

# STATEMENT OF JON BAUMGARTEN

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Before the Subcommittee on Courts, Intellectual Property, and the Internet of the Committee on the Judiciary Hearing on “A Case Study for Consensus Building: The Copyright Principles Project” on May 16, 2013

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I am Jon Baumgarten. Having retired from the practice of law, I am appearing today in my individual capacity in response to invitation from Chairman Goodlatte to testify regarding my participation in the Copyright Principles Project (“CPP”). By way of disclosure, in addition to government service as General Counsel of the Copyright Office from 1976 through 1979, before and after that period I served as counsel to copyright owner plaintiffs in a number of leading cases that established precedent and principles of copyright law which are subject of considerable contention in today's copyright debates, as well as counsel to major copyright industry trade associations, consortia, and companies. I have not been a neutral or (even in retirement) dispassionate observer of the great copyright debates. Nor, of course, were or are my CPP colleagues, whether the numerous representatives of the academy or the few from the private sector.

We all hold and brought to our deliberations strongly held views borne of scholarship, citizenship, learning, experience, observation and practice. The report of the Copyright Principles Project ---*The Copyright Principles Project: Directions for Reform*, 25 Berkeley Tech. L.J.1 (2010) (“*Report*”) --- is not a disinterested independent assessment or impartial opinion. It may, however, usefully serve as one example of a more frank and less rhetorical, or at least more collegial and informative, discussion than many others of some of the important issues facing this committee as it continues its vigilant, deliberate and critically important stewardship of this country’s copyright law.

It is important to go further and make even more clear to this committee what the *Report* was, and even more important, to make clear what it was not. As I suggested a moment ago, when viewed from the perspective of today's increasingly polarized, largely distrustful, and deeply antagonistic copyright debates, the process and *Report* of the CPP was a breath of fresh air. (As I will mention a bit later, however, its tenor was not entirely unique or unprecedented.)

A hallmark of the process was not simply civility, but rather real dialog among representatives of significantly differing views. During the discussions, and as reflected in the *Report* -- and notably in several cases in its evolution from draft to final form -- by and large the participants listened to instead of speaking past each other and took the remarks of others genuinely into account in developing and putting toward their own positions and replies.

While this process yielded a constructive exchange and, I hope, a cadre of continuing disputants who are more understanding, tolerant, and perhaps even respectful of each other's' views, it does not at all mean that it generated overwhelming or even a good deal of substantive agreement. Indeed, it became apparent quite early in the process that considerable meaningful agreement would probably not be --- as indeed it was not --- the conclusion of our efforts. That objective was, in fact, soon disavowed as even our purpose. The *Report* (pg 3) notes, for example, that "we are not in a position to offer a comprehensive and detailed set of... proposals" ; that "CPP members are not uniformly of one mind about various steps that could lead to improvements" ; and that "we have succeeded in...articulating both where we agree and where and why we disagree". It also cautions (pg 4) that "participation in the project should not ...be interpreted as an endorsement of each and every proposal discussed in the document. In fact, various members of the group maintain reservations and even objections to some proposals described as recommendations in this Report."

I will not, in my prepared testimony, review my own objections and reservations with aspects of the *Report*; this is principally because, in tribute to my colleagues and our convener, for the most part the *Report* does a fair job of explicating or at least summarizing my concerns and those of all other participants.

Examination of the (unfortunately mis-named) section of the Report that sets forth “twenty five reform proposals” makes the qualitative preponderance of “disagree[ment]” quite clear. The majority of descriptions of these points explicitly recorded (and explained) lack of consensus, opposing views, express concerns, or in a few cases the need for considerably more detail and study before any judgment could be made. The express acknowledgement of disagreement among the CPP participants appears elsewhere in the *Report* as well, in connection with such important subjects as possible changes to copyright duration (pg 10), to the definition of exclusive rights (pg 13), to allocation of the idea/expression dichotomy (pg 16), and to application of the preemption doctrine (pg 16).

Of the twelve descriptions that did *not* record explicit disagreement, at least one (# 17: expanded statement of fair use purposes) and perhaps more were in fact the subject of substantial reservation and objection at the meetings; two (#12: injunctions and principles of equity; and #14: permanence of public domain) have been subject of dissension among CPP participant related interests in the courts); one (#19) may – as I understand it -- have been since disavowed by some or all of the same interests that supported it; one (#21: orphan works legislation) has been explored in far greater detail by the Copyright Office and others); and in my view few (## 7; 14; 17; 19; 21) are of major doctrinal and practical significance. It is worth noting, however, that one of these uncontested yet important proposals (#7: right of communication to the public) is of increasing benefit to copyright owners.

Given this lack of agreement, it is understandable for members or staff of the committee and other readers of the *Report* to wonder how the document could describe a collection of twenty five revision “proposals” (after explicitly concluding that “we are not in a position to offer a comprehensive and detailed

set of... proposals [pg 3]”), refer to “recommendations”, or assert that “we believe...”. The *Report* explains (pgs 4, 22):

“While various proposals elicited enough support within the group that it was deemed constructive to style them as recommendations, *we do not intend affirmative statements or use of phrases, such as ‘we recommend’ or ‘we believe’ to suggest that the group as a whole was uniformly in support of each particular view stated.* It is a tribute to the collegiality of the group and our collective desire to foster a constructive dialog... that there was enough agreement among us to set forth recommendations in this manner.”

Given the composition of the membership and strength of dissenting views, the “enough support” rationale is, at least in retrospect (and was to some at the time) an unfortunate and inadvertently misleading one.

But all of this does not mean that the deliberations and *Report* of the CPP are irrelevant to the process Chairman Goodlatte has announced, or unsuitable as a point of orientation or beginning to the difficult but important task of Chairman Coble, Ranking Member Watt, and members of this committee. To the contrary, the *Report* expressed the hope that “recording the nature of our disagreements could advance discourse on copyright issues by others” (pg 4 ), that the Report “will contribute to a wider and more effective conversation...” (pg 4 ), and that the purported proposals would “stimulate thoughtful conversation...” (pg 12 ). If my CPP colleagues and I have proven ourselves useful to the committee in that posture then we may conclude that our time in the CPP was not only intellectually rewarding and socially pleasant, but also productively spent.

Although the tone and tenor of the CPP deliberations and conclusions is a welcome tempering of at least the decibel level of recent copyright debate, there are other instances where procedural and substantive collegiality prevailed among interested parties on very difficult and complex copyright policy issues notwithstanding intense differences. For one example, the sometimes harshly contrasting and loudly voiced positions of the motion picture industry on the one hand, the consumer electronics industry on another and the information

technology industry on yet a third on certain copyright issues are very well known to this committee. Yet over a period of several years a number of us -- notably including counsel, technologists, and business persons from each group-- repeatedly convened, carefully explored each other's concerns, put aside the rhetoric, and in result created the legal and technical environment -- and with the essential aid of Congress, the critical legislative support -- for emergence of the then great new media consumer success, DVD and related formats. There are other examples of productive professional collegiality existing side by side with or under the surface of simmering copyright controversy. Since at least the years of the great copyright revision program of the 1960's and 70's and to more recent times, these include negotiated guidelines and even legislation, and multi-party studies and reports. Not all have survived the years, the progress of technology, or the evolution of political strategies; some have not yet become effective or operational; others have been perhaps more the product of congressional prodding than of voluntarily initiated association. Yet --- at least in my own experience --- for the greater part, much like the CPP, these events have "proven that it is possible for persons of good will with diverse viewpoints and economic interests to engage in thoughtful civil discourse on even the toughest and most controversial copyright issues [*Report* pg 4]."

At the risk of now suddenly introducing an extra discordant note into this discussion, I will conclude my testimony with an additional point:

I think it fair to consider the discussions and *Report* of the CPP as somewhat more attentive to perceived problems caused by copyright to access and related interests of "users" than to the substantive and remedial/enforcement needs of "copyright owners" in the Twenty First Century. (I do apologize for resurrecting this old and imprecise class distinction; but for the moment it serves a purpose.) In my judgment, nineteen of the twenty five points examined by the Report (all but ##5, 7, 9, 23, 24 and 25 ) can reasonably be categorized as addressing "user" access and related concerns. Please understand that I am speaking here in comparative terms of the CPP's *focus of attention*; not of its absolute substance. Indeed, there are notable acknowledgments of copyright owner interests in both specific "proposals" (#7: communication to the public; # 9: recognizing

importance of ISP responsibility, though with substantial disagreement on implementation; see also, ## 5 & 23[small claims and treatment of contributions to software] and, for individual authors ##24 & 25 [termination and attribution rights]); in many of the discussions of recorded objections and concerns to other “proposals”; and in other sections of the *Report* as well. For example, it is most welcome to see instead of the more commonplace copyright trampling rush to instant gratification of an immense technology enhanced appetite for immediate content, the following: “It may take some time and patience to allow disrupted copyright sectors to consider, experiment with, and develop other or more refined models and approaches with which they will be reasonably comfortable [pg 2].” It is comforting as well to note the Report’s tight categorization of the Supreme Court’s *Sony Betmax* decision as involving only some device “makers” and time shifting of free to air broadcast [pg 5, ] rather than the far broader if not unbounded cloak of immunity for primary and secondary infringement liability wrongly accorded to that decision by others; its recognition of copyright’s importance to “encouraging provision of capital and organization needed for *dissemination* of works” as well as to authorial effort [pg 2 ] ; and the importance of developing and deploying technical protection measures in the digital age [pg 19 ] .

As this committee goes beyond the CPP Report toward the announced “comprehensive review of copyright law” I am confident that it will take forward and expand the CPP’s “focus of attention” to encompass even more comprehensively the needs and concerns of copyright owners as well as of all stakeholders and participants in the world of copyright, and of the public.

I am confident of that because I have seen and closely experienced this committee, including its predecessors, do so before. During the last omnibus copyright revision I spent many hours as Copyright Office General Counsel assisting committee staff and members in addressing major concluding issues of the revision program and its implementation. Prior to and after that period I had numerous opportunities to confer with the committee on behalf of clients affected by its copyright related deliberations. I have high regard for its process, deliberation and expertise; but I add, rather selfishly, that today, having retired

from practice, I am particularly delighted to experience something of a homecoming in venue and in substance, and I am thankful for the opportunity to appear here again.