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## The Scholarly Publishing Scene--Q and A with Jon Baumgarten

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# The Scholarly Publishing Scene — Q and A with Jon Baumgarten

Column Editor: **Myer Kutz** (President, Myer Kutz Associates, Inc.) <myerkutz@aol.com>

**J**on Baumgarten has been one of the country's most esteemed intellectual property lawyers for decades. I first got to know him nearly 30 years ago when he was counsel to the **Association of American Publisher's (AAP)** copyright committee and I was chairman. One of the big issues for the committee in those days was whether **AAP** would support U.S. adoption of the **Berne Convention**, the international copyright regime in effect most everywhere else since 1886. Major U.S. publishing, motion picture and other copyright industries had come to view **Berne** adherence as an important component of American leadership in international copyright affairs and in efforts to counter increasing foreign copyright piracy. At the same time, these U.S. copyright industries were concerned with possible disruptive effects of certain convention guarantees of so-called "moral rights" whereby authors have rights to continued "integrity" of their works, have the right to object to changes made in their works and even to contractually authorize new versions and adaptations of their works, and have the right to withdraw their works after publication. Committee discussions were enlivened by a **Time Inc.** lawyer's consternation about whether moral rights would prohibit *Time's* practice of cutting writers' submissions to fit allocated spaces on the magazine's pages or, more devilishly, to make the words fit the company's editorial slant.

**Jon** was acting for a combination of publishing and motion picture companies and other copyright entities plus serving on a small expert committee dealing with the question. He crafted submissions to **Congress** and developed legislative report language demonstrating the risks of new moral rights protections to copyright industries' contracts, business models and practices as well as providing assurance that those



author interests were adequately protected already by a variety of state laws and required no amendments to the copyright act. These arguments won the day, and many publishers and other copyright entities supported **Berne** adoption, which passed **Congress** in 1989. (*Time* survived, of course, although it's much slimmer now than it was back then.)

**Jon** went onto bigger stages for the next 20-plus years until his retirement from active law practice a few years ago. He and his wife **Jodi**, an accomplished pianist who is a leading light on the local arts scene, live on an island off the Carolina coast, which is heavily populated by birds, deer, alligators, and bobcats. The magnificent beach is 11 miles long, but **Jon** also enjoys sports played on grass and other non-sand surfaces, such as golf (providing you stay out of the bunkers), tennis, and pickleball, which **Jon** introduced to the island. (Never heard of it? It's a turducken of tennis, badminton and ping-pong, played with paddles and plastic balls on indoor and outdoor courts by around two and a half million people in the U.S.) Recently, he's taken up "sporting clays," a shotgun sport akin to skeet shooting. As I tell him, he's clearly making up for all those years sitting indoors while pouring over briefs and law tomes.

**Jon's** still invited to address audiences worldwide on the current state of intellectual property law and what judges who are ruling on copyright cases are up to these days. A couple of months ago, he emailed me a copy of a speech on fair use that he gave to a conference in Australia last year. After I read the speech, which I found engrossing, (it's published in the December 2015 issue of *Copyright Reporter – Journal of the Copyright Society of Australia*) I thought it would be worthwhile to get **Jon's** views on what he sees happening in the

copyright arena that he knows so well. Here are my questions and his answers.

*You're living far away from the legal hurly-burly, but you still follow the ups and downs of copyright law. You'd have to say that it's in your blood, right?*

Yes, after almost forty years of law practice, government service, litigation, legislative effort, commercial, policy and technological negotiation, and other activities affecting copyright law, I'd have to say it has left an indelible mark — mostly good — on my psyche. Importantly, it has left wonderful memories, both of issues faced and in many cases resolved, and of many good, smart, ethical, intellectually honest and trustworthy people, both allies and adversaries.

*Can you describe some of the issues you refer to?*

I was fortunate over my career to have regularly been on the front lines of copyright law's repeated, tension filled encounters with new and developing technologies. Take photocopying: today it is viewed as a quaint, rather prosaic technology. Beginning in the 60s, however, and continuing for many years, there were very grave and well founded concerns in the publishing community worldwide, in both the commercial and not-for-profit publishing sectors such as university presses and learned societies, particularly in STM, reference and professional, and college publishing, over the impact of unbridled photocopying going on in scholarly institutions and among research-intensive and other commercial businesses. Indeed, photocopying or "reprography," more precisely the advent of new and increasingly cheap and widely available copying devices, marked the first dramatic emergence of a number of hallmarks that have continued as prominent characteristics of all copyright law/technology tensions, including those of the digital and Internet eras. These include *decentralized* copying arising from decisions by large numbers of individuals and organizations to make their own copies and compilations of copies (such as course packs); inexpensive and readily accessible copying *outside a pressing facility* or other industrial plant; very simple reproduction of extensive portions of copyrighted works and of *entire* copyrighted works; "private" copying having the cumulative effects of *mass* copying; the treatment of *intermediaries* who might be held legally responsible for end user copying (such as libraries and document delivery services then and Internet service providers now) or found suitable to facilitate resolution or at least diminishing of tensions (such as the **Copyright Clearance Center** and other collective licensing "reprographic rights" organizations); and more. In other

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Later I'd understand that the subaudible beat was the Knowledge, that it kept you ready, prepared for anyone to start swinging, to start shooting. Back then, I had no context, no great wall against fear. I felt it but couldn't say it."

And a few of **Coates'** words to his son about the choice for his name from *Between the World and Me*:

"The Struggle is in your name, **Samori** — you were named for **Samori Touré**,

who struggled against French colonizers for the right to his own black body. He died in captivity, but the profits of that struggle and others like it are ours, even when the object of our struggle, as is so often true, escapes our grasp. I learned this living among a people whom I would never have chosen, because the privileges of being black are not always self-evident. We are, as **Derrick Bell** once wrote, the 'faces at the bottom of the well.' But there really is wisdom down here, and that wisdom accounts for much of the good in my life. And my life down here accounts for you." 🐼

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media, the new technology/copyright issues I centrally participated in included off-air and off-cable audio and video taping; unauthorized digital duplication of DVD and Blu Ray format movies and television programs; and the appropriate treatment of both computer programs and semiconductor chips under intellectual property law.

In all these controversies I handled major litigations, Congressional negotiations, and cross-industry attempts at cooperative, voluntary solutions. Several litigations, I am proud to say, established leading precedents that have remained as key legal positions for authors, publishers, motion picture and television companies, and other copyright owners in many different contexts and media. Two intellectually complex litigations I successfully handled for the government while serving as general counsel at the Copyright Office were particularly challenging as they required resolution for contemporary copyright purposes of an issue centuries old and still debated by philosophers: the dividing line, if any, between "art" and "design." Two non-litigation efforts I spent considerable time with — and emerged from with at least some multi-lateral, cooperative solutions and many lasting friendships even with firm opponents — were legal

negotiations on behalf of publishers with the library and educator communities over permissive even if unlicensed photocopying, and integrated legal/business/technology negotiations on behalf of motion picture and television studios with both the computer and consumer electronics industries over the emergent and then hugely successful home video market. Another noteworthy, lengthy and instructive, but thus far not impactful, effort I participated in was one among leading academics, lawyers and other experts from all affected interests or "sides" of the copyright/technology divide to reach a set of common principles.

***Weren't you also involved in the actual drafting of the Copyright Act, and other copyright legislation?***

Yes, for many years, beginning in the late 1950s, various copyright owner and user interests had been attempting to revise and update the long-governing, long outdated **1909 Copyright Act**. From about 1970 to 1976 I participated in those efforts on behalf of book publishers, songwriters and others. This comprehensive revision effort succeeded in late 1976 and became effective on January 1, 1978. I had been appointed General Counsel of the U.S. Copyright Office, was involved in the final formulation of the new law, and was responsible for the extensive government rulemakings and revision of every Copyright Office regulation and practice that had to be undertaken in consultation with the private sector

under the revised act. It was an exhausting yet exhilarating time.

Later I became involved on behalf of publishers, technology companies, and motion picture studios in negotiating several further amendments to the revised copyright act and trade agreement texts governing multinational protection of copyrighted works. These included the expansion of fair use as applied to unpublished manuscripts and the like; United States adherence to the principal treaty governing international copyright (the **Berne Convention**); the rules governing the recapture of foreign works from the public domain in this country; special protections for architectural works, certain limited edition works of visual art, and semi-conductor chip topographies; standards for protection of American works abroad; prohibitions on circumvention of encryption and other technological protections of copyrighted works, and principles governing the liability of Internet service providers for unauthorized Internet copying and transmission of copyrighted works. (The anti-circumvention and service provider provisions became combined in the well-known **Digital Millennium Copyright Act**.)

***What are some of the major issues that are currently in contention?***

Two very prominent ones are these: First, resolving the legal responsibility of internet service providers and other internet-focused

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entities to effectively monitor and meaningfully hinder persistent infringing by uploading, downloading and retransmission of copyrighted works over the Web. Several of the Digital Millennium Copyright Amendments of some years ago (I am proud to say my partners and I secured trial and appellate judgments upholding their enforcement and Constitutionality) attempted to handle this with a regime of takedown notices and related principles. In some ways — at least as the statute has been interpreted by some courts — that system has largely been undermined by the “whack-a-mole” problem of repeated, unmonitored uploads and retransmission of precisely the same material. That problem continues to be the focus of attention in the copyright owner and technology communities. Another is the well-known litigation of authors’ organizations against the **Google Books Project**. The lawfulness of that project as “fair use” was sustained at trial and on appeal, but the authors (with support of publishers and other organizations) are currently seeking review of the decision by the Supreme Court. This dispute has really captured my attention, in the form of at least public speaking and informal consultation here and abroad, notwithstanding my retirement.

In summary, I believe the courts’ **Google Books** decisions are quite wrong, and more specifically have at least ignored and undermined, if not silently but unduly overruled, major copyright precedents that have held sway to preserve a vibrant and vital copyright system for many years and that are of increased importance today. In other words, I believe these decisions — and a few other case holdings that resemble the errors of the **Google Books** courts in some though not all respects — have effected fundamental, unwarranted and unwise expansive change in American fair use doctrine. Additionally, I fear the attitude of some who believe that the decision is a “one off,” or sui generis one — that is, one that is effectively limited to the **Google Books Project** given the astonishing but rather unique scale, commitment and investment **Google** brought to its mass copying project. I adamantly do not share that limited view of the case. Even if the breadth and reach of the **Google Books Project** is viewed as singular, there are many other un-authorized large scale and “mass digitization” projects in the wings with respects to all sorts of copyrighted works; indeed, the essence of

rapid developments in digital replication, error checking, storage, and the like are certain to enhance this trend — notably, the very term “mass digitization” has become a term of art in the United States and abroad and is not limited to **Google** (or to books). Furthermore, even if one were to (wrongly) put aside the **Google Books** decision as limited to its facts, my concern remains with respect to *the way the court reached its result* — that is, its ignoring, limiting, or silently overruling key precedents; hence, this impact of the decision may well be systemic and far from a limited one.

I must acknowledge that some of your readers will not share my view of the **Google Books** case; it will certainly not be the first time that library interests and I have disagreed on matters of copyright law. But I would ask those readers to at least avoid knee-jerk reaction to the seemingly perennial copyright owner/user divide and give attentive thought to the potential negative impact of unauthorized mass copying on the creative heritage intended to be underpinned by a vibrant copyright system.

Other matters of continuing concern and dispute are the development, legal propriety, and impact of so-called electronic reserves that arguably serve as the digital equivalent of the unauthorized course packs of the photocopying era; the ability to effectively restrain electronic reach of off-shore or foreign piracy sites; and the effect of 11th Amendment providing immunity to state institutions from copyright infringement actions. Additionally, there have been comprehensive roundtables, hearings and reviews and reports in **Congress** and among agencies with respect to numerous copyright issues in the current and still expanding digital era, though the practical effects of these efforts in terms of legislation and regulation largely remain to be seen.

I should mention that many of these issues are also being voiced, debated and examined abroad. One of particular interest in that arena is the question of whether the so-called “flexible” doctrine of fair use as followed in the United States should replace or supplement the more specifically defined and limited regimes of “fair dealing” and “specific exemptions” that prevail in other countries. In several instances I have expressed considerable concern to foreign audiences as to the wisdom of their governments doing so — especially if American fair use law is understood to now reflect the new, unduly expansive fair use interpretations and doctrinal changes of the **Google Books** case and some other quite faulty (in my opinion) decisions.

*In my view, judges are sometimes unduly influenced by the magic of technology... Do you see things that way too?*

Yes, and very much so — and not only among judges, but also among legislators and other policy makers here and abroad. The basic problem, as I see it, is the overt advocacy by some technology interests and the receptive tendency of some judges and policy makers to be so favorably overwhelmed by the exciting promises, benefits and convenience of new technology that they view copyright as an impediment, so its protections ought to be diminished if not swept aside. This view is entirely short sighted and counterproductive to a healthy environment for intellectual scholarship and creativity.

One example of this trend in advocacy is the use of the word “innovation” in copyright debate today. Proponents of diminished copyright protection commonly argue the purported “stifling” of technological innovation posed by strong copyright law, and pretend that technology companies, as opposed to the creative copyright industries, are the only “innovators.” (Some technology companies have quite explicitly urged governments abroad to limit copyright protection as a means of encouraging their local investment or presence.) Unfortunately, these arguments conveniently overlook at least two points: *first*, that a great deal of technologic innovation in products and services of the digital economy are produced by the time, effort, and investment of the creative industries themselves, as repeatedly shown in new, emergent, exciting and popular offerings (new media, new platforms, new formats, new research tools, etc.) of motion picture companies, scientific publishers, and others — actions that are critically underwritten by the protections offered by the copyright laws to the creative works of these companies made available through their own innovations in new entertainment and scholarly products and distribution mechanisms. *Second*, in the case of copyright works being made available to the public, *successful or meaningful* innovation even if initiated by technology companies can only be viewed as a partnership or fusion of scientific invention and copyright creativity. This is exemplified in a recent newspaper article appraising the future of virtual reality in entertainment media that noted: “[w]ithout compelling content, even the most impressive piece of technology won’t appeal to more than a hardy base of early adopters.” 🌳

## Rumors from page 46

and instruction, and for coordinating the **Hayden Library** renovation project. **Lorrie McAllister** will arrive in late May from **MIT**, in the position of Senior Administrative Librarian with the title of Assistant University Librarian. Her responsibilities will include supervision of the library’s data gathering and assessment exercises; strategic initiatives at

my direction, to include print collection strategy and digital special collections; and our operational relationship with EdPlus, **ASU**’s online learning organization. Finally, our colleague **Dennis Brunning** has agreed to serve as Interim Associate University Librarian for Academic Programs starting on June 1. This position has responsibility for Collections and Scholarly Communication, Archives and Special Collections, and Academic Program Services, subject to the caveat of impending reorganization. **Dennis** has been

Editor-at-Large and a columnist for **Against the Grain** since 2008, and has been a contributing editor for **The Charleston Advisor** since 1996. <http://www.against-the-grain.com>

I am running out of column inches but have to get this last bit in. Another WOW! The awesomely wonderful **Steve Oberg** (Wheaton College) has been elected Vice President/President-Elect of **NASIG** for the 2016 election year! Congratulations, **Steve!**

Love to all of you, **Yr. Ed.** 🌳

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