Chapter 6

From a Yiddish Bible to a German Prayer Book

# The Yiddish Bible and the Council of Four Lands

Before relocating to Poland, Uri Fayvesh Halevi (1625–1715) had been a leading Ashkenazic publisher in Amsterdam and one of only two Jewish members of the Amsterdam Guild of Booksellers, Bookprinters, and Bookbinders. In 1670, at the height of Amsterdam’s dominance of the Jewish book trade, Fayvesh conceived a plan to publish the first ever complete Yiddish translation of the Hebrew Bible unaccompanied by the usual Hebrew text and commentaries.[[1]](#footnote-1) Fayvesh’s Yiddish Bible project took a tortuous path, replete with Christian financers, broken promises, failed partnerships, and litigation in Dutch secular and rabbinic courts. One failed partnership spawned a competing edition of the Yiddish Bible and, in turn, rival rabbinic reprinting bans and secular book privileges. As the saga of what became the two competing Yiddish Bibles vividly illustrates, even at the height of Amsterdam’s Jewish book trade, leading Jewish printers faced perilous financial risks, heavy dependency on Christian financing, and treacherous uncertainties of navigating among overlapping rabbinic and secular authorities in multiple jurisdictions.

To finance his Yiddish Bible project, Fayvesh joined with a silent business partner, Borrit Jansz Smit, a local Christian merchant-bookseller and a publisher of a 1662 edition of the Dutch Bible. On December 14, 1670, the two partners executed a written promise to pay Ḥaim b. Judah Leib of Pila, a Polish rabbi, one thousand guilders for R. Ḥaim to intercede on their behalf to obtain an approbation and reprinting ban from the Council of Four Lands for Fayvesh’s “Jewish German” edition of the Bible. The partners’ contract with R. Ḥaim provided that the Council’s haskama would be in Fayvesh’s name and that its reprinting ban would be of at least four years duration. Fayvesh wanted the Council’s reprinting ban as an assurance of exclusivity in his primary market, the Yiddish-speaking Ashkenazic communities of the Kingdom of Poland, spanning from Poznan to Bratzlav. While the elite rabbinic scholars and academies of Poland would have disdained a Yiddish Bible that did not contain the ancient Hebrew text, for the vast majority of East European Jews, including virtually all women, the Bible was directly accessible only in Yiddish. Fayvesh hoped that the Council of Four Land’s approbation and reprinting ban would assure him a large pool of potential buyers.

R. Ḥaim proceeded to obtain two haskamot from the Council of Four Lands, the first signed in Lublin on April 5, 1671, and the second on May 22, 1671, issued by Yitzḥak ben Avram of Posen during a meeting of the national council of great Poland. In many respects, the Council’s haskamot were exactly what Fayvesh and Smit wanted: the Council granted permission to print and distribute the Yiddish Bible and forbade anyone from printing or buying a competing edition for a period of ten years on pain of excommunication. But the Council’s haskamot were made out in favor of Fayvesh’s translator, Yekutiel Blitz, a rabbi who hailed from Witmund in northern Germany, rather than to Fayvesh himself. Fayvesh accordingly refused to pay R. Ḥaim until he obtained a corrected haskama made out to Fayvesh. In turn, R. Ḥaim refused to hand over the haskamot to Fayvesh. He finally did so in 1672, apparently after receiving full payment in return for his promise to obtain a corrected haskama, a promise that he apparently never carried out.

By the time Fayvesh had the Council’s haskamot in hand, the Dutch Republic was at war with England, France, and the Bishop of Munster and its economy was in turmoil. In the wake of those developments, Fayvesh and Smit went bankrupt, and Fayvesh’s Yiddish Bible project stagnated. When the hostilities and recession ended, they renewed their efforts to publish the Yiddish Bible, but they lacked sufficient financing for the expensive project. Accordingly, on February 10, 1674, they entered into a new contract for the printing of the Yiddish Bible with an additional Christian financial backer, Jan Otto van Van Halmael. Under that contract, Van Halmael was to provide financing to print the Yiddish Bible as well as some Hebrew books.

Soon thereafter, on various dates between October 28, 1674, and August 23, 1675, Fayvesh obtained haskamot from the Ashkenasic and Sephardic rabbinic leadership and lay councils of Amsterdam. The Amsterdam haskamot refer to the Council of Four Lands haskamot, which Fayvesh submitted to the Amsterdam rabbis and councils in support of his petition. And like the Council of Four Lands, the Amsterdam rabbis prohibited other Jewish printers from printing a Yiddish Bible for a period of ten years. Fayvesh also received a haskama, supporting those of the Amsterdam rabbis, from R. Meir Stern, whom Fayvesh had retained as his corrector. Stern’s haskama was given on the condition that all proofs must be submitted to him for correction before the edition went to press.[[2]](#footnote-2)

Fayvesh’s printing of Yekutiel Blitz’s Yiddish translation began around January 1, 1675. It was supposed to be completed within a year, but by September 1675, less than half the initial print run had come off the press. Dissatisfied with the slow pace and quality of the printing, Van Halmael insisted on bringing yet another partner into the venture: the renowned Sephardic publisher, Joseph Athias, who had been the first Jew to gain membership in the Amsterdam Guild of Booksellers, Bookprinters, and Bookbinders. Athias specialized in books for the non-Jewish world; his Hebrew publications were limited to those that Uri Fayvesh did not publish. But Athias had already achieved great commercial success in publishing editions of the Hebrew Bible in English and Spanish, as well as a Hebrew edition with an introduction and annotations in Latin by the Christian Hebraicist, Johannes Leusden. Van Halmael hoped that Athias would bring his considerable acumen in such endeavors to publishing the Yiddish Bible.[[3]](#footnote-3)

Athias also agreed to make a substantial financial contribution to the venture. He pledged to pay paper costs and printers’ wages up to a total of 12,000 guilders, of which he borrowed 5,000 guilders from Van Halmael. Newly-printed sheets were to be locked in a “neutral attic” for safekeeping and held as security for Athias’s financial contribution. No one but Athias and Van Halmael were to hold a key. The contract with Athias provided that Athias would receive one third of the net profits and that “around 6,300” copies of the Yiddish Bible would be printed.

That expanded partnership, too, was shortlived. By December 1675, Athias came to be so unhappy with the quality of certain newly-printed sheets that he suspended all payments, and all further printing, until Fayvesh corrected them. Apparently, the text had not been corrected after the first proof and was riddled with typographical errors. Unwilling to take on the cost of further corrections, Fayvesh charged that Van Halmael had harassed him into accepting a disadvantageous agreement and that Athias was now blocking work even under that agreement. Fayvesh threatened to treat the entire contract as null and void, which led Van Halmael and Athias to declare Fayvesh solely responsible for all consequences resulting from the rift. The partnership was official dissolved on February 6, 1676.

Athias then seized the printed sheets that had been deposited in the “neutral attic”and presented them in support his petition for an exclusive book privilege for the Yiddish Bible from the States of Holland and West Friesland. On March 18, 1676, the States issued their fifteen-year exclusive privilege to Athias for the “Old Testament printed in the High German language in Hebrew characters, never before printed this way; which publication had already advanced to the fourth book of Moses, as emerged from the leaves shown to us.” Armed with a book privilege under secular law, Athias and Van Halmael proceeded with their, now rival, edition of the Yiddish Bible. To complete the project, they hired a different translator, Joseph Witzenhausen, a typesetter from Witzenhausen in Hessen, Germany. They also hired away from Fayvesh the corrector and issuer of a haskama in favor of Fayvesh, R. Meir Stern.

Unwilling to cede the venture to his rivals, Fayvesh found yet another group of Christian investors. In April 1676, he entered into a publishing and financing contract with Willem Blaeu, an influential Amsterdam publisher and member of the city council, and the brothers Laurens and Justus Baeck, who were wealthy Amsterdam merchants. Under that contract, the Christian partners would provide the financial backing for the project, while Fayvesh would print the Yiddish Bible and obtain a book privilege from secular authorities to prevent a rival publication of a similar edition. Fayvesh would own one-quarter of the edition, but he could not sell his share until his financiers had sold theirs.

In an attempt to acquire a secular book privilege, Fayvesh and his new partners brought a lawsuit challenging the privilege that the States of Holland and West Friesland had already granted to Athias for the Yiddish Bible.[[4]](#footnote-4) They were unsuccessful. After prolonged litigation, the Dutch court apparently accepted Athias’ argument that Fayvesh had bungled the work. It was also convinced that, given Athias’ demonstrated record of success in publishing and selling Bibles, a Yiddish Bible published by Athias would have a much better chance of selling, notwithstanding the rabbinic approbations and reprinting bans that Fayvesh had obtained.

By October 1676, Fayvesh’s financial situation had greatly deteriorated. He was forced to cede title and control over his printing house to Willem Blaeu and Justus Baeck (Laurens had died), who had assumed Fayvesh’s debts. Fayvesh could recover his printing establishment, included his inventory and machinery, only if he repaid his financiers the principle sum of his debt to them, with interest, within one year.

Around this time, Fayvesh also petitioned the Ashkenazic rabbinic court of Amsterdam for a ruling prohibiting Athias’ translator, Joseph Witzenhausen, from continuing to prepare a Yiddish translation of the Bible in opposition to Fayvush’s haskamot. On October 13, 1676, the Ashkenazic rabbis granted Fayvush’s petition. Citing Fayvush’s ten-year rabbinic reprinting ban, they enjoined Witzenhausen from preparing a translation for printing by a certain third party, a thinly veiled reference to Athias.

In the meantime, to further secure the prospects of recovering their investment, Fayvush’s Christian partners, Blaeu and Baeck, petitioned King Jan Sobieski III of Poland for a privilege for the Yiddish Bible. Blaue and Blake were granted a twenty-year royal privilege for their “German Bible with Chaldean Characters,” on October 17, 1677. The privilege made no mention of Uri Fayvesh or his translator, Yekutiel Blitz.

By then, Van Halmael, who had been a partner with both Fayvesh and Athias, had abandoned his rights in both editions, apparently by selling the sheets in his possession to Favyesh’s new financier, Willem Blaeu. Athias, in turn, had a new financier of his own. Until 1672, Athias principal financier had been his paper merchant, Christoffel van Gangelt. But when Van Gangelt himself faced financial difficulties, he sold Athias’ outstanding loans to his son-in-law, Josephus Deutz. Under their agreement, Deutz was also to come into possession of all books that Athias had given to Van Gangelt as security for payment of his debt. These included the Athias’ Yiddish Bible. In an apparent oblique reference to Athias’ unbound copies, Deutz’s records mention the deposit of “6,000 and more High-German Bibles,” each worth three guilders, but still lacking the final sheets, for storage in his attic.

Finally, on September 21, 1677, and April 27, 1678, at its successive meetings at Jaroslaw and Lublin, the Council of Four Lands granted Joseph Athias a haskama prohibiting other printers from printing a Yiddish Bible for a period of sixteen years from the issuance of the haskama. The Council also prohibited any Jew from assisting in any such publication. In its haskama for Athias, the Council lauded Athias’s Yiddish Bible for making it possible for women and young children to learn the Torah during times of leisure in the only language they would understand, while men (the Council supposed) would still study in the “difficult and holy language of Hebrew.”

Athias’ haskama appears to stand in direct opposition to the reprinting ban that the Council had purportedly granted in favor of Fayvesh’s translator, Yekutiel Blitz, just three years earlier. Yet it makes no mention of that earlier haskama. Why would the Council so dramatically reverse course? It is possible that, as Athias charged, the haskamot obtained by R. Ḥaim of Pila on behalf of Uri Fayvesh were out and out forgeries and thus that R. Ḥaim was a swindler. However, that seems unlikely given subsequent laudatory references to R. Ḥaim’s character and his later involvement in the publishing and editing of Hebrew books. The ruling of the Ashkenazic rabbinic court of Amsterdam in Fayvesh’s favor also weighs against that possibility. It appears, rather, that the Council now regarded its earlier hakamot null and void because the Fayvesh/Blitz project had passed into Christian hands and, indeed, those Christians had petitioned the King of Poland for a secular privilege.[[5]](#footnote-5)

The completed Fayvesh-Blitz Yiddish Bible was published in 1678. It bore the Council of Four Lands haskama that had been issued in Blitz’s name. But as Fayvesh printed it in his Yiddish Bible, the haskama purports to be issued in favor of Fayvesh, even if it still refers to the Blitz translation. Fayvesh, apparently, made that change on his own initiative. In his forward, he sought to explain that, as originally issued, the haskama “contained by mistake an incorrect name, as is attested in the judgments I have obtained from the Amsterdam geonim.” The Fayvesh-Blitz Bible was printed in some 6,000 copies.

The completed Athias-Witzenhausen Yiddish Bible was printed in 1679. It prominently displays the haskama that the Council of Four Lands awarded to Athias, and insists that Fayvesh’s Council of Four Lands haskama was a forgery. The Athias-Witzenhausen Bible also contains thirty-two pages of the translation that Yekutiel Blitz had prepared for Uri Fayvesh. Athias brazenly incorporated into his edition some of the sheets that had been deposited in the “neutral attic” during his partnership with Fayvesh.

Although Athias completed printing in 1679, few copies of his Bible were sold before 1686. It seems that Athias, seeing that most Amsterdam rabbis continued to support Fayvesh, initially decided to wait until the Amsterdam rabbis’ ten-year reprinting ban in favor of Fayvesh had expired before putting his print run on the market. In 1686, however, Deutch’s heirs began to sell their stock of Athias’ Yiddish Bible to retailers. In turn, Athias printed new title pages, dated 1687, for his unbound inventory, and prepared to place his copies on the market as well. Athias apparently hoped to sell his copies in Germany; his new title pages bore a Latin dedication to the Elector of Brandenburg dated 1687.[[6]](#footnote-6) But Athias was in such immediate need of cash that he soon offered his 3,000 Yiddish Bibles at auction in Amsterdam for a fraction of the original intended selling price.

Despite a large prospective readership, both editions of the Yiddish Bible were commercial flops. A number of factors contributed to this lack of commercial success. First, the combined 12,000 plus copies of the rival editions far exceeded what must have been the publishers’ estimate of market demand for the Bible’s first printing. Athias knew that Fayvesh and his partners intended to print some 6,300 copies. That was already a very large print run for that time, one expected to satisfy virtually all initial market demand for the Yiddish Bible.[[7]](#footnote-7) Athias nevertheless printed a like number of copies of his own edition. He apparently banked on the assumption that he could wrestle market exclusivity out of his Council of Four Lands reprinting bans and Dutch book privilege. Yet as it was, large numbers of both editions of the Yiddish Bible haunted Amsterdam book auctions until well into the eighteenth century.

Second, neither edition was well-suited to an Eastern European Jewish readership. The two translators, Blitz and Witzenhausen, were not great Hebrew scholars. Accordingly, in preparing their Yiddish translations, each made liberal use of Martin Luther’s German translation and of the standard Dutch translation of the Bible. Further, although it was then standard practice to employ West European Yiddish in printing books, the Fayvesh and Athias Bibles contain instances of a distinctly Dutch-Northern German dialect of Yiddish, leaving some passages incomprehensible to Jewish readers in Poland, although this is less the case for the Athias Bible since Athias hired the widely respected scholar, Shabbetai Bass of Prague, to correct Witzenhausen’s translation by eliminating words in use by Dutch Jews that would not be understood by Jews of other countries. Each Blitz and Witzenhausen also sought dramatically to reform the traditional practice of translating Biblical passages into Yiddish; rather than meticulously translating word for word from the Hebrew original into the canonized, archaic Yiddish vocabulary for the Pentateuch known as *taytsch*, they changed the syntax and paraphrased where they deemed it necessary to produce an idiomatic text. Here, too, Witzenhausen ultimately cleaved closer to the traditional Eastern European practice, but, especially since Athias’ Bible contained thirty-two pages that Athias had appropriated from Fayvesh, both Yiddish Bibles contained passages that would have appeared to their readership as unfamiliar and, possibly, inauthentic.[[8]](#footnote-8)

Finally, the rival publishers might have been stymied by the conflicting privilege and reprinting bans they obtained. The privilege that Fayvesh’s Christian partners obtained from the King of Poland likely imposed a significant constraint on Athias’ efforts to export his Bibles into that country, as evidenced by Athias plans to sell his copies in Germany. In that regard, Fayvesh’s contract with a bookselling agent for the Polish market provided that the agent was to prevent “any Bibles of Christoffel van Gengelt and Josephus Deutz, printed by Athias here or elsewhere, from being imported and sold in Poland, but on the contrary make buyers and sellers pay the fines that had been specified by the aforesaid royal privilege.” At the same time, the Council of Four Lands reprinting ban in favor of Athias might have severely hindered Fayvesh and his partners in selling their Bibles to Polish Jews, even if we have record that some copies of Fayvesh’s edition – which, after all, bore the Council’s purported haskama in favor of Fayvesh -- were sold in Poland.

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As the story of the rival Yiddish bibles makes vividly clear, Jewish publishers faced perilous market uncertainty and heavy dependence on Christian financing, even at the apex of Hebrew and Yiddish printing in Amsterdam. Further, the need to obtain reprinting bans for each title from both the Council of Four Lands and the Amsterdam rabbis and to hire agents for book sales in Poland-Lithuania made the Hebrew and Yiddish book industry all the more precarious. For that reason – and, no doubt, others, Uri Fayvesh relocated to Poland, where he established a new printing house in Zolkiew in 1692 with a privilege from King Jan Sobieski III and the support of the Council of Four Lands. In Poland, as we saw in the last Chapter, the Council strictly regulated competition in the Hebrew book trade to ensure that Fayvesh would enjoy a steady market for his books.

The Fayvesh-Athias dispute also sheds light on both the power and the limitations of the Council of Four Lands in the second half of the seventeenth century, a time at which the Council’s influence was near its height. When Fayvesh and Athias published Hebrew and Yiddish texts, the Jewish community of the Polish-Lithuanian Commonwealth was the largest in the world. Any significant publication that sought to reach that market required a haskama containing at least an approbation from the Council of Four Lands. And we see from the example of the Yiddish bibles that a Council haskama was perceived as a necessity not only for foundational rabbinic texts studied in yeshivot, but also for liturgical works in Yiddish aimed at a broad readership. At the same time, Jewish publishers in the centers of Hebrew printing in the Netherlands and Germany also regularly sought complementary haskamot from their local rabbinic authorities.[[9]](#footnote-9) They needed a set of rabbinic approbations and, preferably, reprinting bans in the jurisdiction where they produced their work even if their primary market was elsewhere, in the vast territory governed by the Council of Four Lands.

Jewish publishers also sought privileges from secular rulers, although these were more commonly obtained from authorities in the place the book was printed, not from the King of Poland. In the relatively unusual case in which the King of Poland issued a royal privilege for a book marketed by the Christian partners of a Jewish publisher, that privilege coexisted with any reprinting ban issued by the Council of Four Lands. As we see from the Fayvesh-Athias case, the Council asserted the authority to issue a reprinting ban in favor of the rival of the printer who had obtained a privilege from the King of Poland. Of course, the Council could not countermand the royal privilege. But neither was the Council cowed by the contrary royal privilege issued to Fayvesh’s Christian backers. Significantly, the king’s power was itself circumscribed by the powerful Polish nobility, many of whom were protectors of Jews’ communal autonomy in their respective territories. Hence, at the height of its power, the Council operated with authority over Jewish book distribution that, de facto, overlapped with that of secular powers, rather than being entirely subservient to those powers.

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A century later, however, that relative communal autonomy under the broad umbrella of the Council of Four Lands was no more. Plagued by increasing debt and division among its constituent local and regional councils, the Council of Four Lands met irregularly during the first half of the eighteenth century.[[10]](#footnote-10) Then, on June 1, 1764, the Council was abolished by the Polish Sejm in a measure designed primarily to make tax collection more efficient by removing the mediation of an autonomous body that had expended some of the revenue that it collected to serve the internal needs of Jewish self-governance. Henceforth, taxes and other legal duties would fall directly on each individual Jewish subject, without the intermeddling of a communal authority that had acted as a buffer between Jewish subjects and the state.[[11]](#footnote-11)

Shortly thereafter – and with even more monumental ramifications for the Jewish community, the Polish-Lithuanian Commonwealth was itself dismembered. Following three successive partitions, the first in 1772 and the last in 1775, the Commonwealth disappeared as an independent state. The heartland of European Jewry was now divided among the territories annexed by the Russian Empire, Austrian Empire, and Kingdom of Prussia.

The significance for Polish-Lithuanian Jewry was not merely that it no longer answered to the same overarching secular regime. Rather the partition of Poland also heralded the end of the semi-sovereign communal autonomy that had been central to European Jewish life throughout the medieval and early modern eras. Seventeenth-century Polish and Lithuanian Jewish communities had operated within a so-called “democracy of the nobility,” characterized by a considerable dispersion of power among feudal magnates and the crown. Although magnates and kings cabined the juridical autonomy of Jewish lay and rabbinical councils to varying degrees, the rights of residence that they granted to Jews generally guaranteed the juridical authority of rabbinic courts and communal governing councils, backed, if need be, by the pertinent secular power. Polish rulers were also dependent on Jewish governing bodies to collect taxes and manage internal affairs.[[12]](#footnote-12) But by the end of the eighteenth century, that solicitude towards Jewish communal autonomy had evaporated, together with the “democracy of the nobility” that anchored it – continuing a process begun by the Polish Sejm’s abolition of the Council of Four Lands in 1764. In both the partitioned territories of former Poland and elsewhere, the vast bulk of European Jewry now lived under monarchies that aspired to far more centralized administration and control, and which fluctuated between enlightened and reactionary absolutism.[[13]](#footnote-13)

Beginning in the late eighteenth century, those monarchies, together with the various states and principalities of Germany and the territories conquered by Napolean, systematically dismantled the juridical authority of Jewish community councils and rabbinic courts. They also eradicated rabbinic and lay authorities’ primary tool of enforcement, the ḥerem, by either forbidding rabbis from issuing such a decree or sharply limiting its use. Joseph II of Austria’s Edicts of Toleration (Toleranzpatente), issued and applied in successive stages to Bohemia, Silesia, Vienna and lower Austria, Moravia, Hungary, and Galicia between 1781 and 1789, formed a model for those decrees. Alongside provisions restricting Jews to “productive” occupations, requiring secular education, and compulsory military service, all designed to transform Jews into “useful subjects,” the Edicts abolished the juridical autonomy of the Jewish community councils in civil and criminal matters and eliminated rabbis’ authority to adjudicate civil cases between Jews. They also prohibited the excommunication of those who flouted rabbinic decrees, the sole exception being the rabbis’ authority to order ḥerem for failure to pay taxes, a vestigial rabbinic power that redounded to the benefit of the royal treasury.[[14]](#footnote-14)

In Prussia, the 1797 General Regulation for Jews in South and New Eastern Prussia expressly abrogated rabbis’ judicial authority in civil and religious matters. It also provided that no Jew could be punished for any offense he might commit against Jewish belief or ritual law within his own home. The Emancipation Edict of 1812 reiterated the prohibition against Jewish communal authorities, rabbis, or community elders assuming any form of legal jurisdiction.[[15]](#footnote-15)

In Russia, the statute of 1804 abolished the exclusive jurisdiction of rabbinic courts in civil cases between Jews, providing that Jews “must in all lawsuits have recourse to the general courts.” It also forbade rabbis from imposing ḥerem or similar coercive measures. Jewish lay councils – the last vestige of juridical Jewish community autonomy – were formally abolished in the Kingdom of Poland (a Russian protectorate established by the Congress of Vienna in 1815) in 1822 and in the Polish territories that had been directly absorbed into the Russian Empire in 1844.[[16]](#footnote-16)

As we will now see, by the early nineteenth century, rabbis called upon to adjudicate disputes among printers of Jewish liturgical and rabbinic texts had to grapple with this stark new reality. As precarious as was the Hebrew book trade when Uri Fayvesh and Joseph Athias were in business, they could at least look to the Council of Four Lands to establish printing rights in the major market for Hebrew and Yiddish books and to exert great influence elsewhere. But nineteenth century publishers and rabbis faced Jewish communities divided among different sovereign authorities – monarchies that imposed import barriers on Hebrew books and abolished Jewish communal autonomy together with rabbis’ state-backed authority to adjudicate civil cases between Jews and enforce rabbinic decrees through excommunication. These developments had a profound impact on Jewish life and – of particular relevance here – Jewish copyright law.

II. Sefer Krovot, the “Roedelheim Maḥzor”

In the early nineteenth century, a set of holiday prayer books, entitled *Sefer Krovot*, but commonly known as the “Roedelheim maḥzor,” became the subject of reprinting disputes that reached across the borders of German free cities and principalities into both the Habsburg Empire and the Kingdom of Prussia. The disputes erupted at the cusp of the monumental changes that brought the medieval and early modern governing institutions of European Jewry to an end. Signficantly, when the Roedelheim maḥzor was first printed – in Roedelheim, a small town on the outskirts of Frankfurt am Main, Jewish councils and rabbis still enjoyed juridical authority and autonomy, including the power of excommunication, in most of Germany. By contrast, the Habsburg Empire and Kingdom of Prussia – the sites of the subject reprintings of the Roedelheim maḥzor without its author’s permission -- had already abolished those institutional prerogatives.

## *Sefer Krovot* *Hu Maḥzor*

In 1798, the renowned Hebrew grammarian and Masoretic scholar, Wolf Heidenheim (1757-1832), established a Hebrew and German printing house in Roedelheim with the financial backing of a Jewish partner, “an energetic business man” named Barukh Baschwitz.[[17]](#footnote-17) The pair obtained a license to establish the press from the local count, Graf Vollrath of Solms-Roedelheim. They aptly named it the Orientalische und Occidentalische Buchdruckerei (the Oriental and Occidental Printing House).

Heidenheim published on a wide variety of subjects. But, like most Hebrew presses in Germany in that era, the publication of prayer books was his bread and butter.[[18]](#footnote-18) His small prayer book for times other than holidays, the siddur *Sefat Emet*, went through more than 150 printings, and was long “distinguished for its correctness and typographical beauty.”[[19]](#footnote-19) He also printed a larger prayer book, *Safah Berurah*, with German translation in Hebrew characters. *Sefer Krovot Hu Maḥzor*, the work that sparked the dispute we describe in this chapter, was a nine-volume edition of the maḥzor, the prayer-book used for holiday worship over the annual cycle of the Jewish calendar. Like *Safah Berurah*, it featured a translation of the Hebrew text into High German, but with the German transliterated in Hebrew characters, as well as the holiday liturgy in its original Hebrew.

Heidenheim set the standard for high quality, typographically precise editions of traditional prayer books. Yet, as an early admirer of the *Bi’ur*, Moses Mendelssohn’s German translation of the Bible and Hebrew commentary, Heidenheim also exemplified the complex brew of traditional rabbinic Judaism and modernist reform that characterized the late eighteenth and early nineteenth century proto-Haskalah (often translated as the “Jewish Enlightenment”).[[20]](#footnote-20) *Sefer Krovot Hu Maḥzor*, of which the first volume was published in 1800, featured a preface, interspersed with poetry, by Solomon Dubno, a proto-maskilic Bible scholar and Hebrew poet who had partnered with Mendelssohn on the *Bi’ur* and had encouraged Heidenheim to produce his own critical edition of the Pentateuch.[[21]](#footnote-21) In 1812, Heidenheim published *Divre Iggeret*, a tractate authored by the reformist rabbi, Menachem Mendel Steinhardt, in which Steinhardt defended the highly controversial ruling that he and his fellow reformists at the Jewish consistory of Westphalia had issued permitting Ashkenazic Jews to eat legumes on Passover. In his forward to Steinhardt’s tract, Heidenheim expressed his own approval of the reformist school that the Westphalia consistory had established in Kassel. In Heidenheim’s 1831 edition of the prayer book *Siddur li-Venei Yisrael* (1831), which presented his translation in German letters for the first time, Heidenheim omitted certain prayers and included a preface by the fervent proponet of “enlightened” education and theological reform, Michael Creizenach, which presented an historical and critical analysis of the prayers and advocated gradual reform in light of changing circumstances.



*Sefer Krovot* reflected Heidenheim’s considerable investment of time and study. To compile the nine-volume maḥzor, Heidenheim did not simply reprint earlier print editions or rely on the customary liturgy of his community. Instead, he produced a critical edition by scouring previous volumes and going back to the most ancient manuscripts he could locate, including one dating back to 1258. The project expanded beyond the liturgy practiced in neighboring Frankfurt to include notes annotating the traditions followed by Ashkenazic congregations throughout the world.[[22]](#footnote-22) Indeed, Heidenheim produced two parallel editions, one following the “Ashkenazic” liturgical rite -- that traditionally followed in Germany and northwestern Europe – and the other following the Polish rite, which included local customs originally introduced into the worship service by Jewish communities of Poland-Lithuania and which had been brought to Germany by the many Polish Jews who migrated westward in the seventeeth and eighteenth centurys.[[23]](#footnote-23)

Bringing the *Sefer Krovot* to print was also a substantial undertaking, spanning over several years. The nine volumes of the Ashkenazic rite edition were printed serially between 1800 and 1805. The Polish rite edition was printed between 1804 and 1807.

The liturgical value of *Sefer Krovot* to contemporaries emerged from the numerous innovations that Heidenheim pioneered. Most importantly, *Sefer Krovot* presented the first complete German translation—transliterated in Hebrew characters—to be published of the holiday worship service. The ability to read and understand Hebrew was rapidly diminishing among German Jews of the early nineteenth century even if worship services were still conducted that language.[[24]](#footnote-24) German Jews spoke and read Western Yiddish, a dialect of German that included many Hebrew words and was written with Hebrew characters. Many could also read High German when written in Hebrew characters, although few spoke High German fluently or were able to read in the German alphabet. *Sefer Krovot* thus enabled German Jews to understand the lexical meaning of the Hebrew liturgy that constituted their holiday worship service. *Sefer Krovot* also featured Heidenheim’s textual corrections, based on his historical investigation of previous Hebrew editions published in Italy and Germany, and Heidenheim’s own commentary, extending both to substantive explanations and descriptions of textual variations that he uncovered. The work, which came to be known as the “Rodelheim maḥzor,” went through numerous printings in both the Ashkenazic and Polish rite editions, throughout 1800s and into the twentieth century.[[25]](#footnote-25)

### B. Rabbinic Reprinting Bans

Heidenheim obtained the haskamot of eight prominent rabbis for the first parallel editions of *Sefer Krovot*. With the exception of haskamot from Solomon Hirschell, chief rabbi of Great Britain, and Arieh Leib Breslau, chief rabbi of Rotterdam, all were issued by rabbis of principalities and free cities in Germany or Denmark. Evidently, Heidenheim’s target market for his maḥzor consisted of communities of German-speaking Jews of north-central Europe. The absence of haskamot from rabbis in Prussia or Austria suggests that, given severe restrictions on the import of Jewish books into those territories, those German-speaking lands were, at best, secondary markets for Heidenheim, primarily served by copies that would be smuggled across the border.

Heidenheim obtained four haskamot, including approbations and reprinting bans, prior to commencing printing. They appear in the first volume of the Ashkenasic rite edition, printed in 1800, the prayerbook for the first six days of Passover. Of the subsequent volumes printed in 1800, the volume for the first day of Rosh Ha-shana contains a note apprising the reader that the pertinent approbations and reprinting bans have already been published in the first volume dedicated to Passover, but the respective volumes for the seventh and eighth days of Passover and for Yom Kippur do not contain haskamot or any reference to those printed in the earlier volume. The four additional haskamot appear, respectively, in volumes printed in 1803 and 1805, but all refer back to the four haskamot printed in the first volume and purport to apply to the entire nine-volume edition.

 *Sefer Krovot*’s primary haskamot, those appearing in the first volume printed in 1800, were issued, respectively, by Noaḥ Ẓvi Ḥaim Berlin of Altona, Naftali Hirsh Katzenellenbogen of Frankfurt an der Oder, Arieh Leib Breslau of Rotterdam, and Moshe Tuvia Sontheim of Hanau. Following effusive praise for Heidenheim’s piousness, knowledge, and meticulousness and the high quality of his and his partner’s work, each pronounces a broad, twenty-five year reprinting ban. For example, Berlin’s haskama forbids wrongful competition by reprinting, without the author’s permission, one or more volumes of the maḥzor with or without the German translation or of the German translation standing alone, including with small changes in language, title, or quantity or quality of the text. Berlin’s haskama also forbids any participation with non-Jews in printing such works. Violators of the reprinting ban, his haskama states, will be subject to ḥerem. The other three haskamot are quite similar; indeed, Sontheim’s contains some of the same formulaic language as Berlin’s. Of note, Breslau adds that it is also forbidden to buy or sell any maḥzor edition printed by a non-Jew that a Jew would be forbidden to print under the reprinting ban. Katzenellenbogen states, similarly, that it is forbidden to buy any maḥzor printed in violation of the reprinting ban. Breslau also highlights the importance of Heidenheim’s maḥzor, observing that most European Jews need German translations in order to understand the holiday liturgy.

 Pinhas Horowitz (1730-1805), the chief rabbi of Frankfurt am Main, must have been among the first rabbis whom Heidenheim asked for a haskama. Horowitz was widely respected.[[26]](#footnote-26) Further, at that time, Frankfurt was home to the third largest Jewish community among major cities in the German-speaking world, following Prague and Hamburg.[[27]](#footnote-27) Frankfurt was also the primary market for Hebrew books printed in neighboring Roedelheim.

Horowitz gave his approbation and reprinting ban to *Sefer Krovot*, but not until 1803, three years after its intial volumes were printed. Horowitz’s delay might have resulted from his concern that Heidenheim’s German translation of the prayer book would serve a reformist agenda, similar to that of Moses Mendelssohn’s German translation of Pentateuch and rabbinic commentaries. Horowitz vigorously opposed the Haskalah movement and, in 1782, had famously preached a sermon denouncing Mendelssohn’s *Biur* as heretical. One might expect that the traditionalist rabbi would have held a similarly dim view of a German translation of the prayer book, especially given that such translations were a much-trumpeted, favored project of the proto-maskilim in Mendelssohn’s circle.[[28]](#footnote-28)

Whatever might have been his initial misgivings, Horowitz eventually gave his imprimatur to Heidenheim’s German translation of the maḥzor. But he likely insisted upon inspecting the volumes that had already been printed before doing so. Horowitz also, no doubt, looked to the eminent rabbis who had already granted their haskamot in deciding to issue his own. Presumably, he relied particularly on the haskama, dated 19 Nissan 5560 (March 16, 1800), of Arieh Leib Breslau, whom Horowitz held in high regard as a Talmudic authority and to whom Horowitz repeatedly referred questions of Jewish law.[[29]](#footnote-29) At any rate, following on Horowitz’s approbation and those of the other Ashkenazic sages upon which he relied, rabbinic traditionalists came to celebrate Heidenheim’s maḥzor as a critical bulwark against reform, as a vital tool for enabling the mass of European Jews to understand the holiday liturgy while continuing to recite it, in full, in Hebrew. Decades later, in a responsum devoted to Jewish copyright law that we shortly discuss, the ardent traditionalist Moses Sofer lauded Heidenheim: “And were it not for him, our liturgical poems would have already been buried underground and, as is well understood, would not have been recited by these generations.”[[30]](#footnote-30)

Like the prior haskamot for *Sefer Krovot*, Horowitz’s “haskama and ḥerem,” dated 12 Elul 5563 (August 30, 1803), extends to both Wolf Heidenheim and Heidenheim’s partner, Barukh Baschwitz. Horowitz prefaces his statement by declaring that he is joining with rabbis who earlier gave their haskama to Heidenheim’s maḥzor. Horowitz then praises Heidenheim as a rabbi of great punctiliousness and lauds the fruits of Heidenheim’s and Baschwitz’s holy work. Finally, Horowitz pronounces a sweeping reprinting ban. He forbids anyone, on pain of ḥerem, from engaging in wrongful competition by printing or causing to be printed the Heidenheim-Baschwitz maḥzorim, with the commentaries and German translations, or the commentaries or German translations by themselves, whether in whole or in part. That ban, states Horowitz, is to remain in force for the period set forth by the rabbis who had already issued reprinting bans, which, as we have seen, was twenty-five years.

When Horowitz died in1805, his son Ẓvi Hirsh Horowitz (1730-1817), succeeded him as rabbi of Frankfurt.[[31]](#footnote-31) On September 7, 1807, the younger Horowitz issued a warning to Jews not to purchase copies of an edition of Heidenheim’s maḥzor that a certain unnamed publisher had reprinted without Heidenheim’s permission. Horowitz reiterated that Jews who violated the rabbinic bans issued for the maḥzor, particularly that of his father, would be subject to excommunication. Heidenheim published Zvi Hirsch Horowitz’s warning in subsequent editions of his maḥzor, together with the approbations and reprinting bans from the first edition, beginning with the respective second editions of the Ashkenazi and Polish rites, both printed in 1811.

## C. The First Unuathorized Reprinting: Vienna

##  As Ẓvi Hirsh Horowitz’s 1807 warning makes clear, despite reprinting bans that Heidenheim had obtained, his maḥzor was reprinted without his permission almost before the ink was dry on his first edition. The “certain publisher” to whom Horowitz, no doubt, referred was the Viennese Christian printer, Anton Schmid. Schmid had established a Hebrew press in Vienna in the last decade of the eighteenth century under a royal license to print Hebrew books. Among his first publications was a 1795 edition of Mendellsohn’s *Bi’ur*, an undertaking which, above and beyond his reprinting of Heidenheim’s maḥzor, would not likely have endeared him to rabbinic traditionalists. Schmid typically hired proto-maskilim from Galicia as his typsetters, editors, and correctors, for whom Schmid arranged special permits to live in Vienna, a city where Jews were otherwise forbidden to reside.[[32]](#footnote-32)

## When Schmid entered the Hebrew book trade, Austrian law forbade Jews from printing books. A royal ordinance enacted in 1800 prohibited Jews from importing Hebrew books as well. Contrary to some commentators’ descriptions, Schmid did not enjoy an absolute monopoly over the Hebrew book trade in Austria. He faced several rival Christian printers of Hebrew books in Vienna.[[33]](#footnote-33) In addition, a number of Jewish-owned printing houses were active in the Lemberg, the administrative center of the formerly Polish territory of Galicia, which the Austrian Empire had annexed as part of the first partition of Poland in 1792 and to which the prohibition on Jewish-owned printing houses did not apply. Nevertheless, Schmid profited handsomely from the regulatory restrictions on competition imposed by imperial authorities, particularly the prohibition on importing Hebrew books.[[34]](#footnote-34) His Hebrew printing press reached a wide Jewish market, throughout the Austrian Empire and beyond. Over time, Schmid became a leading publisher of traditional rabbinic and liturgical texts, as well as maskilic works, and received considerable acclaim among his Jewish readers.



[WITH ILLUSTRATION: Schmid’s printer’s mark.[[35]](#footnote-35) The text spells out German words with Hebrew characters, as follows: *Anton Schmid k.k.* [*= kaiserlich und königlich*] *privilegierten hebräischen buchdrucker*, meaning “Anton Schmid, imperially and royally licensed Hebrew book printer.”]

Schmid published his reprinted edition of Heidenheim’s *Sefer Krovot* maḥzor in 1806. Under Austrian law, that reprinting was perfectly legal. Indeed, it was encouraged. As implemented by Maria Theresa and reinforced by Joseph II, it was imperial policy to promote the Austrian book trade by allowing unhindered reprinting of foreign books and, at certain times, even prohibiting the importation of original foreign editions in order to protect the reprinters’ domestic market.[[36]](#footnote-36) Emperor Joseph II’s Decree of 13 January 1781, which remained in force until 1837, provided, accordingly, that “the reprinting of approved foreign-published books is to be granted freely to every book printer as a commercial operation, even if exactly the same work happens to have already been (re-) published by one or several native book printers."[[37]](#footnote-37) Joseph II’s policies contributed to the resurgence of Austria’s book trade and, in particular, to a flourishing reprint industry, which, much to the consternation of publishers in other countries, served not only the domestic Austrian market, but reached readers across the Austrian border as well. Schmid’s reprinted edition of *Sefer Krovot* was but a small part of that vibrant industry, authorized and encouraged by imperial decree.

Heidenheim nonetheless responded as aggressively as he could to attempt to stifle Schmid’s reprinted edition. Having procured Ẓvi Hirsh Horowitz’s directive specifically prohibiting the purchase of such a reprint, Heidenheim, presumably with Horowitz’s active assistance, turned to leading rabbinic authorities in the Austrian Empire. He (or, more likely, Horowitz on his behalf) sent them a written appeal, imploring them to enforce the rabbinic reprinting bans against any Jew who would sell, purchase, or otherwise lend assistance to Schmid’s reprint.

Upon learning of Heidenheim’s appeal, Schmid complained to the Austrian authorities, and on November 12, 1807, the Chancellor’s Court ordered that the rabbinic reprinting ban for the Heidenheim maḥzor be suppressed. The Court’s decree, issued to its regional offices in Bohemia, Moravia, Galicia, and elsewhere, declared:

News has been received that after the domestic book publisher Schmid, with authorization from the state censor, reissued the Jewish prayer book and also printed a well-advised German translation in Hebrew letters prepared by a Roedelheim Jew by the name of Heidenheim, on behalf of the aforementioned Jew Heidenheim, who earlier had received an exclusive privilege to print this book from the Chief Rabbi of Frankfurt, an appeal to the Jewish people has been issued, and has been sent to some of the most respected rabbis in the Austrian monarchy by means of the postal service, that several rabbis, and most notably the Chief Rabbi of Frankfurt, Pincas Levy Horowitz, pronounced a great excommunication order against the later publisher of the Maḥzor and his coworkers and assistants.

The regional offices shall draw the rabbis’ attention to this absurd measure so that if they encounter one of these writings, they will suppress and make no use of it, and in case any of their fellow believers have questions, they shall instruct them about the unlawfulness of such a measure, and they shall in no way dare to enforce any part of the excommunication order.[[38]](#footnote-38)

On May 25, 1808, Chancellor’s Court took its ruling a step further. It commanded its regional offices to “prepare a specific circular to give notice, and in particular to direct the rabbis to clearly and emphatically explain the same in the synagogues of their fellow believers, that every excommunication order is not in force so long as the government does not recognize its legal force, and that whoever disseminates such an excommunication order by his hand, will pay a money penalty of 50 thalers, or based upon the circumstances will face corporal punishment.”[[39]](#footnote-39)

Foremost among the Austrian rabbis who had received Heidenheim’s appeal – and the subsequent author of seminal responsa concerning Jewish copyright law that we later discuss -- was Mordekhai Banet (1753-1829).[[40]](#footnote-40) Banet served for forty years, beginning in 1789, as chief rabbi of Moravia, head of the rabbinic court of Nikolsburg (now Mikulov), and head of Nikolsburg’s large and prestigious yeshiva. Like his mentor, Yeḥezkel Landau of Prague, Banet both excelled in traditional rabbinic scholarship and served as an outspoken presence in matters of public policy. He was a highly respected authority, whose influence extended well beyond Moravia.

While Banet championed the rabbinic tradition, he also exhibited a moderate pragmatism towards the Haskalah, secular study, and the dictates of imperial authorities. As a leading commentator has aptly put it, as “Moravian chief rabbi, [Banet] chose his battles wisely.”[[41]](#footnote-41) Banet resolutely opposed reformist rabbis’ attempts to invoke halakhic precedent to justify lenient deviations from traditional legal norms, including eating legumes on Passover, travelling on the Sabbath, and eating sturgeon, a fish traditionally deemed unkosher. He also firmly rejected liturgical reform, most famously, joining with some twenty of his traditionalist rabbinic colleagues in 1819 in voicing staunch opposition to reformists’ introduction of vernacular prayers and organ music in the Hamburg Temple.[[42]](#footnote-42) Yet in other instances, Banet exhibited sympathies that some viewed as proto-maskilic. He reportedly spoke German, had considerable knowledge in several secular sciences, and encouraged others to attain certain types of secular knowledge so long as it remained subordinate to Talmudic study. It was even reported that Banet “would read the Bible with the German translation of Moses ben Menahem [Mendelssohn] and the commentaries of the Biurists.”[[43]](#footnote-43) Indeed, Banet gave his approbation to a new edition of Mendelssohn’s *Bi’ur*, published in Vienna in 1817–1818.

Further, when confronting efforts by maskilim and the absolutist state to modernize Jewish education, Banet preferred compromise, engagement, and subtle resistance to open opposition. Banet, for example, accepted that he was powerless to block the Austrian government’s policies requiring that Jews study secular subjects and that Jew’s “ethical” study must be radically reformed to further the imperial goal of educating Jews to be “useful subjects.” Rather than flat out oppose those directives, Banet sought to bring whatever traditionalist influence he could on government approved textbooks. In that regard, Banet gave his approbation to two decidedly modernist textbooks of the Jewish religion. The textbooks were modelled on Christian catechisms and were authored by Herz Homberg, a maskilic scholar and Austrian government functionary, who was widely detested in the Jewish community.[[44]](#footnote-44) The first textbook, *Imre Shefer* (published in 1808) appeared in both Hebrew and German with Hebrew characters. The second, *Bne-Zion* (published in 1812), upon which Austrian authorities required Jewish couples who wished to marry to pass a test, was entirely in literary German. Banet gave his approbation for *Bnei-Zion* at the specific request of the Austrian Court Commission on Education. But, as a signal to the Jewish community of the half-hearted nature of his support for the book, he gave his approbation in German. And then, almost immediately, he sought to undermine the book’s adoption by endeavoring to convince local authorities that, whatever its virtues, the book’s content and language were simply too unfamiliar and difficult for most Jews to learn. Ten years later, Banet also promoted a new catechism, authored by his son, which adhered far more closely to rabbinic tradition.[[45]](#footnote-45)

 Banet’s handling of Heidenheim’s appeal to prohibit Jews from buying or selling the Schmid reprint exemplified his staunch support for traditionalism, coupled with pragmatic compromise when necessary. He initially backed Heidenheim -- and rabbinic authority over the Hebrew book trade -- by publicizing the rabbinic reprinting bans.[[46]](#footnote-46) But soon thereafter, in line with the Chancellor’s Court decree and the Emperor’s general prohibition on rabbinic enforcement of ḥerem, Banet was arrested by the Austrian authorities in Bruenn, the administrative capital of Moravia, and compelled to rescind his endorsement of the bans. As Banet later explained in one of his responsa on Jewish copyright law:

And I tested this thing when the gentleman-publisher Schmid printed the Roedelheim maḥzorim. When I disseminated the bans of the sages on the buyers and the dealers to deter [their buying and selling of the work], the aforementioned publisher brought us up in court before the authorities in my country, in the city of Bruenn. I was positioned in a grave dispute from morning until evening and they spoke harshly to me and they saw my activities as wrongs and in this way said I was rebelling against the government, until the mercy of God came upon me and I was released in peace on condition that “the mouth that forbids will be the mouth that permits.” And so I did…. [[47]](#footnote-47)

Banet, indeed, duly complied with the terms of release by affirmatively rescinding his support for the reprinting bans. In a letter addressed to Moses Löb Ziltz (d. 1831), a rabbinic scholar and judge who served under Banet on the Nikolsburg rabbinic court, Banet affirmed:

The rabbinical sages of Ashkenaz have granted an approbation and ban to all of the maḥzorim printed in Roedelheim and translated into the vernacular. And it is elucidated on the title page by the wise man, W. Heidenheim, that no other person may use the same format for twenty-five years; and I have said, lest there, therefore, be among the children of our nation who reside under the merciful wings of His Majesty, the Emperor, a man or woman whose heart will accordingly not wish to buy the maḥzorim that are being printed in the city of Vienna by Mr. Anton Schmid, that I hereby invalidate and declare that all of the words regarding bans and curses which have been issued, and which will be issued in the future by rabbis in other countries upon the next printing, are to be deemed nonexistent….[[48]](#footnote-48)

As we shortly elucidate, Banet presented several halakhic justifications for his newly discovered position that the rabbinic reprinting bans issued for Heidenheim’s maḥzor in other countries are “to be deemed nonexistent.” It is obvious, however, that Banet’s position was heavily colored by his painful realization of the profound limits of rabbinic authority under Habsburg rule. Indeed, Banet’s halakhic justifications for holding rabbinic reprinting bans unenforceable expressly reflect his pragmatic understanding of the limits of rabbinic authority in a world of vanishing juridical autonomy for rabbinic courts and of secular governments’ restrictions on the Hebrew book trade.

Yet, despite Austrian authorities’ abrogation of the rabbinic reprinting bans and Banet’s coerced about-face, the initial publication of the bans in Austria seems to have had its desired effect: many Jews refrained from purchasing Schmid’s reprinted edition. As a result, before issuing his next reprint edition of Heidenheim’s maḥzor, Schmid took the trouble and money to acquire the rights of Heidenheim’s (now former) partner, Barukh Baschwitz, in *Sefer Krovot*.[[49]](#footnote-49) Evidently, Mordekhai Banet lent his assistance to Schmid in that endeavor. Schmid’s next edition, printed in 1816, features a letter from Banet, dated January 11, 1816, and no doubt intended for publication.[[50]](#footnote-50) The letter confirms that Schmid had purchased from Bashwitz the right to reprint *Sefer Krovot*. Banet, in other words, publicly provided his imprimatur for Schmid’s second edition based on the purchase by a seemingly recalcitrant Schmid of reprinting rights from a joint holder of those rights under the rabbinic reprinting bans that had originally been issued for *Sefer Krovot*. By ensuring that Jewish purchasers of the Schmid edition would see that, as confirmed by the Chief Rabbi of Moravia, Schmid had ostensibly acquiesced in the ban of the Ashkenazic sages by purchasing the reprinting rights from their rightful holder, Banet adeptly projected a measure of rabbinic authority over the Hebrew book trade. He did so even as he had, shortly before, relinquished the central pillar of that authority, the rabbinic power to issue reprinting bans that are enforceable by ḥerem anywhere in the Jewish world.

For his part, Heidenheim remained aggrieved by Schmid’s reprinting. In his next edition of *Sefer Krovot*, published between 1815 and 1817, Heidenheim inserted an impassioned statement just below his reproduction of the original haskamot from 1800 to 1805 and Ẓvi Hirsh Horowitz’s warning to comply with them. Heidenheim begins: “Who would believe that in the face of all of those rabbinic bans and warnings, someone would nevertheless have it in his heart to commit the villainous acts [forbidden by the bans] for nefarious profit?” He then recites that a certain printer recently announced that he already has commenced a second reprinting of Heidenheim’s maḥzor in Vienna, this without Heidenheim’s consent, and that said printer gave the excuse that he had been given a written authorization for the reprinting from Heidenheim’s former partner, Barukh Baschwitz. Heidenheim then insists that Baschwitz had no authority to sell Heidenheim’s rights to others or to allow acts that were prohibited by the rabbinic bans. The rabbinic bans, Heidenheim asserts, were given to him for his benefit, as evident from the words of the sages who issued them and from the warning in support of the rabbinic bans that Ẓvi Hirsh Horowitz issued in September 1807, at which time Baschwitz was no longer Heidenheim’s partner. Conspicuously absent from Heidenheim’s statement is any indication that it was Mordekhai Banet, Chief Rabbi of Moravia, who provided Schmid with Baschwitz’s authorization and who confirmed its authenticity.

D. The Second Unauthorized Reprinting: Dyhernfurth

In 1822 *Sefer Krovot* was again reprinted without Heidenheim’s consent. This time the reprinter was Hirsch Warschauer, a Jewish publisher based in Dyhernfurth, a small town near Breslau, located in Prussian Silesia.[[51]](#footnote-51) Dyhernfurth was then a hub of Hebrew printing. Its first Hebrew press – and, indeed, its first Jewish presence – was established around 1688, when the local magnate invited Shabbetai Bass, the scholar who had edited Joseph Athias’s Yiddish Bible, to open a printing house in order to develop that recently founded town. In the ensuing 140 years, Jewish presses centered in Dyhernfurth published hundreds of Hebrew and Yiddish works.[[52]](#footnote-52)

Warschauer printed the first volume of Heidenheim’s nine-volume *Sefer Krovot* in 1822. His reprint appeared with the approbation, dated 7 Sivan 5581 (June 6, 1821), of Israel Yona Landau, head of the rabbinic court of Kempno, located in territory that had been annexed by Prussia in the 1793 Second Partition of Poland.[[53]](#footnote-53)

No sooner had the Warschauer printed the first volume, than Heidenheim threatened to haul him before a rabbinic court for violation of Heidenheim’s rabbinic reprinting bans.[[54]](#footnote-54) In so doing, Heidenheim once again sought protection under Jewish law against a reprinting of his maḥzor that was entirely permissible under secular law. Unlike Austria, Prussia did not actively encourage reprintings, and, indeed, periodically pressured other states to honor Prussian printing privileges in their territories.[[55]](#footnote-55) But in line with common practice in the early nineteenth century, Prussia did not accord protection against reprints for foreign authors and publishers absent a treaty with the foreigner’s sovereign ruler that required such protection– and Prussia did not begin to sign such treaties with other states of the German Confederation, including the Grand Duchy of Hessen, where Roedleheim was located, until 1827.[[56]](#footnote-56)

Whatever were his rights under secular law, Warschauer attempted to settle the dispute. He offered to give Heidenheim thirty reprinted “copies,” presumably of the entire nine-volume maḥzor, in return for Heidenheim’s consent to Warschauer’s reprinting. He also pointedly reminded Heidenheim that, in any case, the twenty-five year period of Heidenheim’s rabbinic reprinting bans was nearing its end.

Heidenheim evidently rejected Warschauer’s settlement offer. Warschauer then turned to Akiva Eiger (1761–1837), rabbi of Posen (also in Polish territory annexed by Prussia) and one of the most highly respected posekim of his generation. Warschauer relayed to Eiger that he had embarked on his reprinting of *Sefer Krovot* in good faith, pursuant to the rabbinic imprimatur of Israel Landau of Kempno. He also pleaded that he had invested heavily in the project and would go bankrupt if unable to complete it, or at least to sell the volume he had printed and a second volume for which he had already set the type. He added that there was nothing he could do to stop the distribution of the copies he had printed in any event. He had borrowed from his non-Jewish partner to finance the reprinting and that if he were unable to repay the debt, the non-Jew would seize the printed copies and put them on the market.

In an effort to lend his weight to resolving the dispute, Eiger sent a written appeal, dated 1 Av 5582 (July 19, 1822), to Zalman Tarir, head of the rabbinic court of Frankfurt am Main, accompanied by a letter addressed directly to Wolf Heidenheim.[[57]](#footnote-57) In addition to recounting Warschauer’s good faith and dire financial straits, Eiger expressed his concern that if Heidenheim should enforce the reprinting bans against Warschauer, Warschauer’s non-Jewish partner might bring an action before a Prussian court challenging the rabbinic bans – and “who knows what might sprout from that.” In his letter to Heidenheim, Eiger warned further that an action by Warschauer’s non-Jewish partner might lead Prussian authorities to enforce prohibitions on importing books into Prussia, and to impose fines on violators, just as the Emperor of Austria had directed as a result of a “similar case” in that country– a thinly veiled reference to Austrian authorities’ sharp response to Heidenheim’s efforts to enforce his rabbinic bans in Austria. Eiger added that, under those circumstances – in which it would be impossible to import copies of Heidenheim’s maḥzor to Prussia, the Dyhernfurth publishers would find rabbis in Prussia who would give their approbations to the reprinting of *Sefer Krovot* even without Heidenheim’s permission and he, Eiger, might well give his approbation as well. Eiger concluded his written appeal by personally guaranteeing the delivery of forty copies of Warschauer’s reprinted edition to Heidenheim in return for Heidenheim’s written consent to Warschauer’s reprinting.

III. An Extended Colloquy: Mordekhai Banet and Moses Sofer

In parallel to Eiger’s effort to bring about a compromise settlement of Heidenheim’s claim against Warschauer, the head of the rabbinic court in Dyhernfurth asked Mordekhai Banet for a ruling on the question of whether Heidenheim’s reprinting bans were enforceable against Warschauer. Perhaps Heidenheim had brought a complaint against Warschauer in that rabbinic court and the rabbi of Dyhernfurth then sought the opinion of a greater authority on what is the halakha in such a matter. Or perhaps the inquiry was sparked by Warschauer, seeking the imprimatur of the rabbinic court of Dyhernfurth, as he had received from the head of the rabbinic court of Kempno. Neither Banet’s responsum nor the historical record gives us an indication.

Banet’s responsum addresses the Dyhernfurth rabbi as the “light of the Exile” and by other honorifics, but does not identify him by name. He was apparently Yaakov Yehuda Leib Falk (c. 1767-1838), who served as head of Dyhernfurth’s rabbinic court and as a rabbinic judge in neighboring Breslau. Several years later, Falk granted an approbation for yet another reprinting of Heidenheim’s *Sefer Krovot*, published by Leib Sulzbach in Breslau between 1829 and 1830.[[58]](#footnote-58)

It would have been out of the ordinary for Falk, a rabbi of Dyhernfurth, to seek a ruling on such a matter from a rabbinic authority outside of his country. In his responsum, indeed, Banet initially expresses some reluctance to respond, noting that he is unaccustomed to issuing a ruling to an inquirer from a different land, especially given the presence of preeminent rabbinic authorities in that land. Evidently, Falk chose to ask Banet for a ruling on the assumption that if anyone could authoritatively speak to the concerns that Akiva Eiger raised about the grave dangers of attempting to enforce Heidenheim’s reprinting bans in Prussia, it would Mordekhai Banet. And on that score, Falk could reasonably assume that Banet would incline favorably towards the Dyhernfurth printer. Banet had, after all, withdrawn his support for enforcing Heidenheim’s reprinting bans in Austria following the Austrian authorities’ sharp response to Heidenheim’s enforcement efforts in that country.

If that was, indeed, the Dyhernfurth rabbi’s reason for posing his halakhic question to Mordekhai Banet, he was not to be disappointed. In his ruling, dated Thursday, 5 Elul 5582 (August 22, 1822), Banet took a decidedly narrow view of the protection to which Heidenheim was entitled under Jewish law.[[59]](#footnote-59) In so doing, Banet exhibited a keen sense of the limits of rabbinic authority in a Jewish world divided among imperial powers that were bent on supplanting much of that authority – and that had decreed that reprinting of foreign works was permissible under secular law.

But although Banet provided the assurance that Falk sought for Falk to back the Dyhernfurth printer, Banet’s word was not the last on the subject in the annals of Jewish copyright law. Some six months after Banet’s ruling, Moses Sofer (1762-1839), rabbi of Pressburg, at that time the most important Jewish community in Hungary, wrote a responsum addressed to Banet and directly taking issue with him. Sofer was Banet’s junior; indeed, Banet has recommended Sofer for his first rabbinic post in Dresnitz in 1794. But Sofer had already attained an exalted position in traditional rabbinic culture, a position cemented by his prominent role in opposing the reformist Hamburg Temple some four years earlier.[[60]](#footnote-60) In his responsum, dated 24 Adar 5582 (March 7, 1823), Sofer forcefully argued that Jewish law and longstanding rabbinic practice require that rabbinic reprinting bans be fully enforced throughout the Jewish world, including in a country other than the country where the ban was issued.[[61]](#footnote-61)

As appears from its context and content, Sofer’s initial responsum was evidently part of a private correspondence that he carried on with his senior colleague. It seems that Sofer initiated this exchange of letters by asking Banet to join him in granting haskamot for a forthcoming book, which Sofer identified as “*Oryan T’litai*.”[[62]](#footnote-62) That request would have been quite routine; the two rabbis joined in granting approbations for several books, both before and after this exchange. Banet responded that that he would grant an approbation, but not a reprinting ban. That response would also not have been out of the ordinary; Banet had not granted a reprinting ban since he retracted his initial support for the bans for the Roedelheim maḥzor in 1807. But on this occasion, in a letter that Sofer quotes at the beginning of his responsum, Banet outlined his argument for why bans are unenforceable and should no longer be issued, and referred to the recent ruling he had given to the rabbi of Dyhernfurth.

Sofer responded by seeking to convince Banet that rabbinic reprinting bans were, indeed, a legitimate, enforceable exercise of rabbinic authority. In contrast to the ruling that Banet issued to the head of Dyhernfurth’s rabbinic court, we have no reason to think that Sofer’s letter to Banet would have been widely circulated at the time. Further, Sofer’s responsa, a number of which consist of private correspondence, were not published until after his death.[[63]](#footnote-63)

In any event, it is not entirely clear what brought Sofer to respond to Banet. Apparently, Frankfurt rabbi Ẓvi Hirsh Horowitz had asked Sofer to intercede on Heidenheim’s behalf several years before, probably to endorse the ban against Jews lending buying or selling Schmid’s reprintings. In a later responsum, in which Sofer further explicates his arguments for enforcing reprinting bans, he notes that Horowitz, who died in 1817, had informed him that Heidenheim had spent a large amount of time proofreading hymns and translating them into German, had gathered existing texts for that purpose, and had expended a great deal of money, as to which he still remained accountable for unpaid debts.[[64]](#footnote-64) Yet, in his 1823 responsum, Sofer also refers to a letter he received several months previously from Akiva Eiger, who was Sofer’s father-in-law, complaining that a certain rabbi had claimed in writing that he, Eiger, had definitively stated that rabbinic reprinting bans are ineffective and thus are not to be enforced. Perhaps it was that letter that sparked Sofer’s response to Banet. Indeed, Sofer states in his responsum that he now suspects that the certain rabbi who had offended Eiger by overstating his position was the rabbi of Dyhernfurth.

If Sofer truly hoped to convince Banet to change his view of rabbinic reprinting bans, he was unsuccessful. Banet defended his position against Sofer in a responsum dated, 7 Nisan 5587 (April 11, 1827).[[65]](#footnote-65) Sofer then presented his counterarguments to Banet’s defense in a lengthy exposition that touches briefly on the Jewish law of wrongful competition before moving on to other grounds for supporting reprinting bans.[[66]](#footnote-66) In contrast to Sofer’s 1823 responsum, this later, undated, responsum does seem to be intended for public circulation, perhaps for use in teaching at Sofer’s yeshiva. It is not addressed to Banet, or to any other identified inquirer, and it is longer that Sofer’s typical responsa. In any case, the extended colloquy between Banet and Sofer presents in gripping detail the opposing arguments of two preeminent rabbinic scholars of the early nineteenth century on the nature of Jewish copyright law and the enforceability of rabbinic reprinting bans.

Equally, Banet’s and Sofer’s respective responsa both illuminate and are informed by each of those rabbinic leaders’ contrasting approaches for how best to address the crisis of rabbinic authority that engulfed them. To be certain, these two luminaries of the early nineteenth-century Central European rabbinic elite generally shared a devotion to rabbinic tradition, even while embracing the study of certain secular subjects.[[67]](#footnote-67) Further, each Banet and Sofer exhibited considerable adeptness – in extraordinarily difficult circumstances -- in dealing with imperial, ecclesiastical, and other political powers. They each responded with painful awareness of the need to cabin rabbinic authority within the sharp limits that absolutist governments had imposed, while seeking to enlist the support of political powers in preserving the hegemony of traditionalist rabbinic authority within the Jewish community in the face of reformist challenges.[[68]](#footnote-68)

Yet even within this broad framework of common purpose, Sofer and Banet exhibited certain salient differences. First, Sofer exceeded Banet in the resoluteness and intransigence of his defense of rabbinic power and tradition – although it is important to stress that this was a difference in degree, not in kind. It was Sofer who made rigid adherence to immutable tradition an express, overriding principle. That principle is best encapsulated in Sofer’s often cited application of the Talmudic dictum "ḥadash asur min ha-Torah" to mean that any deviation from the traditional understanding of halakha, even if seemingly trivial, is strictly forbidden if for other reason than that it is an innovation.[[69]](#footnote-69) Sofer also ruled that rabbinic rulings and rabbinic-sanctioned local custom are no less an inherent part of that immutable tradition than are explicit biblical commandments.[[70]](#footnote-70) The various elements of the rabbinic tradition thus constitute a single, organic whole, a sanctified body of rules and practices that must be observed in its entirety. For Sofer, as we shall see, rabbis’ longstanding custom of issuing reprinting bans is an integral part of that tradition.

For his part, Banet also insisted that the longstanding custom is as sacred and inviolable as biblical law, and thus may not be abrogated under any circumstances.[[71]](#footnote-71) On the other hand, in his copyright responsa Banet seems to draw a distinction between halakhic rules and custom, on one hand, and rabbinic decrees, on the other. He also argues that the rabbinic practice of issuing reprinting bans does not rise to the level of binding custom.

Further, Sofer not only erected a wall against innovation at the hands of Jewish reformers and purported interpreters of halakha; he also adamantly opposed ceding authority to secular rulers over traditional rabbinic domains.[[72]](#footnote-72) For example, Sofer authored responsa insisting that halakhic rules regarding marriage and inheritance must take precedence over secular governments’ regulation of those areas. He similarly declined to recognize the halakhic validity of wills drawn up in non-Jewish courts. As he cogently expressed it: “Heaven forbid that in such a case we will apply the rule that “the law of the kingdom is the law” against the law of the holy Torah, for if [we were to do so], we would annul all the laws of the Torah.”[[73]](#footnote-73)

Hand in hand with his insistence on the principle of immutable rabbinic authority, Sofer came to hold a highly optimistic belief in his ability to convince secular rulers to support rabbinic traditionalists, especially vis-à-vis Jewish reformers who would undermine the power of the traditional rabbinic elite. As Sofer colorfully expressed:

Secular rulers help and aid us and defend us in the maintenance of our religion, and they have absolutely no desire to abrogate even a single one of our commandments from the Torah. If in some countries the rulers have listened to the voice of these charmers, they have intended only to do good for us, for they do not know and have not been told that this contradicts the foundation of our faith. However, if they hear and understand that this thing is opposed to our Torah and that these persons possess no religion whatsoever, they pay no heed them at all. And God is with us.[[74]](#footnote-74)

As with the differences between Sofer and Banet regarding the defense of rabbinic power and tradition, we see Sofer’s basic optimism about gaining the support of secular rulers, in contrast to Banet’s considerable skepticism, at play in their respective responsa on the continued viability of rabbinic reprinting bans. Both Banet and Sofer carefully couched their arguments regarding Jewish copyright law in halakhic precedent, as well as in their empirical assumptions about when and how the widespread practice of granting rabbinic reprinting bans came into being. But as we now see, their contrasting views of what degree of rabbinic authority it was possible to preserve and their contrasting approaches regarding how best to preserve that rabbinic authority heavily color their colloquy about Jewish copyright law.

## A. Banet’s Responsum to the Dyhernfurth Rabbi, August 22, 1822

In his initial responsum, Banet sets out a number of grounds for why Heidenberg’s reprinting bans were of no force. In so doing, he narrowly construes Moses Isserles’ ruling in favor of the Maharam of Padua so as to avoid disagreeing with Isserles. The arguments that Banet adduces in his responsa boil down to these:

1. *Under the Jewish law of wrongful competition, a publisher does not generally have a right to prevent reprinting by a second publisher, certainly when the first publisher has already sold out his first print run*.

Banet devotes considerable attention to presenting and analyzing the various paradigm cases that provide the framework for the Jewish law of wrongful competition. He begins with the basic rule favoring free competition absent grounds for a specific exception. Like Isserles, Banet’s primary reference point is the Talmudic case of the Open Alley (“mavoy”).[[75]](#footnote-75) In that case, the majority ruled, rejecting Rav Huna’s contrary position, that a resident of an alleyway (or neighborhood) who is the first to establish a mill for commercial purposes in that alleyway may not prevent a local competitor from opening an adjacent mill. As Rashi explains, the competitor may simply shrug off the incumbent merchant’s complaint with, “Whoever comes to me, let him come; whoever comes to you, let him come.” As we have seen, virtually all Talmudic authorities follow that majority rule, as do the *Mishneh Torah* and *Shulḥan Arukh*.[[76]](#footnote-76)

Banet then canvasses four leading Talmudic cases presenting exceptions to the rule favoring free competition: the cases of (1) the Fish Who Lock their Sight on the Bait (“sayyara”), (2) the Dead End Alley (“mavoy satum”), the Poor Man Reaching for a Crust of Bread (“*‘ani ha-mehapekh ba-ḥarara*”), and (4) the Poor Man Who Shakes an Olive Tree (“*‘ani ha-menaqef be-rosh ha-zayit*”). The first and third cases were cited by the Rome rabbinic court in issuing its reprinting ban in favor of Eliyahu Bakhur. The second was invoked by Moses Isserles in his ruling in favor of the Maharam of Padua. CHECK - -does Rema also discuss others?

1) **The Case of the Fish who Lock their Sight on the Bait (“*sayyara*”):** This case (which also appears in BT Bava Batra 21b, the same pericope as the case of the Open Alley) involves two fishermen, each casting a net in order to catch fish. The Talmud rules that the second fisherman must keep his fishing nets away from a fish that has been targeted by the first fisherman for the full length of the fish’s swim. The reason is *sayyara* (they have set their “sight” on the food.).

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

Of course, every explanation generates its own controversy. The foregoing interpretation attributed to Rashi is not universally shared. In particular, Banet noted that Moses Isserles (known in Jewish tradition as “the Rema”) understood Rashi differently. Under the Rema’s interpretation, the difference between The Fisherman, in which one could justifiably limit competition, on the one hand, and The Open Alley, in which competition could not be stopped, on the other, does not result from the confidence of the first fisherman that he will capture the fish. Rather, the distinction between the two cases involves the certainty of the damage to be caused to the first actor. Because potential mill customers are able to choose to return to the first mill even after the rival mill has opened, damage is not certain; hence, it is not proper to limit competition. Let us say that Reuven operates the first mill and Shimon opens a rival shop. Customers can still go to Reuven. Even if they switch over to Shimon, nothing prevents them from later returning to Shimon. By contrast, because fish essentially have no choice regarding being captured by the fishnets, damage is certain and competition properly may be limited.

Banet in addition adduced the view of Mordekhai ben Hillel (1250-1289), who invoked the doctrine of *ma’arufia* on this point. Dating from France and Germany in the tenth century, that concept refers to a recurrent Christian client (nothwithstanding the Arabic etymology of the word itself).[[77]](#footnote-77) It prohibits one Jew from attempting to “steal” another’s established commercial client. The rationale for this principle is that the first Jew has invested time, money and effort in order to achieve the special business ties that he has nurtured with his *ma’arufia*, and thus no one else should be permitted to interfere with the relationship. According to Mordekhai ben Hillel, those Jewish communities that follow the doctrine of *ma’arufia* (the custom is not universal) consider the Gentile client’s patronage to be “certain,” akin to a “fish that has set its eye on the bait,” as it were.[[78]](#footnote-78)

2) **The Case of the Dead End Alley (“*mavoy satum*”):** As also elucidated by the Rema in his ruling, this case -- a variant of The Open Alley – was initially offered by the Aviasaf, a compendium of commentary and rulings from German scholar Eliezer ben Joel Ha-Levi (1160-1235).[[79]](#footnote-79) It involves the resident of a community who operates a mill at the terminus of a dead-end alleyway. According to many rabbinic authorities—even those who reject Rav Huna’s minority position regarding the Open Alley—the first mill owner here *can* prevent a competitor from opening up a new mill near the open end of the dead-end alleyway.[[80]](#footnote-80) These authorities explain that, because the two mills are located in an alleyway with only one entrance, customers cannot reach the first mill without passing by the door of its newly-opened competitor, and therefore will end up doing business with this competitor rather than continuing on to the first mill. Under these circumstances, the first mill owner located inside the alleyway may prevent his competitor from entering the market and opening another mill closer to the entrance of the alley, given that damage to the first mill owner as a result of such competition is certain. In this case, the second mill owner is infringing upon another’s business practices.

To summarize, the damage that occurs to the first fisherman when the second fisherman uses his nets to try to catch the same fish is considered “certain,” because otherwise the fish would have automatically gravitated to the first fisherman’s net. By contrast, in the Open Alley, the damage to the first mill owner is speculative, because a potential customer might choose to return to the equally proximate first mill owner after doing business with the new, competing mill. In the case of the Dead End Alley, however, inasmuch as every customer of the first mill now has to pass by the new shop, the damage again becomes virtually certain.[[81]](#footnote-81)

**3) The Case of the Poor Man Reaching for a Crust of Bread (“*‘ani ha-mehapekh ba-ḥarara*”):** This case (BT Kiddushin 59a) involves a poor man who finds a crust of bread that is ownerless and tries to take it. A second man comes along and grabs it first. The Talmud explains that, in this case, the second man is considered to be an “evildoer.”

That phraseology is deliberate. Let us imagine that Reuven owns a crust of bread outright and Shimon comes along to take it. In that instance, Shimon is a *thief* and subject to the full force of Torah law, including restitution and a fine [Exod. 22:3]. Reverting to the instant case, by contrast, the second man who obtains the bread that was sought by the poor man is called an *evildoer* by analogy to a thief, but is not *actually* a thief. The difference, in practical terms, is that the usurper is subject to moral condemnation, but does not incur the monetary consequences that would attend outright theft.

**4) The Case of the Poor Man Who Shakes An Olive Tree (“*‘ani ha-menaqef be-rosh ha-zayit*”):** This case (Mishnah Gittin 5:8) involves a poor man who climbs to the top of an ownerless tree to knock some olives to the ground, so that he may collect them after he comes down. After the olives land on the ground, a second person appears on the scene to gather them before the first man can climb down to collect them. According to the sages of the Mishnah, the conduct of the second person, albeit not outright theft once again, is treated as such in an adjacent category, “theft because of the ways of peace.” The rabbis reach that determination so as to avoid arguments, fighting, and hatred between people.

Under the minority view of Rabbi Yosi (a second-century tanna typically mentioned in the Talmud without any patronymic), the second person, pursuant to rabbinic law, is treated no differently from an actual thief. Accordingly, the court may order the olives to be removed from the second person and returned to the poor man who shook the tree. Nevertheless, the majority view does not go that far. It disallows the poor man from affirmatively going to court to reclaim the olives; as a practical matter, therefore, it merely treats the second man as the same type of “evildoer” condemned in the previous case.

Having enumerated the paradigmatic exceptions to the rule favoring free competition, Banet proceeds to distinguish them from the case of the second publisher who wishes to reprint the first publisher’s book. Banet initially suggests that one could learn from The Poor Man Who Shakes the Olive Tree that the second publisher should be liable for “theft because of the ways of peace,” giving due consideration to the toil and effort undertaken by the first publisher to produce his set of maḥzorim. Banet explains that the first publisher had toiled hard to put together a definitive Hebrew text and to translate the maḥzor into the vernacular; now, the second publisher had come along in an attempt to benefit from the first person’s effort.

Despite that wind-up, however, Banet concludes that the case before him is not like The Olive Tree and therefore did not implicate “theft because of the ways of peace.” Banet notes that, in both that case and the case of the Poor Man Reaching for a Crust of Bread, the second person wanted to take the exact item that the poor man had toiled to obtain. By contrast, in the case of the publishers, the second is not taking from the first the same exact set of maḥzorim that the first had worked so hard to produce. Rather, the second is printing his own set of maḥzorim. The first publisher objects not because the second is taking an item from him but rather because customers – potential customers – of the first publisher will now purchase books from the second publisher instead. Where have we ever seen, asks Banet rhetorically, that a person who works hard to produce an item acquires the *purchasers* of that item as a result of his hard work, such that another cannot come along and try to convince those purchasers to acquire a competing item from him, rather than from the first actor? According to Banet, the notion that an individual has certain rights with respect to an item merely because of the effort he undertook in connection with that item applies only to the very item itself and not to prospective purchasers of that item. Therefore, this case is not like Crust of Bread or the Olive Tree—for, in both those instances, the very crust of bread or olives that Revuen desired were scooped up by Shimon. In this case, however, the very maḥzorim published by Reuven would not be sold by Shimon, as Shimon had instead printed up alternative physical maḥzorim that customers might purchase.

In addition, Banet notes that the case of the competing publishers is not one that involves certain damages or clear profit to the first publisher. The first publisher cannot say with certainty that the public would buy his maḥzor, particularly inasmuch as Heidenheim sold his maḥzor at an expensive price. For that reason, “the fish had not set their eye on the bait,” as it were, allowing Banet to conclude that this case also is not like that of the Fisherman.

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

2. *The Rema’s ruling in favor of the Maharam of Padua concerned a special case and is not applicable beyond its highly particular facts.*

Banet conclusion that the Jewish law of wrongful competition does not support the enforcement of a reprinting ban against the second publisher would appear to put him a collision course with the famous ruling of the Rema in favor of the Maharam of Padua. However, Banet carefully interprets the Rema’s ruling so as to highlight distinct aspects of that case and ruling that distinguish them from most cases involving second publishers, including the case before Banet.

First, Banet asserts that once the Maharam of Padua received the right to publish the works of Maimonides, the Maharam was confident that others would purchase these works because they were dear to all. Therefore, the case was similar to Rashi’s explanation of The Fisherman—meaning that the Maharam was entitled to prevent his competitor, Giustiniani, from publishing an infringing version.

Second, Banet maintains that Issserles ruled in favor of the Maharam because Giustiniani had announced in advance that he intended to sell his competing version of the *Mishneh Torah* for one gold coin less than the Maharam, and Giustiniani, according to the Rema’s ruling, was unusual in that he had the financial resources to sell his version at that sharply reduced rate. Therefore, Banet explains, the Rema could bar Giustiniani’s publication of his competing version because it involved “certain damage” to the Maharam of Padua. In general, however, a competitor should be allowed to enter the marketplace and sell his competing product at a lower price. In the usual case, in which competing merchants do not have the resources to absorb losses from selling at a below-market rate, it is permissible to compete by selling at a lower price. As Banet notes, in the Open Alley case, the Talmud permitted a competing resident to open up a second mill and was not concerned with the possibility that the second mill owner would sell his products at a lower price, thereby causing damage to the first mill owner.

Third, Banet contends that, in the case before Isserles, Giustiniani proclaimed that he would publish his competing version of the *Mishneh Torah* at a below-market price with the specific aim of causing financial ruin to the Maharam of Padua and his publisher and Giustiniani’s rival, Alvise Bragadini. Therefore, the Rema’s ruling can be conceptualized as providing protection to the Maharam against predatory pricing. Isserles was holding only that a publisher, like any other merchant, may not sell his works at below market price with the intent to drive his competitor out of business. Banet contends, in contrast, that the second publisher in the case before him had no intent to harm the first publisher, but merely was seeking to benefit himself. Therefore, the second publisher would not lower the price of his competing maḥzor if it would result in him suffering a loss (in contrast to Giustiniani). Alternatively, if the second publisher were able to lower his price, then the first publisher would also be able to reduce his price (in contrast to Bragadini), thereby reducing the overall market price for maḥzorim and “may a blessing come upon both publishers” for such conduct! Banet therefore concludes that, in this case, where the second publisher actually seeks to publish his competing maḥzor without reducing his price, that attempt to enter the market does not result in “certain damage” to the first publisher and therefore should be permitted.

Fourth, Banet suggests that Isserles’ ruling is limited to cases in which both publishers operate in the same location and is thus inapplicable where the second publisher prints and sells his maḥzor in a different territory than the first. As Banet notes, according to Rav Huna’s minority view, a resident of an open alleyway can prevent both a resident of a different alleyway and a resident of his own alleyway from opening up a competing business in the first resident’s alleyway. However, even according to Rav Huna, a resident of one community may not prevent a resident of a different community from opening up a competing business in that second community. According to Banet, it is “possible” that the Rema’s ruling was based on the fact that both the Maharam of Padua and Giustiniani were located in the same “alleyway” (*i.e.*, the province of Veneto). Alternatively, Banet posits that, because both the Maharam and Giustiniani were sending their competing versions of the *Mishneh Torah* to the same places where potential customers were located, it was *as if* both were located in the same alleyway. By contrast, what right does a person in one city have to prevent a person in a different city from engaging in a competing business?[[82]](#footnote-82) If a person possessed such a right, then all commerce would be nullified and the first person who engaged in a particular business and sent his products to the marketplace would be able to bar all others from engaging in a similar business anywhere in the world.

Finally, Banet asserts that the two cases are distinguishable because government regulation is different in his own day than it was three centuries earlier when Isserles ruled. Banet notes that governments in his own time give permits to those who want to engage in publishing and other forms of commerce. Through this system, the king collects taxes, people make a living, and the commercial world is able to function. Therefore, how would it occur to someone that one person would be able to prohibit another from competing with him? Such a prohibition would violate the “law of the land” permitting such competition – and in commercial matters, Jewish law typically gives way before the law of the land. Banet surmises (incorrectly) that, in Isserles’ time, kings must not have overseen printing at all, and publishing was undertaken without permission or permits. Now, however, when everything is done with permission of the king, a person in one city does not have the right to prevent someone in a different city from engaging in competition.

3. *Absent a violation of the Jewish law of wrongful competition, rabbis lack the authority to issue and enforce a reprinting ban unless doing so would not impose any loss on the second publisher.*

After determining that the unauthorized reprinters of the Roedelheim mahzor do not violate the Jewish law of wrongful competition, Banet turns to another serious question raised by his analysis: If a competing publisher is neither guilty of “theft because of the ways of peace” nor considered an “evildoer,” where did the sages of earlier generations derive the right to issue bans that result in a benefit to the one person and a loss to his competitor? According to Joseph Colon ben Solomon Trabotto (c. 1420 – 1480), Italy's foremost Judaic scholar and Talmudist of the latter part of the fifteenth century and known in Jewish tradition as “the Maharik,” even the greatest rabbi of the generation is not allowed to issue a regulation that results in a commercial benefit to one person and a loss to the other, except in exigent circumstances.[[83]](#footnote-83) The Maharik’s precept follows from that of some leading rabbinic authorities.[[84]](#footnote-84) But it is not the majority view; most medieval authorities permit taking property from an individual pursuant to a regulation duly enacted by majority vote.[[85]](#footnote-85) Nevertheless, Banet presents the Maharik’s precept as the normative position and then seeks to elucidate why most reprinting bans are nevertheless permitted, while the bans on reprinting the Roedelheim maḥzor run contrary to the Maharik’s precept and thus may not be enforced.

Banet first explains that the Rema could ban Giustiniani’s competing version of the *Mishneh Torah* without violating the Maharik’s precept because the Rama’s ban did not cause Giustiniani any actual loss—for, were it not for the work of the Maharam in producing his edition of the *Mishneh Torah* (with the Maraharam’s original annotations, corrections, and additions of commentary), Giustiniani would have had nothing to begin with. The factual premise here is that Giustiniani’s edition copied heavily from the Maharam’s edition and thus that Giustiniani could not have prepared his edition of the *Mishneh Torah* unless the Maharam had first prepared his. (As we discussed in Chapter 4, this factual premise – whether it is the Rema’s or Banet’s – is probably not accurate; it seems that Bragadini copied as much or more from Giustiniani than the other way around.)

Proceeding to the case before him, Banet then asks how, given the Maharik’s precept, one could possibly justify reprinting bans that rabbinic authorities have frequently issued for new editions of books that had previously been printed, such as the maḥzorim at issue in this case. The difficulty is that if the reprinting bans on the Roedelheim maḥzor are enforced, Heidenheim will benefit, but other publishers will be harmed. Banet explains that, prior to the Heidenheim’s preparation and publication of the Roedelheim maḥzor, publishers regularly printed older versions of the maḥzor. However, now that the Roedelheim maḥzor has been published, it has become the standard, such that no one would purchase a maḥzor that did not have the same content and format as the Roedelheim maḥzor. As a result, if the bans on reprinting the Roedelheim maḥzor are upheld, the other publishers will lose out entirely; they will both be prohibited from publishing the new standard version of the maḥzor and will be left with no market for the older versions that they had previously published. (Banet seems implicitly to distinguish the case of Giustiniani, first, on the grounds that Giustiniani had not previously invested in publishing an edition of the *Mishneh Torah* and, second, by assuming that Giustiniani could have published and sold an alternative versions if he had wished.) Therefore, to enforce according to the precept enunciated by the Maharik, the bans on reprinting the Roedelheim maḥzor would violate the precept enunciated by the Maharik that rabbinic regulation may not benefit one while causing monetary harm to another.

However, Banet intimates, the Roedelheim maḥzor is a special case. In most instances, no particular edition of a previously printed book becomes the indispensable standard edition for that work. As a general rule, therefore, publishers do not suffer a loss if the publisher of a particular edition enjoys a reprinting ban for that edition. Indeed, each publisher would benefit from a reprinting ban for his particular edition, while other publishers would be free to continue to market their editions. Sometimes publisher A would be the first printer and would be able to restrain B and C; when another work arose to be printed, B might be the printer, and could act to restrain A, and C; and, on another occasion still, C would be the one to benefit. Accordingly, Banet concludes, the sages of previous generations must have instituted the practice of issuing bans on reprinting new editions of previously printed books (as well as of newly authored books) because all publishers stood to benefit from that practice. In this way, the customary ban arose with consent of all concerned.

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

4*. In any event, reprinting bans are meant only to secure investment in the publisher’s first print run and thus may not be enforced after the publisher has sold his first print run*.

Banet next addresses the policy reasons that might justify the ban contained in rabbinic approbations. The sages, he surmises, may have imposed bans (such as the one included in the Roedelheim maḥzor) to strengthen and protect from harm those who perform religious commandments by publishing books of Jewish liturgy and learning. If observant people (Heidenheim being the obvious example) were worried that others would be able to publish whatever they chose, they would be inhibited from publishing such books for fear that they would suffer a loss via subsequent competition. Reprinting bans imposed by the sages would alleviate this fear and thus enable publishers to invest in their initial printing. Banet adds, however, that if this is the purpose underlying reprinting bans, those bans should last only until the first publisher has sold out his initial print run, presumably since selling out the initial print run is sufficient for the publisher to recover his investment. The imposition of a ban for a long period of time, which would prevent others from reprinting a book of Jewish liturgy or learning even after the first person sold out his print run, is inappropriate, and is not supported by the above rationale.

5. *Even if reprinting bans are enforceable, they are not enforceable outside the territory in which they were issued.*

Banet further concludes, citing a ruling of R’ Isaac bar Sheshet Perfet (1326-1408; known in Jewish tradition as “Rivash”) that a rabbinic court has no authority to issue a ban that purports to apply outside the court’s territory.[[86]](#footnote-86) The Rivash’s ruling followed on earlier precedent that limited the force of halakhic rulings to the territory of the rabbi who issues the ruling.[[87]](#footnote-87) According to Jewish tradition, the ancient Sanhedrin, a supreme court consisting of 71 judges that convened in Jerusalem, did have legal authority to issue rulings that were universally binding on the Jewish people. Further, following the dissolution of the Sanhedrin in the mid-fourth or early fifth century, rabbinic judges throughout the Jewish world generally recognized the central authority of the Babylonian Geonim, who headed the two leading academies of Jewish learning during the period 589-1040. Since that era, however, neither Jewish law nor rabbinic tradition has recognized any supreme rabbinic authority. Rather, halakhic interpretation and rabbinic regulation and decrees are binding only within the territory of the rabbis who issued them, even if certain rabbis exert considerable influence on their fellow posekim by virtue of the force of their reasoning, position, and personality. And, again, according to the Rivash, *a fortiori*, the power of a rabbinical court to issue a ban carrying a penalty of excommunication is limited to the territorial jurisdiction of the court. Hence, following the Rivash, Banet concludes that the reprinting bans issued for the Rodelheim maḥzor could have no force outside the territory of the rabbis who issued them, and were thus of no effect across the border in the Prussia and Austria.

6. *Reprinting bans that are merely printed in the book they aim to protect are not enforceable because a ban carrying a penalty of excommunication must be pronounced orally in a synagogue*.

Banet further attacks the validity of reprinting bans by citing authority that a ḥerem, like an oath, is effective only if pronounced orally in front of the community. A ḥerem that is promulgated only in writing, including in a printed form in a book, is void from the outset. The rule requiring that a ban be pronounced orally in synagogue provides further support for the understanding that bans are effective only in the local territory where they are issued. If a ban must be orally pronounced and heard in the community where it is issued, it will not have effect against someone who lives elsewhere and thus could not have heard it.

7. *Even if reprinting bans are enforceable in principle, they should not be enforced today, the reason being that since the rabbinic bans cannot, in practice, be enforced against Christian publishers, enforcing them against Jewish publishers will only harm the Jewish publishers without benefiting the beneficiary of the ban.*

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

Banet concedes that, in certain situations, the “Light of the Exile,” Rabbenu Gershom ben Judah (c. 960 -1040? -1028?), had imposed a ban carving out exclusivity in certain retail markets in order to save Jewish store owners from the losses that would arise from mutual competition. But Banet adds that if circumstances were such that non-Jews were willing to engage in competition with the Jewish store owner, then another Jew was also permitted to engage in such competition—for any other rule would simply leave the field open to Gentiles. Banet also cites the responsa of the Maharshal, Morenu Shlomo ben Yechiel Luria (Poland, 1510-1573), regarding the technical issues of an *arenda* (from the Polish for “leasehold”)— in essence, a concession that a person receives from the government or a nobleman for the sale of particular goods, typically a monopoly on distilling[[88]](#footnote-88) or estate management.[[89]](#footnote-89)

In the arenda and other situations where prohibiting Jewish commerce would simply open the field to Gentile competition, Banet concludes, Rabbenu Gershom did not impose a ban. Therefore, in the case before him, if “the printer in Vienna” (a) has the right to engage in printing, (b) can print what he chooses, and (c) has received a copy of the Roedelheim maḥzor from Heidenheim’s partners,[[90]](#footnote-90) and if no other Jewish printer but Heidenheim has the right to print the Roedelheim maḥzor in his land, then this printer in Vienna would reprint the maḥzor and distribute it throughout the world. Better, therefore, is a ruling that other Jews have the right to reprint the Roedelheim maḥzor, so that the printer from Vienna would not be able to walk into a wide open market. For, in either case, Heidenheim would lose business—either from the non-Jewish Viennese printer or from the other Jewish printers who would compete with him. The conclusion follows that the sages would not impose a ban on reprinting the Roedelheim maḥzor, because such a ban would be counterproductive.

B. Sofer’s Response to Banet, March 7, 1823[[91]](#footnote-91)

## Sofer begins by quoting in its entirety Banet’s reply to Sofer’s request that Banet join him in issuing an approbation and reprinting ban for the forthcoming book, *Oryan T’litai.* Banet’s reply rehearses some the principal arguments regarding the invalidity of reprinting bans that he set out in his Responsum of August 22, 1822. And Banet notes explicitly that he has recently written “in the same vein to the rabbi of the holy community of Dyhernfurth.” Banet expresses skepticism about the need for approbations as well. He suggests that buyers of books know full well when a book is one of high quality and thus that rabbinic imprimatur is superfluous. The only reason for issuing haskamot, Banet states, is to decree a reprinting ban, but, for the reasons he enumerates, reprinting bans should not be issued. Banet concludes his letter by stating that, “out of respect” (whether for the book’s author or Sofer is unclear), he is nevertheless willing to issue an approbation for the book, but not a reprinting ban.

Sofer then responds to Banet with a number of arguments.

1. *The practice of issuing approbations is necessary to ensure the integrity of texts of Jewish liturgy and learning*.

Sofer expresses surprise that Banet seems to be prepared to eliminate the traditional practice of providing approbations and bans. Sofer insists, rather, that haskamot are vitally important even in connection with the republication of old and ancient books. Sadly, Sofer continues, the practice of securing haskamot has come to be disregarded, and as a result two negative consequences have ensued: First, the Jewish people have become inundated with inaccurate and heretical texts.[[92]](#footnote-92) Second, publishers of new books name them with a title of an already published book, thus misleading readers who mistakenly think that they are buying the original book. [[93]](#footnote-93) Thankfully, Sofer adds, there are still God-fearing people who will only buy a new book if they see that it contains a haskama from an esteemed rabbi.

2. *Reprinting bans are grounded in the Jewish law of wrongful competition*

Sofer then proceeds to defend rabbinic reprinting bans. He argues, first, that reprinting bans are a venerable rabbinic vehicle for protecting publishers against *hasagat gvul*, the type of wrongful competition that is prohibited in the Pentateuch. The key biblical text here is: “Thou shalt not remove thy neighbor’s landmarks” (Deut. 19:14). The simple meaning refers to moving the marker between two adjacent fields, essentially as a way of permanent trespass or “stealing” that land. But, inasmuch as theft is already prohibited as part of the Ten Commandments, that particular verse could be considered otiose. Therefore, later rabbinic law applied it generally to every attempt to encroach unfairly on a neighbor’s property, or even his means of earning a livelihood.[[94]](#footnote-94)

Along those lines, Sofer contends, from the day that printing was established, rabbinical authorities issued a *gezeirat irin* or “heavenly decree” – a decree that is immutable and universal in scope -- against all who would “trespass” on a publisher’s livelihood by reprinting the publisher’s recently issued book of Jewish liturgy or learning.[[95]](#footnote-95) The rabbis did so in order to ensure that those who engage in mitzvot will not be harmed. The prohibition against trespass set out in rabbinic reprinting bans, Sofer continues, is more critical and fundamental than the exclusive entitlements accorded under arenda, *ma’arufiya*, and the principle of the Poor Man Who Shakes an Olive Tree. For with regard to those exclusive entitlements, if a merchant is unable to make a profit in one place due to competition in that location he still might be able to make a profit by setting up his business elsewhere. For that reason, rabbis did not protect those exclusive entitlements by ordering a ḥerem against violators. In the case of publishers, however, it is impossible to publish a book without making a large initial investment of money and labor. As a result, reprinting without that publisher’s permission will always cause the publisher a considerable loss. It was for this reason and on this doctrinal basis, Sofer maintains, that the Rema forbade the reprinting of the Mishneh Torah by the second printer, Giustiniani, and that other rabbinic authorities have issued similar edicts forbidding reprinting and backed by the sanction of ḥerem.

3. *Policy favors reprinting bans*

Sofer maintains further that even if rabbinic reprinting bans were not grounded in the halakhic prohibition against wrongful competition, it would be fitting to issue a rabbinic edicts banning reprinting. If we do not provide for such edicts, no one will enter the printing trade, and publishers of books of Jewish liturgy and learning will vanish. And if there are Gentile publishers who do not abide by such edicts, rabbinic authorities can prohibit Jews from buying books reprinted in violation of a ban – and such prohibitions on buyers will be productive.

4. *Reprinting bans are enforceable outside the territory where the ban was issued*.

Sofer grants Banet’s point that a rabbi may not generally issue a decree that is binding in another country. However, Sofer insists, there is an exception for reprinting bans. The rabbinic edicts establishing the universal enforceability of reprinting bans are of ancient origin. The reprinting bans were originally issued our sages to be applied to all of Israel, wherever they may be.

5. *Reprinting bans are valid and enforceable even in an age in which imperial and other secular authorities grant licenses for printing and forbid rabbinic bans.*

Sofer vociferously challenges Banet’s contention that reprinting bans should not be issued in an age in which imperial and secular authorities regulate business and forbid rabbinic bans. As Sofer dramatically puts it: “Is it really the case that I – a rabbinic authority -- am just a mouthpiece for the King and a protector of the government that forbids us to place a ban (ḥerem) on anything? No, I am one who reminds others of their obligations under Jewish law to abide by the halakhic prohibition against wrongful competition.”

Sofer also questions whether imperial authorities will perceive rabbinic reprinting bans as an affront to their prerogatives. The King, Sofer argues, earns tax revenue from publishers regardless of what books they publish. Thus, it should not matter to the King, if publishers reprint a book or, in order to comply with a reprinting ban, must print a different book. The King will earn his revenue either way.

Sofer’s resolute support for rabbinic reprinting bans is striking given that he elsewhere advocated acquiescence in government-imposed restrictions on the rabbinic power of excommunication and public condemnation. In response to the reforms at the Hamburg Temple, Hamburg’s traditionalist rabbinic court initially asked colleagues throughout Europe to join it in a public condemnation of the transgressors. While agreeing that the reformers deserved public condemnation, Sofer expressed reservations about that course of action:

And despite this I uphold the word of the king … for thus did the king, may he be exalted, command upon all the principals of his household and kingdom, to close the mouth of the lions, not to let them whisper or curse, and not to strike with the rod which does not draw blood. We are commanded by the Supreme power not to transgress the law of the land, and he has decreed, and who can undo it?

Sofer’s embrace of continuing rabbinic authority to issue reprinting bans versus his reticence to issue a ban and public condemnation against the Hamburg reformers is puzzling. Perhaps Sofer viewed reprinting bans regarding books of Jewish liturgy and learning as more central to rabbinic prerogatives. Or perhaps he believed that government authorities would be more sanguine about local enforcement of rabbinic reprinting bans than they would about a public condemnation and ban on the reformers jointly issued by leading rabbis from several countries.

C. Banet’s Response to Sofer, April 11, 1827[[96]](#footnote-96)

In his response to Sofer, Banet directly takes on Sofer’s principal arguments.

1. *Sofer is incorrect about the origins of the reprinting ban.*

Banet begins by taking on Sofer’s assumptions about the temporal and doctrinal origins of the reprinting ban. According to Banet, Sofer erred in stating that rabbinic authorities throughout the Jewish world joined in issuing reprinting bans to protect against wrongful competition at the birth of print. In fact, Banet counters, in most books published more than 100 years ago there is no mention of a reprinting ban. Rather, such bans have become prevalent only in recent times, having been sought by those who would “use the Torah as a spade.” That reference to using the Torah as a spade is harsh. It follows a traditional rabbinic trope of condemnation—inasmuch as Torah occupies its own supernal realm, it is highly inappropriate to use it “as a spade,” *i.e*., as a mere instrumentality to for personal profit.[[97]](#footnote-97)

2. *Reprinting bans do not serve the purpose of protecting from harm those who engage in mitzvot (i.e., publishing books of Jewish liturgy and learning)*.

Banet counters Sofer’s argument that, in protecting publishers of books of Jewish liturgy and learning from the harm of wrongful competition, reprinting bans serve the goal of protecting those who engage in mitzvot from harm. That proposition is difficult to accept, Banet concludes, “for aren’t the publishers that come afterwards equally engaging in amitzvahby producing books that can be purchased at low cost?”[[98]](#footnote-98) Moreover, most printers are not intending at all to engage in amitzvah, but instead are just out to make a profit. Someone who labors in his study to create a new book might qualify as one who engages in mitzvot, while those who reprint such a book might not, since they are able to publish the book of Jewish learning only because of mitzvah already performed by the first author-publisher. However, if the first publisher is merely printing an old book, he no more qualifies as one who engages in mitzvot than the second publisher.[[99]](#footnote-99)

3. *The doctrinal basis for reprinting bans is consensus among those in the publishing trade, not wrongful competition*.

Reiterating a point he made in his first responsum, Banet maintains that there has never been such a thing as a rabbinic ban against publishing a book *per se*. Rather, the rabbis of previous generations who instituted reprinting bans did so upon the request of book publishers for the publishers’ mutual benefit. The doctrinal basis for reprinting bans is thus something akin to trade guild regulations, not wrongful competition. Here Banet cites Shulḥan Arukh*, Ḥoshen Mishpat* 231:28, which sets forth the rights of members of a given trade to establish among themselves uniform norms – in essence guild regulations -- and to punish those who do not conform to those norms. Effectively, publishers agreed amongst themselves: “Today it will be profitable for this publisher to have an exclusive right for a period of years to publish a particular book and subsequently it will be profitable for another publisher to print his book with the protection of a reprinting ban.” However, when rival publishers object to the issuance of reprinting bans, such bans are no longer an expression of uniform trade agreement and are thus of no force and effect.

Moreover, in our day, Banet continues, the guild regulation rationale for reprinting bans no longer applies. Today most publishers are non-Jews and thus not obligated to abide by our reprinting bans. Indeed, a growing number of Jews also flout the sanction of ḥerem. Under those conditions, enforcing reprinting bans would no longer be to the mutual benefit of all publishers. Rather, upholding the ban against a would-be reprinter would only harm that publisher, while not ensuring the profit of the first publisher since Gentiles and non-observant Jews would still be free to reprint the book.

4. *Rabbinic efforts to enforce reprinting bans will lead to confrontation with government authorities*.

Banet takes particular issue with Sofer’s contention that the government does not care which publishers have the right to print which books, so long as all publishers pay the applicable taxes to the government each year. Banet counters that he has personally tested the validity of that proposition. It is here that he recounts his bitter experience in being hauled before the authorities in Bruenn and threatened with prosecution for rebelling against the government for publicizing the reprinting ban on the Roedelheim maḥzor.

D. Sofer’s Final Rebuttal (Undated)[[100]](#footnote-100)

Sofer’s final rebuttal to Banet canvasses a number of arguments, ranging from wrongful competition to policy dictates.

 1. *Reprinting bans protect publishers against wrongful competition*.

Sofer begins his final rebuttal to Banet’s arguments by stating, “I have now reviewed the laws of *yored l’omanut ḥavero*,” meaning the various doctrines and cases that, together, make up the Jewish law of wrongful competition. Aside from providing citations and a mnemonic for anyone who wishes to study the cases outlined in Banet’s first responsum and enumerated above, Sofer quickly moves on to other possible grounds for supporting rabbinic reprinting bans.

But Sofer later returns to the wrongful competition cases and contends that publishers are especially worthy of protection under the Jewish law of wrongful competition. Sofer first refers to the Case of the Fish Who Lock their Sight on the Bait. Recall that Rashi and other authorities held that reason why competition may be limited in this case is that the first fisherman is certain to catch the fish when the second fisherman interlopes and takes it from the first. In contrast to Banet, who held that publishers cannot say with certainty that the public will buy their books, Sofer contends that, given the longstanding custom of granting reprinting bans, publishers have, indeed, come to be certain that no other publisher will come and encroach upon their livelihood by reprinting their books. Moreover, continues Sofer, the damage that would be caused to a publisher from such an encroachment would be far more severe that that caused to the fisherman or the first to set up a mill on an open alley. Publishers typically invest large sums of their own savings in printing a book. They would thus suffer severe personal harm, not just a diminution in profit, from the encroachment. Finally, Sofer avers, the second publisher can always print a different book rather than reprinting the first publisher’s book, just as the other fisherman can move their nets away from that of the first fisherman. In such circumstances, a reprinting ban, backed by a threat of ḥerem, is definitely warranted.

2. *The jealousy of scholars and teachers*.

Sofer notes further that even Rav Huna—whose minority view, it will be recalled, would accord the first merchant to set up shop in a neighborhood to prevent another from setting up a competing business in that location—permits unrestricted competition in the area of Jewish education. The reason is the Talmudic injunction, set out in the same passage in which Rav Huna debates the majority who favor free competition, that the jealousy of scholars and teachers (literally “scribes”) fosters greater wisdom: *kin’at sofrim tarbeh ḥokhmah* (BT Bava Batra 21a). In invoking this injunction, Sofer quotes a version of the Talmudic passage that puts the injunction in context: “Perhaps we should fear [that the second teacher will put the first teacher out of business and then, without any competition] he will be indolent? And [the Talmud] then replied: ‘the jealousy of teachers increases wisdom.’” The Talmud reasons that teachers of Jewish learning are inherently driven to strive to exceed the knowledge and intellectual prowess of other scholars even when they do not face competition in the local market for teachers.

Thus far, Sofer seems to be left with the majority rule that favors free competition and the admission, even among the minority, that there is no reason to hinder free market competition among Jewish scholars and teachers because even if all but one are driven out of business, the remaining scholar or teacher will still be driven to excel in learning and teaching Torah. Indeed, Sofer goes even farther. He surmises that the rule favoring free competition should apply not just to teachers and scholars, but to all who engage in mitzvot (i.e., publishers of books of Jewish liturgy and learning). Indeed, the rationale beyond the rule should apply to all merchants and peddlers, for even merchants and peddlers who are not Jewish scholars and teachers are unlikely to abandon their business (i.e., become indolent) merely because they have successful driven their competitors out of business.

But Sofer then turns these propositions favoring free competition on their head. He draws from them the negative inference that Jewish law does restrict competition, giving the incumbent merchant an exclusive right to engage in his trade, in those cases in which there is reason to fear that a latecomer would drive the incumbent out of business and then become indolent, and thus the rationale behind the “jealousy of teachers” rule does not apply. The relevance of this negative inference to book publishers is quite attenuated, since Sofer nowhere argues that a publisher who drove his competitors out of business would then stop printing books. However, Sofer later states that, unless book publishers are protected by reprinting bans, they would become indolent for another reason: no publisher would invest in publishing books if any other publisher could come along and rob the first of his profit by reprinting the book before the first has sold out his print run.

3. *Rabbis of early ages instituted a practice of issuing reprinting bans to forbid hasagat gvul and ensure that those who engage in mitzvot till not be harmed*.

Sofer counters Banet’s claim that reprinting bans are of recent vintage. He states: “And I have scrutinized books and found proof of the custom of issuing haskamot for nearly 200 years, and it seems that this custom initially commenced after the Maharam of Padua printed the Ramban’s books, and a certain Gentile trespassed upon his boundary, and the Rema issued his decree, as explicated in his response. From this time onwards, the rabbis began to erect fences in front of intruders and routinely inscribed in a haskama that those who engage in mitzvot will not be harmed.” Moroever, Sofer continues, citing a number of related precedents, publishers qualify as persons who engage in mitzvot [shluchei mitzvot] even if they print and sell books of Jewish learning entirely to earn a living, and not for the sake of engaging in a mitzvah in and of itself.

4. *Reprinting bans are not limited by territory, but, in order to protect publishers against wrongful competition, must have worldwide scope*.

Sofer argues that the conditions of the Hebrew book trade require that publishers be protected against wrongful competition throughout the world, not just in their country. In essence, Sofer argues, even though the general rule is that an incumbent merchant may only prevent competitors who would deprive him of his livelihood from entering the merchant’s own town, not engaging in business elsewhere, an exception must be made for book publishers. Sofer states: “It is well known that it is impossible for a publisher earn a livelihood if he does not print hundreds and thousands of books. But we, the nation of God, are a small minority in this country and thus it is impossible that publishers of Jewish books would be able to sell a sufficient amount of books if limited to a local market. Moreover, the books of the Talmud and the writings of rabbinic decisors and commentators are needed only by diligent Jewish scholars and they, because of our many transgressions, are a small minority of the Jewish people…. Accordingly, where book publishers are concerned, the whole world is considered as one town…. And if another person shall reprint the first publisher’s book within a short period – even at a distance of one hundred parsaot [approximately 4,500 kilometers] – the first publisher will not sell his books and he will lose that which belongs to him. Hence, unless protected by a reprinting ban, no person would be fool enough to draw near the printing of books.”

Therefore, Sofer concludes, “it would have been appropriate to erect a fence to protect publishers against wrongful competition even if doing so were not in accordance with halakhic doctrine and even if rabbis of earlier generations did not adopt such a decree *en masse* and as a unified group. In any event, issuing reprinting bans is the custom which everyone has adopted during the past several hundred years.” Sofer then provides a litany of examples in which rabbis have issued reprinting bans for books of Jewish learning.

Sofer continues that he is puzzled as to why the Rema limited his ban on purchasing editions of the Mishneh Torah that competed with those of the Maharam of Padua to buyers in Poland. As an explanation for this territorial limitation, Sofer hypothesizes that since the Rema’s principle grounds for ruling in favor of the Maharam were applicable to wrongful conduct by a rival publisher, not obligations of buyers, the Rema “did not gather the courage to give his ruling application to scholarly buyers outside his territory.”

5. *Reprinting bans may be directed to prohibit* *Jews from buying reprints of books of Jewish liturgy or learning from non-Jewish publishers.*

Sofer also invokes two secondary grounds for the Rema’s ruling in favor of the Maharam of Padua: rabbinic authorities have ruled that Jews can be required (1) to buy from Jewish merchants rather than Gentile merchants, even if the Gentiles sell at a lower price and (2) to give preference to Jewish merchants who are rabbinic scholars. While those injunctions are subject to various qualifications, Sofer maintains that both always apply when the merchants are selling books of Jewish liturgy or learning. In line with that precedent, Sofer holds, rabbinic reprinting bans may forbid Jews from buying a book that has been reprinted by a Gentile publisher in competition with a Jewish publisher. And what of Banet’s harrowing experience in being hauled before the Austrian authorities for disseminating a reprinting ban against purchasing Anton Schmid’s reprint of the Roedelheim maḥzor? Sofer makes no reference to Banet’s testimonial. Rather, as he did in his initial response to Banet, Sofer expresses a steadfast refusal to countenance secular authorities and their laws forbidding rabbis from issuing bans: “We have thus learned that with regards to book publishers, even if he is a book publisher from the Nations [i.e., a Gentile] who is not required to carry out the rulings of the Sages of Israel; and moreover, even if the government has prohibited the import of books from outside of the country to within the country, and it is thus impossible to bring those books to the country,” Jews may still be prohibited from purchasing the Gentile publisher’s reprinted edition.

6. *Applied to Wolf Heidenheim*

Finally, Sofer relates that he had received a letter from Ẓvi Hirsh Horowitz, praising Heidenheim and asking that the twenty-five year reprinting ban issued on Heidenheim’s behalf be enforced. Quite possibly, that letter was the same written appeal that Horowitz had sent to Mordekhai Banet and other rabbinic authorities in 1807. But it would likely have had special significance for Sofer, who had been a devoted pupil of Ẓvi Horowitz’s father, Pinḥas Horowitz, issuer of one of the reprinting bans in favor of Heidenheim.[[101]](#footnote-101) As Sofer recounts from the letter:

[Heidenheim] spent a large amount of time proofreading religious hymns and translating them into the language of Ashkenaz [German]. And if it wasn’t for him, the hymns would have already been absorbed [in the earth and forgotten] and, as is well understood, would not have been recited by these generations. [But] he endeavored and gathered an amount of books for the hundreds [of worshipers] who needed this undertaking, and expended a great deal of money and established his books, and [he] still remains accountable [for unpaid debts].

Moreover, Sofer continues:

And our pious *Gaonim* and *Rabbis* of Ashkenaz, may their righteous memories be blessed, have determined that his reward should consist of reserving the market for 25 years, so that no other person shall trespass upon his boundary, since he was unable to print a sufficient amount [of *machzorim*] for all of Israel, for 25 years, at a single moment in time. Hence, he prints and reprints [the books at various intervals], and he [may] secure his reward for all of [the merchandise].

Sofer concludes that “the other publishers should publish different *maḥzorim* or other books, for why should they benefit from that which he [Wolf Heidenheim] has created?” The other publishers are like the interloping fisherman in the Case of the Fish who Lock their Sight on the Bait. They should be required “to remove their nets the distance of a *parsa*,” so that that they must seek to catch other fish.

E. Conclusion

In sum, Mordekhai Banet held that rabbinic reprinting bans are grounded in a consensus agreement among the publishing trade – essentially guild regulations, not the halakhic doctrine of wrongful competition or, at least with respect to editions of books that have already been in print, rabbinic authority to protect those who engage in mitzvot. Accordingly, rabbis have no authority to issue a ban that helps one publisher at another’s expense. Further, even if rabbinic reprinting bans are valid exercises of rabbinic authority, they may not be enforced outside the territory in which they were issued or after the publisher has sold out his edition and thus recovered his investment. Finally, Banet argued that reprinting bans are counterproductive because, by preventing Jewish publishers from reprinting, they merely leave the field open to non-Jewish publishers, who are not bound by the bans.

In contrast, Moses Sofer ruled that rabbinic reprinting bans serve to enforce a publisher’s right against wrongful competition under fundamental tenets of halakha. Further, even if publishers did not have such a right, rabbinic reprinting bans would be a necessary measure to promote the publication of books of Jewish liturgy and learning and to protect those who engage in the mitzvah of publishing such works. Moreover, since publishers’ markets extend across borders, bans must be enforceable throughout the Jewish world, not just in the territory where issued. Finally, bans may be enforced even in an age of competition from non-Jewish publishers and secular governments’ contraction of rabbinic autonomy. Bans may prohibit Jews from buying illicit editions and kings should not object so long as they receive tax revenue from the Jewish publisher who benefits from the rabbinic reprinting ban.

Sofer’s responses to Banet were not his last word on the subject of copyright. As we shall see in the next chapter, he later presented grounds to limit the scope of rabbinic reprinting bans and seemed to back away from his insistence that rabbinic reprinting bans serve to enforce publishers’ right against wrongful competition.

1. Our discussion of the Yiddish Bible dispute draws upon Aptroot 1993; Aptroot 1989; Fuks and Fuks-Mansfield 1987: 236-240, 269-270, 289-298, 319; Haberman 1978: 294-309; and Timm 1993. Fayvesh is also known as Phoebus. His Dutch name, under which he was registered in the Amsterdam printers’ guild, was Philips Levi. [↑](#footnote-ref-1)
2. Stern hailed from Frankfurt-on-Main, but was soon to move to Amsterdam. [↑](#footnote-ref-2)
3. On Athias’ English, Spanish, and Hebrew editions, see Haberman 1978: 294-300. [↑](#footnote-ref-3)
4. Fuks and Fuks-Mansfield 1987: 296-97. [↑](#footnote-ref-4)
5. Timm 1993:55. On the other hand, the haskama in favor of Fayvesh is far more perfunctory than that given to Athias and states simply that Fayvesh’s edition would be useful to men, women, children, and youths, without any differentiation between them. Nor, unlike the Athias haskama and, for that matter, those of the Amsterdam rabbis in favor of Fayveh, does the Council of Four Lands haskama for Fayvesh make any effort to justify awarding a haskama for a Yiddish language Bible. Those characteristics do raise some questions about the hakama’s authenticity. [↑](#footnote-ref-5)
6. Fuks and Fuks-Mansfield 1987: 297, 319. [↑](#footnote-ref-6)
7. By contrast, Athias’ previous two printings of the Bible in Hebrew with Latin introduction and annotations, which Athias marketed to Christian Hebraicists as well as Jews, were in print runs of 3,000 and 5,000 copies. Haberman 1978: 294-96; Fuks and Fuks-Mansfield 1987: 292. [↑](#footnote-ref-7)
8. Aptroot 1989: 28-43, 333-34. [↑](#footnote-ref-8)
9. Schmelzer 2006: 51. [↑](#footnote-ref-9)
10. Teller 2008: 355-56. [↑](#footnote-ref-10)
11. Bartal 2005:29. [↑](#footnote-ref-11)
12. See generally Hundert 2006:99-118. [↑](#footnote-ref-12)
13. Bartal 2005: 24-25. [↑](#footnote-ref-13)
14. Miller 2011:46-52. [↑](#footnote-ref-14)
15. Meyer 1997:101. [↑](#footnote-ref-15)
16. Lederhendler 1989: 47-48, 180 n. 50. [↑](#footnote-ref-16)
17. Max Seligson, “Wolf Heidenheim,” 6 *The Jewish Encyclopedia* 319 (1906); Temkin, Sefton D. "Heidenheim, Wolf." Encyclopaedia Judaica. Ed. Michael Berenbaum and Fred Skolnik. 2nd ed. Vol. 8. Detroit: Macmillan Reference USA, 2007. 763; Solomon Feffer, *The Literary Contributions of Wolf Heidenheim (1757-1832)*, in Solomon Grayzel, 14 Jewish Book Annual 73 (New York 1956-1957). [↑](#footnote-ref-17)
18. Prayer books of all types made up about half of the production of Hebrew presses in Germany through the end of the eighteenth century. Mordechai Breuer & Michael Graetz at 226. [↑](#footnote-ref-18)
19. Joseph Jacobs & Schulim Ochser at 439; Sefton D. Temkin at 763. [↑](#footnote-ref-19)
20. This paragraph draws on Kohler 2012: 39; Meyer 1988: 32-33; Reif 1995: 263-64; and Temkin 2007: 763. [↑](#footnote-ref-20)
21. Dubno discontinued his work with Mendelssohn before *Biur* was completed, possibly under pressure from traditionalist friends. But Mendelssoh nevertheless gave high praise to Dubno’s work in his introduction to *Biur*. Levinger 2007:34. On Heidenheim’s relationship with Dubno, see Seligson 1906:319. [↑](#footnote-ref-21)
22. Sefton D. Temkin at 763. [↑](#footnote-ref-22)
23. On the westward migration of Polish Jews, see Shulvass 1971. [↑](#footnote-ref-23)
24. Meyer 1997: 92-95. [↑](#footnote-ref-24)
25. Max Seligson at 320; Mordechai Breuer & Michael Graetz at 226; Sefton D. Temkin at 763; Editor, “Roedelheim,” 17 *Encyclopedia Judaica* 366 (2007) (“The clear Roedelheim texts were still being reproduced more than a hundred years later.”). [↑](#footnote-ref-25)
26. Horowitz 2007: 540-41. [↑](#footnote-ref-26)
27. In 1800, some 3,000 Jews resided in Frankfurt am Main, making up 7.5 percent of the city’s population. Stefi 1997b:55. [↑](#footnote-ref-27)
28. On the maskilic celebration of German language prayer books, see Gries 2007: 140-44. In addition, Horowitz is named as the author of *Gebet*, a special prayer, in Hebrew with German translation, that was printed and pronounced in the Frankfurt synagogue in honor of the accession of Kaiser Leopold II, as Holy Roman Emperor, in 1790. Perhaps Horowitz associated the German translation of Hebrew prayer with that obsequious practice. [↑](#footnote-ref-28)
29. “Breslau, Aryeh Löb Ben Ḥayyim,” The Jewish Encyclopedia (1906). [↑](#footnote-ref-29)
30. No. 79 [↑](#footnote-ref-30)
31. Horowitz 2007:545. [↑](#footnote-ref-31)
32. Wasserman 2007:145; Wistrich 1989:136-37. [↑](#footnote-ref-32)
33. In particular, Joseph Hraszansky, using a Frankfurt on the Main font, opened a Hebrew press in Vienna, and printed a number of foundation rabbinic texts, including an edition of the Babylonian Talmud between 1791 and 1797 and the *Shulhan Arukh* in 1810. See Lehman 2007:523. [↑](#footnote-ref-33)
34. Grunwald 1936: 248-49, 501 (listing some of Schmid’s many Hebrew publications). [↑](#footnote-ref-34)
35. We reprint the mark from Avraham Ya’ari, Diglei ha-Madpisim ha-Ivriyyim 97 (Jerusalem 1944). [↑](#footnote-ref-35)
36. Johns 2009:13; Kawohl 2008a; Whittman 2004. [↑](#footnote-ref-36)
37. Austrian Statutes on Censorship and Printing, Vienna (1781), in Primary Sources on Copyright. [↑](#footnote-ref-37)
38. Urkunden und Akten zur Geschichte der Juden in Wien: Erste Abteilung, Allgemeiner Teil 1526-1847 (1849) (Pribram, A.F., ed ) [Documents and Records of the History of the Jews in Vienna: First Section, General Part 1526-1847 (1849)] (Vienna and Leipzig: Wilhelm Braumüller 1918), at 172-73. **WHO IS TRANSLATOR?** [↑](#footnote-ref-38)
39. *Id*. at 173-74. [↑](#footnote-ref-39)
40. Our discussion of Mordekhai Banet draws on Miller 2010: 60-86; Ferziger 2008: --; [↑](#footnote-ref-40)
41. Miller 2011: 60. [↑](#footnote-ref-41)
42. See Katz 1998b: 215-30. [↑](#footnote-ref-42)
43. Weiss 1895: 36-37, quoted in Miller 2011: 80. [↑](#footnote-ref-43)
44. On Homberg, see Wistrich 1989: 17-18. [↑](#footnote-ref-44)
45. Miller 2011:72-76. [↑](#footnote-ref-45)
46. Banet might have been predisposed to seriously consider lending lend support to the Heidenheim appeal. Among his early mentors was the Hasidic master Shemu’el Shmelke Horovitz of Nikolsburg, Ẓvi Hirsh Horowitz’s uncle and Pinkhas Horowitz’s older brother. [↑](#footnote-ref-46)
47. Parshat Mordekhai 8. [↑](#footnote-ref-47)
48. The letter is reproduced in Milei D’Avot, pt. 1, Ḥoshen Mishpat, ¶ 3 (Ezekiel Menashe Horowitz 1924). Ziltz joined with Banet in granting a haskama for *Noiat Beroma* by Avraham Zvi Isserles in 1814. The haskama praises the author and encourages readers to buy the book. But it contains no reprinting ban. [↑](#footnote-ref-48)
49. Baschwitz had withdrawn from the partnership in 1806. Max Seligson, at 320. [↑](#footnote-ref-49)
50. Schmid’s 1816 reprint also features an approbation from Moses Muenz (or Mintz) Me-Brody (1750-1831), rabbi and head of the rabbinic court of Oban (Obuda, Hungary; also called Altofen). Muenz initially gave his approbation to a book, published in 1803, by the reformist rabbi, Aaron Chorin (1766-1844), that called for changes in liturgy and the elimination of halakhic precepts based on “irrational” customs. Under pressure from Banet and other traditionalists, Muenz withdrew his approbation, claiming that he had issued it without reading Chorin’s book, and convened a rabbinic court to rule on whether book should be burned and Chorin condemned. After the rabbinic court ruled against him, Chorin turned to an Austrian court, which ruled that Banet and other traditionalists behind the move against Chorin had to pay him damages. *See* Miller 2011: 68; Maron 2007: 601; Sofer, Responsa Hatam Sofer, Likkutim, No. 93 (containing letter from Muenz apologizing for his initial support for Chorin). [↑](#footnote-ref-50)
51. Dyhernfurth is now known as Brzeg Dolny. It is located in what is today southwestern Poland. [↑](#footnote-ref-51)
52. Aron Freimann, , at 30, 62; Mordechai Breuer & Michael Graetz, at 223-25; Editor, “Dyhernfurth,” 6 *Encyclopedia* *Judaica* 330 (1972). [↑](#footnote-ref-52)
53. Kempno, or “Kempen,” as it was sometimes called, is now the Polish city of Kepno. [↑](#footnote-ref-53)
54. Our account of the dispute is derived from letters that R. Akiva Eiger (1761–1837) addressed to Zalman Tarir, head of the rabbinic court of Frankfurt am Main, and to Wolf Heidenheim in an attempt to mediate a compromise agreement. See Eiger 1822: 60-61. [↑](#footnote-ref-54)
55. Kawohl, F. (2008) ‘Commentary on the reprinting provisions in the Prussian Statute Book (1794)', in Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer. [↑](#footnote-ref-55)
56. Kawohl, F. (2008) ‘Commentary on copyright treaties between Prussia and several German states (1827)', in Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer. [↑](#footnote-ref-56)
57. Eiger 1822: 60-61. [↑](#footnote-ref-57)
58. Heidenheim’s mahzor was also reprinted by S. Arnstein & Soehne in Sulzbach (a town in Bavaria) in 1826. [↑](#footnote-ref-58)
59. Sefer She’a lot ve-Tshuvot Parshat Mordekhai, Ḥoshen Mishpat # 7 (Von Mendel Vider, Sziget 1889). [↑](#footnote-ref-59)
60. See Katz 1998b: 217-29. [↑](#footnote-ref-60)
61. Sefer Ḥatam Sofer, Ḥoshen Mishpat, # 41 (Könyvereskedése, Budapest, 1861). Of note, just over a year previously both Sofer and Banet had given approbations to an edition of the Seder Mo’ed (Order of the Festivals) of the Jerusalem Talmud printed in Vienna by Anton Schmid. [↑](#footnote-ref-61)
62. Sofer apparently referred to a collection of responsa and commentaries, entitled *Beit Aryeh*, authored by Aryeh Leibush Horowitz, of which the second section is entitled *Oryan T’litai*. *Beit Aryeh* was not published until 1834, more than a decade after Sofer’s request that Banet provide a haskama. But its *Oryan T’litai* section was apparently written much earlier. *Beit Aryeh* contains approbations from Sofer and three other rabbis, but not Banet, who died in 1829. Sofer’s undated approbation refers to the author’s “previous composition,” and another approbation, that of Eliezer Mintz is dated 23 Tevet 5588 (January 10, 1828) – some six years before the book was published, suggesting that the book was a long time in the making. [↑](#footnote-ref-62)
63. See Katz 1998b: 224 (describing a Sofer letter that was certainly not for public distribution, but which was posthumously published as one of his responsa), 404 (noting that Sofer never published a book in his life). Most of Banet’s writings remained unpublished during his lifetime as well. Visi 2012: 177. [↑](#footnote-ref-63)
64. Sofer No. 79. As was – and is – common in traditional rabbinic culture, Sofer refers to Horowitz by the title of the book that Horowitz authored for which he is known, *Maḥane Levi*. [↑](#footnote-ref-64)
65. Parshat Mordekhai, # 8. [↑](#footnote-ref-65)
66. Sefer Ḥatam Sofer, Ḥoshen Mishpat, # 79 (Könyvereskedése, Budapest, 1861). [↑](#footnote-ref-66)
67. Like Banet, Sofer embraced the study of certain secular subjects, including medicine and mathematics, as part of traditional rabbinic education because, in his view, those subjects were essential to understanding central halakhic problems. Katz 1998b: 433. [↑](#footnote-ref-67)
68. While Sofer regarded the obligatory conscription of Jewish boys into the Emperor’s army with great anxiety, particularly given the impossibility for a Jew to observe religious strictures while in Austrian military service, he ruled, in a responsum issued in 1830, that the military conscription law was within the king’s authority and that, accordingly, Jews were obligated to comply. Sofer No. 29. For discussion see Graff 1985: 67-68; Katz 1998b: 417. With regard to seeking the support of political powers, Banet persuaded the Archbishop of Olmütz to take a stand against Jewish reformers in Vienna, while Sofer appealed to imperial authorities to forbid Viennese Jews from transacting business on the Jewish Sabbath. Gruwald 1936: 374. [↑](#footnote-ref-68)
69. Sofer’s principle is often misinterpreted. It does not mean that the halakha may not be applied to new circumstances in unprecedented ways, but only that the halakha must be interpreted and applied in such cases by learned rabbinic scholars who are fully steeped in and faithful to the rabbinic tradition. For example, Sofer expressed the view that the revelation of the truth of the Torah continues through the generations rather than being handed down just once in final concrete form at Mt. Sinai and that learned rabbinic scholars of each generation will be directed to that truth by their deep immersion in Torah study even without being consciously aware of it. *See* Kahana 2007: 521-527 (describing the extended correspondence between Sofer and R. Ẓvi Hirsch Ḥiyot (1805-1855) on that topic). [↑](#footnote-ref-69)
70. Katz 1998b: 431-32. [↑](#footnote-ref-70)
71. Miller 2011: 67-68. [↑](#footnote-ref-71)
72. Gil Graff, at 52, 68, 110; Simon Schwarzfuchs, at 168-70; Jacob Katz, at 156-57. [↑](#footnote-ref-72)
73. Sofer, Ḥoshen Mishpat No. 142, discussed in Graff 1985: 52. [↑](#footnote-ref-73)
74. Sofer, Deroshot 1.113b, quoted in Katz 1998b: 437. [↑](#footnote-ref-74)
75. BT Bava Batra 21b. [↑](#footnote-ref-75)
76. Mishneh Torah, Book of Acquisition, Neighbors ch. 6, sec.8; Shulḥan Arukh, Ḥoshen Mishpat 156:5. [↑](#footnote-ref-76)
77. The word comes “from the Arabic meaning literally “a constant friend—in our context, a permanent business associate.” Tamari, Meir 1987, “With All Your Possessions”: Jewish Ethics and Economic Life (New York, London: Collier Macmillan), 117-18. [↑](#footnote-ref-77)
78. Jacob Katz, at 58; Editor, “Ma’arufya,” 13 *Encyclopedia* *Judaica* 307 (2007); Enforcement of a *ma’arufia* came through the ban. “It is possible that this usage originated in the privileges granted to merchants by the municipal councils of various European towns during the 10th and 11th centuries guaranteeing them trade monopolies.” *Id*. If so, the parallel is apparent to the Merchant Guild, which led to the *herem ha-yishuv*, discussed below. [↑](#footnote-ref-78)
79. The direct writings of the Aviasaf have been lost; we know of his ruling from reading later commentators who record his views. In this instance, Mordekhai ben Hillel, introduced immediately above, attributes this point of view to the Aviasaf. [↑](#footnote-ref-79)
80. Hagahot Maimoniot, Hilkhot Shekhaynim, pt. 6; Beit Yosef, Ḥoshen Mishpat, # 156; Darkhei Moshe (ad loc.). Evidently, this basket of privileges applies to those who live in an enclosed area, and hence can justifiably expect non-intrusion from outsiders. [↑](#footnote-ref-80)
81. The alleyways appear to differ based on certainty. In the case of the Open Alley, some customers are bound to still come to Reuven, whereas others might go to Shimon; but given that Reuven will remain closer to some passersby, he will not lose all the business. In the Dead End Alley, by contrast, *all* the customers must pass by Shimon’s new mill at the alleyway’s entrance in order to get to Reuven’s established mill at its far end; accordingly, Reuven stands to lose everything. [↑](#footnote-ref-81)
82. Note that the matter under discussion here is analytically separate from the case of The Dead End Alley. The current operative assumption is that all parties reside in The Open Alley. The task is to determine the bounds regulating that status. [↑](#footnote-ref-82)
83. Responsa Maharik, root A. [↑](#footnote-ref-83)
84. The Maharik cites the *Mordekhai* [a work authored by R. Mordecai ben Hillel (c. 1240-1298)], which in turn cites to Rabbeinu Tam [Jacob ben Meir, (1100 –1171)], for the proposition that rulers of a city levy taxes only with universal consent; then, it analogizes the rulers of a city to the leaders of the generation, and states that even they may not take something from Reuven and give to Shimon in contravention of Torah law. She’a lot U-tshuvot Maharik, root A. [↑](#footnote-ref-84)
85. See Responsa Rabbi Gershon Meor Ha-Golah [Gershom ben Judah, (c. 960 -1040? -1028?)], No.63; Responsa Maharam Me-Rotenberg [Meir ben Barukh of Rothenburg (c. 1220-1293)], No. 503 (presenting the position of R’ Joseph Tov Alem ben Samuel Bonfils (c. 980-1050)); Responsa Ha-Rif [Isaac ben Jacob Alfasi ha-Cohen (1013 - 1103)], No. 13; Responsa Ha-Rosh [Asher Ben Yehiel (1250 or 1259 – 1327)], Nos. 6-8; Responsa Ha-Rashba [Shlomo ben Aderet (1235–1310)], Part 3 No. 411, Part 5 No. 126. [↑](#footnote-ref-85)
86. Responsa Ha-Rivash, No. 271. [↑](#footnote-ref-86)
87. See Nissim ben Reuven (1320–1376; known in Jewish tradition as “Ran”), Responsa Ran, No. 48 (holding that one is obligated to follow the rulings of one’s local rabbi). [↑](#footnote-ref-87)
88. Up to 8o percent of Jews were engaged in occupations related to the liquor trade during the previous century, leading to a wealth of responsa on point from which Banet and Sofer could draw. “The Jewish innkeeper, distiller, or brewer became a characteristic figure in the region, so much so that the terms *arendarz* (leaseholder) and ‘Jew’ became synonymous.” Gershon David Hundert, *Jews in Poland-Lithuania in the Eighteenth Century* (U.C. Press, Berkeley, Los Angeles 2004), pp. 15, 53. For an extensive discussion of *arendy* (the plural in Polish), see M.J. Rosman, The Lords’ Jews 106-42 (Cambridge 1990) (underlining points that that arrendators could be either Jewish or Gentile—but the former were so common that the term was often used as a synonym for “Jew” and that a “large number of rabbinic responsa dealing with cases of *arenda* competition,” *id*. at 110, 121). [↑](#footnote-ref-88)
89. Antony Polonsky, *The Jews in Poland and Russia*, vol. I (2010), p.36; Jacob Goldberg, “Wine and Liquor Trade” 16 *Encyclopedia* *Judaica* 541, 542-43 (1972). Banet must have been fully versed in these aspects, as many Moravian Jews made their livelihood as arrendators, leasing distilleries, breweries, and taverns from the local landowners. See Miller at 34.

A common example offered in halakhic texts arises when a Jew receives a monopoly for the sale of brandy and then dies—the legal issue ripens whether such an intangible right can be devised to the decedent’s heirs, or whether instead the general halakhic rule is activated that an intangible right (*davar she’ayn bo mamash*) cannot be bequeathed. An *arenda* represents an exception to that general principle, as the *aḥaronim* made a special rule in this case that an *arenda* is considered equivalent to tangible money, and thus may be devised. Note that the *arenda* represented a widespread custom in Eastern Europe, in whose economic sphere Bohemia and Moravia at that time lay. See generally Jacob Katz, at 43-50. [↑](#footnote-ref-89)
90. Recall that, with Banet’s imprimatur, Schmid had purported to purchase rights in the Roedelheim maḥzor from Heidenheim’s partner, Baruch Baschwitz. [↑](#footnote-ref-90)
91. Sefer Ḥatam Sofer, Ḥelek Ḥoshen Mishpat, No. 41 (Könyvereskedése, Budapest, 1861). [↑](#footnote-ref-91)
92. The term that Sofer uses for such texts is “Sifrei Ha-Meiras.” It is not clear to what exactly that term refers. It might possibly reflect a lost author named “Meiras” (or “Mirus” as some alternatives read). But, more convincing is the contention that the sources from which that phrase derives (*e.g*., BT Ḥulin 60b; Mishnah Yadayim 4:6) intended to refer to the Iliad and the Odyssey (taking the reference as a misspelling for *Sifrei Homirus*, *i.e.*, the “Books of Homer”). See Moshe Carmilly-Weinberger, *Censorship and Freedom of Expression in Jewish History* (Yeshiva Univ, Press 1977), p.12. A third possibility is that the *samekh* at the end is a misreading for a final *mem* (which looks very similar), meaning it should read “books of love,” a code word for secular literature. See Avraham Shapir, *Yaḥsam shel hakhamim l’safa ul’sifrut ha-yavvanit bit’qufat ha-tana’im*, http://www.daat.ac.il/daat/history/yahasam-2.htm (visited May 29, 2008). The sentiment would then accord with the condemnation came before Parliament in 1584 of “wanton discourse of love of all languages leud . . . ballads lying histories.” Cindia Susan Clegg, *Press Censorship in Elizabethan England* (Cambridge 1997), p 35. [↑](#footnote-ref-92)
93. For a recent treatment of false attribution in older Hebrew works, see Marvin J. Heller, *Who Can Discern His Errors? Misdates, Errors, and Deceptions, in and about Hebrew Books, Intentional and Otherwise*, 12 Ḥakirah 269 (2011). [↑](#footnote-ref-93)
94. See Menaḥem Elon, at 1462, 1464 (tracing early right of attribution, in nature of copyright, to Sifrei Deut. 188 and Tosef. Bava Kamma 7:13); Louis Jacobs, The Jewish Religion: A Companion (Oxford Univ. Press 1995). [↑](#footnote-ref-94)
95. Sofer advanced a similar argument in another context. In opposing the reformist Westphalian Consistory’s proclamation that legumes may be eaten on Passover, most traditionalist rabbis contented that the prohibition on eating legumes, which had been extended throughout Ashkenazic communities by medieval authorities, was binding as matter of local custom. However, Sofer strengthened the ban against eating legumes on Passover by claiming that the prohibition arose from an immutable and universally binding decree issued by early medieval rabbis. See Katz 1998b: 431. [↑](#footnote-ref-95)
96. Parshat Mordekhai, # 8. [↑](#footnote-ref-96)
97. See Mishnah Avot 4:5. [↑](#footnote-ref-97)
98. Banet brought an explicit proof for his viewpoint in the edict of Ezra the Scribe that peddlers of perfume cannot stop newcomers from encroaching on their sales territory, in order that their wares should remain accessible to the daughters of Israel. See Shulḥan Arukh, Ḥoshen Mishpat, ch. 156, § 6. The parallel is that both publishers of maḥẓorim and peddlers of perfume enable their purchasers to perform a mitzvah. See Artscroll Bava Basra, at 22a1 (offering explanation, “Ezra desired to promote family harmony by ensuring that women would have the means to make themselves attractive to their husbands”). [↑](#footnote-ref-98)
99. In that case, the second publisher does not depend on the activity of the first one in order to perform a mitzvah*,* meaning that “printing a book that has already existed for ages is more similar to peddlers” of perfume. [↑](#footnote-ref-99)
100. Sefer Ḥatam Sofer, Ḥoshen Mishpat, # 79 (Könyvereskedése, Budapest, 1861). [↑](#footnote-ref-100)
101. On Sofer’s continuing esteem for Pinḥas Horowitz, see Katz 1998b: 406-08. [↑](#footnote-ref-101)