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

Episode 6: Making the Code Part of Software Preservation Culture

Speakers & Facilitators: Lindsey Weeramuni (MIT OpenCourseWare), Gordon Quinn (Kartemquin Films), Patricia Aufderheide (American University), Peter Jaszi (American University)

Episode 6 Transcript

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Jessica Meyerson: Thank you for joining us today today we'll be presenting episode six making the code part of software preservation culture. My name is Jessica Myerson and I'm community advisor to the Software Preservation Network and Research program officer at Educopia Institute. This episode is the continuation of our seven part series of webinars exploring the fair use code and other legal tools for operation. This is co-hosted by the association of research libraries and the Software Preservation Network just a little bit of housekeeping before we get started, we asked all but the hosts and the guests to be muted throughout the webinar except in Q&A; and we'll queue you for that period of time just maximize the audio-visual quality of the recording. If you have any questions during the presentation, we ask and encourage you type them into the chat box the Zoom chat box which you can find in your control panel and there's an interface I'll bring these up again during the Q&A; section of the presentation and we will have time for questions for our guests and facilitators. This episode will be recorded transcribed and posted to the SPN website you all can keep a lookout for announcements about the entire series being posted in the next couple of weeks.

Today's discussion takes place with members of the Code of Best Practices research team which I'll name shortly and our esteemed guests which include Lindsey Weeramuni, the manager of intellectual property for MIT's office of digital learning. Weeramuni oversees and implements copyright policy for the MIT OpenCourseWare and MITx. MIT opencourseware is a web-based publication of virtually all MIT person and is available under Creative Commons Attribution non-commercial share-alike license. Weeramuni was the project director for the code of best practices for fair use in OpenCourseWare. She often presents at conferences on open educational resources copyright and you can read more about where these experience with fair use and MIT
OpenCourseWare in the article *how to fight fair use fear uncertainty and doubt the experience of one open educational resource* and we'll make sure that that is included with the final posting of the recording. We also have with us today Gordon Quinn, artistic director and founding member of Kartemquin Films and has been making documentaries for 50 years. A longtime activist for public and community media, Quinn was integral to the creation of public access television in Chicago, the Documentary Filmmaking Code of Best Practices in Fair Use, and the indie caucus to hold PBS accountable. Gordon has created a legacy that inspires young filmmakers and provides a unique structure for the collaborative creation of high quality social issue documentaries.

Your research lead and facilitators for today’s episode include Patricia Aufderheide, University professor school of communication and founder of the center for media and social impact at American University. Patricia is one of the originators of the fair use best practices movement and is co-author of the software preservation code of best practices.

In this episode Pat, Gordon and Lindsay will discuss the difference between a document and a shift and software preservation practice how other communities have incorporated fair use into their professional practice and how to talk to gatekeepers and to allies in your network to strengthen field wide practice and with that going to hand it off Pat.

**Timestamp: [4:05]**

Patricia Aufderheide: Wonderful! I would love my first slide actually my second slide because what I’d like to do with you guys today is first of all to review where we’re going all right so what we’re going to what we hope to spend our time today is actually to spend the most valuable part of it with you in what would usually be a Q&A and so first of all we’re going to talk about why creating the document itself doesn’t get to the goal and then second ways in which the community can make this code available to people who can use it. We’re going to hear from Gordon Quinn about how documentarians did that and we’re going to hear from Lindsey Weeramuni about how the people in the open courseware community did that. We’re going to talk about the efforts that we have begun to disseminate the word in the software preservation community so far and then we’re going to get to the really good part which is what do you think we should be doing. Thanks next slide. This is where I turn it over to Peter Jaszi who’s going to talk about why isn’t the code enough and I think you have to unmute yourself Peter and we’re not hearing the answer to your question.

**Timestamp: [4:41]**

Peter Jaszi: Pat, why the code or why isn’t the code enough in itself really lies in the nature of this and of the other codes that it is a family to which it has family relations and about which you’ll be hearing a little more soon. These codes are relatively high level documents that were represent strong consensus in the field and they are legally vetted and we think and time has has tended to show highly reliable. We can do so much in terms of putting them together and putting them online but then acceptance becomes an issue and that’s why it is crucial that opinion leaders and communities that are affected by copyright and that see some utility of in these codes should take a role themselves in spreading the word there are a lot of ways of doing that and I think that some of those are our our topic for today. The the difficulty is compounded by the fact that if if one only had to convince the line practitioners in a given field that fair use was a robust and reliable friend that might be possible in a fairly straightforward way but of course although the line practitioners themselves have doubts accumulated over time was a result of of exposure to the permissions culture and in a sort of ingrained as as a function of the kind of professional network of beliefs - some valid and some mistaken about copyright. There are others as well who play an important role and the line practitioner often understands very well that although relying on fair use may
entail some level of legal risk, not doing so, not taking advantage of the rights that the law offers produces an even greater risk of an even greater level of what might be called mission risk the possibility that by not exercising one’s rights one will end up not doing the job. Again if we have had only line practitioners to convince that might be fairly straightforward but there are others in the system as well: direct supervisors, supervisors of supervisors and other kinds of gatekeepers in the system. Everybody up to and including University or museum administrators and general counsel they have to be persuaded as well so it’s a complex task.

Timestamp: [9:26]
Patricia Aufderheide: So if we move to the next slide we can see that there are some typical first steps that people take on one of the first things of course when we create codes of best practices with communities we do it through membership organizations such as the association of research libraries and I believe that Krista Cox from the ARL is is on this call. Endorsements are absolutely critical from other institutions that people rely on because what we’re looking for is legitimacy so we go to other organizations in the field that people trust. Something else we do is either write ourselves or get other people to write articles in places that circulate this information in a trusted way - sometimes it’s a listserv sometimes it’s a blog or a magazine. I recall when we released the very first code, which was the documentary filmmakers code, we were just delirious with happiness because Sundance is the big event there and we were able to get articles in every major film magazine that was present at the festival so you just couldn’t avoid us. We often give presentations at conferences either the people who coordinated it or people who are leaders from the community who’ve been involved and we are proud to have extended interviews with 41 leaders in this community already who we’re hoping to draw on more but we know that we’re also talking to other ones on this call and finally we’ve had conversations and meetings with both opinion leaders and leading related associations. In the case of the documentary filmmakers for instance it was insurance brokers. So those are some of the things we think about and I’d love for you to be thinking about connections in your field because we’re going to turn to you at the end of this. And now I’m going to turn it over to Gordon Quinn who is going to talk about what happened to make the code so widely known in the field in the years after it was released and next slide please.

Timestamp [12:05]
Gordon Quinn: So you know we had the good fortune and I think this happened with many of the codes, is that our field really participated in the writing of it. We hosted a couple meetings here and Peter came in and so by the time it was published the field was sort of on board with it or a lot of people in our field. The practitioners, the people who would be using it, were pretty familiar with what we were talking about but now the challenge was to do with the gatekeepers the lawyers and the insurance companies and you know I say that five-year period after we published it I never talked to so many lawyers in my life. We went to conferences - I was at some with Peter and with other lawyers I remember once going to Lake Placid I think with Peter and we were presenting to 500 in leading intellectual property lawyers from all over the country and there was a huge education that had to be done with these people they all thought they knew. You/we were dealing with a industry in which you know they would say, “no no it’s right here and in our NBC standards and practices code - you know the 30 second rule you can you lose 30 seconds or no more” and we would have to educate them about the law and about what we were doing we have really effective presentations at associations of university teachers I remember the first time we presented and I think it was here in in Chicago I think it was the USDA and a bunch of us or on the panel it was Pat and Peter and I think Michael Donaldson and myself and the room was too small
there were literally people trying to just get their head in the room to hear our presentation. So there was a sort of uneasy sense that they didn't quite have this right but we were pushing against what Peter called “the clearance culture” which is that you know 50 years ago when I was making documentaries we didn’t really understand what fair use was but somehow in our gut we thought we had these rights and as we became more successful as we started to be broadcast as we started to get into theaters and and create contracts with distribution companies we ran into the clearance culture where everyone was saying no. I mean basically what people were being taught in school was to be a professional in our field of documentary filmmaking everything in your movie has to be clear that’s what people were being taught and that’s what some of these gatekeepers were you know we're demanding. So little by little we were changing the opinion sometimes it would be at a conference. I refer a period I went to the city of Chicago I don't think I ever traveled for one of these two these I think they call them CLE it’s that thing continuing education for lawyers and I would it would be a lunchtime presentation in a law firm I get a free lunch out and they're all getting paid to be there but I make a presentation on fair use over lunch and little by little we just sort of were reading all these critical people. One of the most important and you know I was less involved with the broadcaster’s except for PBS and PBS was the first gate keeper who finally said, "ok we will accept your fair use claims we will broadcast it even though we at that point we could not get insurance on the fair use claims” and the big breakthrough in our field was when some people behind the scenes I think Pat and Peter were involved in that had been meeting with the insurance companies and one insurance company said, “ok we will you know we will ensure insure your fair use claims.”

I think one of the things that was really important with how we carried on this education process - we would always begin with sort of some fundamental principles about fair use and try to make them understand it’s about a balance. We're not saying everything’s ok. We are in fact rights holders we’re very concerned about piracy and other issues so you have to understand that what we’re looking for and what we in our field were trying to put forth was a balance of conflicting rights based on what was already in the law and that I think helped us to kind of get people to back up a little bit and start thinking rather than just going to do, "like we know this I’m a lawyer and I given thousands of opinions on this"- to take it back to the first principles and the philosophical arguments behind it to get them to kind of go down the path of how the law really should be interpreted and we were enormously successful. It changed everything in our field virtually certainly every documentary we do and most documentaries that you see today have some fair use in it you know of course. And the one other detail and then I'll stop is that by the time we were doing all the certification we had arranged with some law clinics and people too so that we could say to our own field if you stay within these guidelines you’re not going to get sued but it is you are asserting your right so there’s always that vulnerability and we have law clinics lined up that would defend people if they ever did get sued. The important thing I think that we understood by the time we were doing this work with with lawyers like Peter was that the the case law really supported our position of fair use and these big companies that had been threatening us for years with these cease and desist letters threatening to sue and people would you know they full you can't stand up to Sony and if Sony reaches out to your broadcaster you’re then dead in the water but the fact is they didn't actually sue because they had lawyers in this area who didn't want to get a bad precedent and a band court decision and so you know we once we got organized as a field and stood up for our rights and went through this process of educating all these different kinds of people that Pat was laying out we really turned the tide.

Timestamp: [19:11]
Patricia Aufderheide: Oh terrific. Thank You Gordon. Anything else or are we ready for Lindsay?
Gordon Quinn: I think that's it for me

Patricia Aufderheide: Okeydoke then Lindsay if you unmute there we go we're ready for you and next slide please.

Lindsey Weeramuni: So I had the privilege of working with Pat and Peter starting in 2009 because we were inspired by the filmmakers code best practice and one day I looked at my boss and I said, “look at this really cool thing” because one of my co-workers had the code sitting on his desk and he said, “hey look have you ever seen this?” and borrowed it for an afternoon and I read it and I said, “well why can't we have one?” because they can do all these really cool things with it so this was just before a conference that we go to every year for open education and the thing that combines all the people together the open education conferences that they publish under an open license educational materials online and for those of you who don't know that usually means Creative Commons or GNU licenses or other things like that so I sort of had an informal session with the members of other schools in the U.S. and I said, “how would you feel about getting together to collaborate on a fair use code for us in the U.S. just like the filmmakers one?” and they all sort of said, “okay sounds good to me what do we need to do?” and I said well I'll find out and I looked at the back of the filmmakers code and I got in touch with that and it all took off from there. So a year later we had the code published. It took a lot of work but it was so worth it and I can tell you some of the lessons learned, the ups and downs, once I brought it back to MIT to get it implemented. The first thing that's really important for you to take into consideration is that having the support of your office of general counsel to the work on the code that you're doing is so vital to your success. No matter what it takes you should work really hard to persuade them and unless they're already on board with this kind of thing if they need ammunition to help them understand just go to the OpenCourseWare sites that live on Pat's website and you know point to all of the successes and the different codes that exist already and it's all over the culture and creators field already so we're all doing great stuff with fair use and we have been since 2005. So when I brought the code back to my office to train people there was so much fear uncertainty - they were very scared and very nervous and like they wanted to know questions about “does this mean we're gonna get sued now?” “does this cover every kind of content that we have in our courses for things like that because professors who publish courses put film clips in their lectures or you know all the little image snippets that come from text books?” or “I just got this off the web I don't know where it came” from all that kind of stuff and at the same time they were eager and willing to learn so it was this tension between fear and excitement and so the training took place across two or three training sessions and the last half-hour of each training session was for questions and that's an important component when you train a group of people because the questions will be excessive now after the training I always said you know come to me with any doubts or any questions or anything at all I am NOT an expert but if I don’t know the answer I will go to my expert people and I will try to figure it out. We’ll figure it out together so in that way we learned together and that was a really great lesson to learn bit by bit the confidence grew and what they learned and what I figured out for them was employing fair use implementing fair use is like a muscle the more you consider whether you can use it or not the easier it gets the easier the judgment calls make. And that’s an important component - the other lesson that we learned was watch out for copyright holders who don’t understand the rights they can use and it
can exercise and that others can as well there are folks out there that claim to permission culture as described by Peter before. I’ll give you an example we were challenged a couple of times by copyright holders who were so embedded deeply in in permission culture that you know we sent a permission request under our open license in which we never pay for and they sent back an invoice for you know “you can use it for six months and here pay us you know a hundred dollars” and I replied with “thank you but your reply does not meet the terms of our use I will edit our content accordingly” which was code for we’re going to apply fair use here and they wrote back again saying “can you please explain what edit means” and I replied with “well we’re going to turn to our code of best practices of fair use” and there was this back and forth and the reply was something like this long jargony letter about “if you consider using fair use in the future please consult with us so that we may judge whether it’s fair use” and then I banged my head a few times and got a good had a good laugh with our IP lawyers. We were able to challenge off I would say four or five challenges to us like that with the help of our code and that was because we had this strength of our community and we had a document to point to. The one piece of content that I am most proud of is in a film studies class where we felt before we had the code we published it in 2007 with just print lecture notes and the professor was extremely unhappy and our users were extremely unhappy and then we had the code we published the lecture notes with the clips in full unedited and at the end of each end slate that we add that we add to credit all the content that’s in these lecture notes we put a usual content statement that says some content appears courtesy of their content holders and is not covered by our OpenCourseWare license all rights reserved so it’s understood that these bits have copyright holders that are not ours and they’re not covered and if anybody has a question they can go to our FAQ about fair use that our lawyers helped us write. So we feel covered from head to toe and and it’s never failed us since it came out and we’re really really proud of it.

Timestamp: [28:51]
Patricia Aufderheide: Thanks so much to you both. I think one of the things that’s been so interesting to me about our [next slide please] about both of these initiatives and in fact all of the initiatives is that we just don’t see real pushback from copyright holders we see copyright holders getting educated sometimes but we haven’t seen what people probably most fear which is people getting in trouble. So I really appreciate those stories people like Gordon and people like Lindsey they’re there they’re leaders in their communities and it matters tremendously that they that they did this work the other thing that I think so moves me is what Lindsay said about “the more you do it the easier it gets” because that means that the people on this call are are going to have to be the most courageous and everybody who comes after them starts treating it as normal. I recently hosted a young filmmaker made a magnificent a magnificent film called Valentine Road which is just chock-full of all this news material and I said to her on how did you deal with all that material and she said “oh I just fair used it” I was like oh that’s awesome you know um I was part of the team that created the code of best practices she stood huh and I was so thrilled because like it was totally history to her and for her this was just like this is what you do and that’s where I’m really hoping the software preservation community gets to. I just wanted to let you know where we’ve gotten to so far because even though we’re at the very first stages I think there’s some some real good activity that’s been done you can see on this slide the the signatories who endorsed this code and come in strong saying we are going to promote it means these are all organizations that have through their own networks already begun to spread the word this is besides the lead organization the Association of Research Libraries and of course Peter’s Center at the law school my Center at the School of Communication at American University have also done some some work but these these signatory endorsing organizations of the field itself are very important. We’ve also been
presenting at conferences that pull together people like you I want you to take a good look at that conference list because we need more suggestions of other conferences to start making. Of course this webinar series is part of the outreach activity and we hope that once it’s transcribed and all of the episodes are recorded that you’ll be able to go to tell your colleagues about this as a resource for them. There’s also a little explainer video which you can see on our my website which is you can see the URL right there and maybe on Jessica if you have a sec you can put it in chat and that is that is completely fungible you can move it over to your website anytime you want if it. Krista I know you’re lurking in there did I forget anything? Jessica? Peter? chime in if I if I miss something here.

**Timestamp: [32:58]**

**Peter Jaszi:** Certainly nothing missed one one further story I guess which dates to the Puri in which we were doing the or had done really the code of best practices for research libraries which was a pretty big deal a lot of institutions were involved and the point that that Lindsay made and that Gordon made about the role that lawyers play in the process of implementation in institutional settings was borne out on many occasions then as well and I think we learned something too which you may all want to think about as I as I said earlier the code is a relatively high level document it empowers but it doesn’t mandate any any particular set of practices so every institution has to think about how they are going to use the code how they’re going to translate it into guidance that can be even more straightforward even easier to follow than the code itself guidance that will give various kinds of Lyon employees a process for thinking step-by-step through a fair use decision one of the things that we discovered when we were working with with schools and their libraries to implement the research libraries code is that it’s really sometimes a very good idea to get your lawyers involved your institutional lawyers your associate general councils or whoever they are involved in the implementation process to to call on them as helpers rather than treating them as the the audience or only as the audience for the for as an audience for persuasion there was one school where we got the library people in the general counsel together and and we began talking about how this general code was going to be locally implemented and the lawyers got so enthusiastic that they basically said, “oh let us do it” and they did it all themselves and they did a great job they probably did a boulder and and better job or coming up with implementing guidance than the librarians themselves would have done had we waited had we involved them only in a much later stage I’m not sure that they would have been as cooperative. Ownership matters even when you’re dealing with gatekeepers I guess that’s all I would I would say about that experience

**Timestamp: [35:58]**

**Gordon Quinn:** yeah I mean I think that’s a really good point Peter and all these years later I I can’t remember how long ago was we published the documentary filmmakers statement but two weeks ago a group of producers at the local PBS station said can you come and talk about fair use at our station and so I went up there and there’s like about 10 producers in the room and and one of their lawyers is there and working with the clips and you know we talked through some examples and and just the fact of doing that because the lawyer was pretty on top of it he kind of knew what you know he was trying he was there trying to be helpful but by having that discussion even all these years later I could see it strengthened everybody’s backbone and that was partly why they wanted me to come up there you know to be saying we’ve been doing this since the statement was published we’ve never had a we’ve never even been threatened over a fair use claim. we threatened over other things but not that.
Pat Aufderheide: I’m sorry yeah

Gordon Quinn: I just think that it’s you know you have to think of it yes you need to exercise it and the education process is ongoing

Patricia Aufderheide: so on I want to point out that that Lindsay Oh Lindsay you have a point to make sorry

Lindsey Weeramuni: hi I just want to Peter what you said triggered something in my mind we are not setting policy with these codes we are creating a best practice and the mileage varies from institution to institution so these payments are not legal documents they are suggestive and everyone’s employs them implements them in a different way just as fair use the four factors are not a formula they are like a road map it’s a guideline and one does not have to meet all four factors to decide whether the use is fair so you know if that’s if that’s a albatross around your neck set it free.

Patricia Aufderheide: so thank you I’ve moved to the next slide because we’re in the phase of the of the webinar that we where we turn to you. And Peter there are a couple of questions from people I “can you see the chat box?” if you can’t I’ll read them to you but well while you’re on what you’re looking let me just take a look at this list of things that you could do to let people know about this and let me know what are we missing here if if you would like to have reassurance more information on this, better understand it, where would you like us to be? we actually have a wee smidge of travel budget and some of our time for the next few months to do this with you after that you’re on your own so this is like a great moment to ask us to do things. this this moment rarely happens where people will you know you can get other people to do things for you for free so seize it. all right and you could either unmute or or write in your comments. Peter were you able to access the chat? Okay so I’m gonna tell you there’s two questions. One: Drew says, “let’s say that for some reason a copyright holder won a case what’s the worst case scenario for libraries, museums and archives other than a waste of time preserving this software?” the other question is “how does this work in international distribution for filmmakers?” and I think it’s possible for you to address those pretty quickly and I hope that if when you’re after you’ve done that people are going to tell us how they want to take advantage of our time.

Jessica Meyerson: We also have a third question which I can bring up after Peter has the opportunity to address those

Patricia Aufderheide: Sorry I didn't see that. yes okay

Peter Jaszi: so let me let me do them in a reverse order and talk about international filmmaking as well because that allows me to give a little plug for next week’s final episode of the
webinar which is going to be about the international implications of the code of best practice and it's going to talk a little bit about the variation and the way in which national laws around the world deal with copyright limitations and exceptions and how practitioners who have worldwide connections or parts of global networks can begin to think about navigating that space. In the filmmaking world, it actually turns out to be easier than in most of the the other fields for two reasons: one is that in most of the rest of the world even even the the idea of litigating about these issues is so foreign as a practical matter if problems come up they're just sort of there worked out and negotiated informally but the other and even more potent reason is that in general when US filmmakers get insurance for their films which they need to do if they're going to distribute them as broadly as possible domestically that insurance also gives them protection against claims a very copyright related claims worldwide so it hasn't proved to be a problem in particular for filmmakers. I actually think it's a little more complex in other domains such as software preservation hence our decision to to do a separate topic on it next time. The other question is how bad could it be well it's a little bit hard to figure out in this how well I mean back up it's a little bit hard to figure out why anyone would ever choose to litigate against a software preservation institution given the the very small benefits that they could imagine ever deriving from such litigation and I think both a number of people including Matt and Gordon Lindsay and they have suggested that by and large in the whatever it is now close to 15 years that we've been doing this stuff there just haven't been any lawsuits against people operating within the statement of best practices for filmmakers or within the OER code or within any of the other codes so it's kind of hard to speculate. I don't think it's going to happen in all likelihood but if it did then I suppose the worst case is first as described that you you might lose your work you might be subject to an injunction I suppose I'm making this up and it seems so unlikely to would require you to take material down and I suppose that some kind of nominal damage award you know symbolic or rather than real is also possible but we talked about this a little bit earlier on and I said them what I want to repeat now and that is that that by and large because the only benefits that flow from the software preservation work are diffused non monetizable public benefits there just isn't any basis on which a really sort of strong damage award could be could be promised. So I think the exposure is rather low and I think if passes per long which is certainly sure but if it turns out that history is a guide I also don't think the risk of that worst case is appreciate.

**Timestamp: [45:25]**

**Gordon Quinn:** Peter could you in the in our field I know there is also an international treaty and if I understand it correctly and when I speak in other countries I say look your countries your democracy you must have some version of fair use but your law may be different from our law but there is this treaty so that when we broadcast a film and this is I think why we can get the insurance basically all the signatories of that treaty are saying well if it flew in your country then we'll accept it to something some version of that it's some version of that.

**Timestamp: [45:59]**

**Peter Jaszi:** I think that's right I don't know whether I would go so far as to say that that it was mandated by treaty but I think the broad understanding is that the the law that really counts especially in the case of for instance let's say internet distribution that the law that really counts the most law the source country I'll talk about this a little more next week and happily for us in the case of of software preservation projects even those with global reach the ones we're most concerned about are the ones that have the u.s. the the home of fair use as the leave source country jurisdiction so I think that's right.
Jessica Meyerson: maybe a slightly different direction from the previous two questions but but certainly just as important is thinking about how to reach out to different audiences that are doing this practice in different contexts. So “what are some of the challenges in reaching out to either filmmakers, software archivists or even online content creators that are outside the academic or association sphere.” That's a great question Victoria

Lindsey Weeramuni: can I ask for clarification on reaching out to what end what is the goal for the outreach

Jessica Meyerson: yeah Victoria is that to inform and to make sure that cultural heritage institutions outside of those two spheres are still able to apply the code

Lindsey Weeramuni: oh well I just would share the resources that are online and share the anecdotal experiences and successes that we have had I would share the successes that other fair use practitioners and awareness that I have about codes that haven't been implemented that I have known about I would just I just talked it up you know and remind them that fair use is for everybody

Gordon Quinn: and generally you will find I think you know the bigger the institution the more effort you have to put in to changing your thinking and I think it probably varies from field of field we’re independent not-for-profit and Peter knows to this day I come to him for our fair use letters so that we can get insurance and the reason that I they do that is that our own lawyers are too conservative to actually give me the letter they're a big international firm they do a lot of pro bono work for us and they're like you know yes we agree with you I understand and I've been on panels with a guy but he can't bring himself to actually write the letter and you know and I will say to me said well there is some risk I said we’re in a risky business where documentary filmmakers and all the other risks that I take this is de relevant you know but so it's you know and I have noticed that sometimes with universities in places like that too I’ll just give you a quick anecdote because you're on from MIT a Pat and I were on this panel I think maybe it was like 15 years ago when we first published the statement and someone in the audience and I think it relates to this online you know professors courses and things oh yeah [you know what what Lindsey does yes yeah] and so do you remember this Pat somebody asks they said well we have this problem we filled all these interviews with these professors and the university is saying we can't use them we can't put them online because what's in the background behind professors it’s like a shelf of books and those books have titles and the university is telling us because it's a trademark title we can't put it online or we were just like flabbergasted

Pat Aufderheide: I think Lindsay's been hard at work changing that stuff.

Lindsey Weeramuni: I think that was a long time ago before I was on board
Gordon Quinn: yeah it was just amazing I'm sorry go ahead

Peter Jaszi: what I was gonna say well you think let me jump in for a second and address the question and that is the the software preservation of Code code is of course designed for institutional users, for for collections rather than individuals operating as individuals, but it's designed for institutions of every kind and size and variety that's a very broad definition. and so I think part of the answer to the question of how you get the word out as you think about what the affinity organizations are what what places do people even very small entities that do this work go along with their their big University based counterparts and you think about what meetings people from across the field attempt and you think about what informal networks what was Sir what what other webs of connection may exist among and between practitioners even though they aren't necessarily visible about outside the field and you spread the word using all any and all of the above

Lindsey Weeramuni: I just remembered - when you're talking about risk, oh first of all all of those lawyers that you refer to Gordon you're gone now we were so successful in getting for this the code we have now [mit has great lawyers now] awesome when you're taking into consideration levels of risk risk never goes away you just have to determine what level of risk is right for you and we make that call especially around fair use all the time because you have to remember sometimes fair use is not appropriate it's not the right call and if it's not it might be because it's too risky it might be because you know the pendulum weighs against the argument for it for whatever reason or that the risk is just too big you know when we're making copyright decisions about our third-party content all the time we can leave something in because it's a fair use use and we think the risk is really really low all of the clips in that films Studies course are extremely low risk to keep in there I would have pulled my hair up for that lawyer who said that thing about the books on the shelf what?! that's crazy town yeah um but like that's an example of low risk and that lawyers should be ashamed of themselves and go back to law school anyway red and

Peter Jaszi: I would just add one thing that's such an important point that Lindsay has made and it's what I want to suggest is a kind of a process issue and it's one that comes up sometimes when you are dealing with insert not not with spreading the world the word out through the world but internally with trying to persuade various levels of gatekeepers that they should pay attention and that is that of course the final decisions use are not to use are going to be in involve risk considerations and I think there are I just have two caveats I want to offer one is that and this is especially true talking to lawyers and administrators I inverted to it before you have to remember to point out to people that there are risks both ways that there are some risks of doing things but then they were also risks of not doing things that you won't fulfill mission that you won't make the film you want to make that you won't accomplish the the the tremendously important goals of MIT OpenCourseWare or that you won't manage to preserve some rare and fragile old business software program that the world is gonna need 20 years from now so there are risks on both sides it's just that one set of risks you can you can sort of imagine in in monetized terms maybe even though sometimes I think those imaginations are are more fantasy than real and then there's another set of risks which which are are are externalities in effect and don't don't respond to monetization but they both count that's my one point my other point about combining thinking
about risk we're thinking about fair use is that I think there is a an important sequencing issue
somebody sometimes you run into people who say all well this is just all about risk it's nothing but
risk so let's just forget about talking about whether something is or isn't fair using go right to the
risk analysis because after all at the end of the day the risk analysis is going to be important I
am very reluctant to do that and I'm reluctant to encourage others to do it because it's better in
my view to do this in two stages: 1) to say, "okay let's figure out what our rights are here fair uses
our right there's a big consensus about what it is in our field we should be able to figure out how
strong our position is how well within what we think our rights are we actually are positioned” and
then 2) you can think about risk and you can think more productively more sensibly and often I
think more liberal-mindedly about risk if you've done the legal analysis first so I'm very much in
favor of breaking it down into a two-step process let's apply the code let's figure out where we are
let's talk to worry and as lawyers about the legal issues if we have to and then then we'll think
about our own risk based judgments

Timestamp: [57:45]
Jessica Meyerson: Thank you so much, Peter and thank you so much to Pat and to Lindsay and to
Gordon for joining us today I feel especially empowered after today's episode it's clear that there's
a lot of work that we can do that's entirely tractable and it really is about that certain that shared
sense of ownership and asserting those user rights so the conversation continues as far as the
software preservation community most certainly and we will follow up. I just want to reiterate on
the previous slide that Pat said to look out for a survey that will be coming after next week's final
seventh and final episode of the webinar series and we encourage all of you to please respond to
that survey so that we have more information in terms of the research team and the software
preservation network about how we can get all of you engaged and empowered to apply the code
and to educate your colleagues to apply the code so with that I'll say join us next week same time
same place we're seventh and final episode in this series international implications as Peter
mentioned before this will be featuring Ariel Katz from University of Toronto and possibly another
special guest that we have lined up for you next week's episode will be facilitated by Peter Jaszi
the Washington School of Law at American University thank you all as always for joining us today
and we will see you next time. Thank you.