THE MISSING CONTEXT OF THE IP CLAUSE: MADISON, JEFFERSON, AND THE INFLUENCE OF THE FRENCH PHILOSOPHES ENCYCLOPÉDIE PROJECT

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Despite many Supreme Court decisions and scholarly articles, we still do not have a clear idea of what exactly the IP Clause in the Constitution means. Alternately called the Progress Clause, Copyright Clause, or Patent Clause, the language that appears in Article I, Section 8, Clause 8 is generally agreed to authorize Congress to create patent and copyright laws (although it does not mention these by name). Terms that have certain meanings today—such as "arts" and "science"—are clearly used in different ways. Existing scholarship and case law has looked primarily to English sources to interpret the Clause, with unsatisfactory results. This article argues that the proper source for interpretation should be the writings of the French Enlightenment *philosophes* instead. Recent research has shown that Madison, the drafter of the Clause, and Jefferson, the Framer known to have strong views on IP, were more inclined to the *philosophes* positions than to those of contemporaneous English Enlightenment writers. In particular, they were avid subscribers to the historic *Encyclopedie* project of Diderot and d'Alembert published during the late eighteenth century. While strongly influenced by the earlier British philosopher France Bacon, the *philosophes* held different views from contemporary British philosophers, including Locke. New English translations of *Encyclopedie* articles make plain what key terms of the IP Clause mean—including longstanding mysteries such as why the term "discoveries" is used instead of "inventions." Recreating relevant parts of the *philosophes* and their American fans' intellectual worldview finally provides satisfactory answers to the puzzle of the IP Clause, while providing surprising implications for what the Framers intended.