

ACCESSING THEIR VOICE FROM ANYWHERE: ANALYSIS OF THE LEGAL ISSUES SURROUNDING THE ONLINE USE OF ORAL HISTORIES

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ABSTRACT: This article reviews the legal issues surrounding the online dissemination of oral histories, including copyright, right to privacy, and defamation. Whenever possible, the author argues for increased access to materials within a conservative legal framework, as most oral histories were intended to be used by future scholars. The donor agreement is the mediating instrument throughout this process, however, and its role is discussed when applicable. In addition, the University of Alaska's Web site, designed by Karen Brewster, is referenced as a model for oral history presentation because its site use agreement and streaming content limit researchers in their ability to download and misquote materials out of context. Finally, a model legal release form is given, which would allow for future uses of oral history materials while still leaving room for the donor to apply restrictions, if desired.

Introduction

As broadband connections proliferate, more repositories are considering presenting at least part of their collections online. Because of its unique nature, oral history is especially suitable for this form of distribution, as the speaker often clearly intends for his or her words to be used by future researchers. However, many institutions are still wary about allowing open access to their collections. Their concerns are certainly valid, as there are several legal issues to consider regarding online access of oral histories, including terms of copyright, privacy rights, the possibility of defamation, and uncontrolled access or use of a collection. This essay discusses how the primary document for each interview, the donor agreement, determines whether and how an oral history can be used. It also describes how some institutions have chosen to present their collections. Finally, the author analyzes these issues and gives some potential solutions for the problems described, including a model donor agreement in the appendix.¹

Historical Background

The study of oral history in the United States began at the Columbia University Oral History Research Office, which was founded in 1948. At first, these “early programs found little support from skeptical history departments or from archivists who were critical of oral history’s reliance on faulty memory.”²² This lasted until the rise of the social history movement of the late 1960s and early 1970s, when “oral history became a widespread means to recover ‘history from the bottom up.’”²³ As oral history began to become more accepted by historians, the Oral History Association (OHA) began to emphasize oral histories’ special place in supplementing existing documentation by allowing different viewpoints to inform the collection.

In 1981, the Society of American Archivists (SAA) oral history committee became an affinity group, and in 1983 it became its own section. This branch of SAA, despite some archivists’ skepticism regarding the value of oral history,⁴ was at the forefront of developing methods to manage oral history collections. It also worked with the OHA and the American Historical Association to provide, in 1989, a collective “Statement on Interviewing for Historical Documentation,” in which they described some standards for interviewing that would improve comprehension of future oral histories. These methods include fully informing the interviewees of their rights and the anticipated uses for the material they are contributing as well as ensuring that the material itself is recorded accurately on the best equipment available and is treated with utmost respect and professional sensitivity. Because many oral historians are volunteers, these kinds of statements are valuable by helping to ensure some consistency among the interviews.

“Since the early 1990s, however, few archival and library publications in the United States have addressed the role and use of oral history in research institutions.”²⁵ This is quite curious because “oral history was at the height of its popularity among historians during this period.”²⁶ Many archivists even recognized that “oral history will have an important documentary role in the twenty-first century as more and more information, crucial to historical understanding, is disseminated over electronic media,”²⁷ which is transient unless deliberately captured. In addition, “over the past three decades, oral historians have produced well over ten million pages of interview transcripts,”²⁸ and that was in 1987! If this boom continues, online access to these resources will become even more significant as the number of researchers utilizing oral histories will also increase. But first, the donor agreement must be consulted.

Donor Agreements: The Basics

Because an oral history is created by at least two people, the interviewer and the interviewee, a legal release between the two of them and a subsequent donor agreement, provided it is available, regulate almost all of the legal issues discussed below. Release forms are designed to ensure the orderly and permanent transfer from the interviewee and the interviewer of all rights unless designated otherwise.⁹ Good legal releases specify competent parties, acceptable subject matter (for example, no discussions of illegal activities), and mutuality of assent, consideration, and copyright.¹⁰ In a perfect world, these agreements would release all the rights to the archives with no restrictions on access, but this rarely occurs. A recent option that has emerged is to place the oral history into the public domain, but most archives would prefer to hold

the rights themselves because “assigning copyright to the public domain vastly simplifies administration but offers little control over uses of the material.”¹¹ This decision can become especially problematic for both archives and interviewees of potentially defamatory oral histories as public domain status allows open access to these materials with no obligation for protection against misuse.

In 2007, Neuenschwander surveyed 72 agreements from a wide variety of programs and found that there were three major types of agreements: deeds of gift, contracts, and hybrids, all of which varied regarding their descriptions of future uses of the interview.¹² Older donor agreements, if they are present at all, may omit these discussions entirely or be limited in their specifications, leaving confusion as to what can be done with these materials. As most oral histories are recorded with the intent of future use, some repositories have chosen to present them online so they will reach a wider audience, but this lack of clear acceptance by the donor can make more risk-averse archivists pause. Ritchie advises, “Newer projects should build the Internet into the operating plans . . . drafting deeds of gift that specifically permit digital electronic reproduction of the interviews, and preparing transcripts in formats convenient for downloading.”¹³ Even if such technologies are not specified, broad language describing terms of use that do not exclude future technologies for reformatting or delivery, such as transfer to all known and future formats, should be included.¹⁴ In fact, the latter method is preferable because it allows future archivists to provide access to these assets by any means they see fit. But because most donor agreements have not been so designed, archivists must also understand the legal issues surrounding oral histories.

Current Copyright Law

Definition

Copyright law for oral histories is based primarily on the Copyright Act of 1976, which states: “In order to be copyrightable, a work must be ‘fixed’ or recorded in some format and must be original . . . independently created by its author. Copyright protection begins as soon as an original work is fixed in a tangible medium of expression.”¹⁵ Currently, protection limits are 70 years beyond the life of the author, or 120 years from date of creation, or 95 years from date of publication for “works made for hire.” Because oral histories technically have two authors, one of whom is often working for a specific institution, managing these rights can be difficult. The spoken word also differs from the written word, which is why there are several cases pertaining to copyright that are useful to examine.

Right to Publication

In regards to publishing rights, the first case to consider is *Estate of Hemingway v. Random House Inc.*, in which Hemingway’s widow sued A. E. Hotchner, a close friend of Hemingway’s, for writing a posthumous biography about him that relied on quotations from conversations they shared. The court ruled that conversational speech could not be copyrighted unless there is a specific authority to publish that is implied by the

speaker.¹⁶ In another publishing case, *King v. Mister Maestro and the 20th Century Fox Record Corporation*, Martin Luther King Jr. sued for his exclusive right to make records available of his famous “I Have a Dream” speech.¹⁷ He won over CBS and Mister Maestro records in 1963 despite having handed out outlines and summaries of his speech to the press that did not have the benefit of a copyright notice.¹⁸ The precedent from these cases indicates that the law often follows intent. For libraries and archives, this would suggest that unless the creators implied they were going to publish their statements at some future date, which most contributors to oral histories do not, the content within these recordings may be considered as relatively free of copyright.

Section 107: Limitations on Exclusive Rights: Fair Use

Fair use is the most prominent exception to the exclusive rights of copyright, and it is often used by educational institutions to justify their reproduction of various materials. Determination of fair use, however, is subject to courts ruling on the following factors: purpose and character of the use, nature of the copyrighted work, amount and substantiality of the portion in relation to the whole, and effect of use upon the potential market or value for the entire work.¹⁹ Insofar as ownership of the recording is held by the creator, even if the archives has custody of the physical embodiment of that interview, the fair use exemption would not affect transfer of copyright; it merely limits the applicability of specific copyright violations that would occur otherwise. As fair use cases have arisen and been adjudicated, this limitation has resulted in some repositories only posting clips and tape summaries, not entire interviews. Some institutions have sidestepped this issue entirely and have only posted transcripts or finding aids. At the moment, there are no concrete solutions for oral histories in particular, so it may be best to err conservatively unless the repository is willing to risk becoming the next test case.

Section 108: Limitations on Exclusive Rights: Reproduction by Libraries and Archives

In contrast, the Section 108 exception allows libraries to make three preservation copies of copyrighted material, provided “any such copy or phonorecord that is reproduced in digital format is not otherwise distributed in that format and is not made available to the public in that format outside the premises of the library or archives.” This can be seen as both liberating and restrictive. Granted, archives can now preserve precious materials that are under copyright in order to ensure they are available for research, but these materials still cannot be used in a digital form outside the building. This limitation makes sense for many items under copyright because they are often produced with the intent of monetary gain. For other items like oral histories, however, this policy against distribution may actually impede research because many of these assets were designed for unrestricted use, even if such use is not made explicit in the donor agreement or the agreement does not exist.

Orphaned Works

While not yet formally part of copyright law, the concept of “orphaned works” has emerged in recent years to describe those works whose copyright owners have been

extremely difficult or impossible to locate, which may be the majority of oral histories lacking donor agreements.²⁰ This status may also reflect those oral histories with donor agreements if these agreements do not transfer full copyright to the archives. In either case, reproduction and distribution of such works entail some risk because copyright law is still applicable if the rights holder comes forward, especially in cases of litigation for misuse. For less risk-averse archives, however, this probability may be small compared to the greater good of online distribution, especially when considering the special nature of oral histories. Granted, due diligence must still be exercised before making such a decision, but some have noted that this option “may open up opportunities to digitize library holdings in which copyright status is ambiguous.”²¹

Copyright Transfer

To obtain copyright, the repository needs to have it transferred in writing; the clearer and more general, the better, as the interviewee will have no perfect guarantee as to what use his or her words may be put or what technology will arise for preservation and distribution. For copyright transfer to occur, the Copyright Act specifically mandates using a written agreement that is signed by the owner of the rights conveyed.²² However, this document does not need to use the word “copyright” to be valid,²³ although “the parties’ true intent must be clearly discernible from the language used.”²⁴ Certainly, the clearer and more binding the agreement is, the more defensible it will be if the archive is ever challenged, but such specifications may also allow older interviews to be accessible even if they do not transfer copyright explicitly.

In regards to future uses of the recording, the best donor agreement will balance considerations of fully informing the interviewee or rights holder of potential uses of his or her contribution without limiting unknown future uses of the material.²⁵ A good example of such design, mentioned earlier, is including broad language in the agreement, such as transfer to all known and future formats, rather than naming the digitization process specifically.²⁶ Because many repositories are hampered by older release forms that do not include online use, updating these forms before new recordings are accessioned may prevent this problem from occurring in the future. It is imperative, however, that donor restrictions, including sealing the interview, are honored in good faith. In the coming years, however, copyright should become less of an impediment as the oral history community learns to craft legal releases that adequately cover both current and future uses of the interview.

Privacy Rights and Restricted Access

Right to Privacy

The four basic privacy invasions are: “intrusion upon the individual’s seclusion or solitude, or into his private affairs, public disclosure of embarrassing private facts, publicity that places the individual in a false light in the public eye, and appropriation, to another person’s advantage, of the individual’s name or likeness.”²⁷ A good case to illustrate one aspect of this problem, public disclosure, is *Cox Broadcasting v. Cohn*,

in which a local radio station copied the name of a rape victim off of an indictment of the alleged rapist and broadcasted it. It was a low moment for the station, but the victim eventually lost her case in a significant Supreme Court decision that upheld the First Amendment right to publish facts obtained from public documents, which is especially interesting because “in privacy, unlike libel, truth is not an absolute defense.”²⁸ Of course, this implies that such a public document was legally accessed in the first place. If not, then there could still be a suit for breach of privacy in the case of such disclosure. This ruling does seem a little harsh to the rape victim, but it also sets the precedent that publicly available information can be republished elsewhere without violating the subject.

False light, defined as “something which is not quite defamatory; it isn’t libel, but it’s not true either,”²⁹ is a big factor in many privacy suits as well. One good example of this is *Time, Inc. v. Hill*. In this case, Hill and his family survived a hostage situation in 1952 that brought them involuntary notoriety. A subsequent novel, entitled *Desperate Hours*, appeared soon after with a plot similar to their experience. This novel was eventually made into a play, which *Life* magazine described as a reenactment, using photographs of scenes staged in the former Hill home. Alleging that the article knowingly gave the false impression that the play depicted the Hill incident for promotional purposes, Hill consequently sued for damages.³⁰ *Time, Inc. v. Hill* is quite important because this decision laid down a constitutional rule regarding false light, which said that “you had to have actual malice (a deliberate falsehood or recklessness in ascertaining the truth)” in order to make a claim for privacy violations under false light. Merely locating the family against their wishes was not enough. This does give some hope to institutions with interviews that do not have explicit access specifications because they may still be presented under the stipulation that the repository does not intend malice. On the other hand, erring conservatively may be best when the possibility of legal fees is examined and winning a suit is nearly as costly as losing one.

Restricting Access

Despite the participants’ knowledge that they are recording their words for posterity, many times the recordings have access restrictions imposed on them by the interviewee, which must be respected. “The information gained through oral history interviews must never be treated lightly. Caution should always be exercised so that oral history accounts do not find their way into local gossipvines,” Neuenschwander advises.³¹ Schlesinger concurs: “If someone gives an oral history interview, I see no reason why he should not both close it as long as he wants to and require specific permission for each quotation used from it.”³² While the latter point seems a tad extreme considering the democratic nature of most oral histories, the right to individual privacy is an important one to respect. Ritchie does advise, however, that restricted material should only be a portion of the audio recording or transcript, not the entire work. This would allow the rest of the interview to be accessible while still informing interested parties that it has been redacted. “By not announcing the existence of closed interviews, the archives favor those who happen to be present when the records open, a circumstance that too often has made researchers suspicious that favoritism was being shown.”³³ In order to prevent projecting this image and to make oral histories more accessible, such

announcements may be a solution for those interviews where it is obvious which sections to omit. At the very least, it does broker a balance between protecting a donor's privacy and allowing researchers to gain as much information as possible.

Defamation and Libel

“Defamation is traditionally defined as a false statement that injures the reputation of another.”³⁴ In cases where a statement is published, it is called libel. In order for a libel charge to occur, the party libeled must be alive and identified because the right of action cannot be inherited. This is fortunate for historians since many of our contributors are deceased, and “no one can libel or slander a dead person.”³⁵ Publication must also occur. This means that the information must be communicated to a third party, that is, to a person other than the speaker and the person allegedly being defamed.³⁶ The statement must also appear highly defamatory so that an injured reputation results. Neuenschwander notes four categories of such statements: “those imputing falsehood, dishonesty, or fraud; those imputing crime and immorality; those injuring one’s business or professional reputation; and those imputing unfitness for or misconduct or criminal acts while in office or employment.”³⁷ Fortunately, the statute of limitations for most libel law is short, generally one year, though these laws do vary by state, so legal counsel is advised for any material that may be considered defamatory.³⁸

There are several common defenses to a libel suit, some of which may prove useful when considering publishing material like oral histories. The first is the truth. If the statement is found to be true, it cannot be libel. The second defense is a defense of privilege, which means that the public has a right to know certain information—for example, judicial proceedings or legislative business. Malice on the part of the writer invalidates this defense, however. There is also the defense of fair criticism that can apply to some interviews, which allows speakers to voice “an opinion on matters of public concern, based on accurate facts which are susceptible to the opinion given.”³⁹ Thus, there exists a gray area for those statements that can seem defamatory at first glance, but are actually just personal opinion. From an archivist’s perspective, however, it can still be very difficult to discern opinion from defamation, so legal counsel for borderline materials is strongly encouraged, though more risk-averse institutions may want to eschew such publication entirely.

In regards to case law, there are several cases that have set precedent in order to illuminate these issues more thoroughly. The most significant of these since *Time, Inc. v. Hill* is *New York Times Co. v. Sullivan*.⁴⁰ In this case, Sullivan brought suit against the newspaper alleging that he had been libeled in an advertisement, which included statements (some of them false) about police action against students in a civil rights demonstration. Although this advertisement did not mention him by name, Sullivan claimed the statements referred to him because his duties involved supervision of the police. Here, the Supreme Court held that to commit libel, the party had to act with “actual malice”—that is, one would have to intend to do harm, knowing the statement was false, which was not found to be the case for Sullivan because he was a public official and the advertisement commented on his official conduct. As Eustis suggests, “Privacy in the courts has gone pretty much toward freedom of inquiry and allowance

of some margin for mistakes up to the deliberate lie.⁷⁴¹ Without such intended malice, however, there is no claim for libel as the speaker's intent was unclear.

A good case to exemplify this situation arose recently in *Levin v. McPhee*.⁴² In this case, McPhee wrote a book based on five interviews with friends of artist Evgeny Rukhin, a dissident Russian artist who died suddenly as a result of a fire in his Leningrad apartment. Three of the five published versions of his death made a direct accusation against Ilya Levin, the plaintiff. "Levin complained that he had been libeled because the accounts, falsely implicating him in Rukhin's death, state or imply that he was working with the hated KGB and accuse him of cowardice."⁴³ Insofar as libel law falls equally on the institution publishing the libel and on its author, McPhee was fortunate in that the case turned on whether the offensive statements were fact or opinion, not whether they were truth or fabrication. Because McPhee clearly designated these accounts as fictional, even going so far as to label two of them "imagined," the court found that these stories were statements of opinion, not true libel.

A more recent case that would seem to have significance is *Hebrew Academy v. Goldman*. Although this case raised the issue of whether a library providing oral history transcripts to the public could be sued for defamation based on comments made in an interview, in the end its disposition rested on questions of "single publication" and statute of limitations in California. Still, the circumstances do call attention to some potential for litigation relating to putting oral histories on the Web. The source material here is the oral history of Richard Goldman, who criticized the management of the Hebrew Academy by Rabbi Pinchas Lipner in one of his interviews. Although Goldman did have control over its presentation because he was allowed to review and correct the transcript before it was published in a bound volume, the University of California was also named as a defendant in the case because copies of the transcript had been placed in the university's Bancroft and Charles E. Young Libraries. For eight years this material had the limited accessibility that would come with materials available only in print in a reading room. Then, a researcher, Miriam Real, found the statements and forwarded them to Lipner, who believed they were defamatory. Because of the nature of California law in relation to defamation, the case came to focus on whether placement of the transcript in the libraries had constituted a "publication," thus "starting the clock" for the statute of limitations for Lipner to make a claim. In response, Lipner argued that the clock should not start until he had discovered the defamation. His pleading stated that "prior to receiving the two pages of the Goldman oral history from Real, 'I did not know, and could not with reasonable diligence have known, that defendants had published such statements, in that the transcripts were never distributed to the general public, but were available only in a few locations.'"⁴⁴ Thus, the case raised two major issues for oral history practitioners: whether a library could be liable for defamation made by a third party in an interview and whether a library could secure any protection by simply making a limited number of physical copies of the transcript available for walk-in researchers, as opposed to publication or distribution, such as through online dissemination. While the 2005 Court of Appeals decision had sided with Lipner and the Hebrew Academy that they should be able to claim delayed discovery since the transcripts had only a limited distribution, in late December 2007 the California Supreme Court overturned that earlier ruling and instead found that

even though the transcript had limited circulation, it was “accessible to the public” by being in the library since 1993, and thus Lipner had missed the statute of limitations.

While the *Hebrew Academy* case on first appearance might have seemed to promise guidance on key issues of interest to oral historians, in the end it does not provide much assistance. The courts never ultimately examined the question of whether a statement in an interview could be defamatory (instead, they decided the issue more on the matter of the statute of limitations). Likewise, they did not clarify whether a research library could be held responsible for defamation by simply holding an interview transcript. Still, given the particulars of this case’s examination of the “single publication rule,” the more cautious repository might focus on the fact that for at least one year they may have to take editorial responsibility for the statements that are included in oral histories, but then after that year, placing the interview online would be much safer from this sort of claim. Unfortunately, this ruling is only directly applicable in California, but it still may be instructive for large library digitization projects, which might be able to use it to support digitization of interview transcripts previously only available in reading rooms in California.

Unfortunately, enforcing the right to delayed discovery past California’s one-year statute of limitations for libel, however, may reduce this ruling’s effect because repositories must still determine how they are going to manage the risk of potentially damaging statements in their collections during that year while balancing the need for greater access. For libraries outside of California, this ruling clearly cannot have much applicability. While it would be ideal to have a federal decision on such a case for nationwide applicability, defamation judgments are typically rendered at the state level, and defenses against such allegations must be made within the confines of each state’s legal system. While it might be suggested that oral history programs could begin vetting interview transcripts for libelous and defamatory statements, such work would require an overwhelming amount of fact-checking and also run counter to the objective of oral history to record the authentic voices of individual actors in events. Regardless, specific legal counsel is highly recommended when considering online publication of interviews, including whether a statement disclaiming the repository’s endorsement of any statement made in an interview might limit institutional liability.

Who, Where, for What? Access Issues Regarding Online Assets

Most archivists already understand the benefits of better access, but oral history in particular offers some additional benefits for researchers unfamiliar with archival materials. Compared to other primary sources, oral history can be considered a more structured narrative in that it more readily speaks for itself rather than needing interpretation, as would manuscript items. Thus, it may be more intellectually accessible for younger researchers just learning how to interpret historical material. Oral histories also can be very democratic and unpretentious, so “it seems contradictory for oral historians not to avail themselves of the most universal and cost-effective means of mass communication and dissemination of information ever devised.”⁴⁵ In addition, oral histories can offer an entry point into many archives for less-experienced users:

“In an age in which secondary historical literature is plentiful and readily accepted as the basis of historical research, archivists need every device to entice educated minds to the joy of using primary sources.”⁷⁴⁶ Students raised to search electronically may benefit the most from placing these resources online, as “university archivists report that use of manuscript collections and other materials whose finding aids are available online far exceeds that of collections whose catalogs exist only on paper.”⁷⁴⁷ Such students are not the only users who would benefit, however. The repository itself would also benefit because electronic access to any collection often “pull[s] the archives’ holdings and expanding its user base.”⁷⁴⁸

In addition to the compelling nature of the material, the format of oral histories also aids in their online dissemination. “Oral history is better suited for interlibrary loan because it does not need to be shipped out in its original form.”⁷⁴⁹ Because the interview is often considered the original document, altering the audio and transcript into a more usable format for the Internet does not fundamentally alter the archival integrity of the oral history, which is not always the case for foldered manuscripts and records. In fact, it may aid in the preservation of oral histories, as they are more likely to be refreshed and migrated if they are hosted on the institution’s server and presented on its Web site, than if they are merely sitting on the shelf. In regards to displaying transcripts, the archives should take note of one observer’s comment that “the Internet has not proved conducive for reading book-length manuscripts. . . . The Internet does best with screen-sized chunks of information,”⁷⁵⁰ which means that most transcripts may not be read entirely online. Granted, since the time that remark was made more students are using the Internet for their studies and the rise in PDFs for exchanging text documents has proliferated, but the concept behind it is still true. Many researchers and casual readers still prefer to handle large chunks of information in hard copy. Until there is a large cultural shift to using electronic documents exclusively, “the probability is that most interviews will attract researchers seeking to locate specific information instead of casual readers who will peruse the entire document.”⁷⁵¹ Nevertheless, the now widespread availability of Optical Character Recognition (OCR) may greatly enhance oral history transcripts by allowing users to find appropriate references without examining the entire interview. This would also aid in sharing information, especially with the addition of user-generated tags and commentary, even if those matters go beyond the scope of this article.

It is, however, the casual users that should concern archivists the most. By not being physically present when the collection is accessed, regardless of the format, the archivist relinquishes both the ability to show the materials in context and ensure that professional standards are applied for their use. “Archivists and librarians must find ways to ensure that oral history transcripts and audio are utilized by researchers in complete adherence to the wishes and legal restraints outlined by their curators.”⁷⁵² This entails much preparation on the front-end when designing a Web site beyond merely vetting the interviews for the legal issues noted above. It also entails determining how the institution wants these materials to be found because the repository cannot always assume that users will access the interviews through the archives’ homepage, where terms of use are provided, but instead through more indirect access, perhaps as a result

of an Internet search, meaning that important statements about terms of use may be skipped or overlooked or never even encountered. Therefore, the repository needs to consider if its index, or even the page displaying the audio files, should be searchable in engines like Google®. Should there be a registration process to access the holdings? If so, what sort of process? Could users go online and access the materials immediately after creating an account, or would they need to be approved by a staff member? Each institution must answer these questions to its own satisfaction because there are few consistent approaches to evaluate at this time.

Brewster's analysis of 64 Web sites, published in 2000, illustrates some options various institutions housing oral history collections have chosen. At the time of her writing, many Web sites had not published detailed statements of copyright or access restrictions. "Some sites include a copyright statement or disclaimer about the ownership, protection, and preferred uses of the material . . . which may be in place of or in addition to seeking permissions. Most do not mention whether they sought extra permissions from interviewees or relied upon their existing release."⁵³ She also noted that "nobody discussed the respectful use of their material or established any access provisions."⁵⁴ She found that the most common access restrictions were to require researchers to contact the archives directly, but most of the sites with this policy also did not have their material available online. This may be a judicious way for some institutions to avoid legal problems regarding the issues discussed here, but it could also be seen as limiting access. The main purpose of archives must be equitable access or there is simply no point in collecting. As it stands, "some oral history projects . . . have given so little attention to access that one might be considered lucky to find them in only nineteen-hundred years."⁵⁵ As the electronic age progresses, archives must find new and more creative ways to present material while still retaining control over its use and access. Experimenting with online access to oral history holdings may be a good starting point, as users find the content and format attractive, and there are often fewer legal issues with these materials because their creators clearly intended for future use.

Analysis and Conclusions

Although one cannot fault previous archivists for the limitations of their donor agreements, modern archivists can use these documents as a starting point for developing their own, more inclusive legal releases for future oral history acquisitions. As discussed throughout this article, such agreements should include broad language about publication and reformatting to allow for future preservation and distribution despite technological changes. Granted, there are some significant arguments against online publication, such as a lack of control over access and use, but the profession, just as the rest of the world, is moving toward more online access, not away from it. Considering the unique nature of oral histories, online access to these materials needs particular emphasis, but if a risk-averse institution believes that audio clips are the best way to prevent legal action, that may be a reasonable compromise.

However, if an archives is seriously considering republishing these materials online, then it should search through its oral history collections and try to present as many as possible within the bounds of copyright, privacy, and defamation laws. For those interviews for which the archives had not obtained copyright permission for electronic release, the archives should consider presenting them regardless, provided it first examines the donor agreement to understand the spirit of the donation. Since most oral histories were designed with future use in mind, many of these interviews would seem unlikely to face legal challenges, provided the archivist follows due diligence in examining the agreement for privacy restrictions and the transcript for anything that might be defamatory. Beyond that, however, questions of specific copyright for online access to these collections should not deter repositories from presenting this material, though specific issues should be discussed with legal counsel.

In regards to access restrictions, Karen Brewster's University of Alaska Web site, based on the well-known Project Jukebox CDs and designed from her findings, offers a good balance between presenting the material within context, controlling its use, and allowing new users to access it. Brewster did this by creating a Site Use Agreement, similar to Microsoft's, that users had to read and click "I Accept" in order to enter the site. This agreement delineated that there was no right for users to copy or publish the materials beyond limited quotation without written permission, the material could not be used for commercial gain, complete references to the project must be made if it is quoted, and users could not repost or link this site to others on the Web. Unfortunately, although such an agreement should be tenable in court, it is hard to track abusers, making this agreement more like a code of honor than a form of security. This issue is why Brewster decided to add another layer of control by making some areas password protected, due to community concerns about sensitive cultural material being open to any user. Finally, she decided to add yet another layer of security by having the user's audio media player access the content solely from the server instead of downloading it to the user's desktop, thus preventing its unauthorized capture and reuse, unless the user decided to make an unauthorized use of some form of audio capture software to circumvent the controls. Although she does not discuss search engine access to their project, the combination of these other technologically advanced tools functions well to attract new users to the material while making a good faith effort to protect the cultural and intellectual property of the archive.

In conclusion, it is much easier to theorize about these issues than it is to put them into practice. Many repositories simply do not have the funding to undertake such projects in the near future, but these ideas should be on their radar if they have an oral history collection. As demand for online access to primary source materials grows, archives should consider oral histories as a favorable "sandbox" to develop technological solutions and well-drafted donor agreements for online access and any other future uses that may arise. Granted, there are many legal issues to consider when uploading oral history interviews to an online environment, but these should be seen as opportunities for creative solutions instead of stumbling blocks. As a profession, we tend to be conservative when it comes to technological change because we want to be certain it is the right change. However, we also need to recognize the changing mind-set of a

growing population of new researchers who expect to find such materials indexed and accessible online. By doing so, we will be able to demonstrate how useful archives are in uniting users with primary sources, regardless of their location or format.

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Appendix A: Model Donor Agreement

*Appendix A: Model Donor Agreement***LEGAL RELEASE FORM
(RELEASE OF RIGHTS IN AUDIO AND VIDEO RECORDINGS)**

I, _____, hereby grant, give, assign, and transfer, forever, to the University all rights, titles, and interests to the recorded audio or video and any copies thereof and any documentation that accompanies these recordings for use by said University and its patrons in any lawful way including publication or broadcast on a worldwide basis for educational purposes and duplication or migration to all known and future formats for preservation of the material therein, except for the conditions specified below, if any:

(Donor Signature)

University Acceptance:

(Address)

(Representative)

(City) (State) (Zip)

(Date Accepted)

(Date Signed)

NOTES

1. Please note the author is not an attorney, and this article does not offer legal advice. Legal counsel specific to each institution is recommended before undertaking projects similar to those described.
2. Ellen D. Swain, "Oral History in the Archives: Its Documentary Role in the Twenty-first Century," *American Archivist* 66:1 (2003): 140.
3. *Ibid.*
4. *Ibid.*, 142.
5. *Ibid.*
6. *Ibid.*, 143.
7. *Ibid.*, 148.
8. Shirley E. Stephenson, "Protect Your Collection: Oral History and Copyright," *Public Historian* 9:4 (1987): 22.
9. *Ibid.*, 23.
10. Joseph Romney, "Legal Considerations in Oral History," *Oral History Review* 1 (1973): 69–70.
11. Donald A. Ritchie, "Legal Considerations," in *Doing Oral History* (New York: Twayne, 1995), 52.
12. John A. Neuenschwander, "What's in Your Legal Release Agreement?" *Oral History Association Newsletter* (2007): 3.
13. Sherna Berger Gluck, Donald A. Ritchie, and Bret Eynon, "Reflections on Oral History in the New Millennium: Roundtable Comments," *Oral History Review* 26:2 (1999): 15.
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17. *Ibid.*, 353.
18. Truman W. Eustis, "Get It in Writing: Oral History and the Law," *Oral History Review* 4 (1976): 7.
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20. Susan Schreibman, ed., Best Practice Guidelines for Digital Collections (Version 2) [PDF], University of Maryland Libraries (May 4, 2007), 5 (accessed May 3, 2009).
21. *Ibid.*
22. Neuenschwander, "What's in Your Legal Release Agreement?" 3.
23. *Ibid.*
24. *Ibid.*, 7.
25. *Ibid.*, 3.
26. CDP Digital Audio Working Group, Digital Audio Best Practices, 51.
27. A. J. Wright, "Legal Aspects of Oral History Collections" (Birmingham: Department of Anesthesiology of the University of Alabama, 1989), 5.
28. Eustis, "Get It in Writing," 11.
29. *Ibid.*, 12.
30. *Time, Inc. v. Hill* (Court of Appeals of New York No. 22, 1967).
31. John A. Neuenschwander, *Oral History: As a Teaching Approach* (Washington, D.C.: National Education Association of the United States, 1976), 23.
32. Lynn A. Bonfield, "Conversation with Arthur M. Schlesinger Jr.: The Use of Oral History," *American Archivist* 43:4 (1980): 469.
33. Ritchie, "Legal Considerations," 153.
34. Stephenson, "Protect Your Collection," 27.
35. *Ibid.*, 28.
36. Romney, "Legal Considerations," 72.
37. Stephenson, "Protect Your Collection," 28.
38. For those interested in the specific libel laws of their state, individual state laws can be found at www.freedAdvice.com/resources.

39. Romney, "Legal Considerations," 73.
40. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).
41. Eustis, "Get It in Writing," 13.
42. *Levin v. McPhee*, 917 F. Supp. 230, 241–242 (S.D. N.Y. 1996).
43. John A. Neuenschwander, "Oral History Interviews Lead to Libel Suit," *Oral History Association Newsletter* 34:2 (2000): 4.
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46. Bruce H. Bruemmer, "Access to Oral History: A National Agenda," *American Archivist* 54 (1991): 496.
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48. Swain, "Oral History," 156.
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50. Gluck, Ritchie, and Eynon, "Reflections," 14.
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53. Brewster, Internet Access to Oral Recordings.
54. *Ibid.*
55. Bruemmer, "Access to Oral History," 495.