Interlude: the Constitutional Moment?!

When in 1787 the constitutional convention completed drafting the new federal Constitution it included within it what later became known as the Intellectual Property Clause. It was a grant of power to Congress "to promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[1] Later historical narratives as well as legal analyses tended to treat this constitutional moment as a crucial defining event in the life of American intellectual property law. Considerable energy and effort was invested in elaborating and exploring this moment. This short interlude explains why I intend to avoid such tendency and not devote within the boundaries of this work much space and time to analyzing the intellectual property clause or the events surrounding its creation.

First, there is the straightforward fact that much has already been written about the intellectual property clause. Within the relatively scarce body of writing about the history of American intellectual property law the constitutional moment stands out as a salient exception.[2] Paradoxically the lion's share of research and writing in the field was devoted to this episode, regarding which available sources are especially thin and unpromising. Other periods were left almost uncovered.

[1] U.S. Const. art. 1 §8 cl. 8.

[2] About the history of the constitutional clause see: Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 Wayne L. Rev. 1119, 1175-1178 (1983); BRUCE W. BUGBEE, THE GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW 125-131 (1967); Irah Donner, *The Copyright Clause of the U.S. Constitution: Why Did the Framers Include it With Unanimous Approval?*, 36 Am. J. L. Hist. 361 (1992); P.J. Federico, *The Constitutional Provision*, 18 J. Pat. Off. Soc. 55 (1936); Karl Fenning, *The Origins of the Patent and Copyright Clause of the Constitution*, 17 Geo. L. J. 109 (1929); Frank D. Prager, *The Steamboat Pioneers Before the Founding Fathers*, 37 J. Pat. Off. Soc. 486 (1955); EDWARD C. WALTRSCHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE (2002); Edward C. Walterscheid, *To promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. Intell. Prop. L. 1 (1994).

Yet the point is deeper than that. The issue of quantity is a symptom reflecting deeply engrained tendencies in the historiography of American intellectual property law. The chief tendency of this sort is constitutional originalism. The longing for an "original meaning" laid down by the almost mythical authority of the founding fathers, enshrined as part of the most sacred artifact of American civic religion- the Constitution- and serving as a supposed shield against judicial subjectivism, is a longstanding fixture of American jurisprudence and of the American political ethos in general.[3] Not surprisingly, these deeply held convictions of the legal culture radiate on the history writing of the law. Especially, as often was the case with intellectual property law, when such history was written by lawyers.[4]

The originalist focus on the constitutional moment in the history of intellectual property suffers from most of the common ills of originalist legal history. The problem starts, of course, with the very attempt to locate a stable meaning forged in one moment of time and neatly captured by the constitutional language. In some contexts the problems of such enterprises stem from an overflow of relevant "original" materials, utterances, interpretations and views. When it comes to the intellectual property clause, however, the problem is quite the opposite. There was hardly any real reported debate or deliberation regarding the intellectual property clause. It was adopted in the constitutional convention without opposition or debate, and attracted almost no attention or reference during the ratification stage.[5]

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[3] See Erich J. Segal, *A Century Lost: The End of the Originalism Debate*, 15 Const. Comment. 411 (1998); Larry Kramer, *Fidelity to History- and Through it*, 65 Fordham L. Rev. 1627 (1997).

[4] See Morton J. Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 Am. J. Leg. Hist. 275 (1973). The notable exception to the originalist tendencies in the writing of the history of the intellectual property clause is Edward Walterscheid. Walterscheid- an ex lawyer who reinvented himself as an historian of American intellectual property law- while devoting most of his energy to the first years of the system consciously tries to avoid a static view of the constitutional clause and to put it in its prior and later context. See Walterscheid, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE, *supra* note 1, at 22-27.

[5] See Fenning, *supra* note 1, at 114; Donner, *supra* note 1, at 369; Walterscheid, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE, *supra* note 1, at 2. For a survey of the brief instances in which the clause was mentioned during ratification see: Donner, *supra* note 1, at 376-377.

Many of the later writers chose to interpret this as the most perfect embodiment of original meaning by arguing that the general silence reflected a broad consensus about the pressing need for a federal intellectual property regime as well as, presumably, about the content of such a regime.[6] Nevertheless, it seems much more likely that the intellectual property clause, which was not even included in the first proposals for the new Constitution or in the early discussions of the delegates,[7] was simply ignored by many and was perceived by others as one of inferior importance. Consequently it failed to attract the attention and energy of the persons involved in framing and ratification.[8] Whatever was the case, all the seeker for the original constitutional meaning is left with is the text of the clause and a few, rather short and enigmatic references by contemporaries.[9] This made most seekers of such meaning turn to familiar strategies in the arsenal of the originalist: extreme textualsim, which attempts to discern elaborate structures of

[6] See for example: Donner, *supra* note 1, at 362, 365; Bugbee, *supra* note 1, at 128, 129.

[7] Walterscheid, TO PROMOTE THE PROGRESS OF SCIENCE AND USEFUL ARTS, *supra* note 1, at 25; Walterscheid, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE, *supra* note 1, at 82.

[8] For this argument see: Walterscheid, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE, *supra* note 1, at 80-81. When James Madison- one of the main figures behind the adoption and phrasing of the clause- prepared his notes on the defects of the existing government structure prior to the convention, he referred to the lack of uniformity of laws concerning litereary property as one of "inferior moment." 4 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786-1870 128 (1894-1905).

[9] The best known and often cited reference to the constitutional clause is Madison's brief utterance in the Federalist 43 according to which: "The utility of this power will scarcely be questioned. The copyright of authors has solemnly adjudged in Great Britain to be a right at 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 provision for either of the cases, and most of them anticipated the decision of this point by laws passed at the instance of Congress." THE FEDERALIST NO. 43 309 (Benjamin F. Wright ed. 1961). For the many difficulties and ambiguities of Madison's argument see: Walterscheid, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE, *supra* note 1, at 220-226.

meaning within the plain text of the clause, often with strange results;[10] or anachronism that reads into the clause later concepts, views and understandings.[11]

The more fundamental fallacy of the originalist history of the intellectual property clause is that it is a-historic and static. In its focus on one constructed dramatic moment, it tends to erase not only the indeterminism of that moment but also the dynamic and fluid nature of the structure of meaning it seeks to uncover. All that preceded and succeeded the postulated moment is dwarfed either as its prehistory or as its inevitable consequence. Yet, if one seeks to understand the concept of patents and copyrights or even the more general notion of "promoting the progress of science and the useful arts" as they were perceived by Americans in 1787 it seems indispensable to turn to the concepts, practices and rhetoric of such Americans in the period surrounding that point in time. All the more so in view of the scarcity of materials directly affiliated to the constitutional episode.

As the preceding chapters have shown and as the succeeding ones will elaborate, at the end of the eighteenth century the practices and concept of patents and copyrights were in a state of flux both in England and the United States. Traditional patterns were changing in many important respects, but the transformation was an ongoing one. Some of the modern features of these fields did not appear yet while others were amid a process of development. This involved all the vagueness and duality characteristic of a transition period when the old and the new coexist for a while. To the extent that the

[10] Thus, for example, some used the phrase "to secure" in the constitutional clause in order to construct far-reaching arguments about the meaning of the clause as based on recognition of a pre-existing common law right, natural rights theories or both. See for example: Frank D. Parger, *The Historic Background and Foundation of American Patent Law*, 5 Am. J. Leg. Hist. 309, 318 (1961); Bugbee, *supra* note 1, at 129-130; George Ramsey, *The Historical Background of Patents*, 18 J. Pat. Off. Soc. 7, 15-16. About the many problems with such decisive arguments and the ambiguity and inconclusiveness of the term see: Walterscheid, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE, *supra* note 1, at 212-220.

[11] Thus for example Fenning deduced from the fact that the clause mentions neither "copyright" nor "patent" that the framers intended to create exclusive rights that are not subject to any limitations common in earlier periods such as working clauses or compulsory licenses, and hence "[i]t seems clear that it would be unconstitutional for Congress to endeavor to provide for either type of limitations in either patents or copyrights." Fenning, *supra* note 1, at 116.

(often complex and multi-faceted) meaning of these practices and concepts at the end of the eighteenth century can be excavated, it is by tracking this ongoing transformation. Yet the obsession with the constitutional moment and with a supposed stable meaning compressed into it obscures exactly our ability to perceive this dynamic flow of practice and meaning. To the extent we can uncover "the meaning" of intellectual property in the 1780s (and the historian will usually be wary of such a pretension) the originalist point of view serves to obscure rather than clarify, to deny access rather than facilitate it.

All of this is not to say, that the fact that American intellectual property law has a constitutional layer, or indeed the particular language and form of the clause, did not play a significant role in the development of intellectual property in the United States. For one thing, the constitutional clause marked the significant move into the federal era of patents and copyrights, the fact that the decline of the state regimes was only gradual notwithstanding.[12] Moreover, with time, the constitutional clause came to be an important building block used in the shaping of intellectual property doctrine, discourse and practice. Various institutional actors, such as Congress the courts, commentators or litigants, seized upon the clause, interpreted it in order to justify certain positions or deduce from it specific doctrinal details, limitations and requirements. Sometimes such actors presented their case through the prism of originalism arguing that whatever the purpose for which they employed the clause was, it was part of its original meaning.

However, from the outsider's perspective- the historian observing the uses of the constitutional clause throughout the development of American intellectual property law- the originalist position should be turned upside-down. Instead of the clause being an island in the stream- a static source of eternal meaning that forced limits on the flux of intellectual property law- it has been part of this flux. At the very same time that the constitutional layer was used as a building block in constructing changing concepts and practices,

[12] Whether and how a move to a federal regime would have taken place even in the absence of a direct intellectual property clause in the Constitution remains a speculative issue. For the hypothetical possibility of power to Congress to legislate in the field of patent and copyright under the commerce clause, even in the absence of the intellectual property clause see: Walterscheid, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE, *supra* note 1, at 84-86.

these concepts and practices endowed it with its specific meaning[s] in different periods.

This dialectic of the meaning of the constitutional clause as both the shaper of doctrine and practice and the object shaped by them entails an inversion of the originalist method. If one is to track the meaning of the clause within history, she needs to track the transformation of the conceptual and practical environment within which it was used and elaborated, rather than try to explain such an environment on the basis of the stable original meaning of the clause. Let us, then, turn now to this dynamics of the changing framework of American intellectual property law and practice as it developed after the inauguration of the new federal regime.