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)

Jess Farrell:

All right, and we are live. So, let's start this again. Welcome, everyone. Thank you for joining us today. We're presenting episode seven: Implications. My name is Jess Farrell, I'm the community coordinator for the Software Preservation Network at Educopia Institute, and I'm filling in today for Jessica Meyerson, the community advisor 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 of our seven part series of webinars exploring the theory use code and other legal tools for software preservation, cohosted 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 guest will be muted through the webinar to max the AV 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 spin website, freely available for all.

Today's discussion will take place with members of the code of best practices research team and esteemed guest Ariel Katz. Ariel Katz is an Associate Professor at the Faculty of Law, University of Toronto, where he holds the Innovative Chair in Electronic Commerce. Professor Katz received his LL.B. and LL.M from the Hebrew University of Jerusalem and his SJD from the University of Toronto. His general area of research involves economic analysis of competition law and intellectual property law, with allied interests 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, Tim was a summer fellow at the Harvard Library Innovation Lab and a digital archivist at the Canadian Center 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 and facilitator for this episode is Peter Jazi of the Washington School of Law at American University. Peter 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 U.S. fair use law applies to initiatives that involve foreign materials, how preservationists in other

countries can take advantage of local law and the code to advance their work, and the roles that they can play in advocacy for better and more flexible copyright [eclections 00:03:07].

And with that, I will turn it over to Peter. Thanks, Peter.

Peter, please unmute yourself, or I will... Here, I got it.

Peter Jaszi:

Work now, let's try that. How about that? I hope I can be heard.

Jess Farrell:

That's great.

Peter Jaszi:

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, the hardy hardcore who have been with us for all or most of the last seven weeks. I'm grateful those of you who've dropped in and out can, as you've heard, find the episodes that you missed live online. Now 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 case study of Canadian law, and so a number of people form the Canadian archival community, 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 international copyright law, but I probably should say first why I'm talking about international copyright law in the first place. 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. In order to address those questions, there are a few basic technical legal 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. 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 use of a foreign work protected via a treaty is challenged in another jurisdiction, then the nature, and to the largest degree the extent of protection, will be determined under the local law of the country where the challenge use occurred. That's national treatment.

And then finally, the third piece in the mix is a set of rules that lawyers refer to as international conflicts of laws principles, because sometimes a dispute has

connections with more than one jurisdiction. Those jurisdictions may have different legal approaches, either in broad strokes or in fine details, to how such a dispute should be resolved. 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 fair use which exists in the law of the United States, and that principle isn't a universal principle. It's a country specific one, so the... world is essentially divided into three groups of countries; a small but growing group that have fair use 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 copyright exceptions from Ariel Katz 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." 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 flexible 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 U.S.. But if preservation activities are based somewhere outside the U.S., if we're talking about a U.K. 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 a 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 if you will, 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 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 U.S. 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 recognize, especially the ones they recognize 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 [inaudible 00:13:44] position that I can't emphasize enough, if someone is trying to get software preservation or other digital archival activities underway in a country where the laws of that country are inhospitable to the practice, relatively speaking compared with the U.S. 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 law making 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 digital legacy items, know that the decision they make not only affect high value commerce, but also the maintenance of heritage. So there is an opportunity and I would say, 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.

Let me then make one point before I turn to 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 webinar's 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 too disengaged to be consulted. That's why relying on fair use or on some other copyright exception is so important.

Well, if that generalization about the... limitations of a licensing, the severe limitations of a licensing based approach, is true at the national level, 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-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.

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 get a little spacey that's why, but I'm actually really excited to be talking here today, and Jess, if you wouldn't mind moving to the next slide... I'm going to focus, I'll try to talk for about 10 minutes or under, and I'm going to leave anything approaching sort of an overview of Canadian law. Certainly we're going to stay way away from any kind of legal advice; I have no background in law, all of that.

But I'm going to 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 and the U.S. 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.

I'm the digital preservation… Thank you, Jess. I'm the digital preservation library at Concordia. Before this, as Jess mentioned at the beginning, I was the digital archivist at the Canadian Center for Architecture… which is actually the same subway stop in Montreal, it's about a five minute walk away… for the last three years. 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 the what and why of this problem.

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 are CAD and BIM files. CAD might be something that you're familiar with; it 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 on PCs… Sorry, going back to the 60s and available in a commercial market on PCs since the 80s, and incredibly popular since the 90s, that assists in the drawing of architectural plans for the most part. This was originally 2-D software, it's increasingly 3-D, and there's an increasing overlap between 3-D technology used in fields like architecture and design, and used in video games or film animation, things like that.

The next wave of files for design records is called building information modeling or BIM. This is something that's been talked about for decades. In the last, say, half a decade, it's actually gotten quite a lot of traction, 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 ongoing building maintenance. But the basic idea is that there's a kind of full, perfect digital representation of a building, that would follow a building from its initial conception through 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 a building... view 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 unite them are that these are highly software dependent files. So if we talk about files that can't be meaningfully thought of 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. If you want to learn more about these files, I'm going to go over a little bit in the next slide or two, but I'd highly recommend looking at this DPC technology watch report that Alex Ball wrote in 2013, which is by far and away still the best overview and resource on the topic. Next slide, please. 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 IFC 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 version 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 a pretty constant thing. Files often have external dependencies, or what were sometimes called XRefs, so a single CAD file may not necessarily be atomic. There might be elements in that CAD file that are actually getting pulled in dynamically from other files, so they 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 2 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.

Some of the recommendations, that you'd see in something like the FACADE report or in Alex Ball's 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 to different types to 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, but I'll say for my own experience having talked with people, different user communities can often have very different needs. For instance, from a facility manager's perspective for instance, a 2-D CAD file with a plan or even a PDF of that plan might be sufficient if that's what allows for ongoing use of the records for things like renovations, whereas at 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, if we serve up files from 1985 in software from 2019 and say, "Here you are, 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 some of the different kinds of challenges, we could look at two softwares or two different file formats as examples. One is AutoCAD, which has been the de facto industry standard for 2-D CAD and has done 3-D CAD for a couple decades now. The native binary file format is DWG; there are some lightweight visualization formats like DXF or DWF that you might see out there in the wild as well. The nice thing is with AutoCAD; files since 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 where 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 going to be true again in a few years. But that's sort of best case, easiest scenario.

One format that paints a slightly different picture, which might be more representative of the sort of long tail of 3-D modeling software that gets used particularly with more innovative projects, is Form Zed or FormZ, which is software that came out of the University of Ohio, I believe, and was incredibly popular in the 90s and early 2000s as one of the first very sophisticated 3-D modeling tools that was specifically geared towards architects and architecture.

The FMZ file format is notoriously tricky because current versions of the software, and even the oldest versions of the software that the vendor's able to provide, will only read file format versions created in versions of the software after, say, the mid 00s, which means that the vast majority of FormZ files that might find their way in an archive cannot be opened by any commercially available... or even 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. If we can get emulation based strategies to open these files, there's an additional 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 DRM and digital locks. 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. The countries that are painted in red are ones where I personally have talked with archivists, or digital preservationists or librarians, or… folks working in museums or in government, who are dealing with these issues of preservation and access for digital design records. Some of them are working with the earliest records, 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. As one example, Moshe Safdie; it's an architectural archive which contains foreign digital materials as well. Out a little further west at the University of Calgary they're dealing with the same issues, and this is true in plenty of other places as well. I have talked about this with colleagues at the University of South Australia, various folks in the U.K., at the Het Nieuwe Institute in Rotterdam, and so on.

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 context in which this work is happening often are within borders, although 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. Next slide, please.

So I'll end here with questions rather than answers, and hopefully this gives Ariel something to kind of pick up from or for us to circle back and discuss later. Some questions that I've asked myself for the code, in a Canadian context, include what from the code in 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. What can we take? Can we take general lines of argumentation? Can we take more specific details? Certainly court precedent'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 as is.

Another question that I have is what issues arise from network solutions? 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 which I love towards network sharing of legacy software, and really of the whole stack of emulators, of operating systems, of drivers, of end software… The same way that not every 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.

Finally, and I think 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 the U.S. led by folks at the Berkman Klein Center, at Spin, at ARL? How might we even try to work towards protected exemptions in Canada to mirror those in the United States? 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 hand it over to Ariel.

Peter Jaszi:

Thank you so much.

Ariel Katz:

Thank you. Can you hear me?

Peter Jaszi:

Loud and clear.

Ariel Katz:

Okay, so thank you everyone, thanks for the invitation to speak. We are a bit behind, so I'll probably skip some of my slides. Jess, can we go to the next one? So I want to start with some preliminary issues before we talk about fair dealing, and then I'll skip the second point and go to fair dealing.

In talking about the preliminary issues, I... Can we skip the next slide, please? So here's a point that I have written recently in an article, and excuse me for the plug, but the simple observation is that libraries predate copyright. The institutional role of libraries in other institutions of higher learning in the promotion of knowledge and encouragement of learning, those functions have been acknowledged way

before legislators invented the concept of copyright. This is something that it's important to bear in mind for several reasons; why it matters? Can we do next slide, please?

First of all, because we remember that what libraries do, and I'll call it library-ing, has been recognized, and importantly has been recognized before copyright existed. That means that the activities of the library form part of the context in which corporate law was born, and it also 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 that since libraries existed and have been doing libraries before copyright existed, unless we see clear indication otherwise the implication might be that the way we interpret the corporate act is that the [inaudible 00:34:42] not intend to take away 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 a matter of federal jurisdiction, whereas libraries are generally a matter of provisional legislation. That creates an interesting and so far unexplored interface, but there is some line whereby corporate law, federal corporate law, may not be able to interfere too much with things that fall under provisional jurisdiction, and if we come to the conclusion that copyright law really hampers 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-ing has this ancient recognition... Even if it does not have any legal implication, it still has some rhetorical force. 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." Let's skip this one too, and go... This one too, and we'll go directly to fair dealing, okay.

Okay, so first of all just to answer Tim's question about what from the code can be applied in Canada... By and large, most of it. I think if the conclusion is from the code that under U.S. law, yes we can do it. By and large, we can do it in Canada; the differences are just in nuance or what things you might emphasize to appeal more to the Canadian context.

Okay, so first of all, Peter earlier described 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? First of all, as a matter of terminology, is there a difference between dealing and use? No, because you can see that... In the English version of the act we call it fair dealing, in the French version of the act we call it [foreign language 00:37:26], which literally translates to fair use. Both of those versions are equally authoritative, so if there is any difference it's not in the terminology.

But that said, conventional wisdom holds that there is a fundamental difference, that in the 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 fair dealing systems, fair dealing may only apply to the statutorily enumerated purposes, which in Canada right now are research, private study, education, parody, satire, criticism, review, news report.

That entails a two step analysis. First, we have to ask ourselves, "Is the dealing done for one of the recognized purposes?" If and only if the answer is yes, then we proceed to the next question, namely "Is 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. This is the conventional wisdom. Can [inaudible 00:38:35] next slide, please?

But here's Professor Katz's less conventional but better wisdom, which is actually there is no difference here. I've written about that, I can send anyone who's interested, but the bottom line for my research is that even though we don't have the magic word such as in our legislation, Parliament never intended to limit fair use or dealing to those enumerated purposes, and potentially, as is the case in the U.S., fair dealing could apply to any purpose provided the valid dealing is fair.

Now, so other than just promoting my research here... First of all, I hope it's maybe useful for you to know that. Practically, it may not matter much, okay? Further, practically is you will proceed under the conventional wisdom because that's the more prudent thing to do, unless some courts declare that my view is right, but also because it doesn't really matter because even if we take the views that the list of purposes is closed, and that you first must fit into one of the enumerated purposes, it's probably very likely that what all the preservation activities described in the code would easily fit under at least the heading of the purpose of research.

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 dealing for one of the enumerated purposes, to decide what those purposes are they should be a relatively low threshold. We interpret those purposes as broadly as possible, so that the analytical heavy hitting is done in

determining whether the dealing is fair. That's where the Court says we want to see most of the analysis, not on the categorical question "Is it research, is it criticism," and so on. 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 activities eventually… would fall under research.

So the first step, I think, is very easy. We say yes, then we move to the six factors which… In the U.S., the four factors, they are in the act; in Canada, we have six factors. They're not in the act but they come from this Supreme Court decision CCH in 2004. Next slide, please.

Those are the six factors, and the Court mentions that there could be other factors. It's very similar to the U.S.; 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. Is it a substitute, is it not… I just want to say a word about number four, the alternatives to the dealing; in CCH, the court… A crucially important point that the Court made was that the availability of a license is irrelevant, so if something is fair dealing it does not stop to be fair dealing because the corporate owner would be happy to sell you a license to do the activity. The Court said that's the case because fair dealing is a right of users, and because it is a right of users corporate owners cannot take away this right by offering you a license to engage in the activity. That's a uniquely Canadian feature, the irrelevance of a license, and a very important one.

So basically, if you go through those factors again, the analysis is rather similar to what is seen in the code of best practices in the American [inaudible 00:43:10]. I don't want to spend too much time on that, I just want to highlight some differences. First of all, in the U.S. in recent years, the issue of transformative use has 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. We don't have the same emphasis on transformative views as we see in the U.S. in recent cases, so we don't even need to explain... to overly emphasize, perhaps, why the preservation is transformative or not. It may help, but we don't necessarily have to do that.

But here's another interesting point; at least for some transformative uses, a court could find that... If the use is really transformative, then the dealing or the activity would not even amount to copying a substantial part of the work, and hence there would be no infringement without even considering fair dealing. If in a truly transformative case, if we copy a work, and you do it not in order to create a substitute or imitate the work but to do something else, the court said, in this case in Cinar, then there is no infringement, period. Not because it's fair dealing, 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 point worth emphasizing. The Canadian act, like many other acts, in addition to fair dealing 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 fair dealing provision. The Supreme Court in CCH answered this question, said that fair dealing is potentially always available. If there is a specific

exception and what you're doing falls under this specific exception, 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 fair dealing [inaudible 00:45:36] for dealing provisions, and if that's what you want to establish then you don't need to rely on the specific exception. Next one?

Also at CCH, the Supreme Court emphasized the importance of having institutional policies, guidelines, and other indicators of general practice. The Court asked itself, "In a case for fair dealing, does the defendant have to prove that every copy of every work individually satisfies fair dealing, or was it enough for the defendant to show that it has a general practice that was fair?" The Court concluded that the latter is sufficient, 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 or each and every software was necessarily fair dealing. It may be sufficient to show that you have a policy and a general practice that fits the parameter of fairness, and that would be sufficient.

I think ultimately you can go through the details of the fair dealing analysis and the six factors, but essentially… I think it boils down to the question of whether what you're doing is really necessary for the ultimate purpose, and this [inaudible 00:47:05] necessary for the ultimate purpose appears in all the three Supreme Court cases that came to Supreme Court of Canada, which the Court found that there was fair dealing. Okay, Jess is telling me that we need to move to [inaudible 00:47:20], so let me just… I'll skip this one…

Okay, here's just… I think that's all of the last one, just practically a super important point. Now, it's not about fair dealing, it's about statutory damages. These are

damages that the plaintiff can elect to recover without proof of actual damages. Now in Canada in 2012, Parliament introduced some caps on statutory damages for infringements that are for non-commercial purposes, and most of what describes in the code would probably be non-commercial. In that case, the statutory damages are kept at a maximum of $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.

From that point, every previous infringement of a work of that copyright owner or of any other work... cannot be subject to statutory damages. So from a [inaudible 00:48:30] perspective, the actual exposure of an institution is up to $5,000, which is for individuals it maybe a lot, for institutions it's something that... Many institutions can take this risk. There could still be actual damages, but that may be very hard for a plaintiff to prove. I think I'll stop here, yes.

Jess Farrell:

Thanks so much, Ariel. Sorry that we had to rush along there at the end. It was all so interesting; I really wish we had infinite amount of time to continue talking about this, even though you probably only needed about five more minutes to finish out what you wanted to say. But thanks everyone for bearing with us through those awesome three presentations, and now we have just a little bit of time for Q&A. We can take a couple minutes after 3:00 pm Eastern if you want to; we will try to cut off by 3:10 Eastern Time.

We will go to Drew's question first which has been answered a little bit in the chat here, but I just wanted to throw it out there in case the speakers had any more to

add. Drew asks, "Does registering a work for copyright in the United States subject the work to fair use here, despite the company's nationality and/or where the work was performed?" Patricia helpfully jumped in and said, "Fair use can be invoked anywhere within the United States on any material form anywhere, whether or not it is registered here."

Do we have anything else that the speakers want to say about that?

Peter Jaszi:

That's a very good answer, that's this principle of national treatment that I identified earlier. 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. The 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 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 whether or not the laws of all those countries where the researchers sit were relevant, and that's where 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 Canadian practitioners in what we've heard so far. What are some other questions?

Jess Farrell:

Attendees, please continue to type up in 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 or disk images can be across the border. Does anyone want to chat about that a little bit more? Tim, you created these questions, so I was wondering if maybe you had some thoughts on them yourself, or if you truly were just hoping to hear from other speakers on it.

Tim Walsh:

I mean, I think I'm probably the least qualified person here to be answering legal questions, but I will say I think a lot of what Ariel said in his presentation was really encouraging for me. I think this is fantastic; I wish we had talked two years ago, but this is fantastic. But I mean, especially around this question of what's ultimately necessary for the purpose at hand, and I think where a lot of people in our field have independently come and certainly where Spin has been a big advocate for this too, is that we cannot afford, 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, very large scale. I've been very encouraged to see projects like [Easy 00:53:10] 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-

Peter Jaszi:

I want to jump in and follow up with a question for Ariel, which is you talked earlier 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 economies of scale that Tim is describing, that might justify a collaborative project in which all 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?

Ariel Katz:

You know, Peter, we can't answer… It's lawyers… Well, it may depend, right, so I can't give you a straightforward… But I think as a general point, 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, let's say, other way. If you can articulate and have explained why you need to do it on that scale rather than on a smaller scale, why do you need to create multiple copies for redundancy rather than a single copy… If you can explain how the architecture works and what are the practices and why it's considered good practice to create more than one copy and host more than one, because that would accomplish the purposes of preservation much better than if you do it… If you can show that you are aware of the issue and you have been thoughtful in how you designed the project, there's a reason for why you're doing 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 reasonably necessary.

Just about the cost; in one of those cases, the Alberta [inaudible 00:56:04] corporate, which involved copying by teachers, the corporate owners said, "No, copying it was not… The schools could have purchased more books…" and the Supreme Court said, the majority said, "No, that's unrealistic. If a teacher only needs to teach… 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-

Peter Jaszi:

That's a [inaudible 00:56:34]-

Ariel Katz:

-and the cost saving was part of the equation.

Peter Jaszi:

Very helpful, thank you. I wanted… Before we have to go… First of all, other questions? Anyone wants to type a question? Since I see that [Graham Slate 00:56:55] is with us, I wanted to ask him… 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 he would like to say now about the Carl Initiative to, how best put it, transpose the best practices 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 international reach of this document more generally. Graham, is there anything you'd like us all to know?

Graham Slate:

Hi, Peter. Can you hear me?

Peter Jaszi:

I can.

Graham Slate:

Great, thank you very much for the prompt. I've become part of this Carl Initiative maybe over the last month… Wait, I must [inaudible 00:58:00] out of sync here. There we go, sorry about that… And we're just sort of at the early stages. I wouldn't say that… I can't really speak on behalf of Carl, but my understanding is that 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, but you're right to point out that it's sort of… interesting insofar as developing a model of whether that is a feasible project across other jurisdictions, perhaps. That's a good point, and I think what we're going to do is while we can't recreate… I think you mentioned in one of your past webinars that it was a 15 year process developing this code, so I don't think we could-

Peter Jaszi:

Developing all of these codes.

Graham Slate:

Oh, all of the codes. That makes more sense.

Peter Jaszi:

Family of codes. This one was done in a year flat.

Graham Slate:

Yeah, so I think we're going to use the methodology that was laid out in the white paper about the 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 get in conversations with the community of practitioners and lawyers in Canada who are doing this work, encountering copyright issues in their work, and either develop a companion piece to 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 report at the ABC conference in Saskatoon, which is the community conference for copyright practitioners in Canada. That's going to be happening in May, so we'll have more information to share then.

Peter Jaszi:

Graham, thank you very much. I think that's very encouraging, and I must say that I think that… what Tim had to say today underlines the urgency of the effort, and

that what Ariel had to say is pretty encouraging news about the feasibility of the effort.

Graham Slate:

Yes, according to Ariel it seems like we're on pretty solid ground, and I love Ariel, so hi.

Peter Jaszi:

As do we all. With that, last chance to type a quick question, because otherwise 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. Anyone who has been in attendance, or for that matter anyone you know who hasn't been in 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 your enthusiasm, and your willingness to stick through it with us through the last seven weeks. So Jessica, I'm turning it back to you. I think we may now be… As you can see, I don't want to stop, but I think [inaudible 01:01:39] an end.

Jess Farrell:

It's hard to stop, it's been a wonderful seven weeks. We've covered so much and we've learned so much along the way, and 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, or if there's one of these experts you've heard from over the past seven weeks that you'd like to reach out to directly, you're welcome to do that as well. Thanks everyone, it looks like we've covered all of our questions. We appreciate-

Peter Jaszi:

Please recommend us to colleagues and friends who may not have been in attendance, but who might be interested in watching online.

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. Thanks again everyone for attending, and for sticking around a couple minutes later so we could finalize our Q&A there.

Peter Jaszi:

Wonderful.

Jess Farrell:

Have a great afternoon.

Peter Jaszi:

Thanks to Ariel, thanks to Tim. You made an extraordinary contribution. Goodbye all.

Ariel Katz:

Thank you.

Tim Walsh:

Thank you everyone.