Webinar Series: Fair Use Code & Other Legal Tools for Software Preservation
Episode 7: International Implications

Speakers & Facilitators: Tim Walsh (Concordia University), Ariel Katz (University of Toronto), Peter Jaszi (American University)

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Jess Farrell: you all right and we are live so um let's start this again welcome everyone thank you for joining us today we're presenting episode 7 International Implications. My name is Jess Farrell in the community coordinator for the software preservation Network and Educopia Institute and filling in today for Jessica Meyerson, community adviser to the software preservation network and research program officer at Educopia. So thanks to Jessica for setting us up great for this webinar. This is the seventh and final episode over exploring the fair use code and other legal tools for software by the association of research libraries and the software preservation network.

Just a little housekeeping before we get started everyone but the host and the guests will be muted through the webinar to max the a/v quality of the webinar if you have any questions during the presentation please type them into the chat box in your zoom control panel I'll bring them up during the presentation and we will also have time for questions at the end every episode will be recorded transcribed and posted to the SPN web site freely available for all.

Today's discussion will take place featuring the code of best practices research team and esteemed guests Ariel Katz is an associate professor at the Faculty of Law University of Toronto where he holds the innovative chair and electronic commerce professor Katz received his LLB an LLM from the Hebrew University of Jerusalem and his HS JD from the University of Toronto his general area of research involves economic analysis of an intellectual property law with allied interest in electronic commerce pharmaceutical regulation the regulation of international trade and particularly the intersection of all of these fields. Next is Tim Walsh. Tim is the digital preservation librarian at Concordia University prior to joining Concordia temple's a summer fellow at the Harvard library innovation lab and a digital archivist at the Canadian Centre for architecture where he developed a digital preservation program and software preservation projects to address issues of obsolescence for 30 years of digital design records. Your research lead a facilitator for this episode is Peter Jaszi of Washington's School of Law at American University here is one of the originators of the fair use best practices movement and is a co-author of the software preservation code of best practices. Today Peter, Tim, and Ariel will discuss why
licensing isn’t a viable solution to copyright issues and preservation projects with global reach how
US fair use law applies to initiatives that involve foreign materials how preservationist and other
countries can take advantage of local law and the code to advance their work and the rules that
they can play an advocacy for better and more flexible copyright functions and with that I will turn
it over to Peter

Timestamp: [3:30]

Peter Jaszi: I hope I can be heard and before I talk about anything substantial and before I turn the
time over to our two wonderful guests I wanted to say a special word of thanks to two groups of
people who are part of this webinar today first but the core who have been with us for all or most
of the last seven weeks I’m grateful those of you who have dropped in and out can as as as you’ve
heard find the episodes that you missed live online and then I also want to welcome several people
who I know are joining us today because the special topic to which we’re going to turn in a few
moments after I have made a very few brief introductory remarks is the the case study of
Canadian law and so a number of people from the Canadian archival community and the software
preservation community in particular are joining us today and we’re very very happy to have you
as part of the session I want to start by introducing a few of what might be called the big ideas of
an international copyright law but I probably should say first why I talking about international
copyright law in the first place and the answer is that over the course of the seminar or the
webinar we’ve had a number of questions about what this code of best practices for fair use that
was developed by U.S.-based lawyers and practitioners for use with U.S.-based preservation
projects means for the rest of the world on the one hand and for U.S. projects that have some
amount of global reach or participation on the other. And in order to address those questions
there are a few basic technical concepts that need to be put in play.

The International copyright system is based in a group of treaties you’ve heard of the Berne
Convention for example it’s one of several that provide cross border protection for copyrighted
works if two countries are in one of these treaties and a work originates in one of those countries
the other country or countries are required to protect it and they’re required to protect it more or
less as they would protect a similar domestic work and that’s the second big principle that you see
here in the bulleted list so-called national treatment a kind of variant of the Golden Rule if a
foreign work is if a use of a foreign work protected via treaty is challenged in another jurisdiction
then the nature into the largest degree the extent of protection will be determined under the local
law of the country where that challenged use occurred that’s national treatment and then finally
the third piece in the in the mix is a set of rules that lawyer is referred to as international conflicts
of laws principles because sometimes a dispute has connections with more than one jurisdiction
and those jurisdictions may have different legal approaches either in in broad strokes or in fine
details to how such a dispute should be resolved and in those situations where there are several
countries involved the conflicts of laws rules that I’ve just mentioned come into play.

slide please so the reason everything I’ve just described is important is that of course the code of
best practices is about a principle called theories which exists in the law countries specific one so
the V the world is essentially divided into three groups of countries a small but growing group that
have various exceptions broad flexible exceptions to copyright built in like the United States and some of the others that are listed here then there are a so-called fair dealing countries which have similar but not identical flexible exceptions and you'll be hearing a little more about the fair dealing approach to deal with two copyright exceptions from aerial cats in a moment because among the important fair dealing countries in the world is Canada and then there are a lot of countries including most of Europe which deal with exceptions to copyright law including exceptions for cultural purposes like preservation under what are called specific exceptions there's something that is or could be sometimes it is and sometimes it isn't in practice written specifically into the national law that says well you can do archiving in this circumstance but not in that circumstance. You can do preservation under these conditions but not under those conditions and I think it's fair to say as a generalization although I'd be very interested to know whether others agree with this generalization or not that broadly speaking most of the countries that don't have flex copyright exceptions fair use or fair dealing are pretty far behind the mark in terms of bringing their specific exceptions up-to-date for the realities of contemporary digital preservation.

next slide please next slide so here again the u.s. code that we've been talking about for the last six weeks is a very good reliable fairly middle-of-the-road set of guidance principles for the application of fair use to preservation activities when the preservation activities are based in the US but if preservation activities are based somewhere outside the US if we're talking about a UK based or a Canadian based or a French based software preservation program then of course the country where the program is located where the administrative staff is where the computer servers are is going to be an extremely important source of law in other words if you're running up preservation program out of France or the Netherlands you have to think about how the things you are doing do or don't comport with the copyright law of that country both what it prohibits and what by way of exceptions it permits it's also the case that we need at least to think about laws of countries other than the source country or the host country or the base country when a project is of global scope and when material is being uploaded to the project servers from locations other than the one in which the program is based because uploading is a is an activity which in the current digital moment copyright law takes very seriously and there's at least a possibility that if a French institution were uploading files to a us-based consortium of legacy software French law just to give an example might come into play

next slide as I mentioned at the beginning of these remarks the copyright law provisions of different countries relating to both how extensive the limitations on copyright authority that they recognized especially the ones they recognized in favor of cultural activities are they differ in terms of how up-to-date their laws are and those differences need to be taken into account if and this is a proposition that I can't emphasize enough if someone is trying to get software preservation or other digital archival activities underway in the country where the laws of that country are inhospitable to the practice relatively speaking compared with the US or as I think we'll see in a moment Canada then there is an opportunity indeed I would almost say an obligation on the part of practitioners to get involved in the law reform or lawmaking process so that whoever is making the rules whoever is setting the parameters for what is and isn't permissible when cultural institutions seek to preserve legacy software and other link digital legacy items
know that the decisions they make not only affect high-value commerce but also the maintenance of here so there is an opportunity and I would say there just to pound the peg one more time even an obligation if you're not satisfied with what your local law provides to try to get involved with changing it and let me then make one point before I turn to our our wonderful guests and it has to do with the first of the general topics that was stated earlier as being within the scope of the webinars coverage for today in previous sessions we've talked about how as a general matter a licensing based approach that is an approach that's based on finding, consulting, securing permissions where necessary paying the copyright owners of legacy software for the privilege of preserving it isn't very feasible even at the domestic level in the United States. Those owners are simply too many too hard to find and in general to disengaged to be consultant that's why relying on fair use or on some other copyright exception is so important. Well if that generalization about the the the the limitations of a licensing these severe limitations of a licensing based approach is true at the national level it's true exponential it's exponentially true at the international level. Licensing based solutions aren't going to do the job in our opinion which is why again that it is so important to both ascertain and consult and where necessary get involved in changing the local the local national norms that relate to copyright exceptions and with that since our guests have been introduced we can go to the next slide and then right on please to Timothy Walsh welcome Tim

Timestamp: [17:20]

**Tim Walsh**: great thank you Peter thank you for that really wonderful introduction a little under the weather today so bear with me if I if I get a little Spacey that's why but I'm actually really excited to be talking here today and just if you wouldn't mind moving to the next slide um I'm gonna focus I'll try to talk for about 10 minutes or under and I'm gonna leave you know any anything approaching sort of an overview of Canadian law certainly we're gonna stay way away from any kind of legal advice I have no background in law that but I'm gonna talk about a case study that I think is interesting because it's international because there's work that's been happening on this in Canada in the US and in plenty of other countries as an example of why our problems in software preservation are not really set at the national level and our solutions can't be either and why we need to consider some of these ramifications of international law and international case studies to begin with so I'm the the digital preservation Thank You Jess I'm the digital preservation librarian at Concordia before this as just mentioned beginning I was the digital archivist at the Canadian Centre for architecture which was actually you know the same subway stop in Montreal is about a five-minute walk away and for the last three years and while there I did quite a lot of work for the CCA and at the CCA and observed quite a lot of work elsewhere in Canada on this issue of the preservation of digital design records so I'm going to give you a really quick overview of like the what and why of this problem so to get the acronyms out of the way to begin with when we're talking about digital design records the records of architecture of landscape architecture to some degree urban planning and sort of related fields a lot of what we're talking about our cad and bim files cad might be something that you're familiar with stands for computer-aided design sometimes computer assisted drawing or sort of other variants of those terms and this describes computer software with roots in the 80s going back in the commercial
market and available in pcs sorry going back to the 60s and available in commercial market on pc
since the 80s and incredibly popular since the 90s that assists in the drawing of architectural plans
for the most part this was originally 2d software it's increasingly 3d there's an increasing overlap
between 3d technology used in fields like architecture and design and used in say video games or
film animation things like that the sort of next wave of files for design records is called Building
Information modelling or BIM this is something that's been talked about for decades in the last
safe half a decade has actually gotten quite a lot of traction um and this is quite more sophisticated
software than CAD software the way that it often gets described is that it adds additional
dimensions beyond the first three in the forms of time cost and sort of ongoing building
maintenance but the basic idea is that there’s a a kind of full perfect digital representation of a
building that would follow a building from its initial conception through sort of renovations
facilities management on to even demolition at the end of its life and that all the different people
involved as stakeholders in the life of the building give you this one definitive file and simply kind
of see their views on it and interact with the data that they have access to there are a number of
different software packages and file formats that implement cad and bim software but the things
that really unites them are that these are highly software dependent files so if we talk about files
that can't be meaningfully thought of this as renderable or accessible outside of very particular
parameters of viewing software this certainly checks that box and that they have sort of
notoriously been known as the deep end of the pool for digital preservation challenges for a long
time and if you want to learn more about these files I’m gonna go over a little bit in the next slide or
two but I'd highly recommend looking at this GPC technology watch report that Alex ball wrote in
2013 which is by far and away still the best overview and resource on the topic so next slide please
and forgive the phone so some of the qualities of digital design records that make them difficult to
preserve and provide access to as you might have guessed from what I mentioned earlier these are
highly complex files and format specifications that involve quite a lot of mathematical calculations
on the fly the software and file formats are often proprietary there's an increasing move towards
open interoperable file formats like I have see for Building Information modeling but the vast
majority of formats that'll actually be coming into archives are in very proprietary formats as a
general rule software in this industry will not read earlier format versions of the same file format
and this is largely due to market pressure where vendors want companies to be upgrading their
versions every few years so eventually they start to limit backwards compatibility and make it
harder to open the older files that's not universally true but it's it's a pretty constant thing files
often have external dependencies or what were sometimes called X reps so a single CAD file may
not necessarily be atomic there might be elements in that CAD file they're actually getting pulled
in dynamically from other files so we start to have to think about things like directory structure
and maintaining those links and then there’s just a whole sort of box around the question of
migration and there's been a lot of projects starting at the Art Institute of Chicago and then MIT
and Harvard in the mid-2000s with the facade and facade to projects that have investigated what
preservation targets might be for file formats for cad and bim files as well as what those pathways
and workflows might look like and some of the recommendations that you would see in something
like the sod report or in Alex Falls TPC technology watch report essentially say that there's no one
file format or pathway that's going to preserve all the data that we want so the best we can do is
create a bunch of different derivatives of different types that give different insight into the data
and this has led a number of people including often me to speculate that emulation and software preservation might be better preservation strategies than trying to automate some kind of migration that’s exceedingly difficult and often requires very highly skilled manual labor or human labor I should say that instead of doing that maybe we could preserve certain environments that will run the software that we need to interact with the files in their sort of original environment one of the things that complicates that is this question of what exactly it is that we’re trying to preserve with these files and that gets into questions of designated community and significant properties what I’ll say from my own experience having talked with people they’re different user communities can often have very different needs so for instance a facility managers perspective from a Susilo managers perspective for instance a 2d CAD file with a plan or even a PDF of that plan might be sufficient if that’s what allows for sort of ongoing use of the records for things like renovations whereas of the CCA we saw quite a number of architectural historians media studies theorists and others who were actually as interested in this technology and in the process of design as they were in the outputs. So in that case you know if we serve up files from 1985 and software from 2019 and say hey or here’s the thing that doesn’t really give people an insight into that original environment which is sort of the locus of the questions often next slide please so just to paint a very brief picture of kind of some of the different kinds of challenges we could look at - software’s or - different file formats as an examples so one is AutoCAD which has been the sort of de facto industry standard for 2d CAD and has done 3d CAD for a couple decades now the native sort of binary file format is DWG there are some lightweight visualization formats like DXF for gwf that you might see out there in the wild as well and the nice thing is with AutoCAD files sense basically the earliest versions in the 1980s can still largely be opened in current versions of the software and there are lots of free readers out there there’s an asterisk there because that has only been true for the last few years and technically the DWG file format is proprietary even if it’s been reverse-engineered by various people over time and so there’s this question we’re at the moment if you have AutoCAD files in your archive and you want to provide access to them you can get a free DWG reader or a current version of AutoCAD and that should serve the needs of many users but that wasn’t true even a few years ago and there’s kind of no guarantee it’s gonna be true again in a few years but that’s sort of best cased easiest scenario one format that paints a slightly different picture which might be more representative of the sort of long tail of 3d modeling software that gets used particularly with more innovative projects is FormZ or FormZ which is a software that came out of the University of Ohio I believe and was incredibly popular in the 90s and early 2000s is one of the first very sophisticated 3d modeling tools that was specifically geared towards architects and architecture and the the fmz file format is notoriously tricky because current versions of the software and even the oldest versions of the software that the vendor is able to provide will only read file formats file format versions created in versions of the software after say the mid 2000s which means that the vast majority of FormZ files that might find their way is in an archive cannot be opened by any commercially available or even sort of the latest generation of obsolete non commercially available versions of formz which means in my experience I know in at least a couple archives at least tens of thousands of files of very important projects for our cultural history and cultural heritage that are essentially locked away and if we can get emulation based strategies to open these files there’s an addition level of legal complexity
that goes beyond the issue of copyright because much of the software like many of its competitors is protected by hardware keys which introduces a whole issue of sort of DRM and digital locks.

So hardly a comprehensive picture but maybe a little bit of a portrait for you next slide please what I really want to say is that this is not a national issue so the countries that are painted in red are ones where I personally have talked with archivists who or digital preservationist or librarians or folks in working in museums or in government who are dealing with this these issues of preservation and access for digital design records some of them are working with earliest record some more recently in Canada the CCA has a really wide ranging international collection of projects coming from just about every continent on earth down the road at McGill they have architectural archives as well for as one example Moshe Safdie as architectural archive which contains born digital materials well out a little further west at the University of Calgary they're dealing with the same issues and this is true and plenty of other places as well so I I have talked about this with colleagues at the University of South Australia various folks in the UK at the head new Institute in in Rotterdam and so on and the truth is that most of these companies that are the software vendors are very large multinational corporations that are competing in markets around the world and so a lot of the problems that we're facing are not national problems the contexts in which this work is happening often are within borders although not they don't necessarily have to be but certainly are across national borders in the sense that this work is happening cooperatively and independently in a number of different countries so next slide please so I'll end here with questions rather than answers and hopefully this gives Arielle something to kind of pick up from or for us to circle back and discuss later so some questions that I've asked myself for the the code in a Canadian context include you know what from the code and its analysis of fair use can be applied to fair dealing in Canada as Peter said fair dealing and fair use are not the same although they are similar and the law and code in the two countries are different so what what can we take can we take general lines of argumentation can we take more specific details certainly Court precedent it's not going to work but there's this question of what in the code would need to be adapted and what can be used kind of as is another question that I have i. What issues arise from Network Solutions? So if we're going to talk about emulation based strategies for access to legacy design records we don't live in a world where most of our servers still reside in the same country even in cases where that's true the move that which I love towards networked sharing of legacy software and really of the whole stack of emulators of operating systems of drivers of end software you know the same way that not a very institution can afford to do this themselves I'm not convinced that every country can or should either so what issues might come up with say sharing of software collections for an emulation as a service type solution across national borders and finally and I think this this gets back to Peter's point quite a lot how can the code be used as an advocacy tool for building a case for software preservation work in Canada and potentially emulating some of the work in in the u.s. led by folks at the Berkman Klein Center at SPN at ARL how what might we even try to work towards sort of protected exemptions in Canada to mirror those in the United States um I'd be happy to talk about these later to get people's input but for now I think maybe the best thing to do would be to handle / - Ariel

Timestamp: [32:25]
Peter Jaszi: thank you so much

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Ariel Katz: thank you can you hear me loud and clear okay so thank you everyone since written invitation to speak we're a bit behind so I'll probably skip some of my slides. Jess, can we kind of go to the next one. So I want to start with some preliminary issues before we talk about third a link and then I'll skip the second point and go to fair dealing so in talking about the preliminary issues I can ask it the next slide please sorry so here's the point that I have written recently in an article and and excuse me for the plug but the simple observation is that libraries predate copyright okay. And the the institutional role of libraries in other institutions of higher learning in the promotion of knowledge and the encouragement of learning those functions have been acknowledged way before legislators invented the concept of copyright and this is something that it's important to bear in mind for first several reasons why it matters - you can move to next slide please - first of all because if we remember that what libraries do and I'll call these librarying has been recognized and importance this list has been recognized before copyright existed that means that the activities of library form part of the context in which copyright laws copyright law was born. and it also had may have some interpretive function because generally when we have legislation legislation is to be interpreted against the backdrop of previously existing rights and interests so the argument would be is that if since libraries existed and have been doing libraries before corporate existed unless we see clear indication otherwise the implication might be is that the way we interpret the Copyright Act is that the legislature did not intend to take a a from or unduly hamper what libraries have been doing all along. Now it may also have some implication in countries such as Canada which is a federal country because copyright is as a matter of federal jurisdiction whereas libraries are generally a matter of provincial legislation. So that creates an interesting and so far unexplored interface but there is some line whereby corporate law federal copyright law may not be able to interfere too much with things that fall under provincial jurisdiction and if we come to the conclusion that copyright slog really hampers the libraries in what we're doing that might create some constitutional issues in a system like Canada. But beyond that the fact that again library has this ancient recognition if if any even if it does not have any legal implication it still has some rhetorical forts. Okay so that should empower librarians to be ready to come look what we're doing is great it's not controversial it has been acknowledged for hundreds of years we should be allowed to continue doing that without being overly apologetic about that. Ah let's skip this one too and go on this one too and we'll go directly to fair dealing. So okay um okay so first of all just to answer team's question about what can what from the code can be applied in Canada: so by and large most of it. So I think if the conclusion is from the codes that on the U.S. law yes we can do it by large we can do it in the Canada the differences are just in a new Ensor what things you might exercise to appeal more to the Canadian context.

Okay so first of all Peter earlier describe three categories the fair use countries, the fair dealing countries and the specific exceptions countries. So under this view Canada is a fair dealing country and the question is there a difference between fair dealing and fair use. So first of all as a matter of terminology "is there a difference between dealing and use?" No because you can see that I so the
in the English version of the Act record is very dealing in the French version of the Act we call it you Jesus you know I could double which literally translates to serious and both of those versions are equally authoritative so there is if there is any difference it's not in the terminology. Okay but that said conventional wisdom holds that there is a fundamental difference that under in a U.S. style fair use regime potentially any purpose could fall under fair use the only question is it fair or not whereas in the in the fair dealing systems fair dealing may only apply to the statutorily enumerated purposes which in Canada right now our research, private study, education, parody cider crisps and reviewing is reported. That entails two-step analysis first we have to foster self is the dealing is done for one of the recognized purposes if and only if the answer is yes then we proceed to the next question namely it also fair but if it's not to any of those purposes then we stop at that first step and we don't even ask whether the dealing is fair. Okay so this is the conventional wisdom can [you let's start the next slide please um] but but here's professor Katz less conventional but better wisdom which is actually there is no difference here and I've written about that I can send anyone who is interested but the bottom line from my research is that even though we don't have the magic words such as you know in our legislation Parliament never intended to limit fair use or dealing to those enumerated purposes and potentially as is a case in the U.S. certainly could apply to any purpose provided the profile of dealing is fair. Now so other than just promoting my research here so firstly it's it hope it seems may be useful for you to know that practically it may not matter much. Okay so I mean first of all practically as you will proceed under the commercialism because that's the more prudent thing to do unless some court says declare that my view is right but also because it doesn't really matter because even even if we take the view is that the list of purposes is closed to the Chiefs and that you first must fit into one of the enumerated purposes it's probably very likely is that what all the preservation activity is describing the code would easily fit under at least the heading of the purpose of research and the reason for that is because the Supreme Court had said in 2012 when describing those two steps said two things first is that when answering the first question is the dealings for one of the enumerated purposes to decide what those purposes are there should be a relatively low threshold. Okay so it's a very we interpret those purposes as broadly as possible so that the analytical heavy-hitting is done in determining whether the dealing is fair. Okay so that's where the court says we want to see most of the analyses not on the categorical question is it is it research is it criticism and so on. And second also in that case the question arises okay whose purpose counts and the court says it's the ultimate user not necessarily the provider of the material or the person who does the copying but the ultimate user could be the relevant purpose and in the context of research libraries the ultimate user is the patron of the library which very likely all those activity eventually will be would fall and under research. Okay so so the first type of thing is very easy we say yes then we move to the six factors which can let in the U.S. the four sectors there are in the act in Canada we have six sectors or not in the act as they come from this Supreme Court decision see CH in 2004. The next slide please. And those are the six sectors and the court mentioned that there could be other sectors first is that it's very similar to us the purpose of the dealing, the character of the dealing, the amount of the dealing, alternative to the dealing, the nature of the work, and the effect of the dealing on the work. I just want to say a word about number four the alternatives to the dealing in C CH the court and that a crucially important point of the court made was that the availability of a license is irrelevant so if if something is fair
dealing he does not stop to be fair dealing because the copyright owner would be happy to sell you a license to do the activity and the court said that’s the case because thirdly link is a right of users and because it is a right of users copyright owners cannot take away this right by offering you a license to engage in the activity. Okay so that's a uniquely Canadian feature, the irrelevance of the license in a very important way.

So basically if you go through the sector’s again the analysis is rather similar to what you see in the court of brakes best practices and in the American jurisprudence I don't want to spend too much time on that I just want to highlight some some differences first of all in the US in recent years which was the issue of transformative views has been become very important in Canada it hasn't really caught on yet and moreover the Supreme Court emphasized that dealing could be fair even if it's not transformative at all so we don't have the same emphasis on transformative use as we see in the U.S. in recent cases. So we don't even need to explain in great deal or into overly emphasized perhaps why the preservation is transformative or not it may help help but we don't necessarily have to do that but here's another interesting point if at least for some transformative uses a court could find that again if this is truly is really transformative then the dealing or the the activity would not even amount to copying of substantial part of the work and hence there would be no infringement without even considering fair dealing okay so if in a truly transformative case if you copy a word and you do it not in order to create a substitute or imitate the work but to do something else the court said in in this case in scene R then there is no infringement period not because it's very linked but rather because no substantial part was even taken so this is an important difference and a positive one another one this is not really a difference but a worth a point worth emphasizing the Canadian act like many other acts in addition to third a link also has a list of other specific exceptions some apply to libraries some apply to museums and so on and the question is what's the relationship between those specific exceptions and the general store dealing provision and the Supreme Court in CCH answer this question said that fair dealing is potentially always available so you you may really if there is a specific exception and it and what you're doing falls under the specific ception that's fine you can rely on it but you don't have to you can always make the case that what you’re doing is is they're dealing under the general for dealing provision and if that's what you want to establish then you don’t need to rely on a specific exception.

Next one also CCH the Supreme Court emphasized the importance of having institutional policies guidelines in other indicators of general practice. So the question the court asked itself is it in a case for a hearing does the defendant have to prove that every copy of every work individually satisfied very dealing or was it enough for the defender to show that it had the general practice that was there and the court concluded that the latter is is sufficient. So especially in the context of libraries because if you do those activities many times there is a policy you don’t have to show that each and every copy of each of every software was necessary fair dealing it may be sufficient to show that you have a policy or a general practice that fits the parameter or furnace and that would be sufficient. And I think ultimately where you can go through the details of the fair dealing analysis in the six sectors but essentially I think it boils down to the question of whether what you're doing is really necessary for the ultimate purpose. And “is this really necessary for the
ultimate purpose?” appears in all the three Supreme Court cases that came to supergun of Canada and in which the court found that it was very dealing ah okay just tell me that we need to move to Canada so let me just I'll skip this one okay and here's just a lot of things that's almost the last one just a practically a super important point now it's not about fair dealing, it's about statutory damages these are damages that plaintiff can elect to recover without proof of actual damages. Now in Canada in 2012 Parliament introduced some caps on statutory damages for infringement that are for non-commercial purposes and most of what describes in the code would probably be non-commercial so in that case the statutory damages are capped at a maximum $5,000 and in addition to that it means that the first copyright owner who sues and elects to recover statutory damages can get up to $5,000 and from that previous infringement of a work of that corporate owner or as any other work cannot be subject to statutory damages. Okay so from a practical perspective the actual exposure of an institution is up to $5,000 which is for interview individuals it may be a lot for an institution is something that many institution can take this risk there could be still be actual damages but that may be very hard for a plaintiff student to proof I think I'll stop here

Timestamp: [48:54]

Jess Farrell: yes thanks so much presentations just a little bit for Q&A; so we can take a couple of minutes after 3:00 p.m. Eastern if you want to we will try to cut off by 3:10 Eastern Time um. We will go to the Drew’s question first which has been answered a little bit and the chat here but I just wanted to throw it out there in case the speakers had any more to add to Drew’s - “just registering a work for copyright in the United States subject to work to fair use here despite the company’s nationality and/or where the work was performed?” and Patricia helpfully jumped in and said “fair use can be invoked anywhere with within the United States on any material from anywhere whether or not it is registered here.” Do we have any anything anything else said that the speakers want to say about that?

Timestamp: [50:05]

Peter Jaszi: that’s a very good answer that’s the that’s this principle of national treatment that I identified earlier the the rules that apply to uses that occur in a country or that are subject to a country’s law are not sensitive to the question of where the material comes from. Question is a question of where it’s used sometimes that can be a complicated question because it can be used in more than one place. If if one were to set up an emulation tool for example and make it available to researchers all over the world then there would be some question about the whether or not the laws of all those countries where the researchers said were relevant and that’s where the the conflicts of laws rules that tend to focus attention on where the project is based are so important and so encouraging. There’s a lot of interesting material here and I think an awful lot of good news for for Canadian practitioners in what in what we’ve heard so far what are some other questions

Timestamp: [51:30]

Jess Farrell:
attendees please continue to type up and the chat there if you want to jump in and ask a question. I just thought we could jump back to these great questions that Tim proposed about the Canadian context and see if there’s anything here that we wanted to dig into a little bit more after Ariel’s presentation. We were just getting at the second one about what kind of issues might arise from network solutions where servers are just gonna be just maybe across the border. Does anyone want to chat about that a little bit more time you created these questions so I was wondering if maybe you had some some thoughts on them yourself or if you truly were just hoping to hear further speakers on it.

Timestamp: [52:11]

Tim Walsh: I mean I think I’m probably the least qualified person here to be answering legal questions I think a lot of what Ariel said in his presentation was really encouraging for me. I I think this is fantastic. I wish we had talked two years ago but this is fantastic but I mean especially around this this question of what’s ultimately necessary for the purpose at hand and I think you know where a lot of people in our field have independently come and certainly were SPN has been a big advocate for this too is that you know we we cannot afford and we don't have enough time and we don't have enough technological capability individually to solve these issues of obsolescence that have occurred at this multinational like very large scale and I've been very encouraged to see projects like EaaSI in the United States start to address this from a collaborative angle and I think today was very encouraging for me personally in thinking that these solutions might be able to be expanded on an international level as well but I'm not going to actually say whether or not that's

Timestamp: [53:28]

Peter Jaszi: I want to jump in and follow up with a question for Ariel, which is you talked earlier and and so helpfully Ariel about the idea that reasonably necessary was the Canadian standard as repeated in the court decisions. Do you think that the kind of a whole sort of economies of scale that Tim is describing that might justify a collaborative project in which software, old software was both uploaded and downloaded across a network of institutions would be likely to fit within that notion of reasonable necessity? After all one could do it institution by collection by institution it would just be much more expensive and time-consuming. is that reasonably necessary do you think

Timestamp: [54:32]

Ariel Katz: you know you know Peter we can't answer we have to is lawyers well it may depends right so I can give you a straightforward answer but but I think the general point in is that you need to be able when you do those kind of projects you need to be able to articulate a good explanation of why are you doing what you're doing and why are you doing in the way that you're doing and why do you do it this way rather than the other way Taylor and if you can articulate and have explained why you need to do it on that scale rather than a smaller scale why do you need to
create multiple copies for Nega for redundancy rather than a single copy so if you can explain how the architecture works and what are the practices and why it's considered good practice to to create more than one copies and host them in more than one because that would accomplish the purposes of preservation much better than if you do it in create one so if you can if you can show that you are aware of the issue and that you're and you've been thoughtful in how you design the project and there is a reason for what you for what for why you're doing that in the way that you're doing and that serves the legitimate ultimate purpose then it's more likely that the court will say that was reasonable and necessary. And just about the cost so in one of those cases the Alberta of the access copyright the which involved our copying by teachers - the the copyright owner said no copying it was not while they could have purchased the school could have purchased more books with a budget more real and the Supreme Court said image I said no that's unrealistic if a teacher only needs to teach you know if they only use an excerpt of a book we can't expect them to buy the entire book for every student so copying was reasonably necessary and it cost savings I think was I was part of a part of the equation.

**Timestamp: [56:41]**

**Peter Jaszi:** thank you I wanted before we are before we have to go well first of all other questions anyone wants to type a question I wanted since I see that Graham slate is with us I wanted to ask him and I realize I'm not sure we can actually get him to speak but perhaps we can get him to type if he wants to if there's anything that that he would like to say now about the the choral initiative to how to split it transpose the best practices of for fair use into a Canadian guidance document I think that's an interesting initiative in itself highly interesting and also potentially an interesting model for thinking about the the international reach of this document more generally. Graham is there anything you would like to like us all to know

**Timestamp: [57:46]**

**Grant Slate:** hi Peter can you hear me I can great yeah as thank you very much for the prompt I've become part of this CARL initiative maybe over the last monthly I'm sorry about that and we're just sort of at the early stages I wouldn't say that speak I can't really speak on behalf of CARL but my understanding is that there the commitment to do a full adaptation of the document we're not quite at that stage yet we're sort of investigating the feasibility of that. okay but but you're you're right to point out that it's it's sort of interesting insofar as developing a model whether that is a feasible project across other jurisdictions perhaps sort of that's a good point. and I think what we're going to do is well we can't recreate I think you mentioned in one of your one of your past webinars that it was a 15 year process developing this code so I don't think you could do all of these codes all of the codes family of coach this room is a year flat yeah so I think we're going to use the methodology that that was laid out in the white paper about permissions culture and software preservation. I think we're just going to sort of take that component of it and use it as a means to getting conversations with the community of practitioners and lawyers in Canada who are doing this work and encountering copyright issues in their in their work and either develop a companion piece to the the fair use code or do a fair dealing best practices code if we want to call it that I'm not sure but I think that's kind of where we're at and we'll be giving an update on the
progress with report at the ABC conference in Saskatoon which is the sort of the community conference for copyright practitioners and in Canada and that's gonna be happening in May so we'll have more information to share then.

**Timestamp: [59:50]**

**Peter Jaszi:** Graham thank you very much I think that's very encouraging and I must say that that I think that that what Tim had to say today underlines the the urgency of the effort and that what Ariel had to say is pretty encouraging news about the feasibility of the effort

**Timestamp: [1:00:11]**

**Grant Slate:** yes according to Ariel it seems like we run pretty exact solid ground and I love Ariel

**Timestamp: [1:00:21]**

**Peter Jaszi:** with that last chance to take a quick question because otherwise the the curtain will descend I do want to point out that although unfortunately the webinar series ends today the opportunity to be in touch with us, to pose questions either about this topic or about anything that has been developed or any ideas that have been developed in the past six weeks continues. And anyone who has been in attendance or for that matter anyone you know who hasn't been attendance is more than welcome to get in touch and we will make an effort not only to answer questions but to make sure that within limits those answers are made available to the whole community that has been formed thanks to your patience and and your enthusiasm and your willingness to stick through with us through the last seven weeks so Jessica I'm turning it back to you. I think we may now be fine, as you can see I don't want to stop but I think we've come to an end.

**Timestamp: [1:01:41]**

**Jess Farrell:** It's hard to stop it's been a wonderful 7 weeks - we covered so much, and we've learned so much along the way. I doubly endorse everything that Peter said about reaching out to anyone you can just email me or Jessica Meyerson and we can triage your message to the right person if you want there’s one of these experts you’ve heard of over the past seven weeks that you’d like to reach out to directly you’re welcome to do that as well. so thanks everyone it looks like we've covered all of our questions

**Timestamp: [1:02:08]**

**Peter Jaszi:** please recommend us to colleagues and friends who may not have been in attendance but who could might be interested in watching online

**Timestamp: [1:02:19]**
**Jess Farrell:** yes so huge thanks to the guests and the research team keep an eye out for the recordings those are going to be up online as soon as we can possibly get them up and you will be able to rewatch or share or whatever you would like to do with them so thanks again everyone for attending and for sticking around a couple minutes later so we could finalize our Q&A; have a great afternoon

**Timestamp: [1:02:40]**

**Peter Jazsi:** Thanks to Ariel, thanks to Tim you were human made an extraordinary contribution goodbye all thank you