

WHAT IF JAMES MADISON WERE TO ASSESS THE INTELLECTUAL PROPERTY REVOLUTION?

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I am James Madison. You may have heard of me. I invented the United States, although I failed to seek a patent on the new nation. I have come here today because I heard that you are in the midst of a revolution in the law of copyright, patent, and trademark, and that my name and others from our generation are being pressed into the service of the extension of the areas of law which you now call "intellectual property."¹ I have also come to clear up some of the mysteries surrounding the circumstances in which the American law of copyright and patent originated, so as to set the record straight on certain matters, and to explain what we Founders were thinking when we adopted the Patent and Copyright Clause. In particular, I have come to explain the meaning of a few lines in The Federalist No. 43, lines I now wish I had never written. In justifying the inclusion of the clause, I wrote:

The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provisions for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.²

Before addressing No. 43, I note that among modern observers there is some question as to whether we knew of the decision by the House of Lords in Donaldson v. Beckett,³ which dealt the death-knell to the contention that copyright was a common-law perpetual right. Imagine the effrontery, to think that the most literate generation in American history was un-

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1. See Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S. CAL. L. REV. 993, 1021-26 (2006); Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent "Privilege" in Historical Context*, 92 CORNELL L. REV. 953, 977-85 (2007).

2. THE FEDERALIST NO. 43 (James Madison).

3. 1 Eng. Rep. 837 (H.L. 1774).