

ARTICLE

MAHARAM OF PADUA V. GIUSTINIANI: THE SIXTEENTH-CENTURY ORIGINS OF THE JEWISH LAW OF COPYRIGHT

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

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I. INTRODUCTION

Copyright scholars are almost universally unaware of Jewish copyright law, a rich body of copyright doctrine and jurisprudence that developed in parallel with Anglo-American and Continental European copyright laws and printers' privileges. Jewish copyright law traces its origins to a dispute adjudicated some 150 years before modern copyright law is typically said to have emerged with the Statute of Anne of 1709. This Article examines that dispute, the case of *Maharam of Padua v. Giustiniani*.¹

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

Isserles had to grapple with first principles. At this early stage of print, an author-editor's claim to have an exclusive right to publish a given book, absent a printing privilege issued by a

1. This Article draws upon portions of my forthcoming book, co-authored with David Nimmer, FROM MAIMONIDES TO MICROSOFT; JEWISH COPYRIGHT LAW SINCE THE BIRTH OF PRINT (Oxford Univ. Press., forthcoming 2009).

governmental or ecclesiastical authority, was a case of first impression. Moreover, Giustiniani, as a non-Jew, was not inherently subject to the intricate rules of Jewish law applicable to commercial relations among Jews. Isserles' resulting ruling and reasoning thus led him—remarkably so—to some of the same fundamental issues that animate copyright jurisprudence today. Is copyright a property right or a limited regulatory prerogative? What is copyright's rationale? What is its scope? Which law should be applied to a copyright dispute in which the litigants reside under different legal regimes? How can copyright be enforced against an infringer who is beyond the applicable legal authority's reach?

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

II. BACKGROUND

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

Meir ben Isaac Katzenellenbogen, a renowned rabbinical authority and Jewish law scholar, was born in the town of Katzenelnbogen, Germany, in 1473.² After studying in Prague, he moved to Padua, located in the Republic of Venice and a seat of secular and Jewish learning that drew students from all over Europe.³ Katzenellenbogen succeeded his father-in-law, Abraham Minz, as chief rabbi of Padua in 1525.⁴ Katzenellenbogen held the title, *Morenu Ha-Rav* (literally “our teacher the rabbi”), which connoted great academic distinction and gave him authority to exercise the highest functions of rabbinical office.⁵ As such, Katzenellenbogen served the semi-autonomous Jewish community of the Venetian Republic in a multifaceted role of

2. Shlomo Tal, *Meir ben Isaac Katzenellenbogen*, in 12 *ENCYCLOPAEDIA JUDAICA* 19 (Thomson Gale 2d ed. 2007); Asher Ziv, *Maharam Me-Padua*, 28 *HA-DAROM* 160 (1968) (Hebrew).

3. Tal, *supra* note 2. Padua's university was the second oldest in Italy, and its medical school was generally regarded as the best in Europe. See, e.g., DAVID B. RUDERMAN, *JEWISH THOUGHT AND SCIENTIFIC DISCOVERY IN EARLY MODERN EUROPE* 105–06 (Yale Univ. Press 1995).

4. Shlomo Eidelberg, *Abraham ben Judah ha-Levi Minz*, in 14 *ENCYCLOPAEDIA JUDAICA*, *supra* note 2, at 303; Tal, *supra* note 2, at 19.

5. See ROBERT BONFIL, *JEWISH LIFE IN RENAISSANCE ITALY* 137–43 (Anthony Oldcorn trans., Univ. of Cal. Press 1994) (discussing the power, prerogatives, and role of rabbis in Renaissance Italy). Maharam is an acronym of Morenu ha-Rav Meir. Tal, *supra* note 2, at 19.

spiritual leader, judge, legislator, professor, and dean, presiding over the Jewish community court of the Venice Republic, the Venetian regional council of rabbis, and the renowned Academy of Padua until his death in 1565.⁶

Katzenellenbogen produced his edition of the *Mishneh Torah* in the midst of over a century of persecution and turmoil for European Jewry, unrivaled in scope until the attempted “Final Solution” of the Nazi Third Reich. The Spanish Inquisition, formally instituted in 1481, and the expulsion of Jews from Spain in 1492 were part of a tide of violence, pillage, forced conversion, and expulsion that swept through the monarchies and principalities of France, Germany, Portugal, the Low Countries, Switzerland, Austria, and Naples and that was soon followed by the further virulent anti-Semitic ferment of the Protestant Reformation.⁷ The result was a mass exodus of Jews from Western and Central Europe. By 1550, the central and northern Italian peninsula had become home to tens of thousands of Jewish refugees and was virtually the only part of Western Europe where Jews remained.⁸

In central and northern Italy, Jewish presence was tolerated, and Jewish communities were given a degree of autonomy. Yet, there too, Jews faced persecution and periodic anti-Semitic agitation. Jews were not allowed to live in Venice until 1509. Moreover, soon after they were admitted, Jews were required to reside in a walled quarter called the “ghetto” (from whence that word derives) and to pay increasingly large sums of money for their “condotta,” permission to remain in the city for a

6. BYRON L. SHERWIN, SPARKS AMIDST THE ASHES: THE SPIRITUAL LEGACY OF POLISH JEWRY 68 (Oxford Univ. Press 1997). Of historical interest, Katzenellenbogen's descendants are reported to include, in addition to numerous leading rabbis throughout Europe, Karl Marx, Moses Mendelssohn, and Martin Buber. *Id.* A degree of political and legal autonomy was the rule for Jewish communities in Moslem and Christian lands at the time—and indeed from the time of the Romans until today—although Jews have generally exercised that autonomy at the sufferance of the sovereign. See LAUREN BENTON, LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY 1400–1900, at 31–42, 112–13 (Cambridge Univ. Press 2002) (discussing Jewish autonomy in Christian Spain and the Moslem Ottoman Empire); MENACHEM ELON, HA-MISPHAT HA-IVRI: TOLDOTAV, MAKOROTAV, EKRONOTAV [Jewish Law: History, Sources, Principles] 6–17 (Hebrew Univ. Magnes Press, 3d. ed. 1988) (describing the semi-autonomy of Jewish courts and law).

7. JONATHAN I. ISRAEL, EUROPEAN JEWRY IN THE AGE OF MERCANTILISM 1550–1750, at 4–14 (Littman Library of Jewish Civilization 3d ed. 1998) (1985). Jews had been expelled from England in 1294 and were readmitted by Oliver Cromwell in 1656. Edward Fram, *Jewish Law From the Shulhan Arukh to the Enlightenment*, in AN INTRODUCTION TO THE HISTORY AND SOURCES OF JEWISH LAW 359, 362 (N.S. Hecht et al. eds., Oxford Univ. Press 1996) [hereinafter HISTORY AND SOURCES OF JEWISH LAW].

8. See ISRAEL, *supra* note 7, at 4–12.

specified number of years.⁹ Outside the ghetto, Jews had to wear a yellow cap to distinguish them from Christians and were forbidden from engaging in many occupations, including printing.¹⁰ As we will see, the persecution and forced migration of European Jews colored both Katzenellenbogen's edition of the *Mishneh Torah* and some of Isserles' reasoning in the proto-copyright dispute involving that work.

Intellectual cross-currents played no lesser role in framing *Maharam of Padua v. Giustiniani*. At their epicenter stood Moses Maimonides, the twelfth-century rabbinic authority, jurist, philosopher, and royal physician, whose magnum opus, the *Mishneh Torah*, was the subject matter of the dispute.¹¹ Maimonides is a central figure in Jewish thought, law, and religious practice.¹² Yet he has also provoked immense controversy.

Maimonides was a supreme rationalist. His principal philosophical work, *Guide for the Perplexed*, presents a far-ranging synthesis of Jewish faith, Greek-Arabic Aristotelian philosophy, and natural science. In his introduction, Maimonides argues that Judaism must be grounded in reason and that metaphysics ("divine science") can only be successfully undertaken after studying physics ("natural science").¹³ Elsewhere in the work, he contends that the contemporary knowledge of scientists, astronomers, and mathematicians, whether Jewish or Gentile, supersedes that of the rabbinical sages of old and should be accepted even when it contradicts the

9. BONFIL, *supra* note 5, at 67–69. Venice required Jews to live in the ghetto from 1516 onward. *Id.*; see also PAUL F. GRENDLER THE ROMAN INQUISITION AND THE VENETIAN PRESS 1540–1605, at 90–91 (Princeton Univ. Press 1977) (discussing the ghetto, anti-Semitic agitation, and *condotta*).

10. Jews were generally prohibited from joining craft and trade guilds. BONFIL, *supra* note 5, at 93. The Venice *Condotta* of 1548 explicitly forbade Jews from establishing printing presses or working for Christian printers. Nonetheless, Jews managed to be active in a wide variety of skilled occupations and also commonly worked in association with or in service to Christian printers as editors, proofreaders, and investors. SHIFRA BARUCHSON, SEFARIM VE-KORIM: TARBUT HA-KREEYA SHEL YEHUDEI ITALIA BE-SHLAHEI HA-RENAISSANCE [Books and Readers: The Reading Interests of Italian Jews at the Close of the Renaissance] 71 (Bar-Ilan Univ. Press 1993); BONFIL, *supra* note 5, at 93–94.

11. Maimonides is known in rabbinic literature as "Rambam," the acronym for his Hebrew name, Rabbi Moses ben Maimon. Maimonides lived from 1135 to 1204. For a penetrating, comprehensive study of Maimonides' life and work, see HERBERT A. DAVIDSON, MOSES MAIMONIDES: THE MAN AND HIS WORKS 3, 7 (Oxford Univ. Press 2005).

12. Maimonides also influenced non-Jewish thinkers, including Thomas Aquinas. DAVID B. BURRELL, KNOWING THE UNKNOWABLE GOD: IBN-SINA, MAIMONIDES AQUINAS (Univ. of Notre Dame Press 1986); BRIAN DAVIES, THE THOUGHT OF THOMAS AQUINAS 60–61 (Oxford Univ. Press 1992).

13. See MOSES MAIMONIDES, THE GUIDE FOR THE PERPLEXED 1–8 (M. Friedlander trans., 2d ed., George Routledge & Sons 1947).

views of the rabbis.¹⁴ Maimonides' emphasis on science and human reason and his express incorporation of Aristotelian thought brought a virulent reaction from those who espoused a traditionalist and more mystical approach to Jewish faith and practice.¹⁵

The Maimonidean controversy continued to reverberate in the sixteenth century, with Katzenellenbogen and Isserles serving as leading proponents of Maimonides' rationalism. Katzenellenbogen vehemently opposed the propagation of the mystical teachings of the Kabbalah.¹⁶ And, due to his intellectual prowess and commitment to the study of science, Isserles came to be known as the "Maimonides of Polish Jewry."¹⁷

Upon its completion in 1180, Maimonides' fourteen-volume *Mishneh Torah* was no less controversial than *Guide for the Perplexed*. The *Mishneh Torah* was the first systematic codification of the entire corpus of Jewish law ever undertaken.¹⁸ Jewish law derives from express injunctions and subtle references in the Pentateuch as interpreted and supplemented by a dizzying array of rabbinic opinions, judgments, and disputations found in the Talmud and in post-Talmudic commentary, regulations, custom, and rulings.¹⁹ Prior to Maimonides' work, a handful of scholars had crafted redactions of those laws relevant to their contemporary practice. But those redactions largely followed the structure of the classic sources, and thus lacked the logical arrangement that would enable most users to find what they need with relative ease.²⁰ Maimonides sought to produce something akin to a vast Restatement of the Law; indeed "Mishneh Torah" means precisely that, restatement, or reiteration, of the law. He systematically classified the entire existing legal literature by subject matter, ranging from matters of religious practice and faith, to marriage

14. *Id.* § 2:8, at 163, § 3:14, at 277–79; RUDERMAN, *supra* note 3, at 30–32.

15. *See* DAVIDSON, *supra* note 11, at 411–12.

16. *See* DAVID BEN MANASSEH & DAVID DARSHAN, SHIR HAMA'A LOT L'DAVID [In Defense of Preachers] 17 (Hebrew Union College Press 1984) (noting Katzenellenbogen's opposition to the printing of the Zohar); Tal, *supra* note 2, at 20 (noting that, in 1558, he signed two bans against the study of Kabbalah).

17. *See* RUDERMAN, *supra* note 3, at 69–77; David E. Fishman, *Rabbi Moshe Isserles and the Study of Science Among Polish Rabbis*, 10 SCI. IN CONTEXT 571 (1997); Elijah J. Schochet, *Moshe Isserles*, in THE OXFORD DICTIONARY OF THE JEWISH RELIGION 362, 362 (R. J. Zwi Werblowsky & Geoffrey Wigoder eds., Oxford Univ. Press 1997) [hereinafter JEWISH RELIGION].

18. *See* DAVIDSON, *supra* note 11, at 196–97 (describing the unprecedented scope of Maimonides' code); MOSHE HALBERTAL, PEOPLE OF THE BOOK; CANON, MEANING, AND AUTHORITY 74 (Harvard Univ. Press 1997) (referring to the "novelty" of Maimonides' "all-encompassing ambition").

19. *See generally* ELON, *supra* note 6.

20. *See* DAVIDSON, *supra* note 11, at 193–95.

and sexual relations, to criminal, property, and tort law. He then restated the legal doctrine in plain language. Maimonides' restatement covered the entire spectrum of rabbinic law, including not only laws of practical application in his time, but also those relating to life in ancient Israel, when the Temple still stood in Jerusalem.²¹

Maimonides' grand purpose, as he stated in the introduction, was that "the entire Oral Law might become systematically known to all, without citing difficulties and solutions of different views . . . but consisting of statements, clear and convincing . . . that have appeared from the time of Moses to the present, so that all rules shall be accessible to young and old." According to some commentators, Maimonides meant for Jews henceforth to be able to rely on his code alone to determine Jewish law.²² That view finds some support in Maimonides' wholesale omission of citations to the rabbinic authorities from which he drew in extracting legal norms.²³ Indeed, even though the *Mishneh Torah* recommends that students devote substantial time grappling with Talmudic disputation, Maimonides' letters suggest that, in his view, studying the Talmud is merely a means—a tortuously difficult means—to discerning the law, not an end in and of itself.²⁴ At the very least, Maimonides seems to have intended that his opus would obviate the need to study post-Talmudic rulings.

Maimonides' *Mishneh Torah* aroused a storm of opposition not only to his specific conclusions, which reflect the same rationalist outlook he later delineated in *Guide for the Perplexed*, but to the very nature of his project. Opponents feared that, whether Maimonides intended it or not, his code would turn students away from studying the Talmud, which traditionalists viewed as the wellspring of Jewish creativity and thought.²⁵ They also feared that the *Mishneh Torah* would blind judges to the contrasting opinions required to understand the law and reach a just result.²⁶ For them, the need for careful study of the cases, parsing rabbinic argument, and wrestling with contrasting arguments was the very essence of

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

22. See *id.* at 208–11 (presenting the possibility that Maimonides meant for his code to substitute for studying the Talmud); Halbertal, *supra* note 18, at 73–74 (characterizing Maimonides' project as an "attempt to replace the Talmud with a code").

23. Maimonides does list his sources in the introduction, but he does not cite authorities for his enunciation of specific laws in the text. See DAVIDSON, *supra* note 11, at 266–67.

24. *Id.* at 197–202, 208.

25. ELON, *supra* note 6, at 1005–17.

26. *Id.*

Jewish jurisprudence, not an obstacle to be avoided.²⁷ In that vein, they also castigated Maimonides for failing to cite authority for his conclusions. As one opponent put it: “As he does not adduce proofs from the sayings of the Talmudic sages for his decisions, who is going to follow his opinion? It is far better to study Talmud.”²⁸

By the sixteenth century, the *Mishneh Torah* had earned a central place in the Jewish canon, but Maimonides had failed in his goal of providing a single authoritative code that would resolve all disputes. Maimonides’ work spawned several competing codes, each reflecting a different organization and interpretation of the law. The *Mishneh Torah* also inspired numerous commentaries, some seeking to explicate and find Talmudic authority for Maimonides’ conclusory statements of law, others aiming to refute his conclusions, and still others adding the rulings and glosses of later scholars.²⁹

In addition, several leading sixteenth-century rabbinic authorities remained fiercely opposed to the very idea of codifying Jewish law. They included Jacob Pollak, who was Katzenellenbogen’s teacher in Prague, and Shalom Shakhna, who studied with Katzenellenbogen under Jacob Pollak and then went on to become Isserles’ teacher in Cracow. Pollack and Shakhna posited that a judge must decide each case on its own merits, in line with his individual study of legal sources and understanding of the equities—“according to what he sees with his own eyes” and “the dictates of his own heart.”³⁰ The law’s redaction in a code, they argued, would necessarily deprive judges of that vital case-by-case discretion.

Katzenellenbogen and Isserles rejected their mentors’ uncompromising opposition to codification.³¹ They believed that,

27. *Id.* The early eighteenth-century movement to codify the common law in the United States also aroused fierce opposition, albeit for different reasons. See generally CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM (Greenwood Press 1981); MASSACHUSETTS COMMISSIONERS ON CODIFICATION OF THE COMMON LAW & JOSEPH STORY, A REPORT OF THE COMMISSIONERS APPOINTED TO CONSIDER AND REPORT UPON THE PRACTICABILITY AND EXPEDIENCY OF REDUCING TO A WRITTEN AND SYSTEMATIC CODE THE COMMON LAW OF MASSACHUSETTS, OR ANY PART THEREOF (Dutton & Wentworth, State Printers 1837).

28. Haim Hillel ben-Sasson et al., *Maimonidean Controversy*, in 13 ENCYCLOPAEDIA JUDAICA, *supra* note 2, at 371–81 (quoting the report of Sheshet ben Isaac Saroggosa, a Maimonides defender writing around 1200, on the opinion of a rabbinic judge who refused to rule according to Maimonides); see also DAVIDSON, *supra* note 11, at 265–67 (discussing Maimonides’ contemporaries and Maimonides’ response).

29. ELON, *supra* note 6, at 1011–22.

30. *Id.* at 1120–21.

31. For his part, Katzenellenbogen might not have felt much loyalty to his teacher. Some two decades previously, Jacob Pollack had issued an order excommunicating Katzenellenbogen’s father-in-law, Abraham Minz. Shlomo Tal, *Jacob ben Joseph Pollack*,

so long as codes are accompanied by commentary succinctly presenting alternative views, such restatements can make the law accessible while still encouraging judges and students to grapple with competing positions and interpretations. Their own projects manifest that measured view. In his edition of the *Mishneh Torah*, Katzenellenbogen added some early sources that Maimonides had expressly rejected, together with subsequent commentary that took issue with Maimonides' position.³² He also expressed sensitivity to the concern that the *Mishneh Torah* could dissuade readers from grappling with rabbinic sources. In his introduction, Katzenellenbogen states that while he provides Talmudic references for Maimonides' most obscure statements, he resisted the temptation to provide citations for all Maimonides' conclusions out of fear that some readers would then rely on his citations as a shortcut rather than searching for authority in the Talmud themselves. For his part, Isserles drafted his own code and added critical glosses to Joseph Caro's code, the *Shulhan Arukh*, which, largely because of Isserles' commentary and counterpoint, remains the principle authoritative redaction of Jewish law to this day.³³

Katzenellenbogen's publication of the *Mishneh Torah* also reflected his engagement with the traditions of Italy's native and Sephardic Jews. Given the mass migrations of Jews from Western and Central Europe, mid-sixteenth century Italy contained a complex mix of Jews of various geographic origins and distinct socio-legal traditions. These included a group whose presence in Italy dated back to ancient times; "Ashkenazi" Jews, those from Germany and Northern France, who began arriving in northern Italy in the second half of the fourteenth century; "Sephardic" Jews, those who came from Spain and Portugal after

in 16 ENCYCLOPAEDIA JUDAICA, *supra* note 2, at 355.

32. In *Sefer Ha-Mitzvot* [Book of Commandments], which he wrote as a freestanding prolegomenon to the *Mishneh Torah*, Maimonides enumerated 613 commandments that Jews are obligated to follow and set out fourteen principles that guided him in identifying those commandments in Biblical narrative and Talmudic disputation. In so doing, Maimonides expressly rejected an earlier attempt to identify such commandments. Nahmanides, known in Jewish tradition as Ramban, the foremost Jewish law scholar in the generation following Maimonides, published a critique of the *Sefer Ha-Mitzvot*, called *Hasagot* [Criticisms], in which he defended the earlier authors against Maimonides' criticism. Jacob I. Dienstag, *Moses Maimonides*, in 13 ENCYCLOPAEDIA JUDAICA, *supra* note 2, at 386. Katzenellenbogen included in his edition the earlier writings, Maimonides' *Sefer Ha-Mitzvot* and Nahmanides' *Hasagot*.

33. ELON, *supra* note 6, at 1131–37. *Shulhan Arukh* means "the set table." Isserles labeled his commentary, which adds Ashkenazi customs and rulings to Caro's Sephardic-oriented code, *Mappa*, or "table cloth." Louis Isaac Rabinowitz, *Shulhan Arukh*, in 18 ENCYCLOPAEDIA JUDAICA, *supra* note 2, at 529–30. Joseph Caro (1488–1575) completed the *Shulhan Arukh* in 1565. *Id.*

the Inquisition and expulsion in the late fifteenth century; and Jews who lived in regions conquered by Italian states in the Balkans and Greek Islands.³⁴

In certain matters of law and ritual, Ashkenazi Jews followed different rules and customs than their fellow religionists from the Iberian Peninsula, southern Europe, and the Levant. In that vein, Ashkenazi jurists generally ruled in accordance with the *Sifrei Turim*, a code of laws compiled in the early fourteenth century by Jacob ben Asher (who fled from Ashkenaz to Spain at the age of 33 and sought to bring together Ashkenazi and Sephardic sources),³⁵ while Sephardic, Italian, and Oriental Jews typically followed the *Mishneh Torah* of Maimonides (who lived in Spain and Egypt and primarily followed Sephardic post-Talmudic authorities).³⁶ Although Katzenellenbogen was Ashkenazi, he broke with Ashkenazi tradition in his Sephardic-influenced rulings in some cases.³⁷ Moreover, the project of codification was essentially a Sephardic undertaking—indeed Isserles was charged with betraying the Ashkenazi tradition of open-ended, case-by-case argumentation by compiling his code.³⁸ So, although a number of Ashkenazi jurists wrote free-standing commentaries on the *Mishneh Torah* (primarily presenting Ashkenazi glosses and customs),³⁹ Katzenellenbogen's issuance of

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

35. Ephraim Kupfer & David Derovan, *Jacob ben Asher*, in 11 ENCYCLOPAEDIA JUDAICA, *supra* note 2, at 30.

36. Menachem Elon, *Codification of Law*, in 4 ENCYCLOPAEDIA JUDAICA, *supra* note 2, at 774–75; *see also* DAVIDSON, *supra* note 11, at 284–85 (noting Joseph Caro's observation, made in the sixteenth century, that the *Mishneh Torah* served as the standard law code for Jewish communities in all the Arab lands). A study of book ownership among Jews in Mantua in 1595 found, accordingly, a considerably higher percentage of Sephardic and Italian households than Ashkenazi households owned a copy of the *Mishneh Torah*, with the results the opposite regarding ownership of the *Sefer Ha-Turim*. BARUCHSON, *supra* note 10, at 134.

37. Notably, the Maharam cited Sephardic legal sources in relaxing the ban on polygamy (which had been instituted in Ashkenaz in the eleventh century and subsequently accepted in northern Italy). *See* Meir Katzenellenbogen, Responsa Maharam of Padua, Responsa Nos. 13 & 19. For a discussion of the subject, *see* WEISTREICH, *supra* note 34, at 208–10. Katzenellenbogen frequently cited Maimonides in his rulings. *See, e.g.*, Responsa Maharam of Padua, Responsum No. 78 (citing Maimonides in support of a ruling that portions of the Bible may be read in vernacular translation on Yom Kippur). But he also regularly cited the *Sifrei Turim* and did not always follow Maimonides' position.

38. *See* HALBERTAL, *supra* note 18, at 80–81 (describing criticism levied by the sixteenth-century Ashkenazi authority Haim ben Bezalel).

39. A prime example was the *Hagaot Maimoniyot*, written by Meir ha-Kohen of Rothenberg in the thirteenth century. Ha-Kohen's commentary aimed to supplement Maimonides' code with rulings of German and French scholars. *See* Ephraim Kanarfogel,

a complete edition of the classic code, which his publisher, Alvise Bragadini, touted as the work of the great Maimonides “the Sephardi,” likely reflected the Maharam’s “broad tent” approach, and would have been seen as such by his contemporaries.

B. Editing and Printing

Printing was brought to Italy soon after Gutenberg’s invention of movable type in the mid-fifteenth century.⁴⁰ There it flourished, supported by ecclesiastical patrons, a literate culture, and well-to-do urban centers. Venice, with its relative stability, advanced mercantile system, and proximity to the leading university of Padua, was a particularly congenial setting for the new craft. By 1480, Venice had come to dominate the Italian printing industry and, indeed, had become the “capital of printing” of all Europe.⁴¹

Hebrew presses were among the earliest in Italy; the first Hebrew book printed in Italy bearing a publishing date of which we have a record was produced in 1475.⁴² Most fifteenth-century Hebrew printers were Jews, led by the Soncino family, which published books of Jewish law and liturgy as well as non-Hebrew books. By 1500, about 200 Hebrew volumes had already been printed.⁴³ Readers included not just Jews, but also a sizable number of Christian Hebraists devoted to studying the classics of Jewish learning.⁴⁴

Due to prohibitions on Jews engaging in printing and in selling books to non-Jews, Hebrew printing in the sixteenth century came to be dominated by Christian printers, who hired

Haggahot Maimuniyot, in *JEWISH RELIGION*, *supra* note 17, at 289. The *Hagaot Maimuniyot* was incorporated into both the Bragadini and Giustiniani editions of the *Mishneh Torah*, as well as earlier editions, and continues to be included in standard editions of Maimonides’ code today.

40. This paragraph draws upon BRIAN RICHARDSON, *PRINTING, WRITERS AND READERS IN RENAISSANCE ITALY* 3–5 (Cambridge Univ. Press 1999).

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

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

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

44. See generally David B. Ruderman, *The Hebrew Book in a Christian World*, in *A SIGN AND A WITNESS: 2,000 YEARS OF HEBREW BOOKS AND ILLUMINATED MANUSCRIPTS* 101, 101–02 (Leonard Singer Gold ed., N.Y. Pub. Library & Oxford Univ. Press 1988).

Jews or Jewish converts to Christianity as proofreaders, editors, and compositors. The most prominent of these printers was Daniel Bomberg, originally from Antwerp, whose high-quality craftsmanship and typographical arrangement still sets the standard for Hebrew Judaic printing.⁴⁵ In 1515, the Venetian Senate granted Bomberg an exclusive privilege to print Hebrew books.⁴⁶ That grant followed a practice common in Venice and other Italian cities, beginning in the 1480s, of liberally granting exclusive printing privileges, generally lasting ten years, for a particular edition, typeface, or printing technique.⁴⁷ Yet, by the time the Senate granted Bomberg his privilege, there was mounting dissatisfaction with the practice of granting printing privileges, the proliferation of which had led to high prices, poor quality work, and an exodus of printers from the city.⁴⁸ Two years later, indeed, the Senate revoked all existing printing privileges, including Bomberg's, and provided that future privileges would be granted only for works not previously printed.⁴⁹ Bomberg nevertheless managed to convince the Senate to renew his printing monopoly for eight years, and then again, in 1526, for another decade, that time upon paying the sum of 500 ducats, the equivalent of several years' income.⁵⁰

Marc Antonio Giustiniani established a Hebrew press in Venice in 1545.⁵¹ The scion of a wealthy family of Venetian patricians, Giustiniani emerged as a powerful, cut-throat rival to the now aged Daniel Bomberg. Giustiniani hired away some of Bomberg's key Jewish editors and compositors.⁵² He also repeatedly rushed out competing, low price editions of the same

45. Joshua Bloch, *Venetian Printers of Hebrew Books*, in *HEBREW PRINTING AND BIBLIOGRAPHY* 63, 78–79 (Charles Berlin ed., N.Y. Pub. Library & Ktav Publishing House 1976); Abraham Meir Habermann, *Daniel Bomberg*, in *4 ENCYCLOPAEDIA JUDAICA*, *supra* note 2, at 52.

46. CHRISTOPHER L.C.E. WITCOMBE, *COPYRIGHT IN THE RENAISSANCE: PRINTS AND THE PRIVILEGIO IN SIXTEENTH-CENTURY VENICE AND ROME* 44 (Brill 2004).

47. For an in-depth discussion of the Venetian printing privilege system, see WITCOMBE, *supra* note 46, at 21–45.

48. RICHARDSON, *supra* note 40, at 38–43. In 1469, Venice awarded John of Speyer a monopoly over all printing in the city, but the privilege never took effect because he died soon after. *Id.* at 39.

49. Bloch, *supra* note 45, at 70.

50. BARUCHSON, *supra* note 10, at 131–33; Bloch, *supra* note 45, at 70–72. Bomberg had initially offered 100 ducats to extend his privilege but the Senate turned him down in the face of charges that his books were inimical to the Catholic faith. It took three further votes—and a steadily increasing payment offer—for the Senate finally to extend his privilege. See GRENDLER, *supra* note 9, at 91; WITCOMBE, *supra* note 46, at 44–45.

51. Bloch, *supra* note 45, at 79.

52. AMRAM, *supra* note 42, at 199–201, 253.

works printed by Bomberg.⁵³ As his distinguishing printer's mark, a mark that adorns his edition of the *Mishneh Torah*, Giustiniani chose a depiction of the Second Temple of Jerusalem, accompanied by the Biblical verse, "The glory of this latter House shall be greater than that of the former."⁵⁴ Despite that boastful, intended self-reference, Giustiniani never achieved Bomberg's stature. But his fierce competition put the Bomberg press out of business in 1548 and, for a short time, Giustiniani enjoyed a de facto monopoly of Hebrew printing in Venice.⁵⁵

When Katzenellenbogen decided to publish a new annotated edition of the *Mishneh Torah*, he approached Giustiniani to handle the printing, but, for whatever reason, the two did not come to terms.⁵⁶ It was then that the Maharam of Padua joined forces with Alvise Bragadini, another Venetian patrician, who had just established a new Hebrew press in Venice.⁵⁷ The dispute over the *Mishneh Torah* was the beginning of a bitter rivalry between the two presses, with Bragadini ultimately gaining the upper hand. Giustiniani ceased publication in 1552,⁵⁸ while the House of Bragadini emerged to dominate Hebrew printing in Venice until well into the eighteenth century.⁵⁹

Instability and ruinous competition were typical of the printing industry of that era. In 1480, there were 151 printing houses in Venice; by 1500 only ten remained.⁶⁰ In 1588, the Venice Senate complained that only seventy printing houses remained of the 120 that had been in operation earlier that century, and by 1596 their numbers had diminished to forty.⁶¹ The precariousness of the printing business lay in the high fixed costs of labor, rent, press, and type; expense of paper; considerable delay before copies could be sold; unpredictable

53. BARUCHSON, *supra* note 10, at 34; MEIR BENAYAHU, HASKAMA VE-RESHUT BE-DFUSEI VENETZIA: HA-SEFER HA-IVRI MI-ET HAVATO LE-DFUS VE-AD TZATO LE-OR [loosely translated by the publisher as "Copyright, Authorization, and Imprimatur for Hebrew Books Printed in Venice"] 21–24 (Machon ben Tzvi & Mosad Rav Kook 1971); A. M. HABERMANN, PERAKIM BE-TOLDOTH HA-MADPISSIM HA-IVRIM WE-INYANEI SEFARIM [Studies in the History of Hebrew Printers and Books] 167–68 (Rubin Mass 1978).

54. *Haggai* 2:9; Bloch, *supra* note 45, at 70.

55. Bloch, *supra* note 45, at 79.

56. Jennifer Breger, *Competition in the Hebrew Book Market*, AB BOOKMAN'S WKLY., Feb. 27, 1995, at 940.

57. AMRAM, *supra* note 42, at 255–56; Breger, *supra* note 56, at 940.

58. Bloch, *supra* note 45, at 81–82. However, as late as 1570, Giustiniani apparently engaged in surreptitious trafficking in Hebrew books from Cephalonia, a Venetian island stronghold in the Ionian Sea, where the patrician printer had been appointed governor. See GRENDLER, *supra* note 9, at 143–44.

59. Bloch, *supra* note 45, at 86.

60. BARUCHSON, *supra* note 10, at 28.

61. *Id.*

hazards, including risks of pirated copies, real piracy, and the loss of copies due to fire, warfare, or plague; and difficulties in collecting from distant booksellers.⁶² Moreover, given the small market and the many trials of distribution, the typical printing run even for a major publisher with a title of relatively high demand remained just a couple thousand copies throughout the sixteenth century.⁶³ Finally, even if the printer obtained an exclusive privilege, that did not prevent competition from rival editions printed in neighboring jurisdictions.⁶⁴

Printing could be very profitable nonetheless. Even a print run of three hundred to four hundred copies could eventually yield returns as high as one hundred percent, if production and sale went without a hitch.⁶⁵ Successful printers were, by and large, those with considerable capital and broad familial and social connections that could serve to build relatively efficient, secure, and geographically wide distribution networks.⁶⁶

Like today's book publishers, sixteenth-century printers sought to minimize their risk by printing books that were assured considerable demand. During the first century of print, that largely meant printing classics and liturgical works written before the age of print.⁶⁷ The first half of the sixteenth century thus saw numerous Italian editions of the works of Dante, Petrarch, and Boccaccio, just as Hebrew printers invested primarily in issuing successive editions of the Bible, Talmud, and other central texts of Jewish law, liturgy, and literature.⁶⁸

Classic pre-print works had frequently suffered from corruption and textual drift as scribes hand-copied one manuscript from another over the years.⁶⁹ Largely as a result, ambitious printers and publishers came to view an investment in editing, including hiring a respected, celebrated editor, as a primary key to success.⁷⁰ Editions of classic works typically featured a printer's dedication and editor's introduction

62. RICHARDSON, *supra* note 40, at 25–38.

63. *Id.* at 23–24; GRENDLER, *supra* note 9, at 9.

64. RICHARDSON, *supra* note 40, at 40–41.

65. *Id.* at 26.

66. BARUCHSON, *supra* note 10, at 29.

67. See JOHN FEATHER, A HISTORY OF BRITISH PUBLISHING 20–21 (Routledge 2d ed. 2006) (discussing the early book trade in England).

68. See generally BARUCHSON, *supra* note 10, at 83 (discussing Hebrew presses); BRIAN RICHARDSON, PRINT CULTURE IN RENAISSANCE ITALY: THE EDITOR AND THE VERNACULAR TEXT 1470–1600 (Cambridge Univ. Press 1994).

69. See ELIZABETH L. EISENSTEIN, THE PRINTING REVOLUTION IN EARLY MODERN EUROPE 78–79 (Cambridge Univ. Press 1983).

70. RICHARDSON, *supra* note 68, at 7.

trumpeting the editor's arduous work and expertise in producing an accurate and complete instantiation of the original manuscript and in correcting the many errors found in earlier print editions.⁷¹ While editors of newly authored works aspired to present a polished text if even contrary to the author's views, editors of venerated pre-print works typically affirmed their fidelity to the original text, albeit often touting their ability to decipher and resolve incongruities in earlier manuscripts on the basis of their educated conjecture regarding what the author must have written.⁷² To that end, printers and editors also sought to distinguish their editions by supplementing the reconstituted text with the editor's commentary, annotations, and explanatory notes.⁷³

The Katzenellenbogen–Bragadini edition of the *Mishneh Torah* falls squarely within that framework. Like most works that had been repeatedly hand-copied in manuscript prior to the invention of print, the manuscripts of Maimonides' *Mishneh Torah* had numerous discrepancies. Indeed the *Mishneh Torah* appeared in variant versions almost immediately upon its completion since Maimonides himself made emendations to some early manuscripts.⁷⁴ Moreover, by the time Katzenellenbogen embarked on his project, Maimonides' classic code had already been printed several times, the first in Rome before 1480 and the latest by Daniel Bomberg in 1524.⁷⁵ So like Venetian editors working in the crowded market for Italian classics, Katzenellenbogen produced his edition against a backdrop of competing print editions as well as disparate pre-print manuscripts.

Yet, far from being able to point to the error-ridden print editions that preceded him, the Maharam had to justify the need for his attempt to improve upon Bomberg's first-rate 1524 edition. As was typical of his high quality work, Bomberg had invested heavily in his publication. He gathered several manuscripts and marginal glosses for use in the edition's preparation, and employed as editors the noted Italian Talmudist and physician, David ben Eliezer Ha-Levi Pizzighettone, and the

71. *Id.* at 3.

72. *Id.* at 103–10.

73. *See id.* at 99–103 (discussing specific examples of sixteenth-century printers and editors who supplemented their texts with explanatory notes, commentary, and appendixes); *see also* BARUCHSON, *supra* note 10, at 43.

74. *See* DAVIDSON, *supra* note 11, at 269–70; *see also* Alexander Marx, *Texts By and About Maimonides*, 25 *JEWISH Q. REV.* 371, 371 (1935) (noting that printed editions of the *Mishneh Torah* are said to still contain many mistakes).

75. *THE HEBREW BOOK*, *supra* note 42, at 211.

illustrious expert on Hebrew texts, Yaacov ben Haim ibn Adonyahu.⁷⁶ The Bomberg edition also incorporated leading medieval scholars' glosses and commentaries on Maimonides' work.⁷⁷

Hence, in the introduction to his edition, Katzenellenbogen lavishes praise on Pizzighettone and states that he initially saw little value in "gleaning the last crumbs remaining" from the great work of his predecessor.⁷⁸ But the Maharam emphasizes that, through his own arduous study of the text and understanding of Talmudic and post-Talmudic commentary and with the help of his son, he has nevertheless made a number of corrections vis-à-vis the earlier edition, both in Maimonides' text and that of the medieval commentators. At the same time, Katzenellenbogen avows a reverence for text and a conservatism in correcting discrepancies that contrasts markedly with sixteenth-century Venetian editors' generally unabashed use of reasoned conjecture in rendering classical and old vernacular works. Following Maimonides' warning to pre-print editors, Katzenellenbogen insists that he made no corrections relying solely on his own reasoning: "If I did not find a basis for correction in the written sources in front of me, I did not change the text; I just added an explanatory note in the margin."⁷⁹

Further distinguishing his edition from Bomberg's, Katzenellenbogen also proclaims in the editor's introduction that he annotated Maimonides' text with references to Talmudic

76. *Id.*; AMRAM, *supra* note 42, at 211. In his editor's introduction, Pizzighettone notes that he had before him five versions of the *Mishneh Torah*, as well as manuscripts of commentaries. MOSES MAIMONIDES, MISHNEH TORAH (Bomberg edition 1524) [hereinafter Bomberg Edition].

77. These included the *Migdal Oz*, *Maagid Mishneh*, and *Hagahot Maimoniot*.

78. MOSES MAIMONIDES, MISHNEH TORAH (Bragadini edition 1550) [hereinafter Bragadini Edition]. Katzenellenbogen was known for his modesty and benign disposition. In addition, Pizzighettone had sided with Katzenellenbogen's father-in-law, Abraham Minz, in a vituperative, early sixteenth-century dispute among Italian rabbis regarding the proper venue for deciding a major commercial dispute. It was over this dispute that Jacob Pollack, Katzenellenbogen's teacher in Prague, excommunicated Minz. Aaron Rothkoff, *Finzi-Norsa Controversy*, in 7 ENCYCLOPAEDIA JUDAICA, *supra* note 2, at 41.

79. Bragadini Edition, *supra* note 78. Katzenellenbogen noted that he used three prior versions of the *Mishneh Torah* in preparing his own version. *Id.* Similarly to Katzenellenbogen, Bomberg's copy editor, Yaacov ben Haim ibn Adonyahu, emphasizes in his epilogue to the 1524 edition that he abided by the warnings of "Ramban [Maimonides] and Rashba [the thirteenth-century rabbinic jurist Shlomo ben Aderet]" by identifying mistakes and making corrections only when the Talmud and other correct books gave a very clear indication of Maimonides' actual text, and not on the basis of his own reasoning. Bomberg Edition, *supra* note 76. Likewise, Bomberg's chief editor cautions in his introduction that there might be mistakes in the included commentaries, *Migdal Oz* and *Maagid Mishneh*, because he worked from only a single manuscript for each and thus was forced to resort to his own reasoning in resolving apparent discrepancies.

sources and added some brief commentary of his own.⁸⁰ Finally, both Katzenellenbogen's introduction and Bragadini's preface announce that the Maharam has incorporated with the *Mishneh Torah* not only all the commentaries included in the earlier edition, but also a set of writings not previously appended. These included Maimonides' *Sefer Ha-Mitzvot*, a work that Maimonides wrote as a freestanding prolegomenon to the *Mishneh Torah* and in which he criticized some earlier authorities; Nahmanides' *Hasagot*, in which that medieval scholar defended the authorities that Maimonides criticized; and the writings of the early authorities at issue.⁸¹

In addition to contributing his labor and expertise, Katzenellenbogen reportedly invested much of his own fortune in the edition.⁸² The project must have appeared to be a solid bet. As with many other Judaic texts printed in that era, the *Mishneh Torah* would likely have attracted as potential purchasers Jews and Christian Hebraists throughout Italy and beyond.⁸³ Readers all over Europe looked to Venice as an important source of scholarly and liturgical Hebrew books. Indeed, Moses Isserles is reported to have relied on foundational texts proofread by Katzenellenbogen and printed in Venice in writing his glosses on the *Shulhan Arukh*.⁸⁴

III. THE RULING

Giustiniani published his edition of the *Mishneh Torah* closely on the heels of Bragadini's. Giustiniani included Katzenellenbogen's source references and original commentary. In a show of denigration, however, he moved the Maharam's commentary to an appendix and, in his prefaces to the volume and the appendix, criticized the commentary as worthless—"having been written for nothing."⁸⁵ With bravado typical of fiercely competitive printers of

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

81. Bragadini Edition, *supra* note 78.

82. Breger, *supra* note 56, at 940.

83. On the *Mishneh Torah*'s influence among Christian Hebraists and Protestant theologians, see DAVIDSON, *supra* note 11, at 289.

84. Moses Isserles (Rema), Responsa Rema, Responsum No. 10, at 45 n.41 (A. Ziv ed. 1970) [hereinafter Responsa Rema].

85. MOSES MAIMONIDES, MISHNEH TORAH (Giustiniani edition 1550) [hereinafter Giustiniani Edition].

that era, Giustiniani claimed that leading scholars from “Yemen to the West” had told him that Katzenellenbogen’s commentary should be removed from the text because in each annotation the Maharam had either “erred” or “sought to explain things understood even by one who is one day old.”⁸⁶ He appended Maharam’s annotations, nonetheless, Giustiniani continued, only to give scholars the opportunity to judge their worth independently. In like vein, Giustiniani announced that leading scholars had pleaded with him to rush out an alternative to the shoddy edition of “one rabbi from Padua who aspired to stand among the greats.” Those scholars, Giustiniani touted, had also given his edition added value by providing him with additional material not found in the Bragadini, including the *Sifrei Turim* precepts corresponding to Maimonides’ provisions and page references to two leading medieval commentaries on the *Mishneh Torah*, the *Migdal Oz* and *Maagid Mishneh* (which, the preface notes, had no numbered pagination prior to the print editions of those commentaries).⁸⁷

To add injury to insult, Giustiniani sold his edition at a significantly lower price than the Katzenellenbogen–Bragadini *Mishneh Torah*. Indeed, although Giustiniani had apparently spared no expense in producing a woodcut-illustrated, perfectly justified handset edition of stunningly high quality, he promised in his preface to sell the edition for a price of at least a gold coin less than that of his competitor.⁸⁸ His intention, he proclaimed, was to enable the Jewish community to purchase books as cheaply as possible.

Bragadini caught wind of Giustiniani’s plan prior to publication. In response, he hastily added a postscript to his edition charging that his rival acted only to maintain a monopoly on Hebrew printing. Giustiniani, the postscript declared, aimed to drive Bragadini out of business just as he had done previously to Daniel Bomberg.⁸⁹

86. *Id.* Giustiniani’s anonymous editor further charged that Katzenellenbogen had apparently failed to read Maimonides’ letter to Pinhas of Alexandria, in which Maimonides basically stated that his readings of the law were straightforward and needed no annotative explanation and, thus, Katzenellenbogen should have continued to provide Talmudic sources, rather than presumptuously adding his own commentary. *Id.*

87. These claims were set forth in a separate preface by an unnamed person (presumably Giustiniani’s editor). The preface notes that the scholars have also provided parallel references to the *Sefer Mitzvot Gadol*, a leading supplement to the *Mishneh Torah* containing Talmudic and post-Talmudic sources for Maimonides’ precepts, authored by the great thirteenth-century French rabbinic scholar, Moses ben Jacob of Coucy. See Israel Moses Ta-Shema, *Moses ben Jacob of Coucy*, in 14 ENCYCLOPAEDIA JUDAICA, *supra* note 2, at 549.

88. Giustiniani Edition, *supra* note 85.

89. See Bragadini Edition, *supra* note 78; see also BENAYAHU, *supra* note 53, at 24

In absence of an exclusive privilege to print the *Mishneh Torah* granted by the Venetian Senate or another authority elsewhere, Bragadini had no legal claim against his rival. But Bragadini and his copublisher and editor, the Maharam of Padua, were not to be left empty-handed. The Maharam promptly sought a ruling that the Giustiniani edition was a violation of Jewish law.⁹⁰

Katzenellenbogen directed his appeal to Rabbi Moses Isserles. Isserles was only twenty years old at the time and had just been appointed Rabbi of Cracow, Poland.⁹¹ But he was already on his way to become the leading Ashkenazi juridical authority of his day, a place later cemented by publication of his glosses on the *Shulhan Arukh*.⁹² So Isserles was a natural choice for Katzenellenbogen to seek a ruling. Nonetheless, it is probably fair to say that Katzenellenbogen's turn to Isserles had elements of what we might deem "forum shopping." As we have seen, the two were intellectual kinsmen in their support of Maimonides' rationalism and codification. More than that, indeed, they were actual kinsmen: second cousins once removed.⁹³

The procedural posture of *Maharam of Padua v. Giustiniani* is noteworthy in another sense as well: while I have taken poetic license in labeling the matter as one would a case heard in a U.S. court, in fact, the controversy had no such appellation and, indeed, was not a "case" in the sense of consisting of a proceeding at which litigants present arguments and evidence. The semi-autonomous Jewish courts of that era followed intricate rules guaranteeing each litigant a fair opportunity to present evidence and argue his case.⁹⁴ But the testimony of non-Jews was treated as inherently untrustworthy and, no doubt, the non-Jewish Venetian patrician, Giustiniani, would have refused to appear before a Jewish court in any case.⁹⁵ Accordingly, Katzenellenbogen followed a procedure that was often used by rabbinic judges and others seeking guidance on difficult legal questions: he posed a question of Jewish

(quoting Bragadini's postscript).

90. Breger, *supra* note 56, at 940–42.

91. ELON, *supra* note 6, at 1122. Isserles is known as "the Rema," the Hebrew acronym for Rabbi Moses Isserles. He died in 1572. *Id.*

92. See Shlomo Tal & David Derovan, *Moses ben Israel Isserles*, in 10 ENCYCLOPAEDIA JUDAICA, *supra* note 2, at 770.

93. Ziv, *supra* note 2, at 195.

94. See Haim Hermann Cohn, *Practice and Procedure*, in 16 ENCYCLOPAEDIA JUDAICA, *supra* note 2, at 436–37; Menachem Elon, *Mishpat Ivri: Jewish Law—A Law of Life and Practice*, in 14 ENCYCLOPAEDIA JUDAICA, *supra* note 2, at 341–42.

95. See JOSEPH CARO, SHULHAN ARUKH, *Hoshen Mispat*, *Hilkhot Eidut* 34:19 (1565) (stating that the testimony of non-Jews is inadmissible in a Jewish court). That rule of Jewish law mirrors the contemporaneous canon law prohibition against Jews serving as witnesses in lawsuits involving Christians. See BENTON, *supra* note 6, at 34.

law, couched no doubt in his version of the facts, to a leading rabbinic authority.⁹⁶ Much like the decision of a U.S. appellate court, Isserles' formal, written response, or "Responsum," presents Isserles' analysis of the law framed by the factual record before him (in this case Katzenellenbogen's ex parte testimonial) as well as his own assumptions and understandings of social fact (in particular, as we shall see, the high esteem in which he held the Maharam of Padua).⁹⁷

Moving from procedure to substantive law, were *Maharam of Padua v. Giustiniani* to be decided under the U.S. Copyright Act, the Maharam would almost certainly prevail. Katzenellenbogen served in the triple role of copublisher, editor, and author. While Katzenellenbogen would enjoy no copyright in, or other exclusive right to publish, medieval texts, including Maimonides' *Mishneh Torah* and the various commentaries appended to the edition, he would enjoy an exclusive right to print and distribute his own original commentary. So long as it reflected at least some minimal judgment, skill, and originality, Katzenellenbogen's editorial selection and arrangement of Maimonides' *Sefer Ha-Mitzvot*, together with the other, related writings that the Maharam seems to have been the first to append to an edition of the *Mishneh Torah*, might also qualify as copyrightable expression.⁹⁸ So might Katzenellenbogen's choice of Talmudic references to annotate the text of the *Mishneh Torah*, as well as his corrections of earlier texts in the line with his judgment, based on his extensive knowledge of the sources, of what the author must have intended to say.⁹⁹

The same would be true, with some variations, were the case decided under other national copyright regimes. United Kingdom and other commonwealth copyright laws would recognize the

96. See Shlomo Tal, *Responsa*, in 17 ENCYCLOPAEDIA JUDAICA, *supra* note 2, at 231.

97. "Responsa," or in Hebrew, "She'elot u-Tshuvot" (literally "questions and answers"), have played a vital role in Jewish law for some 1700 years. Their subject matter spans the entire spectrum of Jewish law, ranging from commercial disputes, to family matters, to questions of faith, ritual, and philosophy. For a detailed discussion, see ELON, *supra* note 6, at 1213–78.

98. See *Feist Publ'ns. Inc. v. Rural Tel. Servs. Co.*, 499 U.S. 340, 348 (1991) (stating that an original selection or arrangement embodying at least a modicum of creativity constitutes a copyrightable compilation under U.S. law). *But see* *Lamps Plus, Inc. v. Seattle Lighting Fixture Co.*, 345 F.3d 1140, 1146–47 (9th Cir. 2003) (holding that a selection of just a small number of items will generally lack the requisite creativity to qualify); *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003).

99. See CA 2790/93, 2811/93 *Kimron v. Shanks* [2000] IsrSC; *CDC Inc. v. Kapes*, 197 F.3d 1256, 1259–60 (9th Cir. 1999); *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc.*, 44 F.3d 61, 65, 67 (2d Cir. 1994). For criticism of case law recognizing skill and judgment in the process of creation as satisfying the originality requirement for copyrightability, see David Nimmer, *Copyright in the Dead Sea Scrolls; Authorship and Originality*, 38 HOUS. L. REV. 1, 116–45 (2001).

Maharam's copyright in the product of his editorial labor even absent a showing of skill, judgment, and creativity.¹⁰⁰ The United Kingdom also accords publishers a right in new editions of public domain works, which might give the Maharam an additional claim against Giustiniani.¹⁰¹ Continental European copyright laws tend to require a somewhat greater showing of creativity than under either U.K. or U.S. law.¹⁰² But all would recognize the Maharam's copyright in certain aspects of his contribution to the Bragadini edition, and all would find that Giustiniani's literal or near-literal copying of that expression in his edition to be infringing. Under current copyright law, moreover, Giustiniani would likely have no defense to infringement by virtue of adding new material and value to the Bragadini and other editions.¹⁰³

Of course, none of this twenty-first century doctrine was of any relevance to Moses Isserles in August 1550, when he grappled with how to frame Katzenellenbogen's claim. Nor were the printing privileges still issued by the Venetian Senate for previously unpublished new works after 1517 or decisions enforcing those privileges against counterfeit editions.¹⁰⁴ At this still early stage of print, the case before Isserles—a claim for an exclusive right even absent a printing privilege—was one of first impression. And, in any event, Isserles had to interpret and apply Jewish law, his own legal system, in determining whether and under what theory Giustiniani should be prevented from

100. See Sam Ricketson, *The Concept of Originality in Anglo-Australian Copyright Law*, 39 J. OF COPYRIGHT SOC'Y U.S. 265, 269–75 (1992).

101. The United Kingdom accords publishers of new editions a twenty-five-year right to prevent unauthorized facsimile copies of the typographical arrangement of said editions. Copyright, Designs and Patents Act, 1988, 36 & 37 Eliz. 2, c.48, §§ 1(c), 15, 17(5) (Eng.).

102. See *Feist*, 499 U.S. at 358–59 (requiring only a "modicum of creativity" to qualify for protection under American copyright law); see also Thomas Drier & Gunnar Karnell, *Originality of the Copyrighted Work: A European Perspective*, 39 J. OF COPYRIGHT SOC'Y U.S. 289, 291 (1992) (noting that Continental European copyright regimes traditionally require that works evince an imprint of the author's personality in order to qualify for protection).

103. As pronounced by Judge Learned Hand, copyright law's governing premise is that "no plagiarist can excuse the wrong by showing how much of his work he did not pirate." *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936), *cert. denied*, 298 U.S. 669 (1936). On the other hand, if Giustiniani had copied Katzenellenbogen's annotations to the extent necessary to subject them to point-by-point criticism or commentary, that copying might qualify as a fair use. See 17 U.S.C. § 107 (2000).

104. See WITCOMBE, *supra* note 46, at 29–30, 41–43 (discussing the issuance and enforcement of Venetian printing privileges). Isserles gives no indication in his ruling that he was aware of such printing privileges, but he might have been. Indeed, printing privileges were issued in Poland, by the king, as early as 1505. ELIZABETH ARMSTRONG, *BEFORE COPYRIGHT: THE FRENCH BOOK-PRIVILEGE SYSTEM 1498–1526*, at 8–9 (Cambridge Univ. Press 1990).

issuing a competing edition that copied Katzenellenbogen's intellectual work product. That question was rendered all the more complex because Giustiniani, the alleged violator of Jewish law, was not a Jew.¹⁰⁵

Isserles held in favor of the Maharam.¹⁰⁶ But the legal entitlement that Isserles recognized was far more limited than that provided for under today's copyright law, which accords copyright holders a bundle of exclusive rights for the author's life plus seventy years, or even under early Anglo-American copyright law, which, beginning with the Statute of Anne of 1709,¹⁰⁷ granted an exclusive right to print books for a once-renewable term of fourteen years.¹⁰⁸ Isserles' ruling gave Katzenellenbogen an exclusive right to sell out his already printed edition before Giustiniani or others could offer competing editions of the *Mishneh Torah*. Under Isserles' holding, Katzenellenbogen was entitled to prevent Giustiniani and other competitors from undermining his chances of recovering the investment he had already made. But the author-editor had no enduring proprietary right in the product of his intellectual labor, expertise, and creativity. In that sense, the limited entitlement that Isserles found in Jewish law less resembled modern copyright than the book privileges issued by the Church and secular sovereign authorities of his day; with some notable exceptions, these typically gave the author or publisher a short period of exclusivity, ranging from three to ten years, designed to provide a fair chance to sell out the edition.¹⁰⁹

The limited scope of Katzenellenbogen's entitlement reflects the doctrinal and theoretical premises from which Isserles crafted his decision. Much the same is true with modern copyright: its nature and scope reflects an array of views regarding copyright's

105. Breger, *supra* note 56, at 942.

106. See Responsa Rema, Responsum No. 10, *supra* note 84.

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

108. 17 U.S.C. § 302 (2000); E.C. Directive Harmonizing the Term of Protection of Copyright and Certain Related Rights, 93/98 EEC, O.J. (L290); The Statute of Anne; and the first U.S. copyright statute, the Act of 1790, each provided a copyright term of 14 years for new books, with a possibility of renewal for another term of 14 years if the author survived the first term. 8 Anne, c. 19 (1710); Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124.

109. ARMSTRONG, *supra* note 104, at 2–20, 91, 118–25; WITCOMBE, *supra* note 46, at 29, 42–44.

goal, justification, and theoretical foundation. Since the English Parliament enacted the first modern copyright statute, the Statute of Anne of 1709, jurists have characterized copyright in many different ways. For some, copyright is a natural right, an author's property right in the fruits of his or her intellectual labor. Most famously, in his *Commentaries on the Laws of England*, William Blackstone posited, with reference to John Locke's rationale for private property, that an author enjoys a property right "in his own original literary composition" by virtue of the author's "personal labour" and "exertion of his rational powers" in producing "an original work."¹¹⁰ Others understand copyright more narrowly as a limited government grant designed to serve a particular public purpose: the advancement of learning. Along those lines, the U.S. Constitution empowers Congress to enact a copyright statute in order to "Promote the Progress of Science" and the Supreme Court has consistently referred to copyrights as a limited statutory monopoly bestowed upon authors out of a "conviction that encouragement of individual effort by personal gain is the best way to advance public welfare."¹¹¹ Still others view copyright as an author's personalist, noneconomic right in creative autonomy and control. This school has origins in Immanuel Kant's argument that an author's words are a continuing expression of the author's inner self and, thus, an author's right in his work is "not a right in an object, . . . but an innate right, inherent in his own person."¹¹² Others variously contend that copyright is best understood as a species of trade regulation,¹¹³ communications law,¹¹⁴ economic efficiency,¹¹⁵ or free speech jurisprudence.¹¹⁶

110. WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND 405 (T. Cadell & J. Butterworth & Son, 16th ed. 1825).

111. *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

112. Immanuel Kant, *Von der Unrechtmässigkeit des Büchernachdruckes*, in 4 IMMANUEL KANTS WERKE 213, 221 & n.1 (B. Cassirer 1922). Kant argued that any person who illicitly publishes or distributes a literary work infringes upon the author's freedom because he is speaking in the author's name without the author's consent. The infringer is in effect forcing the author to speak against the author's will, in a forum or through a vehicle that is not of the author's choosing. IMMANUEL KANT, THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTALS OF JURISPRUDENCE AS THE SCIENCE OF RIGHT 56–57, 129–31 (W. Hastie, trans., Clark 1887).

113. See, e.g., Sara K. Stadler, *Copyright as Trade Regulation*, 155 U. PA. L. REV. 899, 900–01 (2007).

114. See, e.g., Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 29 (1996); Tim Wu, *Copyright's Communications Policy*, 103 MICH. L. REV. 278 (2004).

115. See, e.g., William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 354 (1989).

116. See, e.g., NEIL WEINSTOCK NETANEL, *COPYRIGHT'S PARADOX* (Oxford Univ. Press 2008).

Jewish law contains rough analogues to several of these frameworks, presenting Moses Isserles with a range of possible tools to fashion what was to become the cornerstone of a Jewish law of copyright.¹¹⁷ But first Isserles had to address a mixed question of conflicts of law and adjudicative jurisdiction, one with profound political implications: by what law and authority was he to rule on the conduct of a non-Jew?

A. *Noahide Law*

Jewish law contains intricate rules governing commercial, familial, and communal relations among Jews as well as conduct of Jews towards non-Jews.¹¹⁸ According to Jewish tradition, these rules were, in the first instance, given to Moses at Mount Sinai and then became the subject of further clarification, delineation, and supplement by subsequent rabbinic interpretation and enactment.¹¹⁹ In principle, neither these rules nor those pertaining to matters of faith and religious ritual obligate non-Jews.

That does not mean that Jewish law is silent regarding the conduct of non-Jews, however. In what is the closest Jewish law comes to natural law, Jewish law sets forth seven “Noahide laws” (or “laws of the offspring of Noah”) that do apply to non-Jews.¹²⁰ As Maimonides wrote in the *Mishneh Torah*, six of these laws are said to have been given by God to Adam and Eve. These are the prohibitions against idolatry, blasphemy, sexual immorality, murder, and robbery and the obligation to establish a system of courts and law. The seventh was given to Noah and his offspring, the first generation to eat meat. It forbids eating a limb torn from a live animal (a cruel practice all too typical in the days before refrigeration).¹²¹

According to tradition, the Noahide laws governed Jews and non-Jews alike until Jews were given the more extensive set of

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

118. See Steven H. Resnicoff, *Jewish Law and Socially Responsible Corporate Conduct*, 11 FORDHAM J. CORP. & FIN. L. 681, 681–83 (2006) (briefly summarizing some such rules).

119. *Id.* at 682.

120. See generally *Ben Noah*, in 3 ENCYCLOPEDIA TALMUDIT (Shlomo Y. Zevin ed., Sefer 1951). For Maimonides’ understanding of Noahide law as natural law, a set of rules that is both revealed by God and known by all rational persons, see DAVID NOVAK, *THE IMAGE OF THE NON-JEW IN JUDAISM: AN HISTORICAL AND CONSTRUCTIVE STUDY OF THE NOAHIDE LAWS* 294–300 (Edwin Mellen Press 1983), and J. David Bleich, *Jewish Law and the State’s Authority to Punish Crime*, 12 CARDOZO L. REV. 829, 852–57 (1991).

121. MISHNEH TORAH, *Hilkhot Melakhim* 9:1.

commandments at Mount Sinai.¹²² Since then, the Noahide laws apply only to non-Jews,¹²³ who are neither required nor expected to comply with (other) Jewish law or, for that matter, convert to Judaism. A non-Jew who formally accepts the Noahide laws is entitled to the respect and material support of the Jewish community.¹²⁴ The Noahide obligations also provide the framework for the Talmudic dictum that the “righteous men of the nations of the world have a share in the world to come.”¹²⁵ Hugo Grotius, the great Dutch philosopher of international law, analogized Noahide law to the *ius gentium* of Roman law, those laws putatively discernable by the exercise of reason that the Romans understood to be common to all nations and that applied to foreigners living under Roman authority in lieu of Roman civil law and state religion.¹²⁶

There is considerable disagreement among rabbinic authorities regarding the content of each Noahide law and the role of Jewish courts in interpreting and applying them. Most basically, given that one of the Noahide commandments is the creation of a system of courts and laws, do Jews have any role in enforcing Noahide law or is enforcement an entirely non-Jewish responsibility, something that Jews believe is obligatory, but not a rule that Jews are themselves obliged to enforce?¹²⁷ The *Mishneh Torah* instructs that any non-Jew living under Jewish political

122. NOVAK, *supra* note 120, at 53. The first explicit enumeration of the Noahide laws is in the *Tosefta*, a work commonly believed to have been edited late in the second century. *Id.* at 3.

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

124. Saul Berman, *Noahide Laws*, in 15 ENCYCLOPAEDIA JUDAICA, *supra* note 2, at 283, 285–86.

125. See Stone, *supra* note 123, at 1165. According to Maimonides, a non-Jew who abides by the Noahide laws out of a belief that they were divinely revealed, as opposed to out of rational imperative, is entitled to a place in “the world to come” (the rough equivalent of “heaven”), like a Jew who abides by and accepts the divine revelation of Jewish law. MISHNEH TORAH, *Hilkhot Melakhim* 8:11; NOVAK, *supra* note 120, at 276–78.

126. H. GROTIUS, *DE JURE BELLI AC PACIS* (F. Kelsey trans. 1964). For a discussion of this point, see Stone, *supra* note 123, at 1163–64. As Gidon Rothstein notes, Grotius viewed Noahide law as an early formulation of universal law, and thus a predecessor of international law. Gidon Rothstein, *Involuntary Particularism: What the Noahide Laws Tell Us About Citizenship and Alienage*, 18 GEO. IMMIGR. L.J. 543, 547–48 (2004). For discussion of *ius gentium* and its relationship to natural law, see Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 133–35 (2005).

127. NOVAK, *supra* note 120, at 53. For illuminating, in-depth discussion of this issue, see Mettatiyahu Broyde, *Hovotam Shel Yehudim Le’oded Shmirat Sheva Mitzvot B’nei Noah Al-Yadei Nokhrim: Skira Teoretit*, 19 DINEI YISRAEL 87 (1998) (Hebrew).

control who violates Noahide law is to be executed.¹²⁸ But when Maimonides wrote, no non-Jew had lived under Jewish political control for over a millennia, and no such Jewish dominion was expected until the coming of the Messiah. Rabbinic commentators have thus almost universally understood Maimonides to refer to an entirely theoretical possibility. Concomitantly, they have posited that, until the coming of the Messiah, neither Jewish courts nor Jews as individuals have any obligation to enforce Noahide law and, indeed, should not punish non-Jews for failing to abide by Noahide law.¹²⁹

Rabbinic jurists have also differed over the precise substance of the Noahide laws. Maimonides held, for example, that the Noahide law of “*dinim*,” the obligation that non-Jews establish a legal system is essentially a procedural requirement. It means that non-Jews must adjudicate and enforce the other six Noahide laws.¹³⁰ In contrast, the great thirteenth-century rabbinic scholar, Nahmanides, maintained that the *dinim* obligation requires, in addition, that non-Jews enact laws governing interpersonal and monetary matters that do not otherwise fall within the other six laws.¹³¹ While Nahmanides did not prescribe the detailed content of those laws, he indicated that they should include prohibitions of fraud, deceit, overcharging, and withholding wages.¹³² Other scholars have insisted that the *dinim* obligation means no more than that non-Jews must obey the reasonably just laws of their own society.¹³³

Isserles generally sided with the weight of authority holding that Jews should not punish non-Jews for violating Noahide law.¹³⁴ But in ruling on the Maharam’s petition, Isserles assumed without discussion that he, as a rabbinic judge, had the right and obligation to enforce Noahide law against a non-Jew in a

128. MISHNEH TORAH, *Hilkhot Melakhim* 9:10, 9:14.

129. See Broyde, *supra* note 127, at 98–103.

130. MISHNEH TORAH, *Hilkhot Melakhim* 9:14.

131. See NOVAK, *supra* note 120, at 55; Broyde, *supra* note 127, at 93. Nahmanides is the common name for Moshe ben Nahman Gerondi. In rabbinic literature and Jewish tradition, he is known as “Ramban,” an acronym of his Hebrew name and title, Rabbi Moshe ben Nahman. See *supra* note 32 and accompanying text. Nahmanides lived from 1194 to 1270. Joseph Kaplan, *Nahmanides*, in 14 ENCYCLOPAEDIA JUDAICA, *supra* note 2, at 739.

132. COMMENTARY ON THE TORAH (Charles B. Chavel trans., Shilo Publishing House 1971); see also Bleich, *supra* note 120, at 853 (“Nahmanides defines ‘*dinin*’ as commanding the establishment of an ordered system of jurisprudence for the governance of financial, commercial and interpersonal relationships” (emphasis in original)).

133. See NOVAK, *supra* note 120, at 55; see also Bleich, *supra* note 120, at 853–54 (describing the positions taken by Naphtali Zvi Judah Berlin and I. Meltzer).

134. See Broyde, *supra* note 127, at 101–02.

commercial dispute with a Jew. Isserles implicitly distinguished, it seems, between levying what we might think of as criminal sanctions versus adjudicating a civil case. He may have further reasoned that Jewish courts should not enforce Noahide law against non-Jews in their commercial dealings with one another, but may hold a non-Jew liable for failing to abide by Noahide law in dealings with Jews.

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

Before assessing Giustiniani's conduct, Isserles propounds a far-reaching proposition regarding the content of Noahide law. He holds that the laws that non-Jews must follow are, in principle, the very same laws governing the conduct of Jews.¹³⁵ Isserles derives this proposition from contested authority holding, on the basis of Scriptural exegesis, that the Noahide obligation of *dinim* means that "Noahide laws are the same as the Jews were commanded at Sinai, . . . except where there is direct evidence of a difference."¹³⁶ Isserles cites the *Mishneh Torah* for further support; according to Isserles' reading, Maimonides concluded that although non-Jews need follow only the seven Noahide laws, the content of those laws are derived from Jewish law applicable to Jews.¹³⁷

For Isserles, then, "Noahide laws" are informed not simply by basic universal principles of justice and equity that lie outside the framework of Jewish law, but rather by the entire set of intricate rules governing Jews unless Talmudic authority explicitly indicates a dissimilarity.¹³⁸ In so holding, Isserles goes even further than what he takes to be Maimonides' conclusion that each Noahide law is informed by the Jewish law in that area. Isserles posits that, at least in regards to civil law, including commercial and monetary matters, Noahide law is

135. Responsa Rema, Responsum No. 10, *supra* note 84, at 45–46.

136. *Id.* Isserles concludes that the law is in accordance with the view of Rabbi Isaac, not Rabbi Yochanan. (All translations from Isserles' ruling are the author's own.)

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

138. Responsa Rema, Responsum No. 10, *supra* note 84, at 48.

generally no different than Jewish law even where Jewish law does not fit within one of the remaining six categories of Noahide law.

Isserles' interpretation of Noahide law is expansive in another sense as well. Jewish law is traditionally divided into two fundamental categories, typically labeled by the Aramaic terms *de-oraita* ("of the Torah") and *de-rabbanan* ("of the scholars").¹³⁹ *De-oraita* law is composed of the foundational rules stated expressly in the Pentateuch or otherwise deemed to be in accordance with a tradition given to Moses at Mount Sinai. *De-rabbanan* law consists of supplemental rabbinic edicts. Even those rabbinic authorities who hold that Noahide law is to some degree informed by Jewish law typically limit that holding to the foundational precepts of *de-oraita* law. But in defining and applying Jewish law in the remainder of his ruling, Isserles subjects Giustiniani to the scrutiny not only of *de-oraita*, but also *de-rabbanan* law. In sum, although he does not say so explicitly, Isserles evidently posits that the requirement of *dinim* means that non-Jews must abide by Jewish law in monetary and commercial matters, including rabbinical edicts issued subsequently to and promulgating obligations that go beyond the fundamental precepts given to Moses at Mount Sinai.

In result, Isserles' assertion of judicial competency to rule on Giustiniani's conduct and application of Jewish law to determine whether the non-Jewish printer wronged Katzenellenbogen comports with current tenets of private international law. Witness, for example, present day courts' repeated assumption of jurisdiction and extension of domestic law to proprietors of foreign websites alleged to knowingly infringe intellectual property or otherwise cause harm in the court's country.¹⁴⁰ Isserles' ruling might also be understood in a context of rough reciprocity; under the doctrine of *dina de-malkhuta dina* ("the law of the land is the law"), the law of the sovereign state is binding within Jewish law, at least so long as it is not repugnant to fundamental Jewish law precepts.¹⁴¹

139. See ELON, *supra* note 6, at 194–98.

140. See, e.g., *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 243 F. Supp. 2d 1073, 1080–88 (C.D. Cal. 2003) (holding that a company organized under the laws of the island-nation of Vanuatu and headquartered in Australia is subject to the jurisdiction of California federal courts); *LG Berlin*, 970193/96 (Nov. 20, 1996), *aff'd*, KG, 5U659/97 (Mar. 25, 1997) (German court exercised jurisdiction over a defendant based in Kansas City on the grounds that the website operated under the defendant's domain name was accessible at the plaintiff's location in Germany); *UEJF v. Yahoo!, Inc.*, T.G.I. Paris, Nov. 20, 2000, *Ordonnance de référé* (Order for Summary Judgment), No. 00/05308, at 3, available at <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.pdf> (French court asserted jurisdiction over Yahoo! in complaint over French Internet users' access to Nazi related materials on Yahoo website).

141. Rabbinic jurists have proffered several alternative legal bases for *dina de-*

Nonetheless, Isserles' broad interpretation of Noahide law, and in particular his evident application of commercial *de-rabbanan* law to non-Jews, was quite unprecedented and has not been generally followed since.¹⁴² Indeed, a later rabbinic authority, Mordechai Banet, held explicitly that non-Jewish publishers are not subject to the Jewish law of copyright because the Jewish law of copyright originates in rabbinic edict, not *de-oraita* law.¹⁴³ As a practical matter, moreover, given Diaspora Jewish communities' lack of political sovereignty and often precarious existence in the Christian and Moslem worlds, exceedingly few Jewish courts would have had the opportunity, or been so foolhardy, to actually rule on the conduct of a non-Jew. Be that as it may, Isserles colorfully concludes his discussion of Noahide law, "We have clarified and proven that we judge non-Jews according to the laws of Israel and a dispute between a non-Jew and a Jew just like a dispute between two circumcised people."¹⁴⁴

B. *Gezel* or "Robbery"

Isserles then proceeds to present four rationales for ruling in the Maharam's favor under Jewish law applicable to Jews. But before doing so and, indeed, almost as an aside during his discussion of Noahide law, Isserles frames the dispute in terms that, coincidentally, go to the heart of a longstanding debate about copyright's conceptual foundation. After citing Maimonides for the proposition that the content of each Noahide law is determined by reference to Jewish law in that area, Isserles notes "the matter before us is *gezel*, which is one of the seven Noahide commandments."¹⁴⁵ *Gezel* is typically translated as "robbery" or, more loosely, "theft". So if Giustiniani has engaged in "*gezel*," does that mean that the Maharam, as an author, editor, and/or publisher, has a property right that Giustiniani has taken?

malkhuta dina. See ELON, *supra* note 6, at 194–98. One such rationale, advanced by the leading eleventh-century commentator, Rabbi Solomon ben Isaac (known by the Hebrew acronym, Rashi), posits a direct reciprocal relation to Noahide law: Jewish law incorporates non-Jewish law because, under the Noahide law of *dinim*, non-Jews are commanded to enact laws to preserve orderly social life. See Bleich, *supra* note 120, at 853–54.

142. See Broyde, *supra* note 127, at 94. For an effort to find plausible interpretations of Isserles' ruling that would not require an application of *de-rabbanan* law to non-Jews, see Yehuda David Bleich, *Hasagat Guvul Be-Dinei Yisrael ve-Be-Dinei B'nei Noah*, 44 OR HA-MIZRAH 42 (1995/1996) (Hebrew).

143. Mordekhai Banet (1753–1829), Parashat Mordekahi, *Hoshen Mishpat*, Responsum No. 8.

144. Responsa Rema, Responsum No. 10, *supra* note 84, at 48.

145. *Id.* at 46.

Common law jurists have long struggled with whether an author's original expression constitutes property that can be stolen. Following enactment of the Statute of Anne, which granted only a short-term copyright in new works, London publishers petitioned the courts to recognize a perpetual common law property right in an author's literary compositions.¹⁴⁶ Opponents of the common law right insisted, among other things, that intangible creations cannot be the subject of property. As Justice Joseph Yates opined in his dissent in the 1769 case of *Millar v. Taylor*:

Their whole existence is in the mind alone; incapable of any other modes of acquisition or enjoyment, than by mental possession or apprehension; safe and invulnerable, from their own immateriality: no trespass can reach them; no tort affect them; no fraud or violence diminish or damage them. Yet these are the phantoms which the author would grasp and confine to himself¹⁴⁷

Proponents of a common law copyright responded by characterizing literary compositions in metaphorically physicalist terms. Blackstone, for example, grounded the author's composition firmly in the actual language of the manuscript, portraying the author's words as markers for the bounds of the author's literary property: "Now the identity of a literary composition consists entirely in the *sentiment* and the *language*; the same conceptions, clothed in the same words, must necessarily be the same composition"¹⁴⁸ We see the theoretical and doctrinal imprint of this reification as late as the 1853 case of *Stowe v. Thomas*,¹⁴⁹ in which the Court ruled that Harriet Beecher Stowe's copyright in *Uncle Tom's Cabin* did not extend to a translation of her novel. After citing and paraphrasing Blackstone's definition of a literary composition as the same conceptions, clothed in the same words, the Court held: "A 'copy' of a book must, therefore be a transcript of the language in which the conceptions of the author are clothed; *of something printed and embodied in a tangible shape*. The same conceptions clothed in another language cannot constitute the same composition, nor can it be called a transcript or 'copy' of the same 'book.'"¹⁵⁰

Jewish law similarly reflects a distinction and tension between rights in tangible things and rights in intangibles, but

146. MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 67–91 (Harvard Univ. Press 1993).

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

148. BLACKSTONE, *supra* note 110, at 405.

149. *Stowe v. Thomas*, 23 F. Cas. 201 (1853).

150. *Id.* at 207.

the dividing lines and issues raised differ from those of the common law. Most importantly for our purposes, while the word “*gezel*” is typically translated as robbery and at its core connotes the open, coercive taking of property, rabbinic authorities often use the term “*gezel*” to encompass a broader set of wrongs, including fraud, withholding payment from laborers, and other monetary and commercial matters. In that vein, rabbinic scholars have debated at least since the time of the Talmud whether “*oshek*,” meaning “oppressing your neighbor,” specifically by enriching oneself or deriving material benefit from violating your neighbor’s rights, falls within the category of *gezel* or stands as a distinct offense.¹⁵¹

Moreover, the Noahide law of “*gezel*,” although typically translated as robbery or theft, is understood to have an even broader meaning than the term “*gezel*” as applied in the law governing Jews. The seven Noahide laws are more category headings than specific provisions. They refer to seven broad areas of legislation, connoted by their respective titles.¹⁵² Accordingly, the Noahide law of *gezel* is commonly seen to prohibit kidnapping, coveting another’s property, cheating, overcharging, using false weights and measures, repudiating debts, and forbidding one’s farm laborers to eat of the fruits of the harvest, as well as conventional stealing and robbery.¹⁵³

Isserles’ labeling of the matter before him as *gezel* under Noahide law must be understood within that broad umbrella. It means only that Isserles saw the matter as falling within the category of monetary and commercial wrongs, not that he necessarily viewed Giustiniani’s conduct as a taking of property.

In fact, it is quite clear that Isserles did not view Giustiniani’s conduct as conventional robbery or theft and did not hold that Katzenellenbogen held a property interest in the product of his intellectual labor. Elsewhere, Isserles states that for something to constitute property, it must be tangible.¹⁵⁴ That rule is fully in

151. See Haim Hermann Cohn, *Oppression*, in 13 *ENCYCLOPAEDIA JUDAICA*, *supra* note 2, at 452.

152. See AARON LICHTENSTEIN, *THE SEVEN LAWS OF NOAH* 92 (Rabbi Jacob Joseph School Press 3d ed. 1995).

153. *Id.* at 20–26. Nahmanides might be an exception. See Responsa Hatam Sofer, *supra* note 137, Likkutim, Responsum No. 14, (opining that the disagreement between Maimonides and Nahmanides was fundamentally over whether laws regarding monetary matters are covered within the Noahide law of *gezel*, which Maimonides contended, or *dinim*, which Nahmanides argued).

154. In his glosses on the *Shulhan Arukh*, for example, Isserles writes: “If in a contract someone wrote only ‘and he acquires from him in order to allow him to live in his house,’ this is not effective [to give rise to a property right] since the essence of that acquisition is on the right to dwell, which is not something tangible” *SHULHAN*

accord with the *Mishneh Torah*, the *Shulhan Arukh*, and other authority. Nor does Isserles' ruling in *Maharam of Padua* give any indication that a property right is at stake. As we will see, Isserles analyzes Katzenellenbogen's claim in terms akin to unfair competition and promoting narrowly defined policy goals, not as theft of property. Neither does his ruling in favor of Katzenellenbogen suggest that the esteemed author, editor, and publisher enjoyed a full property right in the sense that proponents of a common law copyright advanced in eighteenth-century Britain. Blackstone posited that an author's common law right of literary property must extend to "whatever method be taken of exhibiting [the author's] composition to the ear or the eye of another, by recital, by writing, or by printing, in any number of copies, or at any period of time."¹⁵⁵ Isserles granted Katzenellenbogen only the exclusive right to sell out his already published edition.

Isserles also eschewed another application of the term *gezel* that arguably falls not too far from what we think of copyright and intellectual property. The Talmud enjoins plagiarism, and although it does not describe plagiarism as *gezel*, some authorities, probably stemming back to the ninth century, do.¹⁵⁶ As enunciated by a leading rabbinic authority of the early seventeenth century, "Esteemed is one who speaks the words of another in that person's name and who does not rob that person of his ideas, because that robbery is worse than robbing someone of their money."¹⁵⁷

It is far from clear that this use of *gezel* connotes anything like a property right, any more than when we say figuratively that besmirching another's reputation "robs" him of his good name. The Talmudic prohibition of plagiarism and its concomitant requirement of source attribution, moreover, aimed as much or more at ensuring that readers could assess the accuracy and force of a proffered ruling or argument than at protecting a personal right of individual authors.¹⁵⁸

ARUKH, *supra* note 95, *Hoshen Mishpat, Hilkhoh Mekakh U'Memkhar* [Laws of Commercial Transactions] 212:1, *Rema Commentary*.

155. BLACKSTONE, *supra* note 110, at 405–06.

156. RAKOVER, *supra* note 117, at 20–40. The *Tanhuma Yelammedenu*, a collection of stories, homilies, and poetry, compiled in the ninth or tenth centuries and first printed in Constantinople in 1522, recorded the statement: "One who does not repeat a matter in the name of the person who said it transgresses the negative commandment 'Rob not the weak because he is poor.' (*Proverbs* 22:22)." J. D. Bleich, *Current Responsa, Decisions of Bate Din and Rabbinical Literature*, 5 JEWISH L. ANN. 65, 72 (1985); see also Marc Bregman, *Tanhuma Yelammedenu*, in 19 ENCYCLOPAEDIA JUDAICA, *supra* note 2, at 503.

157. RAKOVER, *supra* note 117, at 39 (quoting, per the author's translation, ISAIAH BEN AVRAHAM HA-LEVI HOROWITZ, SHENEI LUHOT HA-BRIT (1649)).

158. See Sacha Stern, *Attribution and Authorship in the Babylonian Talmud*, 45 J. JEWISH STUD. 28, 48 (1994). On the criticism of the *Mishneh Torah* for Maimonides'

Moreover, whatever the rationale for characterizing plagiarism as *gezel*, Isserles makes no more mention of it in his ruling than he does of the term or concept of “property.” Indeed, following his cursory statement that “the matter before us is *gezel*,” Isserles does not expressly refer to *gezel* again. The rationale for Isserles’ ruling must be found elsewhere.

C. *Unfair Competition*

The primary basis for Isserles’ ruling is the Jewish law of unfair competition. The rabbinic literature presents extended discussions of whether competition should be restricted to protect existing suppliers.¹⁵⁹ The question presents a difficult quandary for the rabbinic authorities. On one hand, competition benefits consumers by providing goods at lower prices.¹⁶⁰ On the other, untrammelled competition can deprive suppliers of their livelihood.¹⁶¹ For the rabbis, it is by no means a foregone conclusion that the former justifies the latter. Nonetheless, Jewish law ultimately comes down heavily on the side of allowing free competition, and rabbinic authorities generally decline to regulate prices or restrict entry to existing markets in order to protect incumbent suppliers.¹⁶² There are exceptions, however, particularly where incumbent suppliers are harmed without a clear benefit for consumers.¹⁶³

The paradigm case is in a “Mishnah”, a discussion of law from the second century C.E.,¹⁶⁴ which appears in a chapter in the

failure to attribute sources for his conclusions and Maimonides’ response, see DAVIDSON, *supra* note 11, at 266.

159. For an illuminating survey and analysis of this subject, see YEHOASHUA LIEBERMAN, *TAHARUT ISKIT B’HALAKHA* [Business Competition in Jewish Law] (Bar-Ilan Univ. Press 1989); SHILLEM WARHAFTIG, *DINEI MISHAR BE-MISHPAT HA-IVRI* [Jewish Commercial Law] (Zur-Ot Press 1990); Sinai Deutch, *Business Competition and Ethics: Predatory Pricing in Jewish Law*, 17 *DINÉ ISRAEL* 7 (1993/1994).

160. See Deutch, *supra* note 159, at 7–9.

161. See *id.* at 9, 19–20.

162. See *id.* at 7–8 (“Jewish law favors the system of a free and competitive economy which supports price competition, has a strong concern for consumer’s interest, and enables almost free entry to the market.”).

163. LIEBERMAN, *supra* note 159, at 34.

164. “C.E.” means “Common Era.” It is the term used in Jewish tradition and others to connote the period of time beginning with the year one of the Gregorian calendar, instead of the overtly Christian “A.D.,” or “*Anno Domini*,” meaning “in the year of the Lord.” The *Mishnah* is a collection of rulings, disputation, and teachings from the first and second centuries C.E., compiled and edited by Judah Ha-Nasi at the end of the second century C.E. The *Mishnah* is divided into numerous discussions of discrete issues, each of which is called a *Mishnah*, or in the plural *Mishnayot*. The *Mishnah*, together the *Gemara*, a collection of commentaries and discussions on the *Mishnah* redacted in approximately 500 C.E., make up the Talmud. Confusingly, the *Gemara* is often itself referred to as the “Talmud.” See ADIN STEINSALTZ, *THE TALMUD: A REFERENCE GUIDE* 2–9

Talmud concerning commercial relations and consumer protection. The Mishnah states:

Rabbi Judah said: "A shopkeeper must not distribute parched corn or nuts to children, because he thereby accustoms them to come to him. But the Sages permit it. [Rabbi Judah also held]: Nor may he reduce the price. But the Sages say that he is to be remembered for good."¹⁶⁵

As is generally the case, the "Sages" view (signifying the majority view) became the rule of Jewish law. It favors free competition, including competition through reductions in price. As Maimonides summarized, "A storekeeper . . . may sell below the market price in order to increase the number of his customers, and the merchants of the market cannot prevent him."¹⁶⁶

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

If there is among the residents of an alley [what would be a neighborhood today] . . . a bathhouse or a shop or a mill, and someone comes and makes another bathhouse opposite to the first, or another mill, the owner of the first cannot prevent him and claim that the second cuts off his livelihood. Even if the owner of the second is from another alley, they cannot prevent him.¹⁶⁷

The law makes an exception to this general rule of free entry when the newcomer is from another land and does not pay the taxes imposed on local residents. In that case, the newcomer has an unfair advantage over local suppliers. But even in that case, Rabbi Joseph ibn Migash (1077–1141), who Maimonides revered as his father's teacher, ruled that a nontaxpaying out-of-town merchant must be allowed to enter the market if he sells merchandise of better quality or at a lower price than local suppliers.¹⁶⁸ Ibn Migash reasoned that when competition brings a direct benefit to consumers, the consumer's interest prevails over

(Israel V. Berman, trans., Random House 1989); Berachyahu Lifshitz, *The Age of the Talmud*, in HISTORY AND SOURCES OF JEWISH LAW, *supra* note 7, at 169, 175–80; Gemara, in 7 ENCYCLOPAEDIA JUDAICA, *supra* note 2, at 423.

165. *Baba Mezi'a* 60a. See Deutch, *supra* note 159, at 15–16. "Rabbi Judah" refers to Judah Ha-Nasi, the patriarch of Judea and redactor of the *Mishnah*, who lived during the latter half of the second and beginning of the third century C.E. Stephen G. Wald, *Judah Ha-Nasi*, in 11 ENCYCLOPAEDIA JUDAICA, *supra* note 2, at 501.

166. MISHNEH TORAH, *Hilkhhot Mekhira* 17:4.

167. MISHNEH TORAH, *Hilkhhot Shekhenim* 6:8.

168. See Deutch, *supra* note 159, at 25–26. On Maimonides' reverence for Ibn Migash, see DAVIDSON, *supra* note 11, at 78–79 & n.19, 194.

that of the local merchants.¹⁶⁹ Ibn Migash's ruling was subject to strong criticism by Nahmanides (1194–1270).¹⁷⁰ Nahmanides insisted that the law's embrace of price competition applies only when competition can lead to a substantial, wholesale reduction in price.¹⁷¹ Absent this material benefit to consumers, competition by outside competitors should not be allowed.

Ibn Migash's position became the majority view. It favors free competition, at least when competition benefits the consumer. The consumer's interest prevails over that of the incumbent sellers even when the new entrant enjoys certain advantages, including larger size or fewer expenses, such as exemption from payment of local taxes.

In his commentary on the *Shulhan Arukh*, Moses Isserles followed the majority view. He opined that competition is permitted when outside competitors offer a lower price, even absent an indication that this will lead to a substantial market-wide price reduction.¹⁷² Isserles also cited Ibn Migash's position in ruling on a petition by foreign merchants to invalidate a town's regulation restricting their entry. But there Isserles qualified his support for the rule along the lines of Nahmanides' dissent, suggesting that competition from foreign merchants and the resulting harm to local incumbents must be permitted only if it brings a substantial price reduction.¹⁷³

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

Isserles begins his discussion of unfair competition by reference to a Mishnah in which the third century Babylonian sage, Rav Huna, held that a resident who establishes a mill for commercial purposes may prevent a competitor—even a fellow resident—from setting up an adjacent mill on the grounds that the competitor is cutting off the first mill owner's livelihood.¹⁷⁴ Rav Huna's position was in the minority and, as indicated in

169. See Deutch, *supra* note 159, at 25.

170. *Id.* at 26.

171. *Id.*

172. SHULHAN ARUKH, *supra* note 95, Hoshen Mishpat 156:5–7, Rema Commentary. Isserles' commentary is cited and discussed in LIEBERMAN, *supra* note 159, at 32, 38, and RAKOVER, *supra* note 117, at 247.

173. Responsa Rema, Responsum No. 73, *supra* note 84. The Responsa was discussed in LIEBERMAN, *supra* note 159, at 32.

174. *Bava Batra* 21b.

Maimonides' restatement quoted above, was not accepted as the rule of Jewish law.¹⁷⁵

Isserles recognizes that Rav Huna's holding does not generally apply.¹⁷⁶ But he finds an exception to the majority procompetition rule in a teaching of *Avi'asaf*, a compendium of commentary and rulings of the German rabbinic scholar, Eliezer ben Joel Ha-Levi (1140–1225):

When an alleyway is closed on three sides and is open for entry on only one side and where Reuven lives [and operates a mill] on the closed end and Shimon comes to live [and erect a mill] on the open end, so that potential customers cannot enter the alleyway without passing Shimon's door, the law is that Reuven may prevent Shimon [from entering the market].¹⁷⁷

In other words, when the new entrant is *certain* to damage the first comer's business, the rule is, according to Rav Huna, that the first may prevent entry from the competitor.¹⁷⁸ Isserles finds this exception directly on point:

Therefore, in our case there is also certain damage. The second printer has announced that he will sell all of his books for a gold coin cheaper than those of the *Gaon* [i.e., the Maharam].¹⁷⁹ Who will see this and not come to buy from him [the second printer]? And he is able to sell cheaply because he is one of the wealthiest men in the country.¹⁸⁰

Isserles' somewhat cryptic reasoning on this point has puzzled subsequent judges and commentators. A new competitor's entry is often fairly certain to cause at least some

175. As reflected in the Mishnah, Huna bar Joshua held, at the end of the fourth century, that one craftsman could not restrain a fellow craftsman and resident of the same alley from setting up business in that alley. *Bava Batra* 21b. For discussion, see Menachem Elon, *Hassagat Gevul*, in 8 ENCYCLOPAEDIA JUDAICA, *supra* note 2, at 450–51.

176. Responsa Rema, Responsum No. 10, *supra* note 84, at 48–49.

177. *Id.* at 48–49. Rabbi Eliezer ben Joel Ha-Levi is known by the Hebrew acronym, Ravyah. His works were considered a primary source of Jewish law until the publication of the *Shulhan Arukh*. See Yehoshua Horowitz, *Eliezer ben Joel Ha-Levi of Bonn*, in 6 ENCYCLOPAEDIA JUDAICA, *supra* note 2, at 326–27. The passage in his work, the *Avi'asaf*, was cited by the *Mordechai*, *Bava Batra* 516, and *Hagaot Maimoniyot, Hilkhos Shekhenim* 6:8.

178. Further, Isserles insisted elsewhere that the *Avi'asaf* is correct in opining that even opponents of Rav Huna's position agreed that a new business opened at the entrance to a dead-end alleyway would surely cripple the competing business farther inside the alley and thus may be prevented. MOSES ISSERLES, *DARKHEI MOSHE* 156:4.

179. "Gaon" means an extraordinarily wise and learned person. In modern Hebrew it is often used to mean "genius." Simha Assaf & David Derovan, *Gaon*, in 7 ENCYCLOPAEDIA JUDAICA, *supra* note 2, at 380. Throughout his ruling, Isserles refers to Katzenellenbogen as the *Gaon*.

180. Responsa Rema, Responsum No. 10, *supra* note 84, at 49.

loss to the incumbent. Why should the fact that the competitor has certain advantages, whether owing to location (erecting a mill at the open end of the alley) or great financial resources (Giustiniani), make a difference in the legal rule? Moreover, the rule in *Avi'asaf* would seem to entitle the first comer to an exclusive entitlement to operate his business in the alleyway for so long as he continues in business. But Isserles ruled that the Maharam has only an exclusive right to sell out the existing edition and thus to recoup only his initial investment. If the law is in fact according to *Avi'asaf*, why shouldn't the Maharam have a continuing right to unobstructed sales, even after selling out his first printing?

Explanations center on the nature and degree, in addition to the certainty, of the incumbent's harm, as well as on the conduct of the competitor. Two early eighteenth-century jurists, Ephraim Zalmon Margoliot (1760–1828) and Moses Sofer (1762–1839), each read Isserles to mean that the incumbent merchant may prevent competition that is certain to cause severe harm to his business.¹⁸¹ Sofer goes on to say that Isserles ruled as he did because book publishers cannot profit without making a substantial investment in printing a new edition and will not make that investment if a competitor can effectively eliminate the original publisher's ability to earn a livelihood by thwarting any expectation of profit.¹⁸² That interpretation finds support in Isserles' assessment of what was at stake in the dispute: "It is obvious that if the *Gaon* will not be successful in selling the books, his load will be overbearing [that is, he will be financially ruined]."¹⁸³

Focusing on Isserles' reference to Giustiniani's ability to sell cheaply, Margoliot also suggests that the incumbent merchant may prevent a competitor who sells below the reasonable market price.¹⁸⁴ Isserles, indeed, intimates that Giustiniani has the resources and motive to sell at a loss, and that doing so constitutes unfair competition where the result is to cause severe harm to the incumbent. Moreover, elsewhere in his ruling, Isserles emphasizes that Giustiniani produced his competing edition "for spite and in order to exhaust the *Gaon's* money."¹⁸⁵

181. Ephraim Zalman Margoliot, *Responsa Beit Ephraim, Hoshen Mishpat*, No. 27 (1810); *Responsa Hatam Sofer, Hoshen Mishpat* No. 41, *supra* note 137; *see also* Resnicoff, *supra* note 118, at 684 (citing authorities that hold that entering a market that is insufficiently robust to permit both the incumbent and new entrant to flourish is prohibited).

182. *Responsa Hatam Sofer, Hoshen Mishpat* No. 41, *supra* note 137.

183. *Responsa Rema, Responsum* No. 10, *supra* note 84, at 48.

184. *See* LIEBERMAN, *supra* note 159, at 38.

185. *Responsa Rema, Responsum* No. 10, *supra* note 84, at 48.

Couched in these terms, Isserles' ruling seems to be more analogous to a narrow proscription of predatory pricing than a right of authors and publishers generally to prevent pirated or otherwise competing editions.¹⁸⁶ Like any merchant, a publisher may not sell at a below market price with the intent of driving a competitor out of business.¹⁸⁷ Katzenellenbogen is thus entitled only to protection against the harm of predatory pricing, not an ongoing proprietary entitlement that would insulate him from normal competition.

The present day rabbinic scholar David Bleich suggests another possible interpretation of Isserles' ruling on this point.¹⁸⁸ Like the common law prior to the emergence of modern tort law in the late nineteenth century, Jewish law distinguishes between direct and indirect harm.¹⁸⁹ Unlike the common law, however, Jewish law holds that causing harm indirectly (the Hebrew term is "*grama*") gives rise to no legal liability, but only a moral obligation.¹⁹⁰ Not surprisingly, rabbinic jurists have developed exceptions to that harsh rule. One is the rule of "*garmi*." Under the rule of *garmi*, legal liability does arise when certain conditions are met. Commentators differ on what those conditions are, but according to some early authority legal liability arises when indirect harm is accompanied by an intent to cause damage, an immediacy of harm (roughly akin to proximate cause), and a certainty of harm. Under this doctrine, Giustiniani would be liable for any real loss, but not frustration of profits, that he intentionally caused the Maharam because that harm is a certain and immediate consequence of Giustiniani's pirate edition. Although Isserles does not mention *garmi*, Bleich speculates that it might have been the basis of Isserles' ruling nonetheless, and that Isserles invoked *Avi'asaf* only as an example of certain harm caused by competition.¹⁹¹

As understood by these commentators, Isserles' reasoning is suggestive, but not the equivalent, of current copyright economic

186. See Deutch, *supra* note 159, at 27–28.

187. *Id.*

188. See Bleich, *supra* note 142, at 43–45.

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

190. See Shalom Albeck, *Gerama and Garme*, in 7 ENCYCLOPAEDIA JUDAICA, *supra* note 2, at 502.

191. Bleich, *supra* note 142, at 45.

theory. Economic analysts teach us that copyright is necessary to prevent ruinous free riding off the author's investment in creating original expression.¹⁹² If not for the author's copyright, competitors could sell their editions of the author's work without incurring the first copy costs of creation. While the author must price his edition high enough to recover those first copy costs, free riding competitors need only recover their marginal costs.¹⁹³ As a result, without copyright, authors and publishers would underinvest in creating and disseminating original expression.

Katzenellenbogen invested significant time and money in the Bragadini edition of the *Mishneh Torah*. And, as under copyright's current economic rationale, Isserles was concerned that, without the legal right to prevent Giustiniani's competing edition, Katzenellenbogen could not recover his considerable first copy costs. But Isserles' focus is more on ruinous harm caused by predatory pricing than on free riding off investment in first copy costs. As Isserles describes it, Giustiniani is able to undercut the price that Katzenellenbogen must charge to recover his investment because Giustiniani has the financial resources to absorb a loss from pricing below Giustiniani's own profit point.¹⁹⁴

Giustiniani might have priced below Katzenellenbogen while still earning a profit simply because he did not have to recover Katzenellenbogen's first copy costs. Yet Isserles did not mention that possibility. Perhaps that was because Giustiniani was in fact engaged in spiteful predatory pricing. Or perhaps Giustiniani did not "free ride" on Katzenellenbogen's first copy costs in any meaningful way. It is not clear that Katzenellenbogen's contributions as author and editor were sufficiently substantial and valuable to readers relative to typeset quality and other aspects of the competing editions such that Giustiniani's copying of those contributions gave the non-Jewish printer a meaningful economic advantage.

Later rabbinic jurists understood Isserles' ruling to hinge on Katzenellenbogen's contributions as an editor and as author of his explanatory notes.¹⁹⁵ Yet Isserles' unfair competition rationale would appear to hold even absent Giustiniani's copying of what we would think of today as Katzenellenbogen's copyrightable contributions. If so, the exclusive entitlement

192. Michael J. Meurer, *Copyright Law and Price Discrimination*, 23 *CARDOZO L. REV.* 55, 94 (2001).

193. *Id.*

194. Responsa Rema, Responsum No. 10, *supra* note 84, at 49.

195. See, e.g., Parashat Mordekhai, *supra* note 143, Responsa Nos. 7 & 8.

that Isserles propounded is more a publisher's right, akin to the privileges issued to sixteenth-century printers, than an author's copyright. Isserles, in other words, might have ruled as he did even if Katzenellenbogen had merely invested money as a copublisher in producing a standard edition of an old work (what we would define as a "public domain" work) and Giustiniani had issued a competing edition of that work at a lower price. At that time, after all, publishing even a standard edition of an old work was a highly risky, capital-intensive enterprise, one that less than hardy souls were exceedingly reluctant to undertake absent some protection against ruinous competition.

D. Policy Goals

As set forth in the clause of the Constitution empowering Congress to enact a copyright law, American copyright's fundamental purpose is to "promote the Progress of Science," in the broad sense of "the advancement of learning."¹⁹⁶ American copyright law serves this purpose by striking a balance between incentive and public access.¹⁹⁷ To encourage authors to create and disseminate original expression, it accords them a bundle of proprietary rights in their works. But to promote public access and creative exchange, it limits the duration and scope of copyright holders' rights and invites audiences and subsequent authors to use existing works in every manner that falls outside those rights.

Jewish tradition similarly places a high value on the advancement of learning, primarily the study and teaching of "Torah"—referring generally to Jewish thought and law.¹⁹⁸ Isserles undoubtedly shared that value. In principle, therefore, he would not lightly dismiss Giustiniani's claim that providing the *Mishneh Torah* at a low price would vastly increase access to that foundational text in the Jewish community. Elsewhere, in fact, Isserles held that, in a place where Torah study suffers because books are unavailable, a rabbinic tribunal may require a book owner to lend his books for study, so long as he is compensated for any wear and tear that might be caused to the books in the process.¹⁹⁹ Isserles also held that, while a bailee

196. U.S. CONST. art. I, § 8, cl. 8.

197. Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 285 (1996).

198. HALBERTAL, *supra* note 18, at 7–9.

199. SHULCHAN ARUKH, *supra* note 95, *Hoshen Mishpat*, *Hilkhos Pikadon* 292:20, *Rema Commentary*. For a discussion of this rule and its rough similarity to public access

may not normally open and read books in his care, when the bailee is a rabbinic scholar who lacks the volume himself, he may read and copy from such books.²⁰⁰

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

Isserles, moreover, sets forth three additional foundations for his ruling, each of which serve explicit policy goals that apparently outweigh the objective of providing ready, inexpensive access to Torah learning in this context. At first glance, these are somewhat jarring to the modern reader. But they are also loosely analogous to those woven into copyright doctrine and politics today.

1. *Subsidizing Rabbinic Scholars*. Roughly akin to copyright's encouragement of learning and the progress of science, Jewish law mandates the subsidization of the study and teaching of Jewish thought and law by giving rabbinic scholars preferential commercial advantages. Jewish tradition places a primacy on rabbinic scholars' study and teaching of Torah, which has paramount religious, ethical, and socio-political significance. Rabbinic scholars serve as judges as well as teachers and religious leaders. As such, they are said to build up and "increase peace in the world" and have historically been viewed as a kind of ideal, ethical meritocracy.²⁰¹

Jewish law aims to subsidize rabbinic scholars while still promoting broader access to the benefits of Torah study and preserving the view of Torah study as a pure ethical ideal. To

in U.S. copyright law, see David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 678–79 (2000).

200. SHULHAN ARUKH, *supra* note 95, *Hoshen Misphat*, *Hilkhos Pikadon* 292:20, *Rema Commentary*.

201. Louis Isaac Rabinowitz, *Talmid Hakham*, in 19 *ENCYCLOPAEDIA JUDAICA*, *supra* note 2, at 466–68.

that end, it draws a balance roughly analogous to, although along an entirely different axis than, present day copyright's balance between exclusive rights and public access. On one hand, rabbinic scholars are forbidden from deriving any monetary benefit from teaching Jewish law or acting as rabbinic judges. As the Talmud poetically and sternly puts it: "Whoever derives [economic] benefit from the words of Torah removes his own life from the world."²⁰² For that reason, Maimonides insisted, echoing a Talmudic injunction, that rabbinic scholars must have gainful employment apart from the study, teaching, and adjudication of Jewish law.²⁰³ But the other side of the coin, Maimonides and others held, is that the community must underwrite that gainful employment by exempting rabbinical scholars' from certain taxes, investing in their business ventures, and according them a privilege to sell their merchandise before other merchants.²⁰⁴

The rule that rabbinic scholars have a preemptory right to sell their merchandise presents a quandary when the merchandise consists of books of Jewish law. A scholar's sale of such books would seem to run afoul of the proscription against profiting from teaching Torah. Mindful of that possibility, Isserles insists that the *Gaon*, the wise and learned Maharam of Padua, acts from pure motives, that he "plainly desires life and does not wish to derive benefit from Torah."²⁰⁵ Yet Isserles does not rest on professing the Maharam's purity of motive. For Isserles, Maimonides' rule that scholars be afforded a first mover advantage in selling their merchandise simply takes precedence over the prohibition against scholars deriving a monetary benefit from Torah, at least in this case. As Isserles explains, the commercial privilege is a "just right and Divine inheritance" for the sacred public service that rabbinic scholars like the Maharam perform.²⁰⁶ On that basis, Isserles holds, Katzenellenbogen is entitled to sell his books first, before Giustiniani.

2. *Trade Protectionism.* Isserles' second policy-directed foundation is, in essence, a form of nationalist trade protectionism or proto-mercantilism. In Isserles' day, Jews lived as separate semisovereign communities and often faced severe restrictions

202. MISHNEH, *Pirkei Avot* 4:5.

203. MISHNEH TORAH, *Hilchot Sanhedrin* 23:5. For a discussion of this point, see DAVIDSON, *supra* note 11, at 33–34.

204. MISHNEH TORAH, *Halachot Talmud Torah* 6:10; MAIMONIDES, COMMENTARY ON THE MISHNAH, *Avot* 4:5. On rabbinic scholars' exemption from certain taxes, see Menachem Elon, *Taxation*, in 19 ENCYCLOPAEDIA JUDAICA, *supra* note 2, at 535–36.

205. Responsa Rema, Responsum No. 10, *supra* note 84, at 49.

206. *Id.*

regarding which occupations they could enter.²⁰⁷ Jewish law, accordingly, provided for giving commercial advantages to Jewish over non-Jewish merchants.²⁰⁸ In that vein, Isserles ruled that Jews must buy first from Jewish merchants, even when the non-Jewish competitor offers the goods at a greatly reduced price.²⁰⁹ Hence, Isserles held, the Maharam is entitled to sell his books before the non-Jewish Giustiniani even if Jewish buyers of those books suffer a loss by having to pay a higher price.

Although for different reasons, trade protectionism among territorial nation-states has long been ubiquitous as well. Indeed, trade protectionism played a significant role in early printing privileges and has continued to loom large in modern copyright law. Various sovereign authorities in the sixteenth century strategically issued printing privileges, like other trade monopolies, to promote domestic industries or attract desired foreign enterprises and goods to their borders.²¹⁰ Similarly, until 1891, only works by U.S. authors enjoyed copyright protection in the United States.²¹¹ And until 1986, copies of nondramatic literary works in the English language written by U.S. domiciliaries generally enjoyed no copyright protection in the United States unless manufactured in the United States or Canada.²¹² Similar provisions abounded in the early copyright law of other countries.²¹³

Isserles' ruling is remarkable for its express recognition—in the mid-sixteenth century—that trade protection imposes costs on consumers. Yet he posits, nonetheless, that the needs of the community as a whole, especially given the precarious position of Diaspora Jewry at the time, require favoring Jewish merchants.

3. *Accuracy of Printed Texts.* Finally, Isserles grounds his ruling on the critical importance of ensuring the accuracy of

207. See, e.g., BONFIL, *supra* note 5, at 72–73, 93–94 (discussing ghettos and occupational restrictions on Jews in Renaissance Italy).

208. See Michael J. Broyde & Michael Hecht, *The Gentile and Returning Lost Property According to Jewish Law: A Theory of Reciprocity*, 13 JEWISH L. ANN. 31, 31 (2000). Such advantages might also reflect a rough sense of reciprocity; when non-Jews need not abide by the full obligations of Jewish law; Jewish law excludes them from the law's full benefits. *Id.*

209. Responsa Rema, Responsum No. 10, *supra* note 84, at 50–51.

210. ADRIAN JOHNS, *THE NATURE OF THE BOOK: PRINT AND KNOWLEDGE IN THE MAKING* 248–49 (Univ. of Chicago Press 1998); WITCOMBE, *supra* note 46, at 42–43.

211. See Meredith Shaw, “*Nationally Ineligible*” Works: *Ineligible for Copyright and the Public Domain*, 44 COLUM. J. TRANSNAT’L L. 1033, 1037–38, 1038 n.28 (2006) (discussing the International Copyright Act of 1891).

212. I thank David Nimmer for raising this point. On the manufacturing clause, see 2 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* §§ 7.22–7.23 (1963).

213. See, e.g., Statute of Anne, 1709, 8 Ann., c.21 (Eng.).

printed texts of Jewish law. His foundational source is a Talmudic injunction against keeping a Torah scroll containing scribal errors for more than thirty days.²¹⁴ He then cites authorities that apply that early rule to other legal texts. As Isserles puts it, “If a book contains even minor printing errors, one is liable to make erroneous legal rulings: to prohibit that which is permitted, to permit that which is prohibited, to hold as ritually pure that which is impure, etc.”²¹⁵ Indeed, Isserles continues, citing Talmudic teaching, it is far better to teach less but accurately than to teach in greater quantity but with less accuracy and hope that students will eventually realize that some of the teachings were mistaken.²¹⁶ Accordingly, Isserles concludes that a book of Jewish law should not be published unless it has been thoroughly and competently proofread.²¹⁷

As Isserles describes it, the Maharam diligently proofread his edition of the *Mishneh Torah*, removing errors “with his pure wisdom until there was ‘no straw remaining in the field’ and ‘no stone left in the path.’”²¹⁸ Isserles evidently gave no credence to Giustiniani’s charge that Katzenellenbogen and Bragadini had produced a shoddy product. We are, thus, to prefer the Maharam’s edition over Giustiniani’s even if Giustiniani’s cheaper edition would reach more readers.

An early rationale for copyright was that authors should be entitled to ensure their publisher maintains the quality and integrity of the work. As Lord Mansfield opined in *Millar v. Taylor*,

It is fit [the author] should not only choose the time, but the manner of publication; how many; what volume; what print. It is fit, he should choose to whose care he will trust the accuracy and correctness of the impression; in whose honesty he will confide, not to foist in additions: with other reasonings of the same effect.²¹⁹

However, Isserles’ focus was quite different. His concern is with the integrity of the text as declarative of the law, not with fidelity to an author’s intention. That emphasis on textual accuracy echoes a central theme—and anxiety—of rabbinic

214. Responsa Rema, Responsum No. 10, *supra* note 84, at 51.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* at 49.

219. *Millar v. Taylor*, (1769) 98 Eng. Rep. 201, 252 (K.B.). The concern for preventing the wrong done to authors when their works are incorrectly printed played a role in sixteenth-century French printing privileges as well. See ARMSTRONG, *supra* note 104, at 83–84.

thought. As Moshe Halbertal has illuminated, rabbinic Judaism is a profoundly text-centered religion, jurisprudence, and social practice.²²⁰ In Judaism, the shared textual canon serves as the locus for expertise, authority, religious experience, and community definition, as well as law.²²¹ Within that traditional umbrella, jurists and movements disagree vehemently regarding how the canon is to be interpreted and applied. But all take the textual canon as their foundational starting point.

That text-centeredness places great importance on the integrity of textual transmission from generation to generation. Indeed, one of Maimonides' fundamental thirteen principles of faith, widely regarded as the constitutional framework of traditional Judaism, posits that the version of the Pentateuch in our hands today is identical, in every detail, to that given to Moses at Mount Sinai.²²² Yet, textual drift and error are undeniable facts of hand-copied, scribal transmission as well as hand-set print. Hence, even in Talmudic times, it was understood that the rabbis were no longer aware of the proper spellings of certain words in the Pentateuch.²²³ And what we currently regard as the standard Masoretic text refers to the Daniel Bomberg's 1525 edition of the Bible, compiled and edited from several variants by Yaacov ben Haim ibn Adonyahu.²²⁴

Rabbinic Judaism's overriding emphasis on textual integrity generated great anxiety among those involved in creating, transmitting, and interpreting text. As ben Haim writes in his epilogue to Bomberg's 1524 edition of the *Mishneh Torah*, citing rabbinic authority, "If you add or omit one letter, you will destroy the world."²²⁵ Yet the editor also painfully admits that it is impossible to avoid all mistakes in the printing process and thus begs the reader "not to blame me if he finds a mistake and to understand that I did my best."²²⁶

As ben Haim's words make clear, print technology is a double-edged sword in the struggle for textual integrity. On one hand, print makes it possible to standardize texts and thus to avoid further textual drift. But that very power to standardize carries with it the

220. See generally HALBERTAL, *supra* note 18.

221. *Id.* at 6–10.

222. See MARC B. SHAPIRO, *THE LIMITS OF ORTHODOX THEOLOGY; MAIMONIDES' THIRTEEN PRINCIPLES REAPPRAISED* 90-91 (Litman Library of Jewish Civilization 2004).

223. *Id.* at 91.

224. *Id.*; see also B. BARRY LEVY, *FIXING GOD'S TORAH; THE ACCURACY OF THE HEBREW BIBLE TEXT IN JEWISH LAW* 137–55, 219 n.2 (Oxford Univ. Press 2001) (analyzing ibn Adonyahu's edition and listing sources discussing his work).

225. Bomberg Edition, *supra* note 76 (Epilogue of Yaacov ben Haim ibn Adonyahu).

226. *Id.*

danger of perpetuating error. It was that danger that Isserles addresses in his ruling on *Maharam of Padua v. Giustiniani*, holding that pre-print precedent regarding the need for accuracy in textual transmission applies with equal, if not added, force to print.

In later writing, Isserles echoed his grave misgivings about the power of print to perpetuate and disseminate error.²²⁷ Yet, his ruling in *Maharam of Padua v. Giustiniani* does not fully answer that concern. If purchasing Giustiniani's edition is tantamount to holding an error-ridden Torah scroll, one would expect Isserles to prohibit any purchase or use of the Giustiniani edition ever. Puzzlingly for this rationale for his ruling, however, Isserles merely holds that Katzenellenbogen has a right to sell out his edition before Giustiniani can enter the market with his.²²⁸

E. Remedy and Order

As we have seen, Isserles held both that Jewish law governed the non-Jewish Giustiniani's conduct and that Isserles, in his capacity as a rabbi authorized to rule and settle disputes on questions of Jewish law, had jurisdiction to determine whether Giustiniani had violated Jewish law. But how was Isserles to enforce his judgment against Giustiniani? Neither he nor Katzenellenbogen, nor any other rabbinic or Jewish community authority, had any power to prevent Giustiniani from selling his edition whenever and at whatever price the Venetian patrician wished.²²⁹ Nor could Isserles impose a fine on the infringing printer or order all unsold copies of the Giustiniani edition confiscated, as was common practice in Venice when an exclusive printing privilege was violated.²³⁰

Consequently, Isserles directed his injunction towards those over whom he did have enforcement power: potential Jewish buyers of the Giustiniani edition. He ordered that because "the *Gaon* has prevailed on his claim that he should be granted the right to sell his books first, no person shall buy a book [of Maimonides' *Mishneh Torah*] that has been recently reprinted unless it has been published under the auspices of the *Gaon* or

227. See Nimmer, *supra* note 199, at 678 n.23.

228. Responsa Rema, Responsum No. 10, *supra* note 84, at 52.

229. Isserles expressed acute awareness of the difficulty of enforcing Noahide law in his glosses on the *Shulhan Arukh*. See, e.g., SHULHAN ARUKH, *supra* note 95 *Hoshen Mishpat, Hilkhoh Nizhei, Shekhenim* 154:19, *Rema Commentary* (noting that the prohibition against making a window that looks into a neighbor's yard or establishing a shop opposite the window of a person's house applies to non-Jews as well as Jews, even though, as a practical matter, it is likely unenforceable against a non-Jew).

230. See WITCOMBE, *supra* note 46, at 29–30, 42 (describing sanctions imposed).

his agents.²³¹ And to enforce that injunction, Isserles further ordered that Jews are obliged to excommunicate anyone “in our country” who buys or possesses a competing edition.²³²

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

At the same time, Isserles limited the geographical scope of enforcement of his order. His order of excommunication applied only to those who bought or possessed an illicit edition of Maimonides “in our country,” namely Poland.²³³ That left Katzenellenbogen with the burden of petitioning rabbinic authorities in other lands, including Venice and the rest of Italy, to adopt Isserles’ ruling and enforce it by threat of excommunication in their locations.²³⁴ As a general rule, a Jewish court cannot issue rulings that are binding on other jurisdictions, and Isserles may have had particular concerns for comity in imposing the extreme sanction of excommunication.²³⁵

231. Responsa Rema, Responsum No. 10, *supra* note 84, at 52. Similarly, in order to protect Jewish tenants from being expelled by non-Jewish landlords, Rabbi Gershom ben Judah (circa 960–1040) issued an enactment forbidding Jews from offering to pay a higher rent than the current Jewish tenant or otherwise ousting the Jewish tenant against his will. The rabbinical synod convened in Ferrara, Italy, in 1554, in which Meir Katzenellenbogen participated, issued an enactment affirming ben Judah’s enactment and further providing that a Jewish tenant retains his right of possession even if the Christian landlord sells the house to a Jew. ISRAEL ABRAHAMS, *JEWISH LIFE IN THE MIDDLE AGES* 68–72 (MacMillan & Co. 1896).

232. Responsa Rema, Responsum No. 10, *supra* note 84, at 52. The penalty of excommunication, or “*herem*,” involved a combination of social ostracism, economic boycott, and religious sanction, with the severity depending on the seriousness of the offense. It was typically the most onerous penalty that a Jewish court had the power to impose, at least without the involvement of the sovereign authority. See ELON, *supra* note 6, at 11–13.

233. *Id.*

234. See BENAYAHU, *supra* note 53 (speculating that Katzenellenbogen must have planned to do just that).

235. Fram, *supra* note 7, at 361–62.

Nevertheless, in a later ruling on Jewish copyright law, Moses Sofer criticized Isserles for imposing excommunication only in Isserles' land. Sofer held that crossborder rulings are proper in copyright given that the market for books transcends local borders.²³⁶

IV. POSTSCRIPT

Mid-sixteenth century Poland was a haven for Jews. Yet, Isserles was well aware of the precarious existence of Jewish communities elsewhere and that, indeed, even in Poland, Jewish autonomy and wellbeing lay at the pleasure of the "king and his nobles."²³⁷ Nonetheless, in assessing the Maharam's claim, Isserles twice dismisses concern about the risk of untoward consequences from ruling against a non-Jew, indeed a non-Jewish Venetian printer upon whom Jews were heavily dependant for producing liturgical and legal texts. After holding that Giustiniani committed unfair competition according to Jewish law, Isserles considers a rule of Jewish law forbidding taking money from non-Jews and requiring judicial leniency where necessary to preserve peace and avoid hatred. But he holds the rule inapplicable to commercial matters and insists, accordingly, that there is no reason to "forego this line of justice."²³⁸ Likewise, Isserles summarily rejects the notion that non-Jewish printers might cease printing Jewish books if subject to the strictures of Jewish law:

As a matter of common sense, those who publish do so for their own benefit, in order to profit, like those who deal in other types of commerce. Thus even if they lose on one occasion, they will not refrain from printing. On the contrary they will be even more eager to replenish their loss.²³⁹

Isserles (and Katzenellenbogen) grossly underestimated Giustiniani's fury and ferocity. The Venice printer responded to Isserles' ruling by hiring an apostate Jew to scrutinize Katzenellenbogen's commentary on the *Mishneh Torah* for

236. Responsa Hatam Sofer, Hoshen Mishpat No. 79, *supra* note 137.

237. BERNARD D. WEINRYB, THE JEWS OF POLAND: A SOCIAL AND ECONOMIC HISTORY OF THE JEWISH COMMUNITY IN POLAND FROM 1100 TO 1800, at 165–66 (Jewish Publication Soc'y of America 1st ed. 1972) (discussing Isserles' awareness that Jews were more secure in Poland than elsewhere but potentially vulnerable nonetheless); *see also* EDWARD FRAM, IDEALS FACE REALITY: JEWISH LAW AND LIFE IN POLAND 1550–1655, at 33–34 (Hebrew Union College Press 1997) (discussing Isserles's awareness of Jews' vulnerability).

238. Responsa Rema, Responsum No. 10, at 49, *supra* note 84.

239. *Id.* at 51.

statements that could be interpreted as being objectionable to the Church and to then bring a complaint before the Papal authorities.²⁴⁰ Bragadini defended against the charges, but as the case dragged through the pontifical courts, it became a lightning rod for those who claimed that all Jewish texts and Hebrew printing were inimical to Christianity. The result was disastrous for Hebrew printing in Venice and the Jewish community generally. By decree of the Roman Inquisition, on September 9, 1553, the Jewish holy day of Rosh Hashanah, all copies of the Talmud found in Rome were gathered and set on fire in the Campo dei Fiori.²⁴¹ Three days later, Pope Julius III issued a bull, sent throughout the Catholic world, directing the confiscation and burning of all copies of the Talmud.²⁴² Jews were ordered to deliver their copies to Papal authorities and Christians were forbidden to read or possess them or to assist Jews in writing or printing them, upon pain of excommunication from the Church.²⁴³ The decree spread like wildfire throughout Italy. Hebrew books and manuscripts were burnt in public squares in Bologna, Ferrara, Mantua, Ravenna, and Romagna.²⁴⁴ In Venice, the Council of Ten issued a decree, on October 21, 1553, ordering the confiscation and burning within ten days of all copies of the Talmud, as well as “all compendiums, summaries or other books depending on said Talmud.”²⁴⁵ Among the books confiscated and burned were numerous copies of Maimonides’ *Mishneh Torah*.²⁴⁶

The Pope modified the severity of his decree on May 29, 1554.²⁴⁷ He issued a new bull allowing Hebrew books to be printed, but requiring that they first be submitted to a Papal

240. See AMRAM, *supra* note 42, at 261–62.

241. See Bloch, *supra* note 45, at 82 n.64; Amnon Raz-Krakotzkin, *Censorship, Editing, and the Reshaping of Jewish Identity: The Catholic Church and Hebrew Literature in the Sixteenth Century*, in *HEBRAICA VERITAS? CHRISTIAN HEBRAISTS AND THE STUDY OF JUDAISM IN EARLY MODERN EUROPE* 125, 125 (Allison P. Coudert & Jeffrey S. Shoulson eds., Univ. of Pa. Press 2004). The burning of the Talmud and other Hebrew books represented a culmination of the persecution of Protestants and Jews and the suppression of publications deemed inimical to the Catholic faith that had begun in earnest, even in relatively tolerant Venice, shortly before mid-century. See GRENDLER, *supra* note 9, at 85–91. As Raz-Krakotzkin notes, “The burning of the Talmud must be seen as part of a much wider policy directed by Cardinal Carafa (later Paul IV) during which many books were defined as heretical and set on fire.” Raz-Krakotzkin, *supra*, at 129.

242. Raz-Krakotzkin, *supra* note 241, at 125.

243. AMRAM, *supra* note 42, at 267.

244. Bloch, *supra* note 45, at 82.

245. *Id.*

246. See BARUCHSON, *supra* note 10, at 134 (noting inventory of books seized from the Jews of Manua).

247. Bloch, *supra* note 45, at 82.

editor and permitting their possession only after offending passages had been blotted out.²⁴⁸ In light of these developments, the rabbinic leaders of Italian Jewry convened a general synod in Ferrara. Among the synod's prime movers was Meir Katzenellenbogen. In an act of precautionary, communal self-censorship, the first among several enactments adopted at the synod forbids the printing of any previously unpublished book without the consent of three rabbis and communal leaders, whose names must appear on the book's title page.²⁴⁹

Hebrew printing did not resume in Venice until 1563.²⁵⁰ Even then, the Talmud itself remained off-limits. In one of his rulings, Katzenellenbogen warned that he referred to the Talmud by memory without being able to consult a printed copy.²⁵¹ As late as 1638, the distinguished Venetian rabbi, Leon of Modena, wrote that the Talmud "remains prohibited; and in Italy particularly it is neither seen nor read."²⁵² By that time, the center for printing the Talmud—and the locus of further disputes of Jewish copyright law—had moved from Venice to Eastern Europe.²⁵³

248. *Id.*

249. ELON, *supra* note 6, at 660; Ziv, *supra* note 2, at 180. The enactment is printed in full in LOUIS FINKELSTEIN, *JEWISH SELF-GOVERNMENT IN THE MIDDLE AGES 300–06* (Philipp Feldhaim, Inc. 2d ed. 1964).

250. Bloch, *supra* note 45, at 83.

251. Joseph ben Mordecai Gershon Ha-Kohen (1510–1591), She'erit Yosef, Responsum No. 1 (reporting that the Maharam of Padua warned Ha-Kohen not to rely on his response to Ha-Kohen's question of law because he had been unable to consult the Talmud to confirm his understanding since all copies had been burned).

252. Bloch, *supra* note 45, at 82 n.66.

253. *Id.* at 87–88.