

- Fair use arguments will be enhanced when curation is overt and visible rather than implicit—for instance, when commentary is being provided on the illustrative objects, whether by means of express written or spoken commentary by critics or curators, through selection and juxtaposition of works in a larger context, or both. For example, when exhibited works and excerpts are viewable online in isolation from the larger exhibit or display, it may be helpful to use graphical cues or navigational elements to ensure that visitors who find the item via a deep link can perceive and easily move to the larger exhibit of which the item is a part.

THREE: DIGITIZING TO PRESERVE AT-RISK ITEMS

DESCRIPTION:

Preservation is a core function of academic and research libraries. It involves not only rescuing items from physical decay, but also coping with the rapid pace of change in media formats and reading technologies. Even when libraries retain the originals of preserved items, digital surrogates can spare the original items the wear and tear that access necessarily inflicts. Section 108 of the Copyright Act authorizes some preservation activities, but does not address some of today's most pressing needs: the preemptive preservation of physical materials that have not yet begun to deteriorate but are critically at risk of doing so, and the transfer to new formats of materials whose original formats (such as VHS magnetic tape) are not yet obsolete (as the term is narrowly defined in section 108(c)) but have become increasingly difficult for contemporary users to consult.

The primary purpose of preservation is indubitably beneficial and arguably strongly transformative: ensuring access to aspects of our cultural heritage for future generations, well past the limited term of copyright protection. Furthermore, responsible preservation is a necessary precursor for future scholarly use in a variety of transformative contexts, including criticism, commentary, and teaching. A broader, four-factor analysis further supports digital preservation: Its purpose is non commercial and educational, the amount of the work used is appropriate to the purpose (preserving only parts of works would be unsatisfactory), the nature of the works will in many cases be scholarly nonfiction (although this may be less likely in the case of VHS tapes), and preservation in the absence of a suitable replacement

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.