

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

Oral History Presentation

Barbara W. Sommer

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

Navigating Legal Landmines

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.

Mary Kay Quinlan with Nancy MacKay and Barbara W. Sommer, *Introduction to Community Oral History: Community Oral History Toolkit* (Walnut Creek, CA: Left Coast Press, Inc., 2013): 26.

Navigating Legal Landmines

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

Doug Boyd, Oral Historian

Navigating Legal Landmines

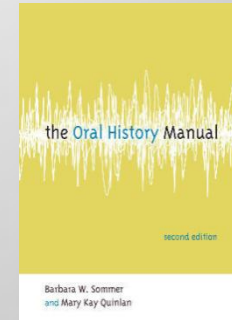
Questions for oral historians include:

- 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

Navigating Legal Landmines

Sources include:

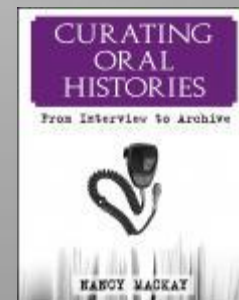
Sommer and Quinlan, *The Oral History Manual*, 2nd ed. 2009



MacKay, Quinlan, Sommer, *Community Oral History Toolkit*, Left Coast Press Inc., 2013



MacKay, *Curating Oral Histories: From Interview to Archive*, 2006, 2nd ed., 2015



Navigating Legal Landmines

Best Practices:

➤ Oral History Association - www.oralhistory.org

➤ *Community Oral History Toolkit* – Best Practices for Community Oral Historians
<http://www.lcoastpress.com/book.php?id=40>

Navigating Legal Issues

**Let's begin with
copyright**

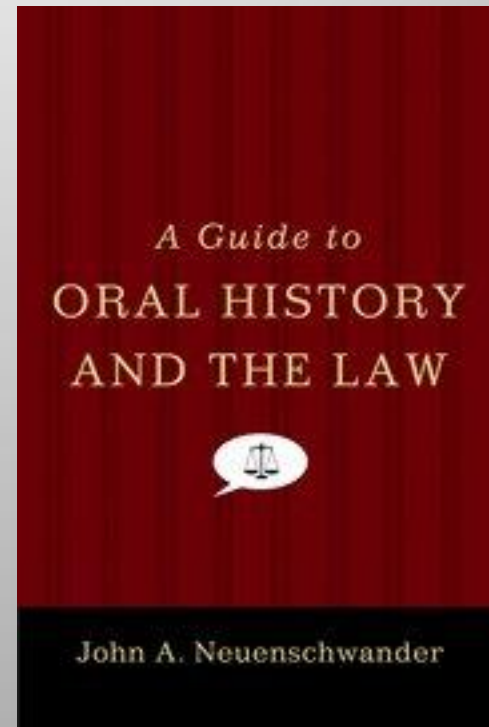


Source: www.ehow.com

Navigating Legal Landmines

The standard source on oral history legal issues is:

John Neuenschwander, *A Guide to Oral History and the Law*, Oxford University Press, 2009, 2nd ed. due out in fall, 2014



Navigating Legal Landmines

- 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

Navigating Legal Landmines

- 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

Sources: Barbara W. Sommer with Nancy MacKay and Mary Kay Quinlan, *Planning a Community Oral History Project:: Community Oral History Toolkit* (Walnut Creek, CA: Left Coast Press, Inc., 2013): 36; John A. Neuenschwander, *A Guide to Oral History and the Law* (New York: Oxford University Press, 2009):64-68.

Navigating Legal Landmines

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

Navigating Legal Landmines

©

Copyright

All rights reserved

Navigating Legal Landmines

Copyright Transfer

- Oral historians use a legal release agreement (donor form) to transfer copyright
- Transfer of copyright includes all exclusive rights of ownership

Navigating Legal Landmines

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

Navigating Legal Landmines

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.

Navigating Legal Landmines

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.

Navigating Legal Landmines

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

Navigating Legal Landmines

- 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

Navigating Legal Landmines

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

Navigating Legal Landmines



Navigating Legal Landmines

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

Navigating Legal Landmines

- 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

Navigating Legal Landmines

- 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

Navigating Legal Landmines

The Creative Commons website has a decision tree to help determine how to select a license

<http://creativecommons.org/choose/>

LICENSES



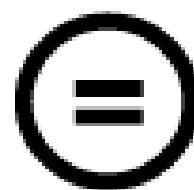
TERMS



BY

Attribution

Others can copy, distribute, display, perform and remix your work if they credit your name as requested by you



ND

No Derivative Works

Others can only copy, distribute, display or perform verbatim copies of your work



SA

Share Alike

Others can distribute your work only under a license identical to the one you have chosen for your work



NC

Non-Commercial

Others can copy, distribute, display, perform or remix your work but for non-commercial purposes only.

Navigating Legal Landmines

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.*

Navigating Legal Landmines

- *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.*

Navigating Legal Landmines

Sources for slides 27-29:

Jack Dougherty and Candace Simpson, “Who Owns Oral History? A Creative Commons Solution,” *Oral History in the Digital Age*,

<http://ohda.matrix.msu.edu/2012/06/a-creative-commons-solution/>

Navigating Legal Landmines

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

Navigating Legal Landmines

**Public
Domain**



Navigating Legal Landmines

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

Navigating Legal Landmines

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.

Sources: Nancy MacKay, *Curating Oral Histories: From Interview to Archive*, 2nd ed. ms. 2014, Neuenschwander, *A Guide to Oral History and the Law* (Oxford University Press, 2009):85

Navigating Legal Landmines

[P]articipants 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

Navigating Legal Landmines

**Now, what
about...?**



Photo credit: nps.gov

Navigating Legal Landmines

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

Navigating Legal Landmines

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
- For further discussion, see: “Oral History, Human Subjects, and Institutional Review Boards”, Oral History Association,
<http://www.oralhistory.org/about/do-oral-history/oral-history-and-irb-review/>

Navigating Legal Landmines

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
- See: Sheldon Halpern, A Shifting Paradigm: Intellectual Property Issues for Oral History in the Digital Age, <http://ohda.matrix.msu.edu/2012/06/shifting-paradigm-intellectual-property-issues/>

Navigating Legal Landmines

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

Navigating Legal Landmines

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

Navigating Legal Landmines

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

Navigating Legal Landmines

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.

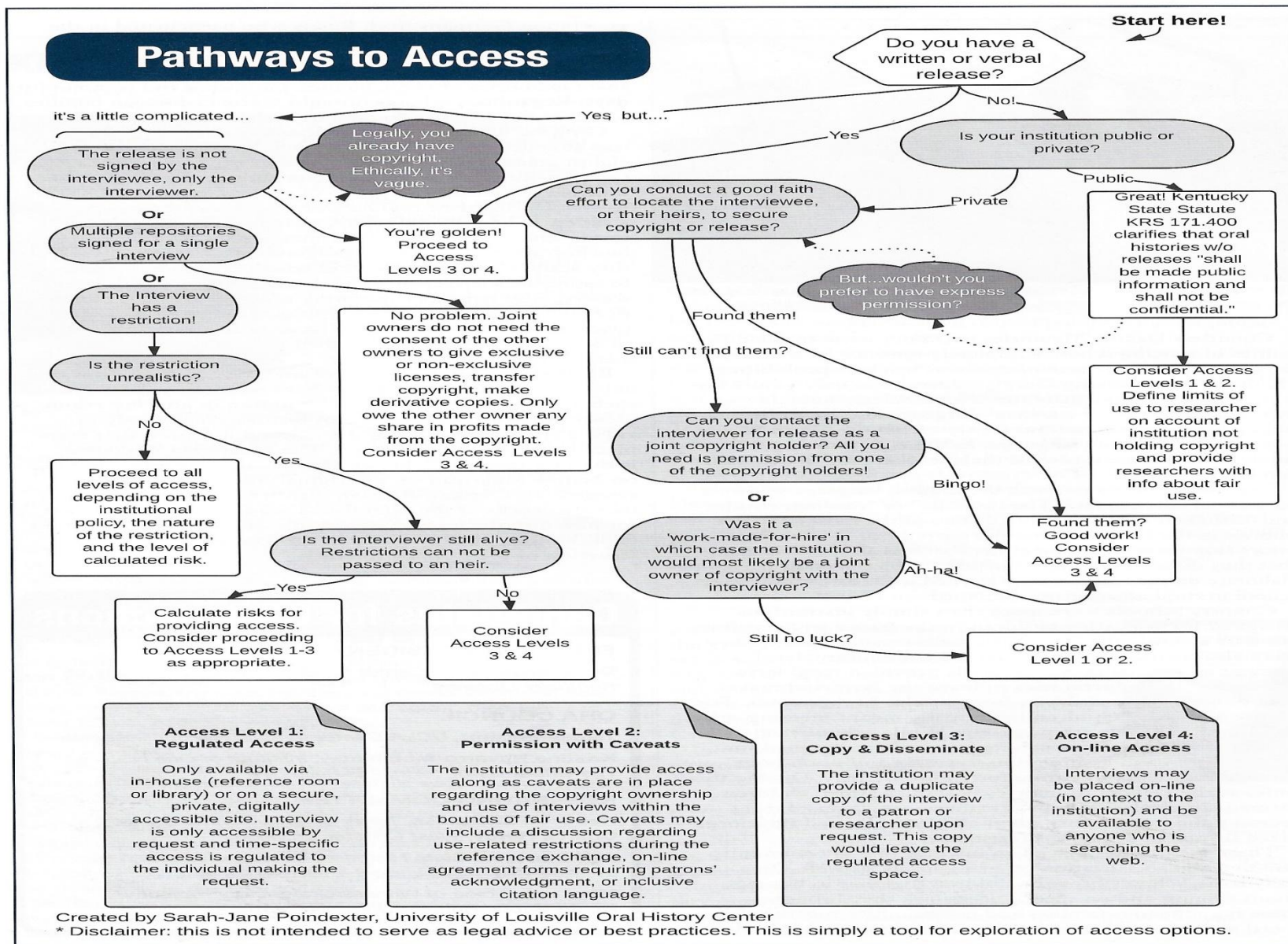
Navigating Legal Landmines

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

Source: Mary Larson, “Steering Clear of the Rocks: A Look at the Current State of Oral History Ethics in the Digital Age,” *Oral History Review*, vol. 40, no. 1, Winter/Spring 2013, pp. 36-49



Navigating Legal Landmines

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

Source: Nancy MacKay, "Oral History Core:" An Idea for a Metadata Scheme, <http://ohda.matrix.msu.edu/2012/06/oral-history-core/>

Navigating Legal Landmines

Uses of metadata for oral history:

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

Navigating Legal Landmines

For more information, see:

- Mary Larson, “Steering Clear of the Rocks: A Look at the Current State of Oral History Ethics in the Digital Age,” *Oral History Review*, vol. 40, no. 1, Winter/Spring 2013, pp. 36-49
- **Oral History in the Digital Age**, <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

Navigating Legal Landmines

When navigating legal landmines, “use common sense, sensitivity, institutional precedence, and professional codes of ethics; educate yourself – and get everything in writing”

Nancy MacKay