

SPEAKING OF MUSIC AND THE COUNTERPOINT OF COPYRIGHT: ADDRESSING LEGAL CONCERNS IN MAKING ORAL HISTORY AVAILABLE TO THE PUBLIC

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ABSTRACT

Oral history provides society with voices and memories of people and communities experiencing events of the past first-hand. Such history is created through interviews; an interview, however, like any other type of intellectual property—once in a fixed form—is subject to copyright law. In order to make oral history available to the public, it is critically important that individuals generating and acquiring oral history materials clearly understand relevant aspects of copyright law. The varied nature of how one may create, use, and acquire oral history materials can present new, surprising, and sometimes baffling legal scenarios that challenge the experience of even the most skilled curators.

This iBrief presents and discusses two real-world scenarios that raise various issues related to oral history and copyright law. These scenarios were encountered by curators at Yale University's Oral History of American Music archive (OHAM), the preeminent organization dedicated to the collection and preservation of recorded memoirs of the creative musicians of our time. The legal concerns raised and discussed throughout this iBrief may be familiar to other stewards of oral history materials and will be worthwhile for all archivists and their counsel to consider when reviewing their practices and policies.

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INTRODUCTION

¶1 Oral history may be defined as “a field of study and a method of gathering, preserving and interpreting the voices and memories of people, communities, and participants in past events.”² Resources that capture oral history provide extraordinary opportunities for researchers and the general public to gain intimate and specific knowledge about a wide variety of subject areas. However, the use and availability of such materials may be affected by U.S. copyright law.³ Thus, it is of critical importance that relevant aspects of copyright law be clearly understood by those who generate and acquire oral history materials, in order to best facilitate making those materials available to the public.

¶2 This iBrief presents and discusses two real-world scenarios that illustrate the various issues related to oral history and the law, including copyright. Although this iBrief specifically involves the field of music, the scenarios should sound familiar to other stewards of oral history materials and their counsel.

¶3 Consider this: in a particular piece of music, simply stated, there may be a melody as well as a counterpoint (another musical line) that runs parallel to, yet also works in tandem with, that melody. If one considers oral history as the melody and copyright law as the counterpoint, given this interrelationship, it should be clear that public archives must be engaged with that counterpoint in making the melody of oral history available to the public.

I. OVERVIEW: ORAL HISTORY AND COPYRIGHT LAW

¶4 Oral history is created through interviews. An interview is subject to copyright law at the moment it is recorded, whether by hand or by machine.⁴ Once it is so recorded, copyright attaches to the

² *Oral History*, ORAL HISTORY ASSOCIATION, <http://www.oralhistory.org/do-oral-history/> (last visited Nov. 19, 2010).

³ See generally JOHN A. NEUENSCHWANDER, A GUIDE TO ORAL HISTORY AND THE LAW (2009) (discussing the impact of U.S. copyright law on oral history materials).

⁴ See 17 U.S.C. § 102(a) (2006) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”).

interview.⁵ Absent a written agreement otherwise, the interview is likely owned by the interviewer and the interviewee jointly.⁶ Thus, any third-party archive wishing to acquire an interview should obtain clear written releases from both the interviewer and the interviewee to clarify the parties' respective relationships and the scope of the archive's ability to make use of any particular interview. Still, it should be noted that where a copyright is jointly-owned, it may be transferred to a third party in writing by either joint owner; the transferor's only duty is to account to the other joint owner for any profits received.⁷

¶5 Additionally, when an interviewer is conducting an interview while employed by an archive, this would likely be considered a work-for-hire relationship.⁸ In work-for-hire situations, the archive—not the interviewer—holds joint ownership with the interviewee and would therefore be free to use the interview.⁹ The archive's sole obligation to the interviewee is to account to the interviewee for any profits obtained through such use.¹⁰

¶6 But when the work-for-hire doctrine does not apply, or when there are no releases on record, it would be necessary for an archive to try to track down the original parties (the interviewer and interviewee) or their heirs, in order to properly secure permission to use an interview. But when the original parties or their heirs cannot be located, or are deceased, how can an archive best fulfill its legal obligations under copyright law? The real-world scenarios in Section III, *infra*, may provide certain guidance in answering this question.

⁵ NEUENSCHWANDER, *supra* note 3, at 64.

⁶ *Id.* at 65–68. As noted by Neuenschwander, “neither the Copyright Act of 1976 nor a precedential court decision definitively establishes that interviewers have a copyright interest in interviews that they conduct, [but] there is a considerable body of persuasive evidence that suggests that this is indeed the case.” Neuenschwander then goes on to discuss such evidence; analysis in this area is outside the scope of this iBrief.

⁷ *Davis v. Blige*, 505 F.3d 90, 98 (2d Cir. 2007).

⁸ *See* 17 U.S.C. § 201(b) (2006) (“In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”).

⁹ NEUENSCHWANDER, *supra* note 3, at 68–70.

¹⁰ *Davis*, 505 F.3d at 98.

II. ORAL HISTORY OF AMERICAN MUSIC

¶7 The Oral History of American Music archive is the preeminent organization dedicated to the collection and preservation of recorded memoirs of the creative musicians of our time.¹¹ The OHAM staff has been collecting and creating oral history interviews related to the field of music since the late 1960s.¹² This unique and valuable collection includes approximately 2,200 audio and video recordings.¹³ OHAM's holdings include original interviews conducted by OHAM staff, and acquired interviews donated to, or purchased by, OHAM.¹⁴

¶8 "Major Figures in American Music" is OHAM's core unit. It consists of approximately one thousand interviews with composers, performers, and other significant musicians.¹⁵ In general, these interviews are created, preserved, and accessed in conformance with the guidelines promulgated by the Oral History Association (OHA).¹⁶

¶9 The acquired collections include older formal oral histories obtained by academics, as well as informal oral histories from conference proceedings, radio shows, college seminars and lectures, and journalistic interviews.¹⁷ These older acquired materials number more than 900 audio and video recordings dating back to the 1940s.¹⁸ For a variety of reasons, unlike OHAM's original interviews and current acquisitions, the OHA guidelines were not consistently applied to the materials in this older acquired collection. These

¹¹ *OHAM: About Us*, YALE U. LIBR., <http://www.library.yale.edu/about/departments/oham/> (last visited Nov. 19, 2010).

¹² VIVIAN PERLIS & LIBBY VAN CLEVE, *COMPOSERS' VOICES FROM IVES TO ELLINGTON: AN ORAL HISTORY OF AMERICAN MUSIC* 11 (2005).

¹³ *OHAM: About Us*, *supra* note 11.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See generally *Principles and Best Practices*, ORAL HIST. ASS'N., <http://www.oralhistory.org/do-oral-history/principles-and-practices/> (last visited Dec. 17, 2010). A complete discussion of the foregoing is outside the scope of this iBrief. For further reading, see VALERIE RALEIGH YOW, *RECORDING ORAL HISTORY: A GUIDE FOR THE HUMANITIES AND SOCIAL SCIENCES* (2d ed. 2005).

¹⁷ See *OHAM: Acquired Collections*, YALE U. LIBR., <http://www.library.yale.edu/about/departments/oham/acquired.html> (last visited Oct. 13, 2010).

¹⁸ Email from Anne Rhodes, Research Archivist, OHAM, to Libby Van Cleve, Director, OHAM (Oct. 12, 2010) (on file with OHAM).

reasons include the informal manner in which OHAM sometimes received donated materials and the age of the materials, which were often collected before the guidelines were issued. As a prominent public archive, OHAM is particularly concerned with addressing the legal requirements and ethical considerations with regard to public offerings from its older, general archive collection. As exemplified by the situations below, the varied nature of the creation, acquisition, and use of some of the archive's materials can present new, surprising, and sometimes baffling legal scenarios that challenge the experience of its curators.

III. REAL-WORLD SCENARIOS

A. Older Interviews with No Releases

1. The Duke Ellington Project

^{¶10} Duke Ellington (1899–1974), the renowned pianist, composer, and bandleader, is widely recognized as one of the most important figures in twentieth-century American music.¹⁹ The Duke Ellington Project—comprised of ninety-two interviews with Ellington's friends, family, and colleagues—is particularly important and significant to OHAM's holdings.²⁰ Ellington Project interviews include those of Alvin Ailey, Dave Brubeck, John Hammond, Max Roach, Billy Taylor, and Mary Lou Williams, among others of note.²¹ A number of the interviews were conducted in the mid-1970s, shortly after Ellington's death, in conjunction with a Duke Ellington Seminar at Yale University.²² Graduate students and undergraduate students conducted interviews with those who had known or worked with Ellington.²³ These interviews were assessed, and the best ones became part of the Ellington oral history collection.²⁴

¹⁹ See MARK TUCKER, *ELLINGTON: THE EARLY YEARS* (1991) (discussing the importance and significance of Ellington and his music).

²⁰ See generally *OHAM: Ellington Project*, YALE U. LIBR., <http://www.library.yale.edu/about/departments/oham/ellington.html> (last visited Nov. 19, 2010).

²¹ See *id.*

²² Email from Vivian Perlis, Founding Director, OHAM, to Libby Van Cleve, Director, OHAM (July 20, 2010) (on file with OHAM).

²³ *Id.*

²⁴ *Id.*

¶11 Because of the informal origin of the interviews gathered by students, no permission forms or releases accompany these materials in the archive. Given the passage of time, it would be difficult, time-consuming, and expensive to attempt to track down the interviewers and interviewees, or their respective estates and heirs, in order to secure the rights to those interviews so that OHAM may make them more widely available to the general public.

2. Copyright Law and the Duke Ellington Project

¶12 If any of the interviewers in the above scenario had been working under the auspices of Yale or OHAM, then the interview would likely be considered a work-for-hire.²⁵ Therefore, assuming that copyright in an interview is jointly owned, Yale or OHAM would be considered a joint owner with the interviewee, or the interviewee's heirs if deceased.²⁶ In those circumstances, Yale or OHAM's only obligation to the interviewee would be to account for any profits from the use of the interview.²⁷ Notably, courts have held a joint owner cannot sue for copyright infringement against the other joint owner.²⁸

¶13 To clarify all such legal relationships, it is best to secure these types of agreements in writing from interviewers when applicable. In the case of the Duke Ellington Project, OHAM does not have any express work-for-hire agreements on file. In the absence of such agreements here, and given that the work-for-hire doctrine may not apply to those interviews conducted by students, it would be prudent for OHAM to at least undertake a reasonably diligent effort to secure a transfer of the copyright from either the original interviewer or interviewee (or both), in order to secure the rights needed to make any particular interview available to the public. Without securing these rights, OHAM may be at some risk of liability when using a particular interview.

3. The Safe Harbor of the Proposed Orphan Works Act

¶14 Still, even if OHAM's efforts to obtain such rights are unsuccessful, documentation that OHAM made a reasonably diligent effort to secure those rights may entitle OHAM to the protection

²⁵ See 17 U.S.C. § 201(b) (2006); NEUENSCHWANDER, *supra* note 3, at 68–70.

²⁶ NEUENSCHWANDER, *supra* note 3, at 65–68.

²⁷ Davis v. Blige, 505 F.3d 90, 98 (2d Cir. 2007).

²⁸ See, e.g., Morrill v. Smashing Pumpkins, 157 F. Supp. 2d 1120, 1126 (C.D.Cal. 2001).

provided by the safe harbor provision of the Orphan Works Act, should that Act ever become law.

¶15 An “orphan work” is a work that is protected by copyright but whose copyright owner is difficult or impossible to find.²⁹ In 2006 and 2008, Congress proposed legislation to address the orphan works problem; neither attempt moved beyond committee.³⁰ The Orphan Works Act would free up for reuse those copyrighted works whose owners could not be found. The Act would limit the amount of damages a copyright owner could collect from an infringer of an orphan work where the infringer is able to show that a reasonably diligent search for the copyright owner was performed before using the owner’s copyrighted work.³¹ OHAM, however, is without a safe harbor unless some version of the Orphan Works Act becomes law. Thus, if OHAM makes use of an interview for which it does not hold a release or without obtaining the copyright owner’s permission, then it may be liable for copyright infringement even if OHAM made a reasonably diligent effort to contact the copyright owner.³²

¶16 It should be clear that written documentation of copyright ownership is a critical part of an archive’s stewardship of oral history. This important aspect of an archive’s work is sometimes hampered by the lack of such documentation for older materials. The best that an archive can do in such circumstances is to try to remedy that lack of documentation as thoroughly as possible.³³

²⁹ Steven Hetcher, *Orphan Works and Google’s Global Library Project*, 8 WAKE FOREST INTELL. PROP. L.J. 1, 3 (2007).

³⁰ Orphan Works Act of 2008, H.R. 5889, 110th Cong. (2008), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:h.r.05889>; Orphan Works Act of 2006, H.R. 5439, 109th Cong. (2006), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.r.05439>.

³¹ See, e.g., H.R. 5889.

³² See, e.g., *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253 (2d Cir. 1986). This assumes certain prerequisites are met by a copyright owner before the owner files suit. 17 U.S.C. §§ 411-412 (2006) (requiring copyright registration prior to the initiation of an infringement suit). Whether such a claim would ultimately be successful is outside the scope of this iBrief. A copyright owner would need to prove (1) ownership, (2) of a valid copyright, (3) that was infringed. Even then, a number of defensive strategies would be available to OHAM, including the affirmative defense of fair use. A review of these strategies and that of fair use would run beyond the scope of the present discussion.

³³ Some organizations in this area have focused their efforts specifically on bolstering the defense of fair use to remedy a lack of documentation. See, e.g., DANCE HERITAGE COALITION, STATEMENT OF BEST PRACTICES IN FAIR USE OF

B. The Necessity of Protocols: Avoiding Conflicts with Donors of Materials

¶17 In the second scenario, an interviewer (“Smith”) donates his interview with a famous composer (“Jones”) to OHAM. No documents are signed in conjunction with this donation. Separately from the above, and after Jones dies, her Estate donates all of her various materials to Yale.

¶18 A number of years pass, and the interview donated by Smith is accessed by a researcher. The researcher wishes to use part of the interview in a book, and asks an OHAM employee what is required. Having no specific protocols in place at the time, the employee states that the researcher should merely give credit to OHAM for its use. No mention is made of Smith or of securing authorization from the copyright owner.

¶19 The researcher publishes the book—and with it, the interview excerpt—properly crediting OHAM, as directed by the employee. Later, a filmmaker chooses to base part of a film on the book, and quotes certain portions of the interview without crediting a source. Smith sees the film, becomes incensed that he was given no credit for the interview, and in a huff, removes the Jones interview from OHAM. What could OHAM have done to forestall such an unfortunate result?

¶20 As an initial matter, Smith was not working for Yale and the work-for-hire doctrine is not implicated. He is, at best, an independent contractor.³⁴ And because there are no signed agreements between Smith and Jones, Smith and Jones would likely own the copyright in the interview jointly.³⁵

DANCE-RELATED MATERIALS 7 (2009), available at http://www.danceheritage.org/fairuse/DHC_fair_use_statement.pdf (“Lawyers and judges . . . take into account the professional consensus of the relevant field in determining what uses should be considered fair. The attitudes and customs of the “practice community” show how the field balances the rights of copyright against that community’s need to use copyrighted material for culturally significant purposes.”) (emphasis omitted). Although the foregoing is a laudable proposal, there are no reported cases in any jurisdiction that currently support such a position.

³⁴ See, e.g., *Cnty. for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1494 (D.C. Cir. 1988) (holding copyrightable work by independent contractor cannot be a work-for-hire absent written agreement and certain other considerations).

³⁵ NEUENSCHWANDER, *supra* note 3, at 65–68.

¶21 Copyright, like any other property, passes into one's estate upon death.³⁶ Thus, after Jones's passing, her Estate will jointly own the copyright in the interview with Smith.

¶22 When Smith first gave the interview to OHAM, OHAM should have insisted upon one of the following in writing: an irrevocable Deed of Gift, including a transfer of Smith's interest in the copyright; or, at a minimum, a non-exclusive license for use of the interview.³⁷

¶23 The Deed of Gift would have addressed the later copyright issues and would have prevented Smith from removing the physical tapes of the interview. Although a license would not have the strength of the Deed of Gift, it would have at least conveyed certain rights to OHAM to let others use the interview.³⁸

¶24 Even if Smith refused to provide either document to OHAM, as noted above, the Jones Estate would still likely hold a joint copyright with Smith in the interview. Therefore, because the Jones Estate chose Yale as a depository for all of Jones's materials, OHAM should be able to secure, if not a Deed of Gift, then certainly a non-exclusive license for use of the interview from the Jones Estate.³⁹ Absent a written Deed of Gift, Smith's physical tapes would likely be seen as a loan rather than as a gift.⁴⁰ While acknowledging the delicacy of the politics involved, if the license from the Jones Estate had included the right to duplicate the recording for archival purposes, then even if Smith sought a return of his original tapes, OHAM could return the original and still retain a copy on file.

¶25 By securing a Deed of Gift or a non-exclusive license from either of the joint owners of the copyright (Smith or the Jones Estate), the researcher might not need to seek permission independently prior to using the interview in a book. Whether the filmmaker would need to come back to OHAM to make use of the interview in the researcher's book or whether the researcher could grant that right will depend on the scope of the right originally given to the researcher by OHAM, which might be limited by the original scope of OHAM's rights in the interview.

¶26 This brings us back to the employee who gave informal directions to the researcher. While it may be true that the researcher perhaps should have known permission was needed from the copyright owner to use the

³⁶ See, e.g., *Range Road Music, Inc. v. Music Sales Corp.*, 472 F. Supp. 2d 558, 560–61 (S.D.N.Y. 2007).

³⁷ NEUENSCHWANDER, *supra* note 3, at 3–17.

³⁸ See *Davis v. Blige*, 505 F.3d 90, 100 (2d Cir. 2007).

³⁹ See *id.*

⁴⁰ NEUENSCHWANDER, *supra* note 3, at 7–8; *Yale Univ. v. Fisk Univ.*, 660 F. Supp. 16, 18 (M.D. Tenn. 1985), *aff'd*, 810 F.2d 204 (6th Cir. 1986).

interview, it is just this sort of sequence of events that may potentially lead to copyright disputes. The object here is to have protocols in place to avoid such disputes and any possible litigation.

¶27 In short, no direction or advice regarding use of materials should ever be given informally, whether in person, over the phone, or even by email. Every archive should have a written policy in place that explains, as fully as possible, and at a minimum, how an archive's materials may be used, the scope of that use, and whether independent permission must be sought.

¶28 This written policy or protocol, which need not be extensive, may then be posted on the archive's website and also made part of any agreement signed by a researcher prior to receiving permission from the archive to use its materials. That permission should, among other things, reference the source of the archive's power to give the permission and require indemnity from the researcher for any claims brought against the archive arising from the researcher's use of the material.⁴¹

¶29 Because OHAM had no release agreements on file, OHAM should have instructed the researcher to obtain permission independently from the Smith and/or Jones Estate. OHAM should have next required that the researcher sign an agreement acknowledging this instruction and indemnifying OHAM for any claims arising from the researcher's use of the interview. Indemnity in such situations is important; without it, archives could potentially be stuck defending hundreds of claims arising from third parties' use of the material in their collections.

CONCLUSION

¶30 Written documentation of copyright ownership is a critical part of any archive's oral history work. As our times transition into the digital age, it is unfortunately necessary to play "catch up" with older materials. Thus, archives should engage in a two-pronged approach to (1) address the need for written documentation of copyright ownership for older materials to the best of their ability; and (2) design copyright documentation protocols so that current and future use of materials satisfies the law's requirements. This two-pronged approach may be time-consuming, and archives may prefer to direct their energies more towards the material itself, but by making a focused and consistent effort to bring the written documentation of copyright ownership in line with applicable law, archives can make their material more widely available to the public, which is ultimately the goal of most archives. By taking this proactive approach, the counterpoint of

⁴¹ "Indemnity" means that the researcher would agree to defend and protect the archive from any such claims. *Foley v. Luster*, 249 F.3d 1281, 1288–89 (11th Cir. 2001).

copyright can become less a tangle of unordered notes and more like the harmonious complexity of a Bach fugue.