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

Episode 1: Code of Best Practices for Fair Use in Software Preservation - How & Why?

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

Episode 1 Transcript

Jessica Meyerson:

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

This is going to be an overview and round table discussion with members of the Code of Best Practices research team, which include Patricia Aufderheide, university professor in the School of Communication and founder of the Center for Media and Social Impact at American University. Peter Jaszi, professor emeritus at American University Law School and founder of the Glushko Samuelson Intellectual Property Law Clinic, and its program on intellectual property and information justice. Krista Cox, director of public policy initiatives at the Association of Research Libraries, and Brandon Butler, director of information policy at the University of Virginia Libraries.

Just a little housekeeping before we get started. I would ask for all of our attendees, and we're so grateful that you're here, just to reiterate. We ask that you all turn your video off unless you are presenting or speaking, and this is to preserve bandwidth. Also, please mute yourself if you're not speaking. This will improve the quality of the recording and aid in voice-to-text transcription. If you have any questions during the course of the presentation and discussion, please do type them into the chat box in your zoom control panel, and once we open up the audience Q&A, we encourage you to continue submitting questions in the chat, and we will do our best to address the answers in the order that they were submitted, questions were submitted.

Any questions that are not addressed by the end of the episode will be recorded in the chat and addressed during either a subsequent episode or on the website once the recording and transcript have been posted. And with that, I would like to hand it over to Brandon and Krista to kick off our discussion.

Brandon Butler:

Oh, hi. Greetings from the sun-drenched fifth floor of the Alderman main library and beautiful Charlottesville, Virginia. I see Krista is coming in loud and clear from ARL. Hi, Krista.

Krista Cox:

Hey, everyone. We've got some sun here too, although it's very windy outside.

Brandon Butler:

Yeah, I heard trees falling in my neighborhood yesterday. Those are not highlights from the code, but now the weather in mid-Atlantic USA. We're really excited to kick off this series of webinars on the Code of Best Practices in Fair Use for Software Preservation. This is just a wonderfully exciting project. We're thrilled to have SPN as a collaborator with us on this. The power and the expertise of this network has just been crucial for making this possible. And so, to the extent that this code becomes a useful tool for you all, we'll be thrilled because we've learned so much from you and we've had so much fun getting to know you. So, we hope that we can introduce the code to you over the next several weeks. Pat, I think, is controlling the slides. I think we're in ... Move on to the next one.

The first thing we wanted to do at the very beginning is give you the [inaudible 00:05:09] version of what's in the code, and what's the subject matter that we talk about in this particular code of best practices. Later on in the presentation, you'll learn more about fair use, generally, from Peter Jaszi, and you'll learn more about codes of best practices, generally, from Pat Aufderheide. This is sort of a getting-oriented webinar where, again, we'll give you a quick preview. Each of these

situations is going to get a much deeper dive in a future webinar. This is just to let you know where we're going to be headed, and then you'll know what to expect. Before I get into the substance of the first principle, I wanted to also make two quick overhead, overarching notes.

One is, if you look at the code, you'll see that there are two assumptions about what kinds of work is being done in each of these situations. One is that this is always work in support of research, teaching and learning. So, if you read about George R. R. Martin writing all of his books on vintage word processing software and you thought, "Well, that's really cool. I'll bring it back and sell it again," this isn't about you. Right? This is for all of our brothers and sisters in the archives, libraries and research collections, museums, the folks who are saving this software so that people can go back and study it and use it for purposes of information retrieval and understanding. So, that's the first scope note.

The second is, throughout these discussions, the norms that we surface always assume that the thing that you're working with is out of commerce. That is, we're not talking typically about using software that you can still go out and buy somewhere. We're talking about a software that needs to be preserved precisely because there's no way to get a new copy from the people who are authorized to sell you a copy. With those two assumptions under our belt, I'll do the first principle and then Krista and I will just go back and forth real quick. Next week, we will go deep on this first principle and the second principle. The first principle is about accessioning, stabilizing, evaluating and describing digital objects, in particular software. This is the first thing you do, right?

You have a box of media disc, floppies, hard drives, whatever, and you've got to figure out what's in there. Can it still run? You need to make a record of what it is. This first principle talks about what's permissible as that first step in the workflow. And the other overarching note I should make is that these principles follow a preservation workflow from the beginning to the end, or from the first most inner recesses of the institution and ever further outward in terms of access and availability. So, that's the pattern we'll be following. And so now, Krista can talk about principle two, which we'll also talk about next week.

Krista Cox:

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

Brandon Butler:

Great. The third principle is when we start talking about access. In two weeks we'll start talking about providing access to software for use in research, teaching and learning. This principal in particular focuses on providing access to users affiliated with your institution. And that doesn't have to be local access physically, it can be remote access, but it's access to users who have a direct connection to your

institution. This is, ultimately, we heard over and over again that preservation is for access, and if you're not making something accessible, then the whole enterprise can come into question. So, access was really important, so we thought it was really important to try to help address that situation. And now we'll go to the next. Let's go.

Krista Cox:

And of course, this follows again nicely with the one that Brandon just mentioned because this is also about providing that access, and this is something else that we heard over and over again. So I was really excited that we were able to describe this situation in the code, and that's providing broader network access that shared across multiple collections in institutions, because this is already the way our cultural heritage institutions work. They want to combine ... I mean, no institution could possibly collect everything themselves. And so, this is about sharing those resources and working with other institutions.

Brandon Butler:

Great. And then finally, we have sort of a ... The fifth principle falls outside of that continuum we just described. So, principles one through four follow a piece of software from ingest all the way to network access across a group of institutions. And then the fifth principle deals specifically with files that are in source code, because the folks that we spoke with from this community told us that files in source code; human readable, reusable content, raised separate issues that deserve their own treatment and a separate principle. And so that's where we end up in the code, is with this fifth principle about source code. Now, to understand

how the code works, you need to understand, I think, the key advantages of a code of best practices as an approach to fair use.

The first is that a code of best practices is a guide to reasoning and not a set of rules. And so, when you Google fair use, what you often will find is, I'm afraid a lot of bad information that is expressed in terms of hard numbers, rules of thumb about how many words or how many pixels can be in your fair use file, these arbitrary limits and metrics that can really trip us up. Those arbitrary limits and metrics are often set by people who are outside of a user community. They're dictated to you by publishers or industry representatives. The [inaudible 00:12:32] best practices come from within the community. They're based on a professional consensus that's grounded in the values and the norms, and frankly the needs of the community. So, the codes of best practices aren't negotiated with copyright holders.

They're not a kind of minimum standard that they're promised they won't sue with about. Instead, they are a statement of what's best. And so, the codes of best practices intend to really express the values of a community rather than something that's imposed or negotiated from the outside. For each ... Here, Krista, would you like to talk about the structure of these principles?

Krista Cox:

Absolutely. The way the code is structured is, there is a description for each of the situations that Brandon and I mentioned, and it describes the type of thing that the principal refers to. So, as I mentioned earlier as an example of documenting that software and it's original operating environment, it'll give some examples of the

type of things that we heard from people in this community, and then it states the principal. And then it goes through a series of limitations; things for people to consider as they determine whether to rely on fair use and how to rely on fair use. Because oftentimes, things like donor agreements, or how broadly something is shared and how broadly you provide access to it can impact the way we rely on these principles and rely on fair use.

Brandon Butler:

All of this stuff is grounded in something called fair use, right? We keep saying these words over and over again. And we know a very basic thing about fair use. Whatever it is, it's a right to use copyrighted material without permission or payment, sometimes, right? Under some circumstances. And when you try to puzzle out what those circumstances are, you're often pointed to the four factors in the law. And when you try to think about what those four factors mean without any other aid or input, you end up looking like all these poor folks from stock photos. Confused, right? Frustrated, annoyed, because the four factors don't tell you enough. And typically, people who talk to you about fair use don't tell you enough to actually help you make decisions.

That lack of knowledge about how fair use actually works leads to, in many communities, and we found it in this community, it leads to a permission culture where projects are afraid to move forward without express permission from a copyright holder. Or if they move forward, they move forward very in the dark, right? People do stuff, but they don't talk to each other about what they're doing. It's hard to develop good norms and practices because you're afraid that what

you're doing might not actually be safe. And so, you're unable to talk to each other about what you're up to.

Krista Cox:

I think that there's also, sometimes this myth that's perpetuated around fair use, or as Brandon said, kind of this bad information that fair use is super unpredictable, it's only on a case by case basis. But what this code was intended to do was to solve some of that by saying, "We have these four factors and it's actually a lot more predictable than some people think."

Brandon Butler:

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

Jessica Meyerson:

Peter, you're muted.

Brandon Butler:

Oh, I think you're still on mute, Peter. Can you reach down and get your microphone? In the bottom left corner. Or Jessica, can you un-mute Peter?

Jessica Meyerson:

One moment. Peter, try now.

Peter Jaszi:

Thank you. I appreciate it. For some reason, I couldn't find the un-mute button on my screen. Just as Brandon began with a couple of premises for his discussion, I'd like to do the same. There are two very general points about fair use that are probably worth making before we get any further into the particulars, because these two points, at least, are very, very clear. One is that when you're engaging in fair use in one of the categories of activity which are sanctioned under this legal doctrine, then you are not engaging in copyright infringement. In other words, sometimes you hear people describe fair use as though it were infringement that was tolerated somehow, or privileged somehow, but still infringement.

And the law is extremely clear that fair use, whatever it is, and we're going to go further in a moment on the question of what it is and how you know, is a non-infringing activity. Now, that's important. Here's another important premise. In the Copyright Act, which I'm sure some of you are closely familiar with, and others may have had the good luck not to have required such familiarity so far, there are some provisions other than the fair use provision that deal specifically with issues of preservation. Unfortunately, for the soccer preservation community, those specific exceptions for preservation don't have much, if anything, to do with software. Happily for this community, it doesn't matter.

Because another thing that is clear beyond argument about fair use is that it exists to complement and supplement whatever specific exceptions relating to preservation you can find in Title 17 of the United States Code. So, fair use is not infringement, and fair use exists in addition to … it's a supplement and compliment to specific preservation exceptions. With those two things out of the way, having talked in effect about what it isn't, now I'll try to talk a little bit about what it is. Perhaps the first thing that needs to be said about this safety valve doctrine is that it's an old one. That the idea goes back, we're not sure how long, into the 18th century, perhaps. The term as courts in the United States began to use it, goes back at least to 1841.

It's basic, it's structural, it's at the heart of copyright doctrine. It's not a later add-on. It's an integral part of the whole scheme. And that's true, even though it didn't actually get written into the statute in so many words until 1976. Now, why is fair use such an old, venerable structural part of our copyright law? It's because it directly reflects the values that are baked into our copyright system as it was conceived by the guys who wrote the constitution, and the first and every subsequent Congress, and all the courts that have had an opportunity to think and write about the issue over the years. Many people understand copyright as the right to control the use of a work after it's made, and that's certainly part of it. But in the US, we don't have copyright to reward creators or investors simply because somehow, inherently they deserve it.

We have copyright because we assume that giving limited authority over works to those who create them will encourage the production of more new material to promote science and useful arts, as the constitution puts it, for the benefit of all. This is an instrumentalist view of copyright, it's not a natural rights view of

copyright, and it's a really important origin story because it flows through everything we know, everything we have decided in the last several hundred years about the specific ways in which copyright doctrine functions. That includes fair use doctrine. So, copyright law has two major modes. It provides in two different ways, for incentives to the production of new cultural value. The monopoly is, of course, one of those modes. Gives innovators some protection in the marketplace.

The other mode of incentive is the one that speaks to the activities of what might be called follow-on creators. New makers, scholars, teachers, activists and others. And this is the aspect, or these are the features of copyright law that say, "Sometimes, new makers don't have to observe the niceties of copyright law. Sometimes they don't have to get permission from others in order to engage in their valued activities." These two modes of encouraging new creativity, giving rights to creators, and providing access to follow-on makers have to be imbalanced. Because without such imbalance, the system is going to tilt in one direction or another. Now, in the old days, and especially before 1976, there were a bunch of features of copyright law that had the effect of achieving balance by limiting the copyright monopoly, copyright lasting a shorter time.

They had to be renewed after 28 years, the scope of copyright protection was relatively narrow. Over time, most of those limits have become much less important as protections for access on the part of follow-on creators. And another doctrine, the ancient and venerable doctrine of fair use that I described earlier, has emerged as being increasingly significant. And then, as I mentioned a moment ago, in 1976, finally, after a lot of strong and effective advocacy from the representatives

of the library community, this doctrine which had been around in the case law for a long time, was finally written into the statute.

And what the drafters of that statute, what came to be called the 1976 Copyright Act, tried to do was to reflect or incorporate in their provision, in the Section 107, what they understood to be the considerations that judges had been using for at least a century in order to deal with these fair use cases when they arose. That took the form of the famous, or infamous four factors. The considerations which whatever else they might look at, courts were supposed to take into account in deciding whether a challenged use, one that a copyright owner thought should've been licensed but that the user insisted fell outside the realm of that copyright owner's control, was or was not fair use.

And I think this was a good faith attempt on the part of Congress to help, both courts that were going to have to continue to apply the doctrine case by case, and also users to understand better what the actual scope of fair use rights might be, and it could have been successful. It wasn't. For a variety of reasons, of which the most important may be that this list of four factors, which is unweighted and unranked, ends with a factor, the market effect, which is the most ... excuse me, the market effect, which looks by virtue of its position like the most significant factor we had after 1978, a really bad decade. A decade in which courts were extremely constrained and everyone else in the copyright system in effect took their cue from those courts, and fair use was widely understood to be extremely limited in its scope of application.

Well, in the early 1990s, that began to change. And a shift took place, a very rapid shift, a shift that really was in substantial part accomplished by the time the US

Supreme Court decided the case of Campbell against Acuff-Rose in 1994, and the very restrictive mode of analysis the courts had been using up to then and that people in various practice settings had necessarily, looking at the court decisions, adopted internally for their own predictive views, is what I'm about to do, will it be or won't it be a fair use, that was very quickly swept away. And the courts instead began with leadership and guidance of the Supreme Court to engage in a much more thorough interest balancing as part of their typical fair use analysis.

And they also came to recognize that fair use was not only structurally essential to the copyright enterprise, but that it also represented the channel by which First Amendment free expression values came into when were given weight in the copyright system. So jumping ahead to the present day, we've had 25 years or so of consistent and prominent judicial decision-making about fair use in this new mode. The mode that was adopted by the Supreme Court in 1994, and these days, as the slide suggests, judges who are confronted with fair use cases take all of the factors very seriously. And in particular, they pay a lot of attention to the first fair use factor, which is the one that asks about the purpose of the use.

And when they ask about purpose, whether or not the use is one that has a purpose that should qualify it or tend to qualify it as a fair use, the specific question that they ask is whether the use is being done for a transformative purpose. This is a new name for an old idea, it's an approach that strongly favors fair use in situations where the follow-on use has a purpose that's different and distinct, and adds some social or cultural value. The term is an important one to parse. It's a legal term of art. It's being used in a special legal, rather than a general dictionary sense. That's important because the cases teach us that the re-purposing that

makes a purpose transformative, or the intended re-purposing that makes a purpose transformative can have a lot of different forms.

Sometimes it may involve modifying the original work, but in other situations it will entail putting that work into a new context while maintaining its content and character as faithfully as possible. That latter idea of transformativeness is of course a very clear one in areas like archival practice, and an important one. Here, legacy objects are being copied and reproduced for research and study purposes, new purposes, not so that they can be used to displace their commercial counterparts to perform the functions for which they were originally created. So that's transformativeness. We'll have a lot to say over the course of the weeks to come about the specific applications of this general concept at various stages in the preservation workflow.

The second thing that judges almost always ask about fair use cases these days, is whether if the use is a transformative one, it's an inappropriate one in terms of quantity or quality, in terms in other words of amount. And that determination of appropriateness or proportionality, as when Mike put it, is can't be made in a vacuum, is of course made in relation to the ascertained transformative purpose. So if I'm writing an article about a poet and I want to quote a few lines from a long poem, that may be fine. If my purpose is to explicate those lines, if I want to attach the whole poem as appendixed by article, that may or may not be appropriate. But of course, sometimes the appropriate amount to use to fulfill a new transformative purpose is the work in its entirety. And that is yet again an observation about fair use very clearly established in the case law.

That's quite important in thinking about the application of fair use to archival practice. There are other things that also come into the judicial consideration of whether or not a particular use is fair, and that also should be considered by would be users when they're making their own perspective decisions about whether to proceed with particular uses. And of these, one of the most important is whether or not there is, out there in the field, documented evidence of what the practice community, the professional cadre of which the individual user, or would be user is a part, thinks are good practices. Accustoms, if you will, around which the field has come together and that it believes are appropriate in the fulfillment of whatever the professional goal or mission of these practitioners may be.

Or, sometimes the practices that even though they have not yet emerged as fully customary, the field nevertheless believes would be essential to achieving the mission that its members share. Which leads us then to a question. We've been 25 years with this new understanding of fair use. What the courts have had to say is extremely consistent and extremely liberating in its implications. It's stable, predictable, and I might even say user-friendly doctrine. But in practice, not all use community, not all all professional communities, not all groups of practitioners who are potential beneficiaries of this change in judicial approach have yet received or internalized the good news. Perhaps that's because, as Brandon suggested earlier about the … because of the amount of toxic mix of information that circulates online and elsewhere.

Or perhaps it's simply because the doctrine, even as it has been made more predictable in recent years, still seems too amorphous when it is matched up against a risk analysis. And it's that possibility, that latter possibility, that has generated the project of which this go-to best practices is a part. And I'm going to

turn it over now to my collaborator in that project of the last 15 years, Pat Aufderheide.

Patricia Aufderheide:

I'm going to proceed, but somebody should tell me if it's not working on. People worry when they think about fair use, because they see a certain kind of risk. They see legal trouble, they see lost relationships, they believe they might have reputational damage. They talk about legal trouble more, but actually what we discover is most people are worried about lost relationship. Yes? We always like to point out that there is always some legal risk associated with using your rights, and that's true with any rights. But there's also a mission risk associated with failing to do things that you really find core to mission, and you really have to balance both risks. That's where understanding the very limited risk [inaudible 00:37:54] fair use is very helpful. That's why we created best practices codes in conjunction with fair use with communities that employ fair use regularly.

The first was documentary filmmakers in 2005. They were very, very skeptical that it would make any difference at all to have a fair use code. They however discovered that there was a lot of change, which I'll tell you about. We went on to work with communication scholars, we worked with poets as Peter has told you, we worked with librarians, including librarians like Brandon and Krista. We worked with a variety of organizations, including people who did OpenCourseWare, film scholars and dance heritage archivists. What happened was that people moved from no to yes. Documentary filmmakers discovered that they were now able to get work that

employed fair use on the air because insurers now agreed that the risk was extremely low. Librarians were able to put digital collections online.

Scholars were able to publish new work uncontroversially in journals that had traditionally only accepted permissioned materials, and archivists were able to put up digital exhibits that are permanent exhibits. What we discovered in short, is that practice makes practice. That fair use, when it's used, expands what is possible for people to do. And that's why we're so excited to be working with you guys, and here are some places where you can get more material. We will also be putting these URLs with Jessica's help up into the chart for you. But they are from all of our organizations. If you are a SPN person, then you should go to SoftwarePreservationNetwork.org. And, of course, if you wanted to, you could always read Peter and my book, if you just feel like this was not enough.

Okay, enjoy, and if you feel like you want to share this PowerPoint, you only want to share a part of it, employ fair use. Thank you.

Jessica Meyerson:

Thank you, Pat, Peter, Krista and Brandon. Well, we're going to go ahead and invite all of our attendees today to ask some questions of all of you while we have you together for this kickoff episode. Just a reminder to everyone to be sure and type your questions into the chat box. I've been monitoring them. I haven't seen anyone paste them in quite yet, but I would really recommend and advise all of our attendees to take advantage of having Pat, Peter, Krista and Brandon on the call, and to share your own experiences about this as we kick off these discussions. Certainly, this Q&A might inform where we focus our time in subsequent episodes.

So, please do, share your thoughts and questions. And while we're waiting for people to put questions in the chat, I have a follow on from Pat, your discussion of how other communities have adopted the code.

Jessica Meyerson:

What have you found have been some of the strategies, or and/or challenges that some of the other communities have faced? Can you talk a little bit more about the process of cultural adoption of the code? Which I know you'll describe in much more detail with some colleagues of yours that have participated in other codes being written, but can you speak to that briefly to give us a sense of what it's about.

Patricia Aufderheide:

Sure. And just to let you know, Zoom is just refusing to let me use the video, so I'm just going to be stuck with audio. That's a great question, Jessica. This is where having trusted partners like SPN is absolutely critical, because people look to the anchor institutions in their communities for legitimacy. Some new thing appears, such as a code, and somebody has to say, "Yes, we're using it, and we're using it to do X." So, I think finding … having SPN be able to tell people about that is great, and one of the things that's going to be super important is for people who are on this call, and other people you may know, to report to SPN when things change in your institutions, when you do things differently because you were able to use the code.

Because until then, what people may be doing is employing fair use, more or less quietly, and thinking that they're getting away with something, and not realizing that they're actually completely legal. Or they might be avoiding taking on a big

project because they're not really sure how much of a hassle it's going to be. And when they hear from some of the people they really respect in the community, they're going to feel much safer in that decision. So, we find that the first person has to be a little bit courageous, but after that it becomes increasingly what you hope it will always be, which is that you shouldn't need courage to use ordinary rights. And that's our big goal for the code. But certainly, having your trusted legitimizers at the beginning is extremely important.

We're also, Jessica and I, are conducting a survey review and we really hope that you all take it because it'll provide us with some baseline information on what you need in order to circulate this code more effectively in the community.

Jessica Meyerson:

Yes. Ditto. Yeah, thank you for that, Pat. Everyone, please do keep a lookout. Again, that documented emphasis on one of those slides, documented use, is really crucial to the continued expansion of the code. We have a couple of questions in line for Pat, Krista, Peter and Brandon. This first one, I'm going to hand off to maybe maybe between Peter, Brandon and Krista, you might want to touch on this, and certainly we'll get a future episode that will be really focused on this with Jonathan Band and Kendra Albert. But can you speak quickly to how the DMCA affected the overall concept of fair use as it relates to software preservation? And this is from Mark Myers at the Texas State Library and Archives.

Brandon Butler:

Since Peter was most recently engaged in this stuff, maybe I'll give him a break and I'll jump in to this one. And Peter and Krista both can add on, because they've both got lots of experience with this stuff. The DMCA is a complicating factor for all fair uses that involve digital media, because the DMCA creates this extra right. It's not really quite copyright, we sometimes call it para copyright, and it sits on top of copyright. There's all this stuff you got with copyright, but if you're very clever and you also put a digital lock of some kind on your media, then we'll give you an extra right that says, "Nobody gets to crack that lock. Nobody gets to make a hack that they can share, and no one gets to use that hack in order to crack digital locks."

Fair use is not [inaudible 00:45:44] to the DMCA in some circuits. In other circuits, maybe, and there's enough uncertainty out there to leave everyone scratching their heads and wishing that they could be more secure about this stuff. What that means for software is the same thing it means for everything. It means, when you're dealing with something that has a digital lock on it, you have the fair use question that tells you, "Do the core principles of copyright allow me to do what I want to do?" And if it's fair use, then the answer will be yes. But then you have another question, which is, "If this thing has a digital lock on it, can I circumvent the digital lock?" And we find out whether we can circumvent digital locks by looking at specific exemptions that are granted.

There are some throwaway, crummy, totally worthless ones that are in the statute. I'm trying to be objective and quite close to the best. There are some really worthless ones in the statute, but what we really have to do is every three years, we go to the copyright office and we ask for special exemptions for uses that … We have to show they're lawful. So we have to have a fair use argument, or some other kind of argument, but usually it's a fair use argument, and then we have to go to the

copyright office and say, "This is a lawful use, but we're being prevented from doing it because of the DMCA." The good news is, we did that last year and we won. When I say "we" there, all credit goes to the Harvard Cyberlaw Clinic, and Kendra Albert, Chris Babitz.

And there were two different teams of two students a piece who pushed this thing across the goal line, with help also from Krista, Jonathan Band. A lot of our friends in DC helped with that petition. But now there is a DMCA exemption for software preservation and it's quite broad. It's a very nice exemption. I'm very proud that we're able to get it, and the Cyberlaw Clinic has a guide to the exemption, sort of the preservationists guide, because these exemptions are written almost as if they didn't want you to use them. And so, it's really nice to have a translation from copyright office into English. The Cyberlaw Clinic did just exactly that for you. So that's the relationship, and we'll have an entire episode where we get into much more deeply into that, three or four weeks down the road. So, more to come.

Jessica Meyerson:

Yeah, and we've got a couple more here to follow on from that. I'll mention too that the link to the guide is now in the chat, and all links that Pat pointed to with her last slide in the presentation will be made available to everyone when we post the episode to the website. So the second question we have is from Sarah. Do you see a difference between a true fair use analysis and a more commercially-minded risk analysis? Are they the same?

Peter Jaszi:

Can I grab that

Brandon Butler:

One for Peter, yeah.

Peter Jaszi:

It's such a good question. The answer is that they are distinct and interrelated, and that any professional, including any software preservation professional, who wants to take advantage of fair use needs to understand and to act on that distinction. Fair use is a legal question, as Brandon and Krista mentioned earlier and as I tried to reinforce. It's gotten quite predictable over the last 25 years, and the code of best practices here, as other codes of best practices that Pat described elsewhere have done is designed to make it even more predictable. Risk analysis is an activity that is undertaken by individuals, or more typically within institutions, and the basic question is, how much trouble can we get into if we do this, and is it the kind of trouble we want, or a kind of trouble we want to avoid? So it has commercial overtones, it may have reputational overtones.

It's an absolutely commonplace and necessary activity, and different institutions do it differently. Different institutions have different levels of risk tolerance. But, you can't do good risk analysis about a question involving a copyright-regulated activity, like this one, without first having a good understanding of what your legal rights are. In other words, the clear understanding of your legal rights, and to be clear, fair use where it applies, is a right. That understanding has to proceed risk analysis, because you can't make a judgment about what is at stake in the use without that

as an input. It's not the only input, but it is one input. And that leads me to another observation, and that is that one of the things that you can do with a code of best practices like this one, is that you can use it as a tool to try to influence risk analysis in your own institutions.

If you've got a supervisor, or a general counsel, or an administrative overseer of some kind who feels very risk-averse about all of this apparently difficult and confusing copyright stuff, one of the things you can do with the code of best practices is to give it to them and say, "Look, our community, backed up by a bunch of very, very well qualified and critical copyright lawyers who reviewed all of this material, they all think that what we're proposing to do or doing, is just fine. That it fits within the parameters of fair use." That can be extraordinarily convincing. So, they're different, they're related, and one that is fair use analysis, needs to proceed and in the best case can significantly influence the other.

Jessica Meyerson:

Thank you, Peter. We also have a question here from James Watson. Krista, I'm going to give this one to you. Can the panel, and starting with Krista, maybe discuss in some detail the issue of copyright in terms of software used to create permanent government records? So the context here, it's a question that they often have to look at, whether it's easier to get a copy of this proprietary software, which is more difficult if it's a licensed copy only, versus finding a way through the IT department to replicate the functions of it.

Krista Cox:

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

Peter Jaszi:

Brandon, please.

Brandon Butler:

I can see it a couple of ways to parse the question. And James, if you want to chime in in the chat to clarify, the forward-looking prospective, is it better to make our documents in Microsoft Word and then deal with preserving Word forever and employ fair use and we'll do what we have to do to make sure? Or, proactively, should the government find a way to replicate the functions of something like Word with a non-proprietary software format in order to avoid future pain and suffering? And I think that's a question that depends on your resourcing and it's similar to the risk analysis Peter was just describing. There's X amount of discomfort associated with having to preserve the format, but maybe it's also a good format and no open

format is as useful. But if you're thinking retroactively, I would agree entirely with Krista.

If you've made a bunch of documents using proprietary software, are you better off using that software to open the documents or trying to find a way to hack the documents open with a new tool? I would say fair use would really strongly support you in your efforts to do the former, rather than hacking something together to get to the content. But again, it's a strategic question. It's about your resources and what you want to do, but fair use would support you if you wanted to take the former strategy and make the proprietary software the tool that you use.

Jessica Meyerson:

Thank you. Thank you, Krista and Brandon on that. We have one more question I want to make sure that we get to, because it's a great forward-looking, community activity question, which is from Brian Thomas, also at T. Slack. As good practice, is there a template for documenting how the situations or particular instances in which an organization has relied on fair use? I think this is a great question, and from all of the panelists, from all of the research team, I think it would be helpful to have a good sense of how organizations that are interested in contributing to the expansion, the assertion of using right [inaudible 00:56:22] context and the expansion of the code over time and document their work.

Peter Jaszi:

Well, let me jump in and start that very important discussion, and I hope it's a discussion that will continue over coming weeks, because it is at a level of

granularity that's actually beyond what the code itself discusses. But here's what I would suggest, and that is, earlier on when I was giving you the short introduction to fair use, I suggested that there are really two questions to which any analysts, a legal analyst, a lawyer who's giving you advice in advance of you're doing something, if you're using a lawyer, or it's considering a challenge to what you've done after the fact. However unusual or unlikely that is. And I should say that it doesn't happen very much.

In other words, over 15 years, our history with these codes of best practices suggest that in general, users who stay within the codes of best practices or even expand modestly beyond them, simply don't get sued. But somebody is making a decision and there are these two questions that come up. A legal decision, one is was there use for a transformative purpose, and the other is, is the amount of material used appropriate for the identified purpose? Those, I think, are the questions about which it would be useful to retain some kind of documentation. Not at the level of necessarily every day workflow choices, but at the project level.

If someone sets out to say, "Well, I think we should be saving and making available this suite of applications, or this particular legacy program." Then I think at the beginning, as part of the general discussion, not as an isolated matter, but as part of the general discussion of whether this is a project worth undertaking, it's interesting to talk and take some notes about how the thing you're doing is going to add value that the mirror existence of the original version was not intended to capture. And the other is, why are you using the … or intending to archive the amount you're intending to archive? And if the answer is, "Well, because we have the … Only the whole thing is significant," that may be the end of the discussion.

So yeah, I think it's very, very valuable to incorporate those discussions into your project workflow, because the contemporaneous documentation should there, however unlikely, ever be, and it is unlikely, a challenge is very, very good evidence, so to speak. I'll stop there.

Jessica Meyerson:

Thank you for that, Peter. Do Brandon, Krista, with Pat off the line, I'm curious if there are any additional comments that you all would like to add before we embark on a wrap up for today's first episode.

Brandon Butler:

I don't think so. In looking at the chat, I see that James followed up and made clear that it is the sort of retroactive question, and that's the problem that we hope we can help you all solve with the code. Those are exactly the scenarios that we'll be talking about over the next several weeks, is-

Peter Jaszi:

We will find a way to return specifically to that question.

Brandon Butler:

Exactly. In fact, one of our guests next week is Leslie Johnson, who's at the National Archives, and does exactly this kind of thing. I bet she'll have some experience to share.

Jessica Meyerson:

Absolutely. Well, thank you. Thank you, everyone. We appreciate all of our attendees for joining us today. And thank you so much to Pat, to Krista, to Peter and to Brandon. And as Brandon mentioned, please join us next week for episode two: Beginning the Preservation Workflow. We'll be going into a deeper dive for scenario one and two, which Krista and Brandon described in short form earlier today. And we'll be joined by special guests, Leslie Johnson, from the National Archives and Records Administration, as well as Henry Lowood from Stanford University Libraries. And we will be sending out an announcement on LISTSERV and Twitter as soon as today's webinar is posted online. So, thank you all again for joining us today, and we will see you next time.

Brandon Butler:

Bye, all.