CODE OF BEST PRACTICES IN FAIR USE FOR SOFTWARE PRESERVATION: WEBINAR SERIES

Episode 7: International Implications

Today:

We'll discuss how the Code of Best Practices may be relevant to software preservation activities outside the US, with a special emphasis on Canada. We'll also discuss how fair use applies to preservation projects with global reach that are based in the US.

BIG IDEAS IN INTERNATIONAL COPYRIGHT:

- Cross-border protection under treaties
- National treatment -- local law applies to local disputes
- Conflict of laws -- what to do when several localities are involved

FAIR USE ISN'T UNIVERSAL

- Fair use countries (includes US, Korea, Israel, Brazil, Singapore, Philippines, and maybe soon South Africa)
- Fair dealing countries (includes UK, other Commonwealth countries, and CANADA!)
- Countries which rely exclusively on specific exceptions (including EU jurisdictions), with a range of approaches to digital preservation.

WHEN THE LOCAL LAW OF COPYRIGHT LIMITATIONS MATTERS MOST

Conflict of laws rules suggest the following situations:

- When projects are based in or focused on a particular country's legacy software
- When materials is being uploaded from a given country to a remote server

THE IMPORTANCE OF ADVOCACY

In the EU and elsewhere, archivists, librarians, scholars, and others can and should let legislators know what their shared preservation mission is, and why copyright flexibilities are essential to fulfilling it.

THE CANADIAN EXPERIENCE

Presentations by:

Timothy Walsh, Digital Preservation Librarian, Concordia University

&

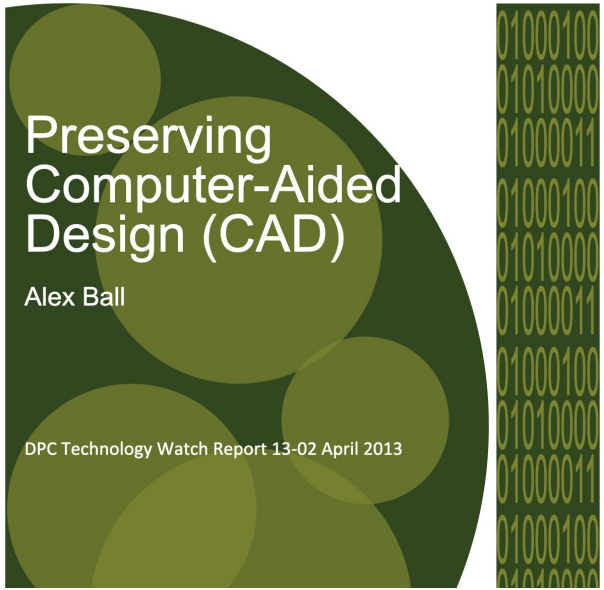
Ariel Katz, Innovation Chair in Electronic Commerce, University of Toronto Faculty of Law

Design Records Know No Borders: A Software Preservation Case Study

Tim Walsh, Digital Preservation Librarian,
Concordia University Library

Preservation of CAD & BIM files

- **CAD**: Computer aided design
- **BIM**: Building information modeling
- Software-dependent
- Unique challenges for preservation and access



http://dx.doi.org/10.7207/twr13-02

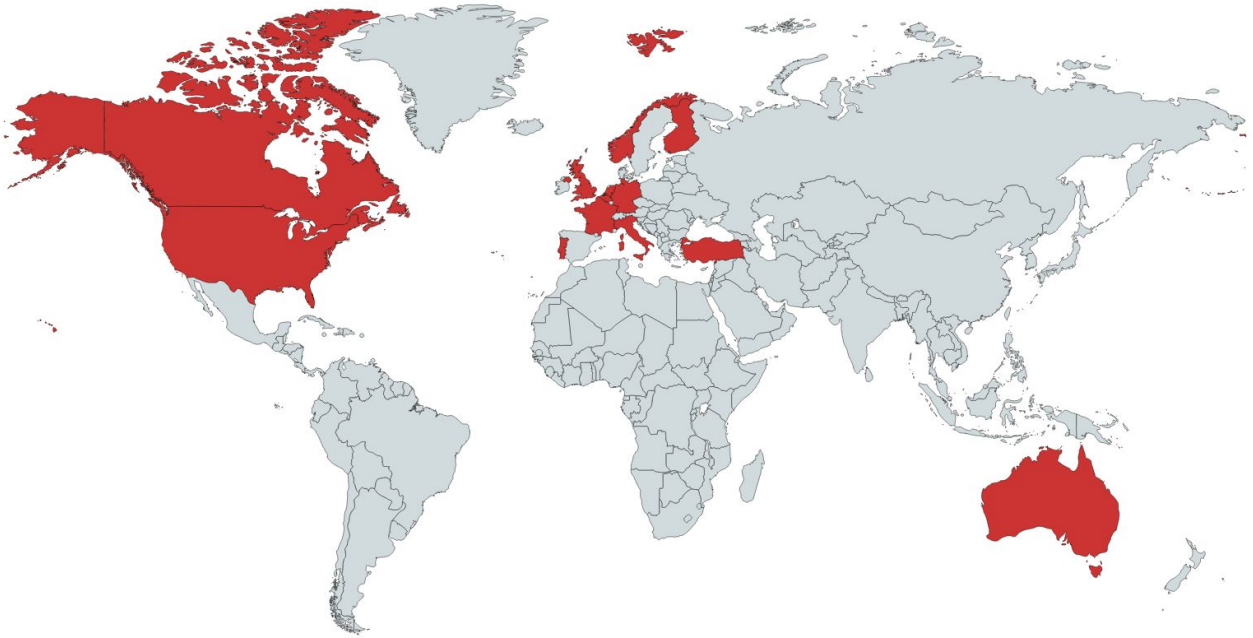
Qualities of Digital Design Records

- Highly complex
- Software and file formats often proprietary
- Software often won’t read earlier format versions
- External dependencies (XRefs)
- Not all data migrates well between formats
- Lack of clear preservation formats, scalable migration pathways
- User community needs can differ significantly (e.g. facilities manager vs. architectural historian)

A Tale of Two Softwares

- **AutoCAD**
  - De facto industry standard for 2D (and some 3D) CAD
  - Formats: DWG, DXF, DWF
  - Files since 1980s can largely be opened in current versions of the software (and lots of readers)*
- **FormZ**
  - 3D modeling software popular in 90s and early 2000s
  - Format: FMZ
  - Software only able to read last few format versions
  - Software protected by hardware key

An International Issue



Questions for Canadian Context

- What from the Code and analysis of fair use in US can be applied to fair dealing and Canada?
- What issues arise from networked solutions (e.g. EaaS) where servers or disk images may be across the border?
- How can the Code be used as an advocacy tool for building a case for software preservation work and exemptions in Canada?

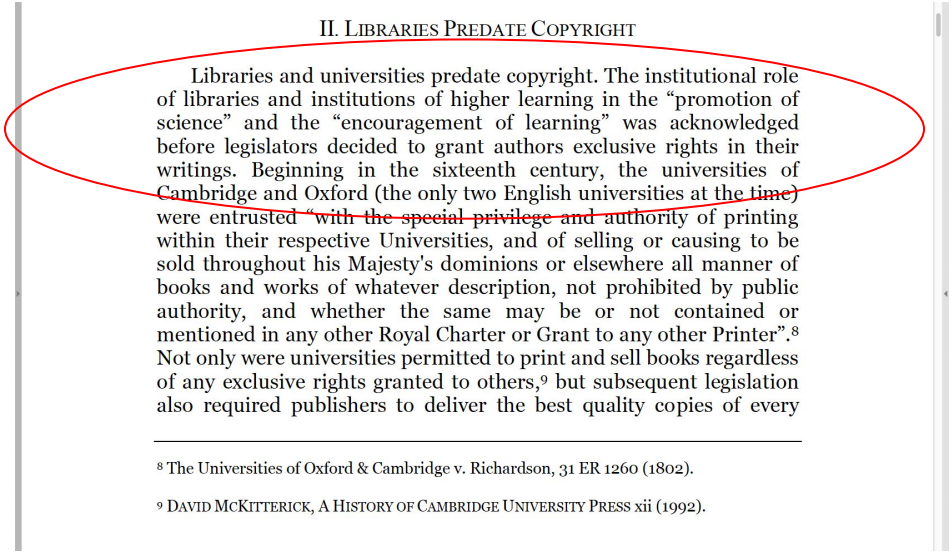
Copyright and Software Preservation in Canada

Ariel Katz, Innovation Chair in Electronic Commerce,
University of Toronto Faculty of Law

Agenda

- Some preliminary issues before we talk about fair dealing:
  - Libraries predate copyright and why it matters
  - Charter or Rights and Freedoms
- Technological neutrality
- Fair dealing (and other exceptions)

Libraries predate copyright



II. LIBRARIES PREDATE COPYRIGHT

Libraries and universities predate copyright. The institutional role of libraries and institutions of higher learning in the "promotion of science" and the "encouragement of learning" was acknowledged before legislators decided to grant authors exclusive rights in their writings. Beginning in the sixteenth century, the universities of Cambridge and Oxford (the only two English universities at the time) were entrusted "with the special privilege and authority of printing within their respective Universities, and of selling or causing to be sold throughout his Majesty's dominions or elsewhere all manner of books and works of whatever description, not prohibited by public authority, and whether the same may be or not contained or mentioned in any other Royal Charter or Grant to any other Printer".[8] Not only were universities permitted to print and sell books regardless of any exclusive rights granted to others,[9] but subsequent legislation also required publishers to deliver the best quality copies of every

[8] The Universities of Oxford & Cambridge v. Richardson, 31 ER 1260 (1802).

[9] DAVID MCKITTERICK, A HISTORY OF CAMBRIDGE UNIVERSITY PRESS xii (1992).

Ariel Katz, "Copyright, Exhaustion, and the Role of Libraries in the Ecosystem of Knowledge Symposium: The Future of Libraries in the Digital Age: Copyright and the Role of Libraries in Preserving Knowledge" (2016) 13 ISJLP 81, at 84.

Why it matters?

1. Part of the context in which copyright law was born and it helps illuminate the goals it was created to achieve.
2. The *Copyright Act* has to be interpreted against the backdrop of previously existing or recognized rights and interests.
3. Federalism: federal (copyright) vs provincial (librarying)
4. Rhetorical force (“we were here first”)

Charter of Rights and Freedom

- Access to information is part of freedom of expression
- Libraries play a crucial law in facilitating and ensuring access to information
- If copyright law unduly impair libraries' function then it might have a constitutional problem

Technological neutrality

Technological neutrality: *ESA v SOCAN*, 2012 SCC 34

[8] The traditional balance between authors and users should be preserved in the digital environment: Carys Craig, "Locking Out Lawful Users: Fair Dealing and Anti-Circumvention in Bill C-32", in Michael Geist, ed., *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (2010), 177, at p. 192.

[9] SOCAN has never been able to charge royalties for copies of video games stored on cartridges or discs, and bought in a store or shipped by mail. Yet it argues that identical copies of the games sold and delivered over the Internet are subject to *both* a fee for reproducing the work *and* a fee for communicating the work. The principle of technological neutrality requires that, absent evidence of Parliamentary intent to the contrary, we interpret the *Copyright Act* in a way that avoids imposing an additional layer of protections and fees based solely on the *method of delivery* of the work to the end user. To do otherwise would effectively impose a gratuitous cost for the use of more efficient, Internet-based technologies.

Fair Dealing in Canada

Is there a difference between fair dealing and fair use?

- Fair dealing = Utilisation équitable
- Conventional wisdom:
  - **US-style fair use** potentially applies to use for any purpose
  - **Canadian fair dealing** may only apply to the statutory enumerated purposes (research, private study, education, parody, satire, criticism, review, news reporting).
  - Two-steps analysis:
    - Is the dealing for a recognized purpose? If yes,
    - Is it fair?

Is there a difference between fair dealing and fair use?

- Prof Katz's less-conventional-but-better wisdom:
  - Parliament never intended to limit fair use/dealing to the enumerated purposes
  - Fair dealing could potentially apply to any purpose, arguably.
- Practically, it may not matter much because...

SOCAN v Bell, 2012 SCC 36

[27] In mandating a generous interpretation of the fair dealing purposes, including "research", the Court in *CCH* created a relatively low threshold for the first step so that the analytical heavy-hitting is done in determining whether the dealing was fair.

[28] ... The provider's purpose in making the works available is therefore not the relevant perspective at the first stage of the fair dealing analysis.

[29] This is consistent with the Court's approach in CCH, where it described fair dealing as a "user's right" (para. 48). In CCH, the Great Library was the provider, offering a photocopying service to lawyers requesting copies of legal materials. The Court did not focus its inquiry on the library's perspective, but on that of the ultimate user, the lawyers, whose purpose was legal research (para. 64).

👍 **The activities contemplated in the Code will very likely amount to "research".**

Six factors of fairness

From *CCH v Law Society of Upper Canada*, 2004 SCC 13

Six factors of fairness

1. The purpose of the dealing
   - E.g., even if the ultimate user's purpose is research, did the provider have an ulterior purpose that should change the analysis
2. The character of the dealing
   - E.g., for profit or not; how many copies made; what measures are taken;
3. The amount of the dealing
   - How much of the work is being copied
   - Copying 100% may still be fair, depending on context
4. The existence of any alternatives to the dealing;
   - The availability of a licence is irrelevant because fair dealing is a users' right and a copyright owner cannot take it away by offering to license the activity.
5. The nature of the work
   - E.g., is it published or not; is it confidential
6. The effect of the dealing on the work
   - Is it a competing substitute? "neither the only factor nor the most important factor that a court must consider in deciding if the dealing is fair."

Additional notes on Canadian fair dealing

- "Transformative" use:
  - Hasn't (yet) caught on as in the US;
  - SCC noted in *SOCAN v Bell*, that the dealing doesn't have to be transformative
  - If transformative, then a court may find that no "substantial part" was even copied, hence no infringement before even considering fair dealing.
    - "The alteration of copied features or their integration into a work that is notably different from the plaintiff's work does not necessarily preclude a claim that a substantial part of a work has been copied. … [But] If the differences are so great that the work, viewed as a whole, is not an imitation but rather a new and original work, then there is no infringement. " *Cinar v Robinson*, 2013 SCC 73

Additional notes on Canadian fair dealing

- Fair dealing vs specific exceptions
  - As an integral part of the scheme of copyright law, the s. 29 fair dealing exception is always available.
  - Simply put, a library can always attempt to prove that its dealings with a copyrighted work are fair under s. 29 of the Copyright Act.
  - It is only if a library were unable to make out the fair dealing exception under s. 29 that it would need to turn to s. 30.2 of the Copyright Act to prove that it qualified for the library exemption. *CCH v LSUC*

Additional notes on Canadian fair dealing

- The importance of institutional policies, guidelines, and other indicators of general practice
  - From *CCH v LSUC*: "Is it incumbent on the Law Society to adduce evidence that every patron uses the material provided for in a fair dealing manner or can the Law Society rely on its general practice to establish fair dealing? I conclude that the latter suffices. ...
  - Persons or institutions relying on the s. 29 fair dealing exception need only prove that their own dealings with copyrighted works were for the purpose of research or private study and were fair. They may do this either by showing that their own practices and policies were research-based and fair, or by showing that all individual dealings with the materials were in fact research-based and fair.

Additional notes on Canadian fair dealing

- "Reasonably necessary for the ultimate purpose"
  - Supreme Court of Canada considered fair dealing in three cases.
  - In all of them, it found that the dealing was fair because it was reasonable for the ultimate purpose.
- If you can articulate clearly and confidently:
  - What you're doing;
  - Why it is important;
  - Why you're doing it the way you're doing;
  - Why you're not copying more than is reasonably necessary
- Then it is more likely that a court would agree that the dealing is fair.

Temporary reproductions

30.71 It is not an infringement of copyright to make a reproduction of a work or other subject-matter if

(a) the reproduction forms an essential part of a technological process;

(b) the reproduction's only purpose is to facilitate a use that is not an infringement of copyright; and

(c) the reproduction exists only for the duration of the technological process.

Statutory damages

38.1 (1) Subject to this section, a copyright owner may elect … to recover … an award of statutory damages …

(b) in a sum of not less than $100 and not more than $5,000 that the court considers just, with respect to all infringements involved in the proceedings for all works or other subject-matter, if the infringements are for non-commercial purposes.

Infringements not involved in proceedings

38.1 (1.12) If the copyright owner has made an election [for statutory damages] with respect to a defendant's infringements that are for non-commercial purposes, they are barred from recovering statutory damages under this section from that defendant with respect to any other of the defendant's infringements that were done for non-commercial purposes before the institution of the proceedings in which the election was made.

No other statutory damages

38.1 (1.2) If a copyright owner has made an election [for statutory damages] with respect to a defendant's infringements that are for non-commercial purposes, every other copyright owner is barred from electing to recover statutory damages under this section in respect of that defendant for any of the defendant's infringements that were done for non-commercial purposes before the institution of the proceedings in which the election was made.

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More information

arl.org/fairuse

cmsimpact.org/software