

The Missing Context of the IP Clause: Madison, Jefferson, and the Influence of the French *Philosophes* and *Encyclopedia* Project

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Starting Points

- Generally adopt the De Wolf/Lutz “balanced sentence” approach
 - Promote the progress of science by securing for limited times to authors the exclusive rights to their writings
 - Promote the progress of useful arts by securing for limited times to inventors the exclusive rights to their discoveries
- Reject simple “dictionary diving” to interpret meanings of key terms
- Key is to understand the intellectual worldview of framers

Specific Questions

- Why “discoveries” and not “inventions”?
- What are the “useful Arts” and why is only “Arts” capitalized?
- What is “Progress”?
- What is “Science”?
- Why are the terms “patents” and “copyrights” not used?
- Why are two ostensibly different powers yoked together?
- Why did the early copyright acts limit subject matter to maps, charts, and books?

The Traditional Account

- Before the 1990s, most commentators relied on a narrative in which the British patent system was the precedent for the American system
- This stemmed from largely unsupported statements by early treatise writers and a strong emphasis on common law patent rights and copyrights
- Before Prager and others (beginning in the 1940s), the belief was that the British system was the first formal patent system
- Courts and commentators waffled between whether the preamble (“to promote the progress of science and useful arts”) was unitary or severable
- From the emphasis on British sources seems to have emerged focus on British Enlightenment thinkers as key influences (e.g., Locke)

Talkin' About a Revolution

- By the time of the Revolution, the Framers, Founding Fathers and many American intellectuals were far more influenced by French Enlightenment thinkers; recent historical work on Madison in particular show this; Jefferson and Franklin have long been known to have been Francophiles
- The Americans were literally and metaphorically at war with England but allied with the French in the bid for independence *and* to form a wholly new kind of Enlightenment government
- Terms such as “patents” and “copyrights” were known and included in early drafts of the IP Clause, but did not appear in the final version; other terms from the British systems such as “monopolies” and “learning” were not included in final IP Clause; clearly the framers were rejecting the British precedents



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The French *Encyclopedie* Project as the Major Intellectual Event of the mid-18th Century

- The French *philosophes*, especially Diderot and d'Alembert, led an ambitious project to catalog and describe all human knowledge across the arts and sciences
- They sought to recruit experts in the various fields to write entries
- Franklin and Jefferson were enthusiastic subscribers; unclear if Madison was

Context of *Encyclopedie* Project

- Explicitly follows Bacon's system of human knowledge, but reverses order of human learning/development
 - Bacon: imagination, reason, memory
 - *Encyclopedists*: memory, reason, imagination
- Also follows Bacon in quest to elevate artisanal activities from lowly status and explore actual operations (procedural knowledge) not just text-based descriptions (declarative knowledge)
- “In the workshop it is the moment that speaks and not the master”
- Major entry on “Art” was published separately because of its importance: this is *not* “art” as we use it today (fine arts)

Context of *Encyclopedie* Project

- Also follows the famous 17th century *Querelle des Anciens et Modernes*:
 - “Progress” (demonstrable advancement of a field) can occur, but only in quantitative-based fields; in those fields, the *Modernes* argue that they had progressed past the ancient Greeks & Romans and so authority was in the present and future, not in the past
 - Qualitative fields were assessed only by “taste” or “sentiment” and could not be shown to progress in any demonstrable way (but rather only change in accordance with taste/fashion/sentiment)
- Crucially, the classic distinction between mechanical arts and liberal arts was in flux beginning in 15th century when the visual arts (painting, sculpture, architecture) began to break off from the latter and become intermediate between the two
- This transition was slow and uncertain

Context of *Encyclopedie* Project

- A notion/system of the “fine arts” (and the beginnings of our modern sense of “art”) only emerged in the mid 18th century; the term mechanical arts still often included the visual arts
- The *Encyclopedists* played a major role in this, and placed these “fine arts” into the category of “imagination”; whereas the remainder of the mechanical arts (and inventions in them) were placed in the category of “memory”

Relevant Contents of *Encyclopedie*

- “Map of the System of Human Knowledge”
- Discovery vs. Invention
 - Discovery. In general this name can be give to everything that is newly found in the Arts and the Sciences; however, it is scarcely applied, and ought not to be applied, except to that which is not only new, but also curious, useful, and difficult to find, and which, consequently has a certain degree of importance. The less important *discoveries* are simply called *inventions*.
- Arts, crafts, and manufacture (grouped together) as uses of nature for human practical needs; part of “memory”
- Science as the systematic study of a field or phenomena to determine its elements and principles, *not* science the way we use it today and *not* “learning in general”



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Relevant Contents of *Encyclopedie*

- “Authors”

Writer, Author

These two words apply to men of letters who give works of their own composition to the public. The former refers only to belletrists or, at least, it is only used in relation to style. The latter is applied to any kind of writing indifferently as it relates more to meaning than to mechanics. The latter may also be linked to the name of a work by using the preposition *of*. Racine and Voltaire are excellent *writers* whereas Corneille is an excellent *author*. Descartes and Newton are *famous authors*. The *author* of “La Recherche de la vérité” is a first-class *writer*.



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IP Clause terms through the lens of the *Encyclopedie*

- “Progress”: quantitatively demonstrable advancement in a field
- “Science”: systematic study of field/phenomena (as object) to determine its elements and principles
- “useful Arts”: possibly a neologism by the Framers (does not seem to appear anywhere *before* Constitution), intended to capture the “uses of nature” arts, crafts, manufactures; possibly coined to minimize risks of using “arts” (would sweep in everything including liberal arts) or “mechanical arts” (could sweep back in the newly liberated visual arts)

IP Clause terms through the lens of the *Encyclopedie*

- “Authors”: only those who write works whose value lies in their meaning (e.g., philosophy, science, non-fiction) and not stylists
- “Inventors”: those who create new things or uncover existing things
- “Discoveries”: significant breakthroughs in the arts or sciences



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Putting it all together

- The “patent” power is to grant exclusive rights to those who create or uncover significant breakthroughs in the traditional mechanical arts *minus* the visual arts; the “useful Arts” is not static but admits of any uses of natural materials or forces to satisfy practical (not aesthetic) human needs/wants
- The “copyright” power is to grant exclusive rights to those who write generally non-fiction works (philosophy, science) that advance the relevant subject matter

So why are they yoked together?

- Again based on the worldview of the *Encyclopedists*, the (useful) arts and sciences were two sides of the same coin and needed to interact; they were also the fields that could be shown to progress, and thus their progress could (and should) be promoted
- Conjecture: the framers (especially Madison) sought to promote them in exactly this kind of interrelated manner
- More speculatively: they are yoked together so that neither one is promoted at the expense or hindrance of the other

Implications

- We can decide whether any particular fields of inventions are within the useful arts by asking whether they are uses of natural materials or forces to satisfy practical human needs/wants.
- But any such inventions must be major breakthroughs to be patentable (role of *genius* in the divine madness/inspiration sense as test, and later reformed into nonobviousness)
- More surprisingly, the expansion of copyright to creative expressive works appealing to taste/sentiment/fashion was likely unconstitutional