a (addressing customs dues). See GIL GRAFF, *supra* n.180, at 2 ("the principle *dina de-malkhuta dina* took on a more expansive role, providing the legal framework for Jewish accommodation to modern Western society"); JACOB KATZ, *supra* n.172, at 48; SIMON SCHWARZFUCHS, *supra* n.469, at 111.

²⁶⁸ It is doubtful that R' Banet engaged in detailed historical research into practices of the sixteenth century. The situation in that regard is clouded. In 1515, the Venetian Senate granted Daniel Bomberg exclusive printing privileges in Hebrew works, a grant that it renewed through 1536 and then later rescinded. Neil Weinstock Netanel, *supra* n.22, at 832-33.

²⁶⁹ We will see later that this dispute is part of a larger struggle, waged by R' Sofer, against the central government taking jurisdiction away from rabbinical courts. See text accompanying note 476.

After explicating the distinctions between the case before him and *Maharam Of Padua v. Giustiniani*, R' Banet turned to another serious question raised by his analysis: If, as already explained, a competing publisher was neither guilty of “theft because of the ways of peace” nor considered an “evildoer,” where did the sages who preceded him derive the right to issue a ban that would result in a benefit to the first person and a loss to the competitor? According to Mahariq *shoresh aleph*,²⁷⁰ even the leader of the generation is not allowed to issue a proclamation that results in a benefit to one person and a loss to the other.²⁷¹ R' Banet answered that, in *Maharam Of Padua v. Giustiniani*, it was possible to explain that the Rema had ruled against Giustiniani's competing version of the *Mishneh Torah* based on an innovative approach that Giustiniani did not suffer an actual loss—for, were it not for the work of the Maharam in producing his original version of the *Mishneh Torah*, Giustiniani would have had nothing.

The implication here is that Giustiniani's version of the *Mishneh Torah* was going to be prepared directly from the Maharam's version. R' Banet then went on to ask about the case before him, wondering how one could explain a ban on a book that already was in existence, such as the maḥzorim at issue in this case. R' Banet noted that, when the Roedelheim maḥzor did not exist, publishers were still printing older versions of the maḥzor. Now that the Roedelheim maḥzor had been published, no one would purchase a maḥzor that was not in the same format as the Roedelheim maḥzor. Therefore, these other publishers would lose out entirely with respect to the older versions of the maḥzor that they were publishing and their hands would be tied because they would not be able to publish a new version of the maḥzor like the Roedelheim maḥzor. Accordingly, R' Banet concluded that the sages must have acted to impose a ban on other publishers because those in the publishing industry were happy that the right to print the Roedelheim maḥzor remain with the first publisher, and that others be prohibited from publishing competing versions. That way, today A would be the first printer and would be able to restrain B and C; when another work arose to be printed, B might be the printer, and could act to restrain A, and C; and, on another occasion still, C would be the one to benefit. In this way, the customary ban arose with consent of all concerned.²⁷²

²⁷⁰ The Mahariq, Joseph ben Solomon Colon (Trabotto), was Italy's foremost Talmudist and scholar in the latter part of the fifteenth century. For more on him, see *infra* n. 300.

²⁷¹ The ruling is famous for deciding “that no one could be forced to take a case to an outside court when there was a court in the place where the defendant was living; for it often happened that rich people took their cases to foreign rabbis in order to make the poor surrender.” Louis Ginzberg, “Joseph b. Solomon Colon,” 4 *The Jewish Encyclopedia* 170 (1903). The tshuva cites the *Mordekhai* for the ruling that rulers of a city levy taxes only with universal consent; then, it analogizes the rulers of a city to the leaders of the generation, and states that even they may not take something from Reuven and give to Shimon in contravention of Torah law. SHE'A LOT U-TSHUVOT MAHARIQ, root a.

²⁷² R' Banet at this point analogized the situation to a passage in which the sages ruled that a Jewish court could order A to return a lost object to B, which would seem to violate the Mahariq's principle that even the greatest sage of the generation cannot issue a proclamation that results in a benefit to one person and a loss to the other. The sage in the Talmud explained that courts may order restitution of objects based on identifying marks, even if Torah law itself does not allow for that ruling. BT BAVA MEZIA 27b. The logic is that all parties in society desire

As R' Banet explained (again citing the Mahariq), there were many potential purchasers of the Roedelheim maḥzor, and the first publisher therefore would make a profit publishing this work. There were no potential purchasers of the older versions of the maḥzor, however, and the publishers of those works thus would not make a profit. Moreover, given that the maḥzor represented the popular publication of the day, one could not even tell other printers to focus their energy on other publications; there was no general consent in the affected industry, accordingly, to enforce this ban on the Roedelheim maḥzor.

R' Banet next addressed the policy reasons that might justify the ban contained in rabbinic approbations. The sages may have imposed bans (such as the one included in the Roedelheim maḥzor) to strengthen those who perform commandments, and save them from damage. If observant people (Heidenheim being the obvious example) were worried that others would be able to publish whatever they chose, they would be inhibited from publishing in the first place, for fear that they would suffer a loss via subsequent competition. Therefore, R' Banet concluded, the ban imposed by the sages would alleviate their fear of committing the resources to initial publishing. R' Banet added, however, that if this were the purpose underlying the ban, those bans should last only until the first person sold out his merchandise. The imposition of a ban for a long period of time, which would prevent others from publishing competing works even after the first person sold out his merchandise, is inappropriate, R' Banet concluded, and not supported by the above rationale.

R' Banet also maintained that the factual realities of the publishing world in his age undercut both the practical basis and the basis under Jewish law for enforcing the ban on publishing other maḥzorim that infringed the Roedelheim maḥzor. R' Banet noted that, in his time, with a proliferation of non-Jewish publishers not obligated to follow any ban that a Jewish authority might impose on publishing, policy reasons in favor of such a ban lack force. A Jewish publisher who follows the ban and does not publish a competing work loses out, whereas non-Jewish publishers are under no parallel disability.²⁷³ Therefore, the ban found in the Roedelheim maḥzor is both illogical and unenforceable.

Finally, R' Banet conceded that, in certain situations, the “Light of the Exile,” Rabbenu Gershom ben Judah had imposed a ban to protect the rights of Jewish store owners, to save them from the losses that would arise from mutual competition. But R' Banet adds that if circumstances were such that non-Jews were willing to engage in competition with the Jewish store owner, then a Jew was also permitted to engage in such competition—for any other rule

such a state of affairs. Today, A will lose inasmuch as he will have to surrender the lost object that he just found. But tomorrow, when A has lost a precious item, the court will order C to return it to him. Thus, in the end, A, B, and C all benefit. That discussion in BAVA MEZĪA 27b parallels the mutual agreement among printers that R' Banet posits here. (In addition, R' Banet cited BAVA MEZĪA 12a-b for another instance of common consent among poor people—every man who glean should be allowed to have his minor son glean behind him, notwithstanding the charge that could otherwise arise of “double-dipping.”)

²⁷³ As R' Banet put it, “*ha-madpisim hagoyim yasigu g’vulo*,” the non-Jewish publishers may overstep his boundary. See the discussion above of unfair competition in the text accompanying note 287.

would simply leave the field open to Gentiles.²⁷⁴ In those situations, R' Banet concluded, Rabbenu Gershom did not impose a ban. Therefore, in the case before him, if “the printer in Vienna”²⁷⁵ (a) has the right to engage in printing, (b) can print what he chooses, and (c) has received a copy of the Roedelheim maḥzor from Heidenheim’s partners,²⁷⁶ and if only Heidenheim and no other Jewish printer has the right to print the Roedelheim maḥzor in his land, then this printer in Vienna would print his competing work and distribute it throughout the world. Better, therefore, is a ruling that other Jews have the right to print a maḥzor in competition with the Roedelheim maḥzor, so that the printer from Vienna would not be able to walk into a wide open market. For, in either case, Heidenheim would lose business—either from the non-Jewish Viennese printer or from the other Jewish printers who would compete with him. The conclusion follows that the sages would not impose a ban on the publication of a maḥzor that would compete with the Roedelheim maḥzor, because such a ban would be counterproductive.

The responsum is signed by “Mordekhai Banet the Insignificant.”²⁷⁷

II. R' Sofer's Initial Responsum

A. Introduction

As already noted, the affiliation between R' Banet and R' Sofer was close. In fact, the latter obtained his first rabbinic post only upon the recommendation of the former. Nonetheless, in his own ruling regarding the enforceability of the ban found in the Roedelheim maḥzor, the

²⁷⁴ R' Banet also cites from the responsa of the Maharshah, Morenu Shlomo ben Yechiel Luria (Poland, 1510-1573), regarding the technical issues of an *arenda*. That term (from the Polish for “leasehold) refers, in essence, to a concession that a person receives from the government or a nobleman for the sale of particular goods, typically a monopoly on distilling or estate management. Jacob Goldberg, “Wine and Liquor Trade” 16 *Encyclopedia Judaica* 541, 542-43 (1972). A common example offered in halakhic texts arises when a Jew receives a monopoly for the sale of brandy and then dies—the legal issue ripens whether such an intangible right can be devised to the decedent’s heirs, or whether instead the general halakhic rule is activated that an intangible right (*davar she’ayn bo mamash*) cannot be bequeathed. An *arenda* represents an exception to that general principle, as the *aḥaronim* made a special rule in this case that an *arenda* is considered equivalent to tangible money, and thus may be devised. Note that the *arenda* represented a widespread custom in Eastern Europe, in whose economic sphere Bohemia and Moravia at that time lay.

²⁷⁵ See text accompanying note 235.

²⁷⁶ See text accompanying note 133.

²⁷⁷ Shortly before that humble tag-line, R' Banet instructed the readers of this responsum not to rely on what he has written in it, but instead to consult their own rabbis and sages who truly understand the Torah. As previously noted, it is difficult to reconcile that admonition with his previous declaration that “the honor of the Torah” required him to speak, even though he usually declined to address matters outside his jurisdiction. See *supra* n.231.

Ḥatam Sofer proceeded to disagree with both the reasoning and the entire rationale of his patron's ruling.²⁷⁸

The ruling in question is responsum 41, issued a mere six months²⁷⁹ after R' Banet's decision.²⁸⁰ In highly unusual fashion, R' Sofer's responsum begins not with his own words, but instead with the reply that they inspired from his opponent. We will turn below to the reprinted letter from R' Banet with which R' Sofer's responsum 41 opens.²⁸¹ But, focusing for the moment on R' Sofer himself, his ruling set forth the bases for his disagreement with the approach followed by the illustrious Chief Rabbi of Moravia.

B. *The Need for Accuracy*

First, R' Sofer expressed surprise that R' Banet was prepared to eliminate the traditional practice of providing approbations and bans, even in connection with the publication of ancient books. Once that practice fell into disuse, two negative consequences ensued: First, the Jewish people became inundated with *Sifrei Ha-Mirus*,²⁸² which we will translate here as “inaccurate texts.”²⁸³ Second, authors of new works began to publish them under the names of earlier, better known rabbis. Thankfully, R' Sofer added, there are still God-fearing people who will only buy a new book if they see that it contains an approbation from a rabbi, who is already known to be God-fearing.

²⁷⁸ There is a Talmudic tradition that one court does not question the competence of its predecessor to reach a ruling. BT BAVA BATRA 138b. Nonetheless, rival rabbinic rulings have been anything but rare in the annals of Judaism. An example is the dispute between Jacob Berab of Safed and Levi ben Habib of Jerusalem regarding the former's efforts starting in 1538, vehemently opposed by the latter, to restore the formal device of rabbinic ordination. Amidst charges and counter-charges, treatises justifying ordination and responsa annulling that device, are two court decisions in Safed itself, one approving ordination and the other invalidating it. JACOB KATZ, *supra* n. 38, at 146-70.

²⁷⁹ At the time R' Sofer wrote in 1823, Hebrew printing had not yet arrived in Pressburg—the first Hebrew press opened there in 1826. MOSHE ROSENFELD, *supra* n.34, at 50.

²⁸⁰ SEFER ḤATAM SOFER, ḤELEQ ḤOSHEN MISHPAT, # 41 (Könyvereskede, Budapest, 1861).

²⁸¹ See text accompanying note 367.

²⁸² What are these “books of Mirus”? The name may possibly reflect a lost author named “Mirus.” But, more convincing is the contention that the sources from which that phrase derives (e.g., BT ḤULIN 60b) intended to refer to the ILIAD and the ODYSSEY (taking the reference as a misspelling for *Sifrei Homirus*, i.e. the “Books of Homer”). See Avraham Shapir, *Yaḥsam shel hakhamim l'safa ul'sifrut ha-yavvanit bit'qufat ha-tana'im*, <http://www.daat.ac.il/daat/history/yahasam-2.htm> (visited May 29, 2008). A third possibility is that the *samekh* at the end is a misreading for a final *mem* (which looks very similar), meaning it should read *Sifrei Himron*, “books of love,” a code word for secular literature. *Id.*

²⁸³ As shown from the conflicting interpretations gathered in the preceding footnote, the meaning here is not pellucid. Based on context, it seems reasonable to infer that R' Sofer was condemning inaccurate texts.

C. *Unfair Competition*

Commenting next on bans against competition (a traditional element of rabbinic approbations), from the beginning of publishing, R' Sofer noted, rabbis throughout the Diaspora believed that it was appropriate to ban unfair competition in order to protect from harm those who engage in a miẓvah. Therefore, such bans were included in every publication.

Given how integral the concept of unfair competition (*hassagat g'vul*) is to copyright protection in the responsa, it is worthwhile to pause for a moment to offer a bit of background on that score. The key biblical text here is: “Thou shalt not remove thy neighbor’s landmarks” (DEUT. 19:14). The simple meaning refers to moving the marker between two neighbors’ fields, essentially as a way of “stealing” that land. But, inasmuch as theft is already prohibited as part of the Ten Commandments, that particular verse could be considered otiose.²⁸⁴ Therefore, later rabbinic law applied it generally to every attempt to encroach unfairly on a neighbor’s property, or even his means of earning a living.²⁸⁵ The following description brings the matter back to the Talmudic page that we have previously encountered:²⁸⁶

The general restrictions on entry often come under the category *hassagat g'vul*—the removal of a neighbor’s landmark. The rabbis extended the concept of *hassagat g'vul* to cover encroachment on another’s business. We begin our analysis of entry restrictions with *Bava Batra* 21b, in which R’ Huna rules that the resident of an alley with a business in that alley can prevent a resident of another alley in the same town from opening a competing business. In contrast, R’ Huna ben R’ Joshua argues that entry cannot be prevented if the entrant is a resident of another town and pays taxes to this one. Moreover, if the entrant is a resident of the same alley, he cannot be prevented from competing. The opinion of R’ Huna ben R’ Joshua prevails. What remains unresolved is whether the entry into one alley by a resident of another alley in the same town is allowed.²⁸⁷

Returning now to R’ Sofer in responsum 41, he continued that printing bans differ from The Poor Man Searching for a Singed Cake, discussed by R’ Banet. (As will be recalled, in that case the Second Man who obtains the cake sought by the Poor Man is called an “evildoer.”)²⁸⁸ R’ Sofer explained that, in that instance, the law afforded the Poor Man no remedy against the Second Man because, even if the Poor Man was unable to make a profit in one location, he could still profit in a different location (by searching for an opportunity elsewhere). Reverting to the facts of our own case, by contrast, it is impossible for a person to publish any work without making a large initial investment. Therefore, if a second publisher were to come along and produce a competing work, that party would cause the first publisher to lose his investment and

²⁸⁴ Menaḥem Elon, *supra* n.114, at 1462, 1464 (tracing early right of attribution, in nature of copyright, to SIFREI DEUT. 188 and TOSEF. BAVA KAMMA 7:13).

²⁸⁵ LOUIS JACOBS, *THE JEWISH RELIGION: A COMPANION* (Oxford Univ. Press 1995).

²⁸⁶ See text accompanying note 237.

²⁸⁷ Dennis W. Carlton & Avi Weiss, *supra* n.237, at 268.

²⁸⁸ See text accompanying note 258.

the fruits of his labor. For this reason, R' Sofer concluded, the Rema issued his ruling barring Giustiniani from publishing his competing version of the *Mishneh Torah*.²⁸⁹

R' Sofer then cited with approval the proposition that it is appropriate to go beyond the scope of the law in order to protect book publishers. If a decree were not issued to prevent others from engaging in unfair competition with book publishers, people would stop publishing books and book-selling²⁹⁰ would be eliminated among the Jewish people.

D. Herem Ha-Yishuv

R' Sofer next addressed, both directly and indirectly, several points advanced by R' Banet. First, he responded to the concern raised by R' Banet that the bans associated with approbations are ineffective, insofar as non-Jewish publishers do not have to abide by them. R' Sofer riposted that, if publishers will not abide by rabbinic bans, it would be appropriate to impose bans on potential purchasers, in order to prevent them from buying books that were published through unfair competition.²⁹¹

Second, R' Sofer agreed with R' Banet that a rabbi in one city generally cannot impose his own decree upon another city that has its own rabbinic leader. However, R' Sofer maintained that the bans on publishing associated with approbations stem from years past, and were imposed by the leaders of the Jewish people throughout the world. In this manner, precedent upholding the ban on unfair competition supports his point of view over that of R' Banet, he concluded. In this context, R' Sofer analogized the ban contained in publishing approbations to the *herem ha-yishuv*,²⁹² a familiar ban²⁹³—parallel to the Christian Merchant Guild²⁹⁴ extant in medieval

²⁸⁹ It bears mention that R' Sofer, as a general matter, elevated the status of R' Isserles into “the legal code par excellence,” in contrast to previous generations who—in keeping with R' Isserles’s own stated intention—“had regarded [R' Isserles] as no more than an aid to the decision makers.” Moshe Samet, *supra* n.144, at 258. R' Sofer even invoked a clever slogan for that purpose: “All of Israel goes out with a raised hand.” The word for “raised hand” is “rama,” the acrostic for R' Isserles (called “Rama” or “Rema”). *Id.*

²⁹⁰ The abbreviation *mem-samekh* could mean a great variety of things—the translation here takes it as *mokher sfarim*. See text accompanying note 220 *supra*.

²⁹¹ Again, this matter foreshadows R' Sofer’s struggle against the central government taking jurisdiction away from rabbinical courts. See text accompanying note 476.

²⁹² He also mentions the *herem ha-shidukhim*, a ban placed on a bridegroom who refused to marry his bride. Haim Hermann Cohen, *supra* n.96, at 354 (quoting Maharam of Rothenburg).

²⁹³ Even without that formal ban, Jewish guilds and communities banded together, for such purposes as to protect peddlers’ exclusive territories, Steven M. Lowenstein, *supra* n.141, at 132, and not to hire each others’ former employees, *id.* at 134.

²⁹⁴ “The core of a merchant guild was an administrative body that supervised the overseas operation of merchant residents of a specific territorial areas and held certain regulatory powers within that territorial area.” Avner Greif, Paul Milgrom, Barry R. Weingast, *Coordination, Commitment, and Enforcement: The Case of the Merchant Guild*, 102 J. POL. ECON. 745, 755

Europe²⁹⁵—that prevented Jews, under threat of excommunication, from settling in a town and doing business there, without the agreement of current residents, even if they shared in its tax burden.²⁹⁶

It bears mention that the citation to the *herem ha-yishuv* is particularly apropos, inasmuch as it has been traced back to the exact same Talmudic page where the Open Alley case is discussed [BT BAVA BATRA 21b], and follows the majority view of Rav Huna son of R' Joshua enunciated there.²⁹⁷ Although not every authority subscribed to the *herem ha-yishuv*, its “restriction on settlement was widely practiced.”²⁹⁸ The Mahariq,²⁹⁹ never one to avoid contention,³⁰⁰ disparaged anyone who would oppose the *herem ha-yishuv*, asking “Who is the person so lacking in intelligence that he would err in this?”³⁰¹

(U. Chi. Press 1994). Those authors recount such matters as the group of guilds in five Flemish that banded together in 1261, the Genoese boycott of Tabriz in the 1340s, through a German embargo of Bruges in 1358. *Id.* at 755-58.

²⁹⁵ See L. Rabinowitz, *The Talmudic Basis of the Herem Ha-Yishub*, 28 JEWISH Q. REV. 217, 217 (U. Penn. Press 1938) (the similarities are “too striking to be accidental and the coincidences of time, place and regulations cannot be explained away as mere coincidence”); Steven M. Lowenstein, *supra* n.141, at 135 (“Even more destitute than the resident poor were Jews without residence permits who traveled from town to town”).

²⁹⁶ See Immanuel Jakobovits, “Herem ha-Yishuv,” 8 *Encyclopedia Judaica* 355-56 (1972). “Despite the view in major codes (for example, *Mishnah Torah*, *Shulhan Arukh*) endorsing the free-entry philosophy of R' Huna ben Joshua, these *herems* were widespread and would appear to be of much greater significance in restricting entry than the doctrine of *hassagat g'vul*.” Dennis W. Carlton & Avi Weiss, *supra* n.237, at 271.

²⁹⁷ L. Rabinowitz, *supra* n.295, at 221.

²⁹⁸ DEAN PHILLIP BELL, *supra* n.17, at 73. To the contrary, however, see ROBERT BONFIL, *supra* n.14, at 58.

²⁹⁹ We have previously met R' Colon, known as the Mahariq. See *supra* n.270. It should be added that his collection of responsa one of the few among his contemporaries to be popular enough to warrant publication, and even a second edition at that. ROBERT BONFIL, *supra* n.14, at 149.

³⁰⁰ Louis Ginzberg. *supra* n.271, at 170-71 (Mahariq threatened to place *herem* on Chief Rabbi of Turkey when he was “carried too far in his zeal for truth and justice”). His contentious personality manifested itself as well in the printing context. The Mahariq bitterly opposed dissemination of the first Hebrew book published during its author’s lifetime, the work of a Jewish humanist who dared to analyze scripture in the classical terms of Cicero and Quintilian. R' Colon found himself in opposition to Judah Messer Leon. ROBERT BONFIL, *supra* n.14, at 166-67. “The book was hardly finished when the conflict divided the Jewish community of Mantua into two camps. This strife became so keen that in 1476-77, the Marquis of Mantua, to save himself from the importuning of the wrangling rabbis, banished both of them from the city.” JOSHUA BLOCK, *supra* n.163, at 96.

³⁰¹ DEAN PHILLIP BELL, *supra* n.17, at 72-73.

Third, R' Sofer expressed bewilderment with R' Banet's position that the imposition of a publishing ban in an approbation interferes with the rights of publication now granted by particular governments.³⁰² What difference does it make to the government, asked R' Sofer, whether one person or another publishes a particular title, so long as the affected publisher pays the applicable taxes to the government each year? Contrary to R' Banet's position, R' Sofer concluded that governmental control over publishing rights exerts no effect on the viability and effectiveness of rabbinic bans set forth in approbations.

E. A Family Matter

R' Sofer ended his responsum by relating a story involving his father-in-law, R' Akiva Eiger (1761-1837), rabbi of Posen, Poland. A rabbi in his region had published the claim that R' Eiger had concluded that a ban is not valid (which would, of course, accord with R' Banet's view). R' Eiger complained to his son-in-law about the brazenness of this claim, R' Sofer added that he did not know who spread that false rumor, but could now appreciate that it must be the rabbi of Dyhernfurth—the correspondent who had posed the initial question to R' Banet.³⁰³

Background for that enigmatic coda comes from a later responsum, authored by Yechezkel Yaakov Weinberg (1878–1966).³⁰⁴ In it, R' Weinberg quotes from R' Sofer's grandson's biography.³⁰⁵ After recounting the efforts of Wolf Heidenheim to print a maḥzor free of errors, he relates that “another printer came from the city of Dyhernfurth, by the name of R' Zevi Hirsch, printed up a new maḥzor with the commentary and translation of R' Wolf Heidenheim, without his permission,” with the result that Heidenheim brought a case against him. The recitation continues that R' Akiva Eiger attempted to broker a compromise between Heidenheim and the new publisher, without success. It also describes the involvement of R' Banet in the matter.³⁰⁶

Finally, R' Weinberg includes in the responsum a description of an earlier copyright dispute also implicating R' Akiva Eiger, this one involving the Slavuta Talmud.³⁰⁷ After the

³⁰² See text accompanying note 484.

³⁰³ The target of R' Sofer's ire may have been R' Moshe Meisels, Av Beit Din of Dyhernfurth. NAḤUM RAKOVER, *supra* n.133, at 166 n.15, 182 n.75.

³⁰⁴ SHE'A LOT U-TSHUVOT SERIDEI EISH, pt. 1, # 145.

³⁰⁵ See text accompanying note 148.

³⁰⁶ Another source likewise recounts that R' Zevi Hirsch had heavily invested in the publication of the maḥzor and was on the verge of bankruptcy. Hirsch argued to R' Eiger that he had made a *bona fide* investment, upon receiving permission to print the maḥzor from the Av Bet Din of Kempna, and had even contacted Wolf Heidenheim to offer him thirty “exemplars” to give his consent to the publication. Although R' Eiger responded by writing a letter regarding the dispute to Wolf Heidenheim in an effort to reach a compromise, he completely agreed with his son-in-law as a matter of applying the law and he (R' Eiger) had no authority to overrule the custom of approbations in effect in Germany and Poland for many years. NAḤUM RAKOVER, *supra* n.133, at 167 n.20, 181-82.

³⁰⁷ This episode forms a separate chapter in the forthcoming volume, cited *supra* n.21.

time-frame listed in the ban on that work expired, another publisher in Vilna-Horodna put out a new edition of this work. When R' Akiva Eiger sided with that second publisher, the first publisher spread a false rumor that R' Akiva Eiger was old and feeble, so his son was calling the shots—meaning that the world should discount the report about R' Akiva Eiger's ruling. After disseminating that vicious rumor, those publishers suffered a calamitous setback, at which point they went to R' Akiva Eiger in an effort to pacify him, and to ask his forgiveness. He pardoned the offense to himself, but not to his son or to the Torah. When the publishers remonstrated that he should be more forgiving, he adamantly refused.³⁰⁸

R' Sofer may have conflated two copyright disputes into one. Did he conclude that the rumormonger against his father-in-law in the Slavuta copyright case must be the same individual who spread a rumor about him in the Roedelheim copyright case? It remains unclear whether his identification of the culprit as the rabbi of Dyhernfurth is accurate. What is beyond question, however, is that R' Sofer wished to rule unambiguously against the second printer in Dyhernfurth who was publishing the Roedelheim maḥzor, unlike the contrary position taken by R' Banet.

The ruling, dated Friday, 24 Adar 5583 (March 7, 1823),³⁰⁹ is signed by “the insignificant Moses Sofer from Frankfurt am Main.”³¹⁰

III. R' Banet's Later Defense

After having supported the advancement of R' Sofer in 1793 with the fabulous praise quoted above,³¹¹ R' Banet must have felt the sting of the latter's relentless attack. He therefore issued a new ruling, defending his earlier point of view. This one is dated Wednesday 7 Nisan 5587, corresponding to April 11, 1827. Given that five years had lapsed since the issuance of his first ruling in the matter, R' Banet must have been exercised, indeed, to feel the need to respond again at such length—and to have taken such an inordinately long time to do so.³¹²

The particular responsum in question is numbered 8 in the published collection, the editor having arranged it directly following the one that he first wrote on the same subject in 1822 (responsum 7).³¹³ After some perfunctory praise for R' Sofer at the outset, R' Banet attacked head-on R' Sofer's position that rabbis throughout the Diaspora believed that it was appropriate

³⁰⁸ This portion of the responsum quotes R' Akiva Eiger in Yiddish: “I am the honor of the Torah in this generation.” Compare his son-in-law's similar stance. See text accompanying note 657.

³⁰⁹ Note that a later reprinting mangled the date, causing some confusion about when the responsum actually issued.. See *infra* n.369.

³¹⁰ Such was his custom. YAAKOV DOVID SHULMAN, *supra* n.146, at 59.

³¹¹ See text accompanying note 177.

³¹² The contrast could not be more striking between the two rabbis, given that R' Sofer himself took less than three weeks to compose responsum 41! See *infra* n.371.

³¹³ PARSHAT MORDEKHAI, *supra* n.225, # 8. Indeed, the responsum begins with the notation that it is on the same subject as its predecessor (*tshuva b-'inyan ha-na"l*).

to ban unfair competition in order to protect from harm those who engage in a *miẓvah*. That proposition is difficult to accept, he concluded, “for aren’t the publishers that come afterwards equally engaging in a *miẓvah* by producing books that can be purchased at low cost?”³¹⁴ Moreover, most printers are not intending at all to engage in a *miẓvah*, but instead are just out to make a profit.³¹⁵ Someone who labors in his study to produce something new might qualify as a fulfilling a *miẓvah*. But if the first publisher is merely printing an old book, he no more qualifies than the second publisher.³¹⁶

Not only did R’ Banet dispute R’ Sofer’s legal conclusions, but he questioned as well the latter’s historical assumptions that rabbis throughout the Diaspora believed that it was appropriate to uphold the ban: “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 that ‘use the Torah as a spade.’” That reference is harsh, indeed, inasmuch as Torah occupies its own supernal realm, meaning it is highly inappropriate to use it “as a spade,” *i.e.*, as a mere instrumentality to obtain the sublunary benefit of earning money.³¹⁷

Moving on, R’ Banet took issue with R’ Sofer’s distinction regarding The Poor Man Searching for a Singed Cake, who could purportedly make a profit in a different location, as opposed to the first publisher, who stands to lose his investment. R’ Banet maintains that there has never been such a thing as a rabbinic ban against publishing a book *per se*, but only a ban issued at the request of the book publishers³¹⁸ for their mutual benefit.³¹⁹ Effectively, those

³¹⁴ R’ Banet brought an explicit proof for his viewpoint in the edict of Ezra the Scribe that peddlers of perfume cannot stop newcomers from encroaching on their sales territory, in order that their wares should remain accessible to the daughters of Israel. See SHULḤAN ARUKH, ḤOSHEN MISHPAT, ch. 156, § 6. The parallel is that both publishers of maḥzorim and peddlers of perfume enable their purchasers to perform a *miẓvah*.

That ruling is directly on point here. For, in his previous responsum, R’ Banet had explicated BT BAVA BATRA 21b. The current ruling stems from the very next page. *Id.* 22a. See ARTSCROLL BAVA BASRA, *supra* n.238, at 22a¹ (offering explanation, “Ezra desired to promote family harmony by ensuring that women would have the means to make themselves attractive to their husbands”).

³¹⁵ R’ Banet cited SHULḤAN ARUKH, *Orekh Haim* 433:8, an involved discussion of when a person must search for unleavened crumbs before Passover in a collapsed wall that may be infested by scorpions, and start a construction project midway into the search. The common element is apparently that an activity may begin as a *miẓvah*, but loses its elevated status once the intention became pecuniary.

³¹⁶ In that case, the second publisher does not depend on the activity of the first one in order to perform their *miẓvah*, meaning that “printing a book that has already existed for ages is more similar to peddlers” of perfume.

³¹⁷ See MISHNAH AVOT 4:5. See also *supra* n.354.

³¹⁸ The parallel to the Stationer’s Guild should be noted. See generally ADRIAN JOHNS, *THE NATURE OF THE BOOK* (U. Chicago Press 1998).

interested parties agree: “Today it will be profitable for this one and after a while it will be profitable for another one who also prints it.” Given that, in this instance, a rival publisher is objecting to the ban, prohibition is not indicated here, he concluded. Moreover, in our day, when most Hebrew publishers are non-Jews and thus not obligated to abide by the ban, R’ Banet made the same point that he advanced earlier, namely that upholding the ban would simply leave the field open to Gentiles.³²⁰

Turning to the case involving Giustiniani, R’ Banet justified the Rema’s stance by positing that the Maharam of Padua had essentially produced a new book with original insights, and thus stood in contrast to someone who simply reprinted a standard old work. He noted that the second publisher in that instance accordingly benefited from the first one’s work³²¹ and further commented that the Maharam of Padua had paid the printer in advance, which he clearly would not have done had he known that Giustiniani would come along and undercut his price.³²² R’ Banet therefore concluded that the Rema had issued his ruling against the background of very special circumstances, not applicable in most instances.³²³

Moreover, R’ Banet objected to the very notion of a ban on doing that which it is lawful to do—if printing a given book is not independently actionable, the rabbis cannot proscribe it through a binding ban.³²⁴ To do so would impinge on the authority of the civil authorities.³²⁵ Certainly, rabbis cannot make rulings that apply extra-territorially, according to the Spanish Talmudist, Rabbi Yizḥak bar Sheshet Perfet (1326-1408). To do so would doubly fly in the face of the civil authorities.³²⁶

³¹⁹ R’ Banet cites here SHULḤAN ARUKH, *Hoshen Mishpat* 231:28, which sets forth the rights of members of a given industry to establish among themselves uniform norms and to punish those who do not conform to those norms.

³²⁰ See text accompanying note 274.

³²¹ To a modern mind, the question immediately intrudes whether that same consideration is not equally applicable to Schmid’s copying of Heidenheim’s maḥzor. Yet the responsum does not venture into that territory.

³²² In this instance, the contrast between that earlier ruling and the Roedelheim maḥzor very much holds, unlike the matter indicated in the previous footnote.

³²³ See *supra* n.264.

³²⁴ At this point, R’ Banet also advanced the lament that his own generation had sunk so low that people would not listen to the rabbis, even if they attempted to vindicate the ban. (One gathers from Jewish history that rabbis have shared that particular lament, regardless of the century in which they lived.)

³²⁵ Once more, it is proper to advert to R’ Sofer’s project of protecting the jurisdiction of rabbinical courts. See text accompanying note 476.

³²⁶ Imagine that citizens of Prague were to ignore Czech law based on rulings of a local rabbi. That specter raises one level of civic discord. Now, imagine that those same citizens were to ignore Czech law based on rulings of a rabbi located in Moravia, France, or even in Recife, Brazil. The problem is compounded.

What about the *herem ha-yishuv*, cited by R' Sofer?³²⁷ It is not to the contrary, R' Banet concluded, as he viewed it as neither universally applicable³²⁸ nor as binding upon all.³²⁹

On top of those considerations, any written ban—such as, perforce, one printed in a book—is invalid. To bring the force of law to a proscription, the ban must be pronounced orally. Given that Heidenheim's case relies on R' Horowitz's written words rather than his spoken admonition, R' Banet concluded that it is fatally deficient.³³⁰

Moving to the last point, it will be recalled that R' Sofer's concluded, "What difference does it make to the government whether one person or another publishes a particular title, so long as the affected publisher pays the applicable taxes to the government each year?" On this matter, R' Banet noted that he personally had tested the validity of that proposition. At that point, his analysis turned defensive and autobiographical. Before reaching those non-legal ruminations, it is necessary to set the stage further; accordingly, they will be discussed below.³³¹

IV. R' Sofer's Subsequent Rebuttal

A. *Strange Tshuva*

We now reach responsum 79—a literary composition that is more than passing strange, in three separate respects.³³² First, R' Sofer began it by stating "I have now reviewed the laws of *yored l'omanut h'averu*." The odd thing about that introduction is that it starts with a proclamation about what "I have reviewed," rather than proceeding based on a question that another posed to the sage for resolution. In this manner, the flavor is that these are remarks *sua sponte*, designed for self-expression as opposed to being truly a response.³³³

³²⁷ It will be recalled that R' Sofer also cited the *herem ha-shidukhim*. See *supra* n.292. R' Banet explained the ban on breaking off an engagement as being rooted in the need to avoid embarrassment.

³²⁸ R' Banet denied the validity of R' Sofer's tracing of the *herem ha-yishuv* to antiquity. Relying on the Rema's gloss on SHULHAN ARUKH, *Hoshen Mishpat* 156:7, he concluded that there are places that impose it and others that do not, meaning it is not an ancient, universally-applicable decree.

³²⁹ R' Banet read later interpretations of the Rema to hold that the *herem ha-yishuv* does not directly apply as a ban upon a newcomer who arrives at a given locality, given that the ban does not originate in law but is more a contractual matter among the pre-existing residents there that they will not deal with the newcomer.

³³⁰ For an analysis of that proposition, see text accompanying note 385.

³³¹ See text accompanying note 403.

³³² SEFER HATAM SOFER, *supra* n.280, # 79.

³³³ We have previously defined "responsa," as their name implies, as "answers . . . to queries from lay people, communities, or other rabbis." See text accompanying note 215. This particular responsum seems to break that mold. It is also out of keeping with R' Sofer's own

To translate *yored l'omanut h'averu*, it literally means “descending on one’s fellow’s craft,” but perhaps is better rendered as “supplanting another’s livelihood.” In any event, it appears to be a variant formula³³⁴ referring to the concept of “unfair competition,” which we have already encountered in the phraseology of “encroaching on boundaries” (*hassagat g’vul*).³³⁵

A second strange aspect of this discussion, which amplifies the first, is that it is undated. All the other responsa treated herein either begin or end by listing the precise day of the week and corresponding date of the Hebrew calendar on which the decisor rendered his determination. No such indication exists here. Again, one is left with the sense that the prod for analysis was not a questioner’s request for guidance, but instead the Ḥatam Sofer’s own urge to clarify some matters that had long dogged him. Nonetheless, one can hazard a guess as to when this responsum was composed: Given that it responds point by point to matters raised by R’ Banet in responsum 8, it had to have been written after that latter one issued in 1827.

Historians have already noted that “rabbinic response . . . contain historically significant data and commentary,” but that they suffer from the pitfall that it is “not even always clear how the events presented to the rabbi for a halachic decision should be interpreted or what their historical significance is.”³³⁶ In the current case, the lack of a questioner renders cloudy even the precise fact pattern R’ Sofer was addressing. Accordingly, we must proceed with caution.

The third oddity about this responsum, which again works in tandem with the other two, is its extraordinary length. The entire collection of the Ḥatam Sofer’s economic responsa occupies 160 pages, each formatted with a double column.³³⁷ Included therein are 207 responsa,³³⁸ meaning that the average responsum occupies about 1.3 columns; among them, some are very short, consisting of only a brief paragraph.³³⁹ By way of benchmark, responsum 41 (R’ Sofer’s first foray into the Roedelheim maḥzor) was typical, covering a bit more than one column. By contrast, the instant responsum 79 continues seemingly without end, until almost ten columns have been completed. As such it is by far the longest³⁴⁰ of all R’ Sofer’s responsa in his

practice that he would weigh in on disputed issues only on the basis of either a judicial notice or in response to both parties’ request. JACOB KATZ, *supra* n. 38, at 460.

³³⁴ See Dennis W. Carlton & Avi Weiss, *supra* n.237, at 267.

³³⁵ See text accompanying note 287.

³³⁶ Mordechai Breuer & Michael Graetz, *supra* n.53, at 3. See Marion A. Kaplan ed., *supra* n.141, at 8 (“Sometimes one cannot determine exactly where or when the case took place or even whether the case was actual or hypothetical.”).

³³⁷ SEFER ḤATAM SOFER, *supra* n.280, *passim*.

³³⁸ Although over 1200 of R’ Sofer’s responsa have been published, the focus here is on those collected in *Hoshen Mishpat*, treating primarily economic torts.

³³⁹ Examples are responsa 14 and 171. *Id.*

³⁴⁰ The only one that even comes close is responsum 1, which is a bit less than six columns, and therefore much shorter than responsum 79.

collection of *Hoshen Mishpat*.³⁴¹ One gathers that it was indeed a profound problem abstracted in R' Sofer's mind, that required elaborate thought to bring down to earth.³⁴²

B. *The Jealousy of Teachers*

Because the discussion is more in the form of a learned treatise exhaustively running through the various Talmudic strains that form the Jewish law of unfair competition than focused on the precise principles that govern Wolf Heidenheim's claims, it is beyond the current scope to delve into all its twists and turns. Suffice it to say that it replows the familiar field of the Open Alley and the Fisherman, juxtaposing the views of *rishonim* as to how to understand the operative distinctions and adding to it an additional consideration, present on the same page of the Talmud. *Bava Batra* 21b clarifies that even Rav Huna—whose minority view, it will be recalled, defines the tort of unfair competition broadly—permits unrestricted competition in the area of Torah education. The reason is that competition in that domain fosters improved Torah knowledge: *kin'at sofrim tarbeh hokhmah*.³⁴³

The phrase just quoted praises increased wisdom that results, literally, from “the jealousy of scribes”—a ramified reference, given the etymology of R' Sofer's own surname! The meaning, as R' Sofer takes it, is convoluted: Normally, when A is in business and then B displaces A, then B might become indolent from lack of competition. But in the case of scholars, if B displaces A, then even if B cannot earn a good livelihood from teaching, he will still exert himself to the limit in perfecting his art, because teachers of Torah are inherently driven (*i.e.*, the jealousy of teachers lest someone exceed their intellectual prowess keeps them on their toes, even if they do not economically benefit as much as they could).³⁴⁴

From those considerations, R' Sofer concluded that, outside of the special case of Torah teachers, whenever there is reason to fear that a newcomer will become indolent after putting his competitor out of business, we should not allow one business to harm another.³⁴⁵ “There is no

³⁴¹ See *supra* n.176.

³⁴² There is a long pedigree for responsa to address what the rabbi thinks the reader should know, rather than what the reader asked. See Mordechai Breuer & Michael Graetz, *supra* n.53, at 235 (Prague rabbi in eighteenth century “printed excerpts from Euclid's geometry at the end of his work of responsa, with illustrations, because of its ‘enormous utility for our teachings’”).

³⁴³ The proposition also appears on the previous page, BT BAVA BATRA 21a. For an economic analysis of that aspect of Jewish law, see generally Dennis W. Carlton & Avi Weiss, *supra* n.237.

³⁴⁴ Here is the way a modern explanation unfolds: “The second teacher, wary of the jealousy felt toward him by the teacher he replaced, will exert himself all the more, lest the other teacher be afforded an opportunity to embarrass him by pointing out his shortcomings to the townsfolk.” ARTSCROLL BAVA BASRA, *supra* n.238, at 21ba³.

³⁴⁵ Here is how another commentator synthesizes the matter:

The *Hatam Sofer* (*Hoshen Mishpat* 61 and 118, cited by *Pithei Teshuvah* 156:3) understands that even Rav Huna the son of Rav Joshua permits

other conclusion, for we do not say “he is to be remembered for good” unless one sells cheaply and thereby the buyers profit and he causes no damage to the [other] sellers’ principal. But to deprive their livelihood—no.” In this way, R’ Sofer expressed the sensibility that financial damage (or perhaps ruin)³⁴⁶ can justify entry restrictions (a view that, moreover, has carried forward into more modern interpretations of Jewish law.)³⁴⁷

competition when the new store will only **decrease** the profits of the original proprietor. However, competition that will **eliminate** the original proprietor’s ability to earn a livelihood is forbidden. The *Hatam Sofer* quotes the *Aviasaf* as a precedent and asserts that Rashi agrees with the *Aviasaf*. Rashi (mentioned above) explains that the lenient view in the Gemara permits competition because “whoever will come to me will come to me, and whoever will come to you will come to you.” Surely, argues the *Hatam Sofer*, Rashi would agree that if the new competitor’s presence made it nearly impossible for consumers to go to his rival’s store, this claim is untenable. Everyone would forbid opening the new store in such a case. The *Hatam Sofer* thus concludes that none of the *Amoraim* ever sanctioned destroying someone else’s livelihood completely.

The *Hatam Sofer* (*Hoshen Mishpat* 79) adds that a community may administer lashes to one who competes unfairly. He bases this on the aforementioned responsa of the Rama (who appears to forbid non-Jews, too, from competing unfairly) and *Mas’at Binyamin*, both of which view unfair competition as a heinous offense. It is worth noting that the *Hatam Sofer* explicitly prohibits unfair competition even when the original merchant knows another trade or can support himself with other money.

Not all *Aharonim* subscribe to the *Hatam Sofer*’s limitations on competition. For example, the *Hatam Sofer* notes that the *Havot Ya’ir* (*Teshuvot* 42) actually derives the reverse from the aggadic passage (cited above from *Makkot* 24a) in which King David praises one who does not enter his fellow’s trade. The *Havot Ya’ir* reasons that David considers this trait a sign of **piety** precisely because it is **technically permitted** (as long as one is a local resident). David commends one who refrains from competing with his friend for going **beyond** the letter of the law. The *Pithei Teshuvah* also cites the *Beit Efrayim* (*Hoshen Mishpat* 26-27), who writes that common practice in his community was apparently not to follow the *Aviasaf*’s view. His community permitted entrepreneurs to open new hotels at the city gate, despite the fact that all who entered the city saw the new hotels before seeing the older hotels inside the city.

R’ Chaim Jachter, *supra* n.240 (emphases original; footnotes omitted).

³⁴⁶ “The *Hatam Sofer* himself distinguishes between weakening someone’s business and totally ruining it, and he only prohibits the latter.” R’ Chaim Jachter, *supra* n.240, fn.13.

³⁴⁷ R’ Moshe Feinstein (b. 1895) agreed and added that the reduction in the incumbent’s earnings below the average of his peer group can justify entry restrictions. Under the protectionist’s view, these general entry restrictions do not apply if the financial ruin is due to the incumbent’s unwillingness to become more

C. *The Policy of Approbations (Revisited)*

With those preliminaries out of the way, the responsum returned to our core domain. R' Sofer explained that the rabbis instituted the custom of the ban upon book publishers, "so that they would refrain from trespassing upon the boundary of the initial publishers for a certain period." Referring to the case involving the Maharm of Padua, he dates the custom of issuing approbations from after that lawsuit:³⁴⁸ "And I have scrutinized books and found proof of an approbation for nearly 200 years."³⁴⁹ From that time onward, approbations were routinely inserted to prevent trespassing, so that those engaging in a *miẓvah* would not be harmed.

R' Sofer then delineated the identify of those who engage in a *miẓvah*. Homiletically,³⁵⁰ he derived that the publishers of books, together with book merchants (including middlemen, *i.e.*, "their merchants' merchants") are engaging in good deeds even though their whole intent is to benefit themselves.³⁵¹

it is well known that it is impossible for a printer [to make a profit] if he does not print hundreds and thousands of books. But we, the nation of God, are a small minority in this country and it is impossible that they [printers of Jewish books] will [be able] to sell [a sufficient amount of books] in this country [because] the books of the Talmud and the halakhic authorities and their commentators are only needed by diligent Torah learners, and they are a small minority because of our many transgressions.³⁵² And since it is impossible for every person to print an immense and great amount of books [in a single production of copies], accordingly the whole world is to be considered as one town, and [the principle of whereby a second merchant cannot be prevented from opening up a competing

efficient. However, if the incumbent lacks the ability to become more efficient, then protection is accorded. In other words, under the protectionist rulings, a firm with a superior technology can be prevented from entering and competing if the result would be the financial ruin of the incumbent.

Dennis W. Carlton & Avi Weiss, *supra* n.237, at 269.

³⁴⁸ "It seems that this initially commenced after the Maharam of Padua printed the Rambam's books, and a certain Gentile trespassed upon his boundary, and the Rema issued his decree, as explicated in his tshuvot."

³⁴⁹ Actually, the provenance of that earlier ruling from the 1550s makes the lapse of time over 250 years.

³⁵⁰ R' Sofer proceeds based on an interpretation of DEUTERONOMY 16:7, which nominally deals with observance of Passover, and to it adds another lengthy excursions about eating tithes in Jerusalem.

³⁵¹ R' Sofer adds that the scribes of old in Jerusalem, who produced Torah scrolls and ritual objects, were necessary for the sound functioning of society, even though admittedly they worked for their own commercial benefit.

³⁵² This phraseology is not uncommon in R' Sofer's writings. See., e.g., JACOB KATZ, *supra* n.38, at 262.

business if he pays taxes in the first merchant's town] is applicable everywhere under the Master of the World, may His name be blessed. And if another person shall publish this book within a short period [after the original printer has done so]—even at a distance of one hundred *parsa'ot* [the length of a continent!]—[the original printer] will not sell his books, and he will lose that which belongs to him. And who is such a fool to draw near printing, especially small books and prayer books and maḥzorim, which are inexpensive; Any printer is sufficiently [capable of accomplishing this] for the inhabitants of our region.

R' Sofer noted that he had seen maḥzorim printed in Amsterdam in 1738, which did not contain a ban. During that era, a prominent rabbi inadvertently issued an approbation and ban on a small maḥzor; but the custom at that time was not to issue approbations for such matters as small volumes of the *Shulḥan Arukh*, unless they contained some new item such as commentary. But regarding all other books of the Talmud, the danger remains that, without legal protection, printers may “become indolent” and decline to publish books, with the attendant risk of financial ruin. Under those circumstances, there would not be sufficient books available to those engaging in Torah study.³⁵³

For these reasons, concluded R' Sofer, it is appropriate to erect a fence to protect the initial printers of a book, even though the halakha does not mandate the fence (implicit in the very concept of it being a “fence,” one might add), and even though the Sages of Israel did not subscribe to such a decree *en masse* and as a unified group. “In any event, everybody has adopted this custom during the past several hundred years.” R' Sofer cited an eleventh century book that he saw printed in 1602, containing an approbation and ban for 10 years, signed by various luminaries.

D. *Wolf Praise*

Having established that even reprinting old works deserves legal support,³⁵⁴ it follows *a fortiori* that printers who publish a new item deserve legal protection. Singling out those who proofread books, he heaps praise on “our teacher and rabbi, the wise³⁵⁵ and pure Wolf

³⁵³ A contemporary of R' Sofer noted that, in years past when books were scarce, sages had permitted themselves to use volumes that contained secular commentaries; but with ready access to more printed works, that practice may no longer be condoned. Meir Hildesheimer, *supra* n.144, at 182.

³⁵⁴ As a technical matter, however, those who print halakhic rulings are forbidden profit and physical benefit in this world, and should instead await their heavenly reward. See *infra* n.317.

³⁵⁵ This excerpt bears on a small dispute recently ventilated on the pages of HAKIRAH. The point is made about

the Chasam Sofer's singular use of the title “*Chacham*” and not his usual Rabbinical titles in the ten times he mentions R. Heidenheim in his writings, the same title with which he addresses Moshe Mendelssohn.

Nosson Dovid Rabinowich, *supra* n.110, at 260. The actual phraseology that R' Sofer used here is ההכם השלם מו"ה וואלף היידנהיימר. Certainly, that snippet does employ the title meaning “wise man.”

Heidenheimer,³⁵⁶ may he live,³⁵⁷ about whom I have heard from the great Maḥane Levi, may his memory be blessed.”³⁵⁸ Before his death, that great sage informed R’ Sofer in writing that Heidenheim had spent a large amount of time proofreading hymns and translating them into German,³⁵⁹ that he had gathered existing texts for that purpose, and that he had expended a great deal of money, as to which (as of R’ Sofer’s writing) he still remains accountable for unpaid debts.

Who is the Mahane Levi, that he was able to compose such elaborate accounts of the composition of the Roedelheim maḥzor? The figure in question is R’ Zevi Hirsh Horowitz,³⁶⁰ son of R’ Pinhas Horowitz, who, as noted above,³⁶¹ issued approbations for the Roedelheim maḥzor.³⁶² After the father’s death in 1805, later versions of the eight-volume Roedelheim set bore the approbation of the son.³⁶³ R’ Sofer added that the rabbis of Germany (presumably

On the other hand, though, the abbreviation immediately preceding Heidenheim’s name means “our teacher and rabbi.” For more on those titles, see ROBERT BONFIL, *supra* n.14, at 137.

³⁵⁶ As noted above, Wolf’s family came from the town of Heidenheim, which made him a Heidenheimer.

³⁵⁷ The outside date for responsum 71 would therefore seem to be before the death of Heidenheim in 1837 (or at least until such news reached R Sofer in Pressburg).

³⁵⁸ Not only does R’ Sofer praise Heidenheim elaborately in this responsum, but writing in another context when clarifying the similarities between the morning and the evening prayers, he noted that he faced a large problem, which the books by the giants of Spain did not solve, “and I did not understand the answer until I found what was written by our rabbi and teacher, the wise Wolf Heidenheim, in his commentary on the *maḥzor* for the haftarah of the first day of Rosh Ha-shanah.” SHE-ALOT UTSHVOT ḤATAM SOFER, OREKH ḤAIM, # 9 (Dec. 20, 1817).

³⁵⁹ “And were it not 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.” It should be added that eliminating piyyutim was a practice of the early Reformers vehemently opposed by traditionalists such as R’ Sofer.

³⁶⁰ Yehoshua Horowitz, “Zevi Hirsch Ben Phinehas Ha-Levi,” 9 *Encyclopedia Judaica* 545, 545 (2007).

³⁶¹ See text accompanying note 109.

³⁶² In fact, “Heidenheim’s liturgical books contain many approbations of various rabbis who praised his pious personality and his extensive knowledge, which enable him to render an outstanding German translation for those who were not able to understand Hebrew.” Meir Hildesheimer, *supra* n.144, at 171 (listing eight eminent rabbis, including Pinḥas Horowitz). One of them was R’ Naftali Hirsch Katzenellenbogen of Frankfurt an der Oder, *id.*, bearing the same surname and thus presumably hailing from the same family as the Maharam of Padua, who started the copyright ball rolling in the responsa literature centuries earlier. See Neil Weinstock Netanel, *supra* n.22.

³⁶³ See <http://www.daat.co.il/daat/history/kehilot/frankfurt.htm> (Hebrew) (visited May 26, 2008). Given the son’s death in 1817, responsum 71—which refers to him of blessed memory—obviously was composed later. But that dating is of little help, given that responsum 41 itself was already dated in 1823, and one presumes that responsum 71 came much later.

including both Horowitz *père et fils*) had already determined that Heidenheim's reward be exclusive rights in the market for 25 years, "so that no other person shall trespass upon his boundary, since he was unable to print a sufficient amount [of maḥzorim] for all of Israel, for 25 years, at a single moment in time." For that reason, his rights include the ability to print and reprint books at various intervals.³⁶⁴

Winding up for the conclusion, R' Sofer analogized Heidenheim to the Fisherman, such that publishers who use their energies to print books should no more be subject to poaching on their domain than the fisherman who has diligently set up his nets.³⁶⁵ Heidenheim is entitled to no less, particularly as he engaged in a heavenly duty, and there is reason to fear that printers who follow in his footsteps will become indolent if not legally protected. In other works, only a fool would expend his time and effort in an endeavor to accurately edit and publish holy books, if afterwards others could come and trespass upon his boundary.

Accordingly, others should print either different maḥzorim or other books, "for why should they benefit from that which he has created?" In parting, R' Sofer commended the Wise Men of old who erected a fence around newcomer printers, confining them to their appropriate boundaries. Those who engage in a *miḥvah* will not be harmed, and we may all "exalt the house of our God [EZRA 9:9]." As a result, "the boundary of the world shall not be encroached upon";³⁶⁶ in other words, unfair competition will not go unredressed.

V. R' Banet's Words As Quoted by R' Sofer

A. *The Copied Letter*

Printed at the beginning of responsum 41 of the Ḥatam Sofer is a letter written by R' Banet³⁶⁷—albeit no imputation should arise that R' Sofer thereby violated R' Banet's

³⁶⁴ The responsum at this point likens Heidenheim to others worthy of reward for their piety and fidelity, such as a resident of Yavneh (see MISHNAH BRAKHOT 4:4), Ḥananya ben Ḥizkaiya ben Garon (see BT SHABBAT 13b), and others who were entitled (before destruction of the Temple in the 70 C.E.) to just compensation from the Holy Temple's Treasury, *i.e.*, correctors of Torah scrolls in Jerusalem and those who taught the priests laws of ritual slaughter and laws of grabbing the flour sacrifice with three fingers. The distinction between those categories and Heidenheim inures to the latter's benefit: All of them took compensation—in cash!—at the actual time they were working in the community's interest. By contrast, Heidenheim earned his proceeds neither in cash nor from the public coffers, but only, via market transactions, from those who actually purchase his printed maḥzorim, and that in order to discharge his prior debts.

³⁶⁵ See text accompanying note 244.

³⁶⁶ That final quote returns us explicitly to the domain of *hassagat g'vul*. See text accompanying note 287.

³⁶⁷ The opening line of R' Sofer's responsum begins with the notation: "A copy of a letter from The Rav and great *Gaon*, the *Av Bet Din* and *Rosh Metivta* [chief judge and head of the yeshiva] of the holy community of Nikolsburg and the Region, may [his merit] protect us,

copyright!³⁶⁸ In the letter, R' Banet explains that he is responding to R' Sofer's own letter from Rosh Ḥodesh Adar.³⁶⁹ R' Sofer dated responsum 41 as 24 Adar (March 7, 1823).³⁷⁰ We can therefore date this letter to around February 1823.³⁷¹

R' Banet began the letter with fabulous praise for R' Sofer: “The face of Moshe is like the surface of the sun which brings light to the world and to its inhabitants, with wisdom, opening gates with his knowledge that fills rooms at Sinai and uproots mountains, shining light upon the righteous.” With those preliminaries out of the way, R' Banet explained that he received a letter from the Ḥatam Sofer and reiterated the basis for his earlier view in responsum 7 (as well as previewing some of the additional points that he would later set forth in responsum 8). He added that he had recently written “in the same vein to the rabbi of the holy community of Dyhernfurth.”³⁷²

One memorable turn of phrase appears in this letter: R' Banet notes that, in light of the fact that currently there are also Gentile printers who are under no obligation to abide by rabbinic decrees, “this one loses and that one doesn't benefit.” That statement represents a twist on a familiar halakhic *dictum*, “this one gains and that one doesn't lose,” meaning roughly that when a plaintiff loses nothing, he has no right to sue for damages, even if defendant has benefited from use of his property. In the instant switch, by contrast, R' Banet makes the point that plaintiff may indeed have been harmed, but nobody else has gained any benefit from that harm. He therefore concludes that enforcing the ban would mean that the remaining Jewish publishers would lose out to the original Jewish publisher, who himself nevertheless would not make any profit, inasmuch as Gentiles could publish the same work.

amen, and glory to God.” After two paragraphs, the quotation closes with “signed, the insignificant Mordekhai Banet.”

³⁶⁸ The same conduct, if contemporaneously undertaken in the United States, could lead to liability for copyright infringement. *Woolsey v. Judd*, 15 Copyright Off. Bull. 3006 (N.Y. Super. Ct. 1855). See 1 NIMMER ON COPYRIGHT § 5.04.

³⁶⁹ The letter from R' Sofer is not reproduced in the responsum; we only have R' Banet's reply.

³⁷⁰ In the modern printing of R' Sofer's responsa, the date of number 41 is set forth as תקפ"ג"ל. SEFER ḤATAM SOFER, ḤELEQ ḤOSHEN MISHPAT, # 41 (Grossman, New York, 1957). Prof. Rakover dates that enigmatic formulation to 1820. NAḤUM RAKOVER, *supra* n.133, at 200. Nonetheless, inspection of the collection of R' Sofer's responsa printed in Budapest in 1861 shows the reprinting to be in error. See *supra* n.280. The formulation at the end of number 41 is actually תקפ"ג"ל לפ"ק, which corresponds to 1823.

³⁷¹ The chronology seems to be that R' Sofer wrote a letter to R' Banet around 1 Adar, to which R' Banet replied by the paragraphs incorporated into his responsum. All of this occurred within the space of little over three weeks—a testament not only to the efficiency of the Moravian postal service but also to how quickly R' Sofer was able to compose a complicated responsum. See text accompanying note 656.

³⁷² It is unclear whether the reference is to R' Banet's responsum 7 itself, which was a *tshuva* to a *she'aila* posed by the rabbi of Dyhernfurth, or to private correspondence not replicated in R' Sofer's responsum 41.

It is the conclusion of R' Banet's letter that is so remarkable—and also sufficiently obscure as to require extended consideration. Although the letter only runs two paragraphs, its mysteries are out of proportion to its brevity.

After reconsidering, I changed my mind because of the honor [due to the Ḥatam Sofer] and I shall say that even though one should not issue a ban, “For there is no divination in Jacob,” I shall write, in an ethical manner and in accord with customary decency,³⁷³ additional words and he will receive the abovementioned approbation here. This is the word of the one who eternally seeks His peace, the insignificant Mordekhai Benat.

What does that obscure passage mean? Of what relevance is his citation to Bilaam's involuntary praise of the Jewish people, “For there is no divination in Jacob, no sorcery in Israel” [NUM. 23:23]? To understand, the intent, we must break R' Banet's words down into parts.

B. *Oryan T'litai*

After reproducing that letter from R' Banet, responsum 41 turns to R' Sofer's own words. He begins by expressing delight that R' Banet has agreed to his request to write an approbation, and there for the first time names the work in question: *Oryan T'litai*. That reference clears away some of the mist from R' Banet's cryptic letter. But much more remains to be discovered.

Let us revert to the chronology. R' Banet wrote responsum 7 in Nikolsberg on August 22, 1822. R' Sofer issued his return broadside, in the form of his own responsum 41, in Pressburg on March 7, 1823. But even during that half-year interval, private correspondence traveled between the two sages. As best we can reconstruct the events, during that interval R' Sofer wished to obtain R' Banet's approval for a book under production, entitled *Oryan T'litai*. In other words, not only did R' Sofer vehemently disagree with R' Banet's pro-defendant ruling, but he further wished R' Banet to effectively recant his earlier stance. Whereas R' Banet in responsum 7 had declined to give validity to the approbation and ban issued by R' Horowitz for the Roedelheim maḥzor, R' Sofer requested that R' Banet himself, within the next few months, sign onto a new approbation and ban, together with R' Sofer, for the aforementioned *Oryan T'litai*.

R' Sofer's request was audacious. It is one thing to read a colleague's *tshuva* and then issue one's own *tshuva* in disagreement—it is quite another to request the original decisor to act in fundamental opposition to his own stance.³⁷⁴

³⁷³ The phrase here is: בדרך מוסר וחק ד"א [דרך ארץ].

³⁷⁴ Of course, that stance is far from unknown. It brings to mind the famous incident of a dispute between Rabban Gamliel and Rabbi Joshua son of Hananiah over the day on which Yom Kippur fell, with the former ordering the latter to bring his staff and money on the day that the latter had calculated (against the ruling of the former). MISHNAH ROSH HA-SHANAH 2:8-9.

History records many works by the name *Oryan T'litai* (“Three-Fold Law”).³⁷⁵ Focusing on those that appeared in print closest to 1822, the first candidate is the following:

Yet this is exactly what R' Sofer asked, and it seems that R' Banet, amazingly, acceded. Or did he? To answer that question, the first order of business is to track down the work in question.

³⁷⁵ The phrase derives from BT SHABBAT 88a. Rashi (*ad loc.*) describes the “Torah of thirds” as consisting of the three parts of *Tanakh*: Torah, Prophets, and Writings.

ספר

אוריין תליתאי

חלק שלישי מחלקי התשובות אשר די על ארבעה חלקי הש"ע
מוסדות, וכבר הוצאתי לאור בעזרת שני חלקים שאלות ותשובות
דבר מושה מהרורא קמא ומהרורא תנינא, וזה החוט המשולש
לא במהרה ינתק

מפתחי ורבינו הכינותי וגם הקרתי

אני הצעיר מושה תאומים רובץ תחת משא עם ה' ועבורת אביד
בק"ק האראדענקא יצ"ו.

וגלוח אליו שרית וחידושים. בחרימות ובקיאות נקראים בשם

שער נפתלי

מכרי' דרבנא הגאון המתבר שלי"א בן מזה הרב הה"צ הולך וגדול קנקן חדש טלא ישן
נצד נחמד כמו שרשו אהוב לשמים נחמד לכריות המהולל בתשבתות

כש"ת סו"ה נפתלי הורץ נ"י שהיה אביד בק"ק דעלאמין ונכת בק"ק וויעלקאמ"ש יצ"ו.

לבוב

בשנת תר"ם לפ"ק.

בדפוס המשובח של הרב וכו' סו"ה יעקב עהרענפריון נ"י.

ORJAN TLISUY

Verlag von MOSES THUMIM Rabbiner in Horodenka.

Druck v. Jacob Ehrenpreis. Lemberg 1880

This book contains responsa written by R' Moses Te'omim, published in Lemberg (Lvov) in 1880.³⁷⁶ It contains an introduction by its author, but no approbation at all, and certainly no endorsement from either R' Sofer or R' Banet. It therefore does not appear to be the volume in question.

Here is the next candidate:

³⁷⁶ Located in Ukraine, that city at the time was “one of the main centers for the production of Hebrew books, not only for Eastern Europe but for the Balkans as well.” Editor, “Lvov,” 11 *Encyclopedia Judaica* 608, 614 (1972).

ספר

תלמוד

אוריין

Samuel...

ספר אוריין תלמוד

אלה כבוד ים הנהיך האריות נברו האנוש כאלהים
 תורה אליהם תהיה מלכי כבוד יחזקו ידו כרוכים רחם
 המחלוקה סגולה לדין חידושי בתענות לנולד ארונים רבינו
 יוסף הלוי נ' מתאם זל זה פרוש פרחאן את תלמיס יורב
 באמלט פוטל אוס כהנול בעמקס חיהו קדושן לברמבא
 זלכה חזק חזיר לירות כמו חסל חל הלך חכס ילח
 הבח"ב הג' מלחמ י"ט רחאן דאורייתא ית באת חידושי חס'
 עכו"ס להר"ע"א זלכה בלסס אלה כבי ג"ח טכס חלח תור'
 וענתה היריה ברך סכר ב"ב ובהגמס וכל יא' אחרס
 יולחן ב"ר ונמקסס ילאו בבוסק סיי כבי דרמסס
 לעיני כל יראל בני מלכיס על יד קענח דארעא חיי
 יוס' אהאל המכונה מויליאט ט"ט חילי העבריס
 מדר"ם לברמבס כל הוכח דאיכא למדר"ם חף
 בחו"ל ובחבן דרכיס ויהי גא פו כב"ל חיי בל"ו סמ"י ה'
 יתן חומר וליוסף חמר לא יתום ספר החור' חסין וסמי דערך
 זרע ברך ה לבי לעולה סמוכיס
 ולדיכך אלו למורשי סאג הדסס' מה אחר הרב
 כהנול חיי חיי אכא כסל ס' נאחן סמאל וילס על
 סס' סבוטת ועסא הדסס'י ב"פ סכסר מה סחיראטי חיי
 הדדסס כעני כס' הוכר חת הסעל

למס סה שאלוניקי יע"ח אה
 וטלח סדון סבין סלחא נס"י

אחר חת סכאלת חוריס הארץ אלסאן חססלס' ד"ה
 וחכא סלכסו

ברוסס הארס' יחמי כ"ד כגולא הלוי ג"ס

Samuel...

This volume was produced in Salonika (Thessaloniki) around 1759, “under the rule of our master, the king Sultan . . . may his kingdom rise.”³⁷⁷ It consists of an anthology setting forth the novellae of illustrious rabbis from the past: ibn Migah, Ramban, and Ritva. Its author is Yosef ben Shmuel Modeliano,³⁷⁸ who also produced a book of responsa under the title *Rosh Mashbir*.³⁷⁹ What is important for current purposes is that this volume, like the later one, lacks any approbation, and bears no trace from R’ Sofer or R’ Banet.

Unfortunately, those two editions of *Oryan T’litai* are either too early or too late to be the work for which R’ Sofer sought R’ Banet’s approval. *Faute de mieux*, we must therefore revert to a work entitled *Beit Aryeh*, published in Zolkiew (Ukrainian “Zhovkva,” Soviet “Nesterov”)³⁸⁰ on May 28, 1834.³⁸¹ That book contains responsa, divided into several sections, of which the second is called *Oryan T’litai*. The book contains numerous approbations, although obviously none by R’ Banet, who had died four years previously. But it does contain one by R’ Sofer, praising the author, R’ Aryeh Lebusch Horowitz.³⁸² It seems most logical to assume that the work under preparation in 1823 did not reach fruition until many years later. We therefore cannot be sure how R’ Banet would have phrased his approval of the book, had it been published during his lifetime.

But R’ Banet’s later history shows that we was willing to offer words of approbation without, however, any imputation of placing a ban on those who failed to heed his admonitions.³⁸³ Thus, R’ Banet’s words reflect a middle course. He stated, “I shall write, in an ethical manner and in accord with customary decency, additional words and he will receive the abovementioned approbation here.” The words appear to be deliberately chosen—pointedly, he will receive the *approbation*, but not the *ban*. In other words, R’ Banet agreed only to write “in

³⁷⁷ As the reference to the Sultan connotes, this domain lay even farther from Moravia than did Lemberg, where the other *Oryan T’litai* was produced.. Salonika was the seat of Sephardic culture, also a prominent center of Hebrew printing. Note the illustrious history of paying tribute to the Sultan; an earlier figure, Elijah Capsali (1420-1495), had even cast him in the redemptive image of Cyrus the Great! YOSEF HAYIM YERUSHALMI, *ZAKHOR* 65 (Univ. Wash. Press 1982, 1996).

³⁷⁸ His surname is variously listed as Modiano, Modiyano, Modeliano, and Modigliano.

³⁷⁹ Happily, Modeliano escaped the fate that befell two of his predecessors in Salonika: On each occasion, when a particular Jew lost a case before a rabbinic decisor, the disgruntled litigant hired an assassin to kill the rabbi’s son. DEAN PHILLIP BELL, *supra* n.17, at 120.

³⁸⁰ This town, home at one point to the famous “Dubner Magid” Jacob ben Wolf Kranz (1740-1804), is located just ten miles north of Lemberg, where the 1880 *Oryan T’litai* was published.

³⁸¹ ARYEH LEBUSH HOROWITZ, *SEFER BEIT ARYEH* (Saul Dov Meyerhoffer 1834).

³⁸² The name and timing are such that this individual may be the same as the Av Beit Din of Zalozhtsy, which is located in the vicinity of Zolkiew. An author of responsa, he lived 1758-1844. Yehoshua Horowitz, “Aryeh Leib Ben Eleazar Ha-Levi Horowitz,” 8 *Encyclopedia Judaica* 986 (1972).

³⁸³ See text accompanying note 415.

an ethical ... manner” words of approval for *Oryan T’litai*, but not to go so far as to join in any *herem* that might accompany the work.³⁸⁴

Still, the question remains: Why was he categorically opposed to bans? Plus, the verse cited for that purpose remains obscure.

C. *Must a Ban Be Pronounced Orally?*

In responsum 7, R’ Banet concluded at length that a ban that appears in writing is invalid; instead, oral pronouncement is required in order to give a ban effect. It is worth pausing to consider how radical such a proposition appears to modern sensibilities. Imagine a judge who rules today in a case brought by plaintiff as copyright owner for infringement against defendant, who defends herself that she acted under license: “Well, I find that the defendant has been fully licensed in a notarized contract, signed both parties. Nonetheless, there is no evidence that plaintiff ever *orally* made a grant to defendant. Inasmuch as a copyright assignment is valid only if spoken aloud, the defendant’s case fails, and I therefore rule for plaintiff.”³⁸⁵

As jarring as that ruling seems, there is some warrant for R’ Banet’s conclusion, in both logic and practice. As a matter of practice, traditionally, the severe ban was “pronounced in the synagogue either before the open Ark or while holding a Torah scroll.”³⁸⁶ In addition, to heighten the physical presence of the pronouncement, shofar blasts³⁸⁷ were sounded.³⁸⁸ Indeed, that practice evidently animated the early rabbis who granted approbations: When a ban was inscribed in a work by R’ Joseph Caro in 1606, the three rabbis who lent their name to the project instructed the sexton to read it aloud in all the synagogues of Venice.³⁸⁹ Based on that history, R’ Banet might have concluded that the failure of R’ Horowitz to proclaim his ban on reproduction of the Roedelheim maḥzor in all the synagogues of Frankfurt rendered that *herem* deficient.

Turning to logic, there is also some basis for his conclusion. Consider the derivative doctrine of an oath (*shevu’a*). In Biblical times, an oath was required to be taken orally [LEV. 5:4], such as occurred at Mizpah. [JUDGES 21:5]. Even today, oral does indeed appear to be

³⁸⁴ NAHUM RAKOVER, *supra* n.133, at 173-74.

³⁸⁵ United States copyright law is exactly to the contrary: It disallows oral copyright grants, while validating those in writing. See *Library Publ’ns, Inc. v. Medical Econs. Co.*, 548 F. Supp. 1231 (E.D. Pa. 1982), *aff’d*, 714 F.2d 123 (3d Cir. 1983).

³⁸⁶ Haim Hermann Cohen, *supra* n.100, at 15-16.

³⁸⁷ Recall the shofar blasts that the young Moses Sofer blew at R’ Adler’s direction when pronouncing imprecations against the recalcitrant bridegroom who was disturbing their Torah studies. See text accompanying note 188.

³⁸⁸ Haim Hermann Cohen, *supra* n.100, at 15-16. One community made its ordinances appropriately solemn through shofar blasts, public readings twice per year, and personal assent by each member. DEAN PHILLIP BELL, *supra* n.17, at 105

³⁸⁹ Moshe Carmilly-Weinberger, “Haskamah,” 7 *Encyclopedia Judaica* 1451, 1451 (1972).

better with respect to oaths. Imagine a perjury prosecution in which a false statement is alleged in the middle of the defendant's lengthy testimony. To the extent that the lie is contained on page 30 of a 50-page affidavit, a ready defense arises: "I was careful to only attest to the truth, but my careless lawyer must have substituted this page for the earlier draft that I meticulously reviewed, as I never would have subscribed to those erroneous propositions." On the other hand, if the subject statement was made on the witness stand, even three hours into five hours of testimony, there is no way that the defendant can disavow it. In short, oaths really are better if made orally than in writing.

Now, let us extend our focus from oaths to bans. What is the connection? Commenting on the oath at Mizpah, the *Tanḥuma* comments, "this is to teach you that an oath is a ban and a ban is an oath."³⁹⁰ To the extent that the midrashic comment is to be taken as normative,³⁹¹ logic therefore supported R' Banet's conclusion that, just as an oath must be taken orally, so must a ban.

Yet a halakhic problem immediately arises. No less a figure than the Ramban, specifically addressing bans, wrote that they have "a more severe aspect than oaths, inasmuch as one can be bound by an oath only by accepting it upon himself and answering 'Amen,' whereas one can be bound by a ban even though he did not accept it upon himself and was not even present at the time of the edict, given that a court is empowered to order a ban."³⁹² From this perspective alone, one can appreciate that, although the force of a ban is derivative of an oath, a ban is not necessarily limited to the identical parameters or conditions of an oath.

R' Banet's rejection of a strict aspect to bans appear suspect. A host of other legal impediments also arise, which R' Sofer was not hesitant to note at length.³⁹³

In sum, the stance that R' Banet took rejecting the efficacy of a written *ḥerem*, places him in isolation from the preponderance of halakhic opinion. Something strange is going on here. But matters get even more outré when his biblical quotation is explicated.

D. *Naḥash*

To refresh the context, R' Banet concluded his letter to R' Sofer:

³⁹⁰ MIDRASH YELAMMDENU, *Va-yeshev* chap. 2.

³⁹¹ That proposition itself poses vexing challenges. David Berger, *Jacob Katz on Jews and Christians in the Middle Ages*, in *THE PRIDE OF JACOB* 41, 47-48 & n.20 (Jay M. Harris ed., Harvard Univ. Press 2002).

³⁹² MOSHE BEN NAḤMAN, MISHPETEI HA-ḤEREM. Note that, among Ramban's seven halakhic monographs, this one details "the way a ban is imposed and release obtained from it." Elmer Gertz, "Naḥmanides," 12 *Encyclopedia Judaica* 774, 780 (1972).

³⁹³ In responsum 79, R' Sofer methodically goes through the requirements of bans, concluding to the contrary of R' Banet that they need not be expressed orally. That aspect of his ruling is not explicated above, given that it lies far afield from the considerations of copyright proper.

After reconsidering, I changed my mind because of the honor and I shall say that even though one should not issue a ban, “For there is no divination in Jacob,” I shall write, in an ethical manner and in accord with customary decency, additional words and he will receive the abovementioned approbation here.

The verse from NUMBERS 23:23 requires explanation. In terms of occult arts, the Torah opposes various sorts: necromancy, soothsaying, augury, enchantment, witchcraft, sorcery. By contrast, it expressly approves of others, such as prophecy, dream-auditing, and the *Urum vetumim*.³⁹⁴ On the “bad” list, one is called *naḥash*. The term itself is used in Biblical Hebrew to refer to a kind of magic translated above as “divination.”³⁹⁵ It is also the very same word that describes the serpent in the Garden of Eden [GEN. 3:1].³⁹⁶ One could therefore allusively translate it into English as “snake-charming” (although scientific support is lacking³⁹⁷ for drawing together its two root meanings in that fashion).³⁹⁸

Moving from magic to snakes, the wisdom of Solomon teaches that “Whoever digs a pit may fall into it, and whoever breaks through a wall may be bitten by a snake” [ECCL. 10:8]. The *Yerushalmi* takes the word wall as being the fence that the sages erect around the Torah [JT BERAKHOT 1:1]. The meaning is that someone who violates rabbinic decrees faces heavenly vengeance in the form of a snake-bite. A later commentator expanded the point. According to Yosef al-Ashkar (who settled in Tlemcen, Algeria, following the Spanish expulsion in 1492), a person should be

careful not to depart from the sages’ words, either to the left or the right, the reason being that their bite is like the bite of a snake. For just as a snake kills with its bite, so the sages punish those who break down their fence. As Solomon wrote, “Whoever digs a pit may fall into it, and whoever breaks through a wall may be bitten by a snake,” and the word *NaHaSH* is an acronym for *Naḥash*, *Ḥerem*, and *Shamta*.³⁹⁹

³⁹⁴ See generally Haim Hermann Cohen, “Divination,” 14 *Encyclopedia Judaica* 111, 116 (1972).

³⁹⁵ It is also the proper name of an Ammonite King. [1 SAM. 11:1]. But that usage does not necessarily denote any additional meaning.

³⁹⁶ A biography of the *naḥash* was recently published. See DAVID FOHRMAN, *THE BEAST THAT CROUCHES AT THE DOOR* (Devorah Pub. 2007).

³⁹⁷ In Aramaic, the root *naḥash* refers solely to “divination” [*naḥashaya*, Onkelos, NUM. 23:23], whereas the word for “snake” is wholly different [*ḥiviya*, Onkelos, GEN. 3:1] It is unclear how the two terms converged in Hebrew.

³⁹⁸ Nonetheless, King Solomon himself drew a similar literary parallel, just three verses later in *Megillat Qohelet*. See ECCL. 10:11. The *naḥash* returns there, this time connected to *laḥash*. Although that word could be taken as referring to “hissing,” most commentators translate as a reference to a charmer (literally, “snake-whisperer”).

³⁹⁹ MIRKEVET HA-MISHNAH on *Pirquet Avot*, chap. 2. For a brief biography of this figure, see Editor, “Joseph ben Moses Alashkar, 2 *Encyclopedia Judaica* 511 (1972).

Those last three words, it will be recalled, refer to the three species of excommunication.⁴⁰⁰

The abbreviation cited by al-Ashkar gained widespread currency. Consider one of the most celebrated bans of all time, the *herem* of Rabbenu Gershom against opening other people's mail. A responsum from the seventeenth century reflects that Jews customarily wrote on the outside of envelopes the abbreviation "דג"מ, so that anyone who found the envelope in the marketplace would be barred from reading its contents.⁴⁰¹ The first word is an abbreviation containing the first letter of each word from the portion of ECCLESIASTES 10:8 referring to snake bites [ויפ' רץ גדר ישכנו נחש], while the second is an abbreviation for Of Rabbenu Gershom, Light of the Exile. The meaning, for anyone who finds a letter thus marked: A snake will bite you if you dare to open someone's mail, thereby transgressing the famous *herem*!

We therefore see an established linkage between the word *naḥash* and the rabbinic *herem*. The clever transposition that R' Banet made here was to state "one should not issue a *herem*, 'For there should be no *naḥash* [*i.e.*, *herem* , along with *niddui* and *shamta*] in Jacob' [*i.e.*, among Jews and their decisors]." To unpack the punch, one can detect four transformations here:

- Instead of quoting the standard verse from *Ecclesiastes*, he adduced an outlier verse from *Numbers*. The result strikes the reader as ironic, as the lesson no longer comes from the wisest man ever to walk the earth, the virtuous Solomon, but instead from the wicked Gentile prophet, Bilaam (albeit here speaking against his will with divine support).
- Concomitantly, instead of a quoting a verse referring to a *naḥash* of the reptilian variety, his selection of a verse from *Numbers* left him with a usage containing a meaning from the sorcery lexicon. Again, the effect strikes the reader as ironic, as it is no longer possible to invoke the metaphorical *snake-bite* of the sages through their *herem* (one would, instead, have to accuse the sages of prohibited *sorcery* should they dare to invoke a *herem*).
- Instead of adopting the usual approval of the *naḥash* as a heavenly agent, he adopts a denunciation of *naḥash*.
- Instead of following the traditional formulation to vest in rabbinic bans supreme power, such that those who dare violate them receive death by snake bite, he attacks the institution of bans, emptying the *herem* of much of its force (a stance which, in turn, drew fire from R' Sofer).

One imagines that R' Banet must have had a smile on his face when he turned matters on their head in this fashion.⁴⁰² For his own reasons, he came out against the type of rabbinic ban that his predecessors had strenuously defended. It turns out those reasons were highly idiosyncratic, as the next section demonstrates.

⁴⁰⁰ See text accompanying note 98.

⁴⁰¹ SHE-ALOT UTSHVOT YA'AKOV GIZ, HILKHOT KETANOT, pt. 1, # 59.

⁴⁰² For an additional such instance, see *infra* n.447.

E. *Explanation*

Thus, “snake” actually refers to the *herem* and its near cousins, those being the three types of rabbinic bans that condemn those who do not wish to date the matter, bracketed earlier, of R’ Banet’s defensive and autobiographical comments near the end of responsum 8. To refresh the context, R’ Sofer’s had concluded, “What difference does it make to the government whether one person or another publishes a particular title, so long as the affected publisher pays the applicable taxes to the government each year?” Here is what R’ Banet had to say in the responsum that he wrote only in 1827:

And I tested this thing when the gentleman-publisher Schmid printed the Roedelheim *maḥzorim*. When I cast the bans of the sages on the buyers and the dealers to prevent [publication], the aforementioned publisher brought us up in court before the authorities in my country, in the city of Bruenn.⁴⁰³ I was positioned in a grave dispute from morning until evening and they spoke harshly to me and they saw my activities as wrongs and in this way said I was rebelling against the government, until the mercy of God came upon me and I was released in peace on condition that “the mouth that forbids will be the mouth that permits.” And so I did, inasmuch as the ban was not pronounced verbally but only in writing.

The reference is unmistakably to events that preceded the issuance of responsum 7 in favor of Schmid in 1822. Thus, as R’ Banet revealed, at some point before 1822, he had ruled in favor of Heidenheim. As we shall see later, the most probable date of the incident in question is 1807.⁴⁰⁴ It was only later that he changed his views. More details now unfold into view.

1800-1802	Publication of Roedelheim <i>maḥzor</i> , subject to 25-year ban signed by R’ Horowitz against republication
<i>Earlier than 1807</i>	<i>R’ Banet upholds R’ Horowitz’s ban and rules against Schmid.</i>
1807	<i>Civil authorities rule against R’ Banet, order him to issue edict in favor of Schmid.</i>
By 1816	Schmid brought out rival version of Roedelheim <i>maḥzor</i> , including letter from R’ Banet.
August 22, 1822	R’ Banet, in tshuva 7, rules against copyright protection for the

⁴⁰³ To quote the interpretation offered by another scholar, R’ Banet “publicized the ban prohibiting the latter edition and cautioned against the purchase of those prayerbooks.” J. DAVID BLEICH, *supra* n. 123, at 125. Then, “the publisher, a gentleman by the name of Schmidt, summoned R’ Mordecai Benet to appear before the civil court alleging his conduct to be contrary to the law of the land since Schmidt had secured permission from the civil authorities.” J. DAVID BLEICH, *supra* n. 123, at 125. (As previously noted, spelling variations included Schmidt and Schmid, as well as Banet and Benet.)

⁴⁰⁴ See text accompanying note 434.

Roedelheim maḥzor.

- February 1823 R' Sofer asks R' Banet to join with him in approving Oryan T'litai; R' Banet agrees only to approbation, not to ban.
- March 7, 1823 R' Sofer, in tshuva 41, disagrees with R' Banet and upholds copyright protection for the work.
- April 11, 1827 R' Banet, in tshuva 8, underlines his previous conclusions from tshuva 7.
- Undated (but after April 1827) R' Sofer, in tshuva 79, writes a lengthy disquisition about unfair competition, in which he again sides with Heidenheim.

CODA TO RABBINIC WRITINGS—R' BANET'S APPROBATIONS

According to the supposition just reached, R' Banet first followed the standard practice of granting force to book bans; but the adversity that he personally experienced around 1806 turned him around. Thereafter, he consistently ruled that a book ban has no force.

The further question remains about his own practice. It would be invaluable to review *Oryan T'litai* to see how he reacted in that instance, but it is not available.⁴⁰⁵ Nonetheless, the historical record offers some close substitutes. By cataloguing how R' Banet treated bans and approbations on the works that he personally was asked to recommend, we can gain greater insight into his character and views on the subject.⁴⁰⁶

To revert to the Roedelheim maḥzor, it bore at its printing both an approbation and ban in the name of R' Pinḥas Horowitz.⁴⁰⁷ R' Banet refused to give legal force to the ban. But that stance did not necessarily impugn the approbation. There is reason to conclude that, throughout his lifetime, R' Banet drew exactly that distinction.

I. The Works of Herz Homberg

We begin with the works of Herz Homberg, a minor functionary who wrote in German, given that his skills were so poor⁴⁰⁸ and who broke with Orthodoxy later in life.⁴⁰⁹

⁴⁰⁵ See text accompanying note 384.

⁴⁰⁶ It is not necessary to engage in the parallel inquiry of how R' Sofer couched his own endorsements, inasmuch as he never doubted the efficacy of book bans. For a list of books to which R' Sofer offered his own approbation, see Nosson Dovid Rabinowich, *supra* n.110, at 253 n.34. Regarding his "imaginary approbation," see *id.* at 255-58.

⁴⁰⁷ See text accompanying note 109.

⁴⁰⁸ WILMA ABELES IGGERS, *THE JEWS OF BOHEMIA AND MORAVIA* 14 (Wayne State U. Press 1992).

⁴⁰⁹ WILMA ABELES IGGERS, *supra* n.408, at 65-68.

In the early 1800s, Homberg wrote a catechism that, by governmental decree, “every bridegroom and bride from the Israelite nation who seek permission to marry shall be examined regarding the contents of this book and shall only receive permission to marry upon passing the examination.”⁴¹⁰ The work led to innumerable tales of embarrassment and misunderstanding.⁴¹¹ Ultimately, the book was so hated by traditional and Enlightenment Jews alike that they finally induced the government to ban it.⁴¹² Here is a copy of that work as published in Vienna in 1812.

⁴¹⁰ URKUNDEN UND AKTEN ZUR GESCHICHTE DER JUDEN IN WIEN: ERSTE ABTEILUNG, ALLGEMEINER TEIL 1526-1847 (1849) (Pribram, A.F., ed) [Documents and Records of the History of the Jews in Vienna: First Section, General Part 1526-1847 (1849)] (Vienna and Leipzig: Wilhelm Braumüller, University Publisher 1918), pp.170-71 (setting forth decree dated December 14, 1810).

⁴¹¹ WILMA ABELES IGGERS, *supra* n.408, at 67, 113. Legions of stories circulated about government officials in Pilsen asking bashful brides questions gleaned from *Bne-Zion*, and not prepared to deal with the resulting theological controversy. *Id.* at 114. An example of one exchange:

- “Where is God?”
- “God is in the air!”
- “No, God is everywhere!”
- “The air, too, is everywhere!”

Id.

⁴¹² WILMA ABELES IGGERS, *supra* n.408, at 113 (“They agitated so long against this unimportant opus that the government itself finally prohibited it.”).



Two years before its publication, R' Banet composed a German-language approbation for the work, writing under his German name, "Markus Benedikt."⁴¹³ The official government decree for the work took note of that approbation, requiring that all printings bear the name of Rabbi Markus Benedikt along with the author's name.⁴¹⁴

⁴¹³ The sources set forth that form as an alternative to "Mordekhai Banet." See IGNAZ MAYBAUM, NICHOLAS ROBERT, & MICHAEL DE LANGE, IGNAZ MAYBAUM: A READER 12 (2001).

⁴¹⁴ GESCHICHTE DER JUDEN IN WIEN. *supra* n.410, at 170-71.

G u t a c h t e n
 des
 Local- und Land-Rabbiners
Marcus Benedikt
 zu
 Nikolsburg in Mähren
 über das Werk
 Bne-Zion, ein religiös-moralisches Lehrbuch
 für die Jugend israelitischer Nation.

Sie haben mir den Wunsch zu erkennen gegeben, meine Gedanken über Ihr mir zur Prüfung übergebenes, in deutscher Sprache verfaßtes Manuscript: Bne-Zion, ein religiös-moralisches Lehrbuch für die Jugend israelitischer Nation, Ihnen schriftlich mitzutheilen. Diesen Wunsch erfülle ich mit dem aufrichtig besten Willen. Das Werk hat mir wahrlich sehr viel Vergnügen gemacht. Die Begriffe, welche in demselben von Gott, seinen Eigenschaften, von der Bestimmung des Menschen, von der Tugend, der allgemeinen Menschenliebe und allen übrigen menschlichen und bür-

gerlichen Pflichten, von Strafe und Belohnung, von der Unsterblichkeit der Seele u. s. w. vorkommen, sind nicht nur unserer heiligen Religion vollkommen gemäß, und in Übereinstimmung mit den Lehren der heiligen Schrift, des Talmuds und aller großen Lehrer unserer Nation in den alten und neueren Zeiten, sondern dieselben werden durch Ihre Erläuterung in das hellste und schönste Licht gestellt.

Da der Vortrag dieser Tugendlehren so sanft und eindringlich ist; so hoffe ich zu dem heiligen Gott, der alles mit Wahrheit besiegelt hat, daß diese von Ihnen so deutlich gemachte Wahrheiten viel Gutes auf das Gemüth der lieben Jugend und der Erwachsenen wirken werden. Ich muntere Sie daher auf, dieses Werk, sobald als möglich, zum Drucke zu befördern, damit das Gute bald ausgefäet werde, und segensreiche Früchte bringe.

Marcus Benedikt
 Local- und Land-Rabbiner.

Nikolsburg am 12. Jänner 1810.

That approbation is notable for proclaiming how satisfied R' Banet's was with the material—not only does it “bring our holy religion appropriately to perfection and is in agreement with the teachings of the holy script of the Talmud and all great teachers of our nation in old and newer times, but also through the book's explanation and illumination, these concepts are presented in the brightest and most beautiful light.” What is notably absent, on the other hand, is a ban. In other words, no prohibition is made on copying the work, and neither is any malediction called upon the head of those who infringe it.

Earlier in his career, R' Banet had written an approbation for another work by the same Herz Homberg,—*Imrei Shefer*, published in Vienna in 1808,⁴¹⁵ Again that work merely included R' Banet's approbation that “in the final analysis, it is entirely founded upon wisdom.” On this occasion as well, it contains no hint of a ban or other prohibition.

⁴¹⁵ Meir Hildesheimer, *supra* n.144, at 174 n.82. That approbation is noted in *Eleh Divrei Ha-brit. Id.* See *supra* n.180.

ה ס כ מ ה

ז"ה • כה הראני החכם השלם המפורסר מו"ה הירץ הומברג
 מגלת ספר, הנוהג אמרי ספר, מוסד מוסד על הפיקר וראש
 אמונה, אבן הפכה • והספר כולו נחמדים ומנוחקים, כולם דברי
 דליקים, כי לשונו תדבר משפט הכנור ומעשהו באמונה, ולבו
 נוהג לאחוז בחכמה ומוסר יחדיו ביראת אלקים • מלמד להועיל
 במה יזכה נער את ארחו לשמור את אשר יעשה האדם וחי בהם,
 ומדריך דרך יגיע בה אל האיסור והלילה • סוף דבר הכל בחכמה
 עשה מלאה הארץ קנינו בינה עלה ותושי' • ראו זו מתת אלקים
 הוא, חלק לו בצינה • יאית לתנוכו ולאשרו, להוליא כלי
 למעשהו • — — — — — ולהשוועים יונעם
 ויחזו בנעם ה' • ולמען לא תהי' האמת כעדרת חתמתי פה ק"ק
 כ"ט יוס' ד' ג' מרחשון תקס"ח לפ"ק •



כאוס ה"ק מרדכי בנעט חונה פה ק"ק ביקלעבורג
 והמדינה יג"א •

א מ ר י ש פ ר

כוללים עניני תורה ומוסר לילדי בני ישראל עלם
 ועלמה • סדרם ובאדם כלשון הקודש אף העתיקים
 אל לשון אשכנזים,

הירץ הומברג

Bl. —————
 שנת תקס"ח לפ"ק

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111

געדרוקט ביים געארט הראשאנצקיא קי. קי. דייטש אונד
 העברעאישען בוכהנדלער אונד בוכהנדלער אום אלטען קיענע
 מארקט. Nro. 589.

When later rebuked by a colleague, R' Banet reread *Imrei Shefer* and withdrew⁴¹⁶ his approval from it.⁴¹⁷ Yet one commentator notes that Homberg “refrained from expressing in this work his personal heterodox views, as it is written in entire harmony with the spirit of Jewish tradition.”⁴¹⁸ After he reread the book, R' Banet evidently concluded, to the contrary, that it did indeed reflect heterodox views—or else, by that time, Homberg’s heretical reputation made his *oeuvre* untouchable as a whole.

⁴¹⁶ In parallel fashion, R' Sofer retracted his approbation from a controversial German translation of the Talmud. Aaron M. Schreiber, *supra* n.150, at 128; Nosson Dovid Rabinowich, *supra* n.110, at 257.

⁴¹⁷ Meir Hildesheimer, *supra* n.144, at 174 n.82.

⁴¹⁸ 3 MEYER WAXMAN, *supra* n.67, at 80 (“It even received the approbation of Mordecai Benet, the leading orthodox rabbi of the time.”).

In any event, the experience of R' Banet with Homberg vindicates the thesis formulated above: a willingness to issue an approbation, but not a ban. More indirect evidence accumulates for the proposition that, when R' Banet told R' Sofer that he was willing to join in a *haskama* for *Oryan T'litai*, he meant his words literally to apply to the *haskama* alone, and not to any additional *herem*.

II. Interlude Regarding Aaron Ḥorin

R' Banet took an early liking to a young rabbinical student named Aaron Ḥorin (1766-1844). When Ḥorin later wrote a book allowing his congregants to eat sturgeon,⁴¹⁹ R' Banet insisted “on the burning of the heretical book.”⁴²⁰

For students of the Roedelheim copyright controversy, R' Banet's dispute with Ḥorin takes on special meaning. For the latter objected to R' Banet's anti-approbation, and brought the matter to a rabbinical court. That body sided with R' Banet and condemned Chorin.⁴²¹ The latter responded by appealing to the imperial government for redress. Those authorities, on “June 24, 1806, annulled the judgment and condemned the leader of his adversaries . . . to pay the expenses of the lawsuit.”⁴²²

We thus witness an early foreshadowing of Anton Schmid! The year before R' Banet lost the civil case brought by Schmid, he had already lost a civil case brought by Ḥorin. The experience cannot have left the Chief Rabbi of Moravia enamored with his entanglement by the secular authorities.

III. The Works of Aryeh Leib Gunzberg

Challenging that view, however, is R' Banet's conduct towards another book. The author in question was a cantankerous rabbi in Metz, Aryeh Leib ben Asher Gunzberg (1695-1785). That author was best known after the title of a volume that he named after himself, *Shaagat Aryeh* (“Roar of the Lion”).⁴²³ Here is the title page, as published in Vienna in 1809.⁴²⁴

⁴¹⁹ To be kosher, fish must have fins and scales. See LEVITICUS 11:9-11. For a modern-day write-up, see <http://www.bluedthread.com/kashrut/sturgeon.html> (visited June 2, 2008) (“Sturgeon is a controversial fish. Some say it is Kosher, some say it is not.”).

⁴²⁰ EMANUEL SCHREIBER, REFORMED JUDAISM AND ITS PIONEERS: A CONTRIBUTION TO ITS HISTORY xx (1892).

⁴²¹ Given the animosity between Chorin and the traditionalists, it is fascinating to note that the existence of a work on world geography by Shimsohn Halevi Bloch bearing approbations from both him and his arch-rival, R' Sofer! Aaron M. Schreiber, *supra* n.150, at 160 n.87.

⁴²² S. Mannheimer, “Aaron Chorin (Choriner),” 4 *The Jewish Encyclopedia* 43 (1903). Reputedly, Chorin chose to forego the fine and then foreswore further writings.

⁴²³ See http://en.wikipedia.org/wiki/Aryeh_Leib_ben_Asher_Gunzberg (visited September 16, 2008). After being driven out of Pinsk, he settled in Metz, where “an early



The book opens with an endorsement from R' Banet, “the great leader, famous in his generation, Av Beit Din of the holy community of Nikolsberg and of the country, may he live

argument with his congregation led to him refusing to enter the synagogue except to give four sermons a year.” *Id.*

⁴²⁴ This approbation by R' Banet is cited in YISRAEL BELSKY, *supra* n.234.

long.” Given how directly his words treat the domain of printing, the paragraph is worth quoting at length:

Ever since the emergence of the printing trade, it has been customary for Rabbis to support the efforts of those who engage in the holy work, the printers of holy books, and lock the door before those who come afterward so they will not produce the same during a limited amount of time. It is well-known that members of a trade are allowed to reach an agreement between themselves concerning a general regulation, especially in a matter wherein there is [communal] profit and no financial loss to this [particular person]; and we are able to bear witness that this regulation is convenient for the printers, because in this manner each and every one will reap benefit for himself.

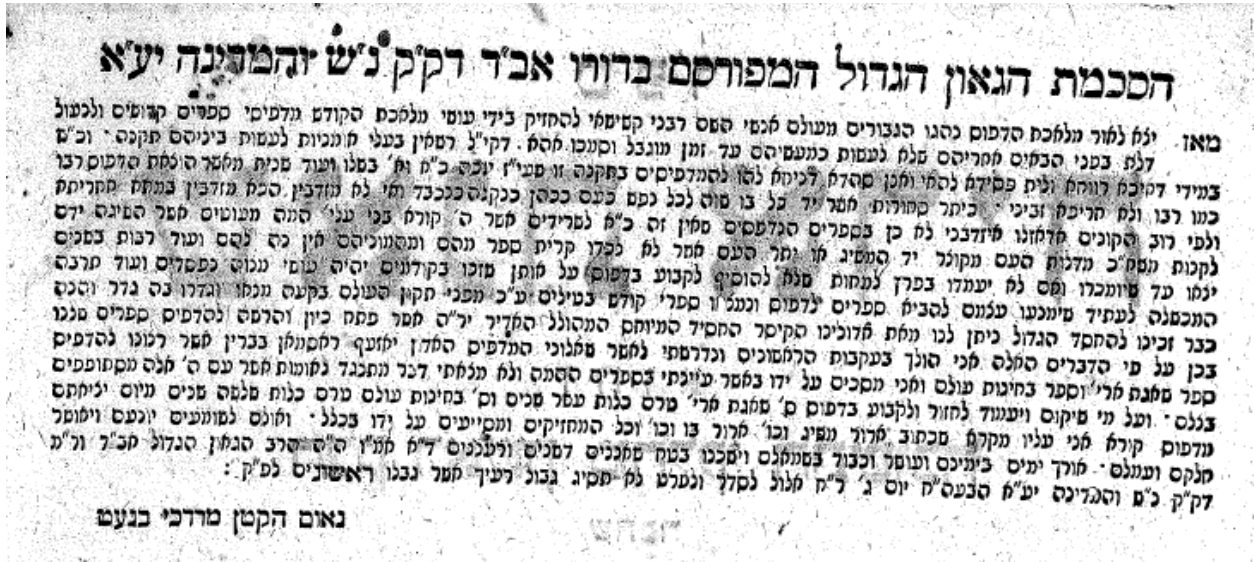
[After comments about development of the printing press and citations of various verses (such as those referencing Qiryat Sefer)⁴²⁵ R’ Banet concludes that unrestrained publication would lead to the detriment of the publishers who originally possessed the rights, with the result that those who engage in *mizvot* would suffer loss.]

Moreover, this obstacle will become more severe in the future, because [publishers] will refrain from bringing books to print and holy books will cease to exist. Consequently, in order to repair the world, the Sages erected a fence, and behold we have already merited that enormous grace has been granted to us by our master, the righteous, noble, extolled and mighty Kaiser, may his majesty ascend, who has opened a path and granted permission to print our books.

Therefore, based upon these foundations, I shall follow the former [Sages] and since I have been asked to approve the petitions of the publisher, Mr. Jozef Rasmunn of Bruenn, who desires to publish the book *Shaagat Aryeh* and the book *Beḥinot Olam*, I hereby approve since I have taken a look at these books and I have not found anything which opposes the nations under which this people of God is sitting on the threshold of their shade.

And whosoever shall arise and stand up in order to republish the book *Shaagat Aryeh* before the passage of ten years, and the book and the book *Beḥinot Olam* before the passage of three years, from the date of their publication, I hereby call out upon him the verse, “Cursed be he who moves his neighbor’s landmark” [DEUT. 27:17] , and he shall be cursed, as shall all who support or assist him.

⁴²⁵ A place named in scriptures [JOSH. 15:14-17], the literal meaning of Qiryat Sefer is “Town of the Book.”



Those last imprecations reveal a radically different sentiment at work. Far from eschewing bans, R' Banet does not hesitate to set forth exclusive 10-year rights for *Shaagat Aryeh*, calling down a curse on all who would dare ignore the ban. From this evidence, it would seem that, by 1809, R' Banet did not actually hold to his anti-ban stance.

But, digging deeper reveals that conclusion to be in error. First, it must be remarked that Aryeh Leib Gunzberg, who died in 1785, had already gained notoriety in his lifetime as the author of *Shaagat Aryeh*. Accordingly, 1809 certainly cannot mark the work's first publication. However, that objection may be promptly set aside. For the instant volume constitutes a *republication* of that work, Jozef Rasmunn undertook at a later date.

What exactly is that later date? We have assumed that it must be 1809, based on the title page set forth above. Actually, however, we do not know whether this particular Viennese printing represents the *first edition* of Rasmunn's production. The question is when R' Banet wrote the paragraph in question. At the very end of his paragraph, the last word (*rishonim*) has some letters that appear in bold. That device employs a custom that traces back to fifteenth century incunabula, of using *gematria* in the words from a biblical verse to signal the pertinent year.⁴²⁶ When that computation is performed here, it appears that R' Banet composed those words on August 23, 1797.

Indeed, there is a previous edition of *Shaagat Aryeh* that appeared in 1797.⁴²⁷ Upon examination, it turns out to bear the exact same paragraph from R' Banet that was late reprinted in 1809. It therefore appears certain that the ban R' Banet affixed on this work represents his handiwork of the eighteenth century, albeit printed almost a decade into the nineteenth.

⁴²⁶ Malachi Beit-Arié, "Colophon," 5 EJ 747, 750 (1972),

⁴²⁷ That volume is located in the non-circulating collection of the New York Public Library, and hence could not be reproduced here.

The situation is actually no different from the ban of R' Pinchas Horowitz, reproduced above, from a 2005 facsimile edition.⁴²⁸ Although the physical book in question was printed in 2005, it contains a ban dated August 30, 1803. By the same token, R' Banet composed a ban in 1797, which was later reproduced verbatim in 1809. The ban reflects his sentiments not of that later date, but of the earlier date on which he actually wrote it.

IV. The Works of Moshe Leib Zilz

R' Banet died in 1829, at which time his son, R' Naftali Banet (ca. 1790-1857), eulogized him in a work that itself has become a classic. Entitled *Misped Gadol* (*Great Mourning, or Eulogy for a Giant*), it was printed the following year by —could there be any doubt?—Anton von Schmid.)

⁴²⁸ See text accompanying note 109.

מספר גדול וכבוד מאוד

על מות

אדוני אבי מורי ורבי כבודי ועטרת ראשי,

אשר היה סגולת הצדיקים,

מבחר התמימים, ותרומת החסידים.

ה"ה הרב הגאון המפורסם,

יחיד בדורו ויקר בעמו.

כבוד מהור"ר מרדכי בנעט זצלה"ה

והרני נפרת משכבו.

אשר סדרתי

בחמלת ה' עלי אני בנו הנעצב נפתלי.

וערכתיו ברבים

כב"ה של אותו צדיק אבי זצלה"ה

בה נ"ש יום א' כ"ב אלול תקפ"ט לפ"ק.



Misped Gadol.

וויען

גערדוקט ביא אנטאן צילעם פאן שמיד, ק' ק' פרוויל' בוכרוקער
אונד בוכהענדלער.

WIEN, gedruckt bei ANTON Edlem von SCHMID. 1830.

Almost a century after his death, a book of responsa was published in Berdejov, Slovakia. Entitled *Milei D'Avot* (*Words of Our Fathers, or Ancestral Pronouncements*), it collected responsa written by a variety of authors, including several successors to R' Banet as chief rabbi

of Moravia. What is relevant for current purposes is that one of the decisors, Moshe Leib Zilz, reproduced a private letter from R' Banet that bears heavily on our study.

The Rabbinical sages of Ashkenaz have granted an approbation and ban to all of the maḥzorim printed in Roedelsheim⁴²⁹ and translated into the vernacular. And it is elucidated on the title page by the Wise Man,⁴³⁰ R' W. Heidenheim, that no other person may use the same format for twenty-five years; and I have said, lest there be among the children of our nation who reside under the merciful wings of His Majesty, the Kaiser, a man or woman whose heart will not wish to buy the maḥzorim that are being printed in the city of Vienna by Mr. Anton Schmid, I hereby invalidate and declare that all of the words regarding bans and curses which have been issued, and which will be issued in the future by rabbis in other countries, upon the next printing, are to be deemed nonexistent⁴³¹

The letter is dated Monday 25 Tevet, but its year is obscured⁴³². The last time during R' Banet's lifetime that 25 Tevet fell on a Monday was 1817, so we can conclude that this letter was written no later than January 13, 1817.⁴³³ In any event, it unambiguously reveals R' Banet's stance: He gave no force whatsoever to R' Horowitz's ban on the Roedelheim maḥzor.

V. German-Language Validation

⁴²⁹ The spelling here reflects R' Banet's inclusion of a *samekh* in the town's name.

⁴³⁰ The wording matches R' Sofer's formula for referring to Heidenheim. See *supra* n.355.

⁴³¹ MILEI D'AVOT, pt. 1, Hoshen Mishpat, ¶ 3 (Ezekiel Menashe Horowitz 1924). The letter continues to set forth R' Banet's logic regarding the ruling of the Rivash. See *infra* n.603.

⁴³² Prof. Rakover quotes this letter from R' Banet as reproduced in *Milei D'Avot*, but without attributing it to any year. NAHUM RAKOVER, *supra* n.133, at 173 & n.36, 397 n.284. The problem is that the printer of this volume in 1924 neglected to put into bold font the appropriate letters to add up to the year in question. See text accompanying note 426.

The reason that the printer neglected to boldface certain letters may inhere in a switch over time in the methodology for noting the year. On the title page of *Milei D'Avot*, the year is indicated by a long Hebrew phrase, יקמו היא מילי דאבות. When every single letter of that phrase is added, the total comes to (5)685, which corresponds to 1924. Perhaps the printer thought that R' Banet had used a similar convention the previous century. However, when every single character is added in the phrase employed by R' Banet from EXODUS 6:13— ויצוים א"ל בני ישראל — the total comes out to (5)776, corresponding to 2015! We can therefore be sure that R' Banet intended in the nineteenth century to emphasize only a subset of the characters, but unfortunately the printer in the twentieth century obscured that intent.

⁴³³ As a calendrical matter, during the interval from publication of the Roedelheim maḥzor until R' Banet's death, 25 Tevet fell on a Monday in 1804, 1807, 1808, 1810, 1811, 1812, 1814 and 1817.

In terms of the date that the Austrian authorities ordered R' Banet to permit that which he had previously forbidden,⁴³⁴ one commentator identifies it as 1807.

Heidenheim violently objected to the publication of the Schmid edition, for he felt that his business would be harmed if his own "Roedelheim Mahzor" would be used by A. Schmid. Heidenheim therefore appealed to Rabbi Pinhas Horowitz of Frankfort-on-the-Main to issue a "protective ban" in favor of the "Roedelheim Mahzor." Horowitz acceded to Heidenheim's request, but on November 12, 1807 the Austrian authorities in Vienna issued instructions that the ban against the Schmid edition should be ignored.⁴³⁵

Part of that account is problematic —Heidenheim did not resort to R' Horowitz for an approbation in response to Schmid's depredations. Instead, the latter's *haskama* accompanied the first printing of the Roedelheim maḥzor, as was customary.⁴³⁶

Nonetheless, from a broader perspective, the German-language literature supports the notion that the key event took place on November 12, 1807. On that date, a Decree issued from the Chancellor's Court to its regional offices in Bohemia, Moravia, Galicia, and elsewhere, as follows:

News has been received that the domestic book publisher Schmid, with authorization from the state censor, reissued the Jewish prayer book and also printed a well-advised German translation in Hebrew letters prepared by a Roedelheim Jew by the name of Heidenheim, on behalf of the aforementioned Jew Heidenheim, who earlier had received an exclusive privilege to print this book from the Chief Rabbi of Frankfurt, an appeal to the Jewish people has been issued, and has been sent to some of the most respected rabbis in the Austrian monarchy by means of the postal service, that several rabbis, and most notably the Chief Rabbi of Frankfurt, Pincas Levy Horowitz, pronounced a great excommunication curse against the later publisher of the Mahzor and his coworkers and assistants. [¶] The regional offices shall draw the rabbis' attention to this absurd measure so that if they encounter one of these writings, they will suppress and make no use of it, and in case any of their fellow believers have questions, they shall instruct them about the unlawfulness of such a measure, and they shall in no way dare to enforce any part of the excommunication order.⁴³⁷

On May 25, 1808, the same Chancellor's Court underlined the issue to its regional offices, ordering them to "prepare a specific circular to give notice, and in particular to direct the rabbis to clearly and emphatically explain the same in the synagogues of their fellow believers, that every excommunication order is not in force so long as the government does not recognize its legal force, and that whoever disseminates such an excommunication order by his hand, will

⁴³⁴ See text accompanying note 448.

⁴³⁵ MOSHE CARMILLY-WEINBERGER, *supra* n.121, at 196.

⁴³⁶ See text accompanying note 111.

⁴³⁷ GESCHICHTE DER JUDEN IN WIEN. *supra* n.410, at 172-73.

pay a money penalty of 50 thalers, or based upon the circumstances will face a corporal punishment."⁴³⁸

Additional scholarship in German concurs that the Austrian government suppressed the ban by means of a Chancellor's Court decree of November 12, 1807, and then adds the suggestion that "Heidenheim and Schmid made an agreement to work together."⁴³⁹ As support, it cites Heidenheim's own preface to the Roedelheim maḥzor published in Vienna.⁴⁴⁰ Inasmuch as Viennese publications emanated from Schmid rather than Heidenheim, it seems doubtful that any such alleged concord actually reflected Heidenheim's viewpoint.

* * *

Based on all the considerations adduced above, we can now complete our timeline:

1797	<i>R' Banet composes strict ban on Shaagat Aryeh.</i>
1800-1802	Publication of Roedelheim maḥzor, subject to 25-year ban signed by R' Horowitz against republication
Earlier than 1807	R' Banet upholds R' Horowitz's ban and rules against Schmid.
1806	<i>Civil authorities rule against R' Banet; order him to pay damages to Aaron Horin.</i>
1807	Civil authorities rule against R' Banet; order him to issue edict in favor of Schmid.
1808-1810	<i>R' Banet issues approbations for works of Herz Homberg, but pointedly refuses to add ban.</i>
By 1816	Schmid brought out rival version of Roedelheim maḥzor, including letter from R' Banet.
By January 13, 1817	<i>R' Banet invalidates all bans against the Roedelheim maḥzor, now and in the future, regardless of the country in which they are written.</i>
August 22, 1822	R' Banet, in tshuva 7, rules against copyright protection for the Roedelheim maḥzor.
February 1823	R' Sofer asks R' Banet to join with him in approving <i>Oryan T'litai</i> ;

⁴³⁸ *Id.* at 173-74.

⁴³⁹ ___ Krauss, "Merkwürdige Siddurim," in *STUDIES IN JEWISH BIBLIOGRAPHY AND RELATED SUBJECTS IN MEMORY OF ABRAHAM SOLOMON FREIDUS (1867-1923)* (New York: Alexander Kohut Memorial Foundation 1929), pp 128-140.

⁴⁴⁰ *Id.* at ___ n.27. The claimed date of 1805 also seems too early to reflect Schmid's involvement. See text accompanying note 133 (dating Schmid's participation to 1816).

	R' Banet agrees only to approbation, not to ban.
March 7, 1823	R' Sofer, in tshuva 41, disagrees with R' Banet and upholds copyright protection for the work.
April 11, 1827	R' Banet, in tshuva 8, underlines his previous conclusions from tshuva 7.
Undated (but after April 1827)	R' Sofer, in tshuva 79, writes a lengthy disquisition about unfair competition, in which he again sides with Heidenheim.

THE LESSONS

I. Emancipation And Its Discontents

A. The Hapless Judge Buffeted By Rival Courts

After R' Banet had expressed himself so forcefully in favor of Anton Schmid based on legal criteria in the context of responsum 7 (written in 1822), and then underlined the halakhic points forcefully again in responsum 8 (written in 1827), not to mention defended the rectitude of his legal position a third time in the February 1823 letter appended to R' Sofer's responsum 41, it is more than shocking to read the above denouement: By his own statement, R' Banet's impetus for his thrice-repeated resolution in favor of Schmid came not from his own reasoned judgment, but instead from compulsion.

This is not to say that his rationale—that a ban, to be efficacious, must be pronounced orally, rather than printed—was devoid of halakhic merit. Still, it was an opinion out of sync with the weight of authorities.⁴⁴¹ R' Banet himself, in responsum 8, pronounced that he was able to find refuge in the circumstance that the ban was not pronounced verbally. In other words, he acknowledged that his primary constraint in ruling as he did came from the command of the Gentile court. Fortunately for him, he could find refuge in a legal technicality—the invalidity of a ban that is in writing. Absent that halakhic foothold, R' Banet might not have been able to boost himself out of his dilemma with the Austro-Hungarian authorities, consistent with his obligation to uphold the dictates of Torah.

It should be recalled that R' Banet had already lost a case before the civil authorities in 1806, when Aaron Horin filed suit against him and others.⁴⁴² Against that background, we can appreciate R' Banet's frame of mind when hauled before the tribunal the following year⁴⁴³ in Bruenn (Czech, "Brno"), the capital of Moravia.⁴⁴⁴ His subjective experience is that "they spoke

⁴⁴¹ See text accompanying note 393.

⁴⁴² See text accompanying note 422.

⁴⁴³ See text accompanying note 434.

⁴⁴⁴ It was in Bruenn, on February 13, 1782, less than 40 years after the 300-year-old ban on Jews living in that city had been lifted, that Joseph II issued his famous *Toleranzpatent*. See text accompanying note 462.

harshly to me” and even went so far as to say that “I was rebelling against the government,”⁴⁴⁵ a charge bordering on treason.⁴⁴⁶ It is not surprising that he readily capitulated and accepted the governmental edict, which he ironically⁴⁴⁷ rendered as “the mouth that forbids will be the mouth that permits.”⁴⁴⁸ That particular phraseology, quoting a familiar halakhic evidentiary trope,⁴⁴⁹ reflects both R’ Banet’s personal predicament and its resolution.⁴⁵⁰ In other words, he resolved the dilemma by taking the ban on Hebrew books that forbids their dissemination, and formulating a legal resolution to reach the opposite conclusion, *i.e.*, to permit newcomers to reprint those books without permission from the initial publisher.

The psychological dimension remains—why did R’ Banet, whose legal analysis initially favored Heidenheim, take it upon himself to carry on at such length in responsum 7 against Heidenheim? It hardly seems that his motivation was entirely a venal one of placating the civil authorities. For had his concern been only to save his own hide, he would not have stated at the outset that he was driven to answer the question “because of the honor of Torah,” and would not have composed such an elaborate castle in the air, juxtaposing the Open Alleyway against the Closed, in light of the Fisherman and the Maharam of Padua. Instead, one would have expected R’ Banet to have issued a perfunctory ruling in favor of Schmid and then to have washed his hands of further involvement.

⁴⁴⁵ When the authorities told R’ Banet that “in this way said I was rebelling against the government,” the fate of traitors in that epoch could not have soothed his anxieties. See text accompanying note 403.

⁴⁴⁶ R’ Banet was not one to make waves, and maintained good relations with the government—so much so that he “succeeded in postponing the disintegration of Moravian Jewry for a at least one generation later than that of the breakup of Bohemian Jewry.” Moshe Nahum-Zobel, *supra* n.136, at 107.

⁴⁴⁷ We can take as a given that the secular authorities did not formulate their ruling as a pun on Jewish law, so the formulation reflects R’ Banet’s sense of humor. See *supra* n.402.

⁴⁴⁸ See text accompanying note 403.

⁴⁴⁹ Imagine that woman X and man Y are caught cohabiting—without more, there is no violation. Now, let us posit the existence of evidence that X was previously married to Z—on that basis, X would be guilty of adultery (and subject to execution, under biblical law). Nonetheless, if the only evidence for her previous marriage is that she says, “I got married, and then I got divorced,” the law is that “she is believed, for the mouth that forbids is that mouth that permits.” MISHNAH KETUBOT 2:5. In other words, the only basis for condemning her as an adulterous married woman is her own statement (“I got married”); but that statement simultaneously exculpates her (“I got divorced”).

The case would be altogether different to the extent that independent evidence existed of her marriage. Under those circumstances, her exculpation is not believed. *Id.* In this fashion, a kind of “equal dignity” rule applies to equivalent oral statements, but not to oral contradiction of a written record.

⁴⁵⁰ Just as an authority figure might say, “You broke it, you fix it,” so the secular judge in this case evidently commanded, “your mouth forbade this conduct, now your mouth had better permit it.”

To the contrary, though, we find that responsum 7 defends the pro-Schmid ruling at great length. It was issued in 1822, many years after the governmental authorities had placed R' Banet under compulsion,⁴⁵¹ and followed in short order by his reiteration of views in the letter that he sent to R' Sofer. Moreover, he issued responsum 8 another five years later (1827), again covering the same terrain again by promulgating another lengthy analysis in favor of Schmid. Perhaps the most straightforward explanation of R' Banet's invocation of "the honor of Torah" is that he could not bear to issue a responsum against his own inner lights; having been commanded by the governmental authorities to rule in favor of Schmid, he had to convince himself that the halakha was in accord, and therefore reworked the same field, exhaustively, three times to justify his stance. His own integrity as a decisor did not allow him the latitude to issue a perfunctory ruling in favor of Schmid; instead, cognitive dissonance forced his mind to follow where his body had been ordered to go.

In that regard, the most pregnant statement in all the responsa is R' Banet's acknowledgement that, after being ordered to reverse his prior stance, "And so I did, inasmuch as the ban was not pronounced verbally but only in writing."⁴⁵² In other words, R' Banet himself recognized the contingent nature of his ruling; he was forced to hold in favor of Schmid, and found himself in the fortunate situation that he could find a technicality on which to hang the conclusion that circumstances had forced him to proclaim.

Without passing judgment from our historical vantage point, we must recognize that R' Banet lived in an era that seldom afforded Jews complete liberty of conscience. He would have risked not only his position as Chief Rabbi of Moravia, but perhaps his liberty (and even his life), by opposing the civil authorities and continuing to side with Heidenheim.

B. Advent of The Emperor

R' Banet's treatment of the copyright issue must be situated within the appropriate historical milieu. How was it that he was hauled before the civil authorities—twice, no less—based on the decision he had reached in a responsum? Investigation shows that he was not the freak victim of two lightning bolts, but instead part of a greater social phenomenon.

Let us revert to R' Sofer.⁴⁵³ It was mentioned earlier that his congregants once raised money to bribe the prosecutor.⁴⁵⁴ A fuller recitation is that, during the Napoleonic war, peasants stripped dead soldiers of their weaponry at the behest of two Jewish businessmen, who sold the armaments to the Austrian army.⁴⁵⁵ The partners in that venture had a falling out, which they

⁴⁵¹ Note that the date is given as November 12, 1807, when the authorities clamped down on R' Banet. See text accompanying note 434.

⁴⁵² See text accompanying note 403.

⁴⁵³ Besides the story to be related below, it can be added that, just as R' Banet ruled against Aaron Horin, who appealed to the civil authorities, R' Sofer served on a Beit Din that ruled adversely to R' Jonathan Alexandersohn, who similarly took his grievance to the civil authorities. JACOB KATZ, *supra* n. 38, at 196-97.

⁴⁵⁴ See text accompanying note 173.

⁴⁵⁵ YAAKOV DOVID SHULMAN, *supra* n.146, at 141.

took to the Pressburg Beit Din. After its ruling, the disgruntled 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 weapons, as both litigants had merely characterized their dispute as involving iron. The ensuing colloquy with the presiding judge is instructive:

“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.”⁴⁵⁶

At that juncture, the judge dismissed the case—not based on legal considerations, but because of a miraculous coincidence:⁴⁵⁷ He revealed himself as Gen. de Monfort,⁴⁵⁸ R' Sofer’s childhood friend from Mayence.⁴⁵⁹

By this point, we see that both of our decisors faced civil judicial proceedings arising out of their previous issuance of responsa. One possibility is that they were anomalous in that fate; another is that theirs was part of a broader experience. As we shall see, the latter explanation is closer to the mark. In fact, Gen. de Monfort’s reference to the Emperor’s emancipation pinpoints the cause of that phenomenon.

Moving backwards in history, throughout medieval times, host countries persecuted Jews, expelled them, or at a very minimum tolerated them as a separate presence. One need only cite the 1264 Statute on Jewish Liberties in Poland as an example.⁴⁶⁰ During this era, Jews possessed their own law courts and could freely impose the ban on recalcitrant congregants.⁴⁶¹

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 for this purpose emanated in the law of patents. One of the early signposts along that route was the *Toleranzpatent*, issued by Kaiser Joseph II in Austria.⁴⁶² In France, Louis XV

⁴⁵⁶ ZELIG SCHACHNOWITZ, *supra* n.146, at 188.

⁴⁵⁷ On the genre of miracle stories regarding R' Sofer, see *supra* n.150.

⁴⁵⁸ YAAKOV DOVID SHULMAN, *supra* n.146, at 142-43; ZELIG SCHACHNOWITZ, *supra* n.146, at 189.

⁴⁵⁹ See text accompanying note 192

⁴⁶⁰ DEAN PHILLIP BELL, *supra* n.17, at 208.

⁴⁶¹ Michael Brenner, *et al.*, *supra* n.43, at 100. Jacob Katz cites “all the usual means of coercion short of captial punishment: fines, imprisonment, pillory, and different grades of religiously sanctioned bans.” JACOB KATZ, JACOB KATZ, OUT OF THE GHETTO 21 (Syracuse Univ. Press 1973). On the different grades of bans, see text accompanying note 97.

⁴⁶² GIL GRAFF, *supra* n.180, at 39. That edict in some measures favored Jews, and in other respects limited them. An example of the latter is its providsion, on two years’ notice, that

similarly issued *lettres patent* to the Jewish community.⁴⁶³ The *Judenpatent* applicable to Bohemia also deserves mention.⁴⁶⁴

This Emancipation⁴⁶⁵ is normally dated to the French revolution.⁴⁶⁶ Even more salient for current purposes is that, in Eastern Europe, its advent came later⁴⁶⁷—just around the time that R' Banet and R' Sofer were issuing their conflicting rulings.⁴⁶⁸ Given that those rabbis issued their ruling in the ferment of Napoleonic invasions, it is worth sketching the scene. At his advent on the Jewish stage, Jews welcomed Napoleon Bonapart effusively as the savior from their persecution.⁴⁶⁹ He certainly did much to integrate Jews into the polity, with the same rights accorded others. But, at the same time, he wished to arrogate control to himself as emperor, with consequent hostility towards independent rights for religious orders, of whatever variety. Even

“all documents written after that period in the Hebrew language or in Hebrew or Jewish script shall be null and void.” WILMA ABELES, *supra* n.408, at 51-53. The back story there is that, insofar as legal and financial documents were concerned, the civil authorities wished to audit the Jews' ledgers. JACOB KATZ, *OUT OF THE GHETTO* 32 (Syracuse Univ. Press 1973). Given the conflicting values that went into the *Toleranzpatent*, it ended up embodying ambiguous goals. *Id.* at 163-64.

⁴⁶³ JACOB KATZ, *supra* n.461, at 11. Those letters issued in derogation of the Edict of Expulsion, which was still in force in France. *Id.* Later, the National Assembly in France granted citizenship in 1791. *Id.* at 30. That later act, together with Joseph II's Edict of Tolerance, are the two most notable signposts on the way to Emancipation. *Id.* at 30.

⁴⁶⁴ JACOB KATZ, *supra* n.461, at 164-65. (“in accordance with the accepted principles of Tolerance so that legislation may finally altogether abolish the difference ... between Jewish and Christian subjects”).

⁴⁶⁵ As a term, “Emancipation” actually reflects a linguistic anachronism, as it was not until the “Catholic Emancipation” of the Irish in 1828 that the subject terminology actually arose. JACOB KATZ, *supra* n.461, at 190, 195.

⁴⁶⁶ GIL GRAFF, *supra* n.180, at 4. Note historian Salo Baron traces its origins earlier. *Id.* Periodicization of history is notoriously difficult, as contemporaries are not considerate enough to signal a radical change from existing practices.

⁴⁶⁷ Outside the West, modernity arguably did not arrive until the twentieth century, if then.. As a writer recently recollected her childhood in Iran, “We were told—by our rabbis, our parents, our teachers and basically everyone above the age of 12—that we must believe, and believe we did, or said we did, because the consequences of defiance were just too great to chance.” Gina Nahai, *Yom Kippur Dilemma*, *JEWISH JOURNAL OF LOS ANGELES*, p. 10 (Oct. 1, 2008).

⁴⁶⁸ GIL GRAFF, *supra* n.180, at 5. Note that full religious freedom in Austria-Hungary was delayed until the revolution of 1848-49. JACOB KATZ, *supra* n.461, at 198.

⁴⁶⁹ GIL GRAFF, *supra* n.180, at 79. They even parsed his name as *bona parte*, which they translated as *helek tov* (“good portion”). SIMON SCHWARZFUCHS, *NAPOLEON, THE JEWS AND THE SANHEDRIN* 22 (Routledge & Kegan Paul 1979). As Harold Bloom remarks, “You don't have to be Jewish to be a compulsive interpreter, but, of course, it helps.” Introduction to YOSEF HAYIM YERUSHALMI, *supra* n.377, at xxiii.

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.”⁴⁷⁰

In 1806-07, 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*. 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.⁴⁷¹ 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.”⁴⁷² This response simply reflected the reality that, by that juncture, Jews habitually resorted to secular courts, such that Jewish tribunals operated as arbitrators upon the consent of all concerned.⁴⁷³ In any event, the political fallout from the answers furnished by the Great Sanhedrin was to secure free religious exercise for the Jewish, but at the cost of their pledge to adhere to the principles embodied in the collective responses.⁴⁷⁴ As a contemporary Jew (who reviewed the transformation from his vantage point in 1870) lamented, “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.”⁴⁷⁵

Naturally, among the opponents to this bargain was R’ Sofer.⁴⁷⁶ He carefully watched the events unfolding in Paris, along with Jews all over Europe.⁴⁷⁷ R’ Sofer staunchly opposed

⁴⁷⁰ GIL GRAFF, *supra* n.180, at 72. Note that the emperor barred papal bulls from entering the country without governmental approval. *Id.* at 73.

⁴⁷¹ GIL GRAFF, *supra* n.180, at 78 (question 8 from Napoleon to rabbinical synod). Background instructions from the Emperor showed 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.” SIMON SCHWARZFUCHS, *supra* n.469, at 100.

⁴⁷² GIL GRAFF, *supra* n.180, at 87.

⁴⁷³ GIL GRAFF, *supra* n.180, at 88.

⁴⁷⁴ GIL GRAFF, *supra* n.180, at 89.

⁴⁷⁵ GIL GRAFF, *supra* n.180, at 107-08 (quoting Jacob Sapir, ellipses omitted).

⁴⁷⁶ R’ Sofer praised the rabbi who had successfully parried Napoleon’s questions. SIMON SCHWARZFUCHS, *supra* n.469, at 170. Interestingly, his arch-opponent, Aaron Horin, found his own reasons to offer praise to that same rabbi. See *supra* n.421. “It is difficult to find a better illustration of the contradictory reactions to which the Paris meeting gave rise: the head of the orthodox party and one of the first reformers approved of them for opposing reasons.” SIMON SCHWARZFUCHS, *supra* n.469, at 171. On the other hand, Jacob Katz detects in R’ Sofer’s reaction a kind of passive resistance. JACOB KATZ, *supra* n.461, at 156-57.

⁴⁷⁷ SIMON SCHWARZFUCHS, *supra* n.469, at 168 (view from Bohemia and Moravia).

Emancipation, whereby Jews would have all the rights as the other inhabitants of the country.⁴⁷⁸ Far better than accepting the blandishment of Hungarian (or French or Prussian) citizenship, in his view, was to remain as Jews in exile, focusing their prayers on redemption.⁴⁷⁹ Though he fully conceded the royal prerogative in such domains as military conscription,⁴⁸⁰ taxation, and coinage,⁴⁸¹ R' Sofer adamantly opposed ceding authority to civil authorities over traditional rabbinic domains—including such matters as construing the validity of a Jew's will.⁴⁸²

This perspective unlocks a deeper understanding to his conflict with R' Banet. By upholding R' Horowitz's printing ban, R' Sofer was simply adhering to the authority that rabbis had exerted since the dawn of printing.⁴⁸³ He expressed bewilderment and surprise that R' Banet would discard such a hoary institution.⁴⁸⁴ By contrast, R' Banet, by virtue of the compulsion he was under, tacitly accepted the core tenet of the Emancipation: "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."⁴⁸⁵ 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.⁴⁸⁶

⁴⁷⁸ Benzion Dinur, "Emancipation," 6 *Encyclopedia Judaica* 696, 708 (1972). For similar reasons, another opponent of the bargain afforded by the Emancipation was R' Shneur Zalman of Liadi (1745-1812), the first Rebbe of Chabad. 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." SIMON SCHWARZFUCHS, *supra* n.469, at 176. An even more dismal view of the Napoleonic wars arose in other Eastern European Hassidic circles, as the war of Gog and Magog. YOSEF HAYIM YERUSHALMI, *supra* n.377, at 37.

⁴⁷⁹ Benzion Dinur, *supra* n.478, at 708.

⁴⁸⁰ To be worthy of recognition, the governmental draft had to be applied on a non-discriminatory basis. GIL GRAFF, *supra* n.180, at 68. Assuming that condition to have been met, R' Sofer determined that a Jew who relieved himself of army duties by coercing another Jew to serve—even a Sabbath desecrator—is to be condemned as a kidnapper (deserving of the death penalty). *Id.*

⁴⁸¹ GIL GRAFF, *supra* n.180, at 110.

⁴⁸² GIL GRAFF, *supra* n.180, at 52. Note that his father-in-law, R' Akiva Eiger, took a similar stance. *Id.*

⁴⁸³ R' Sofer did so in a particularly intense way, bringing his considerable charisma to bear in a single-minded devotion to the law. JACOB KATZ, *supra* n.461, at 159.

⁴⁸⁴ See text accompanying note 302.

⁴⁸⁵ GIL GRAFF, *supra* n.180, at 6.

⁴⁸⁶ Part of the difference between them was a matter of geography. In Moravia, R' Banet was called before the civil authorities, who ordered him to take the stance he took. By contrast, R' Sofer was located farther on the outskirts, and thus able to put up more resistance. JACOB KATZ, *supra* n.461, at 158.

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.⁴⁸⁷ Even in cases of Jews against Jews, increasingly during this period one party sought redress in the secular courts.⁴⁸⁸ 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."⁴⁸⁹ Naturally, the rabbis railed against such derogations of their judicial authority.⁴⁹⁰

It should therefore occasion no surprise that when a case involved not simply *Jew vs. Jew*, but instead *Jew vs. 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 favor of Heidenheim fall. When faced with it, the Christian Schmid did what even disgruntled Jewish litigants⁴⁹¹ were increasingly wont to do when faced with unfavorable rabbinical rulings:⁴⁹² He brought an "appeal against their verdicts to the general secular courts."⁴⁹³

The effect on Jewish courts of these political events was incalculable. Throughout the medieval era⁴⁹⁴ and even through the Renaissance,⁴⁹⁵ rabbis pronounced the *herem* on Jews, and

⁴⁸⁷ We see every permutation. Thus, at times Jews went to secular court to obtain redress against Christians. DEAN PHILLIP BELL, *supra* n.17, at 208 (citing example from Poland in early fifteenth century).

⁴⁸⁸ Mordechai Breuer & Michael Graetz, *supra* n.53, at 183.

⁴⁸⁹ Mordechai Breuer & Michael Graetz, *supra* n.53, at 183. The "Revised General Privilege and Regulation for the Jewry of Prussia," which Frederic II promulgated in 1750, provided for rabbinic jurisdiction—but then 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. GIL GRAFF, *supra* n.180, at 33.

⁴⁹⁰ For a collection of rabbinic inveighing against Jews resorting to Gentile courts, see GIL GRAFF, *supra* n.180, at 189 n.101.

⁴⁹¹ Happily, he did not take the even harsher reprisals against rabbinic decisors that we have encountered earlier. See *supra* n.379.

⁴⁹² "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." JACOB KATZ, *supra* n. 38, at 301. There was even a notorious incident when a rabbi brought his own congregation to judgment; disgruntled by how R' Sofer had ruled, he then brought the matter to the civil authorities, who disqualified the rabbinic judgment and reinstated him with his congregation. *Id.* at 468. There was even an aspect of this affair that threatened to put R' Sofer on the wrong side of the civil authorities. *Id.* at 473.

⁴⁹³ Mordechai Breuer & Michael Graetz, *supra* n.53, at 254. See *id.* at 378-79.

⁴⁹⁴ JACOB KATZ, *supra* n.172, at 51-52 ("one of the main features of Jewish autonomy in this age that the Jews were allowed to adhere to their own jurisdiction, which was based on

Christian authorities granted them the right to do so⁴⁹⁶ (albeit not without resistance).⁴⁹⁷ Yet, by the early nineteenth century—when the first of R’ Banet’s responsa issued—“governmental intervention in internal Jewish affairs had become the norm.”⁴⁹⁸ 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.⁴⁹⁹ In terms of rabbinic ability to impose the ban, “the quintessence of their power since time immemorial,” the fallout from the recent Napoleonic wars was still in the air.⁵⁰⁰

With the expansion of French rule through Napoleonic victories,⁵⁰¹ a new version of civil authority had come into existence: the state that embraced each and every citizen, rather than dividing them by confession. In pre-modern times, Jewish law courts had authority to regulate affairs; “they intervened to prevent ‘unfair’ competition among Jews,” among other purposes.⁵⁰² But all that changed.⁵⁰³ The all-embracing state could not countenance loss of its authority to

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. *Id.* at 59.

⁴⁹⁵ ROBERT BONFIL, *supra* n.14, at 141.

⁴⁹⁶ Note in this regard the “ordinances designed to compel Jews to present themselves before Jewish community tribunals and accept the verdicts they handed down.” ROBERT BONFIL, *supra* n.14, at 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. *Id.* at 205., 206.

⁴⁹⁷ Two Jews complained to the Duke of Ferrara that his allowance of rabbinic jurisdiction entailed surrender of his own “sovereignty ovaer a portion of his subjects, who in their turn were being deprived of a part of their freedom.” ROBERT BONFIL, *supra* n.14, at 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 instituteions down to the smallest detail.” *Id.* at 204. Still, at the end of the day, Jews’ recourse in that era to Christian justice was relatively low *Id.* at 209.

⁴⁹⁸ Michael Brenner, *et al.*, *supra* n.43, at 101.

⁴⁹⁹ Mordechai Breuer & Michael Graetz, *supra* n.53, at 203.

⁵⁰⁰ One metric is that the early modern period ended in 1806 with the impact of the Napoleonic incursions. DEAN PHILLIP BELL, *supra* n.17, at 6.

⁵⁰¹ JACOB KATZ, *supra* n.461, at 168.

⁵⁰² Steven M. Lowenstein, *supra* n.141, at 145.

⁵⁰³ The upheaval was not limited to the printing ban. Previously, we have encountered the *herem ha-yishuv*. See text accompanying note 250. In seventeenth century Moravia, for example, it could prove a powerful force. JACOB KATZ, *supra* n.172, at 161. The same forces as operated against the printing ban struck down Jewish enforcement of *herem ha-yishuv*, as well. JACOB KATZ, *supra* n.461, 178 (citing example of Strassbourg).

either church or synagogue.⁵⁰⁴ 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 had to be ratified by the secular authorities!⁵⁰⁵ Indeed, the ultimate elimination of rabbinic supervision as been labeled “a postulate of the modern state.”⁵⁰⁶

The rabbis pushed in one direction, the state pushed back, 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 its center stood the *herem*.⁵⁰⁷ In stage one, 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.⁵⁰⁸ 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.”⁵⁰⁹

To be sure, none of these phenomena were wholly new. Already by the twelfth century, Maimonides codified the Talmudic classifications [BT BERAKHOT 19a] of the various sinners deserving of excommunication (*nidduy*)⁵¹⁰ 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.⁵¹¹ But the emphasis there was not on recourse to the Gentile judiciary, but instead on the nullification of a substantive provision of Jewish law. On sporadic occasions, Jewish resort to Gentile courts was not unknown.⁵¹² What the Emancipation brought to the fore was the normalization of this

⁵⁰⁴ “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.” JACOB KATZ, *supra* n.172, at 187.

⁵⁰⁵ Mordechai Breuer & Michael Graetz, *supra* n.53, at 255.

⁵⁰⁶ Mordechai Breuer & Michael Graetz, *supra* n.53, at 255.

⁵⁰⁷ 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.

SIMON SCHWARZFUCHS, *supra* n.469, at 187.

⁵⁰⁸ DEAN PHILLIP BELL, *supra* n.17, at 107 (“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. *Id.* at 108, 211.

⁵⁰⁹ Haim Hermann Cohen, *supra* n.96, at 353.

⁵¹⁰ See text accompanying note 98.

⁵¹¹ Hilkhhot Talmud Torah 6:14, #9.

⁵¹² “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

phenomenon,⁵¹³ which contemporaries viewed as “nothing short of catastrophic.”⁵¹⁴ The repeated and pointed fights, of the sort that embroiled both R’s 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 in 1797. By the same token, he did not hesitate to vindicate the ban imposed by the celebrated R’ Horowitz before 1807. For his fidelity to Jewish tradition, he was hauled before a secular court and charged with sedition for daring to uphold the *herem*. One may characterize the Moravian authorities as having imposed a secular *herem* on him if he would contumaciously continue in that path. So he changed course, to continue on a new path for the rest of his life.

We now understand the etiology of R’ Banet’s strange ruling that bans must be pronounced orally, and are invalid if only in writing. As he himself admitted,⁵¹⁵ his operative construction of halakha changed as a function of his life circumstances, first principles rendered so much collateral damage in the arms race then unfolding between Jewish and civil courts.

II. The Printing Press As An Agent of Change

A. 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.⁵¹⁶ Among many other upheavals, it resulted in the passage of the first copyright statute in 1710.⁵¹⁷ Thus, the entire domain of copyright law is one daughter of the press.

Of course, printing affected Jews as extensively as everyone else.⁵¹⁸ The dissemination of books led to “a new open-mindedness within traditional Jewish circles, evidenced by

religious obligation and, at most suffered as a compromise under the pressure of circumstances.” JACOB KATZ, *supra* n.461, at 19.

⁵¹³ “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.” JACOB KATZ, *supra* n.461, at 31.

⁵¹⁴ JACOB KATZ, *supra* n.461, at 142. To traditionalists, these events “must have appeared as some kind of metaphysical debacle.” *Id.* From present-day eyes 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.” *Id.* at 175.

⁵¹⁵ See text accompanying note 403.

⁵¹⁶ See generally ELIZABETH L. EISENSTEIN, *THE PRINTING PRESS AS AN AGENT OF CHANGE* (1979).

⁵¹⁷ HARRY RANSOM, *THE FIRST COPYRIGHT STATUTE* (____ 1956).

⁵¹⁸ DEAN PHILLIP BELL, *supra* n.17, at 149.

mounting interest in the general secular disciplines.”⁵¹⁹ 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 of the Talmud, and in general to correction of proofs.⁵²⁰ Heidenheim’s handiwork in creating the Roedelheim maḥzor is part and parcel of that ongoing 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 to the standardization and wide-scale dissemination made possible by the advent of the printing press, advantages its predecessors had never enjoyed.⁵²¹

The opportunities afforded by printing posed concomitant risks. Not only could it give rise to anti-Semitic calumnies,⁵²² but also heresy could proliferate as easily as orthodoxy through the medium of print. This concern animated much early regulation of presses, the example of England being particularly instructive.⁵²³ To achieve control, one strategy limited the works that could be printed. Censorship could succeed in a closed society, such as England when only four printing presses existed.⁵²⁴ Later, with the proliferation of presses, the issuance of a royal patent became a prerequisite to exercise the privilege of printing.⁵²⁵

A parallel device developed in Jewish communities.⁵²⁶ The Jews of Amsterdam issued a ban on printing any book without community permission,⁵²⁷ and other locales as well required advance approval.⁵²⁸ The community thereby exercised self-censorship, “to counteract

⁵¹⁹ Mordechai Breuer & Michael Graetz, *supra* n.53, at 4. On the attitude of R’ Sofer towards secular knowledge, see generally Aaron M. Schreiber, *supra* n.150. For example, the author of the Noda be-Yeuhuda issued approbations for works on mathematics, history, and grammar. *Id.* at 162 n.94.

⁵²⁰ ROBERT BONFIL, *supra* n.14, at 94.

⁵²¹ DEAN PHILLIP BELL, *supra* n.17, at 150-51. Of course, opposition to the *Shulḥan Arukh* was widespread at its inception, including from such stalwarts as R’ Judah Loew ben Bezalel (1525-1609), the Maharal of Prague. *Id.*

⁵²² ROBERT BONFIL, *supra* n.14, at 27 (woodcut of blood-libel).

⁵²³ LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 20-27 (Vanderbilt Univ. Press 1968). See Thomas F. Cotter, *supra* n.7.

⁵²⁴ LYMAN RAY PATTERSON,, *supra* n.523, at 114-42.

⁵²⁵ LYMAN RAY PATTERSON, *supra* n.523, at 78-113

⁵²⁶ Note the mild ban imposed on the works of Azariah de’ Rossi (1513-1578), extending only to the book rather than to its author. YOSEF HAYIM YERUSHALMI, *supra* n.377, at 71.

⁵²⁷ YOSEF KAPLAN, FROM CHRISTIANITY TO JUDAISM: THE STORY OF ISAAC OROBIO DE CASTRO 210 n.5 (Raphael Loewe trans., Oxford Univ. Press 1989) (directed against those lacking faith in coming of Messiah).

⁵²⁸ Moshe Carmilly-Weinberger, *supra* n.389, at 1451.

kabbalistic, pseudo-messianic and Haskalah tendencies.”⁵²⁹ 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 society, where the control over publication was less than perfect.⁵³⁰ We have previously observed how the printing ban fell afoul of the new spirit of the Emancipation.⁵³¹ The ban equally offended Emancipation’s handmaiden, 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.”⁵³² 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 his work was intended for Jews, was printed in Hebrew characters, and provided with a running Hebrew commentary. His waiving of the customary approval was a slight but conscious defiance of rabbinical authority⁵³³

Modernity views escape from the ghetto as a boon to previously confined Jews. But those who actually lived there did not resent their confinement. Instead, they tended to view it as the normal state of affairs, that admirably served their social and religious needs, as well as affording physical and spiritual security from the outside.⁵³⁴ Just as R’ Sofer opposed the effects of Emancipation,⁵³⁵ so he was none too eager to expose Judaism to the Enlightenment spirit of critical dissection, where “tradition would be brought before the tribunal of reason and called upon to vindicate its truths.”⁵³⁶ Better by his lights would be continued social and cultural

⁵²⁹ Moshe Carmilly-Weinberger, *supra* n.389, at 1451

⁵³⁰ @[Still need to develop—did R’ Sofer see the ban as a way to prevent the spread of heretical works analogous to the Catholic “Index of Prohibited Books”? Also, was a rabbinical approbation the equivalent of an ecclesiastical or state license? The practice of issuing approbations began in the 16c. Was the rabbinical practice modeled on or influenced by the early 16c practice of licensing in Venice and other places? And was the rabbinical “ban” then in some way equivalent to the early modern state “privilege”?]

⁵³¹ See text accompanying note 507.

⁵³² JACOB KATZ, *supra* n.461, at 148-49 (upholding that significance, notwithstanding that the approbation itself may have been a mere formality aimed at securing copyright protection).

⁵³³ JACOB KATZ, *supra* n.461, at 149

⁵³⁴ JACOB KATZ, *supra* n.172, at 132-33. See Elisheva Carlebach, *Early Modern Ashkenaz in the Writings of Jacob Katz*, in *THE PRIDE OF JACOB* 65, 70 (Jay M. Harris ed., Harvard Univ. Press 2002) (“voluntarily in their cultural spiritual ghetto”).

⁵³⁵ See text accompanying note 476.

⁵³⁶ JACOB KATZ, *supra* n.461, at 157.

isolation.⁵³⁷ The enlightenment that he sought may be encapsulated as *Torah orah*, not from exterior knowledge.

Copyright protection matured at the same time as the royal patent,⁵³⁸ and ultimately the familiar copyright notice became a standard device of works published in the United States. By the same token, a printing ban became standard in Jewish books. The first one, for a book published in Naples around 1490, bore the signature of seven rabbis.⁵³⁹ By 1518, a Roman work bore the threat of excommunication if republished within ten years.⁵⁴⁰ 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.⁵⁴¹ 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.⁵⁴²

Those bans were given effect through an extension of traditional Talmudic categories, as we have seen at length in R' Sofer's responsa.⁵⁴³ Justice Elon, formerly of the Supreme Court of Israel, comments that the development of *hassagat g'vul* "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."⁵⁴⁴

B. *Myths Regarding Innovation*

That summary reveals change and innovation to underlie the Jewish legal response to the printing press. The topic leads naturally to the epigram by which R' Sofer is best remembered

⁵³⁷ JACOB KATZ, *supra* n.461, at 158.

⁵³⁸ LYMAN RAY PATTERSON,, *supra* n.523, at 42-77.

⁵³⁹ Moshe Carmilly-Weinberger, *supra* n.389, at 1451.

⁵⁴⁰ Moshe Carmilly-Weinberger, *supra* n.389, at 1451.

⁵⁴¹ Moshe Carmilly-Weinberger, *supra* n.389, at 1451. Pushing the analogy to modern books further, a rabbinic approbation at that time serves the same role as does an introduction written by a well-known person does today. *Id.* at 1454.

⁵⁴² Moshe Carmilly-Weinberger, *supra* n.389, at 1451.

⁵⁴³ A fascinating arc appears. As an indirect consequence of the Maharam of Padua's copyright lawsuit, a papal bull resulted in the wide-scale burning of the Talmud. Neil Weinstock Netanel, *supra* n.22. To forestall recurrence of that disastrous episode, a process of self-censorship arose, whereby every published volume would require an approbation. Along with the approbation went a ban against republication. But now an irony develops from the first copyright case ventilated in the responsa literature, involving the Maharam of Padua, to this second one, involving the Roedelheim mahzor. The first led to the institution of bans as a part of the process of Hebrew book publication, 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.

⁵⁴⁴ Menaḥem Elon, *supra* n.114, at 1466.

today. In response to reformers and others who wished to institute changes or modernization,⁵⁴⁵ his motto was *Hadash asur min ha-Torah*—“The Torah forbids anything new.”⁵⁴⁶ With characteristic cleverness, R’ Sofer derived that motto homiletically, through a play on words, from the Talmudic explication of the Biblical verse [LEV. 23:14] prohibiting the use of new grains before Passover.⁵⁴⁷

Although the familiar motto is habitually trotted out whenever R’ Sofer comes under discussion, the circumstances of its articulation are typically glossed over. The context was an 1819 responsum addressing whether the platform from which the Torah is read can be moved from the middle of the synagogue to the upper bima near the Ark.⁵⁴⁸ Viewed strictly through the prism of precedent, there was no legal bar on that architectural adjustment. But the move represented a change in the practice of German Jewry with which R’ Sofer was familiar. Accordingly, even though not barred on strictly legal grounds, it became forbidden simply because it represented an innovation.

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 of Jewish law 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 shall see, however, multiple myths actually underlie this reasoning.

In 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 times.⁵⁴⁹ 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 Paris Sanhedrin⁵⁵⁰ convened

⁵⁴⁵ “For Rabbi Sofer, Judaism as previously practiced was the only form of Judaism acceptable. In his view the rules and tenets of Judaism never changed—and cannot ever change. This became the defining idea for the opponents to Reform, and in some form, it has continued to influence Orthodox response to innovation in Jewish doctrine and practice.” http://en.wikipedia.org/wiki/Moses_Sofer (visited May 6, 2008).

⁵⁴⁶ ZELIG SCHACHNOWITZ at 218; YAAKOV DOVID SHULMAN, *supra* n.146, at 111, 200.

⁵⁴⁷ 3 MEYER WAXMAN, *supra* n.67, at 726 n.2.

⁵⁴⁸ 3 MEYER WAXMAN, *supra* n.67, at 726.

⁵⁴⁹ Steven M. Lowenstein, *supra* n.141, at 144. “Thus, when these worked-through Orthodox tried to replicated 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.” Samuel C. Heilman, *supra* n.206, at 25.

⁵⁵⁰ See text accompanying note 471.

by Napoleon.⁵⁵¹ In the almost two centuries since, that motto has become “the watchword of the rejectionists.”⁵⁵²

The logical consequence of this scholarly viewpoint is that R' Sofer's motto, forbidding innovation, is itself a startling innovation within the course of Jewish history. As one scholar puts it, his “unyielding self-conscious Orthodoxy . . . ironically, was a itself a departure from the more adaptive traditional Judaism of earlier times.”⁵⁵³ In other words, the ultimate irony in the worldview that “there is something inherent in modernity as such which renders it prohibited”⁵⁵⁴ is that that it is itself a modern innovation! Prior to R' Sofer's enunciation in 1819 of the doctrine that the Torah forbids anything new, the scholarly viewpoint is that rabbinic sages had seen nothing wrong in instituting new practices when circumstances warranted.

Notwithstanding that academic consensus, it is important to recognize that R' Sofer's motto is not at odds with past rabbinic practices. Reverting to seven centuries earlier, Jacob ben Meir Tam, popularly known as Rabbenu 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 *Bavli* unequivocally codified the need to wait. When R' Elijah of Paris urged his followers to adhere to Talmudic law in derogation of the community's actual practice, Rabbenu Tam labeled his view “close to heresy.”⁵⁵⁵ In this way, R' Sofer's deference to lived practice over the letter of the law represented nothing new in the annals of rabbinic rulings.⁵⁵⁶

One could trace similar developments down through the ages; for instance, halfway between the time of Rabbenu Tam and R' Sofer, the Mahariq⁵⁵⁷ ruled that, notwithstanding the halakhic requirement that a *kohen* be called to the Torah for the first segment of reading from the

⁵⁵¹ Samuel C. Heilman, *supra* n.206, at 25. Note that some historians date the term to 1795. *Id.* at 26.

⁵⁵² Samuel C. Heilman, *supra* n.206, at 35. That scholar notes that one “failure” on the part of R' Sofer was his student, R' Bernard Illowy (1812-1871), who actually emigrated to the “*trefe medina* (impure land)” of the United States of America! *Id.* at 46.

⁵⁵³ MICHAEL BRENNER, et al., *supra* n.43, at 126; Moshe Samet, *supra* n.144, at 249 (“an historic innovation, more a mutation than a direct continuation of the traditional Judaism from which it emerged”).

⁵⁵⁴ Moshe Samet, *supra* n.144, at 257.

⁵⁵⁵ JACOB KATZ, *supra* n. 38, at 99-106.

⁵⁵⁶ “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 dermining halakhic norms.” Israel Ta-Shma, *Jacob Katz on Halakhah and Kabbalah, in THE PRIDE OF JACOB* 29, 35 (Jay M. Harris ed., Harvard Univ. Press 2002)

⁵⁵⁷ See *supra* n.271.

Torah, a recalcitrant *kohen*⁵⁵⁸ 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 off⁵⁵⁹ to a non-priest for *Shabbat Bereishit*.⁵⁶⁰ Once again, actual custom trumped formal legal requirements.⁵⁶¹

Moreover, notwithstanding his billing as the arch-conservative, circumstances do not always portray R' Sofer in that light. Moving from copyright to a deeper matter of contention in the responsa literature, consider the core of marking Jewish identity: 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 *meziṣa*, the process by which the mohel sucked out some blood from the wound.⁵⁶² Others adhered to advances in medical knowledge regarding infectious diseases—particularly in light of the death of a number of babies all circumcised by one mohel—to adapt Talmudic practices to modern exigencies.⁵⁶³ In that debate, R' Sofer actually took the “innovative” point of view.⁵⁶⁴ (So shocking was that adoption of modernity that his opponents claimed that the responsum issued in R' Sofer's name must have been forged.)⁵⁶⁵ In short, motto notwithstanding, R' Sofer was ready, when circumstances warranted, to innovate no less than his rabbinic forebears.⁵⁶⁶

⁵⁵⁸ An adjacent synagogue, which did not share that particular custom, invited the individual in question to pray there, and even offered him the first *aliyah* for free, no strings attached. The *kohen* rejected the offer, and insisted on staying at the his own synagogue and receiving the first *aliyah*, without making any donation.

⁵⁵⁹ A custom still prevalent today is to auction off the honor of *Hatan Bereishit* on the festival of Simḥat Torah. Six centuries ago, the custom evidently differed somewhat—the highest bidder won the honor of kindling the lantern in the synagogue, and later on the Sabbath morning would merit the first *aliyah* to the Torah.

⁵⁶⁰ 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. The Mahariq explained that the *kohen* was obligated to respect the local custom and should have just 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 an any specific *miṣvah*.

⁵⁶¹ BAR-ILAN UNIVERSITY GLOBAL JEWISH DATABASE (RESPONSA PROJECT), SHE'A LOT U-TSHUVOT HA-MAHARIQ, # 9.

⁵⁶² JACOB KATZ, *supra* n. 38, at 371.

⁵⁶³ *Id.* at 372.

⁵⁶⁴ *Id.* at 361.

⁵⁶⁵ *Id.* at 380.

⁵⁶⁶ See JACOB KATZ, *supra* n. 38. at 264 (Hatam Sofer's responsum on the second day of the festivals advances “a claim that has no precedent in earlier rabbinic rulings”).

The explosion of one myth leads to the decay of another. Given his adherence to a “mimetic tradition”⁵⁶⁷ rather than complete deference to the doctrine codified in the law books, R’ Sofer (like Rabbenu Tam before him), prolific decisor that he was, no longer should be viewed as a one-dimensional “man of law.”⁵⁶⁸ Instead, he flexible in his orientation as circumstances demanded. Indeed, he falls within the skein of Jewish tradition, which he is normally conceptualized 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.”⁵⁶⁹ Rabbis—and even Talmudists—of old, rather than ruling on the basis of halakhah alone, ruled based on “*piske baale batim*, i.e., jurisdiction of householders guided by commonsense and possibly by some accumulated local precedents.”⁵⁷⁰ R’ Sofer’s reliance on the customs of his own community insofar as it dictated the spot on which to publicly declaim 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.⁵⁷¹

⁵⁶⁷ Cf. KARL F. MORRISON, *THE MIMETIC TRADITION OF REFORM IN THE WEST* (Princeton Univ. Press 1982).

⁵⁶⁸ Cf. JOSEPH DOV SOLOVEITCHIK, *HALAKHIC MAN* (Jewish Pub. Soc’y, Philadelphia 1983).

⁵⁶⁹ JACOB KATZ, *supra* n. 38, at 176.

⁵⁷⁰ JACOB KATZ, *supra* n. 38, at 176. The Jewish community itself issued edicts (“*takkanot*”), which consist of “auxiliary legislation filling in lacunae in the law created due to changing circumstances.” *Id.* at 179. According to Professor Katz—a distinguished historian of halakha at Hebrew University—those edicts “lay the very foundations on which the body-politic of the community rests.” Moreover, their content “did not necessarily conform to halakhic principles.” *Id.* at 180. Rather 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.” *Id.* Katz concludes that these edicts cannot be defended on halakhic grounds. “Yet 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.” *Id.*

As an example of custom, Jewish law allows oaths, but a proverb circulated among the common people at the time of the Hatam Sofer that even a truthful oath was sinful. Instead of vindicating the naked halakha, R’ Sofer called the proverb “a Jewish custom which counts as Torah and is not to be reflected upon.” *Id.* at 188. Thus did he evidence “his extreme conservatism, which expressed itself not only in the rejection of innovations by the religious reformers, but also in the rejection of any attempt to change customs by reviewing them in the light of the original Talmudic tradition.” *Id.*

⁵⁷¹ JACOB KATZ, *supra* n. 38, at 190.

It is important to reflect that the responsum that pronounced “the Torah forbids anything new” itself issued in 1819—before R’ Sofer first upheld Heidenheim’s position in responsum 41. What is important for current purposes is that it is actually R’ Banet’s contrary ruling in 1822 that actually hews closer to the spirit opposing innovation. R’ Banet pointed to the fact that printing bans were of relatively recent origin, and disapproves of them on that basis.⁵⁷² Had he been puckish in this regard, he could have gilded his observation by noting, *Hadash asur min ha-Torah!*⁵⁷³ 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.⁵⁷⁴ To the extent that the reference is to The Book, then it is undeniable that the Torah, together with the Prophets and Writings, is a subject of reverence in Judaism. Yet that reverence renders all the more strange a disconnect between the Hebrew Bible and rabbinic rulings. It has long been settled that the explication of biblical verses does not serve as a direct source for halakhic rulings.⁵⁷⁵ Instead, the deliberations recorded millennia later in the *Bavli* during the seventh century have binding legal force for world Jewry. Yet even that state of affairs is not altogether accurate; for although the halakhah “is according to its own self-understanding unchangeable,” its authoritative fountainhead is not the Babylonian Talmud, but instead the work codified almost a millennium later still, after the invention of the printing press,⁵⁷⁶ namely “the *Shulhan Arukh*, and all the literature which has been added to it since.”⁵⁷⁷ (That state of affairs underwrites the jibe of R’ Menahem Mendel Morgensztern, the Kotsker Rebbe (1787-1859): “A hasid fears God and a *mitnagged* fears the *Shulhan Arukh*.”)⁵⁷⁸

Going further still, even that state of affairs does not capture the essence of the matter. For the *Shulhan 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.⁵⁷⁹ Accordingly, when it came time to adjudicate Heidenheimer’s case, R’ Sofer

⁵⁷² See text accompanying note 317.

⁵⁷³ We have seen two previous instances of R’ Banet’s humor. See *supra* ns.402, 447. On this occasion, however, he refrained.

⁵⁷⁴ See DAVID NIMMER, COPYRIGHT: SACRED TEXT, TECHNOLOGY, AND THE DMCA 217-41 (Kluwer Law Int’l 2003) (noting that early Jews preferred scrolls, whereas early Christians were more favorably disposed towards the codex book).

⁵⁷⁵ JACOB KATZ, *supra* n. 38. at 340.

⁵⁷⁶ See text accompanying note 521.

⁵⁷⁷ JACOB KATZ, *supra* n. 38. at 7. The same point is made in Moshe Samet, *supra* n.144, at 250.

⁵⁷⁸ MICHAEL ROSEN, *supra* n.137, at 82. The Kotsker meant that his own branch, Hasidism, is truly theocentric, whereas its antagonists, the *mitnagdim*—of which R’ Sofer serves the foremost contemporary example—are guilty of something that could be termed “nomolaty.”

⁵⁷⁹ See text accompanying note 544.

called upon not the Bible, nor direct application of the Talmud, nor even the *Shulḥan Arukh*. Instead, he placed primary reliance on printings in Amsterdam in 1738, plus one isolated historical precedent going back to 1602. 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 this custom during the past several hundred years. The upshot is that R' Sofer was able to innovate based on history far more recent still than R' Joseph Caro's composition of the *Shulḥan Arukh*. This case study therefore bears out the reliance of R' Sofer on new, rather than ancient, "traditions" as the basis for his rulings.⁵⁸⁰

It could scarcely be otherwise. Indeed, the very name of the ḤaTaM Sofer, by invoking the acrostic for *Ḥiddushei Torat Moshe*, proclaims that Rabbi Moses's Torah was new.⁵⁸¹ 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. A Ḥasidic contemporary of R' Sofer is no less indicative: On the verse, "They [the judges] judge the people at all times,"⁵⁸² R' Jacob Isaac, the "Seer of Lublin" (1745-1815), commented that it means that the judges must "evaluate the law according to the time and the period."⁵⁸³ R' Sofer could have scarcely disagreed that his were the appropriate rulings geared for his own time and period.⁵⁸⁴ Indeed, one of his responsa explicitly declares, "he who would achieve piety before his Creator will be recognized by his deeds—i.e., by those practices *which he originates* for the sake of heaven."⁵⁸⁵

One isolated phrase from an 1819 responsum no more summarizes the man than would one phrase plucked out of his copyright responsum from 1823. R' Sofer was many things:

⁵⁸⁰ It should be recalled that (a) R' Sofer analyzed the publishing bans in the context of the rulings set forth in BABYLONIAN TALMUD BAVA BATRA 21b; (b) he also analogized them to the familiar ḥerem ha-yishuv; and (c) another commentator finds the roots for the ḥerem ha-yishuv to have sprouted directly from the soil of BAVA BATRA 21b. See L. Rabinowitz, *supra* n.295. Had R' Sofer been similarly minded, he would have advanced the same claim. Instead, he was content to rely on the force of recent history as sufficient to validate his conclusions.

⁵⁸¹ See text accompanying note 163. Note that *ḥidush* is the noun form of the adjective *ḥadash*, the very trait that the Torah supposedly outlaws. Combining *Ḥiddushei Torat Moshe* with the dictum that *Ḥadash asur min ha-Torah* produces the paradox that R' Moshe was doing to the Torah what the Torah explicitly forbids. But that viewpoint simply reflects narrow-minded literalness, which is anything but the spirit that R' Sofer brought to his Torah insights.

⁵⁸² EXODUS 18:26.

⁵⁸³ MICHAEL ROSEN, *supra* n.137, at 64.

⁵⁸⁴ One commentator posits that every great poseq rules according to the goals of the precise case, given its particular circumstances. Aaron M. Schreiber, *supra* n.150, at 161 n.92. "Today, nearly two hundred years later, we cannot know the precise circumstances surrounding each of R' Sofer's actions, nor how he weighed the circumstances and possible outcomes for each action that he contemplated. We are also unaware of his exact calculus in deciding what steps, if any, were appropriate under the prevailing circumstances." *Id.* at 145.

⁵⁸⁵ JACOB KATZ, *supra* n. 38, at 421 (emphasis added). The further recognition that "In this no two individuals are alike, because no two men love God in the same way," *id.*, betokens realization that innovation for the sake of heaven is a constant imperative.

Talmudic genius, Rosh Yeshiva, community leader, etc. We can omit from the enumeration “one-dimensional opponent of all this is new.” Indeed, as we have seen, his copyright rulings show him more open to innovation than was R’ Banet. These considerations counsel an end to the reductionism of Ḥatam Sofer = *Ḥadash asur min ha-Torah*.

III. Visions of Copyright Law

A. *Why the Disagreements?*

Putting aside the external constraint from the forces of emancipation, within the halakha itself there was room for R’ Banet to reach conclusions diametrically opposed to R’ Sofer about copyright in the Roedelheim maḥzor. One could write off the opposition as reflecting simply the indeterminacy of the Talmudic cases that served as their building blocks for their divergent copyright rulings. After all, 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.”⁵⁸⁶ Absent a governing law setting forth the principles governing use of the printing press—not to mention that the cases themselves (the Open Alley, the Fisherman, the Olive Tree, etc.) were formulated before the invention of printing—it is scarcely surprising, on this view, that divergent interpretations arose. The conclusion is that only the historical accidents of (a) the late advent of printing accounts, together with (b) the absence of an overarching statute, 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 law that was formulated after the advent of printing. Happily, a case study exists against which to test that hypothesis. The Statute of Anne was passed in 1710, as a direct response to the innovation of movable type, and consisting 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 separated R’ Banet from 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*⁵⁸⁷ arose over public speeches delivered by the Earl of Rosebery, who disclaimed any copyright in the product. Nonetheless, journalists in attendance reported the speeches verbatim in the London Times, based on their notes. After 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 plaintiff in each instance massaged through effort and skill—investigating old texts in Heidenheim’s case, using the stenographic talents of their reporters in the case of the Times.

⁵⁸⁶ JACOB KATZ, *supra* n.172, at 31.

⁵⁸⁷ [1900] A.C. 539.

It will be recalled that 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.⁵⁸⁸ He reserved special praise for Heidenheim himself, based on the large amount of time and money he had spent in preparing the maḥzor.⁵⁸⁹ Compare that formulation with the words that Lord Halsbury used to open his own remarks in ruling for 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.⁵⁹⁰

In the same vein, it will be recalled that R' Banet concluded that someone laboring in his study to produce something new 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.⁵⁹¹ 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."⁵⁹²

In brief, the divergent views of Rs' Sofer and Banet mirror the divergent views expressed in the House of Lords. We therefore see the former's disagreement not 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 the same battles as those undertaken 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 filed in the District Court in Jerusalem, and ultimately appealed to the Supreme Court of Israel.⁵⁹³ At issue was the original text of one of the key Dead Sea Scrolls, 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 2000 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. Yet that ruling

⁵⁸⁸ See text accompanying note 290.

⁵⁸⁹ See text accompanying note 359.

⁵⁹⁰ [1900] A.C. 539, 545.

⁵⁹¹ See text accompanying note 316.

⁵⁹² [1900] A.C. 539, 561.

⁵⁹³ C.A. 2790/93, 2811/93, 54(3) P.D. 817 (2000).

drew a rejoinder running 217 pages in scholarly commentary.⁵⁹⁴ In sum, that recent case is just as contested as its predecessors.

The lesson is not that Jewish law is indeterminate, but that copyright cases are exceedingly difficult. They are difficult whether they take place in Moravia and Slovakia with almost no precedent, under a law that arose to address competing mills and fishermen, or by contrast in England with almost two centuries of precedent construing a statute expressly designed for the printing press. They are difficult, too, when they arise in a civilized court with three centuries of copyright jurisprudence to fall back on.⁵⁹⁵

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 that we have witnessed in so many copyright cases to reach the United States Supreme Court.⁵⁹⁶ We therefore can appreciate that the differences in viewpoint between the two distinguished decisors, R’ Sofer and R’ Banet, reflects not the inadequacy of Jewish law, but instead that the issues presented in copyright cases are perennially thorny, confounding even specialists in the field.

B. *Protection of Labor or Benefit to Society?*

From a deeper level, 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,⁵⁹⁷ in the United States the second.⁵⁹⁸

Let us follow through on those viewpoints, to observe their consequences. Starting with R’ Banet and Lord Robertson, their focus on the product is such that the law should reward those products that advance human knowledge. Granted, the protection afforded to the individual is a dead-weight to society; as Lord Macaulay observed to the House of Commons in 1841—

⁵⁹⁴ David Nimmer, *Copyright in the Dead Sea Scrolls*, 38 HOUS. L. REV. 1 (2001).

⁵⁹⁵ Actually, 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 was inherited from the British 1911 Act, which in turn traced its roots back to the 1710 Statute of Anne.

⁵⁹⁶ DAVID NIMMER, COPYRIGHT ILLUMINATED: REFOCUSING THE DIFFUSE U.S. STATUTE 385 n.95 (Wolters Kluwer 2008).

⁵⁹⁷ *Dun & Bradstreet Ltd. v. Typesetting Facilities Ltd.* [1992] F.S.R. 320.

⁵⁹⁸ “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.’” 499 U.S. at 354, citing 1 NIMMER ON COPYRIGHT § 3.04.

copyright serves as a “tax on readers for the purpose of giving a bounty to writers.”⁵⁹⁹ That tax is warranted when all of society benefits through the production of new works;⁶⁰⁰ it cannot be justified when someone merely reproduces an old work, as we have seen.⁶⁰¹ Based on that rationale, copyright should last long enough to induce authors to create, but no longer.⁶⁰² 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 was 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.⁶⁰³

Moving now to R’ Sofer, his focus on the process led him to conclude that book sales are the only way that a printer could recoup his initial costs.⁶⁰⁴ That viewpoint is actually historically askew, given that there existed at the time a viable alternative: One could sign up advance subscribers (called “praenumeranti”) and only go to press when guaranteed to cover expenses or make a profit.⁶⁰⁵ In fact, after R’ Sofer ruled in Beit Din against R’ Jonathan Alexandersohn,⁶⁰⁶ the latter adopted just that methodology to fund printing of pamphlets that attacked R’ Sofer’s reasoning.⁶⁰⁷

One might inquire, in addition, 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.”⁶⁰⁸ They approached that task from a humanistic standpoint, not with theological predilections.⁶⁰⁹ The fountainhead for every rabbinic

⁵⁹⁹ SPEECHES BY LORD MACAULAY 164 (G.M. Young ed., 1979).

⁶⁰⁰ David Vaver, *Some Agnostic Observations*, *supra* n.147, at 127.

⁶⁰¹ See text accompanying note 316.

⁶⁰² This sentiment underlies Lawrence Lessig, *Melville B. Nimmer Memorial Lecture, Copyright’s First Amendment*, 48 UCLA L. REV. 1057 (2001).

⁶⁰³ His letter that appears before R’ Sofer’s responsum 41 relies on similar logic: “We have never seen that the first person has a right in law to impede another who follows him, especially 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. And inasmuch as bans on reproduction are not recognized under law, no rabbi may issue a decree in his country to be applied in another country, as is written in the responsa of the Rivash.”

⁶⁰⁴ See text accompanying note 290.

⁶⁰⁵ JACOB KATZ, *supra* n. 38, at 194, 196.

⁶⁰⁶ See *supra* n.453.

⁶⁰⁷ JACOB KATZ, *supra* n. 38, at 444-503.

⁶⁰⁸ U.S. Const, art 1, § 8, cl. 8.

⁶⁰⁹ Michael D. Birnhack, *The Idea of Progress in Copyright Law*, 1 BUFF. INTELL. PROP. L. REV. 3 (2001).

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 miṣvah," who deserved protection on that basis. Thus, Heidenheim's publication of a maḥzor made him eligible for that status. Book publishing in that era focused on the goal of promoting the Progress of Torah.⁶¹⁰ One wonders, however, how R' Sofer would treat publishers of secular textbooks rather than of prayer books; and of harlequin novels; and of teen magazines.⁶¹¹ About pornographers,⁶¹² one need waste little time wondering.⁶¹³

C. Copying As Immoral or Laudable?

At bottom, R' Sofer objected to Schmid's copying from Heidenheim. Others, he concluded, should print either 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" (*ḥakhamim*) of old.

None other than Judge Wiseman, of 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 defendant infringed plaintiff's architectural plans by building a tract of entry-level starter homes, for which plaintiff sought \$92 million in damages.⁶¹⁴ After trial, the court concluded that defendant "intentionally copied" plaintiff's copyrighted designs resulting in

⁶¹⁰ Jewish libraries were comprised overwhelmingly of "sacred literature." ROBERT BONFIL, *supra* n.14, at 147 (98%, in case of Italian Renaissance Jews). The dearth of historical works was particularly pronounced. YOSEF HAYIM YERUSHALMI, *supra* n.377, at 40.

⁶¹¹ 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 they represent a tiny exception in current jurisprudence.

⁶¹² 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." BONFIL, *supra* n.14, at 169.

⁶¹³ 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). Some have speculated 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. DAVID NIMMER, *supra* n. 596, at 155-56.

⁶¹⁴ *Lifetime Homes, Inc. v. Residential Dev. Corp.*, 510 F. Supp. 2d 794, 802 (M.D. Fla. 2007).

“remarkably similar” architectural plans.⁶¹⁵ Yet, 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 defendant. That conclusion exactly accords with precedent⁶¹⁶ It is therefore noteworthy that Judge Wiseman stated that he was “*constrained to conclude, reluctantly,*” that no infringement exists.⁶¹⁷ 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 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 denying attorney’s fees to a prevailing defendant by noting, “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.*”⁶¹⁸ 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 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.⁶¹⁹

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,”⁶²⁰ complained about the destruction of a mural that she created to protest funding cuts in legal aid. After business hours, she installed that huge protest mural (measuring 10 feet by 30 feet) on a state plaza, without having procured the necessary permits (evidently under the misapprehension that another 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.⁶²¹ Pollara’s claim arose under the portion of the Copyright Act known as the Visual Artists Rights

⁶¹⁵ 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.” Lifetime Homes, Inc. v. Residential Dev. Corp., 510 F. Supp. 2d 794, 805 (M.D. Fla. 2007).

⁶¹⁶ Howard v. Sterchi, 974 F.2d 1272 (11th Cir. 1992).

⁶¹⁷ *Id.* at 1325 (emphasis added).

⁶¹⁸ Berkla v. Corel Corp., 302 F.3d 909, 923 (9th Cir. 2002) (emphasis added).

⁶¹⁹ 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.

⁶²⁰ Pollara v. Seymour, 206 F. Supp. 2d 333, 334 (N.D.N.Y. 2002), *aff’d*, 344 F.3d 265 (2d Cir. 2003).

⁶²¹ 206 F. Supp. 2d at 335.

Act (VARA),⁶²² which the court found to be fatally deficient. Precedent here, as in the preceding case, required a finding in favor of defendant, which the court duly entered. In a system founded entirely upon law, there the matter would have ended. But, instead, 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.⁶²³

“Deplorable,” “ashamed”? Those labels emerge from a domain far removed from law; the judge has turned from jurist into prophet, railing against immorality. With Article III judges in modern America displaying that turn, small wonder that the rabbi of Pressburg two centuries ago showed similar proclivities.⁶²⁴

Yet the roots must be examined of what can be labeled this “Hurd mentality.” In tort law, it may be true at times that there is a line beyond which activity is culpable—but that even conduct short of that line should be morally discouraged. An assault is an unconsented touching. A punch or a shove qualifies, 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 *zaddiq*) 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.⁶²⁵ In *Feist Publications, Inc. v. Rural Telephone Service Co.*,⁶²⁶ plaintiff put together a compilation (one of the subject matters to which copyright protection extends)⁶²⁷ consisting of the white pages of a telephone book. Defendant copied the entirety of those listings, including fictitious traps inserted precisely for the purpose of detecting such copying.⁶²⁸ Yet the Supreme Court ruled

⁶²² 17 U.S.C. § 106A.

⁶²³ *Id.* at 335 n.4.

⁶²⁴ The same antinomies show up in *Walter v. Lane*. See text accompanying note 587. 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. In his dissenting view, the case should be decided against plaintiff, with no apology added.

⁶²⁵ See 3 NIMMER ON COPYRIGHT § 13.03.

⁶²⁶ 499 U.S. 340 (1991).

⁶²⁷ 17 U.S.C. § 103(a).

unanimously in favor of defendant, holding that, in terms of protected expression, 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.⁶²⁹

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 his hands off of author A's handiwork. To the contrary, it is pro-social to encourage copying that falls short of the magic line of substantial similarity.⁶³⁰ 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 accorded. The public benefits with a proliferation of more non-infringing works to purchase.⁶³¹

⁶²⁸ 499 U.S. at 344

⁶²⁹ *Id.* at 349-50 (citations omitted).

⁶³⁰ Accordingly, a *zaddiq* would not hesitate to enter that domain. Instructive here is the case of *Driving Miss Daisy*, alleged to infringe plaintiff's play, *Horowitz and Mrs. Washington*. The evidence showed that plaintiff's dialog included the explanation that "a tzaddik is a scholar, a philosopher, with enormous love of all God's creatures, even the smallest." *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). Defendant's dialog merely included a statement that, despite what people say, Jews are quite generous. *Id.* On this and other like bases, substantial similarity was lacking.

⁶³¹ 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 has already performed. Society benefits far 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

Where do these considerations lead us? Wonderfully, they return us directly to R' Banet. As quoted, above, 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?”⁶³² In other words, in the abstract, there is no reason to favor the 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 an appeal to the immorality of copying *per se*.⁶³³ Under United States copyright doctrine, that question is resolved as a determination whether “substantial similarity” is present. Under the halakhic framework, the question is whether the ruling of Rav Huna or his antagonist, Rav Huna the son of R' Joshua, should be deemed controlling. In other words, a “doer of *mizvot*” may be just as likely to copy as to refrain from copying. Indeed, the mark of a *zaddiq* could be copying the works of a predecessor in order to benefit the public at large.⁶³⁴

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, as quoted above.

D. *Approbations as a Barrier to “Sifrei Ha-Mirus”*

It will be recalled that, 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 inaccurate 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 that comment is that it leaves the time-frame unspecified. But from responsum 79, one can gather that R' Sofer was referring to the preceding two centuries. In that regard, his historical account rested on solid ground. The practice of approbations began in the sixteenth century and picked up steam in the seventeenth and

and G may copy those aspects from E, and the progress of science marches ever forward—precisely what copyright law is designed to do.

⁶³² See text accompanying note 314.

⁶³³ 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. *Id.* at 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.” *Id.* at 527.

⁶³⁴ In precisely this manner does Judge Posner explicate the Supreme Court’s *Fogerty* case—“a successful defense enlarges the public domain, an important resource for creators of expressive works.” *Gonzales v. Transfer Techs., Inc.*, 301 F.3d 608, 609 (7th Cir. 2002).

eighteenth. Writing in the beginning of the nineteenth century, R' Sofer accurately characterized this aspect of Hebrew publishing history.

Less defensible is his historical claim that waning popularity in the institution of approbations gave rise to an increase in inaccurate texts. As printing has become successively easier, corrections have become correspondingly easy to implement. R' Sofer's claim about inundation with inaccurate texts is difficult to accept.

His other claim is more difficult to evaluate. R' Sofer posited that authors of new works published them pseudepigraphically under the names of famous rabbis. Although there may be truth to that phenomenon,⁶³⁵ it is difficult to agree with R' Sofer that its source stems from a diminution in approbations.⁶³⁶ Right from the start, historians have realized, the information contained in approbations can be inexact and deceptive,⁶³⁷ sometimes willfully so—as when the place and date of first publication were intentionally altered.⁶³⁸

R' Sofer took refuge in the piety of some readers, who would not read books absent the approbation of a respected rabbi. But even that device failed to serve its purpose, as not infrequently authors forged an approbation to their work “in order to deceive the pious reader.”⁶³⁹ While on the subject, one might add that some authors used inferior paper or unclear type—prompting approbations to mandate specific printing guidelines to avoid those abuses.⁶⁴⁰ It even developed that the rabbi giving an approbation would forthrightly admit of his desire to

⁶³⁵ Indeed, most scholars today would maintain that, as far back as the thirteenth century, Moses de Leon pseudepigraphically attributed the holy *Zohar* itself to the tana R' Shimon Bar Yochai. We find the same sentiment in a contemporary of R' Banet, from R' Eleazar Fleckeles, head of the Prague Beit Din and a noted student of the *Noda be-Yehudah*. Aaron M. Schreiber, *supra* n.150, at 154 n.31. He commented in a responsum how strange it was that the *Zohar* did not emerge until the time of Moses de Leon. LOUIS JACOBS, *supra* n.215, at 209. For more on the phenomenon of pseudepigraphy and its relation to copyright law, see DAVID NIMMER, *supra* n.613, at 427-99.

⁶³⁶ In addition, R' Banet himself issued a responsum condemning the notorious *Besamim Rosh* as a forgery. LOUIS JACOBS, *supra* n.215, at 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 (see *supra* n.240) from five centuries earlier. *Id.* at 347. Obviously, the problem here inheres not in the approbation, but in the forgery itself. Note that the forgery was undertaken in an effort to further the goals of the Enlightenment, as Berlin perceived them. JACOB KATZ, *supra* n.461, at 137-38.

⁶³⁷ Moshe Carmilly-Weinberger, *supra* n.389, at 1453.

⁶³⁸ Moshe Carmilly-Weinberger, *supra* n.389, at 1453. A noted historian cites examples of false geographic imprints dating back to 1566 through modern editions filled with gross errors. YOSEF HAYIM YERUSHALMI, *supra* n.377, at 132-33 ns. 1, 2.

⁶³⁹ Moshe Carmilly-Weinberger, *supra* n.389, at 1453.

⁶⁴⁰ Moshe Carmilly-Weinberger, *supra* n.389, at 1453.

benefit the author financially.⁶⁴¹ Other abuses also crept in, such as granting an approbation based on the author's reputation, without actually reading the volume in question.⁶⁴²

In sum, as with every human institution, that of approbations can do good, at the same time that it can be abused, exert unintended side effects, and even fail in its basic purpose at times. The halcyon past in which the Jewish people was inoculated against *Sifrei Mirus* thanks to the powerful medicine furnished by judicious approbations, in sum, seems to be one more myth that needs to be dispelled

IV. Rabbis As Relentless Realists

Two centuries after the controversy between Heidenheim and Schmid had died down, a school of jurisprudence developed under the heading "legal realism." Rejecting the "science of law," its practitioners claimed that law is indeterminate. For that reason, extralegal considerations often had to enter into their deliberations. To the question, "What is the law," they would answer "whatever the judges say it is."

One could adduce many exemplars of legal realism. Festooned by a degree from Yale Law School, I choose the individual who became "the youngest full professor at Yale Law School in 1940," eulogized as "the relentless realist."⁶⁴³ Fred Rodell, regarded still today as "the 'bad boy' of American legal academia,"⁶⁴⁴ believed that "the words of the Constitution could be twisted to mean nearly anything."⁶⁴⁵ As such, although he himself naturally rejected the terminology,⁶⁴⁶ he can be termed one of the quintessential legal realists.⁶⁴⁷ He started his career as an *enfant terrible* by publishing a piece entitled "Goodbye to Law Reviews," complaining that "the law is a fat man walking down the street in a high hat. And far be it from the law reviews to be any party to the chucking of a snowball or the judicious placing of a banana peel."⁶⁴⁸ Its last line muses that "maybe one of these days, the law reviews will catch on. Meanwhile I say they're spinach."⁶⁴⁹ In later years, he grew even more "eccentric and intemperate."⁶⁵⁰ Richard .

⁶⁴¹ Moshe Carmilly-Weinberger, *supra* n.389, at 1453.

⁶⁴² Moshe Carmilly-Weinberger, *supra* n.389, at 1454.

⁶⁴³ Note, *The Relentless Realist: Fred Rodell's Life and Writings*, 3 U. ILL. L. REV. 823, 851 (1984).

⁶⁴⁴ Julius J. Macke & Ruth Beloff, "Fred M. Rodell," 17 *Encyclopedia Judaica* 362, 363 (2007).

⁶⁴⁵ *Id.* at 829. It is "a malleable instrument in the hands of its interpreters." *Id.* at 827.

⁶⁴⁶ *Id.* at 849.

⁶⁴⁷ Rodell was furious when Yale President Kingman Brewster rallied against "a formerly powerful clique at Yale Law School, those cynics called 'legal realists.'" Charles Alan Wright, *Goodbye to Fred Rodell*, 89 YALE L.J. 1455, 1459-60 (1980).

⁶⁴⁸ Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 33, 40 (1936).

⁶⁴⁹ *Id.* at 45.

⁶⁵⁰ David M. Margolick, *Always the Rebel*, 2 NAT'L L.J. No. 34 (May 5, 1980), at 24. Rodell was many times passed over for the endowed chair that he considered his due. He

Posner condemns Rodell's famous 1939 broadside against the legal profession, *Woe Unto You, Lawyers!*, as "the worst book ever written by a professor at a major law school."⁶⁵¹ Judge Posner is a giant in the law. Yet, another giant, Charles Alan Wright, praises Rodell as "the best teacher I ever had."⁶⁵²

The tenets of legal realism—that the law can be twisted to mean nearly anything, and in the last analysis law means what the judge says it is—lead us back seamlessly to R' Sofer. As one scholar elaborates, the "Hatam Sofer was opposed to halachic argumentation with those who questioned its validity because of the possibility of finding a proof-text for every argument. In his opinion, what mattered was the 'fitness' of the decision maker (*poseq*) and his intention."⁶⁵³ He thus became "the archetype of the future leadership of Orthodoxy: . . . a charismatic leader whose teaching is not to be challenged."⁶⁵⁴

As has been noted above, R' Sofer's admirers claim that, for all his tremendous output, he "almost never had to rewrite anything."⁶⁵⁵ When his son asked how he could write his responsa so quickly even about serious issues,⁶⁵⁶ he replied that "in every generation G-d has appointed a man to be a leader of the congregation, to guide the people and answer their questions. I am that Jew."⁶⁵⁷ * * * "As a result, I do not suspect G-d 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."⁶⁵⁸ That sentiment is in accord with the mystical belief within Orthodoxy that the words of the "pious *poseq*" may supplant even the sources.⁶⁵⁹ In fact, it was R' Sofer himself whose works first inspired that re-appraisal.⁶⁶⁰

retaliated by proclaiming himself "Anonymous Professor of Law." A New Haven barber also compensated by designating in his shop the "Fred Rodell Chair of Law and Limericks." Obituary, N.Y. TIMES, p.D5 (June 6, 1980).

⁶⁵¹ David Margolick, *Courting Disaster*, N.Y. TIMES (June 21, 1998).

⁶⁵² Charles Alan Wright, *supra* n.647, at 1456.

⁶⁵³ Moshe Samet, *supra* n.144, at 267 n.3.

⁶⁵⁴ Moshe Samet, *supra* n.144, at 258.

⁶⁵⁵ YAAKOV DOVID SHULMAN, *supra* n.146, at 202-03.

⁶⁵⁶ The amazing speed with which he composed responsum 41 has already been noted. See *supra* n.371.

⁶⁵⁷ This quote is a blend of Nosson Dovid Rabinowich, *supra* n.110, at 241; YAAKOV DOVID SHULMAN, *supra* n.146, at 203. Note that his father-in-law voiced the same sentiment in his own time. See *supra* n.308.

⁶⁵⁸ *Id.* at 203.

⁶⁵⁹ Moshe Samet, *supra* n.144, at 250. One commentator, noting the irony if R' Sofer battled Reform by relying on the same rationale that the times required a change in the interpretation of the Torah, offers a different perspective: Perhaps he may have meant that "his rulings were designed to reach goals that he thought desirable in each particular case."

To recast into halakhic terms the question that animated the legal realists, does the legal obligation incumbent upon Jews stem from the revelation at Sinai or does law consist of “whatever the judges say it is”? The two copyright responsa from R’ Sofer, contrasted to the two contrary ones from R’ Banet, could incline an observer towards the latter formulation. Plus, to resurrect the legal realist quip (attributed to Jerome Frank) that a case’s outcome depends on what the judge had eaten for breakfast that morning,⁶⁶¹ there is more than a modicum of truth to the perspective that “Judge” Banet ruled in favor of Schmid because of what happened to him on the way to the courthouse (the secular authorities’ threat to regard him as fomenting insurrection if he persisted in ruling on behalf of Heidenheim). In this typology, “Judge” Sofer ruled the opposite because of his own policy determination regarding what would foster good book-publishing practices in the future, rather than simply applying antecedent principles that had been handed down as governing law. That last sensibility returns us to Fred Rodell’s perspective that, when interpreting the constitution, judges are doing nothing more than applying their own policy judgments to the cause at hand.⁶⁶²

So, the distance from the iconoclast of New Haven to the archconservative of Pressburg is not as great as one might have imagined. Fred Rodell was Jewish,⁶⁶³ although his religious identity seems to have played no role at all in his professional life.⁶⁶⁴ It should be added that, as was not untypical of his generation, he changed his original family name so as to achieve greater assimilation into American society at a time when “ethnic” was not “in.” His birth-name, later shortened to Rodell, was actually “Roedelheim.”⁶⁶⁵

Accordingly, the soundness of the legal proofs that he had cited to support his rulings did not affect the correctness of his decisions. Aaron M. Schreiber, *supra* n.150, at 170 n.136.

⁶⁶⁰ Moshe Samet, *supra* n.144, at 267 n.3. At one point, R’ Sofer wrote, “even if this was not the opinion of the Rambam [*i.e.*, Moses Maimonides], 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.” JACOB KATZ, *supra* n. 38, at 414.

⁶⁶¹ MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960*, at 176 (1992).

⁶⁶² Julius J. Macke & Ruth Beloff, *supra* n.644, at 363.

⁶⁶³ David M. Margolick, *supra* n.650, at 24.

⁶⁶⁴ The *Encyclopedia Judaica* article about him is devoid of Jewish content. See *supra* n.644.

⁶⁶⁵ David M. Margolick, *supra* n.650, at 24.