Webinar Series: Fair Use Code & Other Legal Tools for Software Preservation

Episode 5: Understanding the Anti-circumvention Rules and the Preservation Exemptions

Speakers & Facilitators: Lyndsey Moulds (Rhizome), Kendra Albert (Cyberlaw Clinic Berkman Center for Internet and Society), Jonathan Band (Library Copyright Alliance), Krista Cox (Association of Research Libraries), Peter Jaszi (American University)

Jessica Meyerson: Welcome thank you for joining us for today’s webinar my name is Jessica Meyerson and I am community advisor to the software preservation Network and research program officer at a Jacobean Institute this is the continuation of our seven part series of webinars exploring the fair used code and other legal tools for software preservation co-hosted by the association of research libraries and the software preservation network just a little bit of housekeeping before we get started as always everyone but a hosts and guests are asked to be muted throughout the webinar to maximize the audio and visual quality of the recording if you have any questions during the presentation please type them directly into the chat box your chat box which you can find in your control panel to the bottom of your screen I’ll bring those questions up during the presentation during the Q&A; section of the presentation where we'll have time to field and discuss in a little more detail every episode in this series is being recorded it will be transcribed and posted to the spin website freely available for all and today we are presenting episode 5 understanding the anti-circumvention rules and preservation exemptions a discussion with members of the code of best management best practices research team and our esteemed guests including Jonathan ban from policy bandwidth Jonathan Band is a copyright expert and counsel to the Library Copyright Alliance in this role among other work he’s participated in the Copyright Office 1201 rulemaking process including submitting requests for exemptions and testifying to the need for particular exemptions supported by the library community we also have Kendra Albert with us today clinical instructional fellow at the cyber law clinic and lecturer on law at Harvard Law School. They fought for and successfully received exemptions for video game
preservation with the Electronic Frontier Foundation in 2015 and for software preservation on behalf of the software preservation network in 2018. Lyndsey Moulds is also with us today software curator at rhizome a digital art nonprofit founded in 1996 Lyndsey works to preserve software and restage legacy pieces of net art at rhizome she also manages the software collection and computer environments with a focus on browsers other web related programs and then finally today your research leads and facilitators for this episode are krista cox directed the public policy initiatives at the association of research libraries and joined by peter Jaszi professor emeritus at American University Washington School of Law Professor Ozzie is one of the originators of the fair use best practices movement and is the co-author of the software preservation code of best practices for fair use along with Krista Pat ofter Heidi who's also on the call today and Brandon Butler who's also joining us on the call so in this fifth episode Krista Peter Jonathan Kendra and Lyndsey will discuss what the DMCA anti-circumvention provisions are and how they relate to copyright fair use and the code as well as how the triennial exemption rulemaking works and the exemption that's been obtained for software preservation it will also discuss how to apply the exemption to your own practice and with that I'll hand it over to Krista

**Krista Cox:** Great - thank you so much, Jessica. So today we're going to talk about add the DMCA and anti-circumvention provisions because in the course of interviewing all the practitioners that were gracious enough to share their expertise with us they wrote they raised concerns that even if serious applied technological protection measures could prevent them from doing their work and technological protection measures became an issue because in 1998 the Digital Millennium Copyright Act passed and the DMCA as it's known and was intended to implement the two WIPO copyright treaty so that I'm sorry the WIPO internet reduce the WIPO copyright treaty and the web performances and phonograms treaty and I mean it's widely known that the Digital Millennium Copyright Act went further than what was required under the WIPO internet treaties but nevertheless it is part of our law and something that raises a lot of concerns for practitioners that are trying to blight to break technological protection measures which are basically like digital locks around things that are available digitally so it could be a digital lock on a book a digital book or it could be something that is part of technology that's embedded software that's embedded in our everyday technologies like Alexa and Google home or in cars and that sort of thing today and so these digital locks were intended to prevent piracy and the kind of helped happen in any piracy that could occur on the Internet which to proliferate very quickly but at the same time I think that in 1998 we didn't realize how much technology would be embedded in these everyday things that we use and didn't know what kind of harms these provisions would have and these anti-circumvention circumvention provisions have been interpreted at least by some courts to be a separate independent cause of action so it doesn't require any underlying copyright violation in order to violate section 1201 of the Digital Millennium Copyright Act on an types of convention while the DMCA did provide a closed list of exceptions to those anti-circumvention provisions a lot of them today are seen as being kind of useless so there is a exemption for libraries for purposes of acquisitions so you can break the digital lock in order to determine whether you need to acquire an item but practically speaking in the marketplace that hasn’t really been needed and it's not very useful for all the types of things that cultural heritage institutions going to do another example is there's an exemption for security research but people have criticized that because you
know it doesn’t address another law that people are concerned about so they said well even if we can we can circumvent it for purposes of a DMCA we might be in violation of the Computer Fraud and Abuse Act so the 12 section total one has been criticized for being a little bit out of date fortunately there is a provision in there that allows for a three year rulemaking cycle so every three years the Copyright Office undergoes this rulemaking cycle in which people who want to use a particular exemption to circumvent a TPM can go to the Copyright Office and ask for a new exemption and in the past there have been several rulemaking processes so far but in the past it has been this very lengthy process that can take a year and a half or I think one year the entire process from start to finish actually took two years where the people who want an exemption gonna for one you put together this dossier of information of why you need to do this and what the harms would be if you’re not able to do it then the if someone wants to oppose it or holder wants to oppose it they can say well we don’t think it you know this exemption is too broad we don’t think this exemption is necessary hear all the reasons why the Copyright Office shouldn’t grant it there is also a hearing in which people can testify and say no we really need it or rightholders and say no yeah you know it’s just if this long process and people complained about it because it was very time-consuming and often the exemptions that were granted I would say particularly the later ones in like 2012 and 2015 with these very long complicated exemptions that a lot of practitioners and people in the fields said we need a lawyer to understand what these exemptions even allow us to do and so the Copyright Office did a study of 1201 and I think that in the last rulemaking cycle really did improve the process allows a lot for streamlined a streamlined process for people petitioning to renew an exemption that already exists the streamlined process only applied for exemptions that existed even if you wanted a related one that was treated as a new assumption I think overall people were said that that process worked a lot better than the old process and one thing that I want to mention about these exemptions before I get any further is to remind people that this isn’t an exemption just to do something that you want to do so it is an exemption where you have to show that it would be otherwise be a lawful youth most likely yes very you and it’s only because of 1201 and these anti-circumvention provisions that you’re not able to make these lawful uses like preservation for example and there’s a long list of exemptions that were granted in this last rulemaking cycle in 2018 it’s you know things like jailbreaking your phone I’m making a read-aloud version on an e-book accessible for someone who’s blind or fancy tables so now that will kind of have this high-level overview about 1201 and the problems that Afghan types are convention measures can have on otherwise lawful activities I’d like to invite our guests to tell us a little bit more about their work and how it relates to overcoming these obstacles as it relates to both buffer preservation as well as other exemptions that cultural heritage organizations views before I turn it over to John ban who has worked on a number of exemptions for cultural heritage institutions and Kendra Albert who has worked on the software preservation exemption I’d like to ask my co-lead Peter Jazsi or our other code co-facilitators on the code Brandon and Pat if they have anything to add on this kind of high-level overview

Peter Jazsi: hi this is Peter the the one thing I would add to that extremely excellent summary of it of a difficult area is that I think that over time the assess the the exception rulemaking process that Krista has described however frustrating happen however time-consuming and recently thanks to some rules changes it's gotten at least marginally less frustrating and less
time-consuming but however frustrating and time-consuming it has over the the years from the time of the DMCA onward proved to be on the whole worth taking part in in the institutional response which has been primarily and in the first instance from the Copyright Office which conducts the enquiries and holds the hearings and issues the rules to which Krista referred has been all things considered a lot more positive and sympathetic then I would have predicted did predict twenty years ago so it’s not a perfect system I think we would do do well to be without it and perhaps someday we actually will be able to shed it or to modify it substantially but I think the record over over a couple of decades shows that in the absence of anything better it’s a system worth trying to engage with and work within completely agree Peter I so since I’m not hearing anything from from Pat or Brandon thank you uh so Jessica I think we can turn it over now to Jonathan band you can talk about exemptions for cultural heritage institutions and his work on this throughout the years yeah thank you Jonathan

Jonathan Band: thank you very much so even though I I do agree with with Peter that participating in the rulemaking makes sense it is worth saying at the threshold or at the outset that the rules over all don’t make any sense meaning section 1201 and what I was trying to achieve at some sort of policy level doesn’t make any sense to the extent that people on the line are trying to figure out you know well well gee given that it’s relatively easy to circumvent what’s the whole point of having this added layer and you’re exactly right as a practical matter it really doesn’t make a lot of sense and it does simply put in an additional sort of bureaucratic layer that makes preservation activities and other kind of lawful activities more difficult and and without and in any way diminishing infringement as a practical matter but putting all that aside but let’s just talk about you know the world as it is as opposed to the world we want to live in and with respect to the you know I’ve been involved in in these exemption since the very beginning and one of the early issues that the libraries and other educational institutions were really worried about was the circumvention of technological protections on DVDs as all of you know including film clips is is sort of a critical piece of education now certainly in college but also in k-12 you know we’re moving towards a world where you need to have media literacy and you need to know you know the texts that we all read are not just books anymore but but films and and the ability to include films and classes it was a very there’s a pedagogical assisit to doing so in the old days it was relatively easy you would be able to put together a you would splice together clips from a video clips and so you’d be able to show sort of like a clip of you’d be able to have all these clips on the tape and you’d be able to go forward then you could even burn CDs but once you started having section 1201 and you know tell you have technological protections on the DVDs and then the circumvention of the psychological protections was unlawful then all of a sudden it becomes difficult and so it was very very early on it was obvious it was evident that you needed to be able to circumvent the technological protection on the DVD which was called CSS content scrambling system in order to put together a compilation of clips to use in a classroom now of course very early very quickly there was technologies such as thesis which allow you know de CSS which allows you to circumvent the technological protection so again it was easy to break the law of the digital lock but again you wanted people wanted to do it lawfully especially if they were going to be teaching in a classroom and so the there were in these I was involved in these early rulemakings and what we had to do is sort of collect evidence from educators of they wanted to use these
exemptions how they would you know the kinds of uses they would they would make of these clips and why it was important and and we worked together with other people who had similar needs documentary filmmakers and people who want to make other non-commercial uses such as remix people who were making remixes and and so we all sort of work together and you know we made we submitted our own exemptions or our own our own applications for exempt or own petitions but we we coordinated and and you know we early on we were able to convince the Copyright Office that this was a legitimate activity now first they had to determine that the underlying use we wanted to make such as showing the clips in a classroom or a remix we had to convince them that that was a fair use or an otherwise legal use and then we needed to convince them that there wouldn't be this adverse impact on the rights holders if we were granted an exemption and at the same time that we would be adversely affected if an exemption wasn't granted and and we were able to to get an exemption now there was just two interesting dynamics that occurred one was that the the rights holders and every rulemaking would come up with all these arguments as to why the exemption shouldn't be renewed or why it needed to be narrowed and over time the exemptions sort of for educational uses sort of became simultaneously narrower and broader so originally it was just for film classes then it was for all college classes then we were able to get you know k12 but again it originally was k12 Oh as instructors then we were able to get students so we were able to broaden the the the kinds of people who could use the exemptions at the time all sorts of other Road blog that the rights holders were able to claw back various various aspects of these exemptions and so there was a sole issue about quality that you needed to be able to demonstrate that you needed to use the high quality that that was only available if you circumvent a technological protection as opposed to as opposed to using a screen capture and and also they made it clear that you know you you had to use short clips and so arguably you could use longer clothes under fair use or under Section 110 one but but there was this narrowing and also just the the number of words and the exemptions kept on getting longer and longer and so it was harder and harder for someone to understand the exemptions but but now the way it's ended up is is having this the streamlined process that Krista alluded to where if you just want to renew the exemption you don't have to sort of present all the new evidence you don't have to reinvent the wheel that has been enormously helpful and also this length through making the covered office has tried to make the exemptions themselves a little less verbose and a little easier to understand but but there's still far more complex than they need to be and far more difficult to understand and you know they're far more caveats and limitations and them I just briefly want to talk about two other you know one other dynamic and then a couple of the other exemptions that the the the dynamic that it that this this process is sort of brought out is the there's a very surreal quality to the exemption the rulemaking where the the rights holders you get the sense they feel that they need to hoes for the sake of opposing and they end up making sometimes really silly arguments so the silliest was we again we were arguing about quad needed to circumvent a technological protection measures such as against so CSS on a DVD to be in order to assemble the clips to show in a classroom and and the MPAA basically said well you don't need to circumvent a technological protection you can does engage in kamcording and you can just point your camcorder at a high-definition screen and you can copy everything you know this is at the same time that they were running around you know running around the country running or the oral getting all these camp anti camcording laws passed and but they did a demonstration to show how easy it was to
kamcord really good images off of the high-definition television so gonna make like you know on the one hand they're saying it's illegal to do that on the other hand just saying no you adjective because you go ahead and do it on the third hand you know that they're there basically if they're if what they are saying was true that it is so easy to get good quality simply by pointing a camcorder in HD Tel Aviv II then why are we going through this whole exercise at all meaning why are they putting technological protections on if it is really the quality is just as good and of course we showed them that the Queen who showed convinced the Copyright Office of the quality wasn't as good but again there is this kind of bizarre dynamic where the were the where the laws of reason don't seem to apply within the the twelve the context of the 1201 rulemaking we were able to I mean I just touch briefly on some other areas were we've worked on we were able to get exemptions or with for people with print disabilities so that the read aloud functions could work we were able to work more recently on on exemptions for closed captioning so that you can circumvent logical protections in order to insert the captions that was something where we were working with the the Disability Services organizations and and then also areas related to the software preservation and this is where I pass the baton off to the Kendra

Kendra Albert: fantastic Thank You Jonathan I feel like it's it's kind of amazing to get like so much perspective on on the 1201 process since the since its its beginning I'm going to talk a little bit more specifically to prove Jonathan's point can you all see my slides yeah okay hmm there we go um more specifically about exactly how complicated it does look in practice still even after the Copyright Office has sort of I think cut things back a little bit by talking through the current operating suffer preservation exemption which SPN and ARL and the library Copyright Alliance sort of a petition for last cycle and this the information I'm about to present is also sort of available to you through the preservationist guide that SPN and the cyber law clinic where I work released which is what I'm going to sort of face my walk through ha but so the current operating software preservation exemption that was gotten to the triangle rulemaking process has some threshold questions of availability and so in order to be eligible for the exemption in the first place your institution must be a library archive or museum I know that that's not actually necessarily totally helpful to every institution because they may not like strongly fall into one of those buckets I think generally speaking if you feel like you are one it may be a little bit of uh know it when you see it kind of standard but there's some more eligibility requirements in addition so you have to be make your collections open to the public or routinely available to affiliate unaffiliated outside researchers must ensure that your collections are composed of lawfully acquired or licensed materials implement reasonable digital security measures have a public service mission and trained staff are volunteers the provide services normally provided by libraries archives or museums so in order to even have a broader conversation about whether you can preserve software under the exemption you have to meet all of these criteria um but I think what's
interesting about this is so the I do you think as Jonathan mentioned much of I think the Copyright Office is approach to the 1201 exemption process is trying to find ways to sort of do what they perceive will make everyone happy which is sort of very narrowly fit the facts that have been placed before them by petitioners while not making exemptions that are broader because that might frustrate or piss off the rights holders so something like this where there’s that kind of brought us some specific set of eligibility criteria is pretty normal through this process and if you’re an institution and you’re like or you work somewhere and you’re like hey I would like to press but I actually don’t fit really well within these criteria or these criteria are problematic for me um this brings me a sort of first overall take away that is not the content of the exemption which is you should come talk to to stn to LCA to me to Jonathan to someone because part of what drives these crafting of these exemptions is the specific examples we can bring to bear about the kinds of preservation activities and the kinds of players who are trying to do particular preservation activities and so when we think about you know when we’re arguing in from the Copyright Office saying hey you should renew this but you should expand it slightly or eliminate these eligibility criteria a lot of times that is based on the examples that we can bring to bear that persuasively argued that the criteria are problem so if you see things that you think will inhibit your preservation of works of software we would love to know about because that’s something we can flag for the next round in three years and in some ways the good thing about to triennial real making process is we always have the opportunity to go back and sort of try again the next so having said that the next question in that you want to ask when you’re looking at the software preservation exemption is is this for a video game so this on the face of things makes no sense because as I think actually Lindsay pointed out when she was kindly testifying in front of the Copyright Office the difference between software and video game is not actually necessarily a nice clean line but it’s the software that you’re trying to preserve is a video game that requires a connection to an external server for gameplay a different set of rules apply to it than the one I’m about to walk through and this is a mostly the copyright offices fault but partially also mine in the sense that in the 2015 round I worked with the ffs to get an exemption for video games that required external server connections so now there’s two exemptions for software preservation one that’s specific to video games that have required an external server connection and one that sort of covers all other software it’s laid out even more confusingly than that in the actual final rule that the Copyright Office put out but that’s basically the gist I’m gonna talk about the the exemption for software for everything also where that’s not a video game that requires an external server for game play in this context so that’s the first sort of that’s another caveat another thing to keep in mind then we asked whether the software is eligible so there’s a couple of criteria here but frankly this is like not super complicated so the computer program must have been lawfully acquired which means either like licensed or purchased I I think inevitably every time I’ve talked about this have gotten a specific question about hey is this kind of specific thing lawfully acquired the answer is it’s kind of hard to tell sort of off the cuff it’s not a particularly well defined term so I think that you know if you have something specific that you’re thinking about talking to an attorney or you know coming and talking to the cyber eleking quit we would be happy to help you figure it out the next sort of criteria and this is the big limiting factor on this exemption is that the computer software must no longer be reasonably available on the commercial marketplace and this was the major concession that we made during the course of the exemption
process in order to get rights holders to be more comfortable with the sort of broad preservation exemption so what does it mean to be reasonably available in the commercial marketplace well it can be specific to a particular version so if word is still being sold as word she’s has an 18 or 2019 I don’t know at this point they’re probably running like four years ahead so we’re probably already in word 2025 or something um that is if they’re even actually marketing stand-alone software or any more and it’s not just office 365 but um if you wanted to preserve a copy of Word 2003 just because Microsoft is selling leader versions of word that doesn’t mean that it’s reasonably available in the market and the other thing is that the the secondhand stores don’t count which is to say that you even if you could potentially buy a couple copies of software on eBay that does not necessarily make it reasonably available such that you can’t preserve it so you know the question here basically is is the manufacturer original distributor of the software still selling it if not then you can go ahead and preserve it under the exemption and then as Krista mentioned there are some rules about the kinds of preservation activities you can undertake under the exemption so I think about this as preservation activity eligibility the sole purpose of the circumvention activity must be fair lawful preservation of the computer program or digital materials depending on a computer program so what that means is if you don’t really care about preserving a certain version of AutoCAD but you do need to preserve particular files that run off that version of AutoCAD you can still preserve a version that version of AutoCAD and this is an important thing to note because of the version dependencies of some some software files the preservation can’t be for direct or indirect commercial advantage pretty straight forward or straight photos anything around to your debts the preservation activity must be not purging so if you’ve watched the very many previous webinars in the series you’ll know maybe a little bit more about that but it can be non-infringing because the software is not copyrighted for example if it was software produced by the US government because you have permission because section 108 applies which is a library exemptions to the Copyright Act or because they use this fair see episode 4 so the those are all reasons that you can that preservation activity may be eligible there are many others as well but those are the sort of those are the big ones and that if you’ve checked all this boxes like congrats go ahead and preserve the thing please don’t worry about 1201 liability but one more caveat you can’t make copies of the computer program available outside the available is important and it’s on the slide outside of the physical premises of the library archive or museum so that’s the exemption again if I’ve sped through it too fast and you’re a little bit confused fair enough all of what I’ve just said is in the preservationist guide which is on the SPN website um I think I sort of before we go too over to Lyndsey you want to just take it back to what Jonathan said and what Krista said about the sort of broader context of this process which is that you know 1201 I don’t think folks were really thinking about the concerns of software preservationist when they were crafting drafting 1201 is a response to their us is copyright obligations and so in some ways like 1201 has never been a particularly good fit for the needs ups for the needs of lots of folks but software preservation is specifically um and so when we we and the Copyright Office I think understands that I do think frankly um eight people associated with like galleries libraries archives museums like glam cultural heritage institutions tend to be the kinds of folks that the Copyright Office sort of thinks that the 1201 exemption process is for but nonetheless you see that you get these really complicated exemptions I can be hard to sort of navigate and fall into and the best way we have until you know something Congress amends the statute to sort of get y’all who preserve work
more latitude in this space is providing really good examples of what the kinds of harms that are coming about or the kinds of preservation projects that aren’t possible because the exemption is narrow so that brings me to sort of what I owe you can help which is that if this is something that you affects your day-to-day work and you’re interested in talking more and/or you use the exemption as part of your practice we would love to hear about it there’s a use form which all I think we can send out in the sort of background materials or you can always just straight up email me and I’ll make sure that the right folks within SPN or the right folks who are involved in sort of fleeter exemptions find out about it because what we’re interested in doing is making sure that you know we can use the facts on the ground to get as much latitude for software preservation as possible so I think that’s all for me I’m happy to answer any questions and you can always email me more follow up with me um I although I have not been doing the 1201 process as long as Jonathan I’ve done a 1201 across a variety of contexts including for computer security researchers so it’s a lot of what I do on a day to day basis I’m always happy to talk about it more

Jessica Meyerson: you so much Kendra huge things to Kendra and Jonathan if you have questions for the two of them I saw Melissa provided a question which we’ve added to the queue please do continue to type them into the chat because we’re keeping track of them in a in one list and we’ll come back to them for the Q&A; so I’ll hand it off to Lyndsey for now

Lyndsey Moulds: hi Jessica would you mind sharing my slides for me through the jacobian Institute zoom or how should I do this okay awesome let me go ahead and fix it fullscreen okay amazing thank you so much my name is Lyndsey Moulds and I work at Rhizome I participated by testifying in the 1201 exemption hearings last year but other than that I am mostly a practitioner so I’m going to just share some of my experiences working with archiving born-digital materials there are some ways in which the exemption totally applies to us and some of it in some ways in which it doesn’t I’ll get into a little bit but mostly I sort of wanted to give you of what rhizome does and why we’ve sort of wrestled with like fair use and sort of also how a lot of discussion around fair use doesn’t really quite describe exactly what we do so I could hug the next slide I don’t know what the best way to oh I can start my video - it’s not gonna be high quality but try okay so rise I’m actually started as a community-based mailing list which was founded by an artist named mark tribe in 1996 and we’ve been pretty distributed but New York has been where we’ve been located since the beginning we’re actually located on premises at the New Museum which is a Contemporary Art Museum in New York and we're an affiliate of the new museum so we currently work out of new ink which is a new museum’s incubator and co-working space so we have an artistic program and the promotes foreign dental art projects and also organizes exhibitions and we currently have an exhibition up in the new museum lobby called the art happens here but we don’t actually usually have a physical gallery space so generally speaking our exhibitions are online yeah can i yep great in addition to online exhibitions and an editorial program we’ve also had an online archive of boring title art called the art base online since 1999 and we also have a digital preservation program that builds in-house software tools to support preservation activities so a lot of times we’re working with sort of applied for grants or working in spaces where we’re working alongside other museums whose creation or archival practices are built for physical objects which as we know are really difficult to extend to digital practices so a lot of times we’re
working with things that are produced distributed or consumed interfaces or the web and that's why rhizome refers to these things as like form digital so if you hear me saying born digital that's kind of our terminology for things that were born on the internet and for the internet so this next slide is an example of that which is Amalia almonds excellences imperfections which was it's a series of Instagram posts and it actually consists it's like an Instagram performance so it I think this is like a time-based performance it's not just the pictures that make it it's actually the fact that it was embedded in the Instagram platform and playing out over time so to some degree when we say I want to preserve this piece of art you're actually preserving parts of the Instagram platform and brand and layout as it existed in that moment so we're not just documenting the work of artists specifically but also the surrounding fabric of these web sites and platforms Thanks since the late 2000s like rhizome has moved away from simply just like exceptional the works into our archive to trying to continue to ensure public access to functional historical artworks and we really want to develop new ways to archive and contextualize this artwork so that people can continue to appreciate it and over the last three years in particular where we sort of shift our focus to developing new preservation tools and strategies for reaper formance and a lot of institutions have put work into file preservation file integrity long-term storage like solutions for doodle heart attack artifacts there are probably a lot of people on this call who are have expertise in that area that's not really something we're institute like interested in as an institution we're not imaging hard drives I'm not running file integrity checks every hour what I really want to do is make it possible to access as many works as possible for as long as possible in a manner that's authentic to the intent of these works so I want to support the performative qualities of artwork on the Internet I want people to be able to see you know what the artist intended when they made this work in 1999 and that's where things get kind of difficult so I'm gonna try and show you this video Jessica can you okay if that doesn't work can you try it man sing to the next one and see if you can play the one on that okay that time oh can you play that one yay so this is a video it might be really tiny um it's a piece called scroll bar composition and it's basically like a big HTML page it has a bunch of sort of mini oh is that the right I think that's not the right video I think I shared the wrong video I'm sorry oh that's for Mart okay that still kind of works so there are a lot of there are a lot of pieces from this period in the web that use elements of the browser in a really specific way so things like buttons radio buttons scroll bars actually constitute parts of the artwork formally and so if you view these pieces in a modern browser the scroll bars buttons all of that stuff looks completely different so that's one of the kind like that's an example of the kind of thing that we're actually trying to preserve when we like Reaper form this is we really want this to be authentic to you know I guess I'd say authentic to battle so it's not necessarily that there's one particular authentic browser for every single piece you know in 1999 there were certainly lots of different browsers that people could have been using to search the web so I think part of it is like if if something like scrollbar comp composition and does look different in a bunch of legacy browsers that we're contemporary giving people the option to see it in those different browsers is really important to sort of understand things like what using the web was like at that point in time and to that end you can go ahead and advance because I'm not sure how long a lot of what I do is trying to work with commercial software dependencies and an interesting thing not working with internet art that was largely independently created in the 90s and 2000's is that you end up with all manner of software it sees a lot of these dependencies are free as in like freeware but they are
proprietary and they're really difficult to find now sometimes they were bundled with browsers
and before working at rhizome if you ask me about software dependencies I'd say oh well you
know maybe when I think of a software and eating a specific dependency I think oh it needs some
specific version of Python or I have to run it on Windows 7 but in actuality it's more often in my
case that I'm trying to dig up old versions of things like realplayer things like flash macro media
directory like create time excuse me so in some cases it's you know I I'm trying to find in this
browser plugin that was deprecated years and years ago and often without the artist knowledge
because sometimes these pieces haven't been revisited by the artist or anyone who created them
in decades and so there's been a great emphasis put on preserving software it produced by artists
and sometimes even the source code but as far as proprietary plugins or middleware go those who
have decayed and become inaccessible despite a lot of preservation efforts so something can be in
pristine condition otherwise maybe someone made really really fantastic like backups of all of
their work and you know all of the executables they created for various platforms but if we can't
actually get these dependencies from anywhere you know the work is not accessible and so that's
where TPM becomes a point of difficulty for us is you know it's not as if you know artists are
bringing work to me like oh I put DRM on this ten yeah it's not like a thing so much as the
middleware software the supporting software the dependencies have some kind of TPM or in
most cases just sometimes require registration or something like that and so we're really working
to get all of these pieces together to create an environment that can support this artistic software
and so even if we totally have the rights even if people you know we're really diligent about saving
their own work and preserving it there are all of these other factors with web-based works
especially in the late 90s and early 2000s that are really sort of outside of I guess what people
would think of as traditional like preservation in that regard so um some other challenges that
rhizome has are you know what kind of memory institution is rhizome from that checklist that kind
of shared like what do we like where do we fit into that box some of then we took off some of them
we like are it's kind of amorphous like when we apply for grants sometimes people say oh well
you're a library not a museum and sometimes people say oh you're a museum not a library and you
know it's like oh we are located on the premises of a museum but are we a museum and yeah so
there's a little bit of a question of where we fit into the preservation landscape legally but also like
who are peer institutions so that's something we're constantly sort of exploring as we preserve
this work and also just thinking about our mission as an institution of supporting weren't it'll work
like what can we actually do to support artists when DIY software maintenance isn't out of reach
for most private collectors and this is something that was sorry sort of brought up in the hearings
last year but hasn't really been addressed by the code as far as I'm concerned is that you know it's
kind of sad but like we see a lot of artists who go back to producing physical ready-mades or
ready-mades or like some kind of project that has a physical aspect they can sell because it's
actually really difficult to sell digital based works or born digital works to private collectors
because there's not really a good pot for people outside of memory institutions to maintain this
artwork so right now if you're a private collector and you buy one of these pieces from someone
and then you know it depends on flash and then the flash breaks this is a example because there's
like like you know what I mean if something goes wrong and you need the help of expertise and
you would Nessus you might need a 1201 exemption sort of leeway to be able to fix this piece and
keep it running what do you do do you bring it back to a memory institution it's not it's not clear to
us we don’t know how to advise people we don’t know how to advise artists about how to build a sustainable practice when people are saying I really want to buy your work but I have preservation concerns and that’s something where we’re trying to figure out like what a path forward would look like and again it’s another thing where we’re not sure you know there are other people who are trying to fix this problem by you know oh I want to attach like digital artworks to the Bitcoin and that’s how I’m going to you know that’s how we’re going to make pieces that can be sold to other people but I think for for general purposes it’s like to me it’s not necessarily that I think it’s problematic that the work can be replicated or that it’s consisting of files the problem to me is that we share these files and then we don’t have any necessary have a way to care for them in the future and we don’t have a way to necessarily invite or show people how to care for them if they end up needing to use something like that although one exemptions in order to fix a dependency so

Jessica Meyerson: thank you and I know that’s incredible and I want to make sure because people definitely have questions for you Kendra and Jonathan today I just want to make sure that we get to those so with that in mind Melissa made a comment right there at the end Lindsay that you might be able to speak to and then yeah we will we’ll get back to another question that Melissa had which is thoughts on practical options for limits to premises which as Kendra described is one of the limitations in the current software preservation exemption Lyndsey would you like to speak though quickly - Melissa's comment on the fact that for acquisition practices for museums and museum boards you know they struggle with the fiduciary duty for funds where the work is temporary so things that can't be owned this is just building on your point but is there anything else you’d like to say

Lyndsey Moulds: um I don't know I mean I think that really that summarizes kind of a larger issue in this kind of preservation because I think Amalia almonds excellence isn't present for excellent system perfections is a really good example of this like there have been showings of that that consist of books or prints on a wall and I think I can only speak for myself but as someone who works at rise on one works a lot with digital materials I think of that as being like a time-based art work in the same way that you know people who have like performance practices where you would go into a museum and see someone in a space doing some kind of like motion or movement or sustained performance to me it’s more akin to that than it is to you know a series of photographs and I think that that’s something that a lot of institutions struggle with I think it’s something that there’s not a lot of president before in terms of law and fair use and yeah I don’t know what the answer is I think trying to sort of I don’t know like yeah it’s it’s kind of like the video game problem it’s like will creating more definitions around these things actually help or hurt it’s difficult it’s definitely difficult

Jessica Meyerson: that’s a that's a great response thank you so much Lindsay and with that we'll go back to one of our first questions Melissa this is also from you so feel free to elaborate on this but just thoughts on practical options for the limits of premises which is in the current software preservation inscription Kendra would you like to take that one on
Kendra Albert: so in my attempt to make things slightly more simple I mean I didn't include one of the words that is in the actual exemption which is physical premises which clarifies somewhat in a maybe not ideal way that the software has to be kept on the physical premise not made available outside the physical premises of a library archive or museum um you know I think we don't know much about what that means other than that you know and I'd be happy if there's particular scenarios they're thinking about I'd be happy to talk about it more you know I do think that that's a real challenge and I think a real problem for software that's primarily dependent that software that people are preserving primarily for exactly the kind of stuff Lyndsey was talking about with just the fact that it's a dependency for other works because you know if the goal is to use the spec Ament TPMS in order to enable software to be used to access works more broadly um you know there might be really valuable options in terms of in terms of sharing it with other institutions but yeah the language in the exemption is physical premises

Peter Jaszi: hi this is this is Peter and if I could just jump in for a moment I had one thought about this question it is it okay if I absolutely please so earlier on in your in your your excellent presentation Kendra and and krista as well you were talking about some of them some of the terms that remain undefined or at least softly defined in the exemptions generally and of course in this good new exemption in particular we're told things should be sure it but we aren't told how short short is and now we're told things should be on premise fees but we aren't told exactly what premises are my sense and I think this is true of the lived experience of all kinds of beneficiaries of different exams over years is that the system for good or real and I obviously think it's more for good than for ill depends a great deal on the good faith activities of the beneficiaries of the exemptions to make reasonable judgments about these definitional questions and then should and it almost certainly would never come to that but should in the extremely unlikely event those judgments be challenged then to be prepared to explain them with respect to premises we've talked a lot in the previous episodes of the women are about the way in which the code of best practices recognizes and encourages certain kinds of networked activities both those that originate in the physical premises of particular institutions and engaged their constituents their students their faculty their researchers wherever they are to be found and we also have talked about the somewhat more ambitious model in which physical institutions may join together to create consortium through which in turn all of their members and constituents will have access to a broader range of materials and I would like to urge those who are going to be thinking both about how to behave under the new exemption and about how to implement the code of best practices to think relatively broadly rather than narrowly about this question of premises it's pretty clear what the limitation that is was written into the statute is getting at it's getting at discrete freestanding copies of software that it may find their way out of the institution into the wild so to speak and then potentially be put to a wide variety of uses at least some of which may be less less easily defended than the instance the uses that have institutional connections but I must say that I would be and would be would be interested in in in Kurt what I would encourage the community to think about the possibility that uses on the premises does not any longer necessarily refer to uses which are wholly and entirely confined within a bricks-and-mortar space that uses on the premises can also be thought of consistent with what I understand the intention of the
limitation to be to involve network uses originating from and under the control of a located institution I can't tell you for sure that that's the right definition but I don't think anyone can tell me for sure that it's the wrong definition either and it's certainly a definition that could be embraced by a community in good faith

Jessica Meyerson: thank you Peter that's wonderful and hopefully empowering to everyone on the call and I just want to follow up - doc I know we're out of time we're at the top of I'm going to ask a quick question for the purposes of this recording and I'm going to hand this over to Andrew and Jonathan and if some of you have to leave we completely understand but again this is for the purposes of the recording I think it's an important question so given the current limitation of the software preservation exemption as just described by Kendra and Peter um could you tell us a little bit about what a recommended expansion for the next round might look like and what the community needs to do produce or documents to help support the expansion of a future round of triennial rulemaking

Jonathan Band: well let me just jump in and then because Kendra actually knows a lot more about the subject than I do so if I let her go first I won't have anything to say I'll think the the local thing and really underscores what Kendra said is in terms of what people can do is as they're going through their day to day work in this area whenever there's an area or something a problem that you have write it down make a note and and then when when the time comes when Kendra and others are working on the new exemption having those examples of the shortcomings or the problems or the complications it will will be very helpful I mean because then we can you know be very concrete and say you know so-and-so was trying to do X Y & Z with this specific program and couldn't or had this difficulty and and nothing it's in this area nothing works like the anecdote and the concrete and so that that's what everyone on the phone can do but but I'll turn it over to Kendra in terms of you know certain areas were that are that are pretty obvious that need to be fixed

Kendra Albert: yeah no I that's Jonathan's totally correct which is like the most useful thing is evidence and anecdotes might be the slightly slightly expanded version of anecdotes I think there are two areas that I think worth currently thinking about targeting and this is something I haven't necessarily discussed fully with all the stakeholders so so sort of my personal view on it one is broadening the the eligibility criteria at the beginning to be beyond library archives and museums to any institution any cultural heritage institution that meets the 108 categories or the categories that I mentioned partially to deal with the exactly the problem Lyndsey flagged which is that if it's not really clear exactly what your institution does but you do all of the things that the Copyright Office once the name of your institution shouldn't cause a problem or create an certainty I mean the other thing is as we've already talked about probably broadening the premises language to more specifically reflect the kinds of understanding that Peter was emphasizing which is sort of a control either you know something like a media control funding model or a sort of a access over over on network or access to copies that are controlled and including that so that software can be more widely used without understanding that that does not create significantly more risk of piracy then before so I think those are the two areas that I currently sort of have on my list to target but
of course you know if the if there are other things that the community keeps running into you in terms of problems with the exemption you know we're happy to sort of take up the take up the banner and figure out where we can where we can make changes

**Jessica Meyerson:** thank you so much Jonathan and Kendra I just want to say huge thanks to all of our esteemed guests today Jonathan, Kendra, Lyndsey that was a very engaging set of presentations and hopefully everyone walks away from today's webinar with a with a better understanding of the relationship between the exemption and the code we so appreciate you all showing up and being here for the discussion today and we say you know join us next week same time same place we've got episode six making the code part of software preservation culture so again this question of community engagement and ownership is really paramount to the topic of next week's episode and that will be featuring Gordon Quinn from Kartemquin Films and Lindsey Weeramuni from OpenCourseWare at MIT and next week's episode will be facilitated by a Pat Aufderheide of American University and Peter Jaszi of the Washington School of Law at American University so thanks again for joining us today we hope to see all of you next time have a lovely day