Field Services Alliance Presents: Navigating Legal Landmines in Museums and Archives

Oral History Presentation
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Navigating Legal Landmines

Oral History

• Brief Overview
• Copyright
• Copyright options
• Legal and ethical issues

Photo Credit: http://vimeo.com/sohp
Navigating Legal Landmines

The Oral History Association defines oral history as:

- Oral history is a field of study and a method of gathering, preserving and interpreting the voices and memories of people, communities, and participants in past events.

Source: www.oralhistory.org
Another defining statement:

Oral history is primary source material collected in an interview setting with a witness to or a participant in an event or way of life and is grounded in context of time and place to give it meaning. It is recorded for the purpose of preserving the information and making it available to others. The term refers to both the process and the final product.

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Oral history is in a profound transition ... into the digital, networked, multi-media rich age.

Doug Boyd, Oral Historian
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Questions for oral historians include:
• Costs of doing oral history
• Standards of practice and scholarship
• Preservation and access
• Intellectual property rights and informed consent
• Benefits and challenges of the Internet

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Sources include:


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Best Practices:

- Oral History Association - www.oralhistory.org

- *Community Oral History Toolkit* – Best Practices for Community Oral Historians
Navigating Legal Issues

Let’s begin with copyright

Source: www.ehow.com
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The standard source on oral history legal issues is:

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- According to U.S. copyright law, copyright is automatically granted to anyone whose words are recorded on a fixed medium in tangible form.
- Oral histories are copyrightable works.
- Interviews are recorded on a fixed medium in tangible form.

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- There is substantial evidence that oral history interviews are recognized as joint works under copyright law.
- Joint works doctrine covers copyright ownership of interviewer and interviewee.
- Copyright ownership includes exclusive rights to reproduce a work, prepare derivative works, distribute copies to the public, and display or perform a work.

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Oral historians have several options for handling copyright ownership rights to allow for preservation and access of interview information:

• Copyright Transfer
• Creative Commons License
• Public Domain
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©

Copyright

All rights reserved
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Copyright Transfer

• Oral historians use a legal release agreement (donor form) to transfer copyright

• Transfer of copyright includes all exclusive rights of ownership
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A legal release agreement transferring copyright contains two kinds of information:

• **Standard release of copyright** – transfers copyright from the owners to another entity

• **Informed consent statement** – includes statement clarifying the interviewee is participating voluntarily, states the purpose of the interview, and how the interview will be used
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A legal release agreement often begins with an informed consent statement. For example:

The mission of the _______ oral history project is to document the history of __________. A major part of this effort is collecting oral history interviews with knowledgeable individuals. Review this agreement and ask any questions you have about its terms and conditions. Then we ask you to sign it to make the interview available to future users.
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Release or transfer of copyright is done using standard language:

I, ________, interviewee, donate and convey my oral history interview dated ________ to the __________ (repository). In doing so I convey all right, title, and interest in copyright to this repository.

Note: Most donations are made without restrictions.
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A legal release agreement also usually includes language covering:

• Right to use of owners’ names and likenesses in outreach and educational materials
• Non-exclusive right of owners to use interview throughout lifetime
• Owners’ right to review before interview is placed in repository
• Understanding that future uses may include quoting in publications, use of video clips in media, and availability on the Internet
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• Interviewer and interviewee must each sign a legal release agreement for each interview for copyright purposes
• This is commonly done immediately after the interview
• With the signing, copyright ownership transfers to the stated repository
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The best legal release agreements contain precise but not overly legalistic language, document the full meeting of the minds between the parties on all relevant issues, and provide a road map for future use and administration.

John Neuenschwander

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[Creative Commons Logo]
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Creative Commons License

• Creative Commons encourages use of information through a process of attribution rather than ownership

• A legally-binding Creative Commons license offers various levels of control over content while maintaining copyright for the original owner
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• A Creative Commons license is free and accessible
  – http://creativecommons.org/licenses/
• It provides a standard process for granting copyright permissions while protecting owner rights and privileges
• It works internationally and lasts as long as copyright lasts
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• Creative Commons requires licensees (users) to get permission to do any of the things that copyright law reserves to a licensor (owner)

• Licensees (users) must credit the licensor (owner) and keep copyright notices intact
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The Creative Commons website has a decision tree to help determine how to select a license

http://creativecommons.org/choose/
**Licenses**

- **Attribution (BY)**: Others can copy, distribute, display, perform and remix your work if they credit your name as requested by you.

- **No Derivative Works (ND)**: Others can only copy, distribute, display or perform verbatim copies of your work.

- **Share Alike (SA)**: Others can distribute your work only under a license identical to the one you have chosen for your work.

- **Non-Commercial (NC)**: Others can copy, distribute, display, perform or remix your work but for non-commercial purposes only.

**Terms**

- **Attribution**

- **No Derivative Works**

- **Share Alike**

- **Non-Commercial**
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Example of legal release form language using Creative Commons license:

• I voluntarily agree to be interviewed for this historical study ...

• I understand that my interview (and other items above) may be distributed to the public for educational purposes, including formats such as print, public programming, and the Internet.
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• Also, I agree to freely share my interview (and other items above) under the terms of a Creative Commons Attribution-NonCommercial-ShareAlike 3.0 Unported License. This means that I retain the copyright, but that the public may freely copy, modify, and share these items for non-commercial purposes under the same terms, if they include the original source information.

• In return, the interviewer promises to send one free copy of the interview recording, transcript, and related items to my address above.
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Sources for slides 27-29:

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A move to this different type of agreement [Creative Commons] may be the next sea change for [oral history] practitioners and users.

Mary Larson, Past President, Oral History Association
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Public Domain
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A work is in the public domain if:

• Copyright has expired (usually 70 years after the death of a creator)
• It is created by the federal government
• Owners have intentionally renounced copyright
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Renunciation of oral history copyright

For public domain, the copyright assignment clause in an oral history legal release agreement is replaced by a renunciation clause

Example: *In making this gift I understand that my interview will not be copyrighted by me or the oral history program but will be placed in the public domain. This decision is intended to provide maximum access by future researchers.*

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Participants in an oral history interview ... create a copyrightable document as soon as the recorder is turned off.

Mary Kay Quinlan, OHA Newsletter Editor

Each option [dealing with copyright] has consequences ... [D]ecisions ... are becoming situational, decided on a case-by-case basis, project-by-project basis.

Nancy MacKay, Oral Historian
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Now, what about...?
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What is legal and what is ethical?

• With the use of digital technology, this question becomes increasingly complicated

• The trust relationship between interviewer and interviewee must always be given priority, emphasizing importance of informed consent

• Privacy issues are important considerations

• Wording of older legal release forms also is a factor to consider
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Anonymity?

- Important in some interview situations
- Keep in mind that oral history is context-based information; knowing an interviewee’s background and frame of mind is critical to understanding content – intellectual property
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Privacy?

• Creation of digital oral history files lead to questions of control over dissemination and use of intellectual property and can have an impact on the privacy of interview participants

• Keep oral history ethics in mind at all times; balance legal with ethical

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Defamation?

- John Neuenschwander describes defamation in oral history terms and includes a list of “red flag” words in *A Guide to Oral History and the Law* (pp.35-47)
- Suggestions for avoiding situations involving defamation include staff training, corroborating information in question, and careful editing
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Restricted Access?

• It has been common practice to allow interviewees to restrict access to their interviews.
• Ongoing litigation involving the Belfast Project at Boston College has raised many questions about the use of restricted legal release agreements.
• As of this date, the case has resulted in four court proceedings, three additional possible or pending legal challenges, with no end in sight.
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Suggestions for dealing with the restricted access option for oral histories now include:

• fully informing interviewees that restrictions are not subpoena-proof
• including a statement on the legal release agreement that restrictions will be protected “to the extent possible”
• having a contingency plan in place to mount a legal defense if needed
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For more information, see “The Impact of the Boston College case on interview restrictions” by John Neuenschwander in the Oral History Association Newsletter, Vol. XLVIII, No. 2, Summer 2014, pp. 1,4,6,7.
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There is no signed legal release agreement? (or out of date agreement)

Responses can include:

- Assume legal and ethical rights are equivalent and place interviews online
- Make detailed finding aids available online but keep physical control over interviews
- Put excerpts of older interviews online (generally following “fair use” guidelines)
- Re-contact interviewees for updated permissions

pathways to access

It's a little complicated...

The release is not signed by the interviewee, only the interviewer.

Legally, you already have copyright. Ethically, it's vague.

You're golden! Proceed to Access Levels 3 or 4.

Can you conduct a good faith effort to locate the interviewee, or their heirs, to secure copyright or release?

Start here!

Do you have a written or verbal release?

Yes but......

Is your institution public or private?

No!

Public

Private

Or

Multiple repositories signed for a single interview

The Interview has a restriction!

Is the restriction unrealistic?

No problem. Joint owners do not need the consent of the other owners to give exclusive or non-exclusive licenses, transfer copyright, make derivative copies. Only own any share in profits made from the copyright. Consider Access Levels 3 & 4.

No!

Or

Was it a 'work-made-for-hire' in which case the institution would most likely be a joint owner of copyright with the interviewer?

Still can't find them?

No

Bingo!

Found them?

Good work! Consider Access Levels 3 & 4

Access Level 2:

Permission with Caveats

The institution may provide access along as caveats are in place regarding the copyright ownership and use of interviews within the bounds of fair use. Caveats may include a discussion regarding use-related restrictions during the reference exchange, on-line agreement forms requiring patrons' acknowledgment, or inclusive citation language.

Access Level 3:

Copy & Disseminate

The institution may provide a duplicate copy of the interview to a patron or researcher upon request. This copy would leave the regulated access space.

Access Level 4:

On-line Access

Interviews may be placed on-line (in context to the institution) and be available to anyone who is searching the web.

Access Level 1:

Regulated Access

Only available via in-house (reference room or library) or on a secure, private, digitally accessible site. Interview is only accessible by request and time-specific access is regulated to the individual making the request.

Access Level 3:

Copy & Disseminate

The institution may provide a duplicate copy of the interview to a patron or researcher upon request. This copy would leave the regulated access space.

Access Level 4:

On-line Access

Interviews may be placed on-line (in context to the institution) and be available to anyone who is searching the web.

Created by Sarah-Jane Poindexter, University of Louisville Oral History Center

* Disclaimer: this is not intended to serve as legal advice or best practices. This is simply a tool for exploration of access options.
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Metadata:

• Data about data

• Essential to collecting and preserving oral histories

• Integral to every step of the oral history process

• Include in project planning and continue through recording, rights management, description, location, and use

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Uses of metadata for oral history:

- Creation, multiversioning, reuse, and recontextualization
- Organization and description
- Validation
- Searching and retrieval
- Utilization and preservation
- Disposition

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For more information, see:

- Oral History in the Digital Age, [http://ohda.matrix.msu.edu/about/](http://ohda.matrix.msu.edu/about/) (series of essays on a variety of topics)
- Clifford Kuhn, “The Digitization and Democratization of Oral History,” “*Perspectives on History, the Newsmagazine of the American Historical Association*, November 2013
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When navigating legal landmines, “use common sense, sensitivity, institutional precedence, and professional codes of ethics; educate yourself—and get everything in writing”

Nancy MacKay