Introduction

The efforts of Noah Webster – "The Father of Copyright" – and James Madison – "The Father of the Constitution" – are important to understanding the constitutional foundation of copyright, even though these efforts are little known by some. Separately and jointly, these two prominent figures in early American history called attention to the need for copyright protection in our newly independent nation. And, through their efforts, they played a leading role in successfully obtaining protection for copyright in several states, and, ultimately, in the U.S. Constitution.

Recalling this oft-overlooked historical alliance between the Father of Copyright and the Father of the Constitution sheds light on the nature and meaning of copyright in our nation's fundamental law. Significantly, Webster and Madison both advanced a public understanding of copyright as a form of "literary property," grounded in a person's basic right to the fruits of his or her own labor. This understanding and grounding should inform our reading of the U.S. Constitution's copyright provision and should continue to guide copyright policy today.
Unlike James Madison, Noah Webster – a lawyer, statesman, author, and lexicographer – is an oft-forgotten figure today. But he played a pivotal role in fixing copyright into American constitutionalism. During the time of the Articles of Confederation, Webster personally lobbied the Continental Congress as well as several state legislatures for adoption of laws securing authors' exclusive rights to the proceeds attributable to their labors. Webster's efforts were largely successful in the states. In large part, this success owed to Webster's close connections with prominent statesmen of the day, including George Washington and James Madison.

James Madison's contributions to American constitutionalism are so significant and wide-ranging that it is easy to overlook the key role he played respecting copyright's place in our constitutional order. Madison pushed through the Continental Congress a resolution urging all states to adopt uniform laws securing rights in literary property. For his part, Madison also helped pass Virginia's copyright law in 1785. Madison regarded the lack of uniform protection of literary property in the states to be a vice in the regime that prevailed under the Articles of Confederation. He did not want to see this same vice carried forward into the new constitutional order.

With Webster's backing, Madison would eventually propose to the 1787 Constitutional Convention a provision for protecting copyright and patent. That provision is contained in the Article I, Section 8, Clause 8 of the U.S. Constitution – the Intellectual Property (IP) Clause. Both Madison and Webster believed that a uniform copyright system was a necessary component of a more perfect Union, to promote progress in science and the arts, as well as commerce.

Copyright's constitutional history – and the contributions of Webster and Madison, in particular – should serve as an important backdrop to today's public deliberations about copyright policy. In particular, Webster's and Madison's view of copyright as literary property arising out of the fruits of one's labor and deserving uniform protection should redirect policymaking to government's primary purpose under the Constitution – protecting rights of property in all its facets. Recognizing copyright in the fundamental law of the land conveys its importance as a means of promoting progress in science and useful arts, as well as in commerce. And by recognizing an individual's rights to the fruits of his or her labor, copyright not only promotes progress and commerce, but also secures a space for individual entrepreneurship free from government control or taking.

For policymakers and analysts today, the IP Clause makes copyright a normative feature of the American constitutional order, deserving of respect. Of course, we do not maintain that the terms of Article I, Section 8, Clause 8 definitively settle all boundaries regarding scope of ownership and terms of protection. But we do maintain that copyright's status as a constitutionally protected property right does require that all policy touching on such rights comport with the rule of law.
Webster's State Copyright Quest

According to biographer Harlow Giles Unger, Noah Webster's late 1782 petition to the Connecticut General Assembly seeking copyright protection for authors was the first effort in the United States to obtain passage of a copyright law, earning Webster the title "Father of Copyright." Early in 1783, a Connecticut Assemblyman presenting Webster's petition convinced that state's legislature to adopt a copyright law granting authors exclusive rights to earnings from their publications for a term of fourteen years.

Webster's lobbying coincided with promoting his American Spelling Book – or "blue back speller," as it was popularly known. Webster sought to protect the publication proceeds of his spelling instruction book from unauthorized copying. In the words of Webster biographer Joshua Kendall, "Webster invented the modern book tour and drafted America's first copyright laws."

Webster's efforts in lobbying state legislatures – whether through petitions and personal visits or through correspondence and acquaintances – helped secure copyright laws in the newly independent states. New York, Massachusetts, New Jersey, South Carolina, Virginia, Maryland, and Delaware were among the states passing copyright laws at Webster's urgings. Pennsylvania became the last state to pass a copyright law, just prior to the 1787 Constitutional Convention in Philadelphia.

Webster's persistence in advocating copyright laws was bolstered by a principled set of arguments he advanced on their behalf. Specifically, he contended for copyright legislation as a measure to promote and protect the rights of authors to the fruits of their labor. Webster regarded publication proceeds as the exclusive property right of authors. For example, in his plea to the New York State Legislature, Webster sought "to secure to your petitioner the benefit of his own labors to which he conceives himself solely entitled but which are not protected by the laws that protect every other species of property."

According to Webster, works of the mind constitute a species of property on par with physical types of property. As he declared in his petition to the state legislature in Delaware:

Among all modes of acquiring property, or exclusive ownership, the act or operation of creating or making seems to have the first claim. If anything can justly give a man an exclusive right to the occupancy and enjoyment of a thing it must be that he made it. The right of a farmer and mechanic to the exclusive enjoyment and right of disposal of what they make or produce is never questioned. What, then, can make a difference between the produce of muscular strength and the produce of the intellect?

Virginia's Copyright Law: Webster and Madison Joined in Alliance

Of special interest, from a constitutional history standpoint, is Noah Webster's connection to copyright legislation in Virginia. In the early 1780s, Webster had become an
acquaintance and correspondent with George Washington and James Madison. Both Virginians were familiar with Webster’s fifty-page pamphlet calling for constitutional reform and national unity, *Sketches of American Policy* (1785). *Sketches* would advance a "Plan of policy for improving the advantages and perpetuating the union of the American states." The pamphlet would also anticipate aspects of the future U.S. Constitution, such as the separation of powers and the Presidency.

To ensure legislative action to secure copyright protection in Virginia, Webster obtained letters of introduction from George Washington to the state's governor and legislative leaders. Armed with Washington's letters, Webster travelled to Richmond in late 1785. According, to Harlow Unger:

Webster met with James Madison, who greeted the New Englander warmly and recalled their previous meeting and subsequent correspondence with enthusiasm. He "spoke with praise of [the] contents" of the *Sketches*, which Washington had shown him and which he had studied carefully. Madison's newfound enthusiasm combined with Washington's letter to win passage of copyright legislation.

The next month, Webster would write to Washington: "For this success I acknowledge myself indebted… to your politeness." In his memoirs, Webster would later recall that in the very same session, the Virginia legislature would invite other states to meet in Annapolis, Maryland, in order to "form some plan for investing Congress with the regulation and taxation of commerce." The Annapolis Convention, which Madison attended, would become a precursor to the 1787 Constitutional Convention in Philadelphia.

**Protecting Literary Property: Copyright During the Articles of Confederation**

Noah Webster's previous interaction with James Madison likewise involved the subject of copyright. In fact, Webster's effort to obtain state copyright legislation was preceded by his lobbying of the Continental Congress at the end of 1782. Madison was a member of the Congress and took active interest in the matter.

The *Journal of the Continental Congress* records a March 1783 motion:

That a committee be appointed to consider the most proper means of cherishing genius and useful arts through the United States by securing to the authors or publishers of new books their property in such works.

Madison was named to that committee. In May of that same year:

The committee, consisting of Mr. [Hugh] Williamson, Mr. [Ralph] Izard and Mr. [James] Madison, to whom were referred sundry papers and memorials from different persons on the subject of literary property, being persuaded that nothing is more properly a man's own than the fruit of his
study, and that the protection and security of literary property would greatly tend to encourage genius, to promote useful discoveries and to the general extension of arts and commerce, beg leave to submit the following report:

Resolved, That it be recommended to the several states, to secure to the authors or publishers of any new books not hitherto printed, being citizens of the United States, and to their heir or assigns executors, administrators and assigns, the copyright of such books for a certain time, not less than fourteen years from the first publication; and to secure to the said authors, if they shall survive the term first mentioned, and to their heirs or assigns executors, administrators and assigns, the copyright of such books for another term of time not less than fourteen years, such copy or exclusive right of printing, publishing and vending the same, to be secured to the original authors, or publishers, or their assigns their executors, administrators and assigns, by such laws and under restrictions as to the several states may seem proper.

The Continental Congress's resolution urging the States to secure copyright protection to authors offers insights into the nature and purpose of copyright in the mind of Madison and in other American statesmen leading up to the Constitution's drafting and ratification. Madison and his colleagues regarded copyright as a type of property — "literary property" they sometimes called it — grounded in the rightful ownership of the fruits of one's labor. And they believed that the promotion of arts, discoveries, and commerce depended upon the securing the rights to such property.

Operating under the Articles of Confederation, however, the Continental Congress lacked any power to adopt or enforce copyright laws. This prompted Webster to pursue his state-by-state strategy. But it also factored into Madison's deeper and broader thinking about the structural defects and other deficiencies of government under the Articles as well as the problems arising in the States.

According to Madison constitutional biographer William Lee Miller, in the 1780s Madison would undertake a vigorous personal study of systems of government, including the fall of ancient republics and confederations. That study, as well as his reflections on the situation in America, would be reflected in some key memoranda written by Madison. *Vices of the Political System of the United States* (1787) is one such memorandum. Therein Madison listed a dozen deficiencies of government among the several States and under the Articles of Confederation. Under the memo's heading for vice number 5, "want of concert in matters where common interest requires it," Madison wrote:

> This defect is strongly illustrated in the state of our commercial affairs. How much has the national dignity, interest, and revenue suffered from this cause? Instances of inferior moment are the want of uniformity in the laws concerning naturalization & literary property...
As Miller observed, "Madison certainly would get a lot of mileage out of his memos. He drew heavily upon them in his speeches in the Federal Convention in Philadelphia."

Copyright at the 1787 Constitution Convention

It is well known that Madison's speeches, committee work, and lobbying of fellow delegates played a pivotal part in shaping the proposed Constitution. But it is much less well known that Noah Webster was likewise in Philadelphia during the Convention's meeting during the summer of 1787. "Throughout that summer, Webster was spending a lot of time with 'Convention Men,'" wrote Joshua Kendall. And Webster also socialized with the Virginia delegates, [including] James Madison" and Convention President George Washington. Webster was only too eager to take advantage of opportunities to promote his ideas for a strengthened union and for copyright protection in his visits with Convention delegates.

Thus, in Philadelphia in 1787, the efforts of both the Father of Copyright and the Father of the Constitution came to ultimate fruition. Madison's Notes of Debates in the Federal Convention of 1787 for Saturday, August 18 reads: "In Convention Mr. Madison submitted...the following powers as proper to be added to those of the General Legislature...To secure to literary authors their copy rights for a limited time." There is no indication of any contentious debate on this point. And so the Convention's proposal would come to include the so-called "IP Clause," in Article I, Section 8, Clause 8, which provides that "Congress Shall have Power... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

Copyright and Constitutional Ratification

"Even after the convention Madison continued to make use of his memorandums," Miller recounted. In particular, Madison "borrowed from them when he composed his entries in the Federalist papers." Reflecting an apparent consensus and lack of debate over the matter of copyright protection, Madison's defense of the IP Clause took only one brisk paragraph of Federalist No. 43. Writing under the pen name of "Publius," Madison explained that "[t]he utility of this power will scarcely be questioned" and that "[t]he public good fully coincides [in both the case of copyright of authors and of the right to useful inventions by inventors] with the claims of individuals." Echoing his earlier memo, Madison also pointed out that "[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."

In short, Madison in the Federalist Papers regarded the IP Clause as a measure to ensure the rights of authors (and inventors) and to further the public good through a national policy of protection and enforcement. For his part, Webster offered high praise of The Federalist upon its publication. In his estimation, "It would be difficult to find a treatise ... in which the true principles of republican government are unfolded with such precision." Writing under the pen name "A Citizen of America," Webster offered his own, albeit less sophisticated, defense of the proposed constitution in a pamphlet titled
An Examination into the Leading Principles of the New Federal Constitution Proposed by the Late Convention Held at Philadelphia (1787). According to Kendall, "[t]hough the Federalist Papers are much better known to history, at the time Webster's pamphlet may well have exerted even more influence, particularly outside New York State."

Conclusion

Thus, knowledge of the efforts of Noah Webster – "The Father of Copyright" – and James Madison – "The Father of the Constitution" are important to understanding the constitutional history of copyright and its foundational principles. This history reinforces a basic understanding of copyright as a form of "literary property," grounded in a person's fundamental right to the fruits of his or her own labor. Such an understanding and grounding should inform our reading of the IP Clause and continue to guide copyright policy today.

Indeed, Webster's and Madison's view of copyright as literary property arising out of the fruits of one's labor and deserving uniform protection at the national level should focus and redirect policymaking to government's primary purpose under the Constitution – protecting rights of property in all its facets, whether tangible or intangible. Recognizing copyright in the Constitution, in the fundamental law of the land, conveys its importance in promoting progress in science and useful arts, as well as commerce.

For lawmakers, policymakers and analysts today, the IP Clause makes copyright a normative feature of the American constitutional order, one deserving of understanding and respect. Copyright's status as a constitutionally protected property right requires that all policy touching on such rights comport with the rule of law.

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Further Readings

A Citizen of America (Noah Webster), An Examination into the Leading Principles of the New Federal Constitution Proposed by the Late Convention Held at Philadelphia (1787).

James Madison, Vices of the Political System of the United States (1787).

Publius (James Madison), The Federalist, No. 43 (1788).

Noah Webster, Sketches of American Policy (1787).

Journals of the Continental Congress (1783).


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