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William Patry

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WILLIAM PATRY*

Dwight Carhart's wish in establishing this lecture series was to honor his father, Fred, by increasing ethical training for lawyers. I hope to do my part to fulfill that goal in my area of law, copyright, by exploring both ethical and moral claims about how we should approach unauthorized use of copyrighted works. Why unauthorized uses? First, because if a use is authorized there is little or nothing to talk about. Second, because of the claims of some copyright owners and their supporters that any or at least most unauthorized uses should not be permissible. This view usually stems from two sources: one of a view of copyright as property; the other is that it is immoral or unethical to use property without the owner's permission. This presupposes of course an established, and most importantly pre-existing and moral, ethical, and likely binding framework that supports such a view. But is there such a framework? It is my argument there is no such framework, binding or not, and that to the contrary many uses that are unauthorized have an equal claim to being ethical or moral if there is such a framework.

I am certainly not the first to discuss ethics and morality in copyright. In 2009, Professor James Grimmelman of New York Law School published an article entitled *The Ethical Visions of Copyright Law*.[1] He deliberately chose not to entitle his article *The Moral Visions of Copyright Law*.[2]

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1. James Grimmelmann, *The Ethical Visions of Copyright Law*, 77 FORDHAM L. REV. 2005 (2009).

2. *See id*. at 2006 n.2.

Professor Grimmelmann explained why he used the word "ethical" rather than "moral:"

> I use the term "ethical" rather than "moral" for three reasons. First, "moral rights" is a term of art in intellectual property law, and I wish to avoid confusion. Second, "moral" has come to have overtones of religious morality, particularly on sexual matters, whereas this essay is about issues of good and bad in a broader, more secular sense. Third, "morality" suggests a comprehensive view and a grounding of one's theory of good and bad actions in a broader theory of right and wrong. On the other hand, "ethics" suggests instead a more specific focus on context, roles, and relationships, and is therefore closer to the issues this essay raises. When I refer to "moral" questions or theories in this essay, it is specifically to call attention to the fact that the overall grounding in a more complete theory of right and wrong is at stake – or because a familiar phrase such as "moral authority" simply sounds awkward if altered.[3]

Professor Grimmelmann's first reference to "moral" as a term of art in copyright is to the concept of *droit moral*, a civil law concept found in Article 6*bis* of the Berne Convention for the Protection of Literary and Artistic Works.[4] *Droit moral* vests, in the individual[5] creator of a copyrighted work, rights that are believed to emanate from the creator's personal relation with the work.[6] *Droit moral* are noneconomic rights reflecting both the creator's bond with the work and the creator's reputation, appreciating that reputational harm can also cause economic harm.[7]

The United States, despite its adherence in 1989 to the Berne Convention for the Protection of Literary and Artistic Works, has been hostile to such noneconomic rights.[8] It was not until 1990 in the Visual

3. *Id*.

4. Berne Convention for the International Union for the Protection of Literary and Artistic Works, *reprinted in* 9 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, app. 27-6 (Rev. Ed. 2010).

5. Juridical entities do not have *droit moral*. *See* Rudolf Monta, *The Concept of "Copyright" Versus the "Droit D'Auteur,"* 32 S. CAL. L. REV. 177, 178-79 (1959) (describing how only the physical person is vested with such moral rights).

6. *See* Laura Lee Van Velzen, Note, *Injecting a Dose of Duty into the Doctrine of* Droit Moral, 74 Iowa L. Rev. 629, 633-34 (1989) (discussing the development of the *droit moral* doctrine).

7. *See id*.

8. *See* Sonia Tara Banerji, *Recent Developments in Law and Policy Under the Visual Artists Rights Act of 1990:* Martin v. City of Indianapolis *and the Problem of Unwanted Art*, 9 WINDSOR REV. LEGAL & SOC. ISSUES 99, 104 (1999) (describing the history of "moral rights").

Artists Rights Act,[9] which created section 106A in title 17 of the United States Code, that the concept was statutorily recognized and even then in a very limited fashion.[10] Note too that the term used in that act is "artists' rights," rather than "moral rights."[11] During the debates on the provision, concerns were expressed by members of Congress about the second connotation of "moral" – issues concerning religious or sexual matters. At this time, then Senator Jesse Helms was battling with the National Endowment of the Arts over funding of artist Robert Mapplethorpe's works, and it was feared that Senator Helms would kill the copyright bill if the term "moral rights" was used; hence, the neutral term "artists' rights."[12] Such terminology did not, however, prevent actual disputes over such moral matters and artists' rights. In a famous case under the similar New York Artists' Authorship Rights Act, *Wojnarowicz v. American Family Association*,[13] the defendant (formerly known as the National Federation For Decency) was shocked by the plaintiff's explicitly graphic works of art, some of which had received funding from the National Endowment for the Arts. The defendant was so shocked that it copied in a cropped form some of the works of art in pamphlets which it mailed to 523 members of Congress, 3,230 Christian leaders, 947 Christian radio stations, and 1,578 newspapers.[14] The court found a violation of the act.[15]

Professor Grimmelmann was also reluctant to use "moral" because of worries that the term connotes a broader, subjective view of good and bad. Indeed, in a lecture at Duke Law School in 2003 Jack Valenti, then head of the Motion Picture Association of America, made precisely this connection. His lecture was called "Moral Imperatives and Copyright."[16] Here is how Mr. Valenti began his speech:

> No free democratic society can lay claim to greatness if it doesn't construct some kind of moral platform, a moral imperative if you

9. Pub. L. No. 101-650, 104 Stat. 5128 (1990).

10. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 555 (1985) (expressing both the property and creation interests an author has in the first publication of his work).

11. *See* Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (1990).

12. Grace Glueck, *Publicity is Enriching Mapplethorpe Estate*, N.Y. TIMES, Apr. 16, 1990 *available at* http://www.nytimes.com/1990/04/16/arts/publicity-is-enriching-mapplethorpe-estate.html?scp=2&sq=Helms+Mapplethorpe&st=cse&pagewanted=print.

13. 745 F. Supp. 130 (S.D.N.Y. 1990).

14. *Id*. at 134.

15. *Id*. at 133-34.

16. Jack Valenti, Comments on the Moral Imperative, Address at the Duke Law Third Annual Frey Lecture in Intellectual Property (Feb. 24, 2003), *available at* http://www.law.duke.edu/webcast/?match=Frey+Lecture+in+Intellectual+Property.

> will, to guide the society and have the society recognize and respect civil trust. This moral imperative applies to every business, every industry, every profession, every university, and the government as well. It is defined by what William Faulkner called the old verities, words that illuminate what a free and loving land is all about. Words like duty, honor, service, integrity, pity, pride, compassion, sacrifice. Now if you regard these words casually, if you find them uncool, or if you treat them as mere playthings that only the rubes, the rabble and the unsophisticated, the unlearned observe and honor, then I tell you my friends, you and I will witness the slow undoing of the secret of America, no question.[17]

Mr. Valenti wanted us to form beliefs about modern copyright law through the transference of belief structures contained in ancient morality stories. By virtue of that transference, we were asked to believe that his clients are entirely righteous and that we are sinners. I have been interested in religious views on copyright for some time, beginning with my own religion, Judaism. That interest was heightened when I became a law professor in Manhattan at Yeshiva University's Benjamin N. Cardozo School of Law. I was fortunate to have many knowledgeable colleagues, including Rabbi David Bleich, who although not a lawyer was an expert on Jewish religious law often called *halacha*.[18] Rabbi Bleich wrote a bit about copyright as have other Jewish scholars[19]. One book on the subject, *Copyright and Jewish Law*,[20] by Rabbi Nachum Weisfish of Israel claims, wrongly, that his is the first comprehensive study of copyright and *halacha*.[21] There have been earlier books, and in my view Rabbi Weisfish's is far from comprehensive.

Leaving law aside for just a moment, there are some religious people who believe that if they are as strict as possible, if they refrain from as many things as possible,[22] they will be more holy and more ethical. Without

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17. *Id*.

18. The term *ha-Mishpat ha-ivri* is a better term for secular law.

19. *See e.g.*, YAAKOV AVRAHAM COHEN, 4 EMEQ HA-MISHPAT, VOL. 4: ZECHUYOT YOTSRIM [VALLEY OF THE LAW; VOL. 4: COPYRIGHT] (1999); *see also*NAHUM RAKOVER, Zohut ha-Yotzrim be-Mekorot ha-Yehudim [COPYRIGHT IN JEWISH SOURCES] (1991).

20. RABBI NACHUM MENASHE WEISFISH, COPYRIGHT IN JEWISH LAW, (Tzvia Ehrlich-Klein ed., Feldheim Publishers 2010) (2002). The book was originally published in Hebrew as Mishnas Zechuyos HaYotzer in 2002.

21. *Id*. at xvii. In any event, a far better book is by Neil Netanel. *See* NEIL NETANEL, FROM MAIMONIDES TO MICROSOFT; THE JEWISH LAW OF COPYRIGHT SINCE THE BIRTH OF PRINT (forthcoming 2011).

22. I am not talking about the eht ,עשרת הדברים*Aseret Ha-Dvarim*, known popularly as the Ten Commandments, the eighth of which is *Lo tignov*, "Do not steal." According to Tractate Sanhedrin 86a,

making any judgment at all about religions that have such a belief system, no concept of asceticism exists in Judaism[23] and, in any event, the Torah commands that we shall not add to nor subtract from God's commands.[24] The great twelfth century Spanish Rabbi Moshe ben Maimon, known also as Moses Maimonides or Rambam, and the author of the famous *Guide to the Perplexed*,[25] wrote in his תורה משנהMishneh Torah:[26]

> Our Sages commanded that one should not deprive oneself of anything, except from things which the Torah has forbidden. Is not what the Torah has forbidden enough that you have to forbid for yourself other things?!. According to this rule, those who always restrict themselves are not on the path of good. About these and similar things Shlomo HaMelech said, "Don't be excessively righteous[.]").[27]

Even Jack Valenti warned in a speech to the Carnegie Council on December 7, 1994: "When I encounter self-designated human repositories of Divine Truth, I remember an old southern prayer: 'Dear Lord, let me seek the truth, but spare me the company of those who have found it.'" [28]

The belief that in doing more than God commanded one is acting more righteously nevertheless is where the concept of *Naval birshut haTorah*

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this passage (which occurs three times in the Torah) refers to kidnapping and not to theft of property, the latter of which is prohibited in *Sefer Vayikra* [*Leviticus*] 19:11 (Tanakh).

23. Perhaps this is because the doctrine of original sin and hatred of one's body do not exist in Judaism and is antithetical to it. *See* ALFRED J. KOLATCH, THE SECOND JEWISH BOOK OF WHY 63-4 (Jonathan David Pub. 1985). Nevertheless there were two early sects that practiced various forms of asceticism, the Essenes, and particularly the Naziarites. The latter of whom are referred to in the Torah, where the nazir is mentioned as abstaining from wine, wine vinegar, grapes, and raisins, cutting your and coming into contact with corpses and graves. *See Sefer Bamidbar* [*Numbers*] 6:1-21 (Tanakh); *see also Sefer Vayikra* [*Leviticus*] 21:6 (Tanakh). ., Samson was the most famous nazir. *See* ARTHUR PENRHYN STANLEY, Lectures on the History of the Jewish Church: Part I, Abraham to Samuel 403-04 (Charles Scribner 1863).

24. *See Sefer Dvarim* [*Deuteronomy*]13:1 (Tanakh) ("Everything that I command you, you shall be careful to do it. You shall neither add to it, nor subtract from it.").

25. In the original Hebrew מיכובנ הרומ, *Moreh Nevuchim*. *See* HERBERT A. DAVIDSON, MOSES MAIMONIDES: THE MAN AND HIS WORKS, 98-116 (Oxford U. Press 2005) (providing a general overview of the work).

26. Mishneh Torah, http://en.wikipedia.org/wiki/Mishneh_Torah (last visited Feb. 5, 2011).

27. Op-Ed, *The Post-Pesach Pizza Rush—A Response*, CROWNHEIGHTS.INFO, Apr. 7, 2010 *available at http://www.crownheights.info/index.php?itemid=25520* (quoting Hilchot Deios, Chapter 3).

28. Jack Valenti, *William Faulkner's Old Verities: "It's Planting Time in America*,*"* Remarks to the Carnegie Council (Dec. 7, 1994), *available at* http://www.cceia.org/resources/publications/nizer_lectures/001.html.

comes into play in Judaism and copyright. On the first page of Rabbi Weisifish's book on copyright, he says:

> Throughout this book, the words "not forbidden" mean that, although the action is not explicitly forbidden, it is preferable not to do so. It should also be kept in mind that one who merely keeps strictly to the letter of the Law, even though s/he may be technically within the parameters of the Torah, is looked upon negatively by the Torah, and is considered *naval birshut haTorah*[.][29]

Naval birshut haTorah means you can be considered a sordid person who stays within the boundaries set out in the Torah.[30] Despite the name, the origins of *naval birshut haTorah* lie not in the Torah nor with the Talmud but rather in the writings of Ramban, also known as Nachmanides,[31] a thirteenth century Jewish scholar. As Professor Grimmelman might have feared, Ramban's use of *naval birshut haTorah* was in connection with refraining from forbidden sexual acts. According to Ramban, this means not only abstention from sin but also reining in physical urges even where those urges lead to permitted expression.[32] Ramban, in a famous disagreement with the French eleventh century Jewish scholar Rashi,[33] declared that the expression "You shall be Kedoshim" (You shall be holy) refers not just to prohibited activities but also to permissible activities.[34] One should, Ramban argued, "sanctify yourself by withdrawing from that which is permissible to you" (*kadesh et atzmecha b'mutar lach*). Unless one so restricted oneself, Ramban believed you can be *naval birshut haTorah*.[35]

While there is a general approach in *halacha* that, where there is doubt whether something is permitted or not, one should follow a strict interpretation, how one reconciles refraining from doing things that *are* permitted with the Torah's admonition not to add to or subtract from God's

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29. WEISFISH, *supra* note 19, at xxi. To be fair, Rabbi Weisfish is not alone in this view among non-copyright, Orthodox Jewish writers.

30. *See* WEISFISH, supra note 19, at xxi.

31. *See* RABBI SIGMUND HECHT, POST BIBLICAL HISTORY: A COMPENDIUM OF JEWISH HISTORY FROM THE CLOSE OF BIBLICAL RECORDS TO THE PRESENT DAY 125-26 (Am. Hebrew Pub. House 1898).

32. Rav Motti Novick, Parashat Vayakhel-Pekudei, http://www.vbm-torah.org/archive/salt-shemot/22-9vayakhel-pekudei.htm (last visited Mar. 29, 2011).

33. *See* HECHT, *supra* note 30, at 109-13.

34. *See* Rabbi Yissocher Frand, *The Command to 'Be Holy' Was Given In a Mass Gathering*, http://www.torah.org/learning/ravfrand/5765/kedoshim.html (last visited Mar. 29, 2011).

35. *Id*.

commandments requires a far more sophisticated mind than mine, but let's examine other views about the issue.

My former colleague Rabbi David Bleich wrote a *responsa*[36] on copyright in his book series, *Contemporary Halakhic Problems*.[37] Rabbi Bleich observed that the "[e]arliest references to [copyright] in rabbinic literature focus upon ascription of authorship rather than upon proprietary rights and the concern expressed is for recognition of intellectual prowess rather than protection of pecuniary interests."[38] And even in this context, the Talmud encourages repeating others' insights. Tractate *Pirkei Avot* (Ethics of the Fathers") states: "Whoever repeats a thing in the name of the one who said it brings redemption to the world, as it is said: 'Esther said to the king in the name of Mordechai' (Esther 2:22)."[39] From this, Rabbi Bleich concluded that it was acceptable to record without permission lectures given on the Torah even if permission had been requested but been refused.[40]

Rabbi Bleich states, however, that commercial reproduction of a scholar's work on religious subjects is a different matter.[41] It is here that we get to the leading dispute in Judaism, the famous case of *Maharam of Padua v. Giustiniani* decided in 1550 by Rabbi Moses Isserles, the Rabbi of Cracow, Poland.[42] The "plaintiff"[43] in the dispute was Rabbi Meir ben Isaac

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36. *See* W.O.E. OESTERLY & G.H. BOX, A SHORT SURVEY OF THE LITERATURE OF RABBINICAL AND MEDIAEVAL JUDAISM 28-9 (The Macmillan Co. 1920) (describing *responsa* as a class of Rabbinical and Talmudic literature written by Jewish teachers in response to questions regarding Jewish life).

37. J. DAVID BLEICH, 2 CONTEMPORARY HALKHIC PROBLEMS 121 (1983).

38. *Id.* at 121-122. For an excellent article on copyright as property under Jewish law, see Neil W. Netanel & David Nimmer, *Is Copyright Property? The Debate in Jewish Law*, 12 THEORETICAL INQUIRIES 1 (forthcoming 2011). *See also* THE PRINCIPLES OF JEWISH LAW 344–46 (Menachem Elon ed., 2007) (1975); ADIN STEINSALTZ, THE ESSENTIAL TALMUD 78–79 (1992), *reprinted in* THE WAYS OF RELIGION: AN INTRODUCTION TO THE MAJOR TRADITIONS 287-291(Roger Eastman ed., 2d ed. (1993)); J. David Bleich, *Current Responsa, Decisions of* Bate Din *and Rabbinical Literature: Copyright*, 5 JEWISH L. ANN. 71-79 (1985); Rabbi Israel Schneider, *Jewish Law and Copyright*, www.jlaw.com/Articles/copyright1.html (last visited Mar. 29, 2011); Matthew I. Kozinets, *Copyright and Jewish Law: The Dilemma of Change*, 1 U.C. DAVIS J. INT'L L. & POL'Y 83 (1995); Samuel J. Petuchowski, *Toward a Conceptual Basis for the Protection of Literary Product in a Post-Printing Era: Precedents in Jewish Law*, 3 U. BALT. INTELL. PROP. L.J. 47 (1995); Rabbi Israel Schneider, *Jewish Law and Copyright*, 21 J. HALACHA & CONTEMP. SOC'Y 5751 (1991); Victor Hazan, *The Origins of Copyright Law in Ancient Jewish Law*, 18 BULL. COPYRIGHT SOC'Y 23-28 (1971); Rabbi Yechezkel Landau, *Nodah bi-Yehudah*, VOLUME 2, CHOSEN MISHPAT NO. 24 (1776).

39. Emanuel Quint, Theft of Intellectual Property, http://www.ou.org/torah/tt/5765/behar65/specialfeatures_jewishlaw.htm (last visited Mar. 29, 2011).

40. *See* BLEICH, *supra* note 36, at 122.

41. *See id*. at 123.

42. Neil Netanel, *Maharam of Padua v. Giustiniani: The Sixteenth-Century Origins of the Jewish Law of Copyright*, 44 HOUS. L. REV. 821, 839-40 (2007).

43. *Id*. As Professor Netanel points out, using the traditional adverse party appellation in this context is misleading because there was no trial or witnesses; instead, the Maharam presented to Rabbi Isserles ex parte a question of halacha (with his own version of the facts), which Isserles answered. *See* id. at 839-40.

Kazenellenbogen of Padua, then in the Republic of Venice.[44] The "defendant" was a Christian printer Marco Antonio Giustiniani.[45] The Maharam's work was also published by Alvise Bragadini, a Christian publisher in Venice. By the sixteenth century, due to restrictions placed on Jewish printers, Hebrew printing was dominated by Christians who hired Jews as proofreaders, editors, and compositors.[46]

The work in question was a new edition of the *Mishneh Torah*[47] by the Maharam, who had added his own commentary and editing of Maimonides's work.[48] The publication by Giustiniani was of the highest quality with wood-cut illustrations.[49] The defendant copied the Maharam's commentary (but moved it to an Appendix) and criticized the commentary as worthless, "having been written for nothing." [50] The defendant is said to have been motivated by a desire to strike back at a competitor, saying he would sell the work cheaply in order to cause harm to the plaintiff.[51] The plaintiff heard of the defendant's plans and rushed to Rabbi Isserles, seeking to have the book banned.[52]

Going back to 1469, individual printing privileges were granted in Venice.[53] The investment-based claim for the protection granted by these privileges is seen in a 1496 petition by Bernardino Rasma:

> For when [a printer-publisher] shall have set himself to produce a book of rare beauty – which entails the absorption of all his capital in it—should his brother merchants come to hear of it, they use every cunning device to steal the proofs of the new work . . . and set to . . . print the book before the original designer of the book can finish his edition, which, when it is ready for issue, finds the market spoiled by the pirated edition.[54]

In 1517, to avoid the burden of individual petitions and to prevent an imminent paralyzing of the book trade Venice revoked all privileges, adopted a series of general regulations governing printing licenses, vested

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44. Known by his Hebrew acronym "the Maharam of Padua." *See id.* at 822.
45. *See id*.
46. Netanel, *supra* note 41, at 831-32.
47. The Mishneh Torah is Moses Maimonides' seminal code of Jewish law. *Id.* at 822.
48. *Id.* at 836-37.
49. *Id*. at 838.
50. Id. at 837.
51. BLEICH, *supra* note 36, at 124.
52. *See* Netanel, *supra* note 41, at 839.
53. See WILLIAM PATRY, 1 PATRY ON COPYRIGHT §1.02.
54. HORATIO BROWN, THE VENETIAN PRINTING PRESS (1891), *reprinted in* THE VENETIAN PRINTING PRESS 55-56 (Gérard Th. Van Heusden 1969).

the power to grant privileges solely in the Senate, if approved by a two-thirds majority, and limited protection to new books and works.[55] This new approach led to a certain amount of graft as Christopher Witcombe explained:

> After 1517 there is also evidence that privileges could be "purchased," with the supplicant offering a sum of money to the Senate. An interesting case is that of the Jewish merchant-publisher Daniel Bomberg. On 7 December 1515, Bomberg was granted a ten-year privilegio for "certain books in Hebrew" (*certi libri hebrei*) and a patent for Hebrew cuneate type. When all privileges were revoked in 1517, Bromberg successfully had his reconfirmed by the Senate in 1518. When the privilegio expired in 1525, Bomberg applied for renewal for five years but the Senate, fearing complications with the ecclesiastical authorities because of the Hebrew subject matter, failed to pass the motion. A second attempt, submitted by Bomberg four days later on 12 October 1525 also failed. According to Marino Sanuto, "The motion was put to the vote and lost, and this for the second time; and it was well done, and I had my hand in it; for he printed books in Hebrew that were against the faith." With his second submission Bomberg had offered one hundred ducats for the privilegio. When this failed, with his third submission, made the following day, 17 October, he increased the amount to one hundred and fifty ducats. The motion failed again. On 8 March 1526, Bomberg tried once more, offering this time three hundred ducats, but again failed. Finally, on March 27, he was able to overcome the religious scruples of the Senate with an offer of five hundred ducats and was granted a ten-year privilegio.[56]

Bomberg's situation is interesting because he had been a prominent Dutch printer but Giustiniani, the defendant in the dispute under question, hired away Bomberg's key workers and reportedly put out low-priced editions of Bomberg's work, ruining him.[57] Perhaps this past caught up with Giustiniani (Bragadini had quickly appended a postscript to the Maharam's book before publishing it, asserting that Giustiniani wanted to ruin his

55. CHRISTOPHER WITCOMBE, COPYRIGHT IN THE RENAISSANCE: PRINTS AND THE PRIVILEGIO IN SIXTEENTH CENTURY VENICE AND ROME 41-42 (2004).

56. *Id.* At 44-45 (2004) (emphasis omitted).

57. *See* Netanel, *supra* note 41, at 832-833.

business as he had ruined Bomberg's)[58] when Rabbi Isserles ruled in the Maharam's favor, banning Jews from buying Giustiniani's planned edition if he published it.[59]

The ruling itself – that is the effective portion – resembles far more the investment-oriented concerns of the Venetian printing privileges than copyright law. Under the ruling, the plaintiff could sell out the existing edition, but thereafter competitors were free to offer competing editions.[60] While there were policy reasons given for the ruling,[61] there is only one true legal basis derived from the שבע מצוות בני) נח*Sheva mitzvot B'nei Noach*), the seven Noahide laws that the Talmud regards as binding on all humankind.[62] One of these laws forbids *gezel* (robbery or theft), but as Professor Neil Netanel rightly observes, to say that Giustianiani's act was *gezel* presupposes that the Maharam had a preexisting property right that was wrongly taken.[63] Professor Netlanel believes, however, that Rabbi Isserles did not believe the Maharam owned intangible property – on the contrary, he held that for something to be property, it must be tangible.[64] Rather, Rabbi Isserles adopted what we would call an unfair competition approach; hence the limited effect of the ruling.[65]

The unfair competition approach, based on other principles, was not a first principles argument as there was no text that addressed the issue at hand[66] Rabbi Isserles was engaging in what is sometimes called analogical "reasoning" – the quotation marks acknowledging that there are those who question whether the use of analogies to decide non-similar disputes is in fact reasoning. Critics of reasoning by analogy extend beyond law[67] and

58. *Id*. at 838.
59. *Id*. at 863.
60. *Id*. at 842.
61. *See id*. At 860- 64. (The policy goals were subsidizing rabbinic scholars, protecting trade within communities, and ensuring the accuracy of texts.).
62. *See* THE PRINCIPLES OF JEWISH LAW 708 (Menachem Elon ed., Transaction Publishers 2007) (1975);
63. *See* Netanel, *supra* note 41 at 849-850.
64. *Id*. at 851.
65. *See id*. at 851-53.
66. *But see id*. at 822-23.
67. Among the legal critics is Judge Richard A. Posner. *See* Posner, Book Review, *Reasoning by Analogy: Legal Reason: The Use of Analogy in Legal Argument*, 91 CORNELL L. REV. 761, 765 (2006); *see generally* POSNER, OVERCOMING LAW 518–519 (1995); POSNER, THE PROBLEMS OF JURISPRUDENCE 86–94 (1990). *See also* Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 925, 971-75 (1996); Larry Alexander, *Bad Beginnings*, 145 U. PA. L. REV. 57, 57 (1996); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 183–187 (1991); Melvin A. EISENBERG, THE NATURE OF THE COMMON LAW 83 (1988); KENT GREENAWALT, LAW AND OBJECTIVITY 200 (1992); Peter Westen, *On "Confusing Ideas": Reply*, 91 YALE L.J. 1153, 1163 (1982); NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY 161, 186

early on included logicians, some of whom consider it a fallacy.[68] Even those who advocate its use do so cautiously or in ways that merely assume away embarrassing problems.[69] Indeed, there is a lack of agreement about whether reasoning by analogy is inductive, deductive, an independent form of reasoning, or not reasoning at all.[70] The sources of the disputes over analogical reasoning are many, including a lack of agreement about how judges decide cases versus what they say in their opinions, the nature of legal reasoning, and even about the nature of law.[71]

Some have focused on the underlying unarticulated assumptions utilized in analogies: "One can never declare A to be legally similar to B without first formulating the legal rule of treatment by which they are rendered relevantly identical."[72] These and other critics argue that once one does formulate the underlying legal rule, the actual legal work is deductive, with analogy being little more than window dressing, or rhetoric.[73]

In the case of copyright, reliance on a moral or ethical basis on which to condemn behavior demonstrates the lack of a text ascribing moral or ethical failure to that behavior. Even Rabbi Weisfish concedes that "[t]he issue of copyrights is not explicitly discussed in the *Talmud*, as it has only come to the fore as a halachic 'problem' within the last 200 years, i.e., from the time that printing became a widespread phenomenon."[74] Copyright came into being as positive law in common law countries by the enactments of secular legislatures for specific social purposes, including the increase of knowledge. The first copyright act, the 1710 English Statute of Anne, begins with this statement of purpose: "An Act for the Encouragement of

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(1978). Other skeptics include EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 3, n.5 (1949). *Cf.* Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 742(1993) (rejecting and addressing various critiques of reasoning by analogy); G.E.R. LLOYD, POLARITY AND ANALOGY: TWO TYPES OF ARGUMENTATION IN EARLY GREEK THOUGHT (1966); DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING 308–09 (P.H. Nidditch ed., 3d ed. 1975).

68. *See e.g.*, MONROE C. BEARDSLEY, PRACTICAL LOGIC 107–08 (1950); JOHNSON & BLAIR, LOGICAL SELF-DEFENSE 115–22 (1994). *See also* COPI & COHEN, INTRODUCTION TO LOGIC 443–68 (12th ed. 2005). *See also generally*, THE ANALOGICAL MIND: PERSPECTIVES FROM COGNITIVE SCIENCE (D. Gentner et al. eds., The MIT Press 2000); SIMILARITY AND ANALOGICAL REASONING (Stella Vosniadou & Andrew Ortony eds.1989).

69. *See generally* LLOYD WEINREB, LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT (2005),

70. *See id.* at 19-41.

71. *See id.* at 123-63.

72. *See* Peter Westen, *On "Confusing Ideas": Reply*, 91 YALE L.J. 1153, 1163 (1982)(footnote omitted).

73. See Douglas Walton et al., *Argumentation Schemes for Arguments From Analogy, Classifications and Precedent: New Foundations for Case Based Reasoning in Law* § 1 (Apr. 1, 2006) (unpublished manuscript).

74. WEISFISH, *supra* note 19, at 63.

Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned."[75]

Our Constitution similarly grants Congress the power to grant copyright and patents, "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[76] In both cases the ultimate objective was not the protection of authors but to increase learning and authors were put into the equation as a means to that objective. I caution that this does not mean any disrespect to authors or to regard them as unimportant to the scheme of copyright. They are quite important to the scheme, but they are not the reason the scheme was created.

Why does this matter? It matters because, from its inception, copyright has never regarded unauthorized uses as inherently unethical or immoral; on the contrary, a number of such uses have been deemed socially essential. English common law judges interpreting the Statute of Anne were quite explicit in articulating their rationale for permitting the unconsented use of one author's work by a subsequent author. That rationale, found initially in the "fair abridgment" context,[77] was that the second author, through a good faith productive use of the first author's work, had in effect created a new work that would itself benefit the public.[78] Since the 1710 English Statute of Anne gave no guidance on the standards to be applied in determining infringement, the English courts looked to the statute's purpose.[79] Fair use was believed to be necessary to fulfill that purpose.[80] English judges accordingly acted boldly to achieve that purpose. [81]

Operating under a similar lack of statutory guidance and a similar but constitutional goal of promoting "the Progress of Science," courts in the United States incorporated and further developed the fair use doctrine to ensure that subsequent authors and the public may build upon the work of earlier authors.[82] Fair use recognizes that much intellectual activity is based upon the efforts of others and frequently involves referential activity. As

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75. Copyright Act, 1709, 8 Ann., c. 19 (1710) (Eng.).

76. U.S. CONST. art. I, § 8, cl. 8.

77. Gyles v. Wilcox, (1740) 26 Eng. Rep. 489, 491 (Ch.). *See also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 576 (1994)(discussion of fair abridgment); Twin Peaks Productions, Inc. v. Publications Intern., Ltd., 996 F.2d 1366, 1376 (2d Cir. 1993) (citing author's fair use treatise). *See also* David Vaver, *Abridgements and Abstracts: Copyright Implications*, 17 EUR. INTELL. L. REV.. 225 (1995).

78. *See Gyles*, 26 Eng. Rep. at 491. *See also* Cary v. Kearsley, (1802) 170 Eng. Rep. 679, 681.

79. *See Gyles*, 26 E.R. at 491.

80. *See id*. at 491.

81. See Hawkesworth v. Newbery, Lofft 775, 775–776 (1774), *reprinted in* (1909) 98 Eng. Rep. 913-914, which is a description by the reporter, Lofft of an oral opinion.

82. U.S. CONST. art. I, § 8, cl. 8.

Professor Zechariah Chafee noted: "The world goes ahead because each of us builds on the work of our predecessors. 'A dwarf standing on the shoulders of a giant can see farther than the giant himself.' Progress would be stifled if the author had a complete monopoly of everything in his book[.]"[83] Similarly, the Supreme Court observed in *Campbell v. Acuff-Rose Music, Inc.*[84] that fair use "permits [and requires] courts to avoid rigid application of the copyright statute, when, on occasion, it would stifle the very creativity which that law is designed to foster."[85] Fair use is designed to perform the vital constitutional goal of ensuring that the balance between encouraging authors to create through the grant of a limited monopoly and the need to permit reasonable, unconsented-to, and uncompensated uses by second authors and the public is not upset by overbroad assertion of rights.[86] Fair use should not, as Judge Pierre Leval put it, "be considered a bizarre, occasionally tolerated departure from the grand conception of the copyright monopoly. To the contrary, it is a necessary part of the overall design."[87]

Similarly, in *CCH Canadian Ltd. v. Law Society of Upper Canada*[88] involving the Great Library's fulfillment of request-based reproductions, the Canadian Supreme Court articulated clearly that exceptions to copyright, (in this case fair dealing, a kissing cousin of fair use) are a part of the system

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83. Zechariah Chafee, *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 511 (1945). Regardless of one's height, the origins of the quoted passage and its phrasing have been the subject of much scholarly interest. The most extensive look at the quote is contained in a book by Robert K. Merton called, appropriately, "On the Shoulders of Giants" ROBERT K. MERTON, ON THE SHOULDERS OF GIANTS (1965). A 1993 reprint called the "Post-Italianate Edition," has a Shandean Postscript and a foreword by Umberto Eco.

Many associate the saying with Isaac Newton: "If I have seen further it is by standing on ye shoulders of Giants." Newton's remark first appeared in a February 5, 1676, letter to Robert Hooke (1635–1703).S*ee id.* at 31. Some have interpreted it as a sarcastic remark given Hooke's slight build and a severely stooped nature. *See* JIM BENNETT ET AL., LONDON'S LEONARDO: THE LIFE OF ROBERT HOOKE 2-3 (2003). Hooke was not short, however, the two did apparently have a falling out in 1672 over a presentation Newton made to the Royal Society showing that prisms split white light rather than modifying it, which Hooke criticized. *See* ALLAN CHAPMAN, ENGLAND'S LEONARDO: ROBERT HOOKE AND THE SEVENTEENTH CENTURY SCIENTIFIC REVOLUTION 196 (Tom Spicer, ed. 2005). Hooke was an astonishing polymath: a scientist, inventor, and famous architect. *See generally* ROBERT HOOKE AND THE ENGLISH RENAISSANCE (Allan Chapman and Paul Kent eds., 2005); *see generally* CHAPMAN, *supra* note 82 ; *see generally* BENNETT ET AL. *supra* note 82 . Both Newton and Hooke appear in Neal Stephenson's trilogy of novels. *See generally* THE BAROQUE CYCLE (2003–2004).

Merton ascribes to Robert Burton's epic masterpiece "The Anatomy of Melancholy" the attribution to Didacus Stella; however, my edition of Burton (the 1978 Jackson edition) has Burton tracing it to Plato's Banquet (p. 437 n.4).

84. 510 U.S. 569 (1994).

85. *Id.* at 577, (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990) (internal quotation marks and citation omitted)).

86. Eldred v. Ashcroft, 537 U.S. 186, 219–20 (2003).

87. Pierre N. Leval, Commentary, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1110 (1990).

88. [2004] 1 S.C.R. 339, 2004 SCC 13 (Can.).

and not a derogation from it.[89] In interpreting the Canadian fair dealing provision, the Court wrote that it "must not be interpreted restrictively," but rather accorded "large and liberal interpretation" so that "users' rights" are not impeded.[90] What Judge Leval, Chief Judge MacLachlin, and the early common-law judges who created fair use understood is that copyright is a system; it is not a thing and it is not a property right. Copyright is a means to an end with the end being to encourage learning. All learning is a community experience and one that takes place over generations, over decades, over centuries. For any system to function, it must take into account, in a meaningful, liberal way, the manner in which humanity proceeds. In the case of copyright, this means that fair use must be viewed as an integral part of the system and not a begrudging exception.

To me, this also means that such uses, even when unauthorized, are both ethical and moral. They are ethical and moral because they serve to fulfill a recognized public policy. One could argue that the policy is purely economic and not ethical or moral. As a federal court in Manhattan held: "Copyright and trademark are not matters of strong moral principle. Intellectual property regimes are economic legislation based on policy decisions that assign rights based on assessments of what legal rules will produce the greatest economic good for society as a whole."[91]

The need for clarity regarding the principles at stake was eloquently made in the greatest speech ever given on copyright, that of Lord Thomas Macaulay in opposing an 1841 bill in the British House of Commons to increase the term of copyright.[92] The bill's supporters argued that Parliament should grant the additional period of protection simply because it was "right and just" to do so. Disagreeing, Lord Macaulay regarded the issue as involving "expediency," meaning that Parliament should grant the additional rights only if it was determined empirically that doing so would benefit the public, as copyright had been created for the public good, not for the private benefit of authors.[93] Here is the relevant excerpt from Lord Macaulay's lengthy remarks:

> The first thing to be done, Sir, is to settle on what principles the question is to be argued. Are we free to legislate for the public

89. *See id*. at ¶ 48.

90. See id. at ¶¶ 48, 51.

91. Sarl Louis Feraud Int'l v. Viewfinder, Inc., 406 F. Supp. 2d 274, 281 (S.D.N.Y. 2005), *affirmed on this point, vacated and remanded on other grounds*, 489 F.3d 474, 480 n.3 (2d Cir. 2007). *See generally* WILLIAM LANDES & RICHARD POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW (2003).

92. *See* MACAULAY: PROSE AND POETRY 731 (G.M.Young, ed., Harvard University Press 1967).

93. *See* MACAULAY, *supra* note 92 at 732.

> good, or are we not? Is this a question of expediency, or is it a question of right? Many of those who have written and petitioned against the existing state of things treat the question as one of right. The law of nature, according to them, gives to every man a sacred and indefeasible property in his own ideas, in the fruits of his own reason and imagination[.]
>
> Now, Sir, if this be so, let justice be done, cost what it may. I am not prepared, like my honourable and learned friend, to agree to a compromise between right and expediency, and to commit an injustice for the public convenience. [94]

The answer to Lord Macaulay's questions is that in common law countries – and I assert in civil law countries too – copyright is a matter of expediency. As a question of expediency, ethics and morality are coextensive with the expedient measures taken to achieve their policy goals. This does not mean that we do not look to larger social concerns or trends; on the contrary, we must since copyright is a social beast.[95] Adding extra-legal concepts of ethics or morality, however, are simply rhetorical efforts to ask economic interests. Legislatures have been happy to render unto Caesar what is Caesar's, and we should be too. Rendering unto Caesar provides authors with what they need most, a way to make a living.

94. *See* MACAULAY, supra note 92 at 731.

95. This is what I take Professor Grimmelmann to mean when he referred to "context, roles, and relationships." *See* Grimmelmann, *supra* note 1, at 2006, n.2.