Welcome everyone. Thank you so much for joining us. My name is Jessica Meyerson and I am the community advisor for the Software Preservation Network and research program officer at the Educopia Institute. And today we have the sincerest pleasure of kicking off our seven-part series of webinars that explored the fair use code and other legal tools for software preservation. This series is co-hosted by the Association for Research Libraries and the Software Preservation Network. Every episode will be recorded, transcribed, and posted to the SPN website freely available for all, and then we are presenting episode 1: the Code of Best Practices for Fair Use in Software Preservation - How & Why.

Speakers & Facilitators: Patricia Aufderheide (American University), Krista Cox (Association for Research Libraries), Peter Jazsi (American University), Brandon Butler (University of Virginia).

Episode 1 Transcript

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Jessica Meyerson: Welcome everyone. Thank you so much for joining us. My name is Jessica Meyerson. I'm the community advisor for the Software Preservation Network and research program officer at the Educopia Institute, and today we have the sincerest pleasure of kicking off our seven-part series of webinars that explored the fair use code and other legal tools for software preservation. This series is co-hosted by the Association for Research Libraries and the Software Preservation Network. Every episode will be recorded, transcribed, and posted to the SPN website freely available for all, and then we are presenting episode 1: the Code of Best Practices for Fair Use in Software Preservation - How & Why. This is going to be an overview and roundtable discussion with members of the Code of Best Practices research team which include Patricia Aufderheide, University professor in the School of Communication and founder of the Center for Media and Social Impact at American University; Peter Jazsi, professor emeritus at American University Law School and founder of the Glushko-Samuelson Intellectual Property Law Clinic and its program on Intellectual Property and Information Justice; Krista Cox, director of Public Policy Initiatives at the Association for Research Libraries; and Brandon Butler, director of Information Policy at the University of Virginia Libraries.

Just a little housekeeping before we get started, I would ask for all of our attendees and we're so grateful that you're here just to reiterate we ask that you all turn your video off unless you are presenting or speaking and this is to preserve bandwidth also please mute yourself if you're not
speaking this will improve the quality of the recording and aid in voice to text transcription if you have any questions during the course of the presentation and discussion please do type them into the chat box in your zoom control panel and once we open up the audience Q&A; we encourage you to continue submitting questions in the chat and we will do our best to address answers in the order that they were submitted. Any questions that are not addressed by the end of the episode will be recorded in the chat and addressed during either a subsequent episode or on the Epis on the website once the recording and transcript have been posted. And with that I would like to hand it over to Brandon and Krista to kick off our discussion...

Timestamp: [3:40]

Brandon Butler: oh hi greetings from the sun-drenched fifth floor of the Alderman main library and beautiful Charlottesville Virginia and I see Krista is coming in loud and clear from ARL hi Krista

Krista Cox: Everyone, we got some Sun here too although it’s very windy outside

Timestamp [4:00]

Brandon Butler: yes yeah we heard trees falling in my neighborhood yesterday - so those are not highlights from the code but now you know the weather in mid-atlantic USA so we’re really excited to kick off this series of webinars on the code of best practices in fair use for software preservation this is just a wonderfully exciting project we’re thrilled to have spin as a collaborator with us on this the the power and the expertise of this network has just been crucial for making this this possible and so you know to the extent that that this code becomes a useful tool for you all we’ll be thrilled because we’ve learned so much from you and we’ve had so much fun getting to know you so we hope that we can introduce the code to you over the next several weeks

[Pat I think is controlling the slides I think we move on to the next one.]

So the first thing we wanted to do at the very beginning is give you the the whitening version of what’s in the code and what’s the subject matter that we talk about in this particular code of best practices later on in the presentation you’ll learn more about fair use generally from Peter Yazzie and you’ll learn more about codes of best practices generally from Pat after Heidi so this is sort of a getting oriented web and where again we’ll give you a quick preview each of these situations is going to get a much deeper dive in a future webinar so you know this is just to let you know where we’re going to be headed and then and then you’ll know what to expect

So before I get into the substance of the first principle I wanted to also make two quick overhead over overarching notes one is if you look at the code you’ll see that there are two assumptions about what kinds of work is being done in each of these situations:

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#1 is that this is always work in support of research teaching and learning so you know if you read about george RR martin writing all of his books on vintage word processing software and you thought well that’s really cool i’ll bring it back and sell it again this isn’t about you right this is for all of our brothers and sisters and the archives libraries and research collections museums the folks who are saving this software so that people can go back and study it and use it for purposes of you know information retrieval and understanding so that’s the first scope note and
#2 is throughout these discussions the norms that that we surface always assume that the thing that you're working with is out of commerce that is we're not talking typically about using software that you can still go out and buy somewhere we're talking about a software that needs to be preserved precisely because there's no way to get a new copy from the people who are authorized to sell you a copy. So with those two assumptions under our belt I'll do the first principle and then Krista and I will just go back and forth

The first principle is about accessioning and describing digital objects in particular software. So this is the first thing you do right you have a box of media discs you know floppies hard drives whatever and you've got to figure out what's in there can it still run you need to make a record of what it is and so this this first principle talks about what's permissible as that first step in the workflow and the other kind of overarching note I should make is that these principles follow they sort of follow a preservation workflow from the beginning to the end or from the first most inner recesses of the institution and ever further outward in terms of access and availability so that's the pattern we'll be following and so now Krista can talk about principle to which we'll also talk about next week

Timestamp: [8:22]
Krista Cox: yeah so this this follows nicely from the first principle and it's part of that workflow so in addition see what Brandon mentioned about you know preserving and describing that object another aspect to that is documenting that software and how it operates so for example in its original operating environment you might want to take some screenshots a record how it's being used or if you know they a lot of times there are expert users on a particular type of software that the average user might not understand how all the features work so you might want to document how that works and as Brandon said we'll go much deeper into how these two situations work in our next episode

Timestamp: [9:09]
Brandon: great so the third principle is when we start talking about access and so in two weeks we'll start talking about providing access to software for use in research teaching and learning and this principle in particular focuses on providing access to a phil' users affiliated with your institution and that doesn't have to be local access physically it can be remote access but it's access to users who have a direct connection to your institution and you know this is ultimately we heard over and over again that preservation is for access and if you're not making something accessible then the whole the whole art and are in the whole enterprise can come into question so access was really important so we thought it was important to try to help address that situation and now we'll go to the next

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Krista Cox: and of course this follows again nicely with the one that Brandon just mentioned because this is also about providing that access and this is something else that we heard over and over again so I was really excited that we were able to you to describe this situation in the code and that's providing broader network access that's shared across multiple collections and institutions because this is already the way our cultural heritage institutions work they want to combine resources and I mean no institution could possibly collect everything themselves and so this is about sharing those resources and working with other institutions
Brandon Butler: great and then finally we have sort of a the fifth principle sort of falls outside of that continuum we just described so principles one through four follow follow a piece of software from ingest all the way to you know networked access across a group of institutions and then the fifth principle deal specifically with files that are in source code because the folks that we spoke with from this community told us that files in source code you know human readable reusable content raised separate issues that deserve their own treatment in a separate principal and so that's where we end up in the code is with this fifth principle about source code

Now to understand how the code works you need to understand I think the key advantages of a code of best practices as an approach to fair use the first is that a code of best practices is a guide of as a guide to reasoning and not a set of rules and so when when you sort of google fair use what you often will find is I'm afraid a lot of bad information that is expressed in you know terms of you know hard numbers you know rules of thumb about how many words or how many pick so can be in your fair use file these arbitrary limits and metrics that can really trip us up those arbitrary limits and metrics are often set by people who are outside of a user community they're dictated to you by publishers or industry representatives the previous best practices come from within the community they're based on a professional consensus that's grounded in the values and the norms and frankly the needs of the community so the codes of best practices aren't negotiated with copyright holders they're not a kind of you know minimum standard that their promise they won't to us about instead they are a statement of what's best and so the codes of best practices intend to really express the values of a community rather than something that's imposed or sort of negotiated from the outside so for each here Krista would you like to talk about the structure of these

Krista Cox: so the way the code is structured is there is a description for each of the situations that Brandon and I mentioned and it describes the the type of thing that the principal refers to so as you know as I mentioned earlier as an example of documenting that software in its original operating environment we'll give some examples of the type of things that we heard from people in this community and then it states the principle and then it goes through a series of limitations things for people to consider as they determine whether to rely on fair use and how to rely on fair use because oftentimes things like donor agreements or how broadly if something is shared in how broadly provides access to it can impact the way we rely on these principles and rely on fair use all of this stuff is grounded in something called fair use right we keep saying this words over and over again and we no a very basic thing about fair use whatever it is it's it's a right to use copyrighted material without permission or payment sometimes right under some circumstances and you know when you try to puzzle out what those circumstances are you're often pointed to the four factors in the law and when you try to think about what those four factors mean without any other aid or or input you end up looking like all these four folks from stock photos confused right frustrated annoyed because the four factors don't tell you enough and typically people who talk to you about fair use don't tell you enough to actually help you make decisions so that lack of knowledge about how fair use actually works leads to in many communities and we found it in this community it leads to a kind of permission culture where projects are afraid to move forward without express permission from a copyright holder or if they move forward they move forward very in the dark right people do stuff but they don't talk to each other about what they're doing it's hard to develop good norms and practices because you're afraid that what you're doing might not actually be safe and so you're unable to talk to each other about what you're up to any
I think that there's also sometimes this myth that's perpetuated around fair use or as Brandon said kind of has bad information that guy uses super and predictable it's you know only on a case-by-case basis but what this code was intended to do was to solve some of that by saying you know we have these four factors and it's actually a lot more predictable than then some people think

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Brandon Butler: yeah so this is a good spot to turn it over to Peter Jaszi who's sort of a world's expert in fair use and can give us the deep dive on how we know that fair use is so much more reliable than maybe some people want us to think

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Peter Jaszi: so just as Brandon began with a couple of of premises for his discussion I'd like to do the same there are two very general points about fair use that are probably worth making before we get into any further into the particulars because these two points at least are very very clear:

#1 is that when you're engaging in various and one of the categories of activity which are sanctioned under this legal doctrine then you are not engaging in copyright infringement. in other words I've actually heard people describe fair use as though it were infringement that was tolerated somehow or privileged somehow but still infringement. The law is extremely clear that fair use whatever it is and we go further in a moment on the question of what it is and how you know is a non infringing activity that's important here's

#2 another important premise in the Copyright Act which I'm sure some of you were closely familiar is with and and others may have had the good luck not to have required such familiarity so far there are some provisions other than the fair use provision that deals specifically with issues of preservation unfortunately for the software preservation community those specific exceptions for preservation don't have much if anything to do with software happily for this community it doesn't matter because another thing that is clear beyond argument about fair use is that it exists to complement and supplement whatever specific exceptions relating to preservation you can find in Title 17 of the United States Code so it's fair use is not infringement and fair use exists in addition to its a supplement and complement to specific reservation exceptions with those two things out of the way having talked in effect about what it isn't now I'll try to talk a little bit about what it is and perhaps. The first thing that needs to be said about this safety valve doctrine is that it's an old one that the idea goes back we're not sure how long into the into the eighteenth century perhaps the term as courts in the United States began to use it goes back in at least to 1841 it's it's basic its structural it's bits at the heart of copyright doctrine it's not a later add-on it's an integral part of the whole scheme and that's true even though it didn't actually get written into the statute in so many words until 1976 now why is fair use such an old venerable structural part of our copyright law it's because it directly reflects the values that are baked into our copyright system as it was conceived by the guys who wrote the Constitution and the first and every subsequent Congress and all the courts that have had an opportunity to think and write about the issue over the years many people understand copyright as the right to control the use of a work after it's made and and that's certainly part of it but in the u.s. we don't have copyright to reward creators or investors simply because somehow inherently they deserve it we have copyright because we assume that give Limited authority over works to those who create them will encourage the production of more new material to promote science and useful arts as the Constitution puts it for the benefit of all and this is an instrumentalist view
of copyright it’s not a natural rights view of copyright and it's a really important origin story because it flows through everything we know everything we have decided in the last several hundred years about the specific ways in which copyright doctrine functions and that includes various doctrine so copyright law has two major modes it provides in two different ways - for incentives to the production of new cultural value the monopoly is of course one of those modes gives innovators some protection in the marketplace the other mode of incentive is the one that speaks to the activities of what might be called follow-on creators know makers scholars teachers archivists and others and this is the aspect or the these are the features of copyright law that say sometimes new makers don't have to observe the niceties of copyright law sometimes they don't have to get permission from others in order to engage in their valued activities these two modes of encouraging new creativity giving rights to creators and providing access to follow-on makers have to be in balance because without such a the system is going to tilt in in one direction or another now in the old days and especially before 1976 there were a bunch of features of the copyright law that had the effect of achieving balance by limiting the copyright monopoly copyrights lasted a shorter time they had to be renewed after 28 years the scope of copyright protection was relatively narrow over time most of those limits have become much less important as protections for access on the part of follow-on creators and another doctrine the ancient and venerable doctrine of fair use that I described earlier has emerged as being increasingly significant and then as I mentioned a moment ago in 1976 finally after a lot of strong and effective advocacy from the representatives of the library community this doctrine which had been around in the case law for a long time was finally written into the statute and what the the drafters of that statute what came to be called the 1976 Copyright Act tried to do was to to reflect or incorporate in their provision in the section 107 what would they understood to be the considerations that judges had been using for longer at least at least a century in order to deal with these fair use cases when they arose and that took the form of the famous or infamous four factors the considerations which whatever else they might look at courts were supposed to take into account in deciding whether a challenged you one that a copyright owner thought should have been licensed but that the user insisted fell outside the realm of that copyright owners control was or was not fair use and I think this was a good-faith attempt on the part of Congress to help both courts that we're going to have to continue to apply the doctrine case-by-case and also users to understand better what the actual scope of fair use rights might be and it could have been successful it wasn't for a variety of reasons of which the most important may be that this list of four factors which is unweighted and unranked ends with a factor the market effect which is the most excuse me the market effect which which looks by virtue of its position like the most significant factor we had after 1978 a really bad decade a decade in which courts were extremely constrained and everyone else in the copyright system in effect took their cue from those courts and fair use was widely understood to be extremely limited in its scope of application well in the early 1990s that began to change and a shift took place a very rapid shift a shift that really was in substantial part accomplished by the time the US Supreme Court decided the case of Campbell against ache of Rose in 1994 and the Molde very the very restrictive mode of analysis the courts have been using up to then and that people in various practice settings have necessarily looking at the court decisions adopted internally for their own predictive use is what I'm about to do will it be or won't it be a fair use that was very quickly swept away and the courts instead began with the leadership and guidance of the Supreme Court to engage in a much more thorough kind of interest balancing as part of their typical various analysis and they also came to recognize that fair use was not only structurally essential to the copyright enterprise but that it also represented the channel by which First Amendment free expression values came into and were given weight in the copyright system so jumping ahead to
the present day we've had 25 years or so of consistent and and and prominent judicial decision-making about fair use in this new mode the mode that was adopted by the Supreme Court in 1994 and these days as the slide suggests judges who are confronted with fair use cases take all the factors very seriously and in particular they pay a lot of attention to the first fair use factor which is the one that asks about the purpose of the use and when they ask about purpose whether or not the use is one that has a purpose that should qualify it or tend to qualify it as a fair use specific question that they asked is whether the use is being done for a transformative purpose this is a new name for an old idea it's an approach that strongly favors fair use in situations where the follow-on use has a purpose that's different and distinct and has some social or cultural value the term is an important one to parse it's a it's a legal term of art it's being used in a special legal or rather than a general dictionary sense that's important because the cases teach us that the repurposing that makes a purpose transformative for the intended repurposing that makes a purpose transformative can have a lot of different forms sometimes it may involve modifying the original work but in other situations it will entail putting that work into a new context while maintaining its content and character as faithfully as possible that latter idea of transformative ness is of course a very clear one in areas like archival lab practice and an important one here legacy objects are being copied and reproduced for research and study purposes new purposes not so that they can be used to displace their commercial counterparts to perform the functions for which they were originally created so that's transformative mis will have a lot to say over the course of the weeks to come about the specific applications of this general concept at various stages in the preservation workflow the second thing that judges almost always ask about in fair use cases these days is whether if the use is a transformative one it's an appropriate one in terms of quantity or quality in terms in other words of amount and that determination of appropriateness or proportionality is one might put it is can't be made in a vacuum it's of course made in relation to the ascertained transformative purpose so if I'm writing an article and I about a poet and I want to quote a few lines from a long poem that may be fine if my purpose is to explicate those lines if I want to attach the whole poem as an appendix to my are going to call that may or may not be appropriate but of course sometimes the appropriate amount to use to fulfill a new transformative purpose is the work in its entirety and that is yet again an observation about fair use very clearly established in the case law that's quite important in thinking about the application of fair use to archival practice there are other things that also come into the judicial consideration of whether or not a particular use is fair and that also should be considered by would-be users when they're making their own prospective decisions about whether it proceed with particular uses and other things one of the most important is whether or not there is out there in the field documented evidence of what the practice community the professional cadre of which the individual user or would-be user is a part thinks are good practices the customs if you will around which the field has come together and that it believes are appropriate in the fulfillment of whatever the professional goal or mission of these practitioners may be or sometimes the practice that even though they have not yet emerged as fully customary the field nevertheless believes would be essential to achieving the mission that its members share which leads us them to a question we've been 25 years with this new understanding of fair use what the courts have had to say is is extremely consistent and extremely liberating in its implications it's stable predictable and I might even say user-friendly doctrine but in practice a not all use community is not all professional communities not all groups of practitioners who are potential beneficiaries of this change in judicial approach have yet received or internalized the good news perhaps that's because as Brandon suggested earlier about the because of the amount of toxic mix information that circulates online and elsewhere but for instance simply because the doctrine even as it has been made more predictable in recent years years still seems too
amorphous when it is matched up against a risk analysis and it's that possibility that latter possibility that has generated the project of which this go to best practices is a part and I'm going to turn it over now to my collaborator in that project of the last 15 years

Timestamp: [37:07]

Pat Aufderheide: People worry when they when they think about fair use because they see a certain kind of risk they see legal trouble they see lost relationships they believe they might have reputational damage they talk about legal trouble more but actually what we discover as most people are worried about lost relationship yes so I always like to point out that there is some always some legal risk used with the associated with using your rights and that's true with any right but there's also a mission risk are you associated with failing to do things that you really find core to mission and you really have to balance both risks and that's where understanding the very limited risk public fair youth was very helpful that's why we created best practices codes in conjunction with fair use with communities that employ fair use regularly the first was documentary filmmakers in 2005 they were very very skeptical that it would make any difference at all to have a fair use code they are however discovered that there was a lot of change which I'll tell you about we went on to work with communication scholars we work with poets as Peter has told you we worked with librarians including librarians like Brandon and Krista we worked with a variety of organizations including on people who did opencourseware film scholars and dance heritage on archivists what happened what happened was that people moved from no to yes documentary filmmakers discovered that they were now able to get work that employed fair use on the air because insurers now agreed that the risk was extremely low librarians were able to put digital collections online scholars were able to publish new work uncontroversially in journals that had traditionally only accepted permissions materials and archivists were able to put up digital exhibits that are permanent exhibits what we discovered in short is that practice makes practice that fair use when it's used expands what it's possible for people to do and that's why we're so excited to be working with you guys and here are some places where you can get more material we will also be putting these URLs I with Jessica's help up into the chat for you but they are from all of our organizations if you are a spin person then you should go to software preservation network.org and of course if you wanted to you could always read Peter in my book if you just feel like this was not enough ok enjoy and if you feel like you want to share this powerpoint you only want to share a part of it employs their youth thank you

Timestamp: [40:07]

Jessica Meyerson: thank you Peter, Krista, Pat and Brandon well we're going to go ahead and invite all of our attendees today to ask them questions of all of you while we have you together for this kickoff episode just a reminder to everyone to be sure and type your questions into the chat box I've been monitoring them I haven't seen anyone paste them in quite yet but I would really recommend and advise all of our attendees to take advantage of having Pat Peter Krista and Brandon on the call and to share your own experiences about this as we as we kick off these discussions certainly this QA might inform where we focus our time in subsequent episodes so please do share your thoughts and questions you

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Jessica Meyerson: and while we're waiting for people to put questions in the chat. I have a follow-on from Pat your discussion of how other communities have adopted the code so have you found have been some of the strategies or and/or challenges that some of the other communities have faced can you talk a little bit more about the process of cultural adoption of the code which I
know you'll you'll describe in much more detail with some colleagues of yours that have participated in other codes being written but can you speak to that briefly to give us a sense of here

**Timestamp: [41:48]**

**Pat Aufderheide:** and just to let you know so it's just refusing to let me use the video so I'm just going to be stuck with the audio but that's a great question Jessica and this is where having trusted partners like SPN is absolutely critical because people look to the anchor institutions in their communities for legitimacy so some new thing appears such as a code and somebody has to say yes we're using it and we're using it to do X so I think finding on having spin be able to tell people about that is great and one of the things that's going to be super important is for people who are on this call and other people you may know to report to spin when things change in your institutions when you do things differently because you were able to use the code because until then what people may be doing is employing fair use more or less quietly and sort of thinking that they're getting away with something and not realizing that they're actually completely legal or they might be avoiding taking on a big project because they're not really sure how much of a hassle it's going to be and when they hear from some of the people they really respect in the community they're going to on they're going to feel much safer in that decision so we find that it this first person has to be a little bit courageous but after that it becomes increasingly what you hope it will always be which is you shouldn't need courage to use ordinary rights and that's that's our big goal for the code but certainly having your trusted legitimize errs at the beginning is extremely important we're also Jessica and I are concocting a survey for you and we really hope that you all take it because it will provide us with some baseline information on what you need in order to circulate this code more effectively in the community

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**Jessica Meyerson:** Can you speak quickly to how the DMCA affected the overall concept of fair use as it relates to software preservation and this is from Mark Myers at the Texas State Library and Archives

**Timestamp:** [44:42]

**Brandon Butler:** so since Peter was most recently engaged in this stuff maybe I'll give him a break and I'll jump in to this one and then Peter and Krista both can add on because they've both got lots of experience with this stuff

so the DMCA has a complicating factor for all fair uses that involve digital media because the DMCA creates this kind of extra right it's not really quite copyright we sometimes call it para copyright and it sits on top of copyright and it says if there's there's all the stuff you get with copyright but if you're very clever and you also put a digital lock of some kind on your media then we'll give you an extra write that says nobody gets to crack that lock nobody gets to make a hack that can share and no one gets to use that hack in order to crack digital locks and their use is not a defense to the DMCA in some circuits in other circuits maybe and there's enough uncertainty out there to leave everyone sort of scratching their heads and wishing that they could be more secure about this stuff but there's so what that means for software is the same thing it means for everything it means when you're dealing with something that has a digital lock on it you have the fair use question that tells you do the core principles of copyright allow me to do what I want to do and if it's fair use then the answer will be yes but then you have another question which is if this thing has a digital lock on it can I circumvent the digital lock and we find out whether we can
circumvent digital locks by looking at specific exemptions that are granted there were some throwaway crumby totally worthless ones that are in the statute. I'm trying to be objective and there's some really worthless ones in the statute but what we really have to do is every three years we go to the Copyright Office and we ask and we ask for special exemptions for uses that we have to show their lawful so we have to have a fair use argument or some other kind of argument but usually it's a fair use argument and then we have to go to the Copyright Office and say this is a lawful use but we're being prevented from doing it because there's a DMCA and the good news is we did that last year and we want and when I say we they're all credit goes to the Harvard Cyberlaw clinic and Kendra Albert, Chris Bavitz and there were two different teams of two students apiece who who push this thing across the goal line with help also from Krista, Jonathan Band a lot of our friends in DC helps with that petition so but now there is a DMCA exemption for software preservation and it's quite broad it's a very nice exemption I'm very proud that we were able to get it and the cyber law clinic has a guide to the exemption sort of the preservation Guide because these exemptions are written almost as if they didn't want you to use them and so it's really nice to have a translation from Copyright Office into English and the cyber law clinic did just exactly that for you so that's the relationship and we'll have an entire episode where we get into much more deeply into that three or four weeks down the road so more to come

**Timestamp: [48:33]**

Jessica Meyerson: The second question we have is from Sarah do you see a difference between a true fair use analysis and a more commercially minded risk analysis? are they the same?

can i grab that Peter yeah it's such a good question and the answer is that they are distinct and interrelated and that any professional including any software preservation professional who wants to take advantage of fair use needs to understand and to act on that distinction fair use is up legal question is Brandon and Krista mentioned earlier and as I tried to reinforce it's gotten quite predictable over the last 25 years and the co2 best practices here as other codes and best practices that describes elsewhere have have done is designed to make it even more predictable risk analysis is a activity that is undertaken by individuals or more typically within institutions and the basic question is how much trouble can we get into if we do this and is it the kind of trouble we want or a kind of trouble we want to avoid so it has commercial overtones that they have reputational overtones it's it's an app's we commonplace and necessary activity and differ institutions do it differently different institutions have different levels of risk tolerance but you can't do good risk analysis about a question involving a copyright regulated activity like this one without first having a good understanding of what your legal rights are in other words the clear understanding of your legal rights and to be clear fair use where it applies is a right that understanding has to precede risk analysis because you can't make a judgement about what is at stake in the use without that as an input it's not the only input but it is one employee and that leads me to another observation and that is that one of the things that you can do with a coded best practices like this one is that you can use it as a tool to try to influence risk analysis in your own institutions if you've got a supervisor in General Counsel or an administrative overseer of some kind who feels very risk-averse about all of this apparently difficult and confusing copyright stuff the things you can do with the code of best practices is to give it to them and say look our community backed up by a bunch of very very well-qualified and critical copyright lawyers who reviewed all of this material they all think that what we're proposing to do our doing is just fine that it fits within the parameters of various that could be extraordinarily convincing so they're
different they're related and one that is fair use analysis needs to proceed and in the best case can significantly influence the other

Jessica Meyerson: thank you Peter um we also have we have a question here from James Watson. Krista I'm gonna give this one to you can the panel and starting with Krista maybe - “Discuss in some detail the issue of copyright in terms of software used to create permanent government records - James is in a context where they often have to look at whether it's easier to get a copy of this proprietary software which is more difficult if it's a licensed copy only versus finding a way through the IT department to replicate the functions of it.

Krista Cox: I mean I'm interested in what Peter and Brandon have to say about this but I mean of course for the government information itself presumably is probably not under copyright if it's created by a government employee and the scope of their work but as far as accessing the information via the software that was used to create it I mean I would apply what we have in the code because a third party software that's not software that's created by the government itself I would I would also just note as a policy issue there is a federal agency that is proposing government ownership of software that is created by the government so that is a policy a separate policy issue that is just something to be aware of in this space but I'm interested for Brandon and Peter if your thoughts differ on this

Brandon Butler: So I can see I mean a couple of ways to parse the question and James if you want to chime in in the chat to clarify they're sort of the forward-looking prospective you know is it better to make our documents in Microsoft Word and then deal with preserving words that forever and and and employs our uses and we'll do what we have to do to make sure or proactively should the government find a way to replicate the functions of something like word with a non proprietary software for in order to avoid future you know pain and suffering and I think that sort of a that's a question that you know depends on your resourcing and it's just similar to the kind of risk analysis Peter was just describing there's X amount of discomfort associated with having to preserve the format but maybe it's also a good format and no open format is as useful but if you're thinking about retro actively I would agree entirely with Krista if you've made a bunch of documents using proprietary software you know are you better off using that software to open the documents or trying to find a way to hack the documents open with a new tool I would say fair use would really strongly support you in your efforts to do the former rather than hacking something together to get to the content but again it's a strategic question you know it's about your resources and what you want to do but fair use would support you if you wanted to take the former strategy and make the proprietary software the tool that you use

Timestamp: [55:37]
Jessica Meyerson: thank you Krista and Brandon on that we have one more question I want to make sure that we get to because it's a great forward-looking community activity question which is from Brian Thomas also at TSLAC so “As good practice, is there kind of a template for documenting how the situations or particular instances in which an organization has relied on fair use?” so I think this is a great question and yeah I'm from all of the panelists from all of the research team I think it would be helpful to have a good sense of how organizations that are interested in contributing to the expansion the assertion of user rights context and the expansion of the code over time and document their work

Timestamp: [56:27]
Peter Jaszi: well let me jump in and start that very important discussion and I hope it’s a discussion that will continue over coming weeks because it is at a level of granularity that’s actually beyond what the code itself discusses but here’s what I would suggest and that is earlier on when I was giving you the short introduction to fair use I suggested that there are really two questions to which any analyst a legal analyst a lawyer was giving you advice and advancing you’re doing something if you if you’re using a lawyer or a court that’s considering a challenge to what you’ve done after the fact however unusual or unlikely that is I should say that it doesn’t happen very much in other words over 15 years our history with these codes and best practices suggests that in in general users who stay within the codes of best practices or even even if you sort of expand modestly beyond them simply don’t get sued but somebody is making a decision and there are these two questions that come up a legal decision one is was it use for a transformative purpose and the other is the amount of use the material used appropriate for the identified purpose and those I think are the questions about which it would be useful to retain some kind of documentation not at the level of necessarily everyday workflow choices but at the project level of someone it sets out to say well I think we should be we should be saving and making available this this suite of applications or this particular legacy program that I think beginning as part of the general discussion not as an isolated matter but as part of the general discussion of whether this is a project worth undertaking it’s interesting to talk and take some notes about how the thing you’re doing is going to add value that the mirror existence of the original version was not attended was not intended to capture and the other is why are you using the or intending to archive the amount you’re intending to archive and if the answer is well because we have the only the whole thing is significant that may be the end of the discussion so yeah I think it’s very very valuable to incorporate those discussions into your project workflow because the contemporaneous documentation should there however unlikely ever be and it is unlikely a challenge is very very good evidence so to speak I’ll stop there

Timestamp: [59:46]
Jessica Meyerson: thank you for that Peter do Brandon Krista with Pat off the line I’m curious if there are any additional comments that you all would like to add before we before we wrap-up for today’s first episode

Timestamp: [1:00:07]
Brandon Butler: I don’t think in looking at the chat I see that James followed up and made clear that it is the sort of retroactive question and that’s the problem that we hope we can help you all solve with the codes that those are the exactly the scenarios that we’ll be talking about over the next several weeks

Timestamp: [1:00:23]
Peter Jaszi: we will find a way to return specifically to that question

Timestamp: [1:00:28]
Brandon Butler: exactly in fact one of our guests next week is Leslie Johnston who’s at the National Archives and does exactly this kind of thing so sad that she’ll have some experience to share

Timestamp: [1:00:39]
Jessica Meyerson: absolutely well thank you thank you everyone we appreciate all of our attendees for joining us today and thank you so much - Pat - Krista - Peter and Brandon and as
Brandon mentioned please join us next week for episode 2 beginning the preservation workflow so we'll be going into a deeper dive for scenario 1 & 2 which Krista and Brandon described you know in short form earlier today and we'll be joined by special guest Leslie Johnston from the National Archives and Records Administration as well as Henry Lowood from Stanford University Libraries and we will be sending out an announcement on listservs and twitter as soon as today's webinar is posted online so thank you all again for joining us today and we'll see you next time bye