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

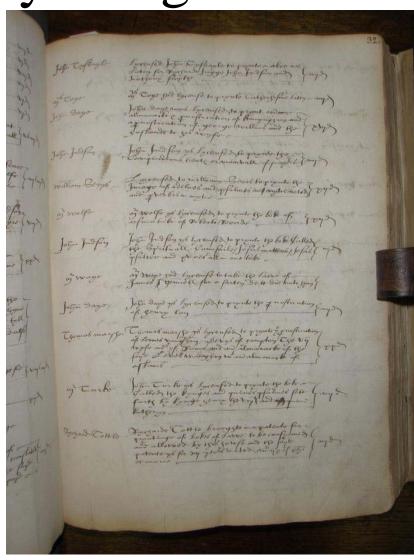
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John Day's Privilege for the Catechism, Westminster (1553), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org

Stationers' Company's Registers

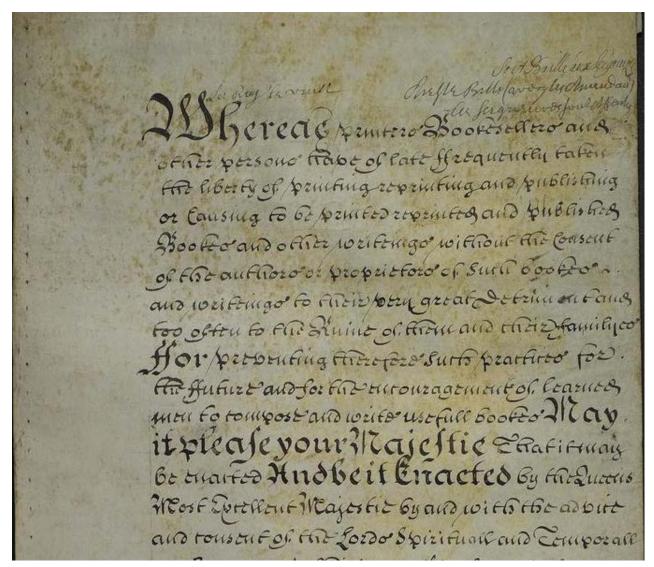
"the companie do order emongest them selves that he which bringeth a booke to be printed should use yt as a priviledge... everie of such Stationers hath divers copies severall to them selves"

> 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



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 entrys...

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 Lent. 30 1026 I me the works tick deepen, no perting in the regions metric Interioral, it seems to raise Having, since my return from Europe had no omeotioned of seeing you I take this occupion to expects to you my acknow lugaments, for complying with my request, & pos wering an act of Congress, enabling me to import copies of my butionary Hymophis into the united that, free ofthe duties imposed by The taniff. When I write to you from Cambridge (Eng.) I had not offered my manuscripts to the both fellers, I remove I should find no difficulty in processing them to be published. But after I went to bowon, I soon forein that he principal publishers were engaged in a new edition of Johnson I in a new works of the little kind; I they were not bring into market a work that might come in competalion with Those in which they were engaged. The small er bockspellers & prestrictions could not read in take so heavy a public ation. One of the min cincil books ellen who examina my manuferent said the work would maintain of growing in England, but his engage menty would not permit him to winder take the hubbit. ation. I am therefore obliged to wait for types to execute the work in this country; I this has caused a great delay. mut this delay. I find, will be very useful to the works; & on the whole, I have reason to be well satisfied with the · result, with of my voyage & of my application to the En, ligh Bookspellers. There is another subject his, to which I take

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

Freeing Copyright From Formalities

A Future Without Formalities

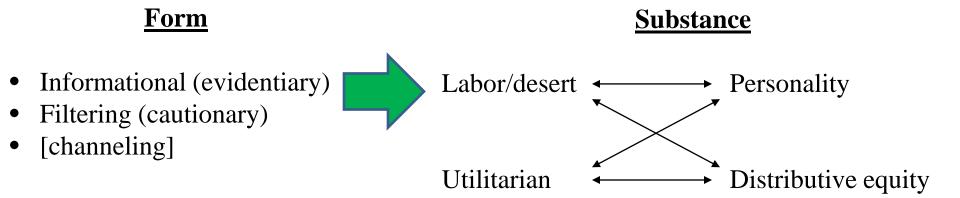
The End of Formalities: No More Second-Class Copyright Owners

Reasons for Erosion

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

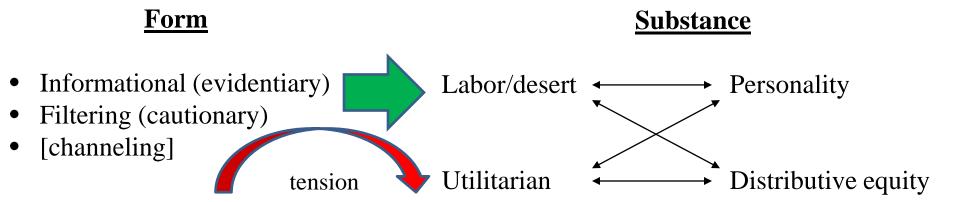
The Internal Dialectic of Legal Formalities

Formalities



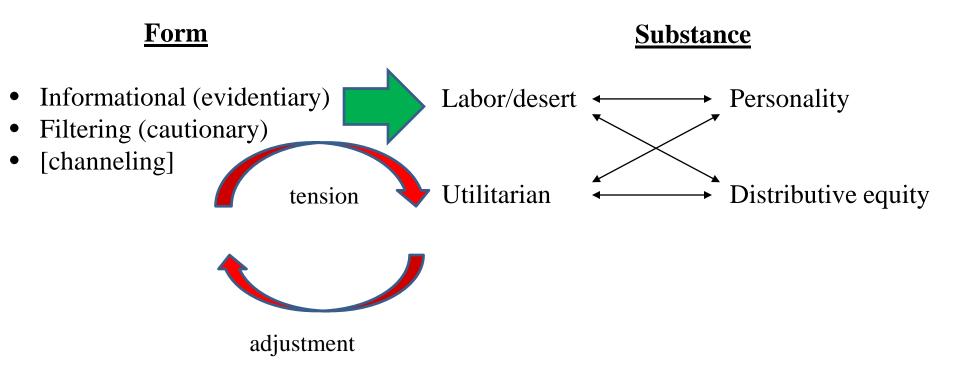
The Internal Dialectic of Legal Formalities

Formalities



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Freeing Copyright From Formalities

A Future Without Formalities

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Reform(aliz)ing Copyright?

