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# From Maimonides to Microsoft: The Jewish Law of Copyright Since the Birth of Print

Chapter 1: Introduction

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## CHAPTER 1



# Introduction

## *Microsoft in Bnei Brak*

### I. A RABBINIC COURT EDICT

In the 1990s, Israel earned the dubious reputation as a “one disk country.” Software producers, record labels, and film studios complained that each CD or DVD they were able to sell in Israel immediately became the master for tens of thousands of illicit copies. Microsoft’s Israeli subsidiary responded to the rampant piracy of its software with a campaign of consumer education—and litigation. Beginning in 1997, Microsoft brought dozens of lawsuits seeking to enforce its copyrights under Israel’s then-applicable copyright law, an updated version of the British Mandate copyright statutes that had been in effect at Israel’s independence.

Yet Microsoft was not content merely to seek redress under Israeli law in official Israeli courts. It also petitioned an esteemed rabbinic court in the ultra-Orthodox (or “*haredi*”) city of Bnei Brak to proclaim that anyone who pirates software violates Jewish law. On August 6, 1998, the court issued its ruling, a one-paragraph edict signed by seven rabbinic luminaries. Included among the signatories was Yosef Shalom Eliashiv, until his recent death at the age of 102 widely regarded as the paramount living rabbinic authority for Ashkenazi Jews; Ovadia Yosef, until his recent death, the foremost living authority for Israel’s Mizrahi Jews; and Nissim Karelitz, the court’s presiding judge and a leader of Israel’s Lithuanian *haredim*. As is customary, the court’s edict was promptly printed on wall posters, known as *pashkvilim*, and plastered on notice boards throughout the streets of Bnei Brak.

The rabbinic court's edict curtly states:

We hereby emphatically announce in the matter regarding those who commit the act of copying computer disks and programs of various texts and selling them for a low price, and in so doing wrongfully encroach upon the business of those who invested years of labor and significant sums of money in developing those computer programs. Rabbinic authorities of the modern era have already expounded upon the prohibition of such wrongful competition at length, and every person who commits such act and copies any version is a transgressor. Moreover, each purchaser from such persons is an abettor of those who violate the law, and there is no excuse that such purchases are for the benefit of learning. The descendants of Israel shall not do wrong, and may all who obey the law find pleasantness.<sup>1</sup>

The edict raises myriad questions. Not the least of these is: Why was Microsoft, the multinational computer technology giant, seeking a ruling under Jewish law? For that matter, under what authority, and for what reason, would a rabbinic court of Israel's fervently Orthodox and militantly insular Haredi community—a community whose rabbinic leaders prohibit all secular entertainment and condemn the Internet, computers, CD players, and films as “dangerous”—concern itself with software piracy?

Then there is the ruling itself. The rabbinic court forbids the combined act of copying computer programs and selling the copies for a “low price.” But what about copying for oneself, giving copies away for free, or even selling pirated copies for the same price as that of the producer? What about loading free pirated software on personal computers that are offered for sale? Does the court mean to excuse those acts? Further, under U.S. and Israeli law alike, computer programs are protected by copyright and other intellectual property rights. Yet, the rabbinic court characterizes the violation of Jewish law as one of “wrongful competition,” the illicit encroachment upon software producers' investment of labor and money, not infringing authors' copyright or property rights in their expressive creations per se. Does that doctrinal categorization suggest that the court in fact targets just those commercial pirates who wrongfully compete by undercutting the creator's price? Does it mean that the court, indeed, let off the hook individuals who are not commercial competitors, but merely engage in personal copying and file sharing? If so, why does the court cast a wide net—wider than would be the case under secular copyright law—when it comes to *consumers* of mass-marketed pirate copies, declaring that anyone who *purchases* a low-price pirated copy is an abettor, meaning that the purchaser violates Jewish law as well? Finally, who are those unnamed “rabbinic authorities of the modern era” who have already expounded upon the prohibition of such wrongful competition?

1. The rabbinic term for wrongful competition is “hasagat gvul.” As used in the Pentateuch, that term originally referred to the prohibited act of moving one's neighbor's border markings, effectively seizing his land. Deuteronomy 19:14. But over the centuries it has come primarily to mean wrongfully encroaching upon another's livelihood or business opportunity, conduct that falls within the rubric of what is called unfair competition in secular law.

## II. WHAT IS JEWISH COPYRIGHT LAW?

Our exploration of these questions will take us on a journey that begins with the dawn of print. Rabbinic authorities have, indeed, expounded upon the nature of authors' and publishers' rights under Jewish law, or "halakha," since the early sixteenth century, some 200 years before modern copyright law is typically said to have emerged full-grown from Parliament's brow with enactment in 1710 of the United Kingdom's Statute of Anne. Our exploration spans from 1518, when a Rome rabbinic court prohibited reprinting a trilogy of Hebrew grammar books without permission of their author or publisher, to the lively debates over private copying and Internet downloading among rabbinic jurists in Israel today. Along the way, we witness the proliferation of rabbinic reprinting bans and traverse several leading disputes, each featuring rulings on Jewish copyright law by preeminent rabbinic authorities of their age. Among those rulings, we encounter Moses Isserles's seminal dictum on Jewish copyright law, issued in Krakow, Poland, in 1550, in response to a bitter dispute over rival print editions of Moses Maimonides's iconic code of Jewish law, the *Mishneh Torah*. As we shall see, Isserles's reasoning reverberates in the ultra-Orthodox court's ruling on Microsoft's petition. All told, from the sixteenth century through the present, the rabbinic rulings and reprinting bans, supplemented by numerous additional rabbinic court decisions, responsa,<sup>2</sup> and, in our times, treatises, scholarly articles, and blog postings, present a rich, multifarious body of jurisprudence regarding the nature, scope, doctrinal specifics, and foundations for authors' and publishers' rights under Jewish law.

In fashioning a Jewish copyright law, the rabbis have grappled with many of the same issues that have long animated secular copyright jurisprudence: How long should copyrights last? Should copyright consist only of the exclusive right to print and reprint a book's original text, or should it include the exclusive right to make translations, abridgements, and new, modified editions as well? For that matter, should authors (or publishers) always have an exclusive right, or should they sometimes have only a right to receive reasonable compensation, perhaps just enough to cover their investment in creating the work, but no more? In that regard, is copyright a broad property right or, rather, a more limited form of protection grounded in trade regulation, unfair competition, unjust enrichment, state-awarded privilege, or a combination of those doctrines? Which law should be applied to a copyright dispute whose litigants reside in different countries? Should copyright extend to noncommercial copying, including Internet downloading for personal use and copying for classroom

2. "Responsa," or in Hebrew, "she'elot u-tshuvot" (literally "questions and answers"), are written answers by particularly learned rabbinic scholars to written questions posed to them, often by local rabbis seeking guidance from a greater rabbinic authority. Responsa have played a vital role in Jewish law for over 1,000 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 1997: 1213–78.

instruction? If copyright law allows individuals to make copies for their own use, can authors prohibit copying anyway by distributing their work subject to a standard form, mass market contract that purports to obligate the recipient not to copy?

In addition to the shared doctrinal issues they face, Jewish and secular copyright law share common origins. Both grew from early efforts of jurists and ruling authorities to grapple with a central challenge posed by the technology of print: how to enable publishers of worthy books to undertake the significant investment required to bring a book to print without facing the risk of being undercut by a rival publisher who reprints the same book. Prior to the advent of print, Jewish law saw no need to recognize an exclusive right of authors or scribes in their manuscripts. Indeed, Jewish law in the pre-print era generally encouraged the copying, sharing, and dissemination of works of Jewish learning and liturgy. But with the invention of printing technology, rabbinic authorities, like their secular and papal counterparts, sought to forge a legal regime that would encourage both the printing and the widespread dissemination of valued books. As such, they endeavored to strike a balance. They would grant the first person who prints a particular book a period of market exclusivity, as needed for him to recover his investment in that printing. Yet they would also aim to foster the availability of books at a reasonable price, typically by allowing others to reprint and sell that book after the circumscribed period of exclusivity.

However, despite the commonalities between Jewish and secular law in regulating the book trade, when I refer to rabbinic rulings and pronouncements on questions of publishers' and authors' rights as "Jewish copyright law," I do so somewhat loosely. Rabbinic commentators have not actually used the term "copyright," or its modern Hebrew equivalent, "zkhut ha-yotzrim," until the last couple of decades. Further, the halakhic principles, methods of analysis, and doctrinal rules that govern the rights of authors and publishers—and thus make up what I denominate "Jewish copyright law"—often diverge sharply from those of Anglo-American and Continental European copyright law, the two principal systems of modern, secular copyright law, even if there are areas of convergence as well. (Of course, as comparative copyright scholars can attest, much the same can be said in contrasting Anglo-American copyright law with its Continental European counterpart.)<sup>3</sup>

The precursors of modern secular copyright law consisted of printing monopolies and exclusive book privileges that kings, princes, popes, and other authorities bestowed upon favored publishers and, in some cases, authors, a practice that began soon after the advent of print. Further, over time, printers' and booksellers' guilds came to establish legally sanctioned cartels in a number of countries. But in the eighteenth and nineteenth centuries, republican legislatures enacted modern copyright statutes that swept aside royal printing monopolies, book privileges, and guild cartels. The copyright statutes instead vested legal rights in individual authors. In so doing, lawmakers proclaimed the sanctity of literary property and celebrated authors' contributions to education, public liberty, and the progress of science.

3. See Netanel 1994 (detailing profound differences in ideology and doctrine between common law "copyright" and civil law "authors' rights").

To serve those ends, the copyright statutes provided that authors would, henceforth, have exclusive rights to publish, print, and, in some countries, publicly perform their newly authored books and plays. Authors could determine to which publishers, if any, to license or assign their rights. And a couple of decades following publication, the author's work would enter the public domain, meaning that anyone who wished to reprint and copy from the work would be free to do so.

In the ensuing centuries, judges and legislatures have greatly expanded the breadth and duration of copyrights. Copyrights have come to encompass new rights, new subject matter, new technologies, and new markets for creative expression. As a result, today's copyright law accords authors manifold exclusive rights to market, communicate, and reformulate creative expression in analog, hard copy, electronic, and digital media.

Microsoft, for example, enjoys the exclusive right under secular copyright law to reproduce and distribute its computer programs. Copyright law likewise accords novelists the exclusive right to translate, write sequels, and produce motion picture versions of their novels. It gives playwrights the exclusive right to authorize the public performance of their work on stage or on television; motion picture studios the exclusive right to exhibit their movies in theaters, to broadcast them on television, and to stream them over the Internet; photographers and visual artists the exclusive right to display their work on websites; and record labels and composers the legal (if not easily enforceable) right to prevent individuals from trading music recordings via peer-to-peer networks. In most countries, the law also recognizes authors' "moral rights," namely the rights to claim authorship credit and to prevent distortions in the author's work even after the author has transferred to a publisher or studio her exclusive rights of copying, distribution, adaptation, and public communication. Further, the rights that today's copyright statutes accord are as enduring as they are broad. Copyrights last a very long time: typically the life of the author plus 70 years; in some countries, the author's moral rights are perpetual.

For its part, Jewish copyright law took shape contemporaneously with the regime of printing monopolies and book privileges, as common responses to the challenge of print, well before the enactment of modern copyright statutes. Jewish copyright law emerged in the sixteenth century through a series of decrees of Jewish communal self-governing bodies, rabbinic rulings, and rabbinic reprinting bans. In that process, the communal councils and rabbis who formulated Jewish copyright law borrowed heavily from the basic template of early modern papal, royal, and municipal book privileges, even as they imbued that template with halakhic doctrine and adapted it to meet the particular needs of Jewish communities and the Hebrew book trade.

Modern copyright statutes and their embrace of the concept of literary property have also influenced rabbinic rulings on Jewish copyright going back to the nineteenth century and continuing today. But that influence has remained circumscribed and contested. Certainly, Jewish law has seen nothing like the fundamental paradigm shift from the book privilege model to modern copyright law. Nor has Jewish law articulated in a systematic fashion anything like modern copyright law's full pallet of exclusive rights.

### III. THE NORMATIVE AND INSTITUTIONAL FRAMEWORK OF JEWISH LAW

Whatever the influences of secular copyright (of which I will have more to say shortly), the rabbis forged Jewish copyright law primarily from basic tenets of halakha. With ancient roots in the Bible and Talmud, Jewish law governed much of the commercial, social, and ritual life of Jewish communities for well over two millennia. Although Jews lacked political sovereignty for most of that period, the royal and feudal powers in the lands where Jews were permitted to live typically granted the Jewish community a considerable measure of self-governing, juridical authority. In accordance with their royal charters and feudal privileges, Jewish communities established governing councils that both represented the Jewish community before the sovereign power and enacted ordinances governing much of the community's internal life. Although the governing councils came to be headed by lay notables, they were heavily dependent on rabbinic leaders, who enforced and gave halakhic imprimatur to community ordinances, ruled on questions of halakha, issued decrees and regulations, and settled disputes.

The last vestiges of that semi-sovereign Jewish community status ended with political emancipation in the eighteenth and nineteenth centuries.<sup>4</sup> And although the State of Israel was established in 1948 as a "Jewish state," its laws are overwhelmingly secular in character, not a codification of halakha. Nonetheless, the halakha continues to be regarded as comprehensive and binding among religiously observant Jews, both in Israel and the Diaspora. Hence, although the ultra-Orthodox residents of Bnei Brak are no less subject to secular Israeli law and to the jurisdiction of Israeli courts than other Israeli citizens, they typically bring internal disputes before self-constituted ultra-Orthodox rabbinic courts, as do their ultra-Orthodox coreligionists in other countries. For the ultra-Orthodox petitioners and litigants, the rulings of those courts exert, very much, the force of law. Indeed, for many ultra-Orthodox Jews, the halakha is the system of law to which they owe their primary, if not sole, allegiance.<sup>5</sup>

In keeping with its millennia-old governance of day-to-day life, Jewish law contains extensive doctrine concerning property, tort, inheritance, unjust enrichment, contract, competition, sales, rabbinic and community regulation, tax, marriage, and judicial procedure, as well as matters of religious study and ritual. Thus, with the advent of print and the vibrant international trade in books of Jewish liturgy and learning that followed, rabbis had available a far-ranging, highly developed body of halakhic precedent to which they could turn to provide legal protection for authors'

4. Bartal 2005: 18–22, 30; Goldberg 1985: 1–8; Berkovitz 1995: 26, 41–42; Manekin 2008: 560, 561–63. In the Ottoman Empire, where modernization came largely at the behest of Western European powers, the legal autonomy of the Jewish community ended in 1856, after which criminal, civil, and commercial cases had to be tried according to new codes, based on French law, that applied to all subjects of the Empire. However, Jews could still turn to rabbinic courts to resolve disputes relating to personal status, including matters of divorce and inheritance. See Benbassa and Rodrigue 2000: 70.

5. Radzyner 2015: 171.



and publishers' investment in producing and printing books. Over the centuries, rabbinic decisors have produced a rich array of rulings and commentary, drawing upon a variety of halakhic doctrines, which collectively accord authors and publishers various rights to prevent others from copying and marketing their works. Those doctrinal underpinnings include the laws of wrongful competition, unjust enrichment, property, and conditional sales. Also relevant to Jewish copyright law are halakhic precepts regarding rabbinic authority to regulate commercial activity and those purporting to govern the conduct of non-Jews, including in their commercial dealings with Jews.

At the same time, printing and the book trade were commercial endeavors that were without precedent before the early modern era, and this fact has posed significant challenges for the rabbis. As expounded in the Talmud, for example, the Jewish law of wrongful competition regulated only the behavior of local artisans competing in the same local market. That centuries-old doctrine had uncertain applicability to international book markets, where a publisher might face ruinous competition from pirate editions produced in distant lands. International book markets also strain traditional limits on rabbinic courts' juridical authority to prohibit conduct outside their local jurisdiction. Further, in the view of many rabbinic scholars, the Jewish law of property recognizes property rights only in land and material objects, not in intangibles such as works of authorship. And for some rabbinic scholars that means that the Jewish law of unjust enrichment is likewise unavailable to protect authors and publishers from pirate editions; as in their view, Jewish law accords protection against unjust enrichment only when one person benefits from using another's *property*, as opposed to benefiting from another's labor or investment. As a result of these and other challenges, the nature, scope, and specific halakhic rationale for authors' and publishers' rights remain hotly contested right up to the present.

Given Jewish copyright law's halakhic foundations and constraints, it is no wonder that Jewish copyright law differs sharply from its secular counterpart in a number of respects. Yet the unique character of Jewish copyright cannot be entirely explained by differences in the doctrinal underpinnings of Jewish copyright law versus secular copyright law per se. Jewish copyright law also originated in very different institutional settings and has followed a distinct historical narrative from those of secular copyright law.

Most important, during the times that modern copyright statutes were enacted and then expanded to adapt to rapidly evolving communications technologies and markets, Jewish law has lacked the institutional mechanisms for such sweeping doctrinal changes. As noted above, that absence of broad-based regulatory authority has not always been the case. For nearly a millennium prior to the eighteenth century, Jewish communities enjoyed a considerable measure of juridical autonomy pursuant to royal and feudal privileges that carved out a realm of Jewish communal self-governance and defined Jews' legal and economic relationships with the sovereign and non-Jews. In line with that autonomy, Jewish communities established both local and regional legislative bodies. Foremost among them was the "Council of Four Lands," a transnational body that enjoyed far-reaching legislative and judicial authority over the Jews of Poland, Lithuania, and Galicia from the late sixteenth to the mid-eighteenth centuries.

However, early modern Jewish communities lost their powers of self-government more or less contemporaneously with the enactment of modern copyright law in the eighteenth and nineteenth centuries. Jews' communal privileges were abrogated by republican legislatures and reform-minded monarchies as part of the same broad movement of modernization that dismantled royal printing privileges and other royal dispensations.<sup>6</sup> The Council of Four Lands, for example, was abolished by order of the Polish Sejm in 1764, well before modern copyright law had reached Eastern Europe.

In theory, rabbinic leaders could subsequently have adopted something like modern copyright law through their power to interpret and apply the halakha, even absent a transnational communal legislative body. But rabbinic decisors of halakha lacked a national or transnational authority with the power to effect such a change. Not since the first millennium of the Common Era has there been a central rabbinic judicial body carrying authority to settle conflicting precedent throughout the Jewish world.<sup>7</sup> Since the demise of the Baghdad gaonate in the eleventh century, halakhic doctrine has evolved from a myriad of disparate, if often mutually referential, local rabbinic decisions, pronouncements, and ordinances. The temporal and geographic impact of any given halakhic ruling depends on the esteem, intellectual prowess, force of argument, position, and, at times, sectarian affiliation of its rabbinic author, not any formally established judicial hierarchy. Jewish copyright law emerged and evolved accordingly—through the discursive exchange of a dispersed community of rabbinic scholars, rather than an encyclical of a central authority.

In addition to these institutional barriers to sweeping legal change, rabbinic decisors would have been highly unlikely to embrace the Enlightenment underpinnings of modern copyright law. Although rabbinic thought greatly values the individual, it places the individual firmly within an inextricable matrix of communal and religious obligation. In that worldview, the Enlightenment ideology of individual self-expression, creative prowess, and even scientific progress—in the sense that human civilization steadily advances as a result of human discovery, education, and untrammelled critical inquiry—is largely foreign, if not anathema.<sup>8</sup> It is an often cited principle of rabbinic thought, indeed, that contemporary halakhic scholarship and spirituality are inferior to those of previous generations.<sup>9</sup> Further, the normative ethos of rabbinic jurisprudence leans heavily inward; it is tied fundamentally to maintaining the integrity and coherence of halakhic doctrine and the rabbinic tradition.<sup>10</sup> In that vein, it is often said that the Torah, which embodies the fundamental principles of the halakha, is timeless and immutable.

6. Bartal 2005: 18–22, 30; Goldberg 1985: 1–8; Berkovitz 1995: 26, 41–42; Manekin 2008: 560, 561–63.

7. The ancient Sanhedrin dissolved in the fourth century; the Baghdad Geonim then exerted similar supreme judicial authority until the eleventh century. Elon 1997: 549–50.

8. For an illuminating account of the understanding of progress that underlies modern copyright, see Birnhack 2001.

9. The principle of contemporary inferiority is called “*yeridat ha-dorot*,” meaning “the decline of the generations.”

10. See generally Sacks 1992: 123.

Significantly, the inwardness of rabbinic jurisprudence also finds expression in an ideal in which the halakha is a perfectly self-contained system, one that is impervious—and superior—to non-Jewish law and morality. A Talmudic dictum admonishes: “Shall not our perfect Torah be as worthy as their idle chatter?”<sup>11</sup> In that vein, rabbinic decisors, exhibit great reluctance expressly to recognize a role for non-Jewish law or morality in interpreting and applying halakha. And, notably, that ideal of absolute normative self-sufficiency applies with equal force to issues presented by new technologies and circumstances on which rabbis of ancient days could not have directly opined. To give but one particularly forthright example, in a responsum on artificial insemination, Moshe Feinstein, a preeminent rabbinic decisor of the twentieth century, purported unequivocally to reject any place for non-Jewish views on the matter: “My entire worldview derives only from knowledge of Torah, without any mixture of external ideas, [and the Torah’s] judgment is truth whether it is strict or lenient. Arguments derived from foreign perspectives or false opinions of the heart are nothing.”<sup>12</sup>

#### IV. CREATIVE BORROWING, PRAGMATISM, AND COERCION

Given these formidable institutional and normative constraints, the rabbis have not adopted—and would not adopt—secular copyright wholesale. Quite strikingly, however, Jewish copyright law nonetheless reflects the influence of its secular counterpart at numerous junctures. In fashioning Jewish copyright law, the rabbis have not just drawn upon halakhic precedent. They have also creatively borrowed from contemporaneous non-Jewish law. In addition, often in interlocking step with that creative borrowing, rabbinic decisors have tailored their rulings to negotiate the ever tenuous and, over time, sharply diminished juridical autonomy of rabbinic and Jewish communal authorities vis-à-vis the Gentile world.

In that light, as noted above, the early sixteenth-century rabbis who crafted Jewish copyright law borrowed from the model of secular and papal book privileges in doing so. Likewise, subsequent rabbinic rulings and debate about the nature, scope, and doctrinal foundations of copyright under Jewish law have repeatedly taken cognizance, whether implicitly or explicitly, of ideas, perspectives, and developments external to the rabbis’ “knowledge of Torah” narrowly defined. Among other matters, rabbinic decisors have grappled with the availability of secular and papal book privileges for books of Jewish law, learning, and liturgy; the establishment, throughout early modern Europe, of printers’ guilds with certain state-backed powers of self-regulation; nations’ enactment of copyright statutes beginning in the eighteenth century; the enforced subservience of Jewish law to that of post-Enlightenment states; debates in the secular world about the nature and scope of copyright; the ascendancy of

11. *Babylonian Talmud, Baba Batra* 116a. Rabbinic decisors have interpreted the dictum to stand for the superiority of halakha over non-Jewish law and morality. See Kleinman 2011: 19–21 and Broyde 2012.

12. Feinstein, *Responsa Igrot Moshe*, Even Ha-Ezer 2:11. I thank Aryeh Klapper for his comments on this point, cautioning that Feinstein’s statement must be taken in its particular context.

international treaty regimes for the protection of intellectual property; prevailing commercial practices in the book trade—and more recently, in the motion picture, sound recording, music performance, and computer software trades. As such, the historical development of book trade regulation in the Gentile world and the precariousness of Jewish communal autonomy in early modern and post-Enlightenment Europe have left an unmistakable imprint on Jewish copyright law. And “foreign perspectives” continue to find expression in present-day rabbis’ apparent concern that the halakha must comport with what they perceive to be universal legal and moral norms that recognize authors’ exclusive rights in their creations.

In reflecting that external influence, Jewish copyright law has followed a similar path to that noted by scholars of the historical development of halakha in many other areas: over the centuries, despite the rabbinic ethos of insularity and conservatism, rabbis have, in fact, proven highly adept at shaping doctrine as required to meet changing social, economic, political, and technological circumstances.<sup>13</sup> That practice finds support in the halakhic dictum that the law is in accordance with the views of later rabbinic authorities, who, despite their inferiority to the giants of old, must be free to adapt the law to the prevailing circumstances of their time.<sup>14</sup> In so doing, moreover, despite the ideal of the normative self-sufficiency and superiority of the halakha, rabbinic authorities have not infrequently recognized, incorporated, and creatively adapted legal constructs from non-Jewish legal regimes.<sup>15</sup>

Rabbinic decisors have employed a variety of direct and indirect mechanism to marshal external legal constructs when helpful or necessary to resolve a dispute or fill a lacunae in Jewish law. These have included implicit borrowing, occasional explicit reference to foreign law, and giving legal imprimatur to Jewish merchants’ adoption of commercial customs or Jewish lay leaders’ communal enactments, which have not uncommonly reflected non-halakhic concepts prevailing in the surrounding society.<sup>16</sup> Rabbinic decisors have also created openings for bringing non-Jewish law to bear in adjudicating specific disputes, particularly under the halakhic rule that deference

13. See Fram 1997 (presenting in-depth studies of instances in which leading rabbinic jurists adapted Jewish law to pressing economic and communal issues of the day through legal fictions and reinterpretations of textual authority); Katz 2000: 52–62 (discussing rabbinic rulings regulating and partly accommodating previously forbidden activities, including charging interest and dealing in non-kosher wine and food, in response to prevailing economic pressures); Katz 1998b; Gamoran 2008; Westreich 2010: 435–36 (attributing adoption of negotiability to local economic conditions).

14. The rule that “the law is according to later halakhic scholars” was developed in the post-talmudic period and solidified in the fourteenth century. See Ta-Shma 1998. Ta-Shma conjectures that the rule came to be applied among Ashkenazic authorities centuries before Sephardic scholars because, as early as the twelfth century, Christian Europe came to accept that wisdom is cumulatively acquired and developing from generation to generation, whereas that view was not internalized in the Islamic world. Ta-Shma 2006: 163. If so, we see some rabbinic acceptance of the progression of knowledge, which might stand in tension with the rabbinic principle that previous generations were superior.

15. Broyde 2010: 363, 372–76; Jackson 1980 (presenting a critical survey of theories of foreign influence in Jewish law, including the difficulty of proving causation as opposed to parallel development); Goitein 1980: 61; Z. Kaplan 2007 (discussing rabbinic solution to the problem of marriages that were illegal under the French civil law).

16. See Katz 1998b: 179–83 (describing the rabbinic legitimization of community enactments, which sometimes reflected concepts found in the surrounding society that did not

must be accorded to the law of the sovereign state in commercial matters.<sup>17</sup> Hence, alongside the rabbis' immersion within and fidelity to the tradition of Jewish law and teaching, they—like Jewish culture, thought, and communal institutions generally—have both absorbed and creatively responded to the dominant cultures, societies, and markets in which semiautonomous Jewish communities have been embedded.<sup>18</sup>

Jewish copyright law has developed accordingly. Rabbis have drawn upon a wealth of halakhic precedents, extending back to the Talmud, in adjudicating copyright disputes, pronouncing reprinting bans, and debating the nature and scope of authors' rights. But they have done so against the backdrop of contemporaneous copyright-related developments in the surrounding non-Jewish world. In providing exclusive rights for authors and publishers, rabbis have creatively adapted non-Jewish legal constructs and made repeated reference to prevailing market customs and conditions. Yet, in doing so, they have framed their rulings and enactments in terms of halakhic doctrine, local custom, and the practical exigencies of the market for books of Jewish learning and ritual. Even as Jewish copyright law has borrowed from the framework of its counterparts in the Gentile world, it exhibits essentially no trace of the Enlightenment rhetoric and exaltation of authorial creativity that have driven secular copyright.

Jewish copyright law has been constituted by this dynamic dialectic process from its very beginnings, and that process continues to this day. The 10-year reprinting ban for three Hebrew grammar books that Rome's rabbinic leadership issued in 1518—the first such entitlement under Jewish law of which we have record—was most modeled, at least in part, on prevailing practice in the Gentile world, even as it cited halakhic precedent to justify rabbinic authority to issue such an exclusive right.<sup>19</sup> Jewish copyright law's perviousness to external influence was also evident in a decree of the Amsterdam rabbinic leadership, issued in 1716, that, henceforth, no rabbinic reprinting bans would be granted for prayer books, and that bans issued for prayer books by rabbis in other countries would not be enforced.<sup>20</sup> The decree followed the Amsterdam Booksellers and Printers Guild's earlier refusal to enforce an exclusive book privilege that had been issued by the States of Holland and West-Friesland for a Hebrew prayer book, on the grounds that the printing of prayer books had always been free in the Dutch Republic.<sup>21</sup> In that light, the

necessarily conform in substance to halakhic principles). See also Morell 1971 (discussing the rabbinic validation of communal enactments as having operative force under Jewish law).

17. The leading contemporary treatise on the rule of deference, termed, "dina demalkhuta dina," or "the law of the sovereign is the law," is Shilo 1974. See also Graff 1985. Prevailing extra-halakhic norms might also influence rabbinic decisors' rulings when they exercise the discretion that rabbinic judges are said to enjoy to apply "reason and common sense" in adjudicating disputes, rather than being bound by precedent. See, generally, Lamm and Kirschenbaum 1979 (discussing rabbinic decisors' use of reason and the absence of binding precedent in adjudicating disputes).

18. For extensive discussion of historians' various theories of how surrounding cultures have impacted Jewish identity and culture, see Rosman 2007: 82–108.

19. Rakover 1991: 126–33.

20. Rakover 1991: 309–10.

21. Heller 2006: 221. In the Dutch Republic in the eighteenth century, publications by the church, as well as publications for school use and editions of the classics, were ineligible for a privilege. Hoftijzer 1997: 13n32. The guild's full name was the Amsterdam Guild of Booksellers, Bookprinters, and Bookbinders.

rabbinic edict explained, for the rabbis to grant their own monopolies in printing prayer books would harm both competing printers and the Jewish public at large, “particularly in this city in which there is [otherwise] considerable commerce [in such books] at an inexpensive price.”<sup>22</sup> Similarly, when Joseph Saul Nathanson, rabbi of Lemberg, ruled in 1860 that, under Jewish law, authors have a property right in their creative works, he made reference to the Austrian Law for the Protection of Literary and Artistic Property, enacted 14 years earlier, and explained—turning the traditional Talmudic dictum on its head—that “common sense” rejects the possibility that the Gentiles’ laws protect authors but “our perfect Torah” does not.<sup>23</sup> Present-day rabbinic commentators likewise measure Jewish copyright law against what they construe to be universal norms for copyright protection as embodied in international treaties. In partial counterpoint, a leading ultra-Orthodox authority, Asher Weiss, agrees that authors have property rights in their works, but posits that Jewish law should nevertheless take cognizance of what he has heard from music industry experts: that many artists and composers implicitly consent to having their music freely copied, as they would lose much of their audience if they were to insist on enforcing their copyrights in an age in which illicit music recordings are widely available for free.<sup>24</sup>

As such, Jewish copyright law bears much in common with what scholars of comparative law have identified as the ubiquitous phenomenon of *legal transplantation*, one legal system’s incorporation of legal rules or even entire areas of doctrine from another.<sup>25</sup> As scholars have noted, legal transplantation is best understood as a process of legal translation, not rote duplication. Each legal system is firmly embedded in its own native society, culture, and ideology; legal rules acquire meaning only within that context. Further, any given legal rule within a legal system must interact with and be informed by the other rules and doctrines of that system. Hence, transplanting a set of laws from one legal system to another necessarily involves imbuing those laws with new meaning and, in many cases, new functions. Legal transplantation is a creative and dynamic process in which the outer textual form of a foreign legal doctrine is invested with a new normative framework, and sometimes interpreted to yield very different results.

Like many other instances of legal transplantation, particularly in colonial settings, rabbinic borrowing and adaptation have not been entirely voluntary. The coercive character of much rabbinic borrowing has been present in copyright law no less than in other areas. Jewish copyright law has developed under the shadow of the precariousness of Jewish community autonomy and rabbinic authority before the sovereign powers of kings, nobles, republics, and Church. Indeed, Jewish copyright has almost always served as a system of protection that is parallel—and subservient—to

22. Rakover 1991: 309.

23. Nathanson, *Shoel U-Meshiv*, pt. 1, no. 44.

24. See Y. Cohen 1999: Kuntras 560–62 (describing international copyright treaties as *takanat omanim* (guild regulation) within Jewish law, given authors’ associations involvement in drafting them); Weiss 2009: 1.

25. For further discussion, see Bracha 2010: 1459–62; Langer 2004: 29–35.

those sovereigns' copyright laws, printing privileges, and licensing requirements. Numerous Jewish publishers, and numerous Christian publishers of books intended primarily for Jewish readers, have sought printing monopolies and privileges from secular or papal authorities in addition to or in lieu of rabbinic reprinting bans. In many times and locations, Hebrew and Jewish vernacular books, like all books, have also been subject to government or church censorship, including prepublication licensing requirements. Gentile authorities' printing privileges and book regulation have sometimes complemented rabbinic reprinting bans, but have often undermined their force. At the very least, a rabbinic ruling or ban issued in one country might not have been enforceable in another where the king had banned the import of Hebrew books or where a competing printer held a royal printing monopoly. On occasion, indeed, rabbinic judges have even favored a Jewish publisher holding a secular government book privilege over a competitor who had been granted a rabbinic ban for the same book, pursuant to the halakhic precept that deference must be accorded to the law of the sovereign in commercial matters.<sup>26</sup>

Rabbinic jurists have also sometimes run into direct conflict with papal and secular powers in adjudicating copyright disputes. When renowned rabbinic authority Moses Isserles ruled in 1550 that the Christian printer Marc Antonio Giustiniani had violated Jewish copyright law, Giustiniani complained to the papal authorities, leading, in combination with other factors, to a Papal Bull ordering that all copies of the Talmud be confiscated and burned. In the early nineteenth century, Chief Rabbi of Moravia Mordekhai Banet abruptly reversed his support for the enforceability of a rabbinic reprinting ban when Austrian authorities threatened to prosecute him for interfering with a Christian publisher's reprinting of the book in question. Some 50 years later, Joseph Saul Nathanson fashioned an alternative to rabbinic reprinting bans in part because the Russian government had forbidden rabbis from issuing them and the Austrian government had threatened to punish publishers who relied on rabbinic bans rather than on Austria's new copyright law.

Yet within those various confines and influences, rabbinic jurists have forged a body of copyright law that has remained fundamentally distinct from both early modern book privileges and present-day secular copyright law. Even as they have borrowed from those surrounding legal regimes, they have altered and sometimes subverted secular-law doctrines to meet particular needs of the Jewish book trade, semiautonomous Jewish communities, and the elite institution within the Jewish community of rabbinic study and teaching. Even as the rabbis have navigated the limits to their authority and retreated before hegemonic sovereign powers, they have formulated halakhic justifications for their rulings. In so doing, the rabbis have taken the secular-law constructs that they have implicitly or explicitly adopted and imbued them with halakhic norms, norms that differ substantially from the ideological underpinnings of secular copyright law.

26. Rakover 1991: 240–42 (discussing ruling of Rabbi Arie Leibush ben Elyahu Balhaver in dispute between Zhitomir and Vilna printers of competing editions of the Jerusalem Talmud, eventually printed in 1866).

## V. MAPPING OUR JOURNEY

Chapter 2 begins our exploration of this rabbinic innovation and adaptation by bringing to the forefront the context against which Jewish copyright law developed: the emergence of the early modern publishing industry and secular and papal authorities' regulation of the book trade. It also chronicles the dramatic move from book privileges to modern secular copyright law and explicates the principal theoretical foundations for modern copyright law. In so doing, it sets the framework for understanding what the rabbinic jurists might have borrowed from Gentile law and practice, and the ways in which, as the ultra-Orthodox rabbinic court's ruling on Microsoft's petition suggests, Jewish copyright law follows its own unique path.

In Chapter 3, we then turn to the first rabbinic reprinting ban, issued by the Rome rabbinical court in 1518. That chapter relates the story of that rabbinic ban, compares it with the Gentile book privileges of the time, and examines its halakhic rationale. The chapters that follow further measure the influence of rabbinic reprinting bans for publishers and authors of books marketed to Jewish readers. We also consider the relative roles of rabbis and lay-dominated Jewish communal government councils in regulating the Jewish book trade.

Finally, I recount a number of seminal disputes and rabbinic rulings that make up Jewish copyright jurisprudence. I present these disputes and rulings within their historical, sociological, and comparative law context. I elucidate in each case how the rabbis sought to protect the Jewish book trade and traditional Jewish teaching, while both selectively borrowing from secular law and grounding their rulings in traditional halakhic doctrine.

Our final chapter returns to the Microsoft ruling. Chapter 9 pieces together some of the puzzling aspects of the ruling and places it in the framework of the current rabbinic debate about the nature, significance, and perceived inadequacies of Jewish copyright law, that body of halakhic doctrine that aims to protect authors and publishers against ruinous copying.