

The Rise and Fall (and Rise?) of Copyright Formalities

Oren Bracha April 2013



Legal formality

Legal formality

And he that blasphemeth the name of the LORD,
he shall surely be put to death, and all the
congregation shall certainly stone him”

Leviticus 24:16



Legal formality

“May Jose [i.e. The Lord] Smite Jose [i.e. The Lord]”

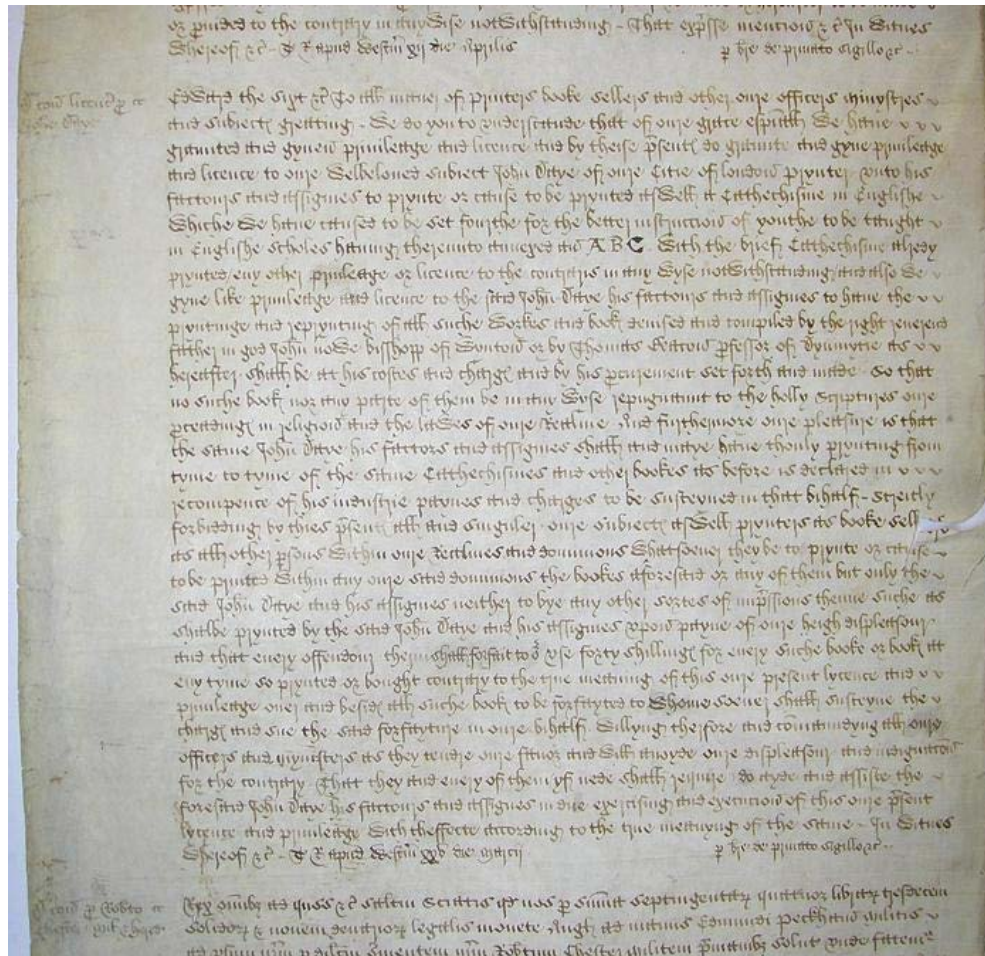
“It has been taught: [The blasphemer is not punished] unless he blessed the name by the name”

Babylonian Talmud, Nezikin, Tractate Sanhedrin, Chapter 7, Mishna 5.



Which Came First
the Copyright or the Formality?

Printing Patents

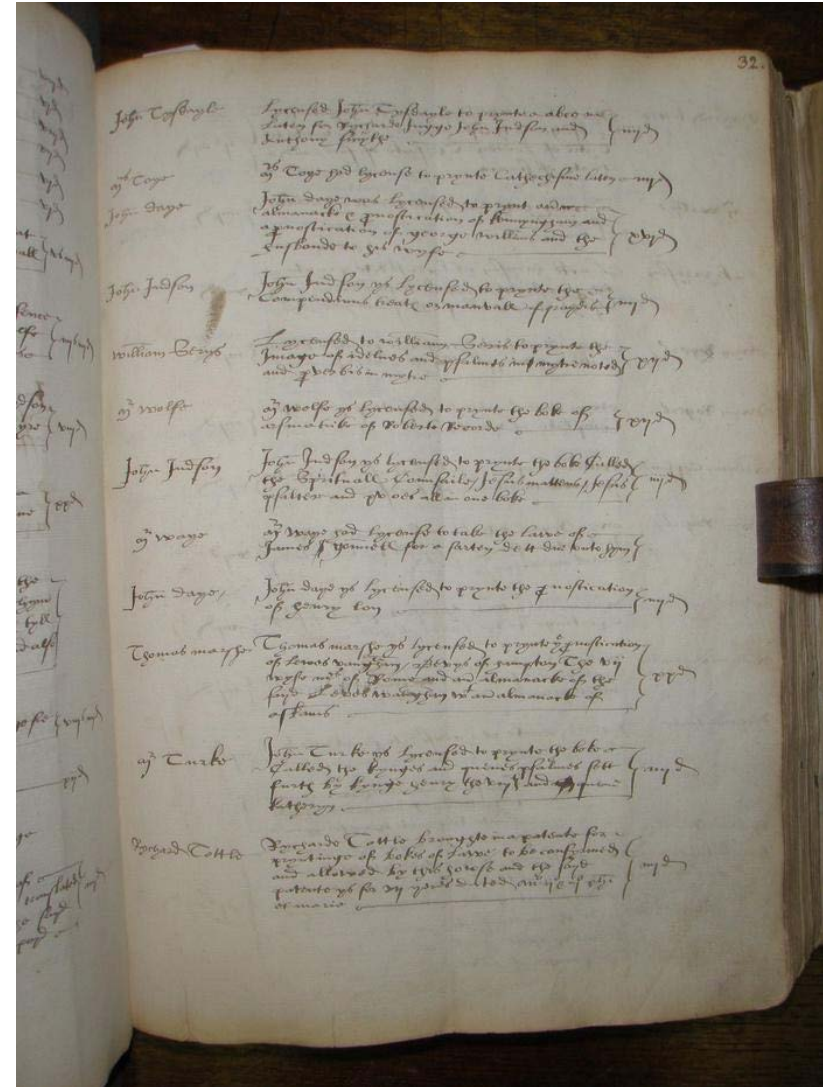


John Day's Privilege for the Catechism, Westminster (1553), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org

Stationers' Company's Registers

“the companie do order emongest them selves that he which bringeth a booke to be printed should use yt as a priviledge... everie of such Stationers hath divers copies severall to them selves”

The final report of the augmented Commission from the Privy Council on the controversy in the Stationers' Company (1583)



Primary Sources on Copyright
(1450-1900)

The Statue of Anne 1710

For the better
And for the better
the better
Whereas printers, booksellers and
other persons have of late frequently taken
the liberty of printing reprinting and publishing
or causing to be printed reprinted and publishing
Books and other writings without the consent
of the authors or proprietors of such books
and writings to their very great detriment and
too often to the Ruine of them and their families
For preventing therefore such practices for
the future and for the encouragement of learned
men to compose and write usefull books **May**
it please your Majesty That it may
be enacted And be it enacted by the Queens
Most Excellent Majesty by and with the advice
and consent of the Lords Spiritual and Temporal

Primary Sources on Copyright
(1450-1900)

The Statue of Anne 1710

And whereas many persons **may through ignorance offend against this Act** unless some provision be made whereby the property in every such book as is intended by this Act to be secured to the proprietor or proprietors thereof **may be ascertained** as likewise the consent of such proprietor or proprietors for the printing or reprinting of such book or books may from time to time be known Be it therefore further Enacted by the authority aforesaid That nothing in this Act contained shall be construed to extend to subject any Bookseller printer or other person whatsoever to the forfeitures or penalties therein mentioned for or by reason of the printing or reprinting of any book or books without such consent as aforesaid unless the Title to the Copy of such book or books hereafter published shall before such publication be entered in the Register Book of the Company of Stationers... **Which said Register Book may at all reasonable and convenient times be Resorted to and inspected** by any Bookseller printer or other person for the purposes before mentioned, without any fee or Reward And the Clerk of the said Company of Stationers shall when and as often as thereunto required give a Certificate under his hand of such entry or entries...

Britain: Later Development

- *Beckford v. Hood*, (K.B. 1798)
 - The ghost of common law copyright haunts formalities
- Imperial Copyright Act of 1911
 - 1908 Art. 5(2) Berne Convention

1790 Copyright Act

- The Statute of Anne cut & pasted
- But: traces of innovation.
 - Requirement of newspaper publication of record
 - Reversion right becomes renewal (conditioned upon re-registration)
 - 1803 notice requirement: “giving information” by inserting record in title page.

1790-1909

The (Golden?) Age of Formalities

- Strict Adherence to formalities as constitutive of copyright [Wheaton v. Peters (1834)].
- Opposition fixed on issue of copyright as a natural property right grounded in common law and focused on:
 - Perpetual Duration
 - International Copyright
- Only rare and sporadic opposition to formalities
 - Noah Webster to Daniel Webster 1826
 - Literary Property, 2 Am. Jurist & L. Mag. 248, 264-267 (1829)
- Treatise writers (George Ticknor Curtis and Eaton Drone)
 - Strong support of common law narrative
 - But acquiesce regarding formalities

International Copyright, 48 N. Am.
Rev. 257 (1839)

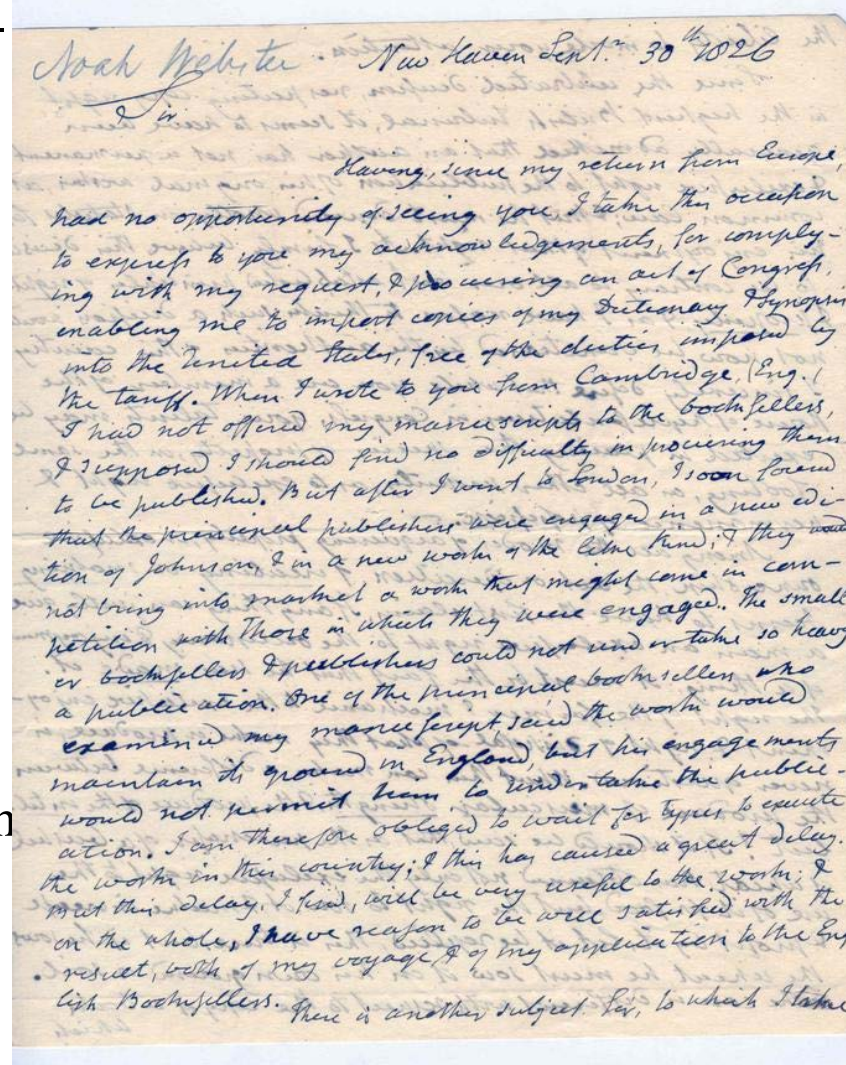
“[N]ever in the annals not only of legislation and jurisprudence, but also of robbery by sea and land, was a more dishonest and insolent sentence uttered than that of Lord Camden in the House of Lords in Great Britain, in the case of Donaldson versus Becket.”

Noah Webster to Daniel Webster 1826

Upon what principle, let me ask, can my fellow-citizens declare that the productions of the farmer & the artisan shall be protected by common law, or the principles of natural or social right, without a special statute, & without paying a premium for the enjoyment of their property; while they declare that I have only a temporary right to the fruits of my labor & even this cannot be enjoyed **without a premium?**

...

I sincerely wish our legislature would come at once to the line of right & justice on this subject, & pass a new act, the preamble to which shall admit the principle that an author has, by common law, or natural justice, the sole & permanent right to make profits by his own labors, & that his heirs & assigns, shall enjoy the right, **unclogged with conditions.**



Noah Webster New Haven Sept. 30 1826

Having, since my return from Europe, had no opportunity of seeing you, I take this occasion to express to you my acknowledgements, for complying with my request, & procuring an act of Congress, enabling me to import copies of my Dictionary & Synonym into the United States, free of the duties imposed by the tariff. When I wrote to you from Cambridge, Eng. I had not offered my manuscripts to the booksellers, & I supposed I should find no difficulty in procuring them to be published. But after I went to London, I soon found that the principal publishers were engaged in a new edition of Johnson, & in a new work of the like kind; & they would not bring into market a work that might come in competition with those in which they were engaged. The smaller booksellers & publishers could not send or take so heavy a publication. One of the principal booksellers who examined my manuscript said the work would maintain its ground in England, but his engagements would not permit him to undertake the publication. I am therefore obliged to wait for types to execute the work in this country; & this has caused a great delay. But this delay, I find, will be very useful to the work; & on the whole, I have reason to be well satisfied with the result, both of my voyage & of my application to the English Booksellers. There is another subject, Sir, to which I have

Primary Sources on Copyright
(1450-1900)

1909 Act and Onward: Loosening and Erosion

- 1909 Copyright Act Regime
- 1976 Copyright Act Regime
- 1989 Post Berne joining Regime

Reasons for Erosion

- Authors' Rights Perspective
- International Norm under Berne

A bright sun with rays shining over a horizon. The sun is a large, glowing white circle in the center, with numerous yellow and orange rays radiating outwards. The background is a gradient of orange and yellow, suggesting a sunset or sunrise sky.

Freeing Copyright From Formalities

A Future Without Formalities

*The End of Formalities: No More
Second-Class Copyright Owners*

Reasons for Erosion

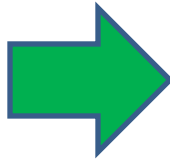
- Authors' Rights Perspective
- International Norm under Berne
- Internal Decay
 - “Primitive” system
 - Irrationality
 - Anti-“small guy” bias

The Internal Dialectic of Legal Formalities

Formalities

Form

- Informational (evidentiary)
- Filtering (cautionary)
- [channeling]



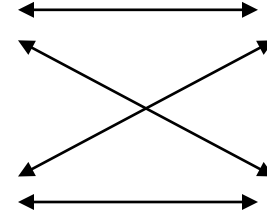
Substance

Labor/desert

Personality

Utilitarian

Distributive equity

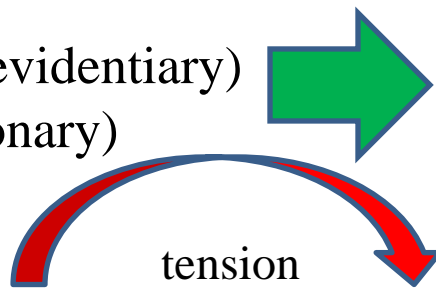


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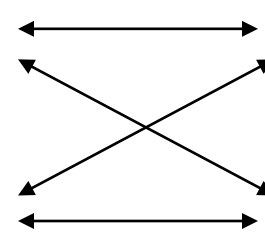
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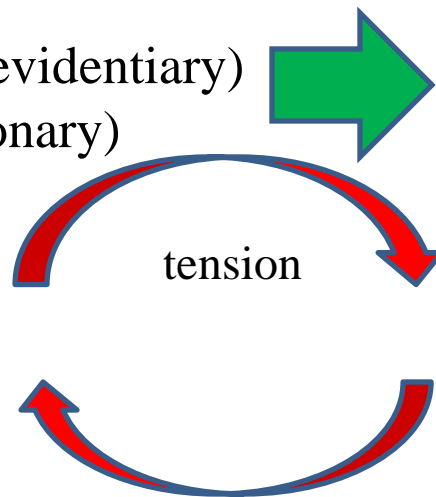


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adjustment

A bright sun rising over a horizon with rays of light. The sun is a large, glowing white circle in the center, with numerous rays of light radiating outwards, creating a warm, orange and yellow background.

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Reform(aliz)ing Copyright?

