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)

Jess Meyerson:
Absolutely. I'm going to pause the recording. All right, everyone, welcome. Thank you for joining us today. Today we'll be presenting episode six, "Making the Code Part of Software Preservation Culture." My name is Jessica Meyerson, and I'm community advisor to the Software Preservation Network, and a research program officer at Educopia Institute. This episode is the continuation of our seven-part series of webinars, exploring the Fair Use Code and other legal tools for [inaudible 00:01:06]. This is cohosted by the Association of Research Libraries and the Software Preservation Network. Just a little bit of housekeeping before we get started. We ask all but the hosts and the guests to be muted throughout the webinar, except in Q&A, and we'll cue you for that period of time, just to maximize the audiovisual quality of the recording.

If you have any questions during the presentation, we ask and encourage you type them into the chatbox. The Zoom chatbox, which you can find in your control panel in the Zoom interface. Then I'll bring these up again during the Q&A section of the presentation, and we will have time for questions for our guests and facilitators. Every episode will be recorded, transcribed, and posted to the SPN website. You all can keep a look-out for announcements about the entire series being posted in the next couple of weeks. Then today's discussion takes place with members of the Code of Best Practices Research Team, which I'll name shortly, and our esteemed guests, which include Lindsey Weeramuni is the manager of intellectual property for MIT's Office of Digital Learning, a department of MIT

Open Learning. Weeramuni oversees and implements copyright policy for the MIT Open Courseware and MITx.

MIT Open Courseware is a web-based publication of virtually all MIT course content and is available under Creative Commons Attribution Noncommercial Share Alike License. MITx offers MOOCs in a variety of subjects. Weeramuni was the project director for the Code of Best Practices Fair Use for Open Courseware. She often presents at conferences on open educational resources, copyright and online learning. You can read more about Weeramuni's experience with fair use and MIT Open Courseware in the article, "How to Fight Fair Use Fear, Uncertainty, and Doubt: The Experience of One Open Educational Resource." We'll make sure that that is included with the final posting of the recording.

We also have with us today Gordon Quinn, who is artistic director and founding member of Kartemquin Films, and has been making documentaries for 50 years. A long-time activist for public and community media, Quinn was integral to the creation of ITVS, public access television in Chicago, the Documentary Filmmakers Statement of Best Practice in Fair Use, and [inaudible 00:03:36] Indie Caucus to hold PBS accountable. With Kartemquin, Gordon has created a legacy that inspires young filmmakers and provides a unique structure for the collaborative creation of high quality, social issue documentaries.

Your research leads and facilitators for today's episode include Patricia Aufderheide, university professor, School of Communication, and founder of the Center for Media and Social Impact at American University. Patricia is one of the originators of the fair use best practices movement and is co-author of the Software Preservation Code of Best Practices. And Peter Jaszi of American University as well as Krista Cox of Association of Research Libraries are two members of the Code of Best Practices Software Preservation Research team, who are joined [inaudible 00:04:22] today.

In this fifth episode, Pat, Gordon, and Lindsey will discuss the difference between a document and a shift in software preservation practice, how other communities have incorporated fair use into their professional practice, and how to talk to gatekeepers and to allies in your network to strengthen fieldwide practice. With that, I'm going to hand it off to Pat.

Patricia A.:
Wonderful. I would love my first slide, actually, my second slide. Because what I'd like to do with you guys today is first of all to review where we're going. So what we're going to, how we hope to spend our time today is actually to spend the most valuable part of it with you in what would usually be a Q&A. So first of all we're going to talk about why creating the document itself doesn't get to the goal, although it's the sine qua non. Then second, ways in which the community can make this code available to people who can use it. We're going to hear from Gordon Quinn about how documentarians did that, and we're going to hear from Lindsey Weeramuni about how the people in the open courseware community did

that. We're going to talk about the efforts that we have begun to disseminate the word in the software preservation community so far, and then we're going to get to the really good part, which is what do you think we should be doing. Thanks, next slide.

This is where I turn it over to Peter Jaszi, who's going to talk about why isn't the code enough? I think you have to unmute yourself, Peter. And we're not hearing you.

Peter Jaszi:
The answer to your question, Pat, why the code, or why isn't the code enough in itself really lies in the nature of this and the other codes that it is a family, to which it has family relations and about which you'll be hearing a little more soon. These codes are relatively high level documents that represent strong consensus in the field, and they are legally vetted and we think and time has tended to show highly reliable. But they don't publicize themselves. We can do so much in terms of putting them together and putting them online, but then acceptance becomes an issue. That's why it is crucial that opinion leaders in communities that are affected by copyright and that see some utility in these codes should take a role themselves in spreading the word.

There are a lot of ways of doing that, and I think that some of those are our topic for today. The difficulty is compounded by the fact that if one only had to convince the line practitioners in a given field that fair use was a robust and reliable friend, that might be possible in a fairly straightforward way, but of course, although the line practitioners themselves have doubts accumulated over time as a result of exposure to the permissions culture and sort of ingrained as a function of the kind of professional network of beliefs, some valid and some mistaken, about copyright, there are others as well who play an important role.

The line practitioner often understands very well that although relying on fair use may entail some level of legal risk, not doing so, not taking advantage of the rights that the law offers produces an even great risk, an even greater level of what might be called mission risk, the possibility that by not exercising one's rights, one will end up not doing the job. Again, if we had had only line practitioners to convince, that might be fairly straightforward, but there are others in the system as well. Direct supervisors, supervisors of supervisors and other kinds of gatekeepers in the system, everybody up to and including, in some cases, university or museum administrators and general counsel. They have to be persuaded as well. It's a complex tax.

Patricia A.:
Thank you. If we move to the next slide, we can see that there are some typical first steps that people take. One of the first things, of course, when we create codes of best practices with communities, we do it through membership organizations, such as the Association of Research Libraries. I believe that Krista Cox from ARL is on this call. But endorsements are absolutely critical from other institutions that people rely on, because what we're looking

for is legitimacy. So we go to the other organizations in the field that people trust. Something else we do is either write ourselves or get other people to write articles in places that circulate this information in a trusted way. Sometimes it's a Listserv, sometimes it's a blog or a magazine. I recall when we released the very first code, which was the documentary filmmakers code, we were just delirious with happiness, because Sundance is the big, big event there, and we were able to get articles in every major film magazine that was present at the festival, so you just couldn't avoid us.

We often give presentations at conferences, either the people who coordinated it, or people who are leaders from the community who've been involved. We are proud to have done extended interviews with 41 leaders in this community already, who we're hoping to draw on more, but we know that we're also talking to other ones on this call. Finally, we've had conversations and meetings with both opinion leaders and leading related associations. In the case of the documentary filmmakers, for instance, it was insurance brokers.

So those are some of the things we think about, and I'd love for you to be thinking about connections in your field, because we're going to turn to you at the end of this. Now I'm going to turn it over to Gordon Quinn, who is going to talk about what happened to make the code so widely known in the field when, in the years after it was released. Next slide, please, and Gordon.

Gordon Quinn:
You know, we had the good fortune, and I think this happened with many of the codes, is that our field really participated in the writing of it. We hosted a couple meetings here at Kartemquin. Pat and Peter came in, so by the time it was published, the field was sort of on board with it, or a lot of people in our field, the practitioners, the people who would be using it, were pretty familiar with what we were talking about. But now the challenge was to deal with the gatekeepers, the lawyers, and the insurance companies. You know, I sometimes say that five-year period after we published it, I never talked to so many lawyers in my life. We went to conferences, I was at some with Pat, I was at some with Peter, and with other lawyers. I remember once going to Lake Placid, I think, with Peter, and we were presenting to 500 leading intellectual property lawyers from all over the country. There was a huge education that had to be done with these people. They all thought they knew it.

We were dealing with an industry in which, you know, they would say, "No, no, no, it's right here in our NBC Standards and Practices Code, you know, the 30-second rule." You can, you use 30 seconds or no more. We would have to educate them about the law and about what we were doing. We had really effective presentations at associations of university teachers. I remember the first time we presented, and I think it was here in Chicago, I think it was the UFBA, and a bunch of us were on the panel. It was Pat and Peter and I think Michael Donaldson and myself, and the room was too small. There were literally people trying to just get their head in the room to hear our presentation.

So there was a sort of, out there in certain parts of the field, there was that unease sense that they didn't quite have this right, but we were pushing against what Pat and Peter called the clearance culture. Which is that, you know, 50 years ago, when I was making documentaries, we didn't really understand what fair use was, but somehow in our gut, we thought we had these rights. As we became more successful, as we started to be broadcast, as we started to get into theaters and create contracts with distribution companies, we ran into the clearance culture, where everyone was saying, no. I mean, basically what people were being taught in school was to be a professional in our field of documentary filmmaking, everything in your movie has to be cleared. That's what people were being taught, and that's what some of these gatekeepers were demanding.

So little by little, we were changing the opinion. Sometimes it would be at a conference. For a period, I went to about probably in the city of Chicago, I don't think I ever traveled for one of these, to these, I think they call them CLE. It's that thing, continuing education for lawyers. I would, it would be a lunch time presentation in a law firm. I'd get a free lunch out of it, and they're all getting paid to be there, but I'd make a presentation on fair use over lunch. Little by little, we just sort of were re-educating all these critical people. One of the most important, and you know, I was less involved with the broadcasters, except for PBS. PBS was the first gatekeeper who finally said, "Okay, we will accept your fair use claims, we will broadcast it," even though at that point, we could not get insurance on the fair use claims. The big breakthrough in our field was when some people behind the scenes, I think Pat and Peter were involved in that, had been meeting with the insurance companies, and one insurance company said, "Okay, we will insure your fair use claims."

I think one of the things that was really important with how we carried on this education process was we would always begin with sort of some fundamental principles about fair use and try to make them understand, we are, it's about a balance. We're not saying everything is okay. We are in fact rights holders. We're very concerned about piracy and other issues, so you have to understand that what we are looking for and what we in our field were trying to put forth was a balance of conflicting rights, based on what was already in the law.

That I think helped us to kind of get people to back up a little bit and start thinking about, you know, rather than just going to, like "We know this, I'm a lawyer, and I've given thousands of opinions on this," to take it back to the first principles and the philosophical arguments behind it, to get them to kind of go down the path of how the law really should be interpreted. We were enormously successful. It changed everything in our field. Virtually, certainly every documentary we do, and most documentaries that you see today have some fair use in it. You know, of course, and the one other detail and then I'll stop, is that by the time we were doing all this education, we had arranged with some law clinics and people so that we could say to our own field, "If you stay within these guidelines, you're not going to get sued, but it is, you are asserting your rights, so there's always that

vulnerability." We had law clinics lined up that would defend people if they ever did get sued.

The important thing, I think, that we understood by the time we were doing this, working with lawyers like Peter, was that the case law really supported our position of fair use, and these big companies that had been threatening us for years with these cease-and-desist letters threatening to sue, and people would, you know, they'd fold. You can't stand up to Sony, and if Sony reaches out to your broadcaster, you're then dead in the water. But the fact is, they didn't actually sue, because they had lawyers in this area who didn't want to get a bad precedent and a bad court decision. So you know, once we got organized as a field and stood up for our rights and went through this process of educating all these different kinds of people that Pat was laying out, we really turned the tide.

Patricia A.:
Oh, terrific. Thank you, Gordon. Anything else, or are we ready for Lindsey?

Gordon Quinn:
I think that's it for me.

Patricia A.:
Okey-doke. Then Lindsey if you unmute, there we go, we're ready for you. Next slide, please.

Lindsey W.:
Hi. So I had the privilege of working with Pat and Peter, starting in 2009, because we were inspired by the filmmakers code of best practice. One day, I looked at my boss, and I said, "Look at this really cool thing." Because one of my co-workers had the code sitting on his desk. He said, "Hey, look, have you ever seen this?" I borrowed it for an afternoon, and I read it, and I said, "Well, why can't we have one?" Because they can do all these really cool things with it. So this was just before a conference that we go to every year for open education, and the thing that combines all the people together at the open education conference is that they publish under an open license educational materials online. For those of you who don't know, that usually means Creative Commons or GNU licenses or other things like that.

I sort of had an informal session with the members of other schools in the U.S. I said, "How would you feel about getting together to collaborate on a fair use code for us in the U.S., just like the filmmakers one?" They all sort of said, "Okay, sounds good to me. What do we need to do?" I said, "Well, I'll find out." I looked at the back of the filmmakers code and I got in touch with Pat. It all took off from there. A year later, we had the code published. It took a lot of work, but it was so worth it, and I can tell you some of the lessons learned, the ups and downs, once I brought it back to MIT to get it implemented.

The first thing that's really important for you to take into consideration is that having the support of your Office of General Counsel to the work on the code that you're doing is so vital to your success. If it takes, no matter what it takes, you should work really hard to persuade them, unless they're already on board with this kind of thing. If they need, if you need ammunition to help them understand, just go to the open courseware sites that live on Pat's website, and point to all of the successes and the different codes that exist already. It's all over the culture and creators field already. We're all doing great stuff with open course, excuse me, with fair use, and we have been since 2005.

When I brought the code back to my office to train people, there was so much fear, uncertainty, and doubt. Like the FUD amongst my colleagues was huge. They were very scared and very nervous, and like they wanted to know questions about, "Does this mean we're going to get sued now? Does this cover every kind of content that we have in our courses?" Things like that, because professors who publish courses put film clips in their lectures or you know, all the little image snippets that come from textbooks, or "I just got this off the web. I don't know where it came from." All that kind of stuff.

At the same time, they were eager and willing to learn, so it was this tension between fear and excitement. The training took place across two or three training sessions, and the last half-hour of each training session was for questions. That's an important component when you train a group of people, because the questions will be excessive. Now after the training, I always said, you know, come to me with any doubts or any questions or anything at all. I am not an expert, but if I don't know the answer, I will go to my expert people and I will try to figure it out. And we'll figure it out together. In that way, we learned together. That was a really great lesson to learn. Bit by bit, the confidence grew. What they learned, and what I figured out for them was employing fair use, implementing fair use is like a muscle. The more you consider whether you can use it or not, the easier it gets, the easier the judgment calls make. That's an important component.

The other lesson that we learned was, watch out for copyright holders who don't understand the rights they can use and they can exercise, and that others can as well. There are folks out there that cling to permission culture, as described by Peter before. I'll give you an example. We were challenged a couple of times by copyright holders who were so embedded deeply in permission culture that, you know, we sent a permission request under our open license, in which we never pay for, and they sent back an invoice for, "You can use it for six months, and here, pay us $100." I replied with, "Thank you, but your reply does not meet the terms of our use. I will edit our content accordingly," which was code for, "We're going to apply fair use here." They wrote back again saying, "Can you please explain what edit means?" I replied with, "Well, we're going to turn to our Code of Best Practices of Fair Use," like there was this back and forth. The reply was something like this long jargony letter about, "If you consider using fair use in the future, please consult with us so that we may judge whether it's fair use."

Then I banged my head a few times and got a good, had a good laugh with our IP lawyers. You know, that was just, that was for larffs. But we were able to challenge off, I would say four or five challenges to us like that, with the help of our code, and that was because we had the strength of our community, and we had a document to point to. The one piece of content that I am most proud of is in a film studies class, where we felt before we had the code, we published it in 2007 with just print lecture notes. The professor was extremely unhappy, and our users were extremely unhappy. Then we had the code. We published the lecture notes with the clips in full, unedited, and at the end of each end slate that we add to credit all the content that's in these lecture notes, we put our usual content statement that says, "Some content appears courtesy of their content holders, and is not covered by our Open Courseware license. All rights reserved."

So it's understood that these bits have copyright holders that are not ours and they're not covered, and if anybody has a question, they can go to our FAQ about fair use that our lawyers helped us write. So we feel covered from head to toe, and it's never failed us since it came out. And we're really, really proud of it. Thanks.

Patricia A.:
Thanks so much to you both. I think one of the things that's been so interesting to me about … Oh, next slide, please. About both of these initiatives, and in fact all of the initiatives is that we just don't see real pushback from copyright holders. We see copyright holders getting educated sometimes, but we haven't seen what people probably most fear, which is people getting in trouble. I really appreciate those stories. People like Gordon and people like Lindsey, they're leaders in their communities, and it matters tremendously that they did this work. The other thing that I think so moves me is what Lindsey said about the more you do it, the easier it gets, because that means that the people on this call are going to have to be the most courageous. Everybody who comes after them starts treating it as normal.

I recently hosted a young filmmaker, made a magnificent film called Valentine Road, which is just chocked full of all of this news material, and I said to her, "How did you deal with all that material?" She said, "Oh, I just fair-used it." I was like, "Oh, that's awesome. You know, I was part of the team that created the Code of Best Practices." She said, "Huh." I was so thrilled, because it was totally history to her. For her, this was just like, "This is what you do." That's where I'm really hoping the software preservation community gets to. Just wanted to let you know where we've gotten so so far, because even though we're at the very first stages, I think there's some real good activity that's been done.

As you can see on this slide, the signatories who endorsed this code and come in strong saying, "We are going to promote it," these are all organizations that have, through their own networks, already begun to spread the word. This is besides the lead organization, the Association of Research Libraries. Of course, Peter's center at the law school, my center at the School of Communication at American University have also done some work. But these

signatory endorsing organizations of the field itself are very important. We've also been presenting at conferences that pull together people like you. I want you to take a good look at that conference list, because we need more suggestions of other conferences to start making sure we focus on.

Of course, this webinar series is part of the outreach activity, and we hope that once it's transcribed and all of the episodes are recorded, that you'll be able to go to tell your colleagues about this as a resource for them. There's also a little explainer video, which you can see on my website, which is you can see the URL right there, and maybe on, Jessica, if you have a sec, you can put it in chat, too. That is completely fungible. You can move it over to your website anytime you want. If it makes a difference to put your organization's bug on it, please do that. So that's kind of ... Now, Krista, I know you're lurking in there. Did I forget anything? Jessica, Peter, chime in if I missed something here.

Peter Jaszi:
Certainly nothing missed. One further story, I guess, which dates to the period in which we were doing the, or had done really, the Code of Best Practices for research libraries, which was a pretty big deal. A lot of institutions were involved, and the point that Lindsey made and that Gordon made about the role that lawyers play in the process of implementation in institutional settings, was borne out on many occasions then as well. I think we learned something, too, which you may all want to think about. As I said earlier, the code is a relatively high level document. It empowers, but it doesn't mandate, any particular set of practices, so every institution has to think about how they are going to use the code, how they are going to translate it into guidance that can be even more straightforward, even easier to follow than the code itself. Guidance that will give various kinds of line employees a process for thinking step-by-step through a fair use decision.

One of the things that we discovered when we're working with schools and their libraries to implement the research libraries code, is that it's a really sometimes a very good idea to get your lawyers involved, your institutional lawyers, your associate general counsels or whoever they are, involved in the implementation process, to call on them as helpers rather than treating them as the audience or only as the audience for, or as an audience for persuasion. There was one school where we got the library people and the general counsel together, and we began talking about how this general code was going to be locally implemented. The lawyers got so enthusiastic that they basically said, "Oh, let us do it." They did it all themselves, and they did a great job. They probably did a bolder and better job of coming up with implementing guidance than the librarians themselves would have done. Had we waited, had we involved them only in a much later stage, I'm not sure that they would have been as cooperative. Ownership matters, even when you're dealing with gatekeepers. I guess that's all I would say about that experience.

Gordon Quinn:

Yeah, I mean, I think that's a really good point, Peter. All these years later, I can't remember how long ago it was we published the Documentary Filmmakers Statement, but two weeks ago, a group of producers at the local PBS station said, "Can you come and talk about fair use at our station?" So I went up there, and there's like about 10 producers in the room, and one of their lawyers is there, and working with the clips, and you know, we talked through some examples. Just the fact of doing that, because the lawyer was pretty on top of it. He kind of knew what, you know, he was there trying to be helpful, but by having that discussion, even all these years later, I could see it strengthened everybody's backbone, and that was partly why they wanted me to come up there, you know, to be saying, "We've been doing this. Since the statement was published, we've never had a, we've never even been threatened over a fair use claim." We've been threatened over other things, but not that.

Patricia A.:
I'm sorry?

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

Patricia A.:
So I want to point out that Lindsey, oh, Lindsey, you have a point to make. Sorry.

Lindsey W.:
Hi. I just want to, Peter, what you said triggered something in my mind. We are not setting policy with these codes. We are creating a best practice, and the mileage varies from institution to institution. So these documents are not legal documents. They are suggestive, and everyone employs them, implements them in a different way. Just as fair use, the four factors, are not a formula, they are like a roadmap. It's a guideline. One does not have to meet all four factors to decide whether the use is fair. You know, if that's an albatross around your neck, set it free.

Patricia A.:
So thank you. I've moved to the next slide, because we're in the phase of the webinar that, where we turn to you. Peter, there are a couple of questions from people. Can you see the chatbox? If you can't, I'll read them to you. While you're looking, let me just take a look at this list of things that you could do to let people know about this. Let me know, what are we missing here? If you would like to have reassurance, more information on this, better understand it, where would you like us to be? We actually have a wee smidge of travel budget and some of our time for the next few months to do this with you. After that, you're on your own. So this is like a great moment to ask us to do things. This moment rarely happens, where people will, you know, you can get other people to do things for you for free. Seize it. You could either unmute or write in your comments.

Peter, were you able to access the chat? Okay, so I'm going to tell you, there's two questions. One, Drew, says, "Let's say that for some reason a copyright holder won a case. What's the worst case scenario for libraries, museums, and archives, other than a waste of time preserving the software?" The other question is, "How does this work in international distribution for filmmakers?" I think it's possible for you to address those pretty quickly. I hope that after you've done that, people are going to tell us how they want to take advantage of our time.

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

Patricia A.:
Sorry, I didn't see that. Yes, okay.

Peter Jaszi:
Let me do them in reverse order and talk about international filmmaking as well, because that allows me to give a little plug for next week's final episode of the webinar, which is going to be about the international implications of the Code of Best Practice, and it's going to talk a little bit about the variation and the way in which national laws around the world deal with copyright limitations and exceptions, and how practitioners who have worldwide connections or parts of global networks can begin to think about navigating that space. In the filmmaking world, it actually turns out to be easier than in most of the other fields, for two reasons. One is that in most of the rest of the world, even the idea of litigating about these issues is so foreign that as a practical matter, if problems come up, they're just sort of, they're worked out and negotiated informally.

But the other and even more potent reason is that, in general, when U.S. filmmakers get insurance for their films, which they need to do if they're going to distribute them as broadly as possible domestically, that insurance also gives them protection against claims, copyright-related claims worldwide. It hasn't proved to be a problem in particular for filmmakers. I actually think it's a little more complex in other domains, such as software preservation. Hence our decision to do a separate topic on it next time.

The other question is, how bad could it be? Well, it's a little bit hard to figure out, how … Well, let me back up then. It's a little bit hard to figure out why anyone would ever choose to litigate against a software preservation institution, given the very small benefits that they could imagine ever deriving from such litigation. I think both number of people including Pat and Gordon and Lindsey have suggested that by and large in the, oh, whatever it is now, close to 15 years that we've been doing this stuff, there just haven't been any lawsuits against people operating within the statement of best practices for filmmakers or within

the OER code or within any of the other codes. It's kind of hard to speculate. I don't think it's going to happen, in all likelihood.

But if it did, then I suppose that the worst case is, first, as described, that you might lose your work. You might be subject to an injunction, I suppose. I'm making this up, it seems so unlikely, that would require you to take material down. And I suppose that some kind of nominal damage award, you know, symbolic rather than real, is also possible, but we talked about this a little bit earlier on, and I said then what I want to repeat now, and that is that by and large, because the only benefits that flow from the software preservation work are diffuse, nonmonetizable public benefits, there just isn't any basis on which a really sort of strong damage award could be premised. So I think the exposure is rather low, and I think that if [inaudible 00:45:53], which is certainly, it's never sure, but if it turns out that history is a guide, I also don't think the risk of that worst case is appreciable.

Gordon Quinn:
Peter, could you, in our field, I know, there's also an international treaty, and if I understand it correctly, and when I speak in other countries, I say, "Look, your country, you're a democracy. You must have some version of fair use, but your law may be different from our law."

Peter Jaszi:
Yeah.

Gordon Quinn:
But there is this treaty, so that when we broadcast a film, and this is I think why we can get the insurance, basically all the signatories of that treaty are saying, "Well, if it flew in your country, then we'll accept it, too." Something, some version of that.

Peter Jaszi:
It's some version of that. I think that's right. I don't know whether I would go so far as to say that it was mandated by treaty, but I think the broad understanding is that the law that really counts, especially in the case of for instance, let's say, internet distribution, that the law that really counts the most is the law of the source country. I'll talk about this a little more next week, and happily for us, in the case of software preservation projects, even those with global reach, the ones we're most concerned about are the ones that have the U.S., the whole of fair use as the source country jurisdiction. So I think that's right.

Jess Meyerson:
It looks like Victoria is asking, in a slightly, maybe a slightly different direction from the previous two questions, but certainly just as important, is thinking about how to reach out to different audiences that are doing this practice in different contexts. So what are some of the challenges in reaching out to either filmmakers, software archivists, or even online

content creators that are outside the academic [inaudible 00:48:00]. That's a great question, Victoria.

Lindsey W.:
Can I ask for clarification on reaching to what end? What is the goal for the outreach?

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

Lindsey W.:
Oh, well, I just would share the resources that are online. And share the anecdotal experiences and successes that we have had. I would share those successes that other fair use practitioners and the awareness that I have about codes that have been implemented that I have known about. I would just talk it up, you know. And remind them that fair use is for everybody.

Gordon Quinn:
Generally, you will find, I think, you know, the bigger the institution, the more effort you have to put in to changing your thinking. I think it probably varies from field to field. We're independent, not-for-profit, and Peter knows to this day, I come to him for our fair use letters, so that we can get insurance. The reason that I do that is that our own lawyers are too conservative to actually give me the letter. They're a big, international firm, they do a lot of pro bono work for us. They're like, yes, we agree with you, I understand it. I've been on panels with the guy, but he can't bring himself to actually write the letter.

Lindsey W.:
Wow.

Gordon Quinn:
You know, and I will say to him, he said, "Well, there is some risk." I said, "We're in a risky business. We're documentary filmmakers. Compared to all the other risks that I take, this is irrelevant." I have noticed that sometimes with universities and places like that, too. I'll just give you a quick anecdote, because you're on from MIT. Pat and I were on this panel, I think maybe it was like 15 years ago. It was when we first published the statement. Someone in the audience, and I think it relates to this online professors courses and things.

Lindsey W.:
Open Courseware.

Gordon Quinn:
Yeah.

Patricia A.:
Yeah, what Lindsey does, yes.

Gordon Quinn:
Yeah. Do you remember this, Pat? Somebody asked, they said, "Well, we have this problem. We filmed all these interviews with these professors, and the university is saying we can't use them, we can't put them online. Because what's in the background behind professors? It's like a shelf of books, and those books have titles. The university is telling us, because it's a trademark title, we can't put it online." We were just flabbergasted, you know. But that was …

Patricia A.:
I think Lindsey has been hard at work changing that stuff.

Gordon Quinn:
Yeah. I think that was, that was a long time ago.

Lindsey W.:
That was before I was on board.

Gordon Quinn:
Yeah. It was just amazing.

Patricia A.:
Yeah, there's … I'm sorry, Lindsey, go ahead.

Lindsey W.:
I forgot what I was going to say.

Patricia A.:
I think …

Peter Jaszi:
While you think, let me jump in for a second and address the question, and that is, the software preservation code is of course designed for institutional users for collections rather than individuals operating as individuals. But it's designed for institutions of every kind and size and variety. That's a very broad definition. I think part of the answer to the question of how you get the word out is you think about what the affinity organizations are, what places do people, even very small entities that do this work, go along with their big university-based counterparts. You think about what meetings people, from across the field, attend. And you think about what informal networks, what list servers, what other webs of connection may exist among and between practitioners, even though they're aren't

necessarily visible about outside the field, and you spread the word using any and all of the above.

Lindsey W.:
I just remembered. When you're talking about risk … Oh, first of all, all of those lawyers that you referred to, Gordon. They're gone now. Which is part of the reason why we …

Gordon Quinn:
Good work.

Lindsey W.:
Were so successful in getting their endorsement for this, the code we have now, OGC's endorsement.

Peter Jaszi:
MIT has great lawyers now.

Lindsey W.:
Awesome. When you're taking into consideration levels of risk, risk never goes away. You just have to determine what level of risk is right for you. We make that call especially around fair use all the time. Because you have to remember, sometimes fair use is not appropriate. It's not the right call. If it's not, it might be because it's too risky, it might be because the pendulum weighs against the argument for it. For whatever reason. Or that the risk is just too big. When we're making copyright decisions about our third-party content all the time, we can leave something in because it's a fair use use, and we think the risk is really, really low. All of the clips in that film studies course are extremely low risk to keep in there. I would have pulled my hair out for that lawyer who said that thing about the books on the shelf. What? That's crazy town. But that's an example of low risk, and that lawyer should be ashamed of themselves and go back to law school. Anyway. Rant.

Peter Jaszi:
I would just add one thing, that's such an important point that Lindsey has made. What I want to suggest is a kind of a process issue, and it's one that comes up sometimes when you are dealing with, not with spreading the word out through the world, but internally, with trying to persuade various levels of gatekeepers that they should pay attention. That is that of course the final decisions, use or not to use, are going to be, involve risk considerations. I think there are, I just have two caveats I want to offer.

One is that, and this is especially true talking to lawyers and administrators, I adverted to it before, you have to remember to point out to people that there are risks both ways. That there are some risks of doing things, but then there are also risks of not doing things, that you won't fulfill mission, that you won't make the film you want to make, that you won't accomplish the tremendously important goals of MIT Open Courseware, or that you won't

manage to preserve some rare and fragile old business software program that the world is going to need 20 years from now. There are risks on both sides. It's just that one set of risks, you can sort of imagine in monetized terms, maybe, even though sometimes I think those imaginations are more fantasy than real, and then there's another set of risks, which are externalities in effect, and don't respond to monetization, but they both count. That's my one point.

My other point about combining thinking about risk, or thinking about fair use, is that I think there is an important sequencing issue. Somebody, sometimes you run into people who say, "Oh, well, this is just all about risk, it's nothing but risk, so let's just forget about talking about whether something is or isn't fair use and go right to the risk analysis. Because after all, at the end of the day, the risk analysis is going to be important." I am very reluctant to do that, and I'm reluctant to encourage others to do it, because it's better, in my view, to do this in two stages. To say, "Okay, let's figure out what our rights are here. Fair use is a right, there's a big consensus about what it is in our field. We should be able to figure out how strong our position is, how well within what we think our rights are we actually are positioned." Then you think about risk.

You can think more productively, more sensibly, and often, I think, more liberal-mindedly about risk if you've done the legal analysis first. So I'm very much in favor of breaking it down into a two-step process. Let's apply the code, let's figure out where we are, let's talk to our in-house lawyers about the legal issues if we have to, and then, then we'll think about risk-based judgements. That's my ...

Jess Meyerson:
Thank you so much, Peter. And thank you so much to Pat and to Lindsey and to Gordon for joining us today. I feel especially empowered after today's episode. It's clear that there's a lot of work that we can do that's entirely tractable, and it really is about that shared sense of ownership and asserting those user rights. The conversation continues as far as the software preservation community, most certainly. We will follow up, I just want to reiterate on the previous slide, that Pat said to look out for a survey that will be coming after next week's final, seventh and final episode of the webinar series, and we encourage all of you to please respond to that survey, so that we have more information in terms of the research team and the software preservation network about how we can get all of you engaged and empowered to apply the code and to educate your colleagues to apply the code.

With that, I'll say join us next week, same time, same place, for our seventh and final episode in this series, "International Implications," as Peter mentioned before. This will be featuring Ariel Katz from University of Toronto, and possibly another special guest that we have lined up for you. Next week's episode will be facilitated by Peter Jaszi, the Washington School of Law at American University. Thank you all, as always, for joining us today, and we will see you next time.

Peter Jaszi:
Thank you.

Gordon Quinn:
Okay, thanks. Yep.