

Who Owns Jewish Cultural Heritage?

**ASSOCIATION OF JEWISH LIBRARIES ROSALINE AND MEYER FEINSTEIN 36TH MEMORIAL LECTURE.
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For Will

Thank you, Lisa Silverman, our council committee chair, and thank you Michelle Margolis, our newly installed president of the Association of Jewish Libraries (AJL), for inviting me to give this year's annual Rosaline and Meyer Feinstein Memorial Lecture. It is an honor to be placed in the company of distinguished past deliverers of this memorial lecture, such as Dina Abramowicz, Jacob Kabakoff, Menahem Schmelzer, and Herbert Zafren, to name just a few. I attribute my own invitation to join this exclusive club more to my advancing age than anything else...

I especially want to remember at this time the late Colonel Seymour Pomrenze, whom our former AJL president Zachary Baker invited to deliver the seventh annual Feinstein lecture at our annual conference held in Denver, Colorado, in 2002. On that occasion, Col. Pomrenze spoke about "The Restitution of Jewish Cultural Treasures after the Holocaust: The Offenbach Archival Depot's Role in the Fulfillment of U.S International and Moral Obligations (a first-hand account)."

Col. Pomrenze discussed his unique experience as the first director of the Offenbach Archival Depot in postwar Germany, where he headed the effort to sort and repatriate cultural property (Jewish and non-Jewish) looted by the Nazis. That Feinstein lecture, which may be freely viewed and downloaded from our AJL website (Pomrenze 2002), has been cited in numerous publications.

Over the last twenty-five years, there has been a flood of new books, articles, conventions, and declarations about the fate of Nazi-looted Jewish cultural property.¹ This burst of activity may be explained variously but all these publications and projects have one thing in common: the still urgent need to grapple with what Yoel Finkelman, curator of the Haim and Hanna Solomon Judaica Collection at the National Library of Israel, has aptly called "murky provenance," namely, cultural property in public and private hands whose acquisition and ownership history may be suspect.

1. See Cohen and Heimann-Jelinek, 2011; Cohen et al. 2018. For a useful bibliography of publications to 2019, see Gallas 2019.

Today, I would like to shift our attention from discussions of Nazi-looted property—especially headline-grabbing individual works of art—to general notions of Jewish cultural heritage. What is the relationship between cultural property that is privately owned and cultural heritage for which there is a public interest? How do we balance these two competing interests: private property rights and calls for public access to works of cultural heritage? What tools are available to promote and achieve equitable outcomes?

Let me begin by telling you a folk tale called “Il Fumo dell’Arrosto,” or “The Fume of the Roast” in English rendition. It comes from thirteenth-century northern Italy (Borelli 1989).

In the town of Alessandria, a chef named Fabio prepared and sold food for a living. One day a poor man passed in front of his store and smelled a roast cooking. The poor man took from his pocket a piece of bread and held it up in the air. As the fumes wafted through an open window, the poor man standing outside began to eat the bread that had absorbed the steam coming out of the pot in which the roast was cooking. Fabio, seeing what was happening, became angry. He went out to the street, grabbed the poor man and said to him: “Pay me for what you have taken from me!” The poor man responded, “But I haven’t taken anything but the steam.”

A heated discussion ensued which eventually landed them in court. After a great deal of deliberation, the judge finally pronounced this sentence: “The defendant has enjoyed (*ha goduto*) the steam but has not touched (*non ha toccato*) the roast. Now, as punishment, the defendant must take a coin and strike it on this table. The sound the coin makes hitting the table will be payment to the cook.”

I begin by recounting this story as a way of framing the central question of today’s talk: the nature and limits of ownership. Who owns the savory smell emanating from the roast being cooked for sale? What damage is done by someone, in a public area, who consumes these vapors and otherwise uses them?

In this folk tale, there is no dispute that the roast is private property, governed by formal and informal rules of sale, barter, or exchange. The dispute is about accessing and benefitting from the vapors the roast gives off. I invite you to think about this dispute as a metaphor for the tensions between private ownership and public interest. Cultural property like a rare book or manuscript with a clear market value may be privately owned but the intangible cultural vapors they give off belong to the public domain and constitute a shared experience open to everyone. Cultural heritage is a public good, by this reading, and is accessible to all. How to reconcile these competing interests is a different question but the legitimacy of both positions—private ownership and public use—is our starting point.

To be sure, the judge does recognize the chef’s ownership claim over the steam that entered the public domain and rules in favor of a symbolic payment. But keep in mind what exactly the judge ruled: the poor man (our public) has enjoyed (what in halakhic terms might be called *hana’ah* or benefits) in some way from the vapors, but he has not touched the roast (*non ha-toccato*; he is “*shomer negi’ah*,” or modestly guards against touching, so to speak). The ruling by the judge in this dispute over ownership distinguishes between tangible property—what can clearly be touched (the roast)—and intangible property—what cannot be clearly touched (the steam). The distinction between tangible and intangible property is a central distinction in halakhic and modern non-Jewish concepts of property law and international heritage law.²

To give some additional background for today’s discussion about ownership, consider that both Jewish and non-Jewish legal concepts of property further distinguish moveable from immoveable tangible property. For our purposes, tangible, moveable property—what the Mishnah calls *metaltelin*,³ that is, portable things that may be lifted and moved—may refer to rare books, manuscripts, and archives; while tangible immoveable property—what the Mishnah calls *karka’ot*—refer, for example, to the land upon which a library is built.

Generally speaking, by contrast, intangible property commonly refers to intellectual property, copyrighted material, patents, trademarks, and brands. These are abstract things you may, for example, be able to see and read but cannot touch. Recent discussions in international and human rights law, as well as United Nations conventions and recommendations have further shifted from speaking about cultural property to cultural heritage, in order to “capture more complex values than property can convey,” namely universal, intangible interests and values (Francioni 2007, 229).

WHO OWNS JEWISH CULTURAL HERITAGE?

Who may represent Jewish ownership claims?⁴ I would like to frame each word in the title of this talk in definitional terms; not to define the terms, but to complicate pre-existing assumptions and expectations about the meaning and limits of ownership over cultural heritage. I will then offer a couple of practical examples of recent *Judaica* ownership controversies to illustrate what I am trying to get at. The remainder of the talk will explore how digital technologies have impacted ownership claims and what that impact means for owners and stewards of cultural property, and

2. The distinction between moveable and immoveable property is enshrined in the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict (1954). For a survey of halakhic sources, see the still helpful article by Webber (1928, 82–93). For additional halakhic sources on acquisition, ownership, and property, see Elon 1994, 79–80, 219–223, 581–584, 587–601, 744–745, 1007–1008, 1074–1075, 1200–1201, 1331–1340). For general studies of theories of property and new approaches to cultural property and intangible cultural heritage, see Alexander and Peñalver 2012; Francioni 2007, 221–236; and Stamatoudi 2011.

3. See especially, *Mishnah Kidushin* I: 1–10; *Bava Metsi’a* IV.

4. Regarding the debate in the 1940s about nature of the Jewish collectivity and who should be entrusted to represent the collective in the absence of a sovereign state, see Bilsky 2020; Gallas 2019, 64–66; and Leff 2015, 97–102.

will conclude by considering new, alternative approaches that balance ownership claims and stewardship responsibilities. For those of you who are impatient and want to know the answer to my question right now, I will state here at the outset that everyone and no one owns Jewish cultural heritage.

WHO

When we ask “who,” are we speaking about an individual person? Or perhaps we are talking about an individual family and their heirs? Or maybe we are not really talking about a “who” at all but rather a “what”, i.e., not a person but a private or public institution, a corporation or foundation, a sovereign nation or nation-state? Or perhaps we are talking about a trustee, a non-owning surrogate, what the Mishnah calls an *apotropos* or *epitropos* (Jastrow 1903), namely a guardian who represents the interests of a beneficiary? Or perhaps we should consider our “who” to be a communal organization representing a collective interest rather than the claims of individual people? For example, the Jewish Cultural Reconstruction was recognized by the American military government in postwar Germany as such an organization, entitled to distribute heirless Jewish property looted by the Nazis. When it comes to ownership, sometimes a “who” is really a “what.”

OWNS

There is an enormous and complex body of modern non-Jewish legal writing as well as halakhic literature about the concept of *kinyan*, namely the acquisition and ownership of property—tangible and intangible (Webber 1928, 82–93; Elon 1994). What does it mean to own something? How was it acquired? By sale, barter, exchange, inheritance? By theft or mere possession? What instruments and/or rituals establish legal ownership? Must ownership be conveyed in writing? Is possession a kind of ownership by virtue of control over access? May possession pass into ownership after a certain time has elapsed? When and how is ownership forsaken?

If ownership may be boiled down (no pun intended) to one idea it is the right, guaranteed by law and force, to exclude, or in other words, to prevent someone from touching, accessing, benefiting, crossing over, or otherwise using one’s private property.

The key question for our discussion is whether ownership of tangible objects of Jewish cultural heritage is absolute by definition and unlimited in power and authority, or does it come with responsibilities and limits (and thus may be subject to regulation and obligation).

It is clear that biblical, rabbinic and halakhic sources provide ample evidence that ownership is not absolute. Yoel Finkelman mentioned in his conference talk⁵ that landscaping around the

5. Yoel Finkelman, “The National Library of Israel: Updates while Moving into the New Building.” AJL Annual Conference, Philadelphia, PA, June 28, 2022.

National Library of Israel’s new building had to be completed before last year’s Jewish New Year because this year the Land of Israel is biblically mandated to be left fallow, a practice called *shemīṭah*, thus placing limits on land use. Classical rabbinic literature is replete with discussions of ownership limitation, such as discussions in the Mishnah about leaving aside a portion of one’s crop (*pe’ah*) for the poor or the ceremonial offering of selected first harvested fruits (*bikurim*) for donation to the Temple. Numerous Talmudic tractates, such as *Bava Batra*, treat and analyze property disputes; Maimonides devotes an entire book (book twelve) of his 14-volume *Mishneh Torah* to the subject of *ḳinyan*—acquisition and ownership. Ownership, as presented in halakhic sources, is not absolute and is regularly limited and regulated by a host of conditions, such as tithing, taxation, and *tzedakah*.

Significantly, rabbinic lore explicitly refers to a special kind of intangible property ownership that might be better thought of as heritage, not property: the acquisition of Torah. Appended to the beloved classical Tannaitic ethical tractate *Pirke Avot* (ca. 200) is a sixth chapter, a ca. tenth-century extracanonical work known as *Perek Ḳinyan Torah*, or the *Baraita d’Rabi Me’ir*.⁶ The title phrase “*ḳinyan Torah*” in literal translation means “the acquisition of Torah.”

This *baraita*, which I can only briefly quote here, attributes to the second century C.E. *tanna* Rabbi Meir the following statement, in praise of intangible forms of acquisition: “whosoever labors in the Torah for its own sake [*li-shemah*, i.e., not for profit or honor], is not only meritorious in many ways but the whole world is indebted to him (*ḳinyan torah*, the acquisition of Torah learning) clothes that person in humility and reverence; it equips him to be just, pious, upright, and faithful. . . .” (Hertz 1945, 104–107).

Here we see a clear example of an intangible form of acquisition constituted by a person’s internalization of torah learning and virtuous living. It is worth noting that the mere possession of a physical library of learning is no proof of ownership of that learning. In this sense, all of *torah she-be’al peh* (Oral Torah) is intangible property. It is a common possession yet owned by no one. It is only acquired through intensive study. It is preserved and transmitted through learning and teaching, internalization, and practice (*li-lemod u-lelamed, li-shemor ve-la’asot*). It cannot be bought.

JEWISH

Who is a Jew? What is Jewish? These perennial, seemingly intractable questions have been debated on religious, cultural, ethnic, national, biological, racial, historical, genealogical, individual, and collective grounds.⁷ For our purposes, I would like to shift the focus on essential

6. On the Geonic dating of *Perek Ḳinyan Torah*, see Higger 1935. My thanks to Louis Meiselman for referring me to this digitized version on short notice.

7. There is a vast literature, both popular and academic, that has tried to make sense of Jewish identity. For starters, see Baron 1964.

identities to practical issues of scope and classification in libraries and other heritage institutions. Here is how we at University of Pennsylvania Libraries have approached the issue in our *Judaica* collection development policy statement, under Collection Description. Rather than rely on essentializing criteria, we opt for a pragmatic, inclusive view:

The term “*Judaica*” used in this policy statement covers a range of materials in a variety of different languages and formats that relate in their subject matter preponderantly to Jews and Judaism across time and around the world. For example, poetry written by Heinrich Heine that does not explicitly address in a central way Jews or Judaism (or perhaps exhibits only minor Jewish content) would not be classified here as a work of *Judaica*; however, poetry by Heine about Jews or Judaism or a secondary work about Heine’s poetry mainly concerned with its arguably Jewish content or about Heine’s own Jewish identity (he was born Jewish and converted to Christianity), would be. Similarly, everything published in Hebrew (*Hebraica*) is not *Judaica*. So, for example, a Hebrew-language work about medicine or chemistry with no substantial, specifically Jewish content, and whose only link to being *Judaica* is the fact that it is written in Hebrew, is not classified here as *Judaica*. On the other hand, clearly it is a work of *Hebraica* in the sense that it is written in the Hebrew language. All *Hebraica*, thus, is not necessarily *Judaic* in content. *Judaica*, conversely, includes *Hebraica*, but is by no means limited to works written in Hebrew.⁸

CULTURAL

The first time I can recall hearing the word “culture” was in a doctor’s office around 1970. I had a history of throat infections, and often overheard the refrain, “we’re gonna need to take a throat culture.” Within a year, my tonsils were removed and for me the problem of culture (and cultures, because I had many) went away. Little did I know what difficulties lay ahead. I will not try to summarize the endless academic debates about the meaning and interpretation of the concept of culture⁹ and diverse cultures here except to shift attention from discussions of Nazi-looted cultural works of art to focus on Jewish cultures of books, libraries, archives, museums, history, and memory.

HERITAGE

Heritage is another tricky term. Does anyone doubt its reality? And yet it is not tangible and not easily defined. Anthropologists, sociologists, psychologists, ethnographers, and scholars of religion all have their approaches to thinking about places, customs, practices, and material objects that evoke history and memory. In a bit of a long-winded but useful summary, the United Nations Educational, Scientific and Cultural Organization (UNESCO)’s Convention for the Safeguarding

8. <https://www.library.upenn.edu/page/judaica-collection-development-policy>. Accessed October 21, 2022.

9. For a useful, recent survey of concepts of culture, see Lenard 1973, but note also Asad (1983) for a classic critique of Geertz’s “Religion as a cultural system” (1973) as overly western and Christian in its orientation and politically naïve in its failure to address the power dynamics that shape the production of knowledge.

of Intangible Cultural Heritage, ratified in 2006, defines intangible cultural heritage as

... the practices, representations, expressions, knowledge, skills—as well as the instruments, objects, artefacts and cultural spaces associated therewith—that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. (UNESCO 2003)¹⁰

Here I would also like to draw attention to the work of Francesco Francione, a professor of International Law at the European University Institute in Florence. Francione has brilliantly analyzed the dynamic evolution of international law and declarations from the language of cultural property to cultural heritage. Francione emphasizes how what “today we call ‘intangible cultural heritage’ refers to objects endowed with intrinsic value as expressions of human creativity” (Francioni 2011). He further takes into account the “question of reconciling the idea of universal value of cultural heritage with that of cultural diversity” (Francioni 2007, 229). The problem he identifies thus is not only one of tangible vs. intangible property rights but reconciling intangible universal values, such as human rights, with the particular intangible rights of individual groups in terms of preserving cultural diversity and respecting group differences.

STEWARDSHIP AND ITS DISCONTENTS

Judaica librarians, as stewards of a public interest in Jewish cultural heritage, have a unique role to play in safeguarding, preserving, and advocating open access to privately held Judaica deemed universally culturally significant. It is our job to identify cultural content of public interest, seek to acquire it for our institutions, work with staff to preserve it, make it known and discoverable through expert cataloging, and otherwise make such cultural heritage materials accessible—physically, and ideally, virtually as resources allow.

A model of public stewardship participates in and yet ultimately works against a market value system. It is critical to remember that if curators, bibliographers, and selectors are doing their job well, at the point of acquisition (*kinyan*) they erase the market value of what they buy or receive as a gift, regardless of purchase price and appraised value. Why? Because culture stewards like me are not buying for resale. Even as nonprofit cultural heritage professionals participate in the marketplace, their acquisitions, in principle, render monetization moot because the purpose of stewardship is precisely not resale.

For that reason, a gift-in-kind of a rare Hebrew book or manuscript with a high fair market appraisal value must not be mistaken as equivalent to a cash donation to an institution. In fact, it

10. See also Blake 2000; Cameron et al. 2007.

is just the opposite—it is a costly responsibility, in perpetuity!—to house, protect, and provide public access to the manuscript. What it is not is a commodity to flip and resell. This fact is sometimes lost on potential donors who do not understand why institutions ask them for additional funds when they are making a high-value gift-in-kind and expect additional services without additional support.

Do owners have any responsibility for tangible cultural heritage in their possession and under their legal control? Are ownership rights absolute? Why would such owners not work cooperatively to ensure public access?¹¹

When I started working over twenty years ago on digital genizah studies, I soon realized that when data is open it becomes possible to make matches among physically dispersed property held all over the world by different owners. I have come to believe that we need to get private owners to think more like stewards of cultural heritage and to get professional stewards of cultural heritage to stop thinking like owners. If private ownership is defined by its capacity to exclude from access, then public stewardship may best be understood as open access.

But why would private owners grant unlimited, unrestricted open access via digitization to their private property? Does not digitization cheapen the market value of something? As a bibliographer responsible for selecting books to purchase for our collections, I often find myself thinking, “Why spend a lot of money for a copy of a book with no particular artifactual value when a digital surrogate is available?”

This discussion of market value assumes the private owner’s motivation is exclusively monetary. Private collectors of Judaica may have many other reasons they collect. Resale value is just one possible motive. Another—and for some owners a no less important motive—is precisely the cultural significance of owning a piece of their heritage (Richard et al. 2001). One auction house, Genazym, makes this point explicitly by appealing to its potential clientele’s personal identity and encouraging them to “own your own heritage.”¹² These types of collectors are stakeholders in the cause of preservation and access to Jewish cultural heritage, even if they are buying for resale. They may buy Judaica as an investment, but they do not only buy Judaica as a financial investment. Their self-definition of their motive for collecting is not exclusively pecuniary. There are many reasons why people do something and clearly money may be just one of their motivations.

11. The legal scholar Andreas Pantazato has argued that we need first to think of ourselves as being “entrusted” with fiduciary responsibilities rather than trusted to hold the physical object. See Pantazato 2016; Wilf 2001; Gerstenblith 2001; and Stamatoudi 2011, 239.

12. “Treat yourself to a taste of our past. Revel in awe-inspiring Jewish history,” <https://www.genazym.com/about/>, accessed October 21, 2022.

I would like to make a stronger claim, however: promoting open access is a win-win for the vast majority of private collectors and for institutions concerned that they would lose out on potential revenue by giving away the rights to their cultural holdings. I argue that digitization enhances market value and intellectual appreciation.

There are a number of reasons for that but for private owners thinking about reselling a precious, authentic original object, digital access provides free advertising!

By amplifying the textual message through instant global communication, digitization also has the unintentional effect of amplifying the market value of the original, material artifact. The more well-known the simulacrum, or virtual version becomes, the greater the appreciation of the aura of the tangible, physical original.

William Noel, the inaugural John T. Maltzberger III '55 Associate University Librarian for Special Collections at Princeton University Library, championed in his 2012 TED talk the cause of open data (Noel 2012). He drew attention in his TED talk to what we might call the “Mona Lisa” effect, namely, that millions of reproductions of the Mona Lisa surely have failed to diminish the market value of the original and the desire for people to encounter the original in person at the Louvre Museum in Paris.¹³ Just the opposite, as anyone who has stood in line to view it there knows.

Digital facsimiles can do many things, but they cannot reproduce the aura of the original,¹⁴ or the experience of encountering a historical document, medieval manuscript, rare book, or association copy. What they do best is preserve content and make it accessible on a global scale. The experience of encountering the original material text is not alienated by preservation and access any more than the market value is.

Cultural heritage professionals, meanwhile, through their participation in the Judaica marketplace, are susceptible to think like owners when their job is cultural heritage preservation and access. I recall a session at one of our AJL conferences when someone asked how much one of our great institutional library collections was worth. The answer, of course, is it is priceless. But not only because of its intangible value but also because it should not be thought of as a commodity for resale. Judaica may be bought and sold like a commodity, but the intangible reality Jewish cultural heritage represents, like the vapors of the roast, cannot be resold.

13. Note however the difference between exhibiting cultural heritage content which may be up for private sale vs providing public access to content under private control. Exhibition and access are different in that the former (exhibits) are there to explain significance which has a potential market value while open access is value neutral and treats all cultural heritage as being of equal, which is to say, intangible value.

14. Alluding to, though differing with the pessimistic conclusions of Walter Benjamin's famous essay, “The Work of Art in the Age of Mechanical Reproduction” in Zohn's translation (Benjamin 1969) or the alternative translation of Edmund Jephcott (Benjamin 2008).

Four recent Jewish cultural property controversies cases may serve to illustrate our discussion about private ownership, public access, and digital technologies: a printed Hebrew book, a handwritten Hebrew manuscript, a Jewish communal ledger book, and a Jewish communal archive. I will conclude by introducing recent discussions of post-custodial practices and how digital technologies and open data may help to advance these approaches.

Among the motives for private acquisition of Judaica is a sense of historical responsibility. Jack Lunzer, the famous custodian of the Valmadonna Trust Library, explicitly described his mania for collecting every Hebrew printed book as a self-conscious rescue mission to protect and preserve Jewish cultural heritage in the wake of the Holocaust. Notably, despite the trustees' fiduciary responsibility to maximize the financial interest of the beneficiaries, the trust authorized the microfilming of the collection and otherwise made it widely accessible for scholars to consult in person. Access to the online texts of the Valmadonna collection of Hebrew, Judeo-Arabic, and Marathi Jewish printing in India previously microfilmed (Sabin Hill and Valmadonna Trust. n.d.) is now restricted by commercial subscription, a situation that may yet be remedied by the current public owner of the Valmadonna Library: the National Library of Israel. In the case of the Valmadonna Trust, access was not viewed as inimical to maximizing market value. In the end, most of the collection was sold and the fact that some of it had been digitized did not affect the market price.

Dr. Manfred R. Lehmann, another outstanding Judaica collector, wrote of the unique responsibility of every private owner of a Hebrew manuscript to publish it and make it known. In the introduction to the four-volume catalog of his collection he explicitly stated that, "I consider that anyone who owns Hebrew manuscripts has a special obligation to work toward their publication ... This is a task which I have also taken upon myself and I have been privileged to publish a fair number of papers each year based on manuscripts in our Collection" (Halamish et al. 1988, 1: xiii). He also wrote of his own mission to collect Judaica to counter the effects of centuries of antisemitism, censorship, destruction, and burning of Jewish books.

Collecting Judaica for both of those collectors was not just a personal hobby or financial investment; their work was driven in part by a feeling of historical and intellectual mission. This intangible value—this sense of mission—is what I hope other private collectors and institutions will feel about providing open public access to the content under their private control.

Openness to digitization as a way of resolving contested ownership claims was made explicit in the 2021 case of the Hungarian Jewish Pre-Holocaust *pinḳasim*, or communal ledger books.¹⁵ In

15. See Affidavit 2021, Stipulation 21: "FACTUAL BACKGROUND: In or around February 2021, law enforcement learned that the auction house of Kestenbaum and Company ("Kestenbaum auction house"), had offered for its 92nd auction of February 18, 2021 (the "Auction"), a total of 21 Manuscripts and Scrolls, as described more fully in Exhibit A hereto, originating from flourishing and dynamic Jewish communities (the "Jewish Communities") that existed and lived before World War II and the Holocaust in what is currently parts of Hungary, Slovakia, Romania and the Ukraine. Upon information and belief, one of the Manuscripts and Scrolls is located at the Kestenbaum

the legal affidavit arguing for the seizure of the *pinkasim*, the point is made that,

The consigner has expressly repeatedly stated his intention to sell the Manuscripts and Scrolls to international buyers, one of whom, in Ireland, already has contacted him directly, and then let those international buyers make high quality facsimiles and distribute them to interested parties. While the consigner’s intention would allow the consigner to obtain remuneration for the Manuscripts and Scrolls, it would operate to prevent the government from returning the works to the survivors and successors of the Jewish communities that created them. (Affidavit 2021, stipulation 41)

In this adversarial legal and commercial context, “high quality facsimiles” not only help promote the sale but also may potentially substitute for the physical return of the originals whose market value the consignor seeks to maximize.

Meanwhile, Wesley Fisher, director of research for both the Conference on Jewish Material Claims against Germany and the World Jewish Restitution Organization, put it this way: “Ideally, all *pinkasim* should be digitized and their contents made generally available, while the original manuscripts—if they are in individual private hands—should be returned to these communities.”¹⁶ The limited force of the word “should” in this formulation reveals that there is no legal obligation. It is a plea based on a moral claim. Still, Fisher turns to digitization as a practical means to arbitrate among competing interests and ensure private sale and public access.

In debates about who owns the Iraqi Jewish Archive, we similarly find discussions that engage digital access as a possible compromise. That cache of historical documents, books, photographs, and other ephemera belonging to the Jewish community of Iraq had been confiscated by Saddam Hussein and kept in the basement of the *Mukhabarat*, the headquarters of Iraq’s intelligence services. By accident, the American military recovered the collection during the second Iraq War in 2003 when the building was searched. The U.S., with the agreement of the newly installed Iraqi government, removed what has come to be known as the Iraqi Jewish Archive and took it to the National Archives and Record Administration (NARA) located outside of Washington, D.C. for conservation treatment. The U.S. promised to return the archive to Iraq after the work was completed. The NARA expert staff conserved, archivally re-housed, cataloged, and digitized most

auction house’s offices, another is with a buyer in Monsey, New York, and 17 are with the consigner.... Two of the remaining Manuscripts and Scrolls were sold to the National Library of Israel and one was sold to an individual in Israel.” See also Lebovic 2021; Guenette 2021.

16. Quoted in Lebovic 2021: “Israeli genealogist Mattan Segev-Frank stumbled upon a so-called ‘binder’ being sold on the auction house platform Bidspirit. The collection of Hungarian-Jewish *pinkasim* included letters and contracts signed by members of the Reich dynasty, to whom the activist is related. The family is also the subject of Segev-Frank’s master’s thesis at Tel Aviv University. After coming across the signatures, Segev-Frank decided to use the auction to raise awareness of the issue in Israel and globally. Unfortunately for his cause, however, online auctions of *pinkasim* are usually conducted lawfully—including according to Jewish religious laws regarding abandoned property.”

of the salvageable material; produced a travelling exhibition; and built a website to display the content. They committed significant resources, many years of work, and an estimated \$3 million to the project as a whole. Though not everything recovered was processed, unique and rare materials were prioritized for digitization and a selection of the sources is viewable online.¹⁷

The prospect of returning the archive to Iraq provoked outrage among members of the Iraqi Jewish community who had fled the country. Clearly, a digital surrogate will never adequately substitute for control over one's own family's childhood school records, especially if the original documents are returned to the country you hold responsible for your family's suffering. In the absence of legal options and for the time being, no practical opportunity to regain possession currently exists. Thus, it may come as some comfort to members of that community to think that their heritage at least has been physically preserved. Thanks to NARA, most of the archive is now digitally accessible and open to the public through the Council of Libraries and Information Resources. Though less than an ideal outcome for private individuals, this model offers a viable public alternative to losing all access and control. In the case of the Iraqi Jewish archives, it was publicity—not market forces—that led to a new appreciation of that particular cultural heritage. If not for the ardent campaigning by community activists leading to public debates over its repatriation to Iraq, the material might otherwise have been thrown away, abandoned, or destroyed. Based on condition alone, the market value would in all likelihood not have approached the multi-million dollar cost of its preservation and access.

Given the public interest in privately owned cultural heritage objects, one approach to reconciling these two seemingly irreconcilable positions is to distinguish between private ownership of the physical object and the public, ethical responsibility for preservation and access. Post-custodial methodologies developed in recent years advance this approach.¹⁸ “The post-custodial paradigm of archives,” following the work of Christian Kelleher and others, “re-positions archivists from institutional custodians of archival records to stewards of records in their places of creation or use” (Kelleher 2017, 1).

According to the post-custodial model, you do not have to own someone else's cultural heritage to help steward it in terms of preservation and access. Note that the English phrase “take into or keep in custody” means to “imprison.” Post-custodial culture heritage practices seek to liberate

17. The online Iraqi Jewish Archives, <https://ijarchive.org/search>. For additional information and documentation of the methodologies employed for determining what would be digitized, see the “Project Documentation” and the “Criteria for When to Digitize” pages on that site. My thanks to Stephen Epstein, senior advisor, Bureau of Near Eastern Affairs at the US Department of State, and Noah Durham, preservation officer (acting) at NARA for sharing with me their unique experiences and expert insights about this project.

18. For an overview of post-custodial methods and practices, see Shein and Lapworth 2016. For a founding statement, see Ham 1981. Note especially the work of Terry Cook (1997). My thanks to Samantha Hill, curator of Community Engagement at the Penn Libraries, for the following four additional critical readings: Cook 1994; Kelleher 2017; Henningham et al. 2017; Zavala et al. 2017. See also: Bastian 2004; *The Post-Custodial Method and Community Archives* 2019; Gauthereau 2018; Alpert-Abrams 2018; Suárez 2021; Sangwand and Norsworthy 2013; *Reparative Archives Project: Post-Custodialism* 2022; *The Post-Custodial Method and Community Archives* 2019.

tangible forms of culture heritage from the prison of private control and make them free, open, and accessible. This post-custodial trend follows in the footsteps of postcolonial theory. Practitioners explicitly seek to confront the violence of colonial exploitation and cultural extraction and redeem these histories with ethical, empathic understanding. Their goal is to remediate the alienated control over someone else's culture patrimony through non-ownership models of stewardship.

DISTRIBUTED, DECENTRALIZED JUDAICA CULTURAL HERITAGE DIGITAL COMMONS: A PROPOSAL

Rather than inevitably framing these cases and related disputes in terms of contested property ownership, I would like to explore what it would take for owners to see themselves as stewards who share in the work of preserving and making accessible works of cultural heritage (Stamatoudi 2011, 193ff; Campfens 2015).

I suggest that we—private owners and cultural heritage professionals—need to think and act cooperatively to build, host, and sustain multiple international open-access Judaica digital heritage commons. Such open digital spaces, hosted by different owners and post-custodial stewards, would offer intuitive, interactive, interoperative portals. In this way, anyone could find, view, download and upload, and otherwise digitally discover in an integrated and open way tangible Jewish cultural heritage content. Everyone would benefit from such resources:

- Owners would get free advertising
- Users would get unrestricted access
- Educators would find digital content to use for their courses
- Scholars would benefit from integrated search and discovery
- Innovators would have opportunities to imagine new uses of open data
- Technologists would secure, manage, and sustain the viability of the data and work to provide enhanced interoperability.

Of course, there have been many grand attempts to create *the* centrally managed and controlled portal. My suggestion is that we not try again to build arrogantly a siloed, digital tower of cultural Babel. Rather, that we work together from a distance, locally and internationally, independently, and cooperatively, to host, preserve and provide virtual access to public *and* private collections of Jewish cultural heritage *in situ* wherever they may be found.

Existing models that might be built upon include:

- **Judaica Europeana 2.0.**¹⁹ This project has undergone several iterations. It works within the framework of the European Union’s desire to provide high-quality data and metadata about European Jewish cultural objects found in cultural heritage institutions around the world and make them accessible through the principal site, Europeana. This initiative is limited to European Jewish cultural heritage and is not focused on providing access to privately owned and held materials, which extend beyond that scope.
- **Ktiv.**²⁰ The National Library of Israel has built a digital repository of nearly 95 percent of all known Hebrew manuscripts, publicly held or privately owned. This initiative, called Ktiv, builds on a project launched in 1950 by Israel’s first prime minister, David Ben-Gurion, to seek out and microfilm every Hebrew-character manuscript in the world. Ktiv amplifies the technological capacity of microfilm by providing a global open inventory of data about extant Hebrew manuscripts but does not provide access to images of all of them because not all owners of original source material grant open access via Ktiv, limiting the site’s usefulness (through no fault of the library). Consequently, researchers need to take into account multiple terms of use to view and download content.²¹
- **OPenn.**²² The University of Pennsylvania’s model takes the opposite approach. Unlike Ktiv, Openn hosts only completely open, unrestricted cultural heritage data that may be freely downloaded and used under a creative commons licensing model. It does not provide an exhaustive inventory of a particular type of object (such as Ktiv’s Hebrew manuscripts repository). While it does not serve as a global database, it does serve as a valuable model of local, open access hosting.
- **Footprints.** This project, as its website states, “traces the history and movement of Jewish books since the inception of print.”²³ Footprints is a Judaica open data commons that seeks to document and map evidence found within the pages of pre-1800 Hebrew-character printed books of their readership and use.

CONCLUSIONS

I have tried to pose questions as much as answer them. I have tried to shift traditional discussions about Jewish cultural property from a focus on Nazi-looted property to ownership issues in general. I have tried to direct attention away from tangible cultural property disputes to intangible cultural heritage responsibilities, from private ownership rights to public stewardship obligations, from closed, absolutist, legalist assumptions about ownership to a plea for recognizing common interests and market incentives for embracing open data and cooperation.

19. <https://pro.europeana.eu/project/judaica-europeana-2-0>.

20. <https://www.nli.org.il/en/discover/manuscripts/hebrew-manuscripts>.

21. <https://www.nli.org.il/en/discover/manuscripts/hebrew-manuscripts/terms-of-use>.

22. <https://openn.library.upenn.edu/ReadMe.html>.

23. <https://footprints.ctl.columbia.edu/>.

One final thought about how digital technologies are relevant for our question “Who owns Jewish cultural heritage?” I have tried to suggest that digital technologies offer an unprecedented opportunity to test the proposition that private ownership and public values are not necessarily adversaries. I have tried to show that they are common stakeholders that share overlapping, if not identical interests. Digitization of cultural property, qua amplification, simultaneously transcends private ownership claims and control over physical access and enhances, rather than diminishes, the market value and cultural significance of the original object. This curatorial principle is at the core of driving Judaica digital humanities at the Penn Libraries. We have sought to build partnerships with private owners of works of Judaica which are connected with items in our collections, such as genizah fragments matches and historical correspondence. When successful—and we have not always been successful—we have been able to provide open, integrated digital access to physically dispersed content in public and private hands.

My hope is that we all—private collectors, auctioneers, independent booksellers, communal organizations, and institutions such as universities, libraries, archives, museums, and galleries, as well as sovereign governments—may work together to commit to a model of preservation and access that respects private property rights and public cultural heritage interests.

Why not be able to have our roast and enjoy the aroma too?

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