

# **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)

### **Jess Meyerson:**

Hi Peter.

So, 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 Educopia Institute. This is the continuation of our seven-part series of webinars, exploring the fair use 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 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 Zoom 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.

Today, we are presenting episode five, Understanding the Anti-circumvention Rules and Preservation Exemption. A discussion with members of the Code of Best Practices' research team and our esteemed guests including Jonathan Band 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's 1201 rulemaking process, including submitting requests for exemptions and testifying to the needs 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 Jane Moulds is also with us today, Software Curator at Rhizome, a digital art non-profit founded in 1996. Lyndsey works to preserve software and restage legacy pieces of net art at Rhizome. She also manages the software collection in computer environments with a focus on browsers, other web related programs.

Then finally, today, your research leads and facilitators for this episode are Krista Cox, Director of the Public Policy Initiatives at the Association of Research Libraries and joined by Peter Yazie, professor emeritus at American University, Washington School of Law. Professor Yazie is one of the originators of the fair use best practices movement and is the co-author of the Software Preservation Code Best Practices for Fair Use, along with Krista, Pat [inaudible 00:03:02] Heidi, who is also on the call today, and Brandon Butler, who's also joining us on the call.

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 rule making works and the exemption that's been obtained for software preservation. They will also discuss how to apply the exemption to your own practice. With that, I'll hand it over to Krista.

**Krista Cox:**

Great. Thank you so much, Jessica. Today we're going to talk about 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 raised concerns that even if [inaudible 00:03:54] 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, was intended to implement the two the WIPO Internet Treaty, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

It's widely known that the Digital Millennium Copyright Act went farther than what was required under the WIPO Internet Treaty, but nevertheless, it is part of our law and something that raises a lot of concerns for practitioners that are trying to break technological protection measures, which are basically like digital locks around things that are available digitally.

It could be a digital lock on 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. These digital locks were intended to prevent piracy and the kind of help curb in any piracy that could occur on the internet, which could 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 know what kind of forms these provisions would have. These anti-circumvention provisions have been interpreted at least by some courts to be a separate independent cause of action. It doesn't require any underlying copyright violation in order to violate section 1201 of the Digital Millennium Copyright Act on anti-circumvention.

While the DMCA did provide a close list of exceptions to this anti-circumvention provisions, a lot of them today are seen as being kind of useless. There is a exemption for libraries, for purposes of acquisition. 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 want to do. Another example is there is an exemption for security research that people have criticized that because it doesn't address another law that people are concerned about. They said, "Well, even if we can circumvent it for purposes of the DMCA, we might be in violation of the computer fraud and abuse act."

Well Section 1201 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. Every three years the copyright office undergoes this rule-making cycle in which people who want to use a particular exemption to circumvent a CPM, can go to the copyright office and ask for a new exemption. In the past there have been several rule making processes so far, but in the past it has been a 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 go and ask for one, you put together this dossier of information of why you need to do this and what the harms would be if you are not able to do it.

Then if someone wants to oppose it, a right holder wants to oppose it, they can say yes, "Well we don't think it's, this exemption is too broad. We don't think this exemption is necessary. Here are all the reasons why the copyright office should grant it." There is also a hearing in which people can testify and say, "No, we really need it." Or rights holders can say no. Just 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 2012 and 2015 were these very long complicated exemptions, that a lot of practitioners and people in the fields said, "We need a lawyer to understand these exemptions even allow us to do." The copyright office did a study of 1201.

I think that in the last rule making cycle really did improve the process. Allowed for a lot 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. But I think overall people were... it said that, that process worked a lot better than the old process. 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 to do something that you want to do.

It is an exemption where you have to show that it would be otherwise be a lawful use, most likely a fair use 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. There's a long list of exemptions that were granted in this last rule making cycle in 2018, things like jail breaking a phone or making read aloud version on an ebook accessible for someone who's blind or been disabled.

Now that we kind of have this high level overview about 1201 and the problems that anti-circumvention 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 you both [inaudible 00:10:46] for preservation as well as other exemptions, that cultural heritage organizations view.

Before I turn it over to John Ben 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 Yazie or our other co-facilitators on the code a Brandon and Pat if they have anything to add on just kind of high level overview.

**Peter Jaszi:**

Hi, this is Peter. 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 process, the exception rule making process that Krista has described, however frustrating and 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 years from the time of the DMCA onward proved to be on the whole worth taking part in. The institutional response, which has been primarily and in the first instance from the copyright office, which conducts the inquiries and holds the hearings and issues of the rules to which Krista referred has been all things considered a lot more positive and sympathetic than I would have predicted... did predict 20 years ago.

It's not a perfect system. I think we would 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 a couple of decades shows that in the absence of anything better, it's a system worth trying to engage with and work within.

**Krista Cox:**

Completely agree, Peter. Since I'm not hearing anything from Pat or Brandon-

**Patricia A.:**

I just want to say I think that was a great summary. That's terrific.

**Krista Cox:**

Thank you. So Jessica, I think we can turn it over now to Jonathan Band. You can talk about exemptions for culturally heritage institutions and his work on this throughout the years.

**Jess Meyerson:**

Excellent. Yeah. Thank you, Jonathan.

**Jonathan Band:**

Thank you very much. Even though I do agree with Peter that participating in the rule making, makes sense, it is worth saying at the threshold or at the outset that the rules overall don't make any sense, meaning section 1201, and what it was trying to achieve at some sort of policy level, it doesn't make any sense to the extent that people on the line are trying to figure out well... [inaudible 00:14:32] given that it's relatively easy to circumvent, what's the whole point of having this added layer? You're exactly right. As a practical matter, it really doesn't make a lot of



sense and it does put in an additional sort of bureaucratic layer that makes preservation activities and other kinds of lawful activities more difficult.

Without in any way diminishing an [inaudible 00:15:00] as a practical matter. But putting all that aside, but let's just talk about the world as, as it is, as opposed to the world we want to live in. With respect to the... I've been involved in these exemptions since the very beginning. 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 sort of a critical piece of education now, certainly in college, but also in K12. We're moving towards a world where you needs to have media literacy and you need to know the texts that we all read are not just books anymore, but films and the ability to include films in classes was a very... is this... there's a pedagogic necessity to doing so.

In the old days it was relatively easy. You would be able to put together... you would splice together clips from video clips, and so you would be able to show sort of like a clip, you'd be able to evolve these clips on a tape, and you'd be able to go forward and then you could even burn CDs. But once you started having Section 1201, you'd have technological protections on the DVDs and then the circumvention of the technological protections was unlawful, then all of a sudden it becomes difficult. 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 DECSS, which allow you to circumvent the technological protection. So again, it was easy to break the digital lock. But again, you wanted... people wanting to do it lawfully, especially if they were going to be teaching in a classroom. There were in these... I was involved in these early rule makings and what we had to do is sort of can collect evidence, from educators of how they wanted to use, these exemptions, how they would... the kinds of uses they would they would make of these clips and why it was important. We work together with other people who had similar needs, documentary filmmakers and people who want to make other non-commercial uses such as remixed people who were making remixes.

We all sort of work together and we submitted our own exemptions or our own applications for exempt, our own petitions. But we coordinated and early on we were able to convince the corporate 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. 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. We were able to get an exemption.

Now there was just two interesting dynamics that occurred. One was that the rights holders, and every rule making would come up with all these arguments as to why the exemption shouldn't be renewed or why it needed to be narrowed. Over time, the exemptions sort of for educational use as sort of became simultaneously narrower and broader. Originally it was just for film classes, then it was for all college classes. Then we were able to get K-12. But again, at originally with K-12, it

was instructors then we were able to get students. We were able to broaden the kinds of people who could use the exemptions at the same time, all sorts of other roadblocks that the rights holders were able to clog back various aspects of these exemptions.

There was this whole 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 using screen capture. Also, they made it clear that you had to use short clips, and so arguably, you could use longer clips under fair use or under section 1101 but there was this narrowing, and also just the number of words, and the exemptions kept on getting longer and longer. So it was harder and harder to us for someone to understand the exemptions. But now the way it's ended up 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. Also in this way through making the corporate office has tried to make the exemptions themselves a little less for [inaudible 00:21:52] and a little easier to understand, but they're still far more complex than they need to be and far more difficult to understand. And there are far more caveats and limitations on them. I just briefly want to talk about one other dynamic and then a couple of the other exemptions. The dynamic that this process is sort of brought out is there is a very surreal quality to the exemption, the rule making where the rights holders, you get the sense they feel that they need to oppose for the sake of opposing. They ended up making a sometimes really silly arguments.

The silliest was... again, we were arguing about why we needed to circumvent the technological protection measures such as... again such as CSS on a DVD in order to assemble the clips to show in a classroom. The MPAA basically said, "Well, you don't need to circumvent a technological protection. You can just engage in cam cording, you can just point your cam corder at a high definition screen and you can copy everything you need. Now this is at the same time that they were running around the country, running around the world, getting all these anti cam cording laws passed. They did a demonstration to show how easy it was to cam cord really good images off of a high definition television. We're going to make like, on the one hand, they're saying it's illegal to do that. On the other end they're saying, "You [inaudible 00:23:35] you go ahead and do it."

On the third hand they're basically... if what they were saying was true, that it is so easy to get good quality simply by pointing a cam corder and HDTV 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. Of course we convinced the corporate office that the quality wasn't as good. But again, there is this kind of bizarre dynamic where the laws of reason don't seem to apply within the context of the 1201 rulemaking.

We were able to... I mean I'll just touch briefly on some other areas that we worked on, we were able to get exemptions for people with print disabilities, so that the read aloud functions could work. We were able to work more recently on exemptions for a closed captionings that you can circumvent the technological protections in order to insert the captions. That was something where we were

working with the disability services organizations, then also areas relating to software preservation. This is where I pass the Baton off to Kendra.

**Kendra Albert:**

Fantastic. Thank you, Jonathan. I feel like it's kind of amazing to get so much perspective on the tableau on process, since it's beginning. I'm going to talk a little bit, more specifically to prove Jonathan's point. Can you all see my slides?

**Jess Meyerson:**

Not yet.

**Kendra Albert:**

Oh, okay. There we go. 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 software preservation exemption, which was SPN and ARL and the Library Copyright Alliance, sort of a petition for last cycle. 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 sort of walks through and I won't claim that it's a totally friendly for folks who are not lawyers but as friendly as we could make it, walks through how this works.

But I'm going to go through that in more detail and then I'm happy to sort of answer questions. What you'll see along the way is that it very much [inaudible 00:26:36] Jonathan was talking about, which is that, there's a lot of, sort of a little bit

of intricacy here. First the text of the actual exemption, which is long and complicated, you should not in fact try to read it. That is why we have summarized it nicely in this guide, which is what I'm going to sort of base my walkthrough on. But so the current operating software preservation exemption that was gotten through the, tri-annual rulemaking process has some threshold questions of availability. 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 strongly fall into one of those buckets.

I think generally speaking, if you feel like you are one, maybe a little bit of you know it when you see it kind of standard, but there's some more eligibility requirements in addition. You have to make your collections open to the public or routinely available to 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 train staff or volunteers that provide services normally provided by libraries and sort of museums.

In order to even have the broader conversation about whether you can preserve your software under the exemption, you have to meet all of these criteria. But I think what's interesting about this is... I do think as Jonathan mentioned, much of, I think the copyright office has approached the 1201 exemption and processes, 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.

Something like this where there's sort of specific set of eligibility criteria is pretty normal through this process. If you're an institution and you're like, or you work somewhere and you're like, "Hey, I would like to preserve stuff, but I actually don't fit really well within these criteria or these criteria are problematic for me." This brings me to base sort of first overall takeaway. That is not the content of the assumption, which is you should come talk to SPN, to LCA to me, to Jonathan, to someone. because part of what drives is these, the 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.

When we think about... when we're arguing in front of the copyright office saying, "Hey, you should renew this, but you should expand it slightly or eliminate these eligibility criteria." A lot of that is based on the examples that we can bring to bear that persuasively argue that the criteria are a problem. If you see things that you think will inhibit your preservation of works of software, we would love to know about them because that's something we can flag for the next round in three years, and in some ways, the good thing about the triennial rulemaking process is we always have the opportunity to go back and [inaudible 00:29:47] try again.

Having said that, the next question in that you want to ask when you're looking at the software preservation assumption is, is this for a video game? This on the face of things makes no sense because, as I think actually Lyndsey 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 if the software that you're trying to preserve as a video game that requires that connection to an external server for gameplay, a different set of rules apply to it than the one I'm about to walk through. This is a... mostly the copyright office is

fault, but partially also mine in the sense that, in the 2015 round I worked with EFF to get an exception for video games that required external server connections.

Now there's two exemptions for software preservation. One that's specific to video games that require 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 going to talk about the exemption for software, for everything, all software that's not a video game that requires an external server for game play in this context. That's the first sort of... that's another caveat. Another thing to keep in mind.

Then we ask whether the software is eligible. There's a couple of criteria here, but frankly this is like not super complicated. The computer program must have been lawfully acquired, which means either like licensed or purchased. I think inevitably every time I've talked about this I have gotten a specific question about, "Hey, is this kind of specific thing off we acquired?" But the answer is it's kind of hard to tell. Sort of off the cuff, it's not a particularly well-defined term. I think that if you have something specific that you're thinking about talking to an attorney, or coming and talking to the Cyber Law Clinic, 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. 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. What does it mean to be reasonably available in the commercial marketplace? Well, it can be specific to a particular



version. If Word is still being sold as Word 2018 or 2019, I don't know at this point they're probably running four years ahead.

We're probably already in Word 2025 or something. That is, if they're even actually marketing standalone software anymore and it's not just Office 365. But, 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 commercial market. The other thing is that the secondhand stores don't count, which is to say that even if you could potentially buy old copies of software on eBay, that does not necessarily make it reasonably available such that you can't preserve it. The question here basically is, is the manufacturer or original distributor of the software still selling it, if not, then you can go ahead and preserve it under the exception.

Then as Krista mentioned, there's some rules about the kinds of preservation activities you can undertake under the exemption. I think about this as preservation activity eligibility, the sole purpose of the circumvention activity must be for lawful preservation of the computer program or digital materials depending on a computer program. 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 that version of AutoCAD.

This is an important thing to note because of the version dependencies of some software files. The preservation can't be for direct or indirect commercial advantage pretty straightforward, or straightforward as anything around your debts. The preservation activity must be non infringing. 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 a software produced by the US government, because you have permission, because section 108 applies, which is the library exemptions to the copyright act or because the use fair see episode four. Those are all reasons that preservation activity may be eligible, there may be others as well.

But those are the sort of... those are the big ones. If you've checked all those 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 not on the slide outside of the physical premises of the library, archive or museum. 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 preservation guide which is on the SPM website. I sort of, before we go 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 1201, I don't think folks were really thinking about the concerns of software preservationists when they were drafting 1201 as a response to the, US's copyright obligations.

In some ways 1201 has never been a particularly good fit for the needs of lots of folks. But software preservation is specifically, and so when we... and the copyright office I think understands that. I do think frankly e-people associated with 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 that can be hard to sort of navigate and fall into. The best way we have, until you know, something like congressman's statute, to sort of get you 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.

That brings me to sort of how you can help, which is that if this is something that affects your day to day work and you're interested in talking more or you use the exemption as part of your practice, we would love to hear about it. There's a use form, which I think we can send out in a sort of a background materials or you can always just straight up email me, and all make sure that the right folks within SPN are the right folks who are involved in sort of leader exemptions find out about it. Because what we're interested in doing is making sure that we can use the facts on the ground to get as much latitude for software preservation as possible.

I think that's all for me. I'm happy to answer any questions and you can always email me or follow up with me. Although, I have not been doing the 1201 process as long as Jonathan, I've done 1201 across a variety of contexts, including for computer security researchers. It's a lot of what I do on a day to day basis. I'm always happy to talk about it more.

**Jess Meyerson:**

Thank you so much Kendra. Huge thanks 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 one list and we'll come back to them for the Q&A. I'll hand it off to Lyndsey for now.

## **Lyndsey Moulds:**

Hi, Jessica. Would you mind sharing my slides for me through the Educopia Institute Zoom or how should I do this? Okay, awesome. Well, let me go ahead and exit full screen. Okay, amazing. Thank you so much. My name is Lyndsey Moulds and I work at Rhizome. I participated by testifying and the 1201 exemption hearings last year. But other than that I am mostly a practitioner. 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 towards some of it and some ways in which it does, which I'll get into a little bit, but mostly I just sort of wanted to give you an overview of what Rhizome does and why we sort of wrestle with fair use and sort of also how a lot of discussion around fair use doesn't really quite describe exactly what we do.

I could have the next slide. I don't know what the best way to... Oh, shoot. I can start my video too. It's not going to be high quality, but I'll try. Okay. So Rhizome 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. We're an affiliate of the new museum. We currently work out of New Inc, which is the new museum's incubator and coworking space. We have an artistic program and that promotes born digital art projects and also organizes exhibitions.

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. Generally speaking, our exhibitions are online. Can I get, great. In addition to online

exhibitions and an editorial program, we've also had an online archive of born-digital art called the ArtBase online since 1999 and we also have a digital preservation program that builds in house software tools to support preservation activities.

A lot of times we're working with sort of applying for grants or working in spaces where we're working alongside other museums whose curation or archival practices are built for physical objects, which as we know, are really difficult to extend to digital practices. A lot of times we're working with things that are produced, distributed or consumed via app interfaces or the web. That's why Rhizome refers to these things as born-digital. 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. This next slide is an example of that, which is Amalia Oldman's excellent system perfections, which was... it's a series of Instagram posts and it actually consists, it's like an Instagram performance. 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. To some degree when we say I wanted preserve this piece of art, you're actually preserving parts of the Instagram platform and brand and layout as it existed in that moment. We're not just documenting the work of artists specifically, but also the surrounding fabric of these websites and platforms. Thanks. Since the late 200s, Rhizome has moved away from simply just like accessioning all of the works into our archive to try and to continue to ensure public access to functional historical artworks. We really want to develop new ways to archive and contextualize this artwork so that people can

continue to appreciate it. Over the last three years in particular, we sort of shifted our focus to developing new preservation tools and strategies for reperformance.

A lot of institutions have put work into file preservation, file integrity, longterm storage in solutions for digital artifacts. There are probably a lot of people on this call who have expertise in that area. That's not really something we're 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. I want to support the performative qualities of artwork on the internet. I want people to be able to see, what the artist intended when they made this work in 1999 and that's where things get kind of difficult. I'm going to try and show you this video.

Jessica, can you... Okay if that doesn't work, can you try advancing to the next one and see if you can play the one on that? Okay. That tells... can you play that one? Yay. This is a video. It might be really tiny. It's a piece called Scrollbar Composition, and it's basically like a big HTML page that 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 formal. Okay. That's still kind of works. There are a lot of pieces from this period in the web that use elements of the browser in a really specific way. Things like buttons, radio buttons, scroll bars actually constitute parts of the artwork, formally.

If you view these pieces in a modern browser, the scroll bar is buttons, all of that stuff looks completely different. That's one of the kind... that's an example of the kind of thing that we're actually trying to preserve when we re-perform this, is we

really want this to be authentic too. I guess I'd say authentic too, but also it's not necessarily that there's one particular authentic browser for every single piece. In 1999 there were certainly lots of different browsers that people could have been using to search the web. I think part of it is like if something like Scrollbar Composition does look different in a bunch of legacy browsers that were contemporary, giving people the option to see it in those different browsers is really important to sort of understanding what using the web was like at that point in time.

To that end, you can go ahead and advance because I'm not sure how long this video is. A lot of what I do is trying to work with commercial software dependencies. An interesting thing about working with internet art that was largely independently created in the 90s and 2000s is that you end up with all manner of software dependencies. 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 asked me about software dependencies, I'd say, "Oh, well, maybe when I think of a software needing 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 Real Player things like, Flash Macromedia Director, Clear time, excuse me.

In some cases, I'm trying to find this browser plugin that was deprecated years and years ago and often without the artist's knowledge because sometimes these pieces haven't been revisited by the artists or anyone who created them in decades. There's been a great emphasis put on preserving software produced by artists and sometimes even the source code. But as far as proprietary plugins or middleware

go those who have decayed and becoming inaccessible despite a lot of preservation efforts. Something can be in pristine condition. Otherwise maybe someone made really, really fantastic backups of all of their work and all of the executable is they created for various platforms. But if we can't actually get these dependencies from anywhere, the work is not accessible.

That's where TPM becomes a point of difficulty for us is it's not as if artists are bringing work to me like, "Oh, I put DRM on this [inaudible 00:46:52]." 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. We're really working to get all of these pieces together to create an environment that can support, this artistic software. Even if we totally have the rights, even if people, 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.

Some other challenges that Rhizome are what kind of a memory institution is Rhizome from that checklist that I kind of shared like, what do we... where do we fit in into that box? Some of them we tick off, some of them we like are, it's kind of a morphous like when we apply for grants, sometimes people say, "Oh, well you're a library, not a museum." Sometimes people say, "Oh, you're a museum not a library." It's like, "Oh, well we are located on the premises of a museum but are we a museum?" There's a little bit of a question of where we fit into the preservation landscape, legally, but also who are our peer institutions? That's something we're constantly sort of exploring as we preserve this work.



Just thinking about our mission as an institution of supporting born-digital work. What can we actually do to support artists when DIY software maintenance is out of reach for most private collectors. This is something that was 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 it's kind of sad, but we see a lot of artists who go back to producing physical ready made's or ready made's or 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 path for people outside of memory institutions to maintain this artwork.

Right now if you're a private collector and you buy one of these pieces from someone and then it depends on the flash and then the flash breaks. This is a bad example because there's like [inaudible 00:49:39] but you know what I mean? If something goes wrong and you need the help of expertise and you would know you 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 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." That's something where we're trying to figure out what a path forward would look like, and again, it's another thing where we're not sure... there are other people who are trying to fix this problem by, "Oh, I want to attach like digital artworks to the big client and that's how I'm going to... that's how we're going to make pieces that can be sold to other people.

I think for general purposes, it's like, to me it's not necessarily that I think it gets 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 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 the 1201 exemptions in order to fix the dependencies. That's all. Thank you.

**Speaker 8:**

Hi, [inaudible 00:51:13].

**Jess Meyerson:**

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. With that in mind, Melissa made a comment right there at the end, Lyndsey, that you might be able to speak to. Then 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 to Melissa's comment on the fact that for acquisition practices for museums and museum boards, they struggle with its 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:**

I don't know. I mean I think that really... that summarizes a larger issue in this kind of preservation because I think Amalia [inaudible 00:52:26] her excellence as in

perfections is a really good example of this. There have been showings of that, that consist of books or prints on a wall. I think I can only speak for myself, but as someone who works at Rhizome and works a lot with digital materials, I think of that as being a time-based artwork in the same way that people who have performance practices where you would go into a museum and see someone in a space doing some kind of motion or movement or sustained performance.

To me it's more akin to that than it is to a series of photographs. 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 precedent for in terms of law and fair use. I don't know what the answer is. I think I'm trying to sort of... I don't know. Yeah, it's kind of the video game problem. It's like we're creating more definitions around these things actually help or hurt and it's difficult. It's definitely difficult.

**Jess Meyerson:**

That's a great response. Thank you so much on Lyndsey. 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 or the limits of premises, which is in the current software preservation expression. Kendra, would you like to take that one on first?

**Kendra Albert:**

In my attempt to make things slightly more simple, 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 the library archive or museum. I think we don't know much about what that means other than that. I'd be happy if there's particular scenarios I was thinking about. I'd be happy to talk about it more. I do think that, that's a real challenge and I think a real problem for 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 if the goal is to use [inaudible 00:55:04] to circumvent TPMS in order to enable software to be used to access works more broadly, there might be really valuable options in terms of sharing it with other institutions.

But yeah, the language and the exemption is physical premises.

**Peter Jaszi:**

Hi, this is Peter, and if I could just jump in for a moment, I had one thought about this question. Is it okay if I [inaudible 00:55:32]?

**Jess Meyerson:**

Absolutely please?

**Peter Jaszi:**

Earlier on in your excellent presentation, Kendra and Krista as well. You were talking about some of the terms that remain undefined or at least softly defined in the exemptions generally and of course and there's a good new exemption in particular. We're told things should be short but we aren't told how short, short it is

and now we're told things should be on premises 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 exemptions over years is that the system for good are real and I obviously think it's more for good than for real, 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 than to be prepared to explain them.

With respect to premises, we've talked a lot in the previous episodes of the webinar 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 engage their constituents, their students, their faculty, their researchers, wherever they are to be found. We also have talked about the somewhat more ambitious model in which physical institutions may join together to create consortia for which in turn all of their members and constituents will have access to a broader range of materials.

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 free standing copies of software that 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 easily defended than the ins the uses that have institutional connections. But I must say that I would be and would be interested in and 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. It's certainly a definition that could be embraced by a community in good faith.

**Jess Meyerson:**

Thank you Peter. That's wonderful and hopefully empowering to everyone on the call. I just want to follow up to that. I know we're out of time, we're at the top of the hour. I'm going to ask a quick question for the purposes of this recording and I'm going to hand this over to, Kendra and Jonathan. 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. Given the current limitation of the software preservation exemption as just described by Kendra and Peter, 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 document to help support the expansion of a future round of tri-annual rulemaking?

**Jonathan Band:**

Well, let me just jump in and then, because Kendra actually knows a lot more about the subject than I do. If I let her go first, I won't have anything to say. I think the most important 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 [inaudible 01:01:04] area, whenever there's an area or something, a problem that you have, write it down, make a note. Then 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, will be very helpful, because then we can be very concrete and say, "So-and-so was trying to do XY and Z with this specific program and couldn't.

Or had this difficulty and nothing, it's in this area and nothing works like the anecdote, and the concrete. That's what everyone on the phone can do, but I'll turn it over to Kendra in terms of certain areas where that are that are pretty obvious that need to be fixed.

**Kendra Albert:**

Yeah, no that's... Jonathan's totally correct, which is like the most useful thing is evidence and anecd data might be the slightly expanded version of anecdotes. I think there are two areas that I think we're currently thinking about targeting. This is something I haven't necessarily discussed fully with all the stakeholders. This is sort of my personal view on it. One is, broadening the eligibility criteria at the beginning, to be beyond library archives and museums to any institution, any cultural heritage institution that needs the [inaudible 01:02:36] categories or the categories that I mentioned, partially to deal with 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 wants, the name of your institution shouldn't pose a problem or create uncertainty.

The other thing is, as we've already talked about, probably broadening the premises, language to more specifically reflects the kinds of... the understanding that Peter was emphasizing, which is sort of a control either, something like a media control funding model or a sort of a access 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, than before. I think those are the two areas that I currently sort of have on my list to target, but of course if there are other things that the community keeps running into in terms of problems with the exemption, we're happy to sort of take take up the banner and figure out where we can make changes.

**Jess Meyerson:**

Thank you so much Jonathan and Kendra. I just want to say huge things to all of our esteem guests today. Jonathan, Kendra, Lyndsey, that was a very engaging set of presentations and hopefully everyone walks away from today's webinar with a better understanding of the relationship between the exemption in the code. We so appreciate you all showing up and being here for the discussion today and we say, join us next week, same time, same place. We've got episode six, making the code part of software preservation culture.

**Jess Meyerson:**



Again, this question of community engagement and ownership, is really paramount to the topic of next week's episode. That we'll be featuring Gordon Quinn Kartemquin Films and Lindsey Weeramuni from OpenCourseWare at MIT and next week's episode will be facilitated by Pat [inaudible 01:04:44] Heidi of American university and Peter Yazie of the Washington School of Law and American university. Thanks again for joining us today. We hope to see all of you next time. Have a lovely day.