

How Fair Use Helps in Saving Software



**fair use
week**

Our Cultural Memory Runs on Copyrighted Software

The cultural record is increasingly digital—text, data, images, video, and more that can't be accessed without the right software. To preserve our digital culture, we have to preserve software, which is itself an important part of our history.

440



Digital file formats described by the Library of Congress digital preservation program

133



Public domain software titles out of 83,413 software titles indexed by Wikidata

12



Non-interoperable versions of the AutoCAD file format since version 1.0

3,581



Distinct file formats represented in Wikidata

Almost all software is copyrighted. Without fair use, software could be off-limits for preservation and research.



Fair use is the right to use copyrighted material without permission or payment, under some circumstances. The statute, numerous court decisions, and best practices provide ample guidance about when fair use applies. Fair use is widely used by journalists, researchers, and search engines—and, increasingly, by software preservationists.

Fair Use Works

Beyond the Permissions Culture: Fair use lets preservationists do their work rather than always seeking permission—and it's legal.

Fair use best practices work because they:

- Describe centrist, consensus methods
- Are developed by practice communities themselves, which is also useful to judges
- Are grounded in the mission and practice of software preservation
- Are based on solid research into how courts decide fair use cases
- Do not impose arbitrary and absurd limitations
- Are developed by expert facilitators, reviewed by legal experts, and endorsed by leading library and educational groups



The *Code of Best Practices in Fair Use for Software Preservation* lets people who preserve software employ fair use to support teaching, learning, and research.

Scenarios in Which the Software Preservation Code of Best Practices Applies

Four Fair Use Factors

- 1 Purpose and character of the use
- 2 Nature of the work
- 3 Portion used in relation to the copyrighted work as a whole
- 4 Effect of the use upon the potential market

The most important factor is the purpose: is the use transformative? Courts are much more likely to uphold a use as fair use if it is transformative, meaning that it adds something new, with a different character, expression, meaning or message, or function.

If the right of fair use applies, the user does not need to seek permissions from the rightsholder.

The *Code of Best Practices in Fair Use for Software Preservation* applies to FIVE scenarios:



Accessioning, stabilizing, evaluating, and describing digital objects



Providing access to software for use in research, teaching, and learning



Documenting software in operation, and making that documentation available



Providing broader networked access to software maintained and shared across multiple collections or institutions



Preserving files expressed in source code and other human-readable formats