

## 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.”<sup>1</sup> 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 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.<sup>2</sup>*

*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,<sup>3</sup> 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).

aware of the most important case concerning literary property in the English-speaking world! Of course, we were aware of the decision.<sup>4</sup>

And the decision was an important one. Some have wondered whether I have endorsed a common-law basis for copyright, so I must call your attention to the alarm that a contrary decision in the case would have caused in the colonies. Moderns have seemingly become accustomed to conceiving of the battle over copyright in abstract terms dealing principally with the question of whether copyright is a common-law right or a statutory privilege.<sup>5</sup> This must be an easy mistake to make in dealing with such a lofty concept as “copyright,” especially at such a great historical distance. The appropriate manner in which to regard the conflict that led to *Donaldson* is to consider the actual circumstances surrounding the birth of the case for common-law, perpetual copyright. These circumstances had little to do with the fear that authors would not write if their rights were not secured by a copyright statute, but much to do with a battle waged by London’s booksellers against booksellers outside that metropolis, most importantly the booksellers of Scotland.<sup>6</sup>

Why should you care about that particular fact? For two reasons—first, it serves to remind that, despite being suffused with high-minded argumentation about the rights of the author, the battle was fought principally by and for a group of booksellers, whose original interest in copyright was in maintaining censorship via their own corporate monopoly. Given that circumstance, it is nearly miraculous that the interest of the author was actually taken into account in the Statute of Anne.<sup>7</sup> Furthermore, the monopoly that the booksellers maintained was one that emphasized the rights of the metropolitan center, London, against the colonial peripheries, notably Scotland.

The imperial tenor of the booksellers’ position alone assured that we would have learned of the *Donaldson* decision, but there was a more direct connection still between the case and the colonists. Remember that we were

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4. For discussion of this point, see Mossoff, *supra* note 1, at 979-81; EDWARD C. WALTERSCHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE 75-76, 220-26 (2002); JOHN F. WHICHER, *The Ghost of Donaldson v. Beckett*, in THE CREATIVE ARTS AND THE JUDICIAL PROCESS: FOUR VARIATIONS ON A LEGAL THEME 85, 138, 140-49 (1965).

5. For an extended and provocative discussion of the patent privilege, see Mossoff, *supra* note 1, at 957, 989-1011.

6. AUGUSTINE BIRRELL, SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS 99-138 (1899); RONAN DEAZLEY, ON THE ORIGIN OF THE RIGHT TO COPY: CHARTING THE MOVEMENT OF COPYRIGHT LAW IN EIGHTEENTH CENTURY BRITAIN (1695-1775) 163-67, 187-90 (2004). Deazley characterizes the decision in *Millar v. Taylor* as “The Temporary Perpetual Triumph.” *Id.* at 169.

7. For a thorough account of the adoption of the Statute of Anne, see DEAZLEY, *supra* note 6, at 31-50.

*fighting our own battle against a Parliament that wished us to remain voiceless to the point of refusing to hear our written petitions, and no colonial American would have been permitted to offer an opinion on the case to the Lords. The closest we came, perhaps, was Benjamin Franklin's appearance in the Cockpit before the Privy Council and an assemblage of Lords and Ladies on January 29, 1774.<sup>8</sup> Now, in order to understand the significance of the event, you must picture a scene in which Franklin is standing in front of this assemblage and facing Wedderburn, the British Solicitor-General.<sup>9</sup> Imagine yourself in Franklin's place, and you will understand our attitude toward so-called common-law or perpetual copyright.*

*For nearly a full hour the Solicitor-General harangued, harassed, bullied, and verbally beat Franklin, who stood impassive and immobile the whole time.<sup>10</sup> Why was Franklin there? He had come in order to discuss a petition from the colony of Massachusetts calling for the removal of Governor Hutchinson. What he was chastised for was something quite different, for in the whole time Wedderburn never reached the question of what made Americans unhappy.<sup>11</sup>*

*The Governor's attitude toward his colonists had come to light by virtue of a series of letters that had fallen into Franklin's hands, I know not how, and Franklin had posted them back to America where they were made public in the Boston Gazette. The letters revealed that Massachusetts' colonial Americans were reviled by their own Governor and that he hoped for "an abridgment of what are called English liberties," but that abridgment did not trouble the Solicitor-General at all.<sup>12</sup> What troubled him was Franklin's use of the letters—a use that was unauthorized by their "owners," who did not want to be accountable for their views and who thus disapproved of Franklin's publication of them.<sup>13</sup> Franklin had been pilloried, in short, for the transmission of information in defiance of an imperial political and constitutional monopoly.*

*In February of 1774, the following month, the same Solicitor-General Wedderburn spoke in the case of Donaldson v. Beckett on behalf of the London booksellers<sup>14</sup> who believed in the Statute of Anne only insofar as it might confirm their monopoly in the book trade and make it perpetual.<sup>15</sup> In supporting them, the Solicitor-General made an eloquent argument on behalf of the common-law view of literary property, the practical effect of*

8. See ROBERT MIDDLEKAUFF, BENJAMIN FRANKLIN AND HIS ENEMIES 125-29 (1996); EDMUND S. MORGAN, BENJAMIN FRANKLIN 201-05 (2002).

9. MIDDLEKAUFF, *supra* note 8, at 125-29.

10. *See id.* at 128.

11. *See id.* at 126.

12. *See id.* at 126-27; MORGAN, *supra* note 8, at 186.

13. See MIDDLEKAUFF, *supra* note 8, at 126-27.

14. DEAZLEY, *supra* note 6, at 195.

15. *Id.*

which would have been to harass and bully Scottish booksellers for their temerity.<sup>16</sup> Lest you mistake the nature of his message, allow me to be clear: he pilloried them for their transmission of information in defiance of an imperial literary monopoly.

As you can see, it would have been peculiar for our generation to support the common-law perpetual property view, which was little more than a cloak for literary imperialism. For years, we had been faced with similar imperial reasoning in the political realm, all of which amounted to a declaration that colonials were inferior to real Englishmen and ought to be treated as such.

Thus, two questions are answered at once. We knew of the decision in Donaldson, and we could not have supported a different outcome, one that would have led to the immediate suppression of the Scottish book trade. That would have been followed quickly by the suppression of the Irish book trade and the suppression of America's nascent publishing enterprises. At the time, of course, we were busy combating the military implementation of the imperial political monopoly and were thus denied the luxury of ruminating over literary justice and injustice. Indeed, after the passage of the Coercive Acts and the military occupation of Boston Harbor by Redcoats,<sup>17</sup> the suppression of our publishers would nearly have been welcomed as a peaceful relief. We could then have had a Book Party in Boston, an event both more boisterous and educational than the famous Tea Party.

And now to explain Federalist 43 and to confess that I wish I had never written two of the lines that appeared therein. The goal of the Federalist Papers was to secure adoption of the proposed Constitution by explaining the advantages of a stronger central government over the government we had at the time. I said little about the nature of the inclusion of a power to promote the progress of science and useful arts in large measure because I did not feel it necessary. This power increased the authority of the federal government and passed into the Constitution without a dissenting vote.<sup>18</sup> Why would I have written more than I needed to in Federalist No. 43? To have done so would have been to invite dissent where there was none.

Nonetheless, if I have a regret it is that I included the controversial sentences that have offered succor to your "Lockean" property theorists. My sentiments regarding the perfect coincidence of the public good and the right of the individual author and inventor should be understood, as they were at the time, as a coincidence premised on the severely limited nature

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16. *Id.*

17. See JOHN C. MILLER, ORIGINS OF THE AMERICAN REVOLUTION 369-76 (1943).

18. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 509 (Max Farrand ed., rev. ed. 1937).

of the individual's right.<sup>19</sup> This was no conventional property right; the federalization of the law of property, whether personal or real, could never have passed under the control of the national government. Moreover, my sentiments were not very well-developed, nor could they have been mature reflections on a body of law that did not yet exist.<sup>20</sup> The state copyright statutes were aspirations that were bound to be ineffectual.<sup>21</sup>

As I wrote in No. 43, "[t]he 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."<sup>22</sup> What I wished to do was to call attention to the inevitable inadequacy of the state measures, as well as to note that they came about in response to prompting from the national government to establish that patent and copyright were matters appropriately within the sphere of the national government.

In looking back on our adoption of the Patent and Copyright Clause, and the passage of supporting statutes, I would also observe that we had little choice in the matter. Sovereign nations had acquired the habit of passing such laws, and our own states had, with just one exception, passed copyright laws. Copyright and patent, it seemed, were here to stay, and it was preferable for the federal government to enjoy the power rather than for the states to enjoy it.

Now just a brief word on the intellectual property revolution of your times. Your modern booksellers—members of the music and movie industries—look little different from those in eighteenth-century London who, when deprived of the kind of copyright that had been based in monopoly and censorship, took refuge in arguing for the rights of the author on what is sometimes called a Lockean basis.<sup>23</sup> Their modern counterparts seek just as resolutely to preserve a monopoly by any means possible, but under the law such a monopoly is granted solely in contemplation of the distribution

19. See Liam Séamus O'Melinn, *Software and Shovels: How the Intellectual Property Revolution is Undermining Traditional Concepts of Property*, 76 U. CIN. L. REV. 143, 159 (2007) (noting that in assessing the nature of copyright in the early Republic it is critical to see that the right was severely limited).

20. Mossoff believes that "Madison was inconsistent in his public and private writings on the nature of patent rights." Mossoff, *supra* note 1, at 983. Hughes writes that Jefferson "definitely elaborated on his views or reframed his position in certain letters, perhaps for whomever the recipient was." Hughes, *supra* note 1, at 1031. I would suggest that the seeming inconsistency is symptomatic of the absence of a well-developed body of thought on the nature of copyright and patent.

21. Madison noted "the want of uniformity in the laws concerning naturalization and literary property" as a justification for the Patent and Copyright Clause. James Madison, *Notes on the Confederacy* (April 1787), available at [http://www.jmu.edu/madison/center-main\\_pages/madison\\_archives/constit\\_confed/confederation/confederacy\\_notes.htm](http://www.jmu.edu/madison/center-main_pages/madison_archives/constit_confed/confederation/confederacy_notes.htm).

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

23. See O'Melinn, *supra* note 19, at 152-55.

of copyrighted wares.<sup>24</sup> I would not allow the modern booksellers to distract you with arguments about authors and their property. They care as little for the interests of authors as did their eighteenth-century precursors in London, and the concept of property that they would have you concentrate on has nothing to do with what we sought to protect via copyright and patent.

Second, I marvel at the extraordinary ease with which information can now be transmitted, and I can only wish that it had been so easy in my own time. I suspect that it threatens to render your own booksellers irrelevant to the public welfare, and that their impending obsolescence explains their attempts to focus attention on irrelevant arguments about the sanctity of property. I have moments of regret for once having believed that patent and copyright could be pressed into the service of culture, equality, and the nation, but we did not dream that one day American distributors of copyrighted wares would themselves seek to choke the means of distribution. What use we would have made of your Internet when Jefferson was sending me books from France in the furtherance of my invention of the United States! How much time and expense went into obtaining the sources that enabled me to create the nation, and how much less time and expense would be involved today. Oh well, I must be off to download a catchy tune I heard the other day. Something called "I got you Babe," I believe.

---Publius

It would naturally be an exciting discovery to find the text of a speech given by James Madison on his views on copyright and patent in the 1780s or 1790s, let alone a commentary that is both posthumous and prescient on the extension of the law of intellectual property in the present. The imagined discovery of the above manuscript thus urges caution upon us. Is it the voice of the real Madison, or simply another impostor using a Founder as a mouthpiece, a practice so common in modern law? This is not an easy question to answer, but careful analysis suggests that, if it is not the real Madison, it is at least someone true to Madison's beliefs as expressed in the sometimes elusive historical record.

The reason that a manuscript such as this has any value is that the historical record is sparse and equivocal, with respect to both Madison's views and those of other prominent members of the founding generation.<sup>25</sup> The mystery is why they thought patent and copyright important enough to include in the Constitution and to pass federal statutes, while leaving their reasons for supporting copyright and patent virtually unexplained. This

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24. See *id.* at 164-65.

25. See Mossoff, *supra* note 1, at 977. Both Mossoff and Hughes have attempted to remedy this paucity by giving careful consideration to the origin of the law of copyright and patent in the United States.

strange combination of attention and inattention has left modern commentators in the unsatisfying position of having to seize on such quotations or paragraphs as there are in the historical record, without an obvious connection to context, previous events, or subsequent developments.

Moving in chronological order, Madison's testimony provides strong evidence that the result in *Donaldson v. Beckett* was known to the Founders.<sup>26</sup> It is nearly impossible that Franklin was excoriated by Wedderburn in January 1774 and was then unaware of the *Donaldson* case, in which Wedderburn argued the very next month on behalf of perpetual common-law copyright. It is possible but unlikely that this result was not then transmitted to others, such as Madison. The presence of Franklin at the Constitutional Convention makes it still more unlikely that the Founders could have labored under the misconception that the 1769 decision in *Millar v. Taylor*,<sup>27</sup> establishing copyright as a perpetual common-law right, was still the state of the law in Britain in 1787.

The Wedderburn connection does more than demonstrate the Founders' knowledge of the *Donaldson* decision and its effect on the common-law copyright argument. It also offers an important indication as to how the Founders would have viewed the issue. Madison's point about an imperial political monopoly calls for a comparison with the literary monopoly at the heart of the common-law copyright argument.<sup>28</sup> Wedderburn vilified Franklin at length for disseminating information about the operation of the political and constitutional monopoly.<sup>29</sup> The analogy to the imperial literary monopoly sought by London's publishers in the *Donaldson* case is apt.

What makes the analogy more compelling is the relationship between permission to publish and status. Americans were not allowed to transmit or publish information, such as Governor Hutchinson's low opinion of his colonists, because they were supposed to accept their status as a permanent lower class in the Empire.<sup>30</sup> Their rejection of this low status led to the American Revolution, as former colonial underlings became a governing class, determined to fashion a government that would not imitate any government then in existence. They rejected the imperial political monopoly, and it seems very unlikely that, if asked to render an opinion on the

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26. See *supra* text accompanying notes 8-13.

27. 98 Eng. Rep. 201 (K.B. 1769).

28. For a discussion of the Founders' views on intellectual property laws and monopolies, see Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 84 J. PAT. & TRADEMARK OFF. SOC'Y 909 (2002).

29. See *supra* notes 8-13.

30. For a sustained analysis of the relationship between the origins of the American Revolution and the treatment of American colonists as a permanent underclass, see generally Liam Séamus O'Melinn, *Our Discrete and Insular Founders: American "Degeneracy" and the Birth of Constitutional Equality* (Mar. 9, 2008) (unpublished manuscript, on file with the author).

*Donaldson* case, they would have endorsed a literary monopoly grounded in the common-law perpetual copyright argument.

“The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law.”<sup>31</sup> Whatever this cryptic sentence from *The Federalist No. 43* means, it does not mean that Madison believed that copyright was understood in Britain in 1787 to be a common-law perpetual right. The sentence is more properly understood as a part of his attempt to federalize as much of the law as was possible at the time, and, given that it clearly did not express the state of contemporary British law, it is better seen as a propagandic statement intended to assure people who came from a common-law world that the Constitution was not about to wrench them from that world and subject them to an imperial dictatorship. Why did Madison not say more about the justification for copyright and patent? Probably because he did not need to. Federalization was his goal at the federal convention, and the Patent and Copyright Clause gave him the federalization that he sought in both patent and copyright law.

It was not a question of whether there would be a power to pass copyright and patent laws; all of the states but Delaware had already passed copyright statutes.<sup>32</sup> Madison, who sought federalization of a very broad kind, would not likely have refused to give to the federal government a power that already existed in the states. Whether it also completely preempted state law in these areas is of little importance to understanding Madison’s support. The Patent and Copyright Clause gave the federal government powers that it did not have before, and for practical purposes, took authority away from states on a matter in which they might claim authority but had lacked effective power.<sup>33</sup>

If the question is about what the common understanding was at the time, then Madison’s comments suggest that there was little that could be called common understanding.<sup>34</sup> Several people from the era are famously associated with the origins of copyright, chief among them Noah Webster, but it seems that they were not responding to popular acclaim. Rather, by and large they were authors seeking to protect their own literary efforts, which were meant to serve important national goals.

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

32. See generally Copyright Laws Passed by the Original States (1783–1786), available at [http://www.ipmall.info/hosted\\_resources/lipa/copyrights/Copyright%20Laws%20Passed%20by%20the%20Original%20States,%20\\_1783-1786\\_.pdf](http://www.ipmall.info/hosted_resources/lipa/copyrights/Copyright%20Laws%20Passed%20by%20the%20Original%20States,%20_1783-1786_.pdf).

33. I do not address the question of whether federal law in the areas of copyright and patent completely preempted state law.

34. Mossoff takes a different view, indicating that Americans “likely did not agree with the Jeffersonian story of patent law because the arguments that Madison actually made in *The Federalist No. 43* resonated with their pre-existing ideas.” Mossoff, *supra* note 1, at 985.

Indeed, the paucity of evidence on the subject suggests that copyright and patent had not been thought about very much by Americans, and the adoption of provisions from the Statute of Anne in the state statutes<sup>35</sup> appears to reflect more copying than thinking. We are accustomed to seeking out the settled beliefs and practices of the Founders, yet when it comes to copyright and patent it is quite possible that there was little of either in the new republic.<sup>36</sup> There is not much reason to think that there was a common cultural understanding of the meaning of either copyright or patent, much less that the public associated these rights with Lockean natural-law rights. Such a lack would contrast with the rather highly-developed beliefs and practices in early America with regard to conventional property rights.

Judging by the state and early federal statutes, what *was* common was the view that the author's rights needed to be closely circumscribed in order to promote the public interest. Many of the state statutes had language supporting the author's entitlement to the fruits of his labor on the basis of natural law and equity.<sup>37</sup> For example, the preamble to Connecticut's "Act for the encouragement of literature and genius" read

Whereas it is perfectly agreeable to the principles of natural equity and justice, that every author should be secured in receiving the profits that may arise from the sale of his works, and such security may encourage men of learning and genius to publish their writings; which may do honor to their country, and service to mankind.<sup>38</sup>

This attention to the author should not be ignored, but neither should it be made into something more than it was: preambular language that had little meaning until the *extent* of the author's right was explained. Each of the statutes limited that right to a period of years that was quite inconsistent with conventional property rights.<sup>39</sup> The states had a tradition of protecting conventional property rights, but chose quite a different approach when it came to copyright and patent.

With respect to the extension of the law of intellectual property in recent years, Madison cautions us that thinking about "Lockean" entitlements to property in the setting of copyright and patent, however desirable it might sound, fits all too easily with the pretextual agenda of the modern music and movie industries, which emphasize the ownership rights of authors in order

35. See O'Melinn, *supra* note 19, at 158-59.

36. As I note, *supra* note 20, what might appear to be inconsistency in the Founders' beliefs is more likely a sign that there was no well-developed body of opinion on copyright and patent.

37. See generally Copyright Laws Passed by the Original States (1783-1786), *supra* note 32.

38. *Id.*

39. See *id.*

to divert attention from their own threatened obsolescence as distributors.<sup>40</sup> In this sense, the modern conflict is analogous to the prolonged eighteenth-century dispute that was finally settled by the *Donaldson* case. Madison's opinion on this matter can thus be forecast with some reliability, and his experience with groundless justifications of an imperial monopoly would have positioned him well to recognize similarly spurious arguments made on behalf of modern copyright monopolists. Madison's generation, after all, had been subjected to much reasoning on why the benefits of English law could not be applied fully to English-Americans, and why Americans as an unfree people could not invoke Locke's name in their cause.<sup>41</sup>

Ultimately, regardless of its authenticity, the significance of the above address lies in its overall approach. It argues that pressing Madison into the service of the modern intellectual property revolution to any extent is incorrect, as is the attempt to align him with a Lockean position that had currency in the law in Britain only for five years, from 1769 until *Donaldson* was decided in 1774, and which has never had legal force in America. The natural law argument was born in the eighteenth century of sordid circumstances, which have reproduced themselves today, and Madison reminds us not to miss the sordid features of the debate by focusing on the more abstract issues.

A final point concerns the facetious conclusion which suggests that we may be dealing with an impostor, a pseudo-Madison. The most suspect portion of the purported Madison address, and that which points toward it being a forgery, must certainly lie in the approving reference to online downloading. Surely Madison, with his respect for property, could not have countenanced such barefaced piracy. This seems intuitively to be correct, yet it is also too simple, depending as it does on the surprisingly successful premise that a respect for property should command a corresponding respect for intellectual property. This premise is correct only to a limited extent and must be qualified severely: the intellectual property revolution of modern times has operated to extend the rights of the holders of intellectual property at the expense of the rights of others, and often without regard to the law.<sup>42</sup>

What use would Madison and his generation have made of the Internet? His own attitude can be predicted based on the difficulties that he

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40. See generally O'Melinn, *supra* note 19 (maintaining that the modern "content providers," like the eighteenth-century publishers, use the rights of the creator as a pretext to increase their own rights).

41. See PUBLIC ADVERTISER, Jan. 25, 1775 (insisting that what colonial Americans "have said about Taxation going Hand in Hand with Representation, and which Locke expressly confines to free men, Members of a free State, was never meant to be applied to our Americans, [wh]o are not free Men nor in a State of Independence, with respect to England.") (emphasis added).

42. See generally O'Melinn, *supra* note 19 (arguing that the intellectual property revolution of modern times represents an attack on the concept of property).

faced in the transmission of information. In the months leading up to the Constitutional Convention, Madison had Jefferson send him a great many books on history and politics from the bookstalls of Paris.<sup>43</sup> The results of his study included Madison's famous writings *Notes of Ancient and Modern Confederacies* and *Vices of the Political System of the United States*, which historian Douglass Adair describes collectively as "probably the most fruitful piece of scholarly research ever carried out by an American."<sup>44</sup> These studies also led Madison to the controversial and novel conviction that the republic had to be expansive, a position that he laid out in his famous speech of June 6, 1787, and later made at greater length in *The Federalist No. 10*. This transatlantic transmission of information must give us pause, for it brings to mind Franklin's censure at the hands of Wedderburn, which was an expression of imperial control over the transmission of information.

How would Madison have treated the opportunity to gather up the historical literature free of charge if to do so meant to defy the law? If he could have downloaded the information, despite a legal prohibition, what would he have done? The answer is that he would have downloaded books in the furtherance of his greatest invention, the United States. If it is objected that, in doing so, he would have violated the law, and Madison would not have done such a thing, the question becomes, "Whose law?" The very reason that Madison was working so diligently on creating a new republic was that he had rejected the version of British law that would have imposed a political monopoly on American colonists. There is little reason to think that he would have shown much respect for a copyright law that would have hindered his attempt to create an expansive republic impervious to the perils of degeneration. Neither he, nor Franklin, nor anyone now famous as a Founder, ultimately deferred to an unjust political monopoly justified in the name of the law, and it would have been impossible for them to allow a law protecting literary property to impede the progress of the United States.

If there is a reason to think that Madison would have shown any greater deference to the modern music and movie industries, it does not come quickly to mind.

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43. Douglass Adair, *James Madison*, in *FAME AND THE FOUNDING FATHERS: ESSAYS BY DOUGLASS ADAIR* 124, 134 (Trevor Colbourn ed. 1974); ADRIENNE KOCH, *JEFFERSON AND MADISON: THE GREAT COLLABORATION* 15, 18-19 (1950).

44. Adair, *supra* note 43, at 134.