

copy has no negative effect on the potential market of the preserved work (indeed, preserving the work for posterity should have a positive effect, if any). To justify the effort and expense of digital preservation, the works preserved will typically be unique, rare, or, in any event, out-of-commerce, and the library's activities therefore will not be mere substitutes for acquisition of a new digital copy of the work. Works in obscure, near-obsolete formats present access challenges as well as preservation ones, but the same fair use rationales will apply. Works trapped in decaying and increasingly obscure formats will disappear completely without diligent work from librarians to migrate them to usable formats.

PRINCIPLE:

It is fair use to make digital copies of collection items that are likely to deteriorate, or that exist only in difficult-to-access formats, for purposes of preservation, and to make those copies available as surrogates for fragile or otherwise inaccessible materials.

LIMITATIONS:

- Preservation copies should not be made when a fully equivalent digital copy is commercially available at a reasonable cost.
- Libraries should not provide access to or circulate original and preservation copies simultaneously.
- Off-premises access to preservation copies circulated as substitutes for original copies should be limited to authenticated members of a library's patron community, e.g., students, faculty, staff, affiliated scholars, and other accredited users.
- Full attribution, in a form satisfactory to scholars in the field, should be provided for all items made available online, to the extent it can be determined with reasonable effort.

ENHANCEMENTS:

- Fair use claims will be enhanced when libraries take technological steps to limit further redistribution of digital surrogates, e.g., by streaming audiovisual media, using appropriately lower-resolution versions, or using watermarks on textual materials and images.

- Fair use claims will be further enhanced when libraries provide copyright owners a simple tool for registering objections to use of digital surrogates, such as an e-mail address associated with a full-time employee.

FOUR: CREATING DIGITAL COLLECTIONS OF ARCHIVAL AND SPECIAL COLLECTIONS MATERIALS

DESCRIPTION:

Many libraries hold special collections and archives of rare or unusual text and nontext materials (published and unpublished) that do not circulate on the same terms as the general collection. The copyright status of materials in these collections is often unclear. Despite the investments that have been made in acquiring and preserving such collections, they frequently are of limited general utility because they typically can be consulted only on-site, and in some cases using only limited analog research aids. The research value of these collections typically resides not only in the individual items they contain (although such items are often unique in themselves), but also in the unique assemblage or aggregation they represent. Special collections can have a shared provenance or be organized around a key topic, era, or theme. Libraries and their patrons would benefit significantly from digitization and off-site availability of these valuable collections. While institutions must abide by any donor restrictions applicable to their donated collections, and they will inevitably consider practical and political concerns such as maintaining good relations with donor communities, librarians will benefit significantly from knowing their rights under fair use.

Presenting these unique collections as a digital aggregate, especially with commentary, criticism, and other curation, can be highly transformative. Works held in these collections and archives will serve a host of transformative scholarly and educational purposes relative to their typically narrower original purposes. Materials in special collections typically include significant amounts of primary sources and artifacts (correspondence, institutional records, annotated volumes, ephemeral popular entertainment) whose value as historical objects for scholarly research is significantly different from their original purpose. The new value created by aggregating related documents in a single, well-curated collection is also significant. In addition to access for scholarly purposes, digitization facilitates novel