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Head of U.S. Copyright Office Urges a Reemphasis on "Exclusive Rights"

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By Stephen Van Stempvoort '10

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Delivering the second annual Stanley H. Mervis Lecture in Intellectual Property on November 13 to a packed room of listeners, Marybeth Peters, the U.S. Register of Copyrights, spoke earnestly about the need for current legislation and public policy to return to the historical underpinnings of American copyright law.

Many of the Founders believed that creating incentives for authorship was necessary for the fledgling nation to achieve cultural grandeur, Peters noted. Accordingly, they wrote rights-based copyright protection into the Constitution in order to support such creativity. "Fundamental with regard to the federal power . . . was the primacy of an individual author and his exclusive right," said Peters. "The Federalist Papers justified this [approach] by noting that in the case of copyright, the public good fully coincides with the claims of the individual. At its heart, the Copyright Clause is emblematic of a premise of the Constitution: that power is best reserved to the people, with the hope and expectation that they will use it for the good of the nation."

Although the Founders were committed to a rationale of "exclusive rights" guaranteed to authors, Peters noted that this attitude has been frequently challenged over the 200-year span of American copyright legislation. "From the moment the Founders chose this approach," she observed, "there was debate about its scope and application, which has continued throughout history and continues today." As Peters pointed out, some of the most significant debates over copyright law have dealt with its adaptation and application to new technologies. For the most part, traditional interpretations of copyright law were fairly effective in delivering to authors the exclusive rights guaranteed them by the Constitution. Landmark court rulings in the late 19th century expanded copyright protection to photographs, and by the mid-1950s, authors' rights in films, television broadcasts, and sound recordings were guaranteed by copyright law.

As Peters pointed out, however, the development of new technologies has often prompted increased pressure to develop copyright regimes that are inconsistent with the Founders' vision of "exclusive rights." For example, Peters noted, Congress responded to a 1908 decision by the Supreme Court holding that piano rolls for player pianos fell outside the scope of an author's rights under copyright law by extending



copyright to such works but creating a compulsory license, under which anyone could reproduce a published piano roll as long as they paid the music publisher a fixed rate per copy.

This significant departure from the Founders' doctrine of "exclusive rights," Peters contended, is particularly important in considering the impact of the information age on copyright law. Observing that the Founders also wrestled with the appropriate method of promoting the dissemination of authors' ideas and contributions without undermining the incentive for authors to produce work in the first place, Peters asserted, "In the debate over copyright today, one can see the same fears of chaos or autocracy--of copyright owners on the one hand, emphasizing the perceived dangers of chaos of unlimited, unregulated copying in the information age, while copyright users, on the other hand, are casting the dangers of this autocracy in the form of too much control being given to copyright owners."

While stressing the historical parallels, Peters maintained that contemporary copyright law is arguably occupying an unprecedented position in relation to American consumers. "In many ways," she observed, "the current controversy over copyright in the information age can be characterized as copyright being a victim of its own success. Today, we enjoy so much convenient, inexpensive access to a wealth of creative works that our expectations about what we should be able to do with those works is extremely high. Combined with the promise that new technology offers to us in the enjoyment of those works, those expectations present serious challenges to exclusive rights, the notion that the Founders adopted."

Such expectations, as reflected in the increasing number of compulsory licenses in U.S. copyright law, may be misguided, Peters suggested. "It's not easy to see the uncertainty and the risk of becoming an author," she pointed out. "The Founders did appreciate this precarious position, and saw [copyright] as the most democratic way to advance the culture of our country. I believe we should recognize authors' achievements and not lightly discard their achievements, notwithstanding current passions inspired by rapid technological change."

In Peters' view, even the best-intentioned efforts to limit authors' exclusive rights are similar to lopping off the branch upon which one stands. Quoting one of her predecessors as Register of Copyrights, Peters left the audience with a wry analysis of the consequences that a departure from the Founders' vision would cause. "A serious challenge to copyright authors' rights . . . has come from people with a sincere



interest in public welfare who fully recognize 'that the real heart of civilization . . . owes its existence to the author'; ironically, in seeking to make the author's works widely available by freeing them from copyright restriction, they fail to realize that they are whittling away at the very thing that nurtures authorship in the first place. An accommodation among conflicting demands must be worked out, true enough, but not by denying the fundamental constitutional directive: to encourage cultural progress by securing to the author exclusive rights."

A frequent international speaker on copyright issues and the author of *The General Guide to the Copyright Act of 1976*, Peters has served as the head of the U.S. Copyright Office since 1994. She is the eleventh individual to be named to the post since its inception in 1897. Peters has served for forty-three years in the U.S. Copyright Office and has held a variety of positions, including policy planning advisor to the Register, acting General Counsel, chief of the Examining Division, and chief of the Information and Reference Division. Peters received her law degree, with honors, from the George Washington University Law Center.

The Stanley H. Mervis Lectureship in Intellectual Property was created in memory of Stanley Mervis in 2003 by his family and friends. Mervis, a member of the William & Mary Law School Class of 1950, was patent counsel for Polaroid Corporation for most of his career and was actively involved in important patent and intellectual property issues.