

Copyright and Preservation of Software and Software-dependent Materials

Preservation law and policy challenges and opportunities - OCEAN Webinar

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Relevant legal provisions

A very short introduction

- **Section 108 - Libraries and Archives**
 - Rights for libraries and archives - but not museums (sigh)
 - Preservation provisions:
 - Distinguish published and unpublished
 - Limits number of copies
 - Digital format copies can't leave "premises"
 - *No impact on fair use*
 - § 30.1 is the analog in Canada

Relevant legal provisions

A very short introduction

- **Section 107- Fair Use**
 - Flexible, common law user right
 - Four factors —> Transformative use
 - Context-sensitive - adapts to new tech, new social circumstances
 - Preservation as fair use called out in leg history, and in caselaw

Relevant legal provisions

A very short introduction

- **Section 1201 - the DMCA**
 - “Circumvention” - to break a digital lock that protects access to a copyrighted work
 - Paracopyright - to circumvent is a *separate offense* that may be treated as a violation even when the resulting use of the work is lawful
 - Triennial Rulemaking - proceeding to ask for exceptions to the anti-circumvention provision, to enable lawful uses

Digital Preservation and Software

Or, What to Do When the Law Thinks Your VCR is a Novel

- **Two reasons to preserve software**
 - software is culture
 - digital files require software for access - “software dependency”
- **Why access files in their original software environments?**
 - Emulation is becoming cheap and easy (EaaS!)
 - Information is lost when files are migrated or opened in new environments

Digital Preservation and Software

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- But copyright treats software tools (functional, utilitarian, etc.) as if they were creative works themselves
- Enter the Software Preservation Network
 - Fair use best practices
 - 108 and 30.1 Guide
 - DMCA Rules



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- **Fair Use Best Practices**
- Applies fair use to recurring scenarios in a preservation workflow.
 - Accessioning, stabilizing, evaluating, and describing digital collections materials
 - Documenting software in operation
 - Providing access for research, teaching, and learning
 - Providing networked access to a shared collection
 - Preserving source code



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- **108 and 30.1 Guides**
- Describe application of the general library and archives provisions in US and Canadian law to software
- Special rules for “digital”
- Special rules for “audiovisual works”
- “Reasonable investigation” of commercial availability, etc.
- Ana Enriquez and Graeme Slaght



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- **DMCA Rules**
- Permit circumvention of software “solely for the purpose of lawful preservation of a computer program, **or of digital materials dependent upon a computer program as a condition of access**”
- by an eligible library, archives, **or museum**
- **Remote access** for non-game software, under certain conditions

A Preservationist's Guide to the DMCA Exemption for Software Preservation



>|<: CYBERLAW CLINIC
HARVARD LAW SCHOOL | BERKMAN KLEIN CENTER FOR INTERNET & SOCIETY

by Kee Young Lee and Kendra Albert

A Joint Product of the Software Preservation Network
and the Cyberlaw Clinic @ the Berkman Klein Center

Permalink: <http://www.softwarepreservationnetwork.org/1201-exemption-guide-for-software-preservationists>