A Guide to ORAL HISTORY *and* THE LAW

JOHN A. NEUENSCHWANDER

SECOND EDITION

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For Lucy

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Preface

Oral history is everywhere. Today it seems as though there is virtually no area of American life that has not been visited by an oral historian. The range of practitioners extends from award-winning biographers to grade school children. Oral history is a research tool with virtually unlimited applications from the tens of thousands of veterans who have recorded their memories of America's wars courtesy of the Veterans History Project to the hundreds of authors who annually publish edited collections of interviews. A very selective listing of such books suggests that oral history has no subject matter boundaries:

Nothing to Speak Of: Wartime Experiences of the Danish Jews, 1943–45
Inside This Place, Not of It: Narratives from Women's Prisons
Nisei Soldiers Break Their Silence: Coming Home to Hood River
Twin Cities GLBT Oral History Project, Queer Twin Cities
Lady Bird Johnson: An Oral History

Despite such astronomical growth and the increasing public awareness of how oral histories enrich the historical record, there are still only a handful of reported court cases that address the legal issues that the practice of oral history can generate. This may not be the case for much longer. It is a truism in America that virtually any field of endeavor, whether in business or academia, that experiences rapid growth and increased public attention usually generates a growing number of legal challenges in the process. Many of these challenges may come from the increasingly contemporary subject matter emphasis of oral history research. In addition to the local historical society conducting oral histories with octogenarians, there are growing numbers of researchers who are studying subjects like illegal immigration, prostitution, AIDS, war crimes, and drug use. In this context, the advice given by attorney H. Mason Welch to oral historians attending the Fourth National Colloquium on Oral History in 1969 is still remarkably timely: "This occupation, like any other, harbors a possibility of inflicting real or imagined injury and wrongs upon others, and those things usually. . . result in litigation."

To address the potential legal concerns of oral historians, I wrote a short pamphlet entitled *Oral History and the Law* which the Oral History Association published in 1985. The foremost purpose of this pamphlet and the subsequent editions that followed in 1993 and 2002 was to identify and examine the potential legal issues facing oral historians and to suggest policies and procedures to avoid these problems. While this book shares the same goal, it represents a completely new and far more comprehensive examination of the myriad of legal concerns that go hand-in-hand with the practice of oral history in the 21st century. Readers, for example, will find numerous examples of exemplary practices and procedures drawn from a cross section of oral history programs to assist them in determining how best to deal with key legal issues. They will also encounter frequent discussions of professional ethics to aid them in laying a strong foundation upon which to erect the most legally sound policies and procedures. The recommended code of ethics for both oral historians and programs comes from the *Principles and Best Practices* of the Oral History Association. The intent of this code of ethics is to encourage those who gather, preserve, and utilize oral histories to do so in the most principled manner possible. Foremost among these obligations is the ethical treatment of interviewees. Although the OHA's *Principles and Best Practices* consists of statements of ethics that are not legally binding, the recommended practices that are set out provide a code of conduct which, if adhered to, lays a solid foundation for avoiding legal problems. Readers are also encouraged to read the entire *Principles and Best Practices*, which appears in Appendix 2.

A Note on Legal Terms

The American legal system is often a mystery. Lawyers are like priests who engage in a system of court rituals and incantations that are frequently baffling to the everyday citizen. Whether a lawyer is appearing *pro hac vice* (a special appearance by a lawyer not licensed to practice in that jurisdiction) or making a motion *in limine* (an attempt to prevent evidence from being admitted), the legal terminology can seem impenetrable. Every effort has been made in this book to spare lay readers from having to grapple with excessively complex legal terminology. Where legal terms are utilized, a short definition of the word or phrase will always be provided.

The Use of State Cases

Throughout this book, the reader will also encounter many court cases. To enhance readability, only the names of the most important cases will appear in the text. Because there are very few cases dealing directly with oral history, most of the cases that are discussed in this book were chosen because they present factual situations that closely resemble what oral historians encounter. Except where noted, all cases discussed are published ones. In order for a case

to be published in any state jurisdiction, it has to be decided by an appellate court and have precedential value. The latter term means that the legal holding of the case must be followed by lower courts within the state when they address the same issue.

The appellate courts in all fifty states have two primary responsibilities. The first is to review the work of the trial courts and either affirm their decisions or correct substantive errors. Their second responsibility is to establish legal precedents. This latter role is usually the province of the highest appellate court in a state. State legislatures can and often do preempt their highest court on matters of legal precedent by enacting laws. For example, a sizable number of the states have refused to recognize the privacy tort of false light discussed in Chapter 5. In Wisconsin, it was the legislature that decided to bar the filing of a lawsuit for false light in any state court. In other states, like Texas, it was the supreme court which determined that no lawsuit based on a claim of false light could be filed anywhere in the state.

A case with legal precedent in one state sometimes has a direct bearing on how the legal precedent on a particular issue is decided in another state. For example, *Hebrew Academy of San Francisco v. Goldman* is an important defamation case that was decided by the supreme court of California in 2007. The holding in the case provides binding precedent for all other courts in California. The impact of the decision in *Hebrew Academy* may, however, be persuasive to courts in other states for several reasons. First, it may be an issue that has not yet been addressed. Thus, an appellate court in such a state might find the California Supreme Court's ruling so convincing that they could decide to adopt it. If the highest appellate court in another state did so, then the legal holding in *Hebrew Academy* would in turn become a legal precedent in that jurisdiction. Another factor in the persuasiveness of a case is the standing of the court that issued the decision. Since California and New York probably hear more defamation cases than other jurisdictions, their decisions are bound to carry more weight.

The Use of Federal Cases

On the federal level, district courts are located in every state and conduct all of the trials. They also publish some of their decisions, unlike state trial courts. These decisions can and do serve as precedent if there is no appeal to the circuit court of appeal for that region. The thirteen regionally situated circuit courts serve as the primary appellate court on the federal level. Any decision that they publish serves as binding precedent for all of the district courts in that region. If the same issue subsequently arises in another circuit, the precedent established by any other circuit court of appeals is only persuasive and not binding.

Ideally, when there are legal precedents upon which different circuit courts of appeal disagree, the United States Supreme Court steps in to make the final ruling. Often, however, this does not happen because the vast majority of the

cases that the Supreme Court takes are what are called discretionary appeals. In other words, the Supreme Court may choose not to weigh in on an issue that has produced conflicting legal precedents from different circuit courts. In recent years the Supreme Court has been taking fewer and fewer cases. On average, about ten thousand petitions for writ of certiorari (appeal requests) are filed annually with the Supreme Court. In 2007–2008, the high court agreed to hear fewer than one hundred of these cases. Given the Supreme Court's reluctance to take on a larger workload, rulings by the circuit courts of appeal have taken on even greater importance.

Prevention Is the Key

This preface would not be complete without emphasizing again that this book is first and foremost a venture in preventative or prophylactic law. As such, it is not a guide to successful litigation or a trial lawyer's handbook. The mission of the book is to help readers avoid legal controversy. The message that springs from every page is that legal problems are far less likely to occur if you establish sound procedures and policies and continually update them as needed.

Finally, this book is a general guide, does not constitute the practice of law, and should not be considered authoritative. It is intended to be a resource to assist nonlawyer and lawyer alike in gaining a sound understanding of the legal issues that oral historians should be most concerned about. By understanding the key legal issues that can arise, readers will be much better equipped to avoid becoming legally vulnerable. A local attorney who is licensed to practice law in your state or jurisdiction is always the best resource for the prevention and/or the resolution of legal problems. My hope is that the material presented here will facilitate understanding of the key legal issues and enable readers to more clearly address them with a local attorney.

Acknowledgments

Many of the suggestions offered to me in recent years by oral historians at conference sessions, by letter, and through exchanges on H-NET/OHA discussion list on oral history proved invaluable in the preparation of this book. I would like to thank all those who may have contributed in this manner for their valuable, if unknowing, assistance. I would also like to thank all of the oral historians and programs who responded to my request for sample legal release agreements. The numerous agreements that were sent in greatly enhanced my treatment of this vital legal area. Like any author, I am beholden to a number of key individuals without whose assistance I could not have completed this book. My friend Donald Ritchie not only provided me with incisive commentary on several chapters but also served as my sounding board throughout the preparation of this manuscript. Nancy Toff, my editor at Oxford, also deserves a great deal of credit. Her comments and suggestions were instrumental in making this legal work as germane and reader friendly as possible. My final acknowledgment goes to my wife Lucy. She was not only a constant source of encouragement and support but also provided invaluable assistance to her computer-challenged husband in the preparation of this work.

A Guide to Oral History and the Law

1

A Case Study

Lawsuits involving oral historians are quite rare. Whenever one does come to light, however, it is usually worthy of some discussion and analysis. In the case at hand this is especially true because the litigation centered on the interpretation of an oral understanding between the parties and on several significant copyright issues.

In 1997, Pat Burns, the defendant in this lawsuit, volunteered to begin interviewing Red Cross members who had served overseas. She began with those who had served during World War II and later conducted interviews with others who served during either the Korean conflict or the Vietnam War. To help locate potential interviewees she contacted the American Red Cross Overseas Association, an organization devoted to maintaining and enhancing the ties among workers who served overseas during wartime. The Association agreed to provide her with its membership list and also paid a portion of her travel expenses related to the interviews she conducted. However, the two parties never put the terms of their agreement in writing.

Over the next eleven years she conducted eighty interviews and with the assistance of a volunteer videographer produced two award-winning documentaries: *In the Spirit of Clara Barton* and *Armed with a Smile*. The first presented the faces and stories of Red Cross workers from World War II and the second focused on the Vietnam War. All of the interviewees executed a deed of gift to Burns. Some of the interviewees also loaned her photos and memorabilia. Both documentaries were shown at Overseas Association meetings.

In May 2008 the heretofore cooperative relationship between Burns and the leadership of the Association came to an abrupt end. The leadership informed Burns that she was to turn over all of the interviews that she had conducted as well as the documentaries and working files related to the project. When she refused, the Red Cross Overseas Association filed suit in Cobb County, Georgia, for conversion, breach of contract, and bad faith. Shortly after the lawsuit was filed, Burns and her videographer, on the advice of their attorney, registered the interviews and the two documentaries with the U.S. Copyright Office.

Attorneys for both sides sent out interrogatories and requests for documents during the discovery phase of the proceedings. In July 2010 the attorney for

Burns filed a motion for summary judgment. Such a motion is often filed by defendants in civil proceedings to try to have a lawsuit dismissed prior to trial. To prevail on such a motion, the defendant must convince the court that the plaintiff, in this instance the Overseas Association, had failed to show that there was any genuine issue of material fact that would entitle them to a judgment.

The centerpiece of the Association's claim was that the interviews Burns conducted and all other work products relating to the project, including the two documentaries, were owned by the Association based on their oral understanding. While oral agreements are sometimes upheld by courts, if the property at issue is a copyright, an oral agreement will not suffice. Since the interviews and documentaries had been copyrighted by Burns, her attorney sought to convince the court that Burns was thus entitled to summary judgment.

To support this position, Burns relied on two key provisions of the Copyright Act. The first provision was the automatic assignment of the copyright to the creator unless it was a "work made for hire." But this could have come about only if Burns were an employee of the Association or had signed a written agreement transferring her copyright interest to them. Since Burns was a volunteer and there had never been any written agreement, it was thus uncontroverted that the copyright ownership of the materials at issue resided with her. Before the court reached a decision on Burns's motion for summary judgment, the Overseas Association voluntarily dismissed its lawsuit. In doing so, the attorney for the plaintiff apparently believed that the court would most likely grant the motion for summary judgment.

This lawsuit provides an appropriate introduction to this book. It not only points up how even volunteers can become ensnared in litigation but the crucial importance of carefully documenting all agreements. While a written agreement certainly can also be the source of a legal dispute, as this book will demonstrate, agreements that are clearly written, legally sound, and agreed to following a thorough informed consent process go a long way to ensuring legal peace of mind.[1]

2

Legal Release Agreements

Americans live in a world that is ruled by legal agreements. The average American goes through life signing contractual agreements for credit cards, loans, insurance, and wireless service. To sell anything on eBay, one must first sign a legal agreement. Participants in organized road races must sign a legal agreement that basically waives the liability of the promoters should the runner be injured or suffer a heart attack. The vast majority of Americans usually sign these legal agreements without bothering to read the fine print. Even most lawyers rarely take the time to carefully read, let alone question the stock language that is found in consumer agreements. If an insurance agent or bank officer tells us we need to sign an agreement in order to receive coverage or a loan, the only question usually asked is, "Where do I sign?"

Against this backdrop, it is not surprising that while legal release agreements are essential to the effective functioning of any oral history program, they rarely receive the close attention that they deserve. The public debate surrounding the legal release agreement that former Supreme Court Justice Thurgood Marshall signed with the Library of Congress points up how a single ambiguous word can spell trouble.

Before he decided to donate his papers, including several oral histories, Justice Marshall made a highly unusual decision for a national public figure, namely that there should be immediate access to his papers after his death. This is precisely what happened in 1993. Some of his fellow Supreme Court justices and even members of Marshall's own family, however, did not take kindly to Marshall's decision. Before the furor subsided, a U.S. Senate subcommittee looked into the matter, and the Librarian of Congress was forced to publicly defend the agreement that Marshall signed.

The event that triggered this incident was a three-part series in the *Washington Post* beginning on May 23, 1993. The major focus of these articles was the inner workings of the Supreme Court. Some members of the Supreme Court, as well as members of Marshall's immediate family, were very uncomfortable with the personal characterizations and accounts of key court decisions that the *Post* was able to glean from the Marshall papers. Chief Justice William Rehnquist even wrote a letter to James Billington, the Librarian of Congress, in which he accused the library of "bad judgment" in allowing access to Marshall's papers

so soon after his death.[1] He also warned that current justices might well decide to donate their papers to an archive other than the Library of Congress.

The focus of the inquiry by the Senate Subcommittee on Regulation and Government Information was whether or not the Library of Congress had abided by the terms of Marshall's agreement. After Marshall decided to deposit his papers at the Library of Congress in 1991, a deed of gift was drafted by the staff of the Library of Congress. The proposed agreement reflected his stated wish that there be immediate and unrestricted access to his papers. A cover letter invited him to make any changes he wished. He subsequently signed the agreement and returned it without making any changes. The key clause that prompted the Library of Congress to open his papers to researchers shortly after his death read, "Thereafter the collection shall be made available to the public at the discretion of the Library."[2] James Billington maintained that the library's discretion was purely technical in nature. All it amounted to was the time it would take the library staff to catalog the Marshall papers for public access. He noted that former justice William Douglas had also opted for immediate access. Critics of his decision, however, believed that the library's discretion was far broader and encompassed delaying access for a number of years.

Although the furor over the actions of the Library of Congress soon died down, Harry Blackmun, a colleague of Marshall's, sought to avoid a similar controversy by mandating that his papers could not be accessed until five years after his death.[3] The controversy surrounding the opening of the Marshall papers provides a useful segue to the importance of drafting legal release agreements that are legally binding and free of ambiguity.

Drafting Legal Release Agreements

Although becoming increasingly rare, there still is an occasional posting on H-OralHist, the online discussion list for oral historians, by someone who is either just starting a program or in the process of revising an agreement and who would like to have copies of legal release agreements to use as drafting models. It is even easier to Google sample agreements by simply entering a phrase like "legal release agreements." While either method will certainly allow a program or individual to generate an agreement of some sort, there are far too many important legal and ethical issues that must be considered when putting together a release to take such an effortless approach. 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.[4] In other words, your agreement should be readily explainable to lay persons and defensible in court should such a challenge ever come to pass. Courts do not go out of their way to interpret contested agreements but when forced to do so generally apply fairly standard rules of construction. Although the deed of gift that Justice Marshall signed did not end up in court, if it had, the court would have treated

it just like any other agreement that required interpretation to settle a dispute. To reach a definitive interpretation of the meaning of the "discretion" afforded the Library of Congress to make his papers available, a court would have considered evidence regarding Marshall's intent, the generally accepted meaning of the word in previous donor agreements, and the custom of the industry (i.e., preparation time for cataloging collections). At the very least, there would have been a lot of time and money spent on discovery and lawyers' fees. The resulting decision in turn might not have supported the limited interpretation of "discretion" that the Library of Congress invoked.

Deed of Gift Agreements

A deed of gift is the type of agreement that is most often used by oral historians to legally transfer the ownership of an interview. This choice is not surprising since there is a lengthy American philanthropic tradition of using such instruments to convey ownership of memorabilia and personal papers. Long before oral history came on the scene, archives and libraries relied primarily on deeds of gift to secure legal custody and the ability to utilize historical materials.[5] A gift is the voluntary transfer of property other than real estate while the donor is still alive. In most states, three elements must be met for the donation to qualify as a legal transfer: a clear intent to make the donation, actual delivery, and acceptance by the gift's recipient.[6] In an oral history setting, intent would be satisfied by the individual's willingness to either be interviewed or conduct an interview and then donate the resulting material. The elements of delivery and acceptance pose no difficulty as long as the recording and/or transcript are in the possession of the receiving entity. To incorporate these elements into a legal release agreement, a simple sentence would suffice: "I herein permanently give, convey, and transfer my oral history to the Oral History Program." All three of the elements that make a deed of gift legally binding are obviously present in this sentence. Several sample deed of gift agreements appear in Appendix 1 (Nos. 1, 2, 5, 6, 7, and 8).

Contractual Agreements

Contract style agreements are also used by oral historians to secure the legal transfer of interviews but to a significantly lesser extent.[7] To qualify as an agreement that courts will recognize and enforce, a contract must contain four elements: agreement, consideration, competent parties, and a lawful objective.[8] Drafting an agreement that successfully incorporates these four elements is usually not a difficult task. A properly signed agreement that clearly identifies the respective parties and the interview to be transferred would certainly establish the agreement element. Consideration is more elusive but need not be. What it boils down to is the requirement that both parties actually give up something in the bargain. If an oral history program agrees to conduct an interview and then edit, possibly transcribe, and maintain the resulting

version for future use, the time and money necessary to do so would most certainly qualify as consideration. Interviewees and interviewers are also investing considerable time and effort in addition to signing away their rights to the interview. Thus, both are giving up something. The last two elements, competent parties and legal object, are far removed from the work that oral historians do. The *Principles and Best Practices* of the Oral History Association cautions against the exploitation of interviewees. Any oral historian who would start or continue to interview an incompetent person would be acting far outside the boundaries of professional ethics. The lawful objective element likewise would only come into play if it could be shown that the real purpose of an interview was to defraud or misrepresent something. The likelihood that an oral historian would knowingly participate in such a scheme is inconceivable. Several sample contract style agreements (Nos. 3 and 4) appear in Appendix 1.

Prefatory Language

How does your legal release agreement begin? If yours is like most agreements, after the title at the top, the next line usually begins, "I, _____, herein permanently give, convey, and transfer to the Oral History Program . . ." While there is nothing wrong with such an approach, inserting an opening paragraph to describe the work of the project, program, or individual researcher is advisable from both a legal and ethical standpoint. Legally speaking, a preface provides the overall context for the interviewee's decision to sign a release agreement. It also serves to reinforce the notion that the interviewee is part of a much larger historical undertaking. One of the Oral History Association's most important *Principles* is the expectation that "Oral historians inform narrators about the nature and purpose of oral history interviewing in general and of their interview specifically."[9]

The following is a good example of a context-setting preface:

> I, _____, am a participant in the Veterans History Project (hereinafter "VHP") of the Library of Congress American Folklife Center. I understand that the purpose of the VHP is to collect audio- and video-recorded oral histories of America's war veterans and of those who served in support of them, as well as selected related documentary materials such as photographs and manuscripts, for inclusion in the permanent collections of the Library of Congress. The oral histories and related materials serve as a record of American veterans' experiences and as a scholarly and educational resource for Congress and the general public.[10]

Future Use Clauses

During a workshop presentation at the Oral History Association's annual meeting, I asked if anyone had been forced to try and locate past interviewees to

obtain consent to utilize their interviews in ways that were not envisioned in their original agreement. A number of those who raised their hands indicated that their decision to publish interviews on the Internet was what necessitated this effort. They went on to describe the difficulties in locating and contacting the interviewees and the even more daunting task of trying to track down family members for those interviewees who were deceased. The consensus among those who went through a reconsenting process was to pay special attention to the language that is inserted into the future use clause.

The ethical importance of fully informing the interviewee of all of the possible future uses to which his or her interview could be put is strongly underscored in the *Principles and Best Practices*. This is first underscored in the *Principles* by the expectation that oral historians are to provide interviewees with "The plan for preservation and access, including any possible dissemination through the web or other media, as stated in the informed consent process and on release forms."[11] To make sure that every interviewee is able to grasp these important concepts, the Pre-Interview section of *Best Practices* further recommends that interviewers should schedule a nonrecorded meeting not only to go over the interview process and topics to be covered but also to ensure that the narrator understands "his or her rights to the interviews, including editing, access restrictions, copyrights, prior use, royalties, and the expected disposition and dissemination of all forms of the record, including the potential distribution electronically or online."[12] The next recommendation that the *Best Practices* sets forth is that the interviewer should conduct the interview "in accord with any prior agreements made with the narrator."[13] The final stop on this informed consent journey is in the Post-Interview section of *Best Practices* after the interview is safely housed in an archive. At that point the repository is expected to "comply to the extent that it is aware with the letter and spirit of the interviewee's agreement with the interviewer and sponsoring institution."[14] Though there is some redundancy among these various ethical recommendations, this simply underscores the great importance that the Oral History Association attaches to full and complete disclosure and consent.

But how does one craft a clause that is both ethically grounded and legally sound? There are three major ways in which programs and individuals have sought to effectively address this knotty issue:

1. *Broad, All Inclusive Language:* "For such scholarly or educational uses as the Oral History Program shall deem appropriate," or "The interview will be disseminated by the Oral History Program as it deems appropriate but not limited to, the exclusive right of reproduction, distribution, preparation of derivative works, public performance, and display."
2. *The Middle Ground:* "I understand that all materials produced from this interview, whether in tape, manuscript, electronic, film, digital or any other form, will be used only for research, educational, web, exhibition,

program, presentation, and promotional purposes by the Oral History Program or its public."

3. *Listing Specific Potential Uses:* "Potential uses of the interviews (in whole or in part) include, but are not limited to incorporation in the following: an archive to be made available worldwide via digital networks, education curriculum, film or video documentaries, online computer websites, publications, disc based products, promotional or fundraising materials, and museum exhibits. In addition, interviews may be made available to other entities with similar educational or historical purposes."

While all four future use clauses would most likely be considered binding if challenged in court, the ethical dimension must also be given due consideration. If you juxtapose these four clauses against the recommendation from the *Best Practices* that narrators should fully understand "the expected disposition and dissemination of all forms of the record, including the potential distribution electronically or on-line", obviously, the latter two future use clauses do a much better job of satisfying this ethical mandate because of their greater specificity.

One last issue is the possibility that an archive or program may someday utilize an interview for financial gain. The *Principles and Best Practices* do not directly address this issue, perhaps because the prospect of financial gain from an interview is so remote. Nevertheless, oral historians should bring up this issue on their own if they have any inkling that an interview may someday have commercial value. This ethical obligation goes to the heart of the informed consent process. While most interviewees may not be concerned about whether their interview ever generates any revenue, some may at the very least wish to be informed about this prospect and others may want to have a say in any such decision. Not-for-profit clauses like the following can address this contingency, "My interview cannot be used for any profit-making program or publication without my permission."

For example, the Southern Oral History Program (SOHP) at the University of North Carolina informs would-be users that it "welcomes non-commercial use and access that qualifies as fair use to all unrestricted materials in the collection."[15] In the event, however, that a researcher does plan to make commercial use of the collection beyond the boundaries of fair use, he or she is asked to submit a web form to secure written permission from SOHP. A list of potential commercial uses from the preparation of a derivative work to broadcast in any medium is also provided to guide the researcher as well as a brief discussion of fair use and a link to the UNC Library's Fair Use Evaluator.[16] SOHP's explanation for this non-commercial use policy is that such permissions are necessary to comply with any agreements made with interviewees, interviewers, or donors.

Transfer of Copyright

Securing a specific assignment of an interviewee's and in some instances the interviewer's copyright interest is something that every legal release agreement should be drafted to do, for without that bundle of exclusive rights that make up copyright (reproduction, distribution, display, public performance, and the creation of derivative works), subsequent use of any oral history interview would be severely limited. Even if you are one of those programs or individuals who dispense with copyright protection altogether by placing interviews into the public domain, you should include specific language in your legal release agreement to that effect.

The Copyright Act of 1976 specifically mandates that any transfer of copyright ownership must be in writing and signed by the owner to be valid.[17] Although the statute is silent on whether inclusion of the word copyright is actually required for a valid transfer of ownership, leaving it out serves no purpose. As the Court of Appeals for the Ninth Circuit noted, a writing transferring copyright ownership ". . . doesn't have to be a Magna Charta; a one-line pro forma statement will do."[18] Furthermore, according to the same Circuit Court in another decision, no magic words must be included to satisfy the statute.[19] Thus, language such as "I transfer to the Oral History Program legal title and all literary property rights to my interviews, including copyright" is quite sufficient.

Transfer of Copyright by Nonexclusive License

Exceptions in the law are to be expected, and so it is that the Copyright Act allows a creator to transfer his or her copyright interest without a signed writing. Such an assignment or license is known as a nonexclusive license. As the term implies, even though the copyright holder has seen fit to make such a transfer or grant, unlike an exclusive license that is in writing, he or she is still free to grant licenses to others or even to sell the copyright. The recipient of a nonexclusive license gets to use the work within the parameters of the grant but cannot transfer such a license to someone else or sue if it is infringed upon.[20] The grant of a nonexclusive license can be reduced to writing but it is also valid if done by an oral declaration or if the copyright holder makes the work accessible to others. An example of the former method would be an interviewee's oral statement at the beginning of an interview that he or she is conveying the copyright in the interview to the interviewer or program. Examples of the latter method of conveyance could be as simple as sending an email in response to a question posed on a listserv or uploading an interview to a website. If one assumes that both the email and the interview are protected by copyright, by sending the former and uploading the latter the authors have given an implied nonexclusive license to view their works. The boundaries of such implied licenses are, of course, less well defined than ones that are either reduced to writing or in a recorded statement.[21]

Nonexclusive licenses can be very helpful tools for oral historians in a number of ways. The most common usage is to grant a nonexclusive license to an interviewee to utilize his or her interview during the person's lifetime. It only seems fair to make sure that people who have taken the time to grant an interview should be able to utilize their own words if they elect to do so. The granting of such a nonexclusive license usually is done in the same legal release agreement by which the interviewee assigns his or her copyright to the program. Such a clause might read as follows, "the program grants me a nonexclusive license to utilize my interview/s in any way that I choose during my lifetime." As already noted, such a license does not place any constraints on the copyright ownership of the program or archive.

A second possible use is between institutions. It is certainly not uncommon for a collection of interviews to be housed in different repositories within a state, region, or nationally. Sometimes secondary repositories are uncertain as to what uses they can allow researchers to make of these interviews. One of the easiest ways to eliminate such uncertainty is for the archive that received the original assignment of copyright from the interviewee and/or interviewer to grant a nonexclusive license to the other repositories that hold copies of the interviews. The following is a good example of such a license: "The _____ archive hereby grants a perpetual, nonexclusive, royalty free, paid-up, worldwide license to the _____ library for use of the Milwaukee Dock Workers Collection of oral history recordings and transcripts." With such a license the receiving library can make the collection of interviews available in the same manner as the archive that holds the copyrights.

A third possible use for a nonexclusive license is limited to legacy interviews. As the term implies, these are usually interviews conducted in the early years when legal releases were the exception rather than the rule. If some of the interviews that fall into this category contain oral statements of copyright transfer, this would constitute a nonexclusive license. The OHA's *Best Practices* also recognizes this type of nonwritten transfer of copyright, "in exceptional circumstances recording an oral statement to the same effect."[22] But as noted earlier, the holder of a nonexclusive license cannot transfer such a license to another. Thus, if one program or archive secured such oral releases, the former cannot pass this license on to another repository.

Restricting, Sealing, and Masking Identity

A significant number of oral history programs routinely provide interviewees with the opportunity to restrict access, seal their interviews for a given period of time, or mask their identity. According to a recent worldwide survey of some 350 oral history programs, 62 percent of the respondents offered interviewees the opportunity to restrict access in some way.[23]

Allowing interviewees and sometimes interviewers to craft their own restrictions is especially useful with either high-profile individuals or those who have unique personal concerns about future access. The desire of a program or archive to accommodate such individuals must be counterbalanced, however, by a dose of reality. Someone should always be asking whether the restriction proposed by the donor is one that the repository will be able to actually administer. For example, restrictions that lack clear termination events or times should obviously be avoided as should restrictions that are not enforceable. An example of the latter would be a restriction to the effect that "My interview shall be open to all but cannot be used in any court proceeding." There are already too many older interviews that have legacy status because of confusing or unrealistic restrictions, so the goal should be to avoid creating any future ones.

Although some programs use a separate release agreement to accomplish this, most programs simply include a section in their regular agreement where such restrictions can be documented. In the latter type of agreements, a checklist is usually provided listing the types of access limitations available with appropriate space for the specifics to be set forth. Other agreements have a more open-ended recital: "Access to and use of my interviews is subject to the following restrictions: _____."

What is often left out of such restriction is any language that informs the interviewee that the program or archive cannot guarantee that the restriction will be upheld under all circumstances. If someone were to file a freedom of information request (known as FOIA, for the Freedom of Information Act) for an interview held by a state supported program or serve a subpoena, the best that any repository can do is to mount a reasonable defense. Although the prospect that a restricted interview might be the subject of either an FOIA request or a subpoena is very remote, it is both ethically and legally advisable to include some sort of cautionary language like, "The Oral History Program agrees to take all reasonable steps to maintain the confidentiality of your interviews pursuant the restrictions you imposed. The Program cannot fully guarantee that it will be able to prevent access in the face of a FOIA request or a subpoena from a court of competent jurisdiction."

The ethical obligations that should accompany the application of restrictions to an interview are carefully laid out in the *Best Practices*. Oral historians in the pre-interview stage should alert interviewees to their right to apply restrictions to their interview. During the interview process interviewers are expected make sure that the questions they ask do not compromise any restrictions the interviewee elected to place on the interview itself. Finally, in the post-interview process, "Institutions charged with the preservation and access of oral history interviews should honor stipulations of prior agreements made with the interviewers or sponsoring institutions including restrictions on access and methods of distribution."[24]

Exculpatory and Indemnity Clauses

In recent years there has been an increase in the number of oral history programs that include exculpatory and indemnity clauses in their legal release agreements. Although these clauses ostensibly protect oral historians from future liability, they are certainly not ironclad, and they raise troubling ethical questions. Exculpatory clauses, which are also known as waivers or releases, basically relieve one party of any liability for future legal claims that may arise. Such clauses are an integral part of everyday business dealings. Most parking lots, for example, require motorists to release them from any responsibility for loss of contents or damage to a vehicle. Rental lease agreements usually contain an exculpatory clause that says the landlord is not responsible for damage, injury, or any loss that occurs on the property.[25]

Indemnity or hold harmless clauses are similar in terms of burden shifting between parties, but they typically come into play only if a third party brings legal action against the parties. If this happens, the indemnity clause places all of the risk and cost of defending and/or settling such a claim on one of the parties.

The Veterans History Project at the Library of Congress is the best-known user of such a clause. The releases that both interviewees and interviewers must sign before an interview will be added to the collection state:

> I hereby release the Library of Congress, and its assignees and designees, from any and all claims and demands arising out of or in connection with the use of My Collection, including but not limited to any claims for copyright infringement, defamation, invasion of privacy, or right of publicity.[26]

An example of a shorter but more pointed version of such a release reads as follows: "Participants should be aware that any and all liabilities arising from the interview will be their own and not those of the CAF Museum, or the Oral History Program."[27]

If one assumes that such clauses are enforceable, what type of legal action would the clause protect against? The most obvious would be a lawsuit for defamation arising from a published oral history interview. Less likely but still possible would be legal claims for false light or public disclosure of private facts. For any of these legal actions to occur, of course, the starting point would be the words of the interviewee and possibly the interviewer. But the publication of these words by whatever means could come about only as a result of an oral history program collecting, processing, and either making the interview publicly available or utilizing it in some adaptive way such as in a publication or documentary.

The possibility of a legal claim for copyright infringement seems even more remote because in almost all circumstances oral historians secure the copyright

to interviews through the release process. Despite the highly unlikely prospect that any of these legal claims would ever arise, if they did, an exculpatory clause in an interviewee's release agreement would place the entire responsibility for such an unfortunate event upon his or her shoulders. This would appear to be an ethical reach and might even prove to be unenforceable.

The ethical barrier to such clauses most likely would come from the informed consent process. One of the strongest threads running through the *Best Practices* is the obligation to provide full disclosure regarding all aspects of the interviewing process from collecting/processing/archiving to future use. This ethical obligation would certainly require a program wishing to have a waiver/release clause to fully explain to the interviewee his or her future liability for defamation, invasion of privacy, and any other possible legal claims. For some interviewees such an explanation might well be enough to convince them not to proceed.

Legally speaking, exculpatory and hold harmless clauses are usually enforceable if they are reasonable in nature.[28] The test for reasonableness that courts apply involve a number of factors:

1. Does the clause stand out because of large type or a different color?
2. Is the wording clear and unambiguous to the average person?
3. Is the clause specific enough, including any mention of release of negligence?
4. Was there significant imbalance in the bargaining positions of the parties?[29]

The careful reader has already picked up on the major problem in all this. If a program's legal release agreement is a deed of gift, the bargaining process that applies to contracts is really not present. There is no exchange of consideration between the oral history program and the interviewee. While certain terms in a deed of gift may be subject to negotiation, the bargaining process that is central to all contracts is generally not. Thus, an indemnity clause that is located in a deed of gift agreement would be, to say the least, a fish out of water.

For those programs that utilize a contract-style release there would at least be a presumption that the parties actually bargained for all of the terms in the final agreement. Prefacing such a clause certainly supports this presumption, as the following example illustrates:

> In consideration of Xavier University's support of this opportunity to provide these Materials, and because I am voluntarily providing these Materials, I release Xavier University from all claims relating to or in connection with the use of the Materials, whether foreseen or unforeseen, known or unknown, including, without limitation, any claims of negligence, libel, defamation, and any right to publicity or privacy.[30]

By mentioning negligence, the clause also addresses the specificity/disclosure factors that courts use to assess such a clause.

If there was scant discussion of the clause and the interviewee did not actively negotiate the terms of the legal release agreement, the indemnity clause at issue would appear at the very least to be one-sided and at the very worst an unconscionable benefit to the drafting party. Since in most oral history situations it is the program which invites someone to be interviewed and the interviewees only tangible benefit is a copy of the recording and/or transcript and perhaps a nonexclusive license, asking them to agree in return to foot the bill for any legal problems that arise from the future use of their interviews would hardly signal a level playing field. Unconscionable contract clauses are those that affront decency and shock the conscience; indemnity clauses, however well intended, would seem to be prime candidates for such a designation, which would in turn render them unenforceable.[31]

So why in the face of these potential ethical and legal obstacles did the Veterans History Project put an exculpatory clause in all of its releases? The answer lies in how the American Folklife Center at the Library of Congress administers the thousands of interviews it receives annually. Unlike the vast majority of oral history programs, the recordings it takes in are not listened to or reviewed prior to being cataloged and placed in the appropriate collection. This hands-off approach explains why a waiver clause was inserted into their release agreements from the outset of the project. The purpose was to shift all liability for any future legal claims to the interviewee and interviewer. Since the library does not conduct the interviews, perform audits of the recordings, or do any transcription or programming, its waiver clause in effect does not excuse any negligence on the part of the Veterans History Project.

Warranty Clauses

A warranty is nothing more than "a promise that a proposition of fact is true." In other words, it is exactly what it is represented to be. A very small number of oral history programs include an interviewee warranty clause in their legal release agreements. The purpose of such a clause is to protect against an interviewee who previously gave similar interviews and assigned the rights to them to somebody else: "I warrant that I have not assigned, encumbered, or impaired my rights and interest in the recordings, transcripts, and their content referred to above. This warranty shall not apply to any information in the interview that may be contained in a prior published work of mine." There is really very little need for such a clause unless an oral history program is interviewing high profile individuals who would be the most likely candidates for repeat interviews.

Right of Publicity Clauses

The right of publicity essentially protects individuals from the use of their name or likeness for commercial gain without their express permission. It is a privacy interest that everyone has but is most often identified with movie stars and sports figures. Although the law is unclear on whether the right of publicity can be violated if the unauthorized use is nonprofit in nature, using an interviewee's likeness or name to promote a for-profit program or publication without her or his specific approval could be an infringement. To do so for a nonprofit venture might not violate the right of publicity from a legal standpoint but would be clearly unethical. To avoid the problem of having to go back to the narrator years after he or she was interviewed, a few programs and archives have inserted a right of publicity clause into their standard agreement: "I agree that my name, voice and/or likeness may be used to promote future programs and publications of the oral history project."

Legal Release Agreements for Interviewers

There is a growing body of evidence that an interviewer is in most instances a joint author for copyright purposes. As joint authors of an interview, both the interviewee and interviewer would be considered tenants in common. Each would legally own an undivided share of the copyright (50 percent). For example, in a joint authorship situation an interviewer could grant a nonexclusive license to anyone he or she wished to and even sell his or her interest without the permission of the interviewee. He or she could not, however, grant someone an exclusive license without the agreement of the interviewee. Joint authors also cannot file an infringement action against one another.[32] Each owner does have the continuing legal obligation to share any profits that were derived from an exclusive license or sale of the entire interest.

The Copyright Act of 1976 defines a joint work as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."[33] To be a joint author one must contribute some expression to the unitary whole, which a few courts have held to be as little as 10 percent of a work. The legal support for the position that almost all oral history interviewers knowingly intend from the start that their preparation/research and interview questions are "inseparable and interdependent parts" of the final unitary whole starts with the U.S. Copyright Office. Their policy manual mandates that when a registration application for an oral history interview names only one of the parties (interviewer or interviewee) as the author, the staff is to seek further clarification before completing the registration. This administrative position is grounded on the assumption that "a work consisting of an interview often contains copyrightable authorship by the person interviewed and the interviewer. Each owns the expression in the absence of an agreement to the contrary."[34]

The policies of a number of major oral history programs lend further credibility to the idea that interviewers should be treated as joint authors. The most noteworthy is the Veterans History Project. Its online interview kit includes legal releases for both the veteran and the interviewer and the American Folklife Center will not accept an interview without both signed releases. Other major programs that believe interviewers who are not employees should be considered joint authors include Columbia, Baylor, Kentucky, North Carolina, and Louisiana State University. Although there are no reported cases of interviewers trying to assert a joint authorship right, the best practice is to anticipate this possibility rather than be unpleasantly confronted by it in the future.

The best way to do this is to require all interviewers who are not full-time employees of a program or archive, such as independent contractors and volunteers, to sign a release agreement that covers any interviews that they conduct. Employees do not need to sign such a release because any copyright interest they might have in an interview passed directly to their employer under the work-made-for-hire-doctrine. Sample release agreements for interviewers (Nos. 5, 6, and 7) can be found in Appendix 1.

IRB Modified Agreements

For practitioners of oral history who are based on college or university campuses or at medical facilities, legal release agreements more than likely will have to win the approval of an Institutional Review Board (IRB). Despite continuing efforts by the Oral History and American Historical Associations to exclude oral history research from IRB oversight, at most colleges and universities, even student oral history projects are reviewed by an IRB. The legal release agreement is usually at the center of such reviews. Under the Common Rule, consent is the most important consideration in determining whether a human subject has agreed to participate in a trial or study.[35] Most IRBs spend a good deal of their deliberations making sure that the consent procedure for a particular study satisfies the eight elements for consent. In most of the legal release agreements that have received IRB approval, the following six elements for consent are present:

1. a statement of the purpose of the research, duration of participation and description of the procedure to be used;
2. a statement of foreseeable risks if any;
3. a statement of foreseeable benefits to the individual or in general;
4. a statement indicating that the participation was voluntary and could be terminated at any time without penalty;
5. a statement of confidentiality if applicable;
6. a contact person or persons should an interviewee have questions or concerns.[36]

The following agreement demonstrates how these six consent elements can be directly incorporated into an oral history release:

> The interview will be conducted in the form of a guided conversation and will last approximately _____. I will be free to decline to answer any question that makes me uncomfortable. Moreover, I have the right to stop the recording at any time with no negative consequences. There are no foreseeable risks in doing this interview. The benefit of the interview is to the general public in the form of increased historical knowledge. I recognize that because the interview will be donated to the University of _____ there is no assumption of confidentiality unless I expressly request it.

The final element, whom to contact with questions or concerns, usually appears at the bottom of the consent page and includes the project and the human research protection program's office phone numbers and e-mail addresses. For most oral historians, having to obtain consent by first walking potential narrators through a kind of horror chamber of risks is nothing short of overkill. However, the *Principles and Best Practices* of the OHA actually mirrors some of these consenting elements. Two sample IRB modified agreements (Nos. 9 and 10) appear in Appendix 1.

Legal Release Agreements for K–12 Projects

Thousands of teachers on all levels use oral history in their teaching. Most of these teachers see oral history as just another teaching resource, a tool much like a field trip or computer program. Quite naturally, most of these teachers do not belong to national, regional, or even local oral history groups, nor do they generally attend conferences or seminars put on by such groups. Although they may be hard to count, there is no doubt that these "silent users" are definitely out there.

The major pedagogical consideration for most K–12 teachers who occasionally have students conduct interviews is to enrich course content. Thus, a unit on the Great Depression or the Vietnam War can have far more impact if students are able to interview someone who actually experienced it. In such situations, the training that students receive is often heavily weighted toward interviewing. Preserving, archiving, and making such interviews available for future classroom use are usually well beyond the scope of the project. There are, to be sure, a handful of middle schools and high schools, such as the D.C. Everest Schools in Wausau, Wisconsin, that have developed nationally recognized oral history programs in which student interviews generate publications and media productions. These are not the norm.

Experts on school-based oral history projects advocate the use of legal release agreements for all projects.[37] They point out the usual areas for legal

concern such as defamation and copyright infringement and recommend a safe-rather-than-sorry approach. There is much to be said for such an approach especially if the interviews will indeed be kept and utilized in the future. But if this is not the case, something less than a full-blown deed of gift or contract is more advisable. A simple one-time permission-to-use agreement is all that is really necessary. Such an agreement dispenses with all assignments of rights and future use clauses; it focuses solely on the intended classroom use. It also leaves no ambiguity as to what happens to the recording or video after the unit is finished: "Once the project is completed the recordings of my interview, as well as any transcript, will be returned to me. No copies of my interview shall be retained by the student interviewer, teacher, or school without my express permission." A final sentence or two can be inserted to affirm that the interviewee's copyright interest in his or her interview has not been disturbed or altered by signing this permission-to-use agreement. In the end, students using permission-to-use agreements will still learn about how the law applies to and protects the spoken history. A sample permission-to-use agreement appears in Appendix 1 (No. 11).

One last consideration concerns students who have not reached the age of majority, usually eighteen. Whether their role is that of interviewer or interviewee, a signed permission from a parent or legal guardian should be secured. The reason for this is obvious. Minors in the vast majority of states are considered not to have the capacity to enter into a contract. If a minor happens to sign a contract on his or her own, such an agreement is considered voidable by the minor because of the minor's presumed lack of capacity. The only exceptions to this rule are for agreements for some basic necessity. Also, once the minor turns eighteen the power of a parent or other adult to void an agreement itself becomes null and void.

Explaining Legal Release Agreements

When and how a program or archive presents a legal release agreement to an interviewee and/or interviewer for signing is really an administrative, not a legal, issue. As already noted, the *Best Practices* advocate a "non-recorded meeting" to explain all the terms and conditions connected with the interview and answer any questions an interviewee may have in an unhurried fashion. Although there is no one best method or procedure, the explanation process should not be rushed or short-circuited because of the fear that too much discussion of legal issues may dissuade someone from signing. In other words, an expedited approach is not recommended. It is a rare person in today's world who does not enter into legal agreements, whether to borrow money, buy a car, hire a roofer, or sign up for a credit card. This being the case, securing the interviewee's or interviewer's informed consent should be viewed as an important educational process and not just a *pro forma* exercise. By carefully walking potential signees through their agreements, the prospect of future

misunderstandings can be significantly reduced, and the interviewee may provide even better interviews because of his or her understanding of the legal boundaries. The latter consideration is aptly explained by Linda Shopes, one of the leading advocates for professional conduct by oral historians: "An interviewee who understands the purpose of the interview, who knows he or she is speaking for the record, can measure comments about another person. A conscientious interviewer can avoid setting up too intimate an exchange, one that nurtures imprudent confidences."[38]

Conclusion

Legal release agreements are vital tools for oral historians. As such, they should be carefully drafted from the start and reexamined periodically to determine whether they are in need of revision or expansion. Such reexamination can be greatly minimized if the initial creation process was done with an eye toward drafting an agreement that is grounded on professional ethics and accurately reflects the law of binding agreements in the appropriate jurisdiction. Although there is no perfect agreement, those that have been thoughtfully drafted, receive the input of a knowledgeable local attorney, and are periodically revisited are the most likely to be trouble free.

3

Compelled Release of Interviews

Subpoenas and FOIA Requests

Oral History as Evidence

In the eyes of a court, either state or federal, a recording or transcript of an oral history interview is hearsay. Although there are numerous exceptions to the rules of evidence that bar the introduction of hearsay evidence, none of these exceptions usually apply to the out-of-court statements that are made by an interviewee in the course of an oral history interview. The primary means by which oral history does make it into court is through the opinion testimony of expert witnesses.[1] Rule 703 of the Federal Rules of Evidence provides that an expert witness may rely upon inadmissible evidence "if of a type reasonably relied upon by experts in the particular field in forming opinions and inferences upon a subject."[2] While state rules of evidence vary somewhat from the Federal Rules of Evidence, there are provisions in most state evidence codes for similar reliance by experts on hearsay evidence such as oral history. Under Rule 703, a trial judge does have the authority to exclude an expert's testimony if the court determines that the hearsay evidence upon which he or she is basing his opinion is not the type of evidence that can be "reasonably relied upon," but such authority is rarely exercised.

In litigation involving Native American land or tribal rights claims, for example, oral tradition is usually seen as a type of hearsay that can be "reasonably relied upon" by an expert in offering an opinion on the authenticity of such claims. As noted by the Court of Appeals for the Ninth Circuit in a 1998 case, *Cree v. Flores*, "were it otherwise, the history and culture of a society that relies on oral history tradition could be brought before the fact finder only with the greatest of difficulty and probably with less reliability."[3] In this case, the Yakima Indian Nation filed suit against Washington State officials to prevent them from collecting truck license and overweight permit fees from Indian drivers who hauled timber from tribal lands to outside purchasers. Since the Yakima maintained that an 1855 treaty exempted them from such fees, the court battle was largely between dueling experts. One of the experts

for the State of Washington was a history professor from Central Washington University who had written a biography of Isaac J. Stevens, the territorial governor of Washington at the time the treaty was signed. The chief expert for the Yakima was William Yallup, a tribal member who was well versed in Yakima history and culture. After losing at the trial level, the State of Washington appealed. One of its major issues on appeal was the decision by the trial court to give more credence to Yallup's testimony than that of the experts for the state. Attorneys for the state questioned the trustworthiness of oral tradition as the primary basis for an expert's testimony. They cited ample legal precedents for their position that when there are dueling experts, the ones who rely on oral tradition to formulate an opinion are in general less reliable than the experts who do not. The Ninth Circuit, however, upheld the both the district court's decision to rely more heavily on Yallup's testimony as well as the judgment in favor of the Yakima.

Oral History and Discovery in Civil Cases

If oral history cannot come into a court proceeding on its own, why would an attorney even bother trying to get his or her hands on sealed or restricted interview material? The simple answer is discovery. This is the pretrial evidence-gathering process that precedes most civil cases. During this sometimes lengthy period between the filing of a civil lawsuit and the actual trial, both sides amass as much evidence as time and money will allow them to determine if they will have the upper hand if the matter goes to trial. According to one authority on civil litigation, "Discovery is very, very broad. . . . As a practical matter almost anything goes. For this reason, the parties are permitted to go on fishing expeditions to discover virtually anything they want."[4] So even though oral history may be hearsay, if there is even a remote chance that interviews might be helpful, attorneys will usually want to take a look rather than miss any valuable evidence.

Obviously if an oral history interview or collection is not restricted, a curious attorney would not need to procure a subpoena to secure access. But if we assume hypothetically that an attorney in a civil lawsuit (i.e., a contract dispute, personal injury, or product liability case) determines that the information contained in a restricted oral history collection might be of assistance, then a subpoena could come into play. Since subpoenas are an integral part of the legal system, both state and federal courts have guidelines to determine whether a subpoena must be complied with. In situations where an individual or group wishes to challenge a subpoena, there are both procedural and substantive defenses that can be raised. The key substantive objections are relevancy, undue burden or expense, vagueness, confidential information, and privilege. The test for relevancy is fairly broad and does not even require that the information sought by the subpoena be admissible at trial.[5] To show undue burden a party must be able to show real probabilities and not just generalities.

The confidentiality objection often requires the subpoenaing party to establish that the information sought cannot be obtained elsewhere without undue hardship. Even if they can establish this, courts usually grant the party with the confidential information some sort of protective order. The last objection, privilege (attorney-client, doctor-patient) if successfully raised, can result in a subpoena being quashed.[6] To raise these objections a party must file a motion to quash. After taking testimony and hearing arguments the court can either deny the motion, modify the subpoena, or quash it entirely.

Because there are no published cases involving oral historians who sought to quash a subpoena for restricted interviews from an attorney in a civil lawsuit, for guidance we must look to cases involving academic researchers. The issuance of subpoenas for access to ongoing research studies that may help a party to a civil lawsuit is definitely on the increase. A recent case exemplifies how and why this is happening.[7] In 2012, Anastosios Kaburakis was an assistant professor at St. Louis University. One of his research projects involved sports video games and the ability of users to identify the featured student athletes. As he was completing his research, the National Collegiate Athletic Association (NCAA) and Electronic Arts (EA) were being sued by a group of former athletes for failing to compensate them for the use of their names and likenesses after they had finished their college careers. Attorneys for EA sought to bolster their case by securing access to Professor Kaburakis's research materials. In an effort to thwart the subpoena, Kaburakis claimed an academic privilege based on his concerns that pre-publication disclosure would have a negative impact on the peer review process and publication of his study. Ultimately the court fashioned a compromise, but in so doing specifically rejected his academic privilege claim because there was so little precedence for an academic privilege; only two federal courts of appeal (1st and 7th Circuits) had directly acknowledged its existence.[8]

The academic or scholar's privilege is almost always an extension of the generally recognized reporter's privilege that flows from the First Amendment. The reasoning behind such an extension is that academics are also conducting research that is beneficial to the public welfare and should not be discouraged from exploring issues that may involve controversial topics or illegal behavior because they cannot offer their subjects defensible pledges of confidentiality. At this writing, forty states have shield laws that recognize the reporter's privilege and another nine states do so by judicially created precedent.[9] There is, however, no federal shield law.

The case that most clearly illustrates how a scholar's privilege can shield researchers from a subpoena is the decision by the First Circuit Court of Appeals in *Cusumano v. Microsoft Corporation* (1998).[10] The lawsuit that generated the subpoena was a civil antitrust action against Microsoft involving competing browsers and more particularly Navigator, which was developed by the Netscape Corporation. During the discovery phase of the case Microsoft

learned of a forthcoming book written by two distinguished researchers from MIT and Harvard. The book, *Competing on Internet Time: Lessons from Netscape and the Battle with Microsoft*, was based in part on forty interviews with current and former Netscape employees. In order to secure the most candid and complete responses from the interviewees, Professor Michael Cusumano and his co-author promised them that they would have the opportunity to edit, correct, or delete any quotation attributed to them in the book prior to publication. In addition to raising more standard objections to the subpoena, the two researchers asked the court to consider their work akin to that of journalists and extend to them the equivalent of a reporter's privilege.

In reaching its decision on this request the First Circuit began by noting the strong similarities between scholars and journalists. They were both information gatherers and disseminators who could have their best sources dry up if they had no significant protection from subpoenas. This in turn could have a harmful effect on their research, as controversial topics would be less likely to be pursued due to the inability to protect the confidentiality of their sources. More specifically, as the court pointed out, "allowing Microsoft to obtain the notes, tapes and transcripts it covets would hamstring not only the respondent's future research efforts but also those of similarly situated scholars." In the larger context, the compelled discovery of Professor Cusumano's research materials "would infrigidate the free flow of information to the public, thus denigrating a fundamental First Amendment value."[11]

The decision by the First Circuit to recognize a scholar's privilege and use it to quash Microsoft's subpoena was widely applauded by proponents of academic freedom. The ruling provided the most complete recognition of the nexus between a reporter's privilege and the work of scholarly researchers. Unfortunately, in the years since this important decision extended a reporter's privilege to nontraditional news gatherers, its precedential impact has been negligible. No other federal or state court has chosen to utilize *Cusumano* to carve out a scholar's privilege to protect the confidentiality of either the sources or their information in civil lawsuits. As one commentator has noted, the general sense among academic researchers, especially those dealing with sensitive topics, is that "they inhabit a fragile and vulnerable position."[12]

Oral History and Discovery in Criminal Matters

There is a second area of the law from which subpoenas may originate to try to gain access to restricted oral history interviews, namely, the criminal justice system. Since most of the discovery of evidence in criminal matters is done by government authorities, subpoenas for testimony or documents most often come from district attorneys, states' attorneys, or in federal matters, grand juries. The claims of academic privilege that have been made by scholarly researchers to try to shield either their sources or their research from

a criminal subpoena have found absolutely no judicial supporters, as the following three cases demonstrate.

An Arson Investigation

The next case also involved a criminal prosecution, but in this instance the materials sought for discovery were not sealed or restricted interviews but the research notes of a graduate student. In the early 1980s, Mario Brajuha was a graduate student at the State University of New York at Stony Brook doing ethnographic research for his dissertation, "The Sociology of the American Restaurant." He conducted a substantial part of his research by working as a waiter at several Long Island restaurants. In addition to using direct observation, he also interviewed a number of his coworkers. Although he did not tape record them, he did keep detailed field notes of their comments and observations. Shortly after a fire of unknown origin destroyed one of the restaurants he worked at, a local prosecutor, suspecting arson, interviewed Brajuha. Though he freely discussed what he knew from personal observation, he refused to turn over his field notes to the prosecutor. After the prosecutor served Brajuha with a subpoena, a lengthy legal battle ensued. It was finally resolved when the Court of Appeals for the Second Circuit ordered a partial disclosure of his field notes while allowing him to redact sensitive materials that were not relevant to the arson investigation.[13] The court refused, however, to recognize the scholar's privilege Brajuha's attorneys requested to try to shield his research from any discovery. In the wake of his subpoena fight, he found that there was a substantial drop-off in the willingness of fellow restaurant workers to talk with him.

A Criminal Damage Investigation

The second case also centered on oral communications received by a graduate student in sociology. In this instance, however, the doctoral candidate was unable to secure any protection from the court. The focus of James Richard Scarce's research was the radical environmental movement. He had published a book on the subject in 1990 entitled *Eco-Warriors: Understanding the Radical Environmental Movement*. In August 1991, someone broke into the animal research facility at Washington State University. The intruders did over $100,000 in damage. Through its spokesperson, Rodney Coronado, a group called the Animal Liberation Front (ALF) claimed responsibility. In the course of their investigation, the police learned that Coronado had been house-sitting for Scarce in the weeks prior to the vandalism. They also determined that Scarce and Coronado had discussed the break-in shortly after it occurred. As a result, Scarce and his wife were ordered to appear before a grand jury that was to determine whether charges would be filed. Scarce, however, refused to answer any questions regarding his conversations with Coronado or any other members of the ALF. In doing so, he maintained it was his scholar's

privilege not to answer. This privilege, he maintained, was derived from the First Amendment and federal common law. Although his lawyers referenced several cases including Brajuha's, in which a court had recognized some limits on discovery when a scholar's research was at issue, the Court of Appeals for the Ninth Circuit ruled that no court "…has actually recognized a scholar's privilege to withhold from a federal grand jury confidentially obtained information which is relevant to a legitimate grand jury inquiry and is sought in good faith."[14] When Scarce refused to relent, he was found to be in contempt of court and ended up serving 153 days in jail.

The Boston College Case

This case is without question the most widely publicized of all cases in which oral history interviews have been the central focus of the litigation. The length of the litigation, in-fighting between the directors of the Belfast Project and Boston College, the role that an international treaty played in this case, and the fundamental issue of academic freedom all heightened the amount of public attention to this case. The Belfast Project began in 2001 with the goal of documenting the experiences of members of the Irish Republican Army (IRA) and loyalist paramilitary groups who participated in the violent and bloody "Troubles" in Northern Ireland. The promise made to all interviewees was that their interview would remain confidential until their death. A book by the director of the Project and a public admission by one of the IRA interviewees about an unsolved abduction and murder apparently prompted the Police Service of Northern Ireland to seek access to some of the interviews collected by the Belfast Project.

Pursuant to a Mutual Legal Assistance Treaty (MLAT), the United Kingdom requested the United States government to issue subpoenas for the interviews of Dolours Price and Brendan Hughes. The first subpoenas were served in May 2011 and additional ones were served in August, seeking "any and all interviews containing information about the abduction and death of Mrs. Jean McConville." The primary basis for Boston College's motion to quash the subpoenas was the pledge of confidentiality that was extended to all interviewees and the chilling effect that compelled disclosure would have upon future researchers. The college emphasized that if the continued flow of information to both journalists and scholars about controversial topics was constricted, society in general would be negatively affected by such restrictions upon free speech.[15]

In December 2011, the federal district court not only refused to quash the subpoena for Price but after an *in camera* inspection of all of the interviews ordered Boston College to turn over the interviews with seven other participants in the Project. The interview with Brandon Hughes had already been handed over by Boston College because Hughes had passed away. The court's decision triggered two separate appeals. The first was filed by Ed Moloney and

Anthony McIntyre, the director and chief interviewer for the project. The second appeal filed by Boston College addressed the ruling by the district court that it must release seven additional sets of interviews. The college elected not to appeal the district court's ruling regarding the Price interviews because of her public admissions regarding past criminal activities during the "Troubles."

The appeal filed by Moloney and McIntyre challenged the refusal of the district court to allow them to intervene in Boston College's lawsuit seeking to quash the second set of subpoenas. Their original attempt to intervene and subsequent appeal of the denial appears to have grown out of their disagreement with Boston College over the administration of the confidentiality pledge and the legal strategy pursued by the college in defending against the subpoenas. In their appeal to the First Circuit they presented three main causes of action, the first two of which related directly to the MLAT. The last cause of action focused on their First Amendment rights as academic researchers.

In its final ruling, the First Circuit rejected all three causes of action brought forth by Moloney and McIntyre.[16] The most important rejection was the court's response to the researchers' claim that they should be able to protect the confidentiality of their interviewees and the interviews themselves to the same degree as a journalist. They grounded this decision on the precedent established by the U.S. Supreme Court in *Branzburg v. Hayes* (1972). In *Branzburg*, which was a consolidation of several cases, reporters refused to testify before grand juries about information they had received from confidential sources claiming that under the First Amendment their information was privileged. The Supreme Court, however, refused to read such a privilege into the First Amendment. The First Circuit in turn pointedly wrote, "The choice to investigate criminal activity belongs to the government and is not subject to veto by academic researchers."[17] The court went on to emphasize that the treaty obligation to assist another nation in a criminal investigation made the government's interest here even stronger than it had been in *Branzburg*. The court also noted that this litigation might have been avoided had Boston College and the researchers been on the same page regarding the limits of confidentiality. According to the evidence presented to the court, Ed Moloney had been directed by Boston College to place a provision in each release agreement stating that confidentiality would be protected "to the extent American law allows." He did not do that, however, and Anthony McIntyre indicated that had he known that the pledge of confidentiality was not ironclad he would not have undertaken the interviews with the former IRA members.[18]

This decision did not put an end to the litigation. Moloney and McIntyre filed a writ of certiorari with the U.S. Supreme Court and were granted a stay of the First Circuit's decision until the court decided whether to hear their appeal. In the end the Supreme Court chose not to hear the case and the stay was lifted. The last part of the extended litigation was Boston College's challenge

to the federal district court's decision following its *in camera* review of the interviews to order the release of eighty-five interviews. This appeal was also heard by the First Circuit. Foremost among the arguments raised by Boston College was the claim that despite its earlier ruling the court should allow for a limited researcher's privilege because of the unique facts of this case. But this argument failed to sway the court and led to another strong reassertion of *Branzburg*: "the public need for information relevant to a bona fide criminal investigation precludes the recognition of a First Amendment privilege not available to the ordinary citizen."[19] The only small consolation for Boston College was that the First Circuit did find that the district court had abused its discretion in ordering eighty-five interviews to be turned over. The actual number of interviews containing subject matter relevant to the subpoenas was reduced to eleven.

Impact of the Boston College Case on Oral History?

The case has spawned a wide variety of reactions. For most academic researchers in general and oral historians in particular the case seems to have led to a significant reexamination of pledges of confidentiality, starting with the initiation of the research and ending with the issue of defending such pledges in court. Some commentators, however, have taken Boston College to task for everything from the design and implementation of the Belfast Project to the quality of its legal defense to the subpoenas.[20] Professors Ted Palys and John Lowman in particular provide a long list of administrative omissions and missteps. The most significant ones by the project include these:

1. It failed to utilize the expertise of the Boston College IRB on protecting confidentiality.
2. It did not solicit a legal opinion on the defensibility of the pledge of confidentiality being offered or consider the possibility of applying through the IRB for a certificate of confidentiality.
3. It failed to make sure that everyone connected with the project understood the guarantee of confidentiality being offered.
4. It refused to appeal the district court's decision on the subpoena for Dolours Price's interview.
5. It turned over all of the interviews to the district court judge without any attempt to challenge his ruling.
6. It mounted only tepid legal challenges throughout the litigation.[21]

The authors' scathing conclusion is that Boston College's response to the subpoenas provides a prime example of how not to protect research "to the extent that the law allows."

While Boston College may well have been guilty of insufficient planning and clumsy administration, the legal precedence for the First Circuit to recognize

a researcher's privilege as the basis for quashing a criminal subpoena simply did not exist. Therefore, the critics' suggestion that a more vigorous legal defense would have made a difference is simply wishful thinking. This point becomes even clearer if we examine the recent status of the reporter's privilege. Although forty-nine states recognize this privilege in some form, the overall degree of protection is far greater in the case of civil, as opposed to criminal, subpoenas. A 2009 survey also found that 70 percent of the newsroom leaders who responded believed courts in general were demonstrating a far less protective attitude toward news organizations than in previous years.[22]

So what are the lessons to be learned from the Boston College case? The general suggestion offered by Palys and Lowman that institutions develop procedures for closer scrutiny of research requiring pledges of confidentiality from initiation to completion is a good starting point. Their more specific suggestions such as legal risk assessments of confidentiality pledges, utilizing the expertise of the IRB where applicable, making sure all parties understand the extent and nature of the confidentiality promised, and a strong commitment to mounting a vigorous institutional legal defense are all quite helpful. They, along with other critics, also suggest that researchers in the future may want to retain direct control of their research if they consider the university to be a less than reliable defender of confidentiality. As one critic notes, a researcher who wished to defy a subpoena would be in a far stronger position to do so than an archive or university.[23] Taking such a position and risking jail time would be akin to what Judith Miller of the *New York Times* did in 2005. In her case she refused to testify before a federal grand jury that was investigating whether any government official had illegally leaked the identity of Valerie Plame, a CIA operative. After a court refused to recognize her reporter's privilege as a defense, she was cited for contempt and jailed. When I. Lewis "Scooter" Libby, the chief of staff for Vice-President Dick Cheney, admitted his culpability, she was released after spending nearly two months behind bars. Whether such extreme resistance has any viability for most oral historians, however, is highly unlikely.

Is There an Archival Privilege?

Archives, too, have occasionally been subpoenaed to obtain access to restricted materials and interviews. The defenses that archives have raised to try and quash or at least modify a subpoena are very similar to ones that individual scholars have attempted to utilize.

A murder trial in Mississippi involving the Imperial Wizard of the White Knights of the Ku Klux Klan, a violent offshoot of the KKK, provides a dramatic example of how and why a prosecutor considered the discovery of oral history interviews to be a potentially important part of his case. In 1966, Vernon Dahmer, a black civil rights leader, died after his home was firebombed by members of the White Knights. In subsequent years, Samuel H. Bowers, the

Imperial Wizard of the White Knights, was tried four different times for arson and the murder of Dahmer. All four trials ended in mistrials because all-white juries could not agree on a verdict. Finally, in August 1998, a jury found Bowers guilty of the firebombing and the murder of Dahmer, and he was sentenced to life in prison.

Prior to the final trial, the district attorney subpoenaed three oral history interviews with Bowers that were housed in the Mississippi Department of Archives and Records. The interviews were part of a larger project on the civil rights movement in Mississippi. At Bowers's request, no one could access his interviews without his written permission.[24] Attorneys for the Department of Archives and Records sought a protective court order to prevent the unsealing of the Bowers interviews. They argued that the subpoena represented third party interference with the agreement between the archives and Bowers. They also warned that breaching this agreement would have a chilling effect on future interviewees. Their motion for a protective order was denied, however, because such an order would have unduly restrained the ability of the court to consider relevant evidence. As a result, the transcripts of his three interviews were turned over to the district attorney. Although the interviews were not actually used in Bowers's trial because he did not take the stand in his own defense, the prosecution was prepared to use material from the interviews to impeach his testimony.

One possible avenue of defense that attorneys for the Mississippi Department of Archives and Records did not pursue was to request the court to recognize an archival privilege. This is essentially the same as the scholar's privilege but would protect a library or archive from having to turn over sealed or restricted materials in response to a subpoena. The most extended treatment of this privilege comes from a case that directly involved archival material.

Beginning in 1966, Anne Braden began donating her papers to the State Historical Society of Wisconsin. The papers, which eventually totaled 240 boxes, documented the thirty years that she and her husband spent as civil rights activists and her leadership role in the National Committee Against Repressive Legislation (NCARL). In the early 1980s, NCARL and other civil rights groups sued the FBI for monetary damages to compensate them for years of harassment, illegal surveillance, and covert break-ins (black bag jobs.).[25] After learning that the Braden papers were at the State Historical Society of Wisconsin, lawyers for the FBI secured a subpoena to inspect the papers for evidence that might be of assistance in defending against this lawsuit. Because the papers could only be accessed with Braden's permission, the historical society refused to comply with the subpoena. One of the main defenses raised by Braden and the historical society in the court proceeding that followed was to ask the judge to create an archival privilege. Such a privilege, they argued, was necessary because many prominent individuals would be deterred from donating their papers if restrictions on access and use could be brushed aside

by a subpoena. Such action would also have a negative impact on the free flow of ideas and scholarship in general if fewer collections of personal papers were available to researchers.

Unfortunately for Braden and the historical society, the court was not persuaded either by this argument or her attempt to ground such a privilege on the few cases in which courts had been willing to offer a limited degree of protection to academic researchers facing very expansive subpoenas. The latter effort, which has been tried in several subsequent cases, has failed repeatedly because no clear-cut scholar's privilege has ever been endorsed by any federal or state court. As one court categorically noted, "Non-retained or involuntary experts or researchers do not have any federal statutory, case law or common law privilege which protects against their having to involuntarily share their expertise with parties in the litigation."[26] Without a scholar's privilege to build on, it is simply unrealistic to expect that any court in the future will agree to carve out a wholly novel archival privilege.[27]

Informing Interviewees That Restrictions Are Not Absolutes

Since there are no recognized privileges for either scholars or archives, oral historians who receive subpoenas for restricted interviews are left with the same possible defenses and remedies that any citizen or group has, namely, trying to quash or limit the scope of the subpoena on the grounds that it is overly broad, seeks material that is only marginally relevant, or carries a cost (in time and money) for producing the material that is out of proportion to the perceived need. The cost of bringing a motion to quash can be quite expensive. Also, to be successful, whether in quashing or narrowing the subpoena's scope, a court most likely would require an *in camera* review of the materials, as in the Boston College case.

Although the legal landscape may look very bleak when it comes to successfully defending against a subpoena for restricted interviews, it should be readily apparent that the Boston College case arose out of a very unique fact pattern ranging from the extensive self-publicity about the Belfast Project that initially prompted the subpoenas to the bitter feud that emerged between the researchers and college administrators. Thus, while one might be tempted to sharply curtail the practice of sealing or restricting access to interviews, this would be an overreaction. A better approach, in addition to more consciously managing pledges of confidentiality, would be to incorporate into the process the professional ethics set forth in the *Principles and Best Practices*. The *Principles* recognize that interviewees have a right to put restrictions on the use of their materials and should be fully informed of this right prior to the onset of the first interview. The ethical responsibility to honor any restrictions is placed squarely on the shoulders of the program or archive that ultimately houses these interviews. As noted in the *Best Practices*, respositories are expected to

comply "with the letter and spirit of the interviewee's agreement."[28] Although unstated, informing interviewees that the closure of an interview or access restriction might not withstand a subpoena would seem to be an important ethical requirement as well. There should also be some assurance given that should this very rare situation come to pass, the repository would mount a vigorous legal defense of the restrictions. Had such a full disclosure been used in the Belfast Project, the extensive litigation that ensued most likely would never have come to pass.

Certificates of Confidentiality

Oral historians who collect personally identifiable sensitive information may be eligible for such a certificate if they are at an institution that has an Institutional Review Board (IRB) that oversees human subjects research. Such certificates "protect against compulsory legal demands, such as court orders and subpoenas, for identifying information or identifying characteristics of a research participant."[29] The National Institutes of Health (NIH) is the sponsoring federal agency for these certificates. The NIH maintains that a researcher who receives such a certificate can "refuse to disclose identifying information on research participants in any civil, criminal, administrative, legislative, or other proceeding, whether at the federal, state, or local level."[30] Thus far there have been only a handful of legal challenges, and the New York Court of Appeals in 1973 directly affirmed the authority of the NIH to offer such blanket protection. It should be noted that once a researcher is granted a certificate, if he or she subsequently decides to extend the time frame or scope of the study, a timely request for a renewal must be made to the IRB to ensure that all of the data collected is protected.[31]

The eligibility of an oral history project for a certificate is dependent on two factors: the first is whether the subject matter falls within the mission of the NIH. As the nation's leading medical research agency, studies that do not at least indirectly relate to medical issues may not qualify. On its Web site the NIH lists nine examples of studies that would be eligible for a certificate. Only three of the nine—illegal conduct, research involving information that might lead to discrimination against the subjects, and research that would be detrimental to a subject's reputation—suggest the possibility that studies with either a very limited medical connection or none at all would be deemed eligible.[32] The second hurdle is the approval of the local IRB. Based on these two considerations one can surmise that the Belfast Project might not have been deemed within the mission of the NIH and thus not eligible for a certificate. Oral historians who are undertaking projects that will generate sensitive information, however, should at least explore the possibility of seeking a certificate of confidentiality. It certainly has a proven track record.

Admissibility by Statute

Despite the general prohibition against oral histories being used directly in court, except through the mouth of an expert, the Native American Graves Protection and Repatriation Act (NAGPRA), passed in 1990, specifically mandates that oral tradition (oral history) can be used by tribes seeking to repatriate remains or sacred objects. The most dramatic application of this evidentiary mandate was in a case that determined whether a group of tribes or government scientists should have possession and control over the Kennewick Man, the nine-thousand-year-old skeletal remains discovered in 1996 along the banks of the Columbia River outside Kennewick, Washington. Prior to the court battle, the U. S. Department of the Interior hired Daniel Boxberger, an anthropologist at the University of Western Washington, to determine whether oral tradition did in fact establish the requisite "cultural affinity" between the tribes and the Kennewick Man. Based primarily on Boxberger's findings, since most other types of viable evidence were lacking, the secretary of the interior concluded that "collected oral tradition evidence suggests a continuity between the cultural group represented by the Kennewick remains and the modern-day claimant Indian Tribes."[33] A group of government scientists subsequently challenged the secretary's determination and were successful primarily because the court found the heavy reliance on oral narratives spanning more than 8500 years to be highly problematic. The tribes and the secretary in turn appealed to the Ninth Circuit Court of Appeals. In affirming the trial court, the Ninth Circuit also focused on the evidentiary problems with the oral tradition evidence: "Because the value of such accounts is limited by concerns of authenticity, reliability, and accuracy, and because the record as a whole does not show where history or real fact ends and mythic tale begins, we do not think that the oral traditions of interest to Dr. Boxberger were adequate to show the required significant relation of the Kennewick Man's remains to the Tribal Claimants."[34]

In general, however, Native American groups have been able to effectively use oral tradition and oral history evidence in NAGPRA proceedings and also in other instances in which federal statutes require agencies to consider, and in some cases actually conduct, interviews to determine whether past religious or cultural practices would preclude a particular land use. In a 2007 case, the Navajo Nation was able to temporarily stop a ski resort from using treated wastewater to make snow on land that oral histories helped to establish was vital to the Navajo religion.[35]

But even if the oral histories compiled by Native Americans are readily accepted by an agency or court as evidence, they still must be deemed credible to be helpful in court. This was demonstrated in a 2011 case in which a band of Indians (the Snohomish) appealed a decision by the Department of the Interior denying their petition to become a federally acknowledged tribe.[36] One of their claims on appeal was that the department disregarded the oral history

evidence they provided in favor of written sources. In reviewing this claim, the court found, however, that only two of the interviewees even touched on the occurrence of tribal meetings during the period at issue and their recollections were too vague and fragmentary to be of any evidentiary value.

Freedom of Information Requests

Oral history programs that are operated by federal or state entities face an additional challenge to any sealed or restricted interviews in the form of Freedom of Information Act (FOIA) or open records requests. All fifty states as well as the federal government have such statutes, whose sole purpose is to afford the public broad access to governmental records.[37] For any record to be exempted from an FOIA request, it must fit into a statutorily created exemption. The burden of establishing that certain information is exempt from an open records request falls upon the shoulders of the agency that possesses the record. When called upon to resolve a dispute over a claimed exemption, courts are to apply the narrowest definition possible to the exemptions at issue.

Litigation involving some post-9/11 oral history interviews provides a good case study of the reach of open records laws. In addition to a number of other oral history projects that sought to preserve the memories of survivors and rescuers after 9/11, the New York City Fire Department (FDNY) launched its own internal oral history project. A reporter for the *New York Times* subsequently filed an open records request to access the 511 interviews that had been completed up to that time. When the FDNY denied his request, a legal challenge followed. The FDNY maintained that under the state's Freedom of Information Law (FOIL), the oral histories fit into two exempt classifications: intra-agency communications and law enforcement records. The final court to hear this matter was not so persuaded. Instead, the Court of Appeals for the State of New York determined that neither of these exemptions applied: "We infer from the record that the oral histories were exactly what the name implies—spoken words recorded for the benefit of posterity—and that the Department intended, and the people interviewed for those oral histories understood or reasonably should have understood that the words spoken were destined for public disclosure."[38] In the end, the court did allow the FDNY to secure court approval to redact any material in the interviews that they believed could cause pain or embarrassment to an interviewee.

Only two states, Kentucky and Texas, have enacted specific legislation to exempt sealed or restricted interviews from FOIA requests. Although both enactments share a common purpose, the Kentucky statute specifically provides that "a state agency or institution which obtains an oral history interview for historical purposes may enter into a reasonable and mutually acceptable written agreement of confidentiality with the interviewee with regard thereto."[39] An oral history interview that is housed in a state agency in Kentucky that is not covered by a written agreement of confidentiality is considered public

information and may be accessed by an FOIA request. The Texas statute is broader in scope than the Kentucky statute in terms of the archival material protected (oral history, personal papers, unpublished letters, etc.), but exempts such materials only if they were "...not created or maintained in the conduct of official business of a governmental body... ." The Texas exemption also mandates that the materials, whether at a private or public repository, must be used for historical research.[40]

The statutory exemption in Texas is very similar to the protection offered to federal agencies that are statutorily authorized to accept and retain gifts, such as historical materials. An agency with such authority can in turn offer interviewees the opportunity to place restrictions on their interviews. To do so, however, the interview cannot come about because of a job-related requirement. For example, a required exit interview for a federal employee would not qualify. But if the same federal employee volunteered to be interviewed for an agency's history project, he or she could place restrictions on the resulting interview. These restrictions would preclude access via a freedom of information request.

The National Archives is also authorized by law to accept papers and interviews with restrictions. Since 1985, the Archives has encouraged federal agencies that are not statutorily authorized to accept and retain historical materials to utilize the Archives' exemption. To do so, the interviews must also be nonwork related. Employees who volunteer to be interviewed, however, can then place restrictions on their interviews, which the National Archives will honor once they are deposited. As noted by the National Archives, this policy recognizes "...that the quality of an oral interview can depend on the degree to which an interviewee is able to control access to his or her responses."[41] It should also be noted that the National Archives can also enforce restrictions that might be attached to historical materials (oral histories) donated by private individuals or groups.

Conclusion

For the vast majority of oral historians, subpoenas and FOIA requests may never come any closer to them than the discussion in this chapter. However, given the mind-boggling growth in volume of oral history interviewing with each passing year and the increasing emphasis by practitioners on more contemporary topics and issues, the possibility that more subpoenas will be served on oral history archives is becoming less remote. If this day does come, since there is no "archival" or "scholar's" privilege to stand behind, if disclosure cannot be avoided, then the final task should be to minimize the scope of the intrusion. Discovery statutes allow judges to quash a subpoena as overly burdensome or to issue a protective order limiting the scope of discovery. These conventional protective measures, if granted, however, would only serve to minimize the access. For FOIA requests, only Kentucky and Texas exempt oral histories, although many federal agencies, including the National Archives, can do so as well.

4

Defamation

On April 19, 1989, a sixteen-inch gun on the USS *Iowa* exploded during a training exercise. Forty-seven crew members were killed in this tragic accident. Intense media coverage followed. Charles Thompson II produced two programs for *60 Minutes* on the accident and its causation. He subsequently wrote *A Glimpse of Hell: The Explosion of the USS Iowa and Its Cover-Up*, published by W.W. Norton in 1999. The book was based in part on more than two hundred interviews. Daniel Meyer, an ensign on the *Iowa* at the time of the accident, was one of Thompson's most important interviewees. In 2001, four crew members joined together to sue the publisher, the author, and Daniel Meyer for defamation and false light. They maintained in their lawsuit that the book contained numerous falsehoods and suggested that their actions led directly to the death of forty-seven sailors on the *Iowa*. The lawsuit against the author and Meyer was eventually dismissed because the court determined they had insufficient contact with the state of South Carolina where the suit was filed.[1]

The case is instructive because it demonstrates the chain of liability that can arise in any defamation lawsuit that involves the publication of material drawn from interviews. Though the publisher and writer or producer are always the primary defendants in such lawsuits, if the words of an interviewee are part of the claimed defamation, then he or she will most likely be named as a defendant as well. The chain in this instance actually began with Meyer, who provided the interview material that Thomson elected to use in his book, which W. W. Norton in turn published.

Given the extensive coverage that the national media gives to high-profile defamation cases, the impression that most Americans seem to have is that this sort of lawsuit is something that only stars and celebrities have to worry about. In 2013, for example, a defamation lawsuit brought against Jim Boeheim, the legendary basketball coach of the Syracuse Orangemen, was dismissed by a New York appeals court. The suit arose from comments Boeheim made during an interview about two individuals who claimed his long-time assistant coach had sexually abused them when they were juveniles. Boeheim called them liars and suggested they were making false accusations to reap financial gain. The court's dismissal was based on its determination that his remarks were opinions and not factual in nature.[2]

But despite the media's focus on the rich and famous, lawsuits for defamation are filed every day in local courts across the country. One good indication of the frequency of such lawsuits is the annual fifty-state surveys (including Canada) that the Media Law Resource Center (MLRC), a nonprofit clearing house, has been publishing since the early 1980s. This three-volume report is put together by the MLRC to assist lawyers and interested parties in dealing with defamation lawsuits in their respective jurisdictions. A surprisingly large number of the individuals who file these lawsuits are neither celebrities nor public figures.

The manner in which an individual is portrayed to the general public is a branch of tort law. A tort is a civil wrong or injury other than a breach of contract. Defamation is the omnibus term that encompasses injury to one's reputation by libel, the written word, and/or slander, the spoken word. It is usually defined as "a false statement of fact printed or broadcast about a person which tends to injure that person's interest."[3] The readiness of individuals and organizations to go to court to protect their reputations is something that Samuel Johnson, the great eighteenth-century English writer and poet, recognized more than two centuries ago: "Defamation is sufficiently copious. The general lampooner of mankind may find long exercise for his zeal or wit, in the defects of nature, the vexations of life, the follies of opinion, and the corruptions of practice."[4] Unfortunately, lawsuits for defamation are certainly still quite copious today.

From a layperson's standpoint, defamation lawsuits often seem petty and rather confusing. This view is also shared by many in the legal profession. Even one of the great authorities on the subject, William Prosser, begins his attempt to explain this area of the law with the admission, "There is a great deal in the law of defamation which makes no sense."[5] What makes this area of law even more confusing is the coexistence of both state and federal law. The landmark decision in 1964 by the U.S. Supreme Court in *New York Times Co. v. Sullivan* recognized that free speech under the First Amendment could be severely abridged if lawsuits for defamation were not restricted in some way. The mechanism that they devised was to create a much higher burden of proof for people who were in the public eye. In this way, the Supreme Court sought to limit the number of lawsuits that individuals who were considered to be public figures would bring.[6]

Republishers Beware

What concern is all this for oral historians? If an interviewee in a careless moment utters some words that later turn out to be defamatory, is that not the interviewee's problem? Yes, it is, but almost certainly it will also be the problem of the oral history program that made available to the public the recording or transcript containing the defamatory language. The rule as set out in the authoritative *Restatement (Second) of Torts* is: "...one who repeats

or otherwise republishes defamatory matter is subject to the liability as if he had originally published it."[7] Stated in more colloquial terms, talebearers are as liable as talemakers. The applicability of this rule was clearly demonstrated in the case involving the USS *Iowa*. The interviewee, Daniel Meyer, was the original source of the alleged defamation; the author, Charles Thompson II, was the initial recipient of the material, and when he included it in his book he became a republisher along with W. W. Norton.

A 2005 case that directly involved a major oral history program, *Hebrew Academy of San Francisco v. Regents of University of California*, is worthy of extended discussion because it demonstrates how even limited distribution of the transcript of an interview is enough to establish the program as a republisher.[8] This lawsuit arose from interviews that the Regional Oral History Office (ROHO) of the University of California, Berkeley, conducted in 1992 for the Jewish Community Federation of San Francisco. The goal of the project was to document Jewish philanthropy in the San Francisco area by interviewing the fifteen past presidents of the federation. In 1992 a ROHO interviewer conducted four interviews with Richard N. Goldman, one of the past presidents. After he reviewed his interviews, a 102-page transcript was deposited in the Bancroft Library (Berkeley) and the Charles E. Young Research Library (UCLA). The copyrighted transcript was subsequently sent to four other research libraries and listed on several internet databases.

In 2001, a researcher who was preparing to write a historical account of the San Francisco Hebrew Academy and Rabbi Pinchas Lipner, its founder and dean, requested selected pages from the Goldman transcript. When she came across statements by Goldman that were critical of the rabbi and the Hebrew Academy, she passed them on to Lipner. In 2002, the rabbi and the Hebrew Academy filed a lawsuit for defamation and false light against Goldman and the Jewish Community Federation of San Francisco. Shortly thereafter, the Bancroft Library and the Regents of the University of California were added to the lawsuit. The addition of these codefendants was predicated on the publication by ROHO of the Goldman transcript (by distribution to four research libraries), which Lipner's attorneys claimed constituted republication of the defamatory statements. In California, as in other states, talebearers (those who publish or republish) can be as liable as talemakers (Goldman).

Rabbi Lipner and the Hebrew Academy alleged in their complaint that Goldman's statements regarding a 1974 capital fund drive for local Jewish organizations "have injured them in their occupation, tend directly to injure them in respect to their profession, trade or business." The allegedly defamatory portions of the transcript read as follows:

> Goldman: It is a disgrace. I think [Rabbi] Lipner is a person who doesn't deserve respect for the way he conducts his affairs. . . . I don't think he is an honorable man. Anyone who would take children from a school and

use them to protest by sitting in at the Federation offices is someone who doesn't appeal to me. I remember a couple of occasions visiting the Hebrew Academy. When he would walk into the room, the children would stand at attention as if it were the Fuhrer walking in. To this day, I don't understand how he's gotten away with it. I don't object to Jewish education but what he has gotten away with is hard for me to understand or accept. . . .

The Hebrew Academy has done little for the community. The excessive financial support of the school was and continues to be a terrible drain on the community through the Federation. . . . I know that as Russian immigration flourished, he was soliciting them to attend the Academy and then prevailed on the Federation to pay for their education. I don't think those people knew one school from another, but he was the first to approach them. . . .

Glaser: Despite how manipulative you describe Rabbi Lipner is in grabbing on to Russian children. . .

Goldman: I have just watched him in action over the years and I have no respect for him. . . .

I think he is self-serving and an embarrassment. He was run out of other communities before he got here. We are too tolerant of him.

Glaser: Oh, I didn't know that.

Goldman: I'm not sure but I think he had been in Cleveland before he came here. Somebody checked the record and found that community did not tolerate him.[9]

After several failed attempts to have this lawsuit dismissed, attorneys for the Regents and Bancroft Library were able to successfully invoke California's anti-SLAPP statute. SLAPP is an acronym for Strategic Lawsuits Against Public Participation. The purpose of this statute and similar state laws is to enable individuals, groups, or institutions who believe their freedom of expression is being chilled or stymied by a lawsuit to sue for relief. The dismissal of ROHO from the lawsuit was predicated on the court's determination that the recording and publishing of oral histories qualified as a statement in connection with the public interest. Despite this successful outcome for ROHO, the case against the other defendants, Richard Goldman and the Jewish Community Federation of San Francisco, was allowed to continue.

A republisher cannot escape liability by including with the offending material the name of the person who originally made the defamatory statement. Nor does the republisher get a free pass if he or she accompanies the republication with phrases like "it is alleged that" or "it is rumored." As the First Circuit Court of Appeals noted, if the republication rule did not exist, "it would otherwise be too easy for a writer or publisher to defame freely by repeating the

defamation of others and defending it as an accurate report of what someone else had said."[10]

The Elements of Defamation

For a plaintiff to establish a case for defamation, the *Restatement (Second) of Tort* requires:

(a) a false and defamatory statement concerning another;
(b) an unprivileged publication to a third party;
(c) fault amounting at least to negligence on the part of the publisher;
(d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.[11]

The first element, (a), needs no clarification but the phrase "concerning another" sometimes can be a problem if the defamatory material does not directly reference or clearly identify the person claiming damage to his or her reputation. The test for this is usually whether a reasonable reader, viewer, or listener would readily be able to identify who was being referred to. The second element, (b), is literally satisfied by sharing the defamatory words with another person. However, this low threshold is misleading, in that a very limited publication may be found to have a negligible impact on one's reputation when and if the time comes to determine monetary damages under the fourth element, (d). The third element, (c), provides that the minimum level of fault is simple negligence. But based on *New York Times Co. v. Sullivan*, a much higher level of fault, "actual malice," is almost always required when the person claiming damage to reputation is a public figure. The fourth element, (d), while suggesting the potential complexity of the damage issues should a case get that far, can best be understood as requiring some actual damage to one's reputation. For example, persons who are especially sensitive and take offense over a false statement that a more reasonable person would simply shrug off might not be able to establish the fourth element because the damage to their reputation was *de minimus*. The fourth element, (d), also takes into account situations in which the defamatory statements not only damaged the person's reputation but also led to being fired from one's job. All states have criminal as well as civil penalties for defamation. Criminal prosecution, however, is a rarity.

The Dead Cannot Be Defamed

Although defenses to a defamation lawsuit are raised during the course of litigation, in order to be defamed, an individual must be alive. The general rule is that no one can slander or libel a dead person. This prohibition gives authors a completely free hand when it comes to propounding novel or even shocking historical interpretations. Claims that Elvis Presley was a pedophile and Abraham Lincoln was gay are just two recent examples of such interpretations.

Although some legal scholars have advocated an end to this limitation, there is no indication that this will happen anytime soon.[12] Despite the rule, there is still an occasional lawsuit filed by family members who believe a departed loved one's reputation has been besmirched. In most of these instances, the family member's death occurred recently and under tragic circumstances. Such lawsuits usually try to get around the rule by filing a civil action for invasion of privacy and/or intentional infliction of emotional distress. In only a few rare instances have such lawsuits been successful.[13]

Although the general prohibition that the dead cannot be defamed provides a significant measure of protection for most oral history programs, there is one small exception: a person was alive when he or she was allegedly defamed and actually commenced a lawsuit; if that person died while the case was still pending, the death might not automatically terminate the lawsuit. This actually happened in a defamation case brought by William Jewell, the first suspect in the bombing at the 1996 Olympics in Atlanta. After his death in August 2007, his heirs elected to continue with the lawsuit he had filed against the *Atlanta Journal-Constitution* in 1997.[14]

It should also be noted that a statement that seems just to be defaming a dead person may actually contain other references that are highly critical of the living, for example, a statement such as this: "Bruce Fletcher was a con man who defrauded hundreds of folk by promising them that they would receive a fifteen percent return every year on their investment. But he could never have launched his Ponzi scheme without the help of his brother Steve, who was his number one recruiter." If Bruce is dead but Steve is alive and he believes the statement concerning him is defamatory, then he could file such a lawsuit.

Statute of Limitations

All states have a statute of limitations or maximum periods of time for filing most types of lawsuits. For a defamation lawsuit, the range is usually one to two years. The purpose of such statutes of limitations is to ensure fairness by barring the filing lawsuits for which the reliability of the evidence has been greatly diminished due to the passage of time. There are, however, exceptions to these filing limits, and this was the central issue in *Hebrew Academy of San Francisco v. Goldman* after ROHO was dismissed from the lawsuit. At issue was whether or not the so-called single-publication rule should be applicable to Richard Goldman's interview transcript. This rule basically holds that the initial publication of a book, newspaper, or magazine will be treated as a single publication for the purposes of any lawsuit for defamation. The purpose of the rule is to shield publishers from having to defend against a multitude of lawsuits in different jurisdictions. Thus, for example, if a book receives nationwide distribution, the party who is allegedly defamed by the work could file suit in only one jurisdiction.[15]

The issue before the California Supreme Court was whether the single-publication rule should apply to an oral history transcript that in this

instance was first published in 1993 when it was placed in two research libraries. Although the court recognized that it was very unlikely that the plaintiffs could have learned of the existence of the Goldman transcript, since it was accessible only at the Bancroft and Charles E. Young Libraries, it still, however, fell under the single-publication rule.[16] Thus, the one-year statute of limitations to file defamation lawsuits in California began to run in 1993, when Goldman's transcript was first placed in the two research libraries. Since Rabbi Lipner and the Hebrew Academy did not file their lawsuit for defamation until 2002, the court held that it was barred by the statute of limitations.

Because California is a hot spot for defamation lawsuits, this decision is certain to be quite influential should a similar case arise in another state. The holding is a very reassuring one for every library or program that makes recordings or transcripts available to researchers. Had the decision gone the other way, and the court had held that the very limited distribution of the Goldman transcript did not trigger the single-publication rule, then every repository of oral history recordings and transcripts in California would most likely have had to audit their collections for potentially defamatory statements. Fortunately, that will not be necessary.

Organizations Also Have Reputations

This aspect of defamation law is sometimes overlooked because the vast majority of lawsuits filed are brought by individuals. But a business entity, political group, or nonprofit organization may also sue for defamation. The damage caused by the alleged defamation must be to the organization's or corporation's reputation *per se* and not to its individual officers or representatives.[17] In a 1999 case, *Smith v. Cuban American National Foundation*, a professor's statement about the apparent connections between the foundation's political contributions via a political action committee to various congressmen and the receipt of government funds in return was the basis for a defamation lawsuit.[18] Wayne Smith, a professor at Johns Hopkins University, made this statement during an interview broadcast as part of a PBS documentary, *Campaign for Cuba*, which examined the anti-Castro movement within the Cuban-American community. The lawsuit alleged that Smith's statement implied that the foundation was involved in either corrupt or criminal conduct because of the way that it contributed money and in turn received government funds. The lawsuit was eventually dismissed after the court determined that there was "substantial truth" in Smith's statement. As the court explained, "a statement does not have to be perfectly accurate if the 'gist' or the 'sting' of the statement is true."[19]

Public Figures Bear a Heavier Burden

Whether the individual bringing suit is a public figure or just a private individual will also have an important bearing on the ultimate outcome of the case. The decision which initiated all of this was *New York Times Co. v. Sullivan*.[20]

This case grew out of an advertisement in the *New York Times* entitled "Heed Their Rising Voices." The ad, which was paid for by sixty-four civil rights activists, claimed that public officials in Montgomery, Alabama, had acted unfairly and illegally in dealing with nonviolent black protesters. Lester B. Sullivan, the police commissioner of Montgomery at the time, was not mentioned by name in the advertisement, but he sued on the theory that the ad imputed to him illegal and unethical activities. The case came to the U.S. Supreme Court after the Alabama Supreme Court affirmed the trial court's decision in favor of Sullivan and the award of $500,000 in damages.

At issue before the high court was a classic confrontation of private and public rights. If public officials were allowed to utilize local defamation statutes and take their cases before friendly juries in their home state, the First Amendment guarantee of free speech and press would have a very hollow ring. To right the balance, the U.S. Supreme Court not only reversed the Alabama Supreme Court but also rewrote the law of defamation. Specifically, the high court held that even false statements about public officials are entitled to constitutional protection unless made with actual malice (i.e., knowledge of falsity or reckless disregard of whether the statements were true or false).

In 1974, the U.S. Supreme Court in *Gertz v. Robert Welch, Inc.* completed its restructuring of American defamation law by establishing simple negligence as the burden of proof for plaintiffs who were not public officials.[21] In this decision, the high court also expanded the public official doctrine to encompass anyone who takes part in a public matter or controversy. In doing so, the Supreme Court established a two-step analysis to determine if an individual is a public figure: (1) whether a public controversy exists; and (2) the nature and extent of the individual's participation in the controversy. In essence, the decisions in *Sullivan* and *Gertz* have carved out a limited constitutional privilege to defame a plaintiff as long as he or she is definable as a public figure.[22]

Negligence versus Actual Malice

Two cases decided by the supreme courts of California and Texas respectively underscore how important the public versus nonpublic figure distinction is in deciding liability. While neither of these cases directly involved oral history interviews, both arose out of historical incidents that drew prolonged media interest and widespread national attention. The first event was the assassination of Senator Robert F. Kennedy on June 6, 1968, and the second the raid by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) on the Branch Davidian compound on February 28, 1993.

The first case, *Khawar v. Globe International, Inc.*, began with a book entitled *The Senator Must Die: The Murder of Robert Kennedy*, published in 1988.[23] Robert Morrow, the author, claimed that the Iranian secret police (SAVAK) and the Mafia were behind the assassination and that Ali Ahmand, a young Pakistani, actually assassinated Kennedy. In 1989 the *Globe*, a weekly tabloid newspaper,

ran a story on the book entitled "Former CIA Agent Claims: Iranians Killed Bobby Kennedy for the Mafia." The article was an uncritical summary of the book's central allegation. It also included an enlarged photograph from the book of a group of men standing near Kennedy. An arrow beside the photo identified Ahmand as the alleged assassin. Following the publication of the *Globe* article, the man with the arrow pointed at him was determined to be Khalid Iqbal Khawar, a farmer living in Bakersfield, California. Almost immediately, he and his family were subjected to acts of vandalism, intimidation, and death threats.

After Khawar filed suit for defamation and a jury awarded him $1.8 million, the *Globe* appealed, claiming that Khawar was not a private citizen but a limited-purpose public figure. According to the holding in *Gertz*, this type of public figure is one who "...voluntarily injects himself or is drawn into a particular controversy and thereby becomes a public figure for a limited range of issues."[24] When the California Supreme Court applied the facts of the case to this definition, it determined that while Khawar had indeed been drawn into this controversy, it was the book and subsequent newspaper article that did so.[25] Just because he happened to be in a group photo with Robert Kennedy the day of his assassination while he was working as a photojournalist was not enough to make him a limited-person public figure. Although he had been questioned by the police after the assassination, he was never a named suspect. In the end, because he was a private citizen, all that was required was simple negligence on the part of the *Globe*, and there was ample evidence of that. If the Supreme Court had agreed with the *Globe* that Khawar should be treated as a limited-person public figure, he would have had to show that the defendants acted with "actual malice," a much tougher task.

The second case, *WFAA-TV, Inc. v. McLemore*, did not arise from the reporting of a new interpretation of a long past event, but from the second-guessing that occurred almost immediately after the bloody raid on the Branch Davidian compound.[26] John McLemore was a television reporter for station WFTX in Waco, Texas. After the station received a tip that a raid on the Branch Davidians by the Bureau of Alcohol, Firearms, Tobacco and Explosives (AFT) was imminent, he went into the compound with a cameraman. Two days after the raid, which claimed the lives of seventy-six Davidians and four AFT agents, a local reporter told Ted Koppel on *Nightline* that some AFT agents believed that David Koresh, the Branch Davidian leader, had been tipped off about the raid by members of the media. To support their position, these agents alluded to the presence of local reporters inside the compound before the shooting began.

WFAA, a Dallas television station, followed up on this claim the next day. The station broadcast a video showing McLemore inside the Davidian compound and identified him by name as a reporter for KWTX, Waco. The initial story indicated that McLemore and two reporters from a local newspaper were the only media representatives at the site when the raid commenced. Later

that same day, WFAA corrected its story to indicate that only McLemore and his cameraman were in the compound when the shooting began. McLemore subsequently filed suit, claiming that the story implied he had tipped off the Davidians in exchange for permission to be in the compound when the raid began. As in the *Globe* case, the crucial question was whether he was a private individual or a limited-purpose public figure. In deciding that he should not be accorded the negligence standard, the Texas Supreme Court concluded that "…by choosing to engage in activities that necessarily involved increased public exposure and media scrutiny, McLemore played more than a trivial or tangential role in the controversy and, thus, bore the risk of injury to his reputation."[27] As a result, he was not able to show that WFAA's story was created with "actual malice," and his case was dismissed.

Limited-Purpose Public Figures

All-purpose or general public figures are easy to spot. The media provides us with endless accounts of what they have done, are doing, or are thinking of doing. In addition, public officials on all levels are generally considered public figures whether they are elected or appointed. Such a list would generally include "candidates for elective office, public employees, police and other law-enforcement officers and officials, and public-school teachers and coaches."[28]

Limited-purpose public figures are much harder to spot. For example, publicity that is given to a heretofore private individual does not by itself turn this person into a limited-purpose public figure. The first question to ask is whether or not there was or is a public controversy. The second question goes to the extent to which the person at issue chose to participate in this public controversy. In other words, did he or she step forward and take a leadership role or seek media attention? Finally, do the alleged defamatory statements relate to his or her actual role in the underlying public controversy or not?[29]

In both of the previous cases, *Khawar* and *McLemore*, there was a public controversy and the published statements about each certainly addressed their roles. The final decisions in their respective cases turned on the second question: did they knowingly engage themselves in the public controversy? For Khawar the answer was no; his life as an obscure photojournalist was long past, and when he was identified as the alleged assassin in the photo, he was a private citizen and nothing more. By contrast, McLemore was a working journalist who was covering a breaking story. His situation was far different than Khawar's. It is no wonder, then, that the legal skirmishing over the private citizen versus public figure status of the plaintiff is a crucial part of many defamation lawsuits.

Once a Public Figure Always a Public Figure

Although the U.S. Supreme Court has not as yet ruled on this important issue, the Second, Sixth, and Seventh Circuit Courts of Appeal have affirmed the doctrine "once a public figure always a public figure." In *Street v. National*

Broadcasting Co., the plaintiff was Victoria Price, the state's chief witness in the infamous 1930s cases involving the Scottsboro Boys.[30] Nine black youth, ranging in age from twelve to twenty, were charged with raping Price and another white woman, Ruby Bates. Their trials before all-white juries in Alabama created a national furor and led the U.S. Supreme Court to overturn two guilty verdicts because of overt racial prejudice. Price's lawsuit grew out of *Judge Horton and the Scottsboro Boys*, a television dramatization of one of the most dramatic of the trials. The script for this docudrama was based primarily on one chapter in a book entitled *Scottsboro: A Tragedy of the American South* by Dan T. Carter. Carter's sources included the official court transcript of the trial, news reports, the findings that Judge Horton made to overturn the jury's verdict, and interviews with the judge and others. The plaintiff, Victoria Price, alleged in her complaint that the television dramatization of this 1933 trial portrayed her as a perjurer, a woman of loose morals, and a false accuser of the Scottsboro Boys.

For all intents and purposes, the outcome of the case essentially turned on the question of whether Price was still a public figure or had become a private individual due to the passage of time. At stake in this determination was whether NBC's fault was measured by a standard of "actual malice" or simple negligence. Since the latter degree of fault would have imposed a much lower burden of proof on the plaintiff, the attorneys for Price naturally sought to have this standard apply. In affirming the trial court's classification of Price as a public figure, the Sixth Circuit held that "once a person becomes a public figure in connection with the particular controversy, that person remains a public figure thereafter for purposes of later commentary or treatment of that controversy."[31] It also extended public-figure-doctrine protection to historians: "Our analytical view of the matter is based on the fact that the Supreme Court developed the public figure doctrine in order that the press might have sufficient breathing room to compose the first rough draft of history. It is no less important to allow the historian the same leeway when he writes his second or third draft."[32]

In a 1996 case, *Milsap v. Journal/Sentinel Inc.*, the Seventh Circuit Court of Appeals reaffirmed the position in *Street:* "The Circuits addressing the issue have indicated that an individual who was once a public figure with respect to a controversy remains a public figure for later commentary on that controversy."[33] According to one of the leading experts on defamation, it is theoretically possible for someone to regain private figure status with the passage of time, but in all of the cases decided thus far, the "public figure status is a door that swings only one way."[34]

Pure Opinion Is Not Defamatory, But

According to the *Restatement (Second) of Torts*, "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this

nature is actionable only if it implies the allegation of undisclosed facts as the basis for the opinion."[35] The reason that expressions of pure opinion cannot constitute defamation is that ideas without factual grounding cannot be false. They are just ideas. The problem, as pointed up by the U.S. Supreme Court in a 1990 case, *Milkovich v. Lorain Journal Co.*, is that a statement that on its face seems like an opinion may actually contain considerable factual information.[36] As a result, the Supreme Court refused to endorse a wholesale defamation exemption because something is labeled an opinion. Instead, courts are to examine the setting and context in which a statement was made to determine whether it brings something more than an unsupported idea to the table.

The case of *Levin v. McPhee* demonstrates how statements from oral history interviews passed the confusing test established by the Supreme Court in *Milkovich*.[37] In 1994, Farrar, Straus & Giroux, Inc. published a book written by John McPhee entitled *The Ransom of Russian Art*. In this book, McPhee, a prolific author, examined the unique art-collecting efforts of Norton Dodge, a wealthy University of Maryland professor. During the 1950s, Professor Dodge began collecting dissident art in the Soviet Union. For the next thirty years, from Stalin to *glasnost*, he made frequent visits to the Soviet Union and managed to take out more than ten thousand pieces of anti-Soviet art. The painters and sculptors from whom he obtained these works were of necessity clandestine figures. Evgeny Rukhin, one of the leading dissident artists, frequently traveled with Dodge to help him contact other artists.

In 1974 Rukhin and the wife of another nonconforming artist perished in an apartment fire of suspicious origin. In his treatment of Rukhin's death, McPhee presents oral history accounts from five people who were closely acquainted with the artist. All of the interviewees suspected foul play, but only three made a direct accusation against the plaintiff, Ilya Levin. One interviewee opined that Levin set the fire at the urging of the KGB; a second interviewee simply branded him a murderer; and a third interviewee suggested that Levin was a coward for not trying to save Rukhin from the fire. These accusations prompted Levin to file suit against McPhee and his publisher for libel. Although he lost at trial, he appealed to the Court of Appeals for the Second Circuit.

The central issue on appeal was whether under New York law McPhee could be found guilty of libel for reporting differing interpretations of Evgeny Rukhin's mysterious death. The court noted that while McPhee did not make the statements, his use of the statements made by the interviewees made him as liable as if he had made the statements himself. As for these statements—accusing someone of cowardice, conspiring with the KGB, or committing murder by arson—all would certainly damage anyone's reputation. But although these statements were clearly libelous if proven to be untrue, the case did not turn on the issue of truth but on whether or not the offending statements contained underlying factual information or were just pure opinion. In the end, the court was satisfied that McPhee's book had provided enough warnings

to the reader that these accusations were "nothing more than conjecture and rumor."[38] McPhee and his publisher were thus victorious but only after an expensive trial and appeal. Obviously, the opinion defense to a defamation claim, like most of the other defenses—truth, consent, privilege, statute of limitations, and fair comment or criticism—must be asserted during the course of the litigation. They are not stop signs that can be raised to automatically ward off a lawsuit. The best practice is still to do everything possible to prevent the filing of a lawsuit rather than having to convince a court to recognize one or more of these defenses and grant relief.

The Major Categories of Defamation

Words and accusations that may injure a person's reputation are usually classified in most states into five major categories: (1) committing a crime, (2) acting immorally or unethically, (3) associating with unsavory people or otherwise acting disgracefully or despicably, (4) demonstrating financial irresponsibility or unreliability, and (5) demonstrating professional incompetency.[39] Bruce Sanford, one of America's leading authorities on defamation, has compiled a list of terms and phrases that he believes have the potential to be considered defamatory and thus lead to a lawsuit. A sampling of his so-called red flag words appears in Table 4.1. As readers should note, all of these words fit readily into one or more of the five general categories of defamation.

Professional Competency: A Special Concern

The case of *Hebrew Academy of San Francisco v. Goldman* was all about the professional competency of both the head of the Hebrew Academy and the school itself. Whenever an interviewee accuses someone of immorality or criminal behavior, the defamation warning signs should go up fairly quickly. Negative accounts about one's job performance or professional competency may be less likely to set off a defamation alarm. For one thing such statements are not as "hot" or sensational as allegations of criminality or immorality and many interviewers are often intent on finding out why a particular company, organization, or individual failed, succeeded, or chose to leave the marketplace.

A case involving Vincent Bugliosi, the celebrated author of *Helter Skelter*, helps shed more light on how a defamation claim can arise when one's professionalism is called into question.[40] Both Bugliosi and Earle Partington served as defense attorneys in the sensational Palmyra Island murder trials. In 1974, Muff and Mac Graham sailed to Palymra, an uninhabited island in the Pacific Ocean. They were never heard from again. In 1981, after the bones of Muff Graham washed up on Palymra, Stephanie Stearns and Buck Walker, who had been on the island when the Grahams arrived, were indicted for their murders. Partington represented Walker, and his codefendant, Stearns, retained Bugliosi. After separate trials, Walker was convicted and Stearns was acquitted. Bugliosi subsequently wrote a book about the two trials entitled *And the Sea*

Table 4.1 Sanford's Red Flag Words

addict	gangster	plagiarist
adultery	gay	profiteering
alcoholic	graft	prostitute
atheist	herpes	rape/rapist
bankrupt	hit-man	scandalmonger
bigamist	hypocrite	scoundrel
blackmail	illegitimate	seducer
booze-hound	illicit relation	sham
bribery	incompetent	shyster
brothel	infidelity	slacker
cheats	informer	smuggler
child abuse	intimate	sneaky
con artist	Ku Klux Klan	sold out
coward	Mafia	spy
crook	mental illness	stool pigeon
deadbeat	mobster	suicide
defaulter	moral delinquency	swindle
double crosser	mouthpiece	thief
drug abuser	Nazi	unethical
drunkard	neo-Nazi	unprofessional
ex-convict	paramour	unsound mind
fraud	peeping Tom	vice den
gambling den	perjurer	villain

From Sanford, *Libel and Privacy*, Sec. 413, 132, 11–13.

Will Tell. In 1991, CBS produced a television docudrama about the trials that was based on his book. Partington subsequently took issue with the negative portrayal of his legal skills and filed suit for defamation and false light. The representations from both the book and docudrama that offended him were his alleged failure to discover vital evidence, his overly submissive attitude toward the trial judge, his decision not to introduce a potentially exculpatory diary, his failure to call a key witness, and finally, a statement by the actor portraying Bugliosi to the effect that Stephanie Stearns would be spending the rest of her life in prison if he had defended her the way Partington represented Walker. The lawsuit was eventually dismissed because the Ninth Circuit Court of Appeals determined that Bugliosi's negative views of Partington's legal skills were protected opinion under the First Amendment. As the court saw it, "Because the book outlines Bugliosi's own version of what took place, a reader would expect him to set forth his personal theories about the facts of the trials and the conduct of those involved in them."[41]

A defamation case involving real estate mogul and reality TV star Donald Trump demonstrates how a damage to reputation claim can materialize even without any direct criticism of one's professional abilities. The lawsuit arose out of a book by Timothy L. O'Brien, entitled *TrumpNation: The Art of Being Donald*, published by Warner Business Books in 2005. In the book, O'Brien maintained that Trump's net worth was far less than his public claims. According to O'Brien, it was only in the neighborhood of $150 to $250 million. Because this figure directly contradicted Trump's repeated public assertions that he was a billionaire, Trump maintained that it was false and had a negative impact on his business dealings.[42]

The key sources for O'Brien's financial determination of Trump's net worth were three individuals with direct knowledge of his finances. To secure their cooperation, O'Brien promised them confidentiality. Trump's lawyers sought to pierce this veil of confidentiality and learn the identities of the sources as well as gain access to O'Brien's notes in an effort to substantiate his defamation claim. The court, however, refused, ruling that a biography of Donald Trump was a newsworthy event and thus a journalistic activity covered by the shield law. The appeals court ultimately dismissed the lawsuit because it found that Trump failed to prove that O'Brien acted with actual malice in publishing his figures about his net worth. In other words, as a public figure Trump was unable to prove that O'Brien published his account with either knowledge of its falsity or reckless disregard for whether it was true or false.[43]

Suggestions for Avoiding Defamation Lawsuits

Fortunately, there is only one published case, *Hebrew Academy of San Francisco v. Regents of the University of California*, in which an oral history program was forced to defend against a lawsuit for defamation based on the publication of an interview. The best way to ensure that oral history interviews do not generate a future lawsuit is to put into place a comprehensive prevention system. While no such system can be made absolutely fail-safe, careful attention to the following suggestions will greatly reduce the risks:

1. *Staff Training*: Everyone who has some role in the creation, processing, editing, and archiving or retrieval of interviews should be included. This should also be a continuous process in which potentially defamatory statements are discussed and reviewed whether they come from your own interviews or other sources.
2. *Checklists*: Creating a series of questions to assess potential defamation is a good way to facilitate staff training. The following queries provide such an analytical framework:
   A. Is the subject living or active (individual or organization)?
   B. Would a reader's opinion or estimation of the subject be changed after reading the statement?

C. Is the negative opinion expressed just that or does it contain supporting facts or at least imply them?
D. Do you have other evidence to prove the truth of the interviewee's statement?[44]

3. *Verify/Seal/Edit/Delete?* Not every shocking statement or characterization is defamatory.[45] You may in fact be able to corroborate the truth of a statement by consulting written sources and even other interviews. The historical record is not and should not be something that has been sanitized by its creators and keepers. If, however, you are unable to corroborate the statements in question then start your damage control by starting first with the least invasive procedure. Sealing the portions of the interview that might be defamatory for an appropriate time period would faithfully preserve the historical record. Careful editing of the statements at issue could remove concerns about publishing potentially defamatory statements but without greatly distorting the record. The last, and least desirable option in terms of being faithful to the historical record, is deletion of the material. This approach is certainly a form of censorship that is anathema to academic freedom and should only be used as a last resort.

But what if, just if, you receive a letter one day from a lawyer who represents a person or entity who claims they were defamed by something that one of your interviewees said in an interview? Such a moment is not the time to go it alone. Immediate consultation with a knowledgeable local attorney is essential. The money that you spend in retaining an attorney at this stage may go a long way toward resolving this matter before any lawsuit is even filed. Remember, litigation is expensive and often results in bad publicity, so whatever you can in good conscience do to head off or quickly settle a lawsuit is generally the most favorable outcome.

5

Privacy Issues: The Stealth Torts

The use of "stealth" as the defining adjective is quite appropriate for the three privacy torts that could possibly result in the filing of a lawsuit against an oral history program. Since there is much more limited awareness of these types of legal challenges, it is easy to overlook them. Their relatively low profile is due in part to the relatively small number of case filings that are based on one or more of these privacy torts. As a result, they generally receive far less attention from the news media than do the far more common lawsuits for defamation.

The creation of a right to protect one's privacy from unwanted publicity and intrusion was first propounded in a law review article written by Louis Brandeis and Samuel B. Warren in 1890. Until they published their seminal article, "The Right to Privacy," tort law had traditionally protected one from only physical harm.[1] Because of the technological advances that were occurring in the late nineteenth century and the aggressive expansion of newspaper reporting, Brandeis and Warren believed that protection from emotional harm was needed as well.

Legal protection for a right to be left alone has indeed become a reality. Today, this right to protect one's privacy is divided among four different privacy torts: false light, public disclosure of private facts, right of publicity, and intrusion upon physical solitude. Each of these causes of action offers protection for a particular aspect of one's privacy. Since false light is the privacy tort that is most closely linked to defamation, it is the most visible of the four torts. It has also produced a number of published cases involving interview materials. The next two, public disclosure of private facts and the right of publicity, are less well known primarily because they deal with privacy interests that are considerably removed from defamation. That does not mean that oral historians should consider these two torts as beyond the boundaries of concern. The ever-widening net of oral history interviewing coupled with the increasing scholarly and media utilization of these interviews make it imperative that oral historians understand what each of these three privacy torts entails.

Intrusion upon physical solitude is the only privacy tort that oral historians should never have to worry about. Lawsuits involving this tort almost always

involve the news media. Most cases stem from overly aggressive reporters and photographers (known as paparazzi), who follow or stalk a person in public, take unauthorized photographs, and even trespass on the property or possessions of an individual. This type of information-gathering is something that oral historians simply do not do.

False Light

As a rule, most lawsuits for defamation include a false light claim as well. Since both causes of action require proof that the offending party published false information, there is a natural tendency to file both claims together. The elements of this privacy tort as defined by the *Restatement (Second) of Torts* are "(a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed."[2] To successfully prove up a false light claim, a party must be able to prove that the matter was highly offensive to a reasonable person, that the information was published to a substantial number of people, and that the publisher did so with actual malice.[3]

False Light versus Defamation

Although a lawsuit for defamation usually contains a false light claim, the two causes of action diverge significantly. The first major difference involves the words or images at issue. In a false light cause of action, the offending words do not have to be false as they do for defamation. This crucial difference can best be demonstrated by a lawsuit that was triggered by *The Hurricane*, a 1999 movie. Denzel Washington played the role of Rubin "Hurricane" Carter, a talented boxer who was convicted of murder and spent many years in prison before his conviction was overturned. The first three minutes of the movie reenacted the 1965 middleweight title bout against Joey Giardello. In this opening scene, viewers see a clumsy white boxer (Giardello), who appears to be in danger of losing the fight to the more talented "Hurricane" Carter. At the end of the scene, however, an all-white panel of officials awards the decision to a bloodied Giardello, with fans protesting loudly in the background. The clear impression that the opening scene leaves is that Giardello only won the fight because of the color of his skin. After seeing the movie, Giardello filed a lawsuit against the filmmakers for false light. The suit alleged that by all contemporary and historical accounts Giardello was actually the better fighter on the night in question, his victory was a convincing one, and the fans in attendance were generally supportive of the decision. The two parties eventually reached a settlement agreement.[4]

Although *The Hurricane* accurately presented the outcome of the Carter-Giardello fight, what it falsified was the manner in which Giardello gained the victory. By depicting him as the weaker fighter who won only because he was

white, the movie created an image that he deemed offensive enough to warrant a lawsuit. The human interest that is wounded or shattered by a false light representation is not a person's reputation, but his or her emotional well-being. For example, in Giardello's case, the wound was about how the film tarnished and cheapened his victory, not about how it falsely claimed he failed to defend his title.

The second major difference is the requirement in false light cases that there be considerable publicity given to the offending image or message. Thus, a larger audience must be involved to support a false light claim than one for defamation. The third key difference goes to the burden of proof that the person claiming to be the victim of a false light publication must establish. As noted in the *Restatement*, actual malice must be established on the part of the publisher. As in defamation cases, this burden of proof imposes a far heavier burden on the person claiming this emotional injury.

Unfortunately, even an extended discussion of what a false light claim consists of still might not make this very murky tort more intelligible. The murkiness, of course, comes from its all too close association with defamation. Courts are often forced to decide whether a plaintiff who his unable to make his or her case for defamation should be allowed to prevail on their fall-back cause of action, false light. As one authority has noted, "This somewhat nebulous area is a kind of expansion zone for the law of defamation."[5] Fortunately, a number of states have simply refused to allow this legal expansion to take place. In Wisconsin, for example, state law bars the bringing of any claim for false light. Similarly, the highest appellate courts in Colorado, Massachusetts, Minnesota, North Carolina, South Carolina, and Texas have ruled that no cause of action for false light may be filed in their state courts.[6]

Common False Light Claims

Even though the privacy tort of false light is not a valid cause of action in some states and looked upon with disfavor in others, examining the major types of factual situations from which most false light lawsuits emerge is still important. The most common one by far is distortion, or embellishment of the facts. While such distortions usually tilt to the negative side as in the Giardello case, it could also come about from an attempt to make someone look too good. For example, a local newspaper decides to do a feature on a Vietnam War veteran. Although the man served creditably, the resulting story embellishes his record with accounts of heroism and valor worthy of John Wayne. Even though such embellishment might raise his reputation in the community, he could still have an action for false light. The injury here would be emotional; he did his duty but is embarrassed by the license that the paper took in trying to make him out to be a superhero.[7]

Perhaps this scenario is a bit far-fetched, but it is reminiscent of one of the two false light cases decided by the U.S. Supreme Court. In *Cantrell v. Forest*

City Pub. Co., a human-interest article examined how a family was coping with the loss of their husband and father, five months after he tragically died along with forty-two others in the collapse of the Silver Bridge that had spanned the Ohio River at Pleasant Point, West Virginia. Although the reporter for *The Plain Dealer* did not actually interview Mrs. Cantrell, he wrote, "Margaret Cantrell will talk neither about what happened nor about how they are doing."[8] Other portions of the story stressed that the Cantrell family was living in abject poverty; the five children were wearing old, ill-fitting clothes; and their house was in an advanced state of deterioration. While conditions were certainly not good for the family, their lawsuit claimed that the story made them objects of pity and ridicule. The Supreme Court ultimately upheld the Cantrell family's false light claim.[9]

The second major category of false light claims is false associations. In these situations, whether an article, photograph, or media presentation is involved, the alleged offense is the innuendo that can be drawn from being shown with or connected to unsavory individuals or criminal events. A case from Illinois provides a prime example of a false light claim based on such association. In 2003, HarperCollins published a nonfiction account of Michael Corbitt's association with the Chicago mob entitled *Double Deal: The Inside Story of Murder, Unbridled Corruption, and the Cop Who Was a Mobster*. Corbett coauthored the book with Sam Giancana, the godson of the notorious Chicago mob boss Sam "Momo" Giacona. In the photo section of the book, the authors included a picture of Gayle Raveling, Corbett's ex-sister-in-law. The picture was taken in 1983 while she was still married to Corbett's brother. The photo shows her holding Corbett's son, Joey, at his christening while standing beside Sal Bastrone, his godfather. The caption below the photo identified Raveling as Corbett's sister-in-law, and Bastrone is identified elsewhere in the book as the Chicago mob's North Side boss. She subsequently filed a lawsuit for false light claiming her association with the Chicago mob was highly offensive and caused her emotional distress and pain. The Court, however, determined that the mere inclusion of her photograph was insufficient to support her claim and dismissed it.[10]

Docudramas and Photographs

While articles and books can and do give rise to false light claims, such claims also arise from the fictionalized embellishments in docudramas or the placement of a photo as in the *Raveling* case.[11] Since docudramas often involve the use of oral history interviews, the case of *Seale v. Gramercy Pictures* is worth closer examination. The lawsuit was prompted by a docudrama entitled *Panther*, which chronicled the rise of the Black Panther Party. Because Bobby Seale was one of the cofounders of the party, the actor playing him had a prominent role. According to Seale, two of the scenes in *Panther* distorted the historical record and thus cast him in a false light. The first distortion

involved Seale's effort to combat police brutality in Oakland by having the Black Panthers openly carrying guns. In one of the scenes in *Panther,* the actor playing Seale is shown buying guns from an Asian dealer in a darkened room. Seale maintained that the dialogue between the two, as well as the way the scene was shot, suggested that the guns he purchased to arm the Black Panthers were obtained illegally.

The actual fact of the matter was that while Seale had personally purchased the weapons to arm the Panthers, he did so in broad daylight at a sporting goods store. In another scene Seale and the actor playing Eldridge Cleaver are shown arguing about the role that violence should play in the Black Panther movement. Seale also contended that this scene cast his position in a false light by suggesting that he was an advocate of nonviolence rather than the self-defense position he actually had advocated against the police. In the end, the court dismissed his lawsuit because it deemed the distortions to be only minor deviations from the historical record. Even if the distortions had been found to be significant ones, the court opined that he was still unable to show that Gramercy Pictures had produced the scenes with "actual malice."[12]

Possible Links to Oral History

From the analysis thus far, the possible link that this privacy tort might have to oral historians appears to be very far removed at best. The cases discussed have involved a Hollywood film, a tell-all crime book, and a docudrama. The first two of these are not likely to be produced by oral historians. There is, however, no question that the publication and broadcast of oral history materials is on the rise. One indicator of this is the inclusion of a regular media review section in *The Oral History Review* beginning in 2000. Today, almost every issue contains several such reviews. The subject matter of these media productions is also important to consider. Although documentaries that address noncontroversial subject matter continue to be the rule, a number of recent media productions are taking on topics like desegregation and integration, police brutality, and AIDS. While it is certainly true that a false light claim could arise from the manner in which a community's history was presented, documentaries that address cutting-edge issues and topics are much more likely to ruffle more than just feathers.

The second area where vigilance is required is in the use of photographs to illustrate a book of interviews. Proper captioning and placement are very important. All layouts should be reviewed to make sure there are no unfavorable innuendos that might be drawn from the placement of photographs.

Public Disclosure of Private Facts

According to the *Restatement (Second) of Torts,* this cause of action applies when: "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter

publicized is of a kind that: (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public."[13]

This definition can be better grasped if broken down further into the four elements that must be proven to secure any monetary damages:

1. Embarrassing private facts must be disclosed;
2. The facts must be disclosed to the public in general;
3. The facts must be highly offensive to a reasonable person;
4. The facts must relate to matters that are not of legitimate public concern.[14]

This cause of action, also known as the embarrassing facts or private facts tort, allows recovery for truthful disclosures of private or intimate facts about a person that are not newsworthy. In other words, the private facts disclosed do not further public understanding of any newsworthy issue or incident whether it be contemporaneous or from the past. Courts also tend to customize the "highly offensive to a reasonable person" element to the local community or area and the offended party's standing in it. If, however, the information disclosed comes from public records (civil, criminal, or military), then the information is usually considered *per se* to be of public interest.

An Illinois case, *Haynes v. Alfred A. Knopf, Inc.*, effectively demonstrates how private facts can lead to such a lawsuit.[15] In 1991 Knopf published *The Promised Land: The Great Black Migration and How It Changed America* by Nicholas Lemann. Most of his research for this best-selling work came from in-depth interviews with Southern blacks who had migrated to Northern cities from 1940 to 1970. The story of Ruby Lee Daniels is the centerpiece of the book. In telling her story, Lemann included some very private details about her sexual relationship with her first husband, Luther Haynes. After reading these details and other claims by Daniels that Luther lost numerous jobs as a result of his alcohol abuse and was a poor father, Haynes and his wife filed suit for defamation and public disclosure of private facts. As the court noted, the latter and not the former was the major claim in this lawsuit. One of the passages in the book that was the basis for the claim of public disclosure of private facts read:

> It got to the point where [Luther] would go out on Friday evenings after picking up his paycheck and Ruby would hope he wouldn't come home, because she knew he would be drunk. On Friday evenings when he did come home—over the years Ruby developed a devastating imitation of Luther and could re-create the scene quite vividly—he would walk into the apartment, put on a record and turn up the volume, and saunter into their bedroom, a bottle in one hand and a cigarette in the other, in the mood for love. On one such night, Ruby's last child, Kevin, was conceived. Kevin always had something wrong with him—he was very moody, he was scrawny, and he had a severe speech impediment. Ruby

> was never able to find out exactly what the problem was, but she blamed it on Luther; all that alcohol must have gotten into his sperm, she said.[16]

Luther and his second wife maintained that this passage and several others revealed his private sex life in embarrassing detail and "ridiculed" his love-making ability. In upholding the trial court's dismissal of their claim for public disclosure of private facts, the Seventh Circuit Court of Appeals held that the so-called private details were too general to support the tort: "No sexual act is described in the book. No intimate details are revealed. Entering one's bedroom with a bottle in one hand and a cigarette in the other is not foreplay."[17]

This case is instructive for a number of reasons. The plaintiffs, Luther Haynes and his wife Dorothy, could certainly be characterized as average Americans. At the time this lawsuit was filed, Luther was a homeowner and had worked for years as a parking lot attendant. Their decision to take legal action against the publisher and author of *The Promised Land* suggests that public figures are not the only ones who take offense and seek legal redress. The second lesson comes from both the topic and the historical approach. By focusing on a handful of migrants from Clarksdale, Mississippi, Lemann was able to more effectively dramatize the personal struggles involved in this monumental migration and resettlement in the north. Oral history was the vehicle with which he vividly portrayed this historical struggle, as it so often is in the telling of many social sagas. But in sorting through the richness of the detail, oral historians and writers still need to recognize that for some people, like the Hayneses, certain details may be offensive enough to sue over.

Disclosure of Private Facts in Public Records

A case in Idaho, *Uranga v. Federated Publications, Inc.*, demonstrates that even extremely embarrassing private details from years past may be disclosed if they were gleaned from a public record. In 1995, *The Idaho Statesman* published a front-page story recounting a 1950s controversy involving the homosexual solicitation of teens at the local YMCA. The "Boys of Boise" scandal, as it was called, resulted in a lengthy investigation. One of the boys who were implicated was subsequently kicked out of West Point. The retrospective newspaper article published the one-page statement he had given to police at the time of the original investigation. In this statement, he admitted having a homosexual affair with Fred Uranga, his cousin and classmate. After the paper refused to publish a retraction, Uranga sued the newspaper for false light and public disclosure of private facts. Since there was no falsity associated with the publication of the statement, the first claim was quickly dismissed. What the Supreme Court of Idaho struggled with was the question of whether after forty years his past conduct and name were still newsworthy. Because this information appeared in a public record, the court ultimately held it was still a matter of public interest and thus rejected his claim with a parting quote from James

Madison: "Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press."[18]

A case in California, *Gates v. Discovery Communications Inc.*, added the support of the California Supreme to the holding in *Uranga*.[19] In 2001, the Discovery Channel aired a documentary about a murder-for-hire that occurred in 1988. Steven Gates had pled guilty to being an accessory after the fact and was sentenced to three years in prison. Following an early release from prison for good behavior, Gates had, in the words of the court, "lived an obscure, lawful life and become a respected member of the community."[20] His role in the murder, however, was fully revisited in the Discovery Channel's documentary *The Prosecutors*. For him, the fallout from the broadcast was devastating, as he lost his business and marriage, which in turn prompted this lawsuit.

Gates maintained that the passage of time significantly reduced the newsworthiness of his conviction and correspondingly elevated his right of privacy as an average citizen. He also sought to convince the court that *The Prosecutors* was more historical than current in nature and hence not as deserving of the same protection as the news media. No, said the court, "Neither that defendants' documentary was of an historical nature nor that it involved 'reenactments,' rather than firsthand coverage of the events reported, diminishes any constitutional protection it enjoys."[21] It would make no sense to make public records available to the media but forbid their publication "if offensive to the sensibilities of the supposed reasonable man."[22]

Passage of Time and Public Figures

An older case, *Perry v. Columbia Broadcasting System, Inc.*, directly addressed this issue.[23] In 1968, CBS developed and broadcast a seven-part series on the history and culture of blacks in America entitled *Of Black America*. In the first program, "Black History: Lost, Stolen, or Strayed," Negro stereotypes in the movies were addressed. Bill Cosby, the narrator, prefaced the film clips that were presented by stating, "The black male was consistently shown as a nobody, nothing. He had no qualities that could be admired by any man or more particularly, by any woman."[24] Several of the film clips shown were of Lincoln Theodore Perry, a popular Negro actor from the 1930s, whose stage name was Stepin Fetchit. Cosby commented directly on how important Perry's movie roles were in creating this stereotype: "The tradition of the lazy, stupid, crap-shooting, chicken-stealing idiot was popularized by an actor named Lincoln Theodore Monroe Andrew Perry. The cat made two million dollars in five years in the middle thirties. . . It's too bad he was as good at it as he was."[25]

In dismissing Perry's claim for public disclosure of private facts, the Seventh Circuit Court of Appeals held that Cosby's commentary addressed his public life, and "the subject with which the film dealt, the stereotype, and erroneous characterization of Negroes in film was a matter of public interest."[26] The court also brushed aside his claim that almost thirty years had passed since he made

his last film and he should thus be considered a private citizen by noting that he continued to perform, albeit in local clubs and on the radio. The consensus among courts is that the mere passage of time does not significantly erode the newsworthiness of an event or individual or the right of the public to know.[27]

Possible Links to Oral History

The possibility that embarrassing personal details derived from an oral history interview could trigger a private facts lawsuit is remote but not out of the question. Whether these details appear in a publication, media production, or an interview available online, the defenses of newsworthiness and publicly recorded information would of course be available. But the same type of precautionary measures that were previously recommended to try to avoid a lawsuit for defamation certainly apply to this tort as well. Though there have been no published cases to date, an experience provided by Valerie Yow, a nationally recognized expert on oral history ethics, is instructive.

Yow conducted oral history interviews for the history of a psychiatric hospital that she was writing. One of her interviewees told her about the lengths to which a fellow psychiatrist went in their personal rivalry. The two apparently had adjoining parking slots. The interviewee described how the other psychiatrist had driven sharp spikes into the ground on the edge of his spot so that his rival would blow a tire if he ever crossed the line while parking his car. In the end, she left this anecdote out of her history of the institution because she feared that "this could have been interpreted as invasion of privacy because the incident reveals a personal, ruinous obsession that few knew about."[28]

There are valuable lessons to be learned from Yow's experience. The anecdote she chose to leave out appeared to be a truthful statement for all intents and purposes. Had she chosen to, she most likely could have found other interviewees to corroborate the story that the psychiatrist had indeed placed spikes on the edge of his parking spot. But a lawsuit for public disclosure of private facts is never based on falsehoods. Embarrassing private facts are the issue. So when deciding whether to include highly personal details in a book, anthology of interviews, or media production, step back and think about whether publicizing this information would be highly offensive to this person in the situation or community in which he or she is located.

A 2007 case shows that even the most newsworthy events can still strike a sour note with family members and loved ones and spark a lawsuit. On May 11, 2004, Sgt. Kyle Brinlee, a member of the Oklahoma National Guard, was killed in Iraq. Because he was the first member of the Oklahoma National Guard to die in action since the Korean War, there was considerable media attention. A photograph of Brinlee lying in an open casket was subsequently published by *Harper's* magazine. The family was deeply offended and filed a lawsuit for public disclosure of private facts as well as intrusion upon solitude. In upholding the trial court's dismissal of the case, the Tenth Circuit Court of

Appeals held that Sgt. Brinlee's funeral was unfortunately a very newsworthy event to which the public had been invited, and as such did not constitute public disclosure of private facts or intrusion upon the solitude of the family.[29]

Right of Publicity

This is the third privacy tort that oral historians need to be able to recognize. Although it is far less likely to ever come into play in the shape of a lawsuit than false light or public disclosure of private facts, it still must be addressed. The right of publicity is something that each person has. This right allows us to prohibit someone from using our name, personality, or likeness for advertising purposes or commercial gain. It is defined by the *Restatement (Second) of Torts:* "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of privacy."[30] The right of publicity is first and foremost a property right and thus almost always involves the commercial use of someone's name or likeness, most often a celebrity or public figure. But this tort may also apply to noncommercial uses in which someone's likeness or name is used in a not-for-profit publication or broadcast. The privacy interest at issue is not financial gain but one's personal feelings, not wanting to be singled out or spotlighted. Awareness of this has prompted a few oral history programs to actually include a right of publicity clause in their legal release agreements such as: "I hereby authorize the use of my name, likeness and voice in the promotion of any noncommercial publication or broadcast."[31]

Two cases illustrate what manner and types of publication can prompt the filing of a right of publicity lawsuit. In *Tellado v. Time-Life Books, Inc.*, the publishers used a particularly harrowing photo of several American soldiers to promote a multi-volume series of illustrated books entitled *The Vietnam Experience*.[32] The photo had been taken immediately after a bloody "search and destroy" mission. The most prominent infantryman in the photo was Edward Tellado. In the photo, which was featured in brochures, mailings, and media clips, an anguished and dazed looking Tellado with rosary beads hanging from his neck was readily identifiable. He had discovered the photo while emptying a trash can in the course of his postwar job as a janitor. The caption below the photograph in the promotional letter he found read: "THE FACES OF BATTLE. U.S. infantrymen, some of them wounded, some dazed, and most of them frightened, await helicopter evacuation moments after a fierce fire fight."[33] Because he was still trying to escape from his war memories, finding out that his trauma was being used to promote the sale of books was very unsettling. He subsequently sued for false light and right of publicity. Although his false light claim was dismissed, the court held that Time-Life's newsworthy defense did not bar Tellado's right of publicity claim because he was not a public figure and the uses made of his likeness were predominantly commercial in nature.[34] After this ruling, a settlement was reached on his right of publicity claim.

In another use-of-ones-likeness-in-advertising case, *Lane v. Random House, Inc.*, the publication at issue was a newspaper ad for *Cased Closed*, a book by Gerald Posner that supported the findings of the Warren Commission regarding the assassination of President John F. Kennedy.[35] To heighten readership interest, the ad featured photographs of six of the most prominent authors who questioned the findings of the commission and who had offered various conspiracy theories instead. Beneath their photographs, Random House printed the caption, "Guilty of Misleading the American Public." Mark Lane, one of the authors who had authored the best-selling work, *Rush to Judgment*, claimed infringement upon his right of publicity because of the use of his photograph and name to promote Posner's book. In dismissing his claim, the federal district court found that Lane's frequent lectures and writings on the topic of the Kennedy assassination made him a newsworthy figure about whom the public had a right to know whatever the context.

Possible Links to Oral History

Although the prospect of a right of publicity claim being raised would appear extremely unlikely, nevertheless, a program or individual oral historian who wishes to promote a publication by featuring individual interviewees should always secure direct approval beforehand for such use. This recommendation would apply to both nonprofit and for-profit publications, but especially to the latter. Some programs routinely include in their legal release agreement a simple right of publicity clause. While the *Principles and Best Practices* of the Oral History Association does not directly address this issue, this omission seems predicated more on the relatively rare occurrence of situations like this rather than any sense that obtaining permission is an unnecessary ethical obligation.

Do the Dead Have a Right to Privacy?

The simple answer to this question is generally "no." A dead person cannot be embarrassed or emotionally harmed by any private facts or publicity that cast him or her in a false light. If, however, a person was alive when the offending publication took place and then died, in some jurisdictions the deceased's heirs may be able to file suit in his or her behalf. The right of publicity is the only privacy tort that survives the death of the individual. Although not all jurisdictions permit this, in the states where it is allowed, essentially the property right that a famous person has in his or her likeness passes to the heirs. They in turn can determine who may make use of this right of publicity and legally file suit against anyone who does so in an unauthorized manner.[36]

Conclusion

Although far less common than lawsuits for defamation, false light, public disclosure of private facts, and right of publicity are three causes of action from which oral historians are not immune. False light is almost always in a

ride-along position with defamation. But as noted, it can have a life of its own if one who publishes either overly embellishes the facts or fails to recognize how the way in which the material is organized creates a false light implication. The second privacy tort, public disclosure of private facts, is certainly one that oral historians need to be more aware of. The confusing thing about this privacy tort is that it is not about truth *per se,* but very personal facts that are of no real public interest and thus are just highly offensive. The last tort discussed, right of publicity, is probably the least likely to be at issue but is certainly worthy of serious consideration whenever the name or likeness of an interview is used to promote a publication or program.

6

Copyright

The top ten lists were first used by David Letterman in 1985 as a way to heighten viewer interest in his *Late Show*. Since that time, top ten lists have become a staple in American culture. They apparently satisfy a craving to rank virtually everything from actors to athletes. Not surprisingly, there are even top ten lists of the greatest copyright myths. Although there is considerable overlap among the various lists, the following stand out as particularly relevant to oral history:

It is legal to copy a work as long as I give the author full credit. *Nope. Simply giving credit or attribution, without permission, is the same as stealing Joe's wallet and then saying while using Joe's money, 'This came from Joe.' "*

If I use less than 10 percent of someone's copyright work, there is no infringement. *Wrong. There is no such bright-line rule that allows one to exactly measure fair use, although this gets repeated over and over.*[1]

If my use alters or transforms a copyrighted work I have created a brand-new work. *True, but this would be considered a derivative work and this is another one of the rights that copyright owners control.*

I can use another person's "work" as long as I don't profit financially from it. *Simply not the case even though some folks believe by doing so they are giving the copyright owner free advertising and he or she should be grateful.*

Another layer of mythology is brought into play by the Internet:

I can copy a "work" online provided I give the owner credit or a link back. *No, unless a Web site specifically says you can do this. Otherwise assume that the work is protected by copyright and not usable without permission.*

Once a work is posted online it loses copyright protection. *Wrong. By putting a work online it may be considered published, but whether it is an article, photo, or interview it is still protected by copyright.*[2]

A**nything e-mailed to me becomes my property**. *Not so. As with a traditional letter, you have the physical possession but the writer holds the copyright.*

Readers should keep these myths about copyright in mind to better understand how to set up and utilize the most effective protective practices and safeguards to combat these all too prevalent misconceptions.

Copyright in Nonfiction Works

Copyright is a form of legal protection afforded a wide array of creative works. It is a system of property much like the ownership of land. The owner of a copyright may sell, lease, divide, or bequeath his or her interest. The framers of the U.S. Constitution chose the economic mechanism of limited monopoly as the best means "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[3] Today, copyright in the United States is governed exclusively by the Copyright Act of 1976 and the Digital Millennium Act of 1998. These two statutes completely modernized the Copyright Act of 1909, which was enacted well before the onset of many modern media forms.

Since oral history is usually considered nonfiction, an examination of the ability to copyright such works in general is necessary before the status of oral history can be addressed directly. Under the Copyright Act of 1976, "original works of authorship fixed in any tangible medium of expression, now known or later developed" may claim copyright protection.[4] Qualifying nonfiction works, categorized by the act as "literary works," are defined as "books, periodicals, manuscripts, phonorecords, film, tapes, disks or cards in which they are embodied."[5] The scope of copyright protection for works of nonfiction is limited, however, because such works are built on facts. The basic presumption is that all facts are in the public domain. Thus, writers who gather facts, even if they are previously unknown or overlooked, cannot copyright their findings because discovery of a fact is not an original work of authorship. The interpretation that writers attach to their facts is also not copyrightable because this also becomes a fact that is in the public domain as soon as it is created.[6] The bottom line is that creators of works of nonfiction, like an interview, may claim copyright only in "(1) the author's original narration and original expression of facts, ideas, theories, and research and (2) the author's original selection, coordination, and arrangement of material."[7] This is called "thin" copyright as opposed to the higher level of protection offered to those who create works of fiction. But even this more limited protection requires a showing that the selection and arrangement of the facts display some originality. In the 1991 case of *Feist Publications, Inc. v. Rural Telephone Services Company, Inc.*, for example, the U.S. Supreme Court did not consider the mere assemblage of names for a telephone directory worthy of copyright protection because there was insufficient originality in the expression.[8]

Copyright Protection of Oral History: A Case Study

Although the list is not a long one, there are a handful of reported cases dealing with the copyright infringement of oral history interviews. One in particular,

Maxtone-Graham v. Burtchaell, deserves consideration here because it points up how interviews with no real commercial value may still spark a legal battle over copyright. In 1973 Katrina Maxtone-Graham published a book containing interviews with seventeen women entitled *Pregnant by Mistake*. In the book, women candidly discussed their experiences with abortion and unwanted pregnancy. The names of the interviewees were changed to assure their anonymity. The copyrights for the interviews were held by Maxtone-Graham. Some years later James Burtchaell, a professor of theology at the University of Notre Dame, decided to write a book opposing abortion. He sought permission from Maxtone-Graham to utilize extensive quotations from *Pregnant by Mistake*. Although permission was denied, he included direct quotations from the interviews in his book, *Rachel Weeping*. The intent of Burtchaell's book was to critique published accounts of women who discussed their experience with abortion. Maxtone-Graham subsequently sued Burtchaell for copyright infringement. At issue were seven thousand words (4.3 percent) of *Pregnant by Mistake* that he used without permission.

Ultimately, the Court of Appeals for the Second Circuit held that the usage by Burtchaell constituted fair use and dismissed the case against him. What is significant about this case is that it really was more about principle than money. Although most copyright cases involve large dollar amounts, here, Maxtone-Graham wanted to prevent the use of pro-choice materials in an anti-abortion book.[9]

Using Nonfiction to Create Fiction

The limited copyright protection for nonfiction works even applies when someone uses such a work to create a fictionalized account of a historical incident or individual. John Robert Nash authored two books on John Dillinger, a colorful Depression-era bank robber. Unlike previous writers, Nash claimed that his research showed that Dillinger did not die in the FBI's raid on the Biograph Theater in Chicago on July 22, 1934. According to Nash, he had been tipped off to the raid and thus sent a small-time hood named Jimmy Lawrence to the theater in his place. He then capitalized upon his supposed death by changing his identity, forsaking his life of crime, and moving to the West Coast, where he died in 1979. In 1984, CBS broadcast an episode of the detective show *Simon & Simon*, drawing directly upon Nash's unique historical interpretation. This episode tracked John Dillinger to the West Coast and intimated that by changing his name and appearance, he had effectively escaped his criminal past until *Simon & Simon* discovered his true identity. Nash filed suit for copyright infringement, claiming that CBS had infringed upon his historical interpretation.

In dismissing his case, the Seventh Circuit Court of Appeals in *Nash v. CBS* underscored the crucial difference between the protection that a fiction writer receives as compared to a nonfiction writer like Nash: "The inventor of Sherlock Holmes controls that character's fate while the copyright lasts; the

first person to conclude that Dillinger survived does not get dibs on history."[10] If CBS had actually utilized a large portion of Nash's actual words as well as his narrative arrangement of the facts, the Seventh Circuit might have ruled differently. Likewise, had Nash conveyed his startling interpretation in the form of a novel, CBS might well have been found to have infringed his copyright. But, since all that CBS did was borrow Nash's historical interpretation and some supporting facts from his book, this taking was considered to be fair use.

This chapter provides a primer on copyright for oral historians. The modest goal is to first explain and then relate to oral history the major concepts and doctrines contained in the Copyright Act of 1976 and the Digital Millenium Copyright Act of 1998. Key doctrines like fair use, joint works, and works-made- for- hire will be presented solely from the vantage point of the copyright holder. Since virtually all oral history programs and individual oral historians routinely obtain assignments of copyright from their interviewees, this perspective is quite natural.

Ownership

Copyright protection begins at the moment of creation. In a typical oral history interview situation, this would be when the interviewee stops talking into the microphone or video camera. At that point, the recording of the interview would be enough satisfy the threshold criteria of the statute, namely, "original works of authorship fixed in any tangible medium of expression."[11] The vast majority of oral historians and programs at some point secure the transfer of the interviewee's copyright interests by means of a legal release agreement. An increasing number of programs that rely on volunteers or independent contractors to conduct their interviews are also securing releases from interviewers. Such an assignment of rights is specifically mandated by the Copyright Act: "A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer is in writing and signed by the owner of the rights conveyed."[12]

Like the statute-of-frauds provisions that govern certain types of contracts in every state, if you do not get it in writing, you haven't got it. The rule is absolutely clear. If you want to be sure that an interviewee or interviewer has assigned his or her copyright interests to you or your program, there must be a signed written agreement. Although there is no statutorily designated language that such an assignment must contain to be valid, the true intent of the parties must be discernable from the language used.[13] A simple declaration such as "I hereby transfer to the Oral History Program all right, title, and interest including copyright. . . " is more than sufficient.

Joint Works

Although neither the Copyright Act of 1976 nor a precedential court decision definitively establishes that interviewers have a copyright interest in interviews

that they conduct, there is a considerable body of persuasive evidence that suggests that this is indeed the case. The seedbed for this position is found in joint works doctrine. Copyright law recognizes that there may be more than one author of a work. A joint work for purposes of copyright ownership is defined as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of the unitary whole."[14] Most authorities are in agreement, however, that the doctrine of joint authorship is one of the more puzzling aspects of copyright law. The most common examples of works with two or more authors are books, musicals, and computer programs. Whether an oral history interview qualifies as a joint work is still not definitively established, but there is substantial evidence that it does.

To begin with, several experts support this conclusion. Paul Goldstein, a noted authority on copyright, reaches this result by means of a comparative analysis of letters and interviews. The key difference he sees between the two forms of expression is that "the questions and answers that make up an interview are more intimately connected than letters sent back and forth in correspondence."[15] William Patry, another recognized copyright expert, also lends support to this position. He contends that in a typical interview the manner in which questions are phrased, the responses that are elicited, and the follow-up questions would all qualify as creative elements for copyright purposes. Despite the apparent eligibility that interviewers have to claim copyright, Patry goes on to note that such rights in an interview "…occasionally pose troublesome factual issues because of the lack of express intent between the interviewer and interviewee with respect to joint or several authorship."[16]

The affirmative assessments offered by Goldstein and Patry that the questions posed by an interviewer are copyrightable were confirmed in a 2007 case, *Berman v. Johnson*.[17] The investor and promoter of an anti–animal rights documentary film, *Your Mommy Kills Animals*, sued the filmmaker for fraud, breach of contract, and copyright infringement. Richard Berman and Maura Flynn claimed to be joint authors with Chad Johnson, the filmmaker, for copyright purposes and sought appropriate monetary compensation. This film attacked the philosophy and tactics of PETA, People for the Ethical Treatment of Animals. Flynn conducted a number of interviews, portions of which were included in the film by Johnson. The questions used in the interviews were drafted by her. These interviews were an important part of Berman and Flynn's claim of joint authorship. Ultimately, a jury found that Flynn's interviewing was independently copyrightable. Since this decision comes from a federal trial court and not one of the thirteen circuit courts of appeals, it does not establish a precedent and thus is only instructive.

There is, however, a case decided by First Circuit Court of Appeals that extends copyright protection to questions. In *Rubin v. Boston Magazine, Co.*, Professor Isaac Michael Rubin was the creator of a set of scales consisting of

twenty-six questions that were designed to help individuals determine the essential elements of a loving relationship.[18] In 1977, *Boston* magazine published Rubin's scale in a general interest article on why people fall in love. The questions appeared under the heading, "The Test of Love. How to Tell If It's Really Real." The Second Circuit Court of Appeals determined that the questions created by Rubin were original forms of expression that were copyrightable and also held that the wholesale appropriation of his scale was not fair use.

The most compelling confirmation to date that both the interviewee and the interviewer should be considered joint authors of an interview comes from the U.S. Copyright Office itself. This position is set out in the internal policy manual of the U.S. Copyright Office, *Compendium II*. Whenever an application is received for registration of an interview, staffers are to consider the following:

> A work consisting of an interview often contains copyrightable authorship by the person interviewed and the interviewer. Each owns the expression in the absence of an agreement to the contrary. In the event that only one of the two parties, the interviewer or interviewee, seeks to register an interview for copyright purposes, the staff is instructed to seek further clarification as to ownership before proceeding.[19]

To be sure, the vast majority of recorded interviews consist primarily of words spoken by interviewees in response to questions posed by interviewers. But courts have ruled repeatedly that the respective contributions made to a joint work need not be equal in terms of either quantity or quality.[20] The major litmus test appears to be the original intent of the parties. Did they intend from the onset to inseparably merge their efforts to create a unitary whole?[21] Keeping in mind the typical oral history interview, the answer would seem to be yes. The interviewer is certainly the catalyst who brings the parties together. He or she also usually dictates the topics to be addressed and the nature of the coverage by means of the questions that are asked. Also, decisions to explore additional areas are also usually made by the interviewer.

The purpose of this discussion is to underscore the importance of securing copyright assignments from all interviewers who are not regular employees. The consequences of unplanned joint authorship are not comforting. The Copyright Act of 1976 provides that joint authors of a copyrightable work have an undivided interest in the entire work.[22] Translated, this means that each author may grant nonexclusive licenses, prepare derivative works, and even sell or give his or her interest to another party. Also, when a joint author dies his or her interest passes directly to his or her heirs. The only two major limitations on the rights of each author are that they cannot unilaterally grant exclusive licenses and any profits earned from the joint work must be shared

equally. Co-owners of copyrights clearly enjoy wide powers of exploitation without the consent of the other owner. The uncertainties surrounding such a strange ownership relationship are why most authors enter into written agreements before they begin a joint work.

There is, however, one benefit that oral historians can derive from an interview or transcript that is denominated a joint work. This comes about when a program is approached by an individual or group regarding the possible donation of recordings and/or transcripts. If there are no legal release agreements for the oral histories, most programs are reluctant to accept such gifts even if the proffered materials are of some importance. If the would-be donor was the interviewer or has a written assignment of copyright from the interviewer, then he or she would presumably be a joint author. At the very least, any assignment made by such a person would convey the right to use the oral histories as the program or collection deems appropriate. The only obligation to the interviewees or their heirs, if they ever showed up, would be to account for and share any profits derived from the utilization of the interviews. Since the vast majority of oral history interviews never produce any financial gain, the chances of this happening are very unlikely. A sample deed of gift agreement for an interviewer as a joint author appears in Appendix 1 (No. 7).

Works-Made-for-Hire

If one assumes that an interviewer is a joint author, another important copyright ownership issue may arise, namely, his or her employment status. The Copyright Act recognizes that many copyrightable creations are not simply the work of independent authors and artists. Employees and independent contractors often create copyrightable works for others. The work-made-for-hire doctrine is the mechanism by which the act seeks to sort out the ownership rights of the various parties who may be involved in the creation of a copyrightable work. Understanding and correctly applying the work-made-for-hire doctrine is especially important to oral historians because programs and collections often rely on part-time or freelance interviewers.

The Copyright Act sets out two ways in which a work may be classified as a work-made-for-hire. The first simply requires that the work be prepared "by an employee within the scope of his or her employment."[23] The second method covers a specially ordered or commissioned work that falls into one of nine categories: "a collective work, as part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas."[24] Works that fit into one of these nine categories still do not qualify as a work-made -for -hire unless the parties also have executed an express agreement to that effect. The copyright interest in a creation that is definable as a work-made-for-hire belongs to the employer or commissioning party.

Because Congress failed to define precisely just who is an employee for purposes of this ownership doctrine, it has been left to the U.S. Supreme Court to provide such a definition. In 1989 they tried to do so in *CCNV v. Reid*.[25] At issue was the copyright ownership of a sculpture depicting a homeless family that James Earl Reid had created for the Community for Creative Non-Violence. In an effort to try to resolve the uncertainty about who is an employee when the copyright interest in a work-made-for- hire is at issue, the high court adopted a test based on the authoritative *Restatement of Agency* to help other courts resolve this ticklish issue. Unfortunately, the definitions in this *Restatement* are so elusive that such guidance has served only to muddy the waters further.[26] Asking courts to apply the dozen factors in the *Restatement* can lead to very uncertain results. A decision from the very influential Court of Appeals for the Second Circuit, *Aymes v. Bonnelli*, however, suggests that two of twelve agency factors are usually determinative of employment status: whether the hiring entity pays the worker's social security taxes and provides employment benefits.[27] To be on the safe side, three other factors from the *Restatement* should also be applied: namely, the level of expertise that is required to complete the work and whether the hiring party has the right to control the manner and means of production and assign additional work or projects.[28] If affirmative answers can be given to all five of these factors, there is a very real likelihood that he or she is an employee.

Despite the confusion, oral historians and programs to which the copyright interest in interviews and transcripts is important have several fairly straightforward options. If we assume once again that an interviewer is a joint author with the interviewee, then the question becomes how an interviewer who is something other than a full-time employee can be asked to give up whatever copyright interest he or she may have. This question certainly applies to interviewers who may be variously characterized as part-time, independent contractors, or even volunteers. For those programs and employers who wish to make sure that all non-full-time interviewers convey whatever copyright interest they may have, there are two basic options:

1. Have every part-time, independent contractor, and volunteer interviewer sign a work-made-for-hire agreement before they begin interviewing. This type of agreement does not secure an assignment of copyright interest from the interviewer but clearly designates the hiring or recruiting party as the author from day one of the relationship. This type of agreement presumes that the interviews to be conducted fit into at least one of the nine categories of work that the Copyright Act of 1976 requires. The most likely fits for oral histories are: a collective work, audiovisual work, compilation, or supplementary work.[29] Unfortunately, there are no clear-cut guidelines that accurately forecast whether interviews conducted by a nonemployee interviewer fit into any of the nine categories.

But assuming such interviews do, another benefit of a work-made-for-hire agreement is that because the hiring or recruiting party is designated the author, the automatic termination of an author's assignment after thirty-five years does not come into play.[30] This statutory privilege was inserted into the Copyright Act of 1976 to protect authors and their heirs from long-term economic loss due to unprofitable transfers or assignments of copyright.

2. Have every part-time, independent contractor, or volunteer interviewer sign an assignment of copyright agreement before they begin interviewing. This type of agreement, as the name implies, directly assigns whatever interest that a nonemployee interviewer might have in any interviews he or she conducts for the hiring/recruiting party. The right to terminate an assignment of copyright after thirty-five years with proper written notice applies to this type of agreement.[31] Common sense would indicate that only the most monetarily valuable works would prompt an interviewer or his or her heirs to seek such a termination.

If there is any doubt about whether the interviews that a nonemployee interviewer is conducting can reasonably be classified as being part of a compilation, audiovisual, collective, or supplementary work, then do not use the first option. The second option provides the surest and safest approach.[32] A sample work-made-for-hire agreement (No. 12) and sample assignment of copyright agreements (Nos. 5 and 13) are in Appendix 1.

The Six Exclusive Rights of Copyright

The treatment of a copyright as a singular economic interest sometimes obscures the fact that an owner actually possesses five separate and divisible rights. Each of these rights may be individually licensed or assigned depending on the nature of the underlying copyrighted work. The six rights of copyright are:

1. to reproduce the copyrighted work in copies or phonorecords;
2. to prepare derivative works based upon the copyrighted work;
3. to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
4. in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audio visual works, to perform the copyrighted work publicly;
5. in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of motion picture or other audio visual works, to display the copyrighted work publicly. . . .[33]
6. in the case of sound recordings to perform the copyrighted work publicly by means of digital audio transmission.

How the utilization of oral history interviews interfaces with these rights are worthy of some discussion. Right No. 1 comes into play every time a program or archive makes a copy of a recording or transcript and sends it to a researcher or places an interview on its Web site. The researcher who includes paraphrases and direct quotes from interviews in an article or book also comes under No. 1. The preparation of a play, documentary, or edited compilation of interviews falls under right No. 2. For example, *The Boys of New Jersey* by Tom Kindre is an edited compilation of interviews with World War II veterans collected by the Rutgers University Oral History Archives. As Kindre explains, "In working with the transcript excerpts, I have edited out repetitive phrases, and have in some cases shifted material from one point to another to make a more cohesive narrative, but I have added nothing, so there are no words that were not spoken by the storytellers themselves."[34] Because Rutgers allowed him to utilize the copyrighted transcripts on its Web site, Kindre was able to create a compilation which he in turn copyrighted. The creative elements that he added were editing and organization. If a program or archive commissions a play based on interviews, the performance of this play would invoke right No. 4. Right No. 5 would be triggered whenever a museum uses either audio or video portions of interviews to highlight an exhibit or collection. Due to the musical emphasis of No. 6, playing an interview in public might not actually fall within the scope of this right.

Length of Copyright Protection

This chart provides a basic overview of the length of copyright protection for works created under the Copyright Acts of 1909, 1976, and 1998.[35] The length

Table 6.1 Copyright Duration Chart

Date and Nature of Work	*Copyright Term*
Published before 1923	The work is in the public domain.
Published 1923–1963 and never renewed	The work is in the public domain.
Published 1923–1963 and timely renewed	95 years from the date of first publication
Published between 1964 and 1977	95 years from the date of publication (renewal term automatic)
Created but not published or registered before 1978	Single term of 120 years from creation for unpublished works made for hire, and unpublished or pseudonymous works
Created before 1978 and published 1978–2002	Copyright will expire January 1, 2048.
Created 1978 and later	Life of author + 70 years

of copyright protection for joint works and works-made-for-hire can be even longer. A copyright term for a joint work with two or more authors, that is not a work-made-for-hire, is 70 years after the death of the last surviving author. Works-made-for-hire are accorded 90 years from the date of publication or 120 years from the date of creation, whichever is shorter.[36]

Licenses and Transfers

The transfer of all or even a single right from the copyright holder to another is called an assignment of copyright. The transfer of the entire copyright is what almost always occurs when an interviewee or interviewer signs a legal release agreement. The oral historian or program that is the recipient of such an assignment, of course, becomes the copyright holder. If, for example, an author decides after publishing a book that the interviews he or she has conducted should be deposited somewhere for future scholarly use, he or she could assign these copyrights to an archive or program. The receiving entity might decide in turn to grant an exclusive license to the local PBS station to broadcast portions of the tapes (right no. 1). In doing so, the archive or program could still retain all of the other rights of copyright.

As noted in Chapter 2, a growing number of oral history programs are at the time of copyright transfer routinely extending a nonexclusive license to the interviewee. Such a license permits the interviewee to exercise all of the copyright owner's rights including publication and distribution. The term of such licenses is usually limited to the life of the interviewee and does not prevent the program or archive from granting exclusive or nonexclusive licenses to others to use the interview materials. A simple clause in a legal release agreement is all that is needed to share copyright in this manner with an interviewee; for example, "This gift does not preclude any use that I may wish to make of my interview, including publication, during my lifetime."

Fair Use of Interviews?

The ability of a copyright holder to control what uses if any are made of a work is not absolute. The most important limitation is the fair use privilege. This privilege represents a kind of socioeconomic balance between the right to control and benefit financially from the use of one's intellectual property and the personal and public benefits that come from being able to use works that are protected by copyright. Fair use is worthy of in-depth examination because of the copyright holder status that most oral historians and programs have. A well-informed understanding of what does and does not constitute fair use is essential to determining how to recognize potential infringement. The fair use privilege is characterized by the Copyright Act of 1976 as a limitation on the exclusive rights conferred by a valid copyright. It is intended to foster the utilization of copyrighted works for such vital public education functions as criticism, comment, news reporting, teaching, scholarship, and research.

The act contains a four-part test that courts are to apply whenever the fair use doctrine is raised as a defense to alleged copyright infringement:

> The fair use of a copyrighted work. . . for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered. . . include:
>
> 1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> 2. the nature of the copyrighted work;
> 3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> 4. the effect of the use upon the potential market for, or value of, the copyrighted work.[37]

An acronym, PNAM, is the best way to keep track of these four factors. P stands for purpose; N is for the nature of the copyrighted work; A refers to the amount and substantiality of what is taken; and M is the market, or the economic impact on the copyrighted work.[38] Courts are not expected to give equal weight to each factor. The greatest weight is always given to M, the impact on the market. Thus, if an infringing work has a commercial purpose, or P, it will usually have a difficult time getting past M.

On their face, the four PNAM factors seem to provide a fairly straightforward rule of reason for both sides of the copyright use issue. Unfortunately, this is not the case, because whenever a federal court has to apply these factors the facts are always unique and there is considerable variation in how much weight judges give to each one.[39] The result is that there is no reliable risk interpreter to guide potential users of a copyrighted work. What a number of universities, such as Columbia, Cornell, Purdue, and the University of Texas, have done is to create fair use evaluation guidelines to assist faculty and students with this troublesome task. These guidelines pose questions for every factor and allow the researcher to assess whether his or her intended use is on the fair use or infringing side of the copyright fence. If the assessment does come down on the fence or the latter side, the standard recommendations are make no use of the work, make only very limited use, seek permission to use the work, or consult with a university lawyer.

These guidelines also often reduce the four PNAM factors to two: "Is the use you want to make of another's work transformative—that is, does it add value and repurpose the work for a new audience—and is the amount of material you want to use appropriate to achieve your transformative purpose."[40] As Steven Fishman notes in his widely read guidebook on copyright, "The more transformative the work, the less important are the other fair use factors, such as commercialism, that may weigh against a finding of fair use."[41] And for those

who engage in criticism, comment, news reporting, and research and scholarship, such usage is most often the rule rather than the exception.

One of the most important questions these guidelines address is whether the copyrighted work is published or unpublished (N). A line of cases beginning with the U.S. Supreme Court's 1985 decision in *Harper & Row Publishers, Inc. v. Nation Enterprises,* added considerable weight to N.[42] This case involved the unauthorized publication by the *Nation* magazine of a small excerpt from former President Gerald Ford's autobiography, *A Time to Heal*. The excerpt, which amounted to fewer than four hundred words, revealed Ford's explanation for his decision to pardon former President Richard Nixon. *Time* magazine had paid Harper & Row for the right to publish excerpts from Ford's memoir prior to its release. After the *Nation* scooped the most important story Ford had to tell, *Time* refused to pay the balance due on its contract. Although the M factor clearly favored Harper & Row because of *Time's* cancellation and the real possibility of diminished sales of *A Time to Heal,* the Supreme Court also placed special emphasis on the unpublished nature of the memoir. They went on to reject the *Nation's* fair use defense and awarded damages to Harper & Row.

The Supreme Court's decision effectively created a kind of double standard in terms of how the four fair use factors are applied. A greater degree of fair use may be permissible if the underlying work is published as opposed to unpublished. In subsequent decision, courts that have adhered to *Harper & Row* have reasoned that infringing upon a work that is unpublished may very well deprive the copyright holder of the opportunity to determine when to publish for optimum market value. An amendment was added to the Copyright Act in 1992 to try and limit the amount of emphasis that courts can place on the unpublished nature of a work when undertaking a fair use analysis. There is no clear indication, however, that this is having much impact. Before the onset of the digital revolution, the extra protection extended to unpublished works certainly would have applied to oral history interviews. Today, however, as more and more interviews are being made available online, such uploading may constitute publication for copyright purposes. The Copyright Act's definition of publication is "the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership or by rental, lease, or lending."[43] The latter activity would seem readily applicable to any Web site that makes interviews available to the general public. Although there is no definitive case law that answers this question, a number of experts suggest that uploading a work to a Web site most likely does constitute publication.[44] A close examination of several cases may help shed some light on how courts apply the fair use factors to both unpublished works and works of nonfiction like oral history interviews. In a 2005 case, *Payne v. The Courier-Journal,* the publication of quotations from an unpublished children's book generated a lawsuit for copyright infringement.[45]

Tom Payne, a former basketball star at the University of Kentucky, who was serving a prison sentence for sexual assault, was featured in an article that appeared in the *Louisville Courier-Journal*. During his incarceration, Payne had started writing children's books. The manuscript of a new book which he hoped to publish entitled *The Angel Mimi* had been sent to his mother. While interviewing family members about Payne for the *Courier-Journal*, the reporter was allowed to read the manuscript and subsequently included 157 words from it in the story about Payne. The family subsequently filed a lawsuit for copyright infringement. The case turned on whether or not the fair use privilege applied. In its analysis, the federal district court applied all four fair use factors to the facts of the case. The first one, purpose and character of the use (P), favored the *Courier-Journal*. The court noted that the quotes taken from Payne's book were used to elucidate the new path that his life was taking rather than to give readers a sneak preview of his new children's book. As such, the use was transformative and not duplicative.

The second factor (N), however, supported Payne's position primarily because his work was unpublished. The court, however, found that the third and fourth factors, the amount used and the market impact (A and M), supported the fair use claim of the *Courier-Journal*. The direct quotes used did not give away "the moral of the story" nor were they so extensive as to be considered substantial. Finally, the court did not believe that the 157 words would have any adverse impact on the future commercial value of *The Angel Mimi*. If anything, the sympathetic tone of the article might well aid in the future sales of the book when published.[46] In the end, the lawsuit was dismissed. It should be noted that the fictional nature of the unpublished work at issue here was very important in putting the N factor in Payne's column.

Another case involving an unpublished nonfiction work is even more in line with the types of infringement that oral history interviews could be subjected to. In *Love v. Kwitny*, a 1989 decision, the unpublished work at issue was a paper about the 1953 coup in Iran. The paper also included autobiographical information about Kennett Love, the author, who had been in Teheran as a correspondent during the coup. In *Endless Enemies*, a book published in 1984, Jonathan Kwitny directly reprinted more than 50 percent of Love's paper. Although the author claimed to have Love's permission to use the material, the trial court held that the amount taken exceeded any license to use that may have been extended and ultimately decided the case by a fair use analysis. Kwitny maintained that since Love's paper helped establish his main thesis about the CIA's role in the coup, he felt compelled to quote more extensively to provide the "full flavor." On the court's score card, however, the unpublished status of the paper (N) favored Love, as did the percentage used (A). In this regard the court noted that the only portions of Love's paper that were not quoted were the nonautobiographical segments. In the eyes of the court, Kwitny's taking amounted to "nearly every vital organ"

in the paper.[47] The last factor, the impact on the potential economic value of the paper (M), which the court deemed the most important, also went against Kwitny. A subsequent trial was held to establish the damages owed to Kennett Love.[48]

A third case is especially worthy of close examination, even though it is unpublished, because it involved interview material that was utilized along with other sources to create derivative works and also shows how the limited protection for nonfiction works can be expanded if creative elements are added.[49] During the 1990s, Mark Nesbitt published and copyrighted three books containing short stories about the ghosts reputed to haunt the Gettysburg battlefield and surrounding area. He also recounted these stories in another venue: the Ghosts of Gettysburg Candlelight Walking Tours. The material for his books came from interviews, written sources, and some creative embellishment to further enhance some of the ghost stories. After another group in Gettysburg began offering both theater productions and walking tours that also focused on the local ghosts, Nesbitt filed suit for copyright infringement. He maintained that his competitors had infringed upon ten of the forty-one stories in his three books. Prior to trial the defendants filed a motion for summary judgment, which required the federal judge to determine whether there was enough evidence for the case to proceed to trial and if not to dismiss the lawsuit.

The defendants offered four major arguments in favor of summary judgment:

1. The stories were not original to Nesbitt and he could not copyright them.
2. The stories were factual in nature and not copyrightable.
3. There was no evidence of direct copying and the defendants used the same sources to independently create their materials.
4. There was not sufficient similarity between the plaintiff's stories and the defendants' materials to support a claim for infringement.

Before the court could rule on the motion it needed to examine each of the ten stories in relation to the defendant's materials. In doing so the court began by characterizing Nesbitt's ghost stories as derivative works. They were his original creations because he had mixed together interview accounts, written sources, and his own expression and manner of presentation. By doing so he employed what is known as the merger doctrine. This doctrine, which applies mainly to nonfiction works, recognizes that there are only a small number of ways to effectively express a particular fact or interpretation.[50] Therefore, when the writer of a nonfiction work claims copyright infringement the degree of protection he or she receives is very minimal because if it were otherwise, no one else would be able to write about the same facts without the original author's permission. In light of the merger doctrine the court determined that the appropriate level of copyright protection for the ghost stories at issue was the thin variety.

Because Nesbitt was unable to show significant verbatim copying, he argued that the substantial similarity between the defendants' materials and his stories was enough to allow his case to go forward. To determine this issue the court did a side-by-side comparison of the ten stories with the allegedly infringing material. In the end the court determined there was enough similarity to only one of Nesbitt's stories, "The Sartorial Stevens Hall and the Blue Boy," to warrant a trial. The key factor in the court's ruling was how Nesbitt had added some excitement to the original story by including a dramatic "help me" scrawled in the frost on the window as the student in the story went outside to look for the ghost. This small nonfactual embellishment was enough to convince the court that that there was substantial similarity in how the defendants told the same story. In other words, they could not have derived this small incident from the factual record.

In the end, the parties settled the lawsuit prior to trial. But the case is instructive on a number of levels. It illustrates the point from *Love v. Kitney* that to infringe on a nonfiction work one must either take the centerpiece of the article or book or engage in wholesale copying. But in *Nesbitt v. Shultz*, a small creative addition to the facts was just enough to prevent the entire lawsuit from being dismissed.

Suggestions for Analyzing Potential Infringement

Before undertaking any action to stop someone who you think may be infringing upon the copyrights to your interviews (including the drafting of a cease and desist letter), you should undertake a careful analysis of the alleged infringement. Begin by preparing a detailed list of the similarities between the interview and the other work. This should include all direct quotes, close paraphrases, factual references, and organizational similarities. Once this is done, step back and assess the extensiveness of the taking and its substantiality. Then, plug in the this fair use check list:

1. Is the interview published or unpublished? (N)
2. Does the usage transform the interview or merely present it in repackaged form? (P)
3. Is the use commercial or noncommercial in nature? (P & M)
4. Is the amount of the copying substantial or relatively small? (A)
5. Is proper attribution made to your program or archive? (A)
6. Is the interview material that is copied the heart and soul of the work or something far less? (A)
7. Would a court be able to reasonably determine that the use harmed the future economic prospects for the interview? (M)

Although the unpublished status of interviews will always be a plus for the copyright holder in a fair use analysis (N), whether the use is for commercial

purposes, and thus hinders or preempts the market potential of the work (P and M), is the real heavyweight in any fair use analysis. On the other hand, if the use is transformative and nonprofit in nature (P), this will be an extremely hard fair use analysis to win unless there is wholesale copying (A).[51] Remember, works of nonfiction such as oral history interviews have only "thin" copyright. Thus, the path to proving infringement is a much steeper one and should not be undertaken unless the misuse is egregious. One final consideration is that the failure to secure permission to use or quote does not bar an alleged infringer from relying on the fair use privilege.

Pre-Lawsuit Responses to Possible Infringement

Like any legal issue that arises, the first step should almost always be to resolve the matter before either threatening to or actually filing a lawsuit. Litigation is expensive and time-consuming. This is especially true in the area of copyright law. Lawyers who are specialists in this area are almost always located in larger cities and are paid handsomely for their expertise in intellectual property law. Though it is impossible to give a definitive answer to the question, "How much does it cost to pursue a copyright infringement claim?," one copyright law firm's Web site puts the cost of a simple copyright infringement threat letter at $1,500 to $3,000.[52] If a lawsuit were actually filed in federal court and proceeded to trial, the overall cost could easily become a six-figure event. Attorneys' fees for client conferences, research, motion/mediation hearings, negotiations, and the trial itself would represent the majority of such expenses. So unless you are fortunate to have an experienced copyright lawyer or two handy, the best first response to an infringement that you believe is serious would be to draft your own cease and desist letter.[53] This, most likely, would be the same first step that an experienced copyright attorney might counsel you to do as well. Such a letter might take the following form:

May 16, 2009
Mr. Arnold Smith
Publisher
The Literary Press
1234 Author Lane
New York, N.Y. 40000

Dear Mr. Smith,

We recently learned that you published a book entitled *Stories from the Camps: POW Authors* by Brendan Braun. In chapters three and four, the author published extensive quotes from an interview with Jeremy Borden which we hold in our archive. Before his death, Borden also transferred to us the copyrights to all of his fictional stories and novels.

Brendan Braun never received our permission to quote from the Borden interview and reproduced the most poignant portions of Borden's interview, about 35 percent.

We hold the copyright to Mr. Borden's interview and believe that Brendan Braun and The Literary Press have infringed upon our interest. The purpose of this letter is to request that you immediately stop all sales and distribution of *Stories from the Camps: POW Authors* and contact us about reasonably compensating us for this unauthorized use.

Sincerely,
Jordan Blake
Archivist
The POWs Oral History Collection
5678 Memory Lane
Warbridge, WI 20000

Such a letter accomplishes a number of important things. It puts the alleged infringer on notice, sets forth the date that you discovered the possible infringement, establishes your copyright interest, gives the alleged infringer a chance to offer some acceptable reason for the publication, and sets the stage for possible settlement discussions. There is no need to threaten legal action in a cease and desist letter. The purpose is to try and initiate discussion and possible settlement and not to needlessly antagonize the other party.

To Sue or Not to Sue?

For the sake of discussion let us assume that your cease and desist letter has not had any effect on the alleged infringer. The infringers, of course, may be the author and his or her publisher, a corporation, or even a state or local government. Let us assume further that the copyright has not been registered at the U.S. Copyright Office. Now what? It is at this juncture that a lawyer with experience in copyright law has to enter the picture. Without the benefit of the lawyer's knowledge of copyright law and litigation, it is virtually impossible to make a truly informed decision about what should be done. Some of the issues that a lawyer would help you resolve are:

1. whether or not the lawyer should send a settlement proposal to the alleged infringer;
2. what the risks and benefits of a lawsuit are (if no settlement can be reached), including an assessment of the costs versus possible recovery of damages should the suit be successful;
3. whether the copyright in the work that you are trying to protect is registered or not.

A Remedy for Infringement in Cyberspace

Putting interviews online is no longer a future prospect for most programs and archives but a virtual necessity. As a result, the possibility that any infringing activity will be digital in nature rather than of the printed variety is highly likely. One of the key provisions of the Digital Millennium Copyright Act (DMCA) of 1998 was the inclusion of a relatively easy and inexpensive way to force an Internet service provider (ISP) to take down or disable a Web site whose display of copyrighted material was considered to be infringing. Some of the most active users of this ISP takedown provision are photographers. The American Society of Media Photographers, for example, offers its members a brief online do-it-yourself tutorial on how to effectively use this provision.[54] In the hypothetical scenario offered by the society, the copyright holder has already sent a cease and desist letter, and received no response, and has sent a second letter threatening legal action that also was ignored before turning to the ISP takedown option. This begins with a notice to the ISP in which one provides the necessary information on the allegedly infringing materials as well as identifying information and the basis for the claim. If everything checks out, then the provider by law has to quickly remove or disable the site.

It should be no surprise that ISP takedowns are widely used in the commercial arena. There are companies that specialize in this practice who either handle everything or provide "Do-It-Yourself Takedowns" for as little as $10.00 a month. The excessive use and abuse of this DMCA provision, especially against small Web site owners, has led to the formation of Chilling Effects, a joint project of the Electronic Frontier Foundation and clinics at several major law schools. This project seeks to help interested Web site owners understand their legal rights and offers a clearinghouse where one can input a cease and desist letter and have the legalese it contains linked to FAQs that put it in plain English.[55] It also provides background material on such topics as copyright and defamation.

Registration Status Is Crucial

Although it may seem strange to suggest that the last issue, registration, may be the deciding factor in any litigation decision, the following considerations may alter this position. To be sure, copyright protection begins at the moment a work is created. Thus, an oral history recording becomes protected expression as soon as an interview is completed. The same is true for an edited transcript. Moreover, the Berne Convention for the Protection of Literary and Artistic Works of 1989, an international agreement governing copyright, also took away the previous requirement that authors or holders were required to affix a copyright symbol, author name, and date to their works in order to secure protection. It is still, of course, a very good idea to affix such information and notice to any copyrighted work.

Copyright protection does not, however, equal enforcement. No one can file a copyright infringement lawsuit unless the work they are trying to protect is registered with the Copyright Office. This rule is an especially important one for oral historians, who only rarely see fit to register their recordings and/or transcripts. There are many reasons for this. Registration is not free; currently the cost is $85.00 for a standard paper submission and $35.00 for electronic filing. If the work is unpublished, only one copy need be submitted with the application, two if the work is published. Awareness that oral history interviews have only "thin" copyright may further dissuade some oral history programs from bothering to register. There are, however, significant litigation-related benefits to registering prior to any infringement. These advantages in effect make it far more possible for someone with limited resources, who nevertheless possesses a valuable copyright, to sue an infringer. The first benefit is the right to receive statutory damages. These are damages set by law and do not require proof of the actual damages suffered by the copyright holder. The amount awarded is predicated on whether the court finds the infringement was innocent or willful and can be as high as $150,000. The second major advantage is the possibility that you may be awarded attorney's fees by the court, especially if the infringement was done in bad faith.

Since cost is probably the single most important reason that most oral histories are never registered, one money-saving avenue worth considering is to register a group of interviews as a "collection." This can be done by submitting one copy of the interviews together with a single application fee if the "collection" has a single title and displays some common order.[56] An interview project such as "Italian Immigrants in Chicago" or "Inmates of Alcatraz" would seemingly qualify as a "collection" for registration purposes regardless of how many recordings or transcripts there were. Registration can also be done retroactively. Although published material must be registered within three months of the date of first publication, unpublished materials like most oral history interviews need only be registered before the date upon which the alleged infringement occurred.

Selective Registration

Even with the more limited protection that the Copyright Act gives nonfiction works like oral histories, if you still would like to be proactive in protecting against possible infringement, a policy of selective registration is advisable. The hard part, of course, comes in determining which interviews merit registration. Several criteria may be helpful in this regard. First, do you have any interviews that might involve "thick" copyright? Interviews with writers, artists, musicians, or composers who have published creative works may qualify for greater protection. This is especially true if portions of their interviews discuss their creative process. A second category of interviews that might warrant registration are ones that are particularly rich or unique. Asking a simple

question like, are these interviews so special that someone might want to publish them for commercial gain is one way to try and determine which interviews to register.

The Orphan Interview Problem

"Orphan works" is the broad term that the U.S. Copyright Office uses to characterize a work that contains enough originality to be copyrightable but whose owner or creator cannot be found. Such a work could be a film, musical recording, or a photograph. It could also be an oral history interview for which there is no signed release. Whatever the medium of tangible expression involved, anyone who wishes to make use of such works without a license or assignment of copyright risks being sued. As one commentator has noted, "This problem renders untouchable a large swath of existing artistic, literary, and other works."[57]

The problem of orphan interviews is doubtless a large one. It would be a rare program or archive that does not have a shelf or two of interviews that fall into this category. They may have been donated by a small project that passed out of existence or by a researcher who published his or her study, or they may have been conducted by someone who mistakenly believed that legal releases were not needed. Whatever their origin, these "orphans" often contain valuable historical information that cannot be replicated. According to Marybeth Peters, the former Register of Copyrights, the orphan work problem is largely a by-product of the continued relaxation by Congress of the requirements placed on copyright owners to protect and maintain their rights.[58] Most of this has been done by generous additions to the term of copyright, removal of the notice requirement, and the withdrawal of the renewal registration provision. Although these changes were doubtless well intentioned, the net result has been to make it far more difficult to identify the copyright owners of unregistered works. This uncertainty has in turn led many programs and archives to adopt a very risk-averse approach to making orphan oral histories available for research on even a very limited basis. Repeated warnings about potential financial liability loss in the hundreds of thousands of dollars that even a noncommercial infringer might face only serve to reinforce this cautious behavior.

Though legislation has been proposed in Congress to significantly reduce the penalties for infringement and thus encourage greater utilization of the estimated 17 million photographs, 3 million books, and 129,000 films that are orphans, few knowledgeable observers believe that this will happen anytime soon.[59] Thus, other approaches are being explored to try to bring more and more orphan works out of the shadows. It should be noted in this regard that not only do oral histories make up only a tiny sliver of the entire body of orphan works but they were certainly never intended to produce any monetary gain—in contrast to what might have motivated a filmmaker or musician.

The most commonly used method for providing at least some access to orphan interviews is the fair use doctrine. In a recent law review article, Jennifer M. Urban offered a comprehensive overview of how reliance on the fair use doctrine provides a relatively safe and effective partial solution to making publicly available the important cultural and historical information contained in orphan works.[60] She points out that although many libraries and archives have pursuant to Sec. 108 of the Copyright Act digitized millions of orphan works for preservation purposes, the fair use doctrine has not been utilized effectively to support public access "for noncommercial usages such as reading, viewing, research and scholarship."[61] As she notes, the most impressive user of the fair use approach is the American Memory Collection at the Library of Congress. That collection, which contains millions of writings, prints, maps, sheet music, sound recordings, and moving images, informs all would-be users that the Library of Congress does not hold the copyrights to these works and thus:

> It is the researcher's obligation to determine and satisfy copyright or other use restrictions when publishing or otherwise distributing materials found in the Library's collections. Transmission or reproduction of protected items beyond that allowed by fair use requires the written permission of the copyright owners. Researchers must make their own assessments of rights in light of their intended use.[62]

Urban suggests several useful steps that libraries and archives can take to best utilize the fair use doctrine for purposes of making orphan works available. Her suggestions include making good faith searches for unknown and missing copyright owners, giving public notice regarding the orphan copyright status of the works before they are made available, informing researchers that the materials are not to be used for commercial gain, and implementing a quick takedown policy if an orphan owner does come forth.[63]

For purposes of discussion, let us assume that reliance on the fair use doctrine to free orphans still seems too risky. One way to address this concern is to examine the theories of liability that an unhappy interviewee or heir might pursue if he or she wished to bring a lawsuit for copyright infringement against a program or archive. The most plausible cause of actions would be for contributory or vicarious infringement. The former requires that a party engage in activities that he or she knows will induce, cause, or materially contribute to the infringing activities of others.[64] Vicarious liability comes into play even if a party did not intend to foster any infringing activities but had the authority to control the infringing uses made by third parties and also received some direct financial benefit by failing to act.[65] A brief examination of a 2012 case, *Shell v. American Family Rights Ass'n*, may put these legal concepts into clearer focus.[66]

In this case Ms. Shell developed a Web site for families involved with child protective services. She periodically published copyrighted articles and papers on her Web site and also developed a workshop curriculum. In her lawsuit she accused the defendants of not only publishing her materials on their Web site but also encouraging others to make copies. Contributory and vicarious infringement were two of the causes of action she alleged against American Family. The court found, however, that American Family did not know of the alleged infringement by others, did not have the ability to control the uses made of Shell's copyrighted works, and did not gain any financial benefit.

A hypothetical scenario based on this case might put the issue into even clearer perspective. Let's assume that an archive has uploaded a number of orphan interviews from an oral history research project. A researcher comes along and subsequently includes slightly edited versions of these interviews in a commercially successful book. In doing so the researcher completely disregards the archive's prohibition against future commercial use and warnings about uncertain copyright ownership on the Web site. If an interviewee and/or the heirs decided to sue for copyright infringement and elected to bring the archive into the lawsuit, they would seemingly have the same legal elements problems that Ms. Shell did in trying to show contributory or vicarious infringement—namely, proving successfully that the archive knew of the infringing activity, provided some sort of direct assistance or had the ability to control the uses that were being made of the interviews, and in not doing so received some direct financial gain.

Another way to look at the issue of whether the fair use doctrine can provide reliable protection is from the prospective of the putative copyright owner and/or heirs. If it were the interviewee, for example, who reacted negatively to the discovery that her or his long-forgotten interview had been uploaded onto a Web site, the reaction could take a number of forms. The most likely concern would be about her or his privacy, not about about copyright infringement. The major reason that the latter cause of action would be a non-starter is the almost-certain absence of any monetary considerations when the interview was recorded. If the program had wisely accompanied the interview online with proper cautionary language regarding future use and an invitation to the copyright holder to come forward, then the options would be clear: obtain a release or issue an apology and remove the interview from the Web site.

Discovery by the heirs of an interviewee is the second scenario to consider in relation to a possible copyright infringement claim. The Copyright Act specifically provides that copyright ownership "may be bequeathed by will or pass as personal property by the applicable laws of intestate succession."[67] Since by most estimates less than 50 percent of Americans have wills, it is safe to assume that the copyrights for many orphan interviews would be passed down by means of an intestacy statute. Almost all of these statutes follow similar orders of succession: first in line is the spouse and any lineal descendants.

Rather than take this progression further, the point is that any copyright interest that could pass to an interviewee's family would most likely result in multiple heirs. This would in effect turn the singular ownership of the interviewee into a joint authorship. As a result, any workable decision regarding the interviewee's copyright interest in an orphan work would require the consent of all of the new owners.

That joint ownership can be very problematic when it comes to deciding what to do with copyrights is readily demonstrated by the estate planning tips frequently given to for-profit authors. The most fundamental tip is to make sure that any registered copyrights are included in your will. But even if this step is taken, authors are cautioned to go further and arrange for the proper administration of inherited copyrights. This latter tip is offered to warn authors about the dangers of future joint authorship of their copyrights. For example, if there is more than one named heir, the copyright has just become a jointly owned work and this automatically gives each owner the right grant a nonexclusive license or sell his or her interest without the consent of the other owners. Because of the potential conflicts attendant in this type of shared ownership, writers are encouraged to make provisions in their estate planning for specialized literary executors to manage copyrights on behalf of the estate. They are also warned that if they fail to adopt a will or fail to include their copyrights in the devises, the law of intestate succession in the state where they die will decide how to divide up the copyrights.[68]

So with these very important copyright inheritance factors in mind, if the heirs to an orphan interview discover that the work is online, and have a negative reaction, their major concern most likely will be family privacy. And once again if the program made sure that the proper cautionary language was in place regarding ownership and noncommercial use, and there is an invitation to have owners come forward, then it most likely would be a matter of either securing a release or taking down the interview.

These legal what-ifs are not presented here to suggest that a lawsuit for copyright infringement is a virtual impossibility or that all orphan interviews should be treated alike for purposes of access. Policies such as older is better and always giving special treatment to interviews with high-profile individuals should still be followed. But the purpose of all of these what-ifs is to demonstrate that the market impact factor that is so central to almost every copyright lawsuit is virtually nonexistent when it comes to orphan interviews. Additionally, while someone could file a small claims lawsuit in a local court out of spite, someone would need really deep pockets to file a copyright lawsuit based on such motivation. Second, it does not appear that the act of uploading an orphan interview to a Web site accompanied by appropriate cautionary/restrictive language is enough to bring either contributory or vicarious infringement into play for the acts of third parties. A third consideration is the very real likelihood that a breach of privacy is what an interviewee or her or

his heirs would find most bothersome about discovering the interview online. Finally, if the interviewee has died, and his or her copyright interest has passed to multiple heirs, the prospect of developing a united front to launch a copyright lawsuit would be a formidable undertaking.

Resources of the U.S. Copyright Office

User friendly is the best term to describe the willingness of the U.S. Copyright Office to serve the general public. The relative simplicity that characterizes Form TX, the standard registration form for nonfiction works like oral histories, underscores this point. Although thousands of lawyers deal with the office each year, literally tens of thousands of nonlawyers also are in contact with it annually. The Copyright Office publishes over seventy-five circulars and factsheets The single most valuable of these is *Copyright Basics*. This is a very readable and concise guide to copyright law in general. Inquiries and requests for circulars and forms can be addressed to the Library of Congress, Copyright Office, 101 Independence Ave. S.E., Washington, D.C. 20559, but the easy way to contact them is via their Web site, www.copyright.gov/. This site offers a wealth of helpful information and is easy to navigate. All of the circulars, factsheets, and registration forms can be viewed or downloaded from this Web site. It also offers a wealth of information from the most "Frequently Asked Questions" to how to search the records of the Copyright Office. There is also a new procedure, eCO Online System, by which any individual or organizations can electronically register, record, and deposit a work. The procedure is website-portal based, has a lower filing fee ($35.00), offers faster processing, and online status tracking. The next best registration method in terms of processing time is Form CO, a fill-in form that can be completed on a personal computer and replaces Forms TX (literary works), PA (performing arts including motion pictures), and SR (sound recordings). Finally, the Copyright Office maintains a staff of information specialists to answer questions. While they cannot give legal advice, they are very knowledgeable and helpful regarding most aspects of copyright law, especially registration. For general copyright information you may contact them either via e-mail at their Web site (Ask a Copyright Question) or by telephone at (202) 707–5959. For preregistration information, the e-mail option noted above is available, as is a separate telephone number, (202) 707–3000.

Copyright and the Federal Government

The federal government cannot claim copyright in works created by its employees. Although it is without question the largest single creator, collector, and consumer of information in the nation, the Copyright Act of 1976 specifically assigns to the public domain any work "prepared by an officer or employee of the United States government as part of that person's official duties."[57] Thus, all judicial decisions, administrative rulings, official documents, and everything

published by the U.S. Printing Office enter the public domain when they are issued. State and local governments, however, are not barred from claiming copyright protection in works created by their employees.

Like many seemingly straightforward legal tenets, the prohibition against the federal government claiming a copyright interest in a work is not absolute. There are several major exceptions that can and do affect oral historians. An agency of the federal government is allowed to hire an independent contractor to create a work and in turn hold the copyright to this work. A second exception arises from the issue of whether a work created by a federal official or employee was prepared in the course of his or her official duties. A mandatory debriefing, for example, would be the type of interview for which no copyright could be claimed. But if a veteran civil servant volunteered to participate in an oral history project, he or she could claim copyright in the resulting interview.[69] Federal agencies that are statutorily authorized to accept gifts, such as the personal papers of someone who worked at the agency, can also allow interviewees to place restrictions on their interviews. Such restrictions cannot be bypassed by freedom of information (FOIA) requests.[70]

For those federal agencies that are not legally authorized to accept personal papers and other gifts, *U.S. Code Annotated* 44, Sec. 2111 empowers the National Archives and Records Administration to accept for deposit historical materials from other federal agencies "subject to restrictions agreeable to the Archives for their use." In 1985, the National Archives established a procedure to allow oral historians working for federal agencies to offer potential interviewees the opportunity to obtain copyright protection and also to impose access restriction. Although both the federal agency that conducts the interview and the National Archives have some say in what form these restrictions may take, the key point is that such protection from freedom of information inquiries (FOIA) doubtless encourages many federal employees to be more candid and forthcoming.

Copyright Protection Elsewhere in the World

The term international copyright is a meaningless one.[71] Copyright protection is primarily dependent on the laws of each nation. Most countries, however, offer some protection to foreign works. For example, more than 160 countries have ratified the Berne Convention, which is administered by the World Intellectual Property Organization (WIPO). This organization has established minimum protective standards for creators of copyright worldwide. The United States is also a member of another international copyright organization, the Universal Copyright Convention (UCC). To benefit from the UCC, one must place a notice of copyright in the form and position specified by the UCC along with the year of first publication and the name of the copyright owners (for example, © 2009 John Doe). Finally, there are also a number of bilateral treaties between the United States and other countries that may provide additional

protection. But the United States Copyright Office still advises anyone who seeks copyright protection in a particular country to make a specific assessment of whether some or all of the protections discussed here apply and to what extent. Keep in mind that a number of countries offer little or no protection to any foreign works.

As one might expect, the copyright laws of other countries often differ considerably from those of the United States. For example, Canadian courts seem to have a different view of who owns the copyright in an oral history interview. If an individual or group turns the oral statements of an interviewee into written form (transcript), it becomes the copyright holder. Some commentators have suggested that this same legal reasoning might also apply to the sound or video recording of an interview because whoever was responsible for putting the interviewee's words into a fixed form would be the presumed owner.[72] Another difference between the copyright laws of the two nations is Canada's recognition of an artist's "moral rights." Such rights allow the artist to protect a creative work from future alteration or distortion. This right can be invoked even after the artist has legally transferred his or her copyright interest. Canada also allows works created by employees of the national government to receive copyright protection.

How to Dispense with Copyright

Let us assume that you have just read this chapter and as you contemplate the complexities of copyright and the limited protection offered to interviews, you are asking yourself if it is worth bothering with. If your answer is no, there is a simple way to dispense with copyright altogether. The public domain is exactly what it sounds like, a vast repository of works that belong to everyone. It can best be likened to a gigantic library that anyone can visit and utilize without limitation. Any work that one finds there is beyond the reach of copyright law. Works come into the public domain in various ways. The two most common points of entry are the expiration of the term of a copyright and creation by the federal government. One can, however, choose to place an original work of authorship like an interview into the public domain. This can be done by a simple renunciation of copyright. Thus, instead of the standard assignment of copyright clause in a legal release agreement, the following could be inserted: "In making this gift I fully understand that my interview/s will not be copyrighted by me or the Oral History Program but will be immediately placed in the public domain. This decision is intended to provide maximum usage by future researchers."

Although the method just described would also work in cyberspace, another approach to dispensing with copyright is offered by Creative Commons (CC), a nonprofit organization founded in 2001 that offers free legal tools to copyright holders to help them share some of their rights. The six different licenses that anyone can access on the CC Web site have been used to make more than

a hundred million works more usable by the public. A Creative Commons zero or CC0 license enables a creator or author to opt out of copyright protection. Such a license, when placed on a work, tells all who access it that there are "no rights reserved." A CC0 license is also universal in nature and, according to Creative Commons, "provides the best and most complete alternative for contributing a work to the public domain given the many complex and diverse copyright and database systems around the world." Utilizing either approach is something that oral historians should seriously consider if they have no desire to police their copyright interests and wish to encourage the greatest utilization possible of the interviews that they have collected. One caveat should be mentioned, however; if a preexisting legal release agreement requires the continued maintenance of copyright, putting such interviews in the public domain would obviously constitute a breach of this promise.

7

Oral History and the Internet

Oral history, like almost every other branch of scholarship, is trying to cope with the digital revolution. Traditional assumptions about how to gather, process, archive, and use interviews are being turned on their head. The Internet is of course the centerpiece of this revolution. Today any program or archive that is not actively uploading oral history interviews to a Web site is destined to become a dinosaur. There has also been a small revolution within this larger one: namely, making the audio versions as readily available online as transcripts.

The democratization of access to oral histories has and continues to be a boon for researchers and the general public. The ability to locate and access oral histories on tens of thousands of topics is now just a few keystrokes away for any interested person. But such access and portability do not come without some legal and ethical risks for oral historians. Many of the legal issues previously discussed, beginning with the terms of a legal release and extending through defamation and copyright, are all in play, albeit in somewhat different ways. On this new electronic frontier, for example, a potentially defamatory portion of an interview could be read by millions of people instead of just a few. As for copyright law, some commentators believe it cannot survive in cyberspace because so many users choose to believe that if something is online it can be exploited without penalty. There is one other area that has a legal-sounding ring but does not always have a direct legal connection; that area is personal privacy. Personal privacy concerns often arise solely from social ethics and not from the law per se.[1] This chapter examines how all of these issues come into play when an archive or program decides to put interviews and other historical materials online.

Legal and Ethical Authority to Upload

As discussed in Chapter 2, legal release agreements should include future use clauses that do not needlessly limit the options of a program or archive. Although the best legal solution is to have a future use clause that specifically covers electronic publication of an interview, many older interviews are

governed by language that predates the Internet, such as "for such scholarly or educational purposes as the program shall determine." How an archive or program chooses to interpret this language is a mixed question of law and ethics. On the legal side of the ledger, if an interviewee or his or her heirs were greatly offended by the presence of an interview online that they never expected would be so readily accessible, their only real course of action would be for promissory estoppel. This is a doctrine that allows a party to recover damages for the breach of a reasonable promise made without consideration upon which he or she relied to their detriment.[2]

In the most famous case involving this doctrine, *Cohen v. Cowles Media Co.*, the U.S. Supreme Court ruled in favor of an individual who provided inside political information to a newspaper in exchange for a pledge of confidentiality only to discover that the paper published his name anyway.[3] While cases involving promissory estoppel can be found in most states, the good news for oral historians is that they almost always involve monetary issues.[4] Thus, while someone hypothetically could file such a lawsuit over the uploading of an interview to a Web site as a breach of a legal release agreement, there is very little likelihood that this would occur.

A second type of negative response that archives or a program might encounter after the unexpected discovery of an oral history interview online is someone claiming that the interview has invaded their personal or familial privacy. While the word privacy is often given legal status because numerous state and federal laws do protect medical, academic, and personnel records, the invasion of privacy that an individual or family might complain about does not usually provide the basis for a legal claim. If such a complaint is raised, the resolution of the matter will almost certainly occur outside the legal system.

Several examples drawn from the experience of Project Jukebox in putting interviews online may help to provide a better framework for this privacy analysis. In the first case an interviewee readily admitted that her family had more than rumored ties to the Mafia. She signed a release and the interview was placed online. After her death, her granddaughter discovered the interview and was highly upset by the candid admission by her grandmother of Mafia ties. The granddaughter subsequently demanded that the interview be removed from the Web site. After due consideration, Project Jukebox honored her request. In another case a young woman provided an interview about her immigration to Alaska from the Middle East and her struggles to become acculturated. She also signed a release and her interview was placed online. A decade or so later her personal sense of privacy changed and she demanded that Project Jukebox not only take the interview down but remove it from the collection. Though her first request was honored, the second was not because of the importance of the interview. In the end a compromise was reached that allowed the interview to remain in the archive, but with the added restriction that it be closed for thirty years.[5] These examples simply underscore the point

that claims of invaded privacy are not likely to generate lawsuits but present opportunities for nonlegal solutions.

For oral historians, then, the more pressing issue is on the ethical side of the ledger, and this question is directly addressed by the *Best Practices* in the Post-Interview phase of the process: "When media become available that did not exist at the time of the interview, those working with oral history should carefully assess the applicability of the releases to the new formats and proceed—or not—accordingly."[6] While this cautionary language certainly helps to underscore the ethical importance of this decision it does not provide any direct professional guidance. Thus, oral historians must look to "the letter and spirit of the interviewee's agreement" in order to reach a decision.

A recent analysis by Mary Larson regarding this decision-making process indicates that some programs have justified the uploading of older interviews by considering the legal and ethical rights to be essentially equivalent. Other programs have managed the problem by limiting the online information to finding aids and/or interview excerpts. A third approach has chosen to focus on the spirit rather than the letter of the agreement. As a result, these programs have devoted considerable time and resources to locating interviewees or their heirs to secure approval for Internet display.[7]

A more recent offshoot of this legal/ethical conundrum involves the rapidly growing practice of uploading the audio portion of an interview either with or without a transcript. Since the transcript had until fairly recently been the desired final product for most programs, the language incorporated into legal release agreements over the years, especially for older interviews, may reflect this bias and thus once again restart the "to upload or not" question. Take, for example, the following language: "Before your interview(s) is/are deposited in the collection, it will be transcribed and then sent back to you for final approval. Once you have completed your review and returned the transcript, it will be made available for future use." Obviously the transcript bias of this program precluded any mention of the audio portion of the interview. Some programs that have to deal with either unclear or transcript-only future use language have redrafted their releases to cover the audio portion of the interview by using clauses like: "the use of interview material in live or recorded programs for radio, television, cable, multimedia, or any other forms of electronic publishing (including publication on the Internet)."

Copyright and the Internet

Before addressing some of the new legal doctrines that the federal courts have developed to apply copyright law in cyberspace, it is important to review the limits of copyright protection for works of nonfiction that are uploaded to the Internet. Fair use applies equally to an interview that is accessed on-site or via the Internet. What is significantly different is the ease with which one can become a publisher in cyberspace. Because the Internet allows virtually

anyone to post material on a Web site, and hence become a publisher, this has also "...brought potential copyright disputes to the masses."[8] Since such "open access" publication effectively removes any unpublished standing that an interview might have, as noted in Chapter 6, the extra benefit that unpublished works (N) usually receive in fair use determinations would also no longer be available.

A second consideration is the generally agreed upon noninfringing uses that a person can make of nonfiction material on a Web site without express permission. The following actions would seem to qualify as fair use if done by individuals for noncommercial purposes:

1. making a paper copy of an online interview;
2. downloading an interview to one's personal computer;
3. taking a very limited number of quotations from an online interview for educational, scholarly, or journalistic purposes.

An important corollary to No. 3 is the greater degree of fair use that is given to quotations that are used in publications that employ the material in a different way than in the original work.[9] To be sure, fair use is an affirmative defense that must be raised in court either on a motion for summary judgment or at trial, but given the very narrow copyright protection that nonfiction works such as oral histories receive, it would be best to view the uses noted in Nos. 1–3 above as givens.

The misuses that should be of some concern to programs and archives that wish to protect their copyrights are far more wholesale and duplicative in nature and may involve commercial gain. Practices that could lead to infringement go by terms like framing and deep linking. The first of these practices, framing, generally involves the importation of content from one Web site onto another. For example, TotalNEWS, an Internet news service, framed news articles from media outlets such as CNN and *USA Today*. The articles were placed within frames containing advertising and promotions for TotalNEWS. The media outlets filed suit claiming both copyright and trademark infringement. In the end, TotalNEWS agreed to stop framing and was allowed to display text-only links to the media outlets.[10]

In the world of oral history, framing could hypothetically occur if someone decided to create a national Web site on the civil rights movement and unilaterally framed relevant interviews from other online archives. Such wholesale downloading and framing would certainly constitute unauthorized reproduction and distribution even if the Web site was nonprofit in nature. On this latter point, a 2000 case, *Los Angeles Times v. Free Republic*, is instructive. The central issue in this case was whether the conservative-oriented Free Republic bulletin board could post verbatim copies of articles from the *Los Angeles Times* and *Washington Post* so that its readership could react and comment. Although

Free Republic was a nonprofit, the *Times* and the *Post* both claimed copyright infringement. Since Free Republic claimed its uploading was fair use, the court conducted a very thorough analysis of all four fair use factors (PNAM). The court ultimately concluded that three of the four factors—purpose (P), amount (A), and monetary impact (M)—favored the *Los Angeles Times* and the *Washington Post*. Interestingly, the only factor that the court conceded to the Free Republic was the nature of the copyrighted articles (N).[11] This finding was predicated on their nonfiction status. But winning one fair use factor was not enough, and in the end the court issued a permanent injunction barring the Free Republic from uploading any articles.

Linking is one of the most user-friendly attributes of the Internet. The use of hypertext links allows users to quickly travel from one Web site to another. The actual creation of a hyperlink is not an infringement of copyright. Such a creation only rises to the level of infringement when the clear intent of the originator is to incur direct benefits or to knowingly encourage other users to infringe upon the linked Web site. A 1999 case, *Intellectual Reserve Inc. v. Utah Lighthouse Ministry, Inc.*, demonstrates how obvious and intentional the linking must be to qualify as infringement. The Intellectual Reserve filed suit to prevent the Utah Lighthouse from posting the former's *Church Handbook of Instruction* on its Web site. After the court ordered the Utah Lighthouse to remove its posting of the *Handbook*, the Intellectual Reserve sought to evade this order by adding three hyperlinks to its Web site. All three of the addresses provided contained the *Handbook*. The court determined that Utah Lighthouse's addition of these three hyperlinks was intended to induce, cause, or materially contribute to the infringing conduct of another. Such contributory infringement of copyright therefore justified another court order to remove the three hyperlinks.[12] This remote possibility that the creation of a hypertext link may lead to copyright infringement has still prompted one of the leaders in posting interviews online, the University of Alaska Fairbanks Oral History Program, to specifically ask visitors to its Project Jukebox Web site to "Not re-post or link this site or any parts of it to another program or listing without permission."[13]

Although linking is one of the most attractive features of the Internet, deep linking is much more problematic. Because the case law is so thin on this issue, experts are divided as to whether creating a deep link without the permission of the copyright holder is an infringing activity.[14] A deep link enables a visitor to go directly to an internal page without first being shown the sponsoring homepage. In the business world this means one can skip the commercial messages contained on the homepage and go immediately to the desired content. In the noncommercial world of oral history, deep linking could involve uploading an interview from another Web site and making it available without the user information that was posted on the original Web site's homepage.[15] Although there would most likely be some information on the deep-linked interview that alerted any viewer to who created and originally uploaded it,

this might not be enough to establish that the two linked Web sites were not partners or did not endorse each other.

To avoid any confusion about what a link, whether a simple hypertext or a "deep" one, connotes, some experts recommend that the party doing the linking include a disclaimer.[16] A link disclaimer can reduce the possibility of legal problems. Such disclaimers usually indicate that the link does not constitute an endorsement of what it contains and seeks to waive liability should someone else misuse it. This step, of course, is not necessary if one secures permission from the linkee to create the link. It may also not be necessary for most oral history Web sites, which merely offer links to similar collections to provide bibliographic assistance. For example, the Voices of the Manhattan Project provides a links page to "Museums and organizations around the country that feature collections of World War II and Manhattan Project veterans and their families as well as leading scientists and innovators."[17] It also invites other organizations to contact them about having their site added to the links page.

Protecting Copyright Online

Putting oral histories online is no longer a cutting edge approach; it is now the norm. Thus, almost every program or archive is faced with the problem of how to best protect interviews from serious infringement. Since there is no absolutely foolproof method, the issue comes down to how best to warn/alert/inform visitors of the copyright status of the oral histories and fully inform them of the appropriate and inappropriate uses. As one copyright expert notes, "Copyright notice and warnings forbidding unauthorized downloading and dissemination of a work are fine, but they stop only those scrupulous enough to refrain from infringing other people's copyright."[18] As she notes, those who wish to ignore or sidestep copyright use restrictions will usually be able to find a way. So if we assume that the naïve and the scrupulous are the target audience for the legal verbiage placed on a Web site, what are some alternative options?

Click-Wrap Agreement Web Sites

The term "click-wrap" agreement is derived from what are called "shrink-wrap" agreements. Such an agreement is bound to the product by plastic wrap and comes into effect when the buyer opens the "shrink-wrap." A "click-wrap" agreement can be a dialog box or a pop-up that greets visitors to a Web site. It explains the terms and conditions of use, notes any fees, and requires visitors to supply some identifying information and click on the "accept" icon or button before they can access any materials on the Web site. Such agreements are generally enforceable when they offer the only avenue by which to access materials on a Web site and adequately inform the visitor of the terms and conditions of use. Such agreements are also known as end user license agreements or EULAs.[19] "Click- wrap" agreements are, of course, the online version of what some on-site researchers must agree to before gaining access to archival

materials. The enforceability of such "click to accept" agreements was recently demonstrated in a case involving clip art. A trade association was held to have infringed upon the copyrights because it failed to honor the terms and conditions of the "click-wrap" agreement.[20]

There is no question that any visitor to a Web site that relies on "click- wrap" access is immediately made aware that the site's creators are very serious about regulating how materials may be used. The terms and conditions for use that are set out certainly are intended to dispel any Web surfer's misplaced notion that the material is free for the taking. The Densho Digital Archive, for example, which offers a wealth of archival material and interviews on the Japanese-American experience, greets the visitor with an imposing two-page "Agreement & Application." The first paragraph clearly states that you are entering into a binding legal agreement with Densho. In doing so you agree not to copy, download, or transmit illegally any portion of the archive and further agree to indemnify Densho for any breach of this agreement or the unauthorized use of its contents.[21]

Two other oral history programs that rely on "click-wrap" agreements for access project a somewhat less legalistic image. The University of Alaska Fairbanks Oral History Program's Project Jukebox provides a one-page user's guide to its Web site, which asks visitors to accept four conditions:

1. Users must not use the material for commercial purposes. Short quotes and references are permitted for instructional and publication purposes.
2. Users must provide complete citations referencing speaker, interviewer, date, number, jukebox program, and Website with URL Address.
3. Users must not re-post or link the site or any parts of it to another program or listing without permission.
4. Users must follow the *Guidelines for Respecting Cultural Knowledge* and the *Principles and Best Practices* of the Oral History Association.[22]

This Web page also provides contact information for anyone seeking permission to use or publish the materials (beyond limited quotation).

The Regional Oral History Office (ROHO) at the University of California, Berkeley, begins its "click-wrap" with a definition of oral history. Visitors are told that interviews are primary source material and thus "…not intended to present the final, verified, or complete narrative of events."[23] One of the conditions for access to ROHO's oral history interviews, however, is the visitor's agreement not to quote for publication without the written permission of the director of the Bancroft Library. This limitation is far more stringent than the Project Jukebox provision that users may publish short quotations and references from the interviews as long as proper attribution is made to the interviewee and the program. The latter approach is clearly more in line with the fair use privilege.

Notice Only Web Sites

The oral history programs that use this approach do not require visitors to either identify themselves or formally accept any conditions for access. The copyright limitations are, however, prominently displayed. The Web site of the Rutgers Oral History Archives, for example, contains 469 interviews primarily with graduates of the University who served in World War II, Korea, Vietnam, or the Cold War. It was one of the first oral history programs to place interviews online. The introductory Web page informs all visitors that copyright to all of the interviews on the site is held by the archives. At the beginning of each transcript, users are further informed that "Permission to quote from this transcript must be obtained from the Rutgers University Oral History Archives."[24] A similar but more user-friendly version of the "notice with access" approach can be found on the Web site of the New South Voices Collection at the University of North Carolina at Charlotte. Visitors to this site, which contains over six hundred interviews, are informed on the "Copyright" page that "the materials included in this web site are freely available for private study, scholarship or non-commercial research under the fair use provisions of the U.S. Copyright Law. . . ." Prior written permission, however, is needed for any uses that exceed fair use, including ". . . commercial or scholarly publication, broadcast, redistributing or mounting on another web site. . . ." which may in turn involve the payment of fees.[25] Finally, the Web site of the Maria Rogers Oral History Program (MROHP) of the Carnegie Branch Library for Local History hosts thirteen hundred interviews on life in Boulder County, Colorado. The "Copyright & Permissions" page informs the visitor that the copyrights to all interviews belong to the program. Users are free, however, to ". . . quote portions of the interviews, in papers, articles and other written, non-commercial projects unless otherwise noted."[26] Users are not free, however, to download and preserve the sound from the interviews and are instructed to contact the MROHP and the Carnegie Library for permission to do so or to order audio copies.

The Web sites of both the New South Voices Collection and the Maria Rogers Oral History Program provide visitors with reasonable explanations of what generally constitutes fair use. They do this by making reference to key portions of the fair use clause from the Copyright Act of 1976. Users are also clearly warned that commercial use of the interviews will require permission and may in the case of the New South Voices Collection also involve a licensing fee.

Free Access Web Sites

A few oral history programs have chosen to avoid any mention whatsoever of copyright ownership and in turn place no restrictions on the use of interviews. The Web site of the Bland County History Archives in Virginia, for example, features interviews conducted by students at Rocky Gap High

School. They are organized by project such as "The Veteran's Project," which presents interviews with veterans from the county who served in Vietnam or the Persian Gulf Wars.[27] A visitor to this site will not find any reference to copyright use limitations. The same is true for the Bridgeport Working Voices from the 20th Century Web site created by the Bridgeport Public Library. This site presents oral histories "...of the people who worked in Bridgeport, Connecticut, over the past century. Every decade is represented."[28] Finally, the Shenandoah Valley Oral History Project Web site offers interviews with a very diverse spectrum of valley residents, including poultry workers, environmentalists, community activists, Latino immigrants, gays, and ex-offenders. Visitors to this Web site are informed that all of these interviews have been placed in the public domain. The only request that is made to researchers who actively use interviews from the Shenandoah Valley Web site is to "...please credit the interviewee, interviewer, and the Shenandoah Valley Oral History Project if you use all or part of any interviews in a manner other than your personal use."[29]

Using a Creative Commons License

Today, there may already be more copyrighted works on the Internet than in all the libraries of the world. In an effort to free many of these works from copyright restrictions that hinder or prohibit access without providing any direct financial benefit to the owner, Creative Commons (CC) "develops, supports, and stewards legal and technical infrastructure that maximizes digital creativity, sharing, and innovation."[30] This is accomplished by means of six different licenses that provide an easily understood, "standardized way to give the public permission to share and use your creative work—on conditions of your choice."[31] The goal of these licenses is to allow a copyright owner to permit appropriate noncommercial uses without impairing the commercial value of a work. Figure 7.1 shows what a visitor sees on a Web site page protected by a CC license.

The presence of the CC logo and accompanying legal language certainly gives any visitor the sense that the copyright holder has taken serious steps to protect certain of his or her rights while making others readily available. In this context it should be noted that while Creative Commons does not provide any direct legal support to users of its licenses if infringing activities should occur, its Web site does offer sound information on how best to proceed should such a scenario occur. For any oral history program or archive that is considering either modifying a current format or creating a set of new Web site copyright notices or restrictions, a visit to the Creative Commons Web site would be very worthwhile. It is user friendly and provides tutorials and findings to help potential users determine which license would work best and how to implement it.

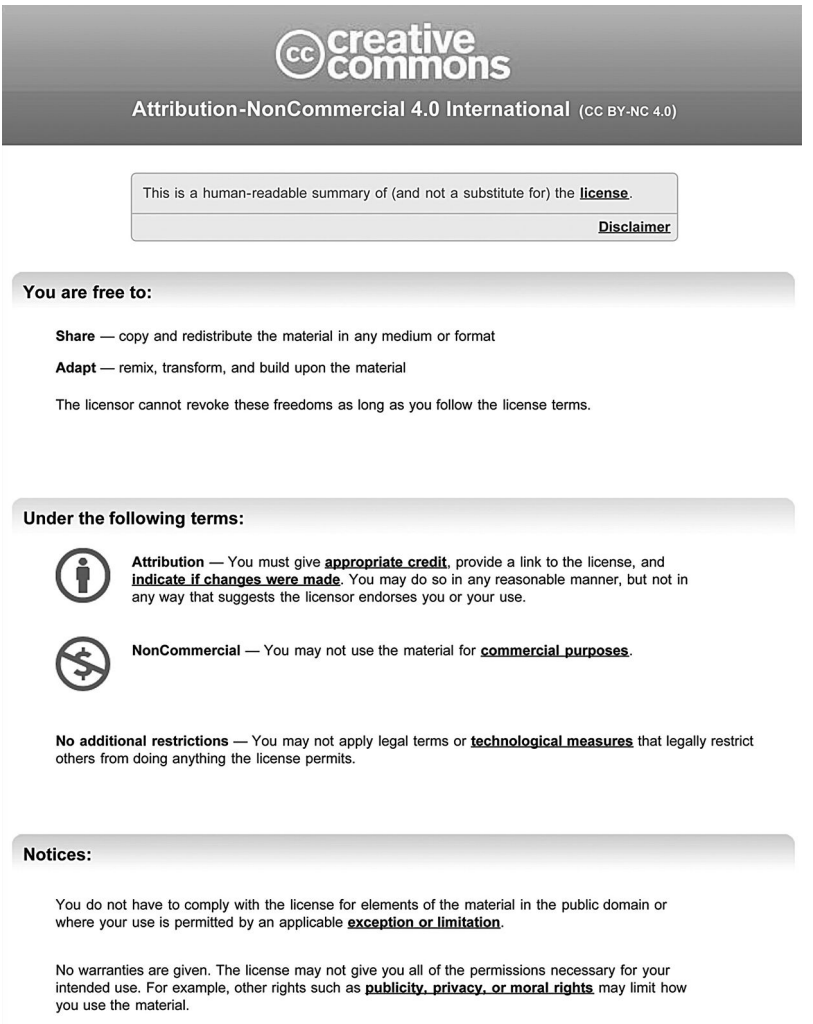

Figure 7.1 There are six types of Creative Commons licenses. All CC licenses have a "three layer" design. They are legal tools, presented in reader-friendly language with a software compatible feature built into each license. (http://creativecommons.org/licenses/by-nc/4.0/deed.en_US)

The Privacy Torts Online

The incidence of defamation has virtually exploded in the twenty-first century because of the information superhighway. Some of the contributing factors are more mobile communication and the extended shelf life of defamatory words on the Internet. This in turn has led to a great expansion in the number of lawyers who specialize in online defamation. Dozens of Web site blogs maintained by law firms not only summarize the latest online defamation cases but also offer their services to those who wish to protect or defend their

reputations. For example, one law firm, REPUTATION HAWK, promises "Online Reputation Management Services that work."[32] The good news for oral historians is that the vast majority of the cases that these law firms handle involve disparaging tweets, untruthful Facebook comments, and scurrilous forum posts. Also, a large percentage of the clients seeking legal assistance are doing so to protect their commercial or professional reputations.[33]

The possibility that an interview that is posted online might still lead to a lawsuit for defamation cannot and should not be completely discounted. The same factors that have fueled the explosion of defamation online like instant recognition and portability would readily apply to defamatory words in an interview or media production. If someone were to come forward with a plausible defamatory accusation, the information superhighway that made the uploading of the interview possible offers the instant removal option as well. In other words, unlike a printed source it can be taken down in a flash. The same Web site on which the interview was originally posted on also could serve as the site for a retraction notice. A retraction would be advisable only if the defamation claim was determined to have merit and, as noted by the Electronic Frontier Foundation that defends users' rights in the digital world, a retraction to be effective must be substantial and conspicuous.[34] In the case of an interview, the most likely locale would be the program's Web site. It should be noted, however, that retractions are not cure-alls but often do serve to end a dispute, or, if a lawsuit is eventually filed, would be a mitigating factor.

The second privacy tort that could come into play in cyberspace is public disclosure of private facts. To make a case for this tort the complaining party has to be able to prove that the information about his or her private life is not newsworthy and is highly offensive to a reasonable person. Whereas in the past, information worthy of such characterization might have languished on the shelf of an archive, with the Internet it is readily available for rapid dissemination. A 2009 case, *Duer v. Henderson*, while not involving oral histories, does provide a useful example of how little-known historical information can generate a lawsuit for public disclosure of private facts and false light.[35] *Weird Ohio*, a travel guide to Ohio's "Local Legends and Best Kept Secrets," was published in 2005. In addition, the guide was also posted to a Web site, *forgottenoh*. In 2008, a lawsuit was filed by Melissa Duer against the guide's authors, the publisher, and the creator of the Web site for a number of causes of action including false light and public disclosure of private facts. The basis for these claims were alleged misrepresentations and revelations in the *Weird Ohio* about her family's history and land ownership. Both of these causes of action, however, were dismissed because she was unable to establish that she was ever personally identified in the ghost stories.[36] In the end Ms. Duer did prevail in her lawsuit against one defendant, the creator of the Web site, only because he failed to appear and default judgment was entered against him. Although this case might have gone forward solely on the print version of *Weird Ohio*, the

creation of the *fogottenoh* Web site certainly allowed Ms. Duer to claim a much wider audience and hence more potential trespassers and vandals.

Conclusion

A very important consideration in choosing the best approach to protecting interviews online is to try and anticipate the motives of potential infringers. In other words, is the infringer more likely to be someone who believes in one or more of the meta-myths about copyright or someone who knowingly infringes for commercial gain? Even though nonfiction works receive the most limited copyright protection of all creative works, extensive or wholesale appropriation of an oral history interview by either a misinformed or intentional infringer would certainly not be fair use. The best protection against the former type of infringer is information. The information provided to Web site visitors about the authorized uses that they can make of interviews needs to be spelled out. It is not enough to just inform visitors that they can use the interviews within the accepted standards of fair use. The lengthy discussion in Chapter 6 on what fair use means suggests that such accepted standards are not readily known at all. A clear and concise explanation of what constitutes fair use can be readily crafted by referencing the language contained in the Copyright Act of 1976. The Jukebox Project provides a good example of how this can be done.

The central tenet of the privilege of fair use as set forth by the Copyright Act of 1976 is the right to make limited use of a copyrighted work "for purposes of criticism, comment, news reporting,...scholarship, or research,..."[37] This is intended, as the title of this section states, as a limitation on the exclusive rights of the copyright holder. However, the policy of some oral history Web sites is to specifically prohibit any quotation whatsoever without permission. Even if the process for receiving such permission is a relatively effortless one, such restrictions still represent an unfair limitation on fair use.

8

Institutional Review Boards and Oral History

Oral historians who ply their craft on university campuses or with organizations that have received federal funding usually have a major bureaucratic hurdle to clear before they can undertake a new project. This hurdle is the local Institutional Review Board or IRB. There are about 6,000 IRBs nationwide, and as Cliff Kuhn, executive director of the Oral History Association, has noted, the unanswered question today and for the past twenty years is whether oral history falls under their purview and if so, to what extent.[1] Due to the virtually unchecked authority that such boards possess to either prevent a research project from going forward or to impose absurd safeguards, it is imperative that oral historians school themselves about how best to deal with IRB oversight.

Because IRBs are administratively created bodies that are virtually immune from legal action, the focus of this chapter is not on law per se. Instead, the emphasis is on why many IRBs fail to understand that oral history is a form of academic inquiry that cannot and should not be evaluated by the same standards as biomedical studies. Fortunately, a number of human subjects research protection programs at leading universities have chosen to exempt oral history from IRB oversight except in rare cases. Finally, since the issue of IRB oversight is not a static one, readers are encouraged to visit the outstanding blog maintained by George Mason University professor Zachary Schrag, which offers timely news and commentary about IRB oversight of the humanities and social sciences.[2]

Origins and Applications

The first Institutional Review Boards (IRBs) appeared on college campuses during the 1980s. They were created to review and monitor research involving human subjects. Ethical considerations such as respect for all persons and justice in the selection and treatment of human subjects were to be the paramount factors by which IRBs judged each research study. If appropriate consideration of these ethical issues was not built into a study, then it could not be allowed to go forward. The impetus for such oversight was a combination of outrage over the Nazi experiments on Holocaust victims and the United States'

own tragic Tuskegee Syphilis Study as well as the recognition after World War II that biomedical research involving human subjects had become an integral part of modern science and needed to be monitored in order to prevent further victimization. The current regulations on human subject research are found in Chapter 45, Section 46 of the Code of Federal Regulations. They are commonly referred to as the Common Rule. Eighteen federal agencies, including the Departments of Education and Defense, subscribe to these regulations and require that institutions which receive federal funds for human subject research must create Institutional Review Boards to apply the Common Rule. Ironically, the National Endowment for the Humanities, which is the federal agency most likely to provide financial support for oral history research, is noticeably absent from this list.

Although institutions are not required to apply the Common Rule to research that is not funded in some way by these eighteen federal agencies, the vast majority of colleges and universities tend to err on the safe side and thus require their Institutional Review Boards to review all human subject research regardless of funding. This expanded oversight has proven particularly troublesome for researchers from the humanities and social sciences. Even when such researchers have no federal funding, they are still required to undergo an IRB review before they can begin their research. The biomedical orientation of most IRBs in turn often leads the board members to presume that qualitative research like oral history poses far more risks to human subjects than it actually does. This mind-set in turn often prevents IRBs from giving behavioral and social science researchers reasonable latitude to conduct their studies in accordance with the professional dictates of their respective disciplines. As noted by the Association for the Advancement of Human Research Protection Programs (AAHRPP), the leading national accreditation organization for human research protection programs, "The federal regulations are broad and subject to over-interpretation by risk-averse IRBs and universities."[3] As a result, most IRBs are unwilling to even explore the flexibility that the Common Rule allows for most behavioral and social science research.

Qualitative researchers in disciplines such as history, geography, and English on campuses across the nation are thus forced to seek approval from IRBs, which often require strict compliance to procedures that were designed to prevent abuse by biomedical researchers. Abnormally restrictive confidentially requirements, prior approval of questions for oral history interviews, absurd security provisions for recordings, and consent forms that inflate the dangers associated with being interviewed are only some of the many horror stories that have been recounted by researchers.

More recourse to legal action by frustrated researchers may well be just over the horizon. An attempt to help students better understand the culture of a historic New York City neighborhood led to an extended confrontation between the historian who developed the project and the IRB that demanded

that it be reviewed and approved before any interviews were conducted. Rather than cave in to the IRB, the historian hired a lawyer to help her and after months of negotiation finally got the IRB to concede that her research was exempt.[4] The first lawsuit actually filed by a researcher against an IRB occurred in 2011.[5] Professor Jin Li sued the Brown University IRB after it moved to block her from publishing a study on the education and socialization of Chinese immigrant children. The funding to cover her three-year study came from two private foundations. Although the Brown University IRB initially approved her protocol, when Professor Li sought to rebalance the compensation provided to participating families based on their socioeconomic status, the IRB refused to allow the changes even though all of the families in the study had consented. After attempting unsuccessfully to convince the IRB to change its position, Li filed suit in federal court. In her complaint she alleged that the Brown University IRB did not meet the federally mandated membership diversity standard and that the IRB's actions amounted to third party interference with contract. She also contended that her research was exempt from IRB oversight on two grounds: no federal funds were involved, and her research consisted of testing, surveys, and interviews that posed no threat to human subjects.[6] She estimated that her damages in lost time and data totaled upward of $200,000. Although she ultimately decided to abandon her lawsuit, her willingness to openly confront the IRB with a lawsuit not only showed personal courage but may have helped to convince Brown University to reform and reshape its human subjects research protection program.[7]

Another possible legal challenge that could be brought against an IRB or its sponsoring university would be a constitutional one. Philip Hamburger, a Columbia University law professor, has maintained for a number of years that both federal regulations and locally adopted rules allow IRBs to act as censors in the tradition of the Spanish Inquisition and Star Chamber. In his analysis he compares a scholar's research and publication to speech and concludes that the tendency of IRBs to constantly force researchers from the humanities and social sciences to heed a prudish brand of ethics violates their First Amendment rights.[8] In the same vein, Hamburger believes that IRBs, by using a medically based view of potential harm to human subjects, often stop or detrimentally alter studies because of the possibility of inflicting some slight discomfort. He further notes that such censorship has a powerful chilling effect in that it often stops some researchers from even bothering to submit protocols on controversial topics. These First Amendment infringements, he notes, are further exacerbated by the total absence of an appeal process to challenge a negative IRB decision.

Trying to Redefine Research

In recent years both the American Historical Association and the Oral History Association have sought to free up most oral history research from IRB

oversight by lobbying the Office for Human Research Protections (OHRP), the federal agency that is charged with monitoring institutional compliance with the Common Rule. This agency, which is housed in the U.S. Department of Health and Human Services (HHS), regularly issues policy guidelines to clarify regulations. The policy guideline sought by the AHA and OHA was issued by OHRP in 2003. It categorically stated that oral history interviews did not contribute to "generalizable knowledge" as defined in the Common Rule. Since such contributions are what usually necessitate IRB review, oral history projects "…can be excluded from institutional review board (IRB) oversight because they do not involve research as defined by HHS regulations."[9] The proponents of this policy believed that it would allow IRBs to effectively distinguish between the methodology of oral history and other research approaches that should be regulated because they involve "a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge."[10] The tipping point, of course, was getting IRBs to agree that researchers using oral history "do not reach generalizable principles of historical social development, nor do they seek underlying principles or laws of nature that have predictive value and can be applied to other circumstances for the purposes of controlling outcomes."[11]

It seemed patently obvious to the supporters of the OHRP policy statement that oral history interviews conducted by most qualitative researchers were readily distinguishable from such systematic investigation. The Oral History Association's definition of oral history makes this abundantly clear: "…a method of gathering and preserving historical information through recorded interviews with participants in past events and ways of life."[12] In other words, the end goal of an oral history interview is to capture a unique perspective or a specific past. Initially, spokespersons for the AHA and OHA voiced cautious optimism that IRBs would implement OHRP's policy statement. Unfortunately, only a handful of IRBs did so, and a national survey conducted in 2006 by the American Historical Association indicated that the statement had had little positive impact.[13] While IRBs were certainly aware of the OHRP policy statement, most appear to have either chosen to consider it as merely a recommendation or interpret the fine print in such a way as to support continued oversight of all oral history research.

The IRB Mind-Set

One of the best ways to try to understand why the OHRP's policy statement on oral history has had so little impact and what can be done about it is to examine the IRB mind-set. To do this effectively, a bit of conjecture is required. Such conjecture is, of course, grounded on the presumption that IRBs are indeed risk-aversive and will always err on the side of some level of oversight rather than categorically declare that a certain type of research is exempt. Furthermore, a careful reading of the policy statement makes it readily

apparent that OHRP never proposed a blanket exemption. This is apparent from the first word in the opening sentence: "Most oral history interviewing projects are not subject to… ."[14] While this caveat is not only never clarified, it is reinforced in the concluding paragraph of the policy: "For these reasons, then, oral history interviewing, in general, does not meet the regulatory definition of research as articulated in 45 CFR part 46."[15] So even if the chair of an IRB wishes to faithfully implement this policy it would seem that he or she must still develop a procedure to determine what kinds of oral history are in the "most" or "in general" category and which are not.

Another important mind-set consideration is the often huge divide between the research training of IRB members and human research protection program administrators and that of the faculty and students in the social sciences and humanities. The "hard science" backgrounds of most IRB members is a given. To expect that even an IRB that is assigned oversight of research proposals only from the social sciences and humanities will be well informed about how and why oral history should be considered exempt is naïve. E. Taylor Atkins, a historian, and one of the leading advocates of working with and educating IRBs as opposed to confronting them, admitted his frustration after he attended a panel in 2006 on ethnographic research methods at the national PRIM&R Conference (Public Responsibility in Medicine and Research). He came away appalled by the "persistent ignorance" of IRB administrators and board members about the special needs of qualitative researchers such as oral historians.[16] To his credit, he still strongly encourages faculty members from the social sciences and humanities to volunteer to serve on IRBs and to embrace rather than resist the ethical training that all researchers must go through on their campuses.

Excluding Oral History from IRB Review?

In July 2011, the U.S. Department of Health and Human Services issued an Announcement of Proposed Rule Making (ANPRM) on possible revisions to the Common Rule, which was last revised in 1991. The 1,100 responses were certainly far greater than HHS could have expected and suggested how deep the dissatisfaction was with the current rules. The numerous horror stories together with thoughtful suggestions for revisions provided by many organizations from the social sciences and humanities were in turn utilized by the American Association of University Professors in the preparation of a report on IRBs and academic freedom issued in 2013. The report forcefully reiterated a recommendation made in a similar report in 2006:

> Research on autonomous adults should be exempt from IRB approval (straightforwardly exempt, with no provisos and no required approval of exemption) *if* its methodology either
>
> (a) imposes no more than minimal risk of harm on its subjects, or

(b) consists entirely in speech or writing, freely engaged in, between subject and researcher.[17]

If this approach were added to the Common Rule, virtually all research based on surveys or interviews would be exempt.

In January 2014, the influential National Research Council weighed in on the overhaul of the Common Rule with a report that also backed a broad exemption for social science researchers who conduct interviews. According to this report, oral history would constitute "excused research" because the risk that such interviewing entails is only "informational" and thus clearly minimal.[18] It appears, however, that the addition of this important voice to the effort to revise the Common Rule will have little impact. The consensus among informed observers of this ANPRM process is that it is stalemated because of the immense difficulty in securing consensus from the eighteen federal agencies that are affected by the Common Rule.19

The Best Approaches to an IRB

What is the best path to take either to eliminate all IRB oversight of oral history research or at least to reduce such review to a minimally intrusive level? Whether this is the first time such an attempt has been made or a repeat effort, the first step should be to provide the IRB with as much background and supporting information as you can possibly amass. The following checklist may be helpful in doing this:

1. Prepare a guide that thoroughly explains the methodology of oral history as a research tool.
2. Develop a bibliography of oral history sources, including examples of similar oral history research that has been published and/or is housed in libraries or archives.
3. Submit and explain how the *Principles and Best Practices* of the Oral History Association guide your project. Informed consent is an integral part of these ethical guidelines.
4. Describe your own training and work in oral history.
5. If there is enough activity, have your department create a committee to review all proposed oral history research.
6. Present the IRB with examples of policies at other universities that either provide a blanket exemption for oral research or provide very nonobtrusive ways of clearing such research.

The AAUP not only favors a straightforward exemption for qualitative research on autonomous adults but stresses that the researcher, not the IRB, should make this call. Fortunately, three major universities already take this approach: Michigan, Southern California, and Columbia. Since each arrives at

this result in somewhat different ways, it is worthwhile to briefly examine all three for both their stated rationale and how they inform researchers wishing to do oral history of their generally excluded status.

At the University of Michigan, investigators are provided with a table of illustrations that contains a "list of common activities for which categorical regulation/not regulated determinations have been made."[19] They are also informed that they are free to determine in which category their research falls and to proceed accordingly. If they are not comfortable making this decision they can seek either an informal consultation with an IRB staff member or a more formal one. The broad definition of oral history in the table of illustrations, however, makes it rather unlikely that a researcher would feel uncomfortable about his or her self-determination that the research was not regulated:

> Interviews that collect, preserve, and interpret the voices and memories of people, communities, and participants in past events as a method of historical documentation. The intent is to document a particular past or unique event in history.

The only limitation is the suggestion that appears beside this definition, "but exercise of professional ethics is expected."[20]

The University of Southern California provides investigators with a lengthy guide to help them determine whether their research qualifies as human subjects research and thus requires IRB approval.[21] The guide sets out three categories of research with appropriate examples of studies that are, may be, or do not qualify as human subjects research. One type of study listed as not constituting reviewable research is "Biography or oral history research involving a living individual that is not generalizable beyond that individual."[22] Like the University of Michigan, however, USC cautions investigators to err on the side of caution and either consult with an IRB designee or submit an online request for a determination if he or she is "uncertain whether the study is human subjects research or not."

The Office of Research Support and Compliance at the University of Texas also has determined that oral history research should be excluded from review. The policy statement that OHRP issued in 2003 is cited as the basis for this exclusion. If the oral history research is "a method of gathering and preserving historical information through recorded interviews with participants about past events and ways of life …" then it is excluded from IRB review.18 A list of the departments most likely to be affected by this exclusion of oral history research is also provided: American Studies, Anthropology, Geography, Government, History, Latin American Studies, Middle Eastern Studies, Music, and Theater/Dance. However, faculty and graduate students in these departments are still expected to fill out an application claiming this exemption and

submit it to the appropriate IRB chair. Although in most cases that is as far as the review process goes, the chair does have the authority to determine that either the proposed interviewees or the subject matter does not fit under the oral history exclusion and that more direct IRB review is needed. This policy, in effect, directly implements the 2003 OHRP policy statement on oral history research. That is, to find out what constitutes "most" oral history research for exclusion purposes, you must provide a minimal level of scrutiny.

Since Columbia University is home to one of the most successful oral history programs in the country it is quite natural that the Center for Oral History Research would take the lead in helping the IRB develop policies that provide nonintrusive oversight of oral history research. The general presumption underlying Columbia's policy is that oral history activities in general are not designed to contribute to generalizable knowledge and thus do not constitute research on human subjects as defined by 45 CFR 46.102(d).[23] This characterization is made even clearer by following statement:

> Oral history interviews that only document specific historical events or the experiences of individuals or communities over different time periods would not constitute "human subjects research" as they would not support or lead to the development of a hypothesis in a manner than would have predictive value.[24]

If a researcher decides based on this information that his or her oral history project does not constitute human subjects research, then his study would be excluded from IRB review. The policy at Columbia also has an exempt category for oral history research, but this comes into play only if a researcher believes that the oral history project will in fact contribute to generalizable knowledge or pose more than minimum risk to the interviewees.[25]

To aid researchers planning to do oral history, Columbia's policy statement provides two hypothetical examples of projects together with thoughtful explanations of why one would be excluded and the other require IRB review. The first example presents a graduate student who is writing a dissertation on the long-term social impact of the Vietnam War on American culture. Part of the research will involve life histories of veterans to document the broader meaning of the war in their lives. The resulting interviews will be donated to the Veterans History Project at the Library of Congress. A separate "Rationale" follows the example, explaining that the project does not require IRB approval because "...the information collected from the interviews is not a systematic investigation (it is not intended to address a hypothesis)."[26]

A second example, also dealing with the Vietnam War, presents a faculty member who is doing a long-term study of Post Traumatic Stress Disorder (PTSD) in veterans. The researcher plans to work with an existing PTSD

support group to secure interviews with some of the members. One stated goal of the research is to develop assessments of what type of exposure to war is most likely to produce PTSD. One of the conditions required by the support group is that all participants will remain anonymous. The separate "Rationale" following this example explains that this project does require IRB approval because "...the information collected from the interviewees will be designed to contribute to generalizable knowledge."[27] The fact that the veterans are to remain anonymous was not a factor in the determination that this is IRB-reviewable research.

Researchers at Columbia are encouraged to contact either the Columbia Center for Oral History Research (COHR) or an IRB representative if after reading this policy statement and the examples provided, they wish to clarify whether the proposed interviewing is in the excluded or exempt category. If the consultation determines that it is in fact in the latter category, the chair of the IRB would review the study. If he or she determined that it was an exempt study, there would be no further IRB involvement. The chair could also decide that the oral history project needed to go before the full IRB, perhaps because it was international in nature or involved more than minimal risk.

Conclusion

A 2007 article in the *New York Times* painted a bleak picture of the extent to which qualitative research done by faculty and students from the social sciences and humanities is forced to undergo time-consuming and needless oversight by IRBs. In the article, Bernard A. Schwetz, the director of the Office for Human Research Protection (OHRP), admitted that clearer guidelines from his office might help IRBs to be less intrusive. In the same breath, however, he still contended that human subjects must always be protected from any dangers associated with nonmedical research: "I think it's naïve to say there isn't any risk."[28]

It is likewise naïve to assume that researchers on university and college campuses across the nation who wish to employ oral history will be freed from IRB oversight any time soon. But education and negotiation are the methods most likely to secure the least invasive IRB oversight. When a researcher receives an adverse decision from an IRB there is no formal appeal process. So unless a researcher is willing to enter into a protracted confrontation with an IRB, file a complaint with the Office of Human Research Protection (OHRP), or even go so far as filing a lawsuit as Professor Li did, the best options are still education and negotiation. Although the exemption policies at Michigan, Southern California, and Columbia are clearly exceptions rather than the rule, they would be the best models to use to try to convince an office of human subjects research protection that oral history research should be exempt from IRB review because the information collected rarely contributes to generalizable knowledge and poses only minimal risk.

9

Is There a Duty to Report a Crime?

It happens so rarely that even in-depth oral history workshops and graduate oral history courses never broach the subject. This rarity occurs when an interviewee either admits to an interviewer that he or she committed a crime or names someone else as the perpetrator. If the interviewee is elderly, the admission or revelation is most likely so far in the past that it no longer matters except to the narrator. But what if the interviewee is not an octogenarian but a much younger individual and the crime that he or she is relating is neither distant nor dated? Does an oral history interviewer have any legal duty to report what he or she was told and recorded? If there is no legal duty is there an ethical one?

One could construct any number of hypothetical examples of this sort of stunning revelation but a handful of oral historians have readily admitted on H-NET/OHA, the oral history listserv, to being privy to such admissions and/or accusations. The crimes that they mention included fraudulent land use claims, war crimes, and election fraud. One oral historian during a public presentation even claimed that one of his interviewee's had confessed to a murder.[1]

The suggestions from other oral historians on the listserv as to how to handle such revelations focused primarily on remedial steps such as: whether to immediately turn off the recorder, to warn the interviewee that such an admission was ill-advised, or to urge him or her to delete that information from the interview. While all of these responses were well intended, they did not address the fundamental issue here: is an interviewer who learns of the commission of a crime under any legal duty to report this information to the proper authorities? In other words, once you know, what if anything should you or must you do? This is a mixed question of law and ethics.

Societal versus Legal Expectations

Despite Americans' reputation for helping each other, both collectively and individually, the American legal system traditionally has not imposed liability, either civil or criminal, on individuals for their failure to render aid,

promptly report, or actually rescue someone in distress.[2] In fact, greater liability often occurs when a Good Samaritan is somehow negligent in his or her rescue effort. In recent decades, every state has enacted "duty to report" child abuse statutes. Such statutes usually impose criminal liability on certain professionals for failing to report. But as the Texas Supreme Court observed in 2006, "requiring certain crimes to be reported would be unnecessary if every failure to report a crime were itself a crime."[3] Another category of "duty to report" laws involves serious or violent crimes. Although there are significant variations from state to state, Texas, for example, recently criminalized the failure of any citizen who witnesses the commission of a serious crime to immediately report it to the police unless he or she would place themselves in danger of serious bodily harm by doing so or it was reasonable to assume someone else had made the required report. These types of laws obviously apply only to eyewitnesses but are worth noting because they put into perspective the legal duty that can emerge when a person receives after the fact information about the commission of a felony. This offense, which is called misprision of felony, is the one that oral historians need to be aware of whenever an interviewee admits to a past crime or accuses another of committing such an offense.

Federal Misprision of Felony

The origins of this crime go back to medieval England but misprision of felony was included in the first federal criminal code in 1790, and today individuals are still being charged and convicted of this offense: "Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years or both."[4]

Like all criminal offenses, key elements must be proven beyond a reasonable doubt before a conviction can be secured. For federal misprision of felony these elements are:

1. the commission and completion of a felony;
2. the defendant's knowledge of that fact;
3. failure of the defendant to notify the proper authority;
4. some affirmative step by the defendant to conceal the felony.[5]

The key elements for the purposes of this discussion are Nos. 2, 3, and 4. Both case law and respected authorities are in agreement that there must first be actual knowledge that a crime was committed, No. 2. Something more than rumor or innuendo is required. Failure to provide the proper authorities with the information, No. 3, must always be accompanied by some form of

concealment, No. 4. In other words, a person who learns about a crime but merely keeps the information to himself or herself—this is not enough. He or she must also make untruthful statements, hide evidence, or actively shield the perpetrator to satisfy No. 4. A 2008 case, *In re Calonge*, effectively illustrates this affirmative requirement. Gloria Calonge, the defendant, drafted and mailed a letter to the U.S. Citizenship and Immigration Service to cover up a fraudulent certificate of employment that had been previously submitted. Because she knew that the employment certificate was a fraud, writing a letter in her capacity as an attorney constituted the type of concealment that is needed to satisfy element No. 4.[6]

State Misprision of Felony

Today, the vast majority of states do not have a misprision of felony offense in their criminal codes. For a variety of reasons, this offense was either never recognized or it has been amended so as to apply only to persons who are eyewitnesses to the commission of a violent felony.[7] A closer look at several states that do recognize the offense is instructive. South Carolina is one of the states in which failure to disclose knowledge of crimes to authorities is still prosecuted. In 1980 an eyewitness to a murder and robbery in Charleston was convicted of this offense after he lied to the police both about whether he had been at the scene where the crime occurred and whether he observed anything. Independent witnesses had identified him and placed him in a position to observe the crime prior to his denials to the police. He was convicted of misprision of felony.[8]

Although the fact pattern of this case has no connection to the work that oral historians do, it and similar prosecutions apparently prompted a member of the South Carolina House of Representatives a decade later to request an opinion from the attorney general on the reporting obligations of researchers who were conducting a study entitled "Substance Abuse in South Carolina Black Communities." He raised two questions: "Can a researcher be compelled to testify regarding alleged violations of criminal law which the researcher acquires while accumulating data? Is a researcher obligated to come forward and report criminal activity, the knowledge of which the researcher acquires while accumulating data?"[9] Although the first question is certainly important to oral historians, the second question is the crucial one for this discussion. The attorney general's opinion addressed it as a mixed question of law and morality. He noted that "each individual must be guided by his own conscience; nevertheless, anyone who acts affirmatively to conceal a criminal undertaking could be committing the crime of misprision of felony."[10] But after reviewing the elements of misprision of felony in South Carolina in relation to the projected role of the researchers, the opinion concluded, "Thus, it appears that the mere failure of a researcher to come forward, without some affirmative act to conceal, would not be misprision of felony.[11]

Ohio and South Dakota are two other states that recognize the offense, but unlike South Carolina they have directly incorporated it into their statutes. Both these statutes are written broadly enough to raise the possibility that an oral historian who learns of a past crime could be prosecuted for failing to come forward. The South Dakota statute provides: "Any person who, having knowledge which is not privileged, of the commission of a felony, conceals the same, or does not immediately disclose such felony with the name of the perpetrator thereof, and all facts in relation thereto, to proper authorities, shall be guilty of misprision of felony."[12] The statute does not, however, require anyone to report the commission of a misdemeanor, which is a less serious crime than a felony and generally results in a fine and/or less than one year of imprisonment.

The Ohio statute simply states that "no person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities."[13] As one learned commentator noted, "Ohio's statute is unambiguous in making criminal an omission to report a felony."[14] This statute, however, does not apply to privileged communications with attorneys, doctors, licensed psychologists, drug counselors, and confidential clergy-parishioner counseling. There are no published cases indicating that either of these two state statutes has ever been used to prosecute a researcher or anyone else who received information about a past felony and simply failed to report it.

Confession versus Accusation

Before turning to the ethical side of this issue, another factor needs to be addressed, namely, whether an interviewee personally admits committing a past criminal offense or simply accuses another of doing so. The language of the federal misprision of felony statute clearly specifies that there must be "actual knowledge" of the commission of a felony. The personal admission of an interviewee would seemingly satisfy this requirement. An accusation, however, would be far weaker if the narrator did not actually witness the crime and thus did not have "actual knowledge" but only learned about it from someone else (in which case it would be hearsay).

Legal Duty?

Legally there is only the remotest possibility that a researcher, who learned of a previously committed crime and did not come forward, would be charged with misprision of a felony. If the information was about a federal crime, case law clearly demonstrates that whoever received such information would not be chargeable unless he or she took some affirmative action to prevent disclosure. The mere act of receiving such information during the course of one's research would not suffice. Oral historians in Ohio and South Dakota who learn of a past criminal act are in a somewhat more ambiguous situation because of the

very expansive wording of the misprision of felony statutes in these states. But even this observation must be hedged by other considerations. Whether the offense can still be prosecuted is one important factor. All federal and state criminal offenses are subject to statute of limitations. These are the time periods during which a criminal offense must be prosecuted. If these time limits are not met, the alleged perpetrator of a crime cannot be prosecuted. In Wisconsin, for example, criminal offenses like robbery and burglary must be prosecuted within six years from the date upon which the crime was committed. For homicides, however, there is no statute of limitations.[15] Another consideration is whether the crime in question was a felony or misdemeanor. The latter type of offense is a lesser crime like criminal damage to property or resisting arrest. Because such offenses are not felonies, they are not the type of reportable crimes that are envisioned by either the federal or misprision of felony statutes in Ohio and South Dakota.

Professional Ethics?

The discussion thus far has focused solely on whether there is a legal duty to report a crime. It is also important to consider this question from the vantage point of both professional and personal ethics. The *Principles and Best Practices* of the Oral History Association does not directly address this issue beyond urging oral historians "to uphold certain principles, professional and technical standards, and obligations."[16] The *Principles and Best Practices* do expect that oral historians will faithfully adhere "to standards of scholarship for history and related disciplines."[17] While this statement may be seen as ducking the issue, it does recognize that the vast majority of oral historians are simply users of the methodology. The American Historical Association, American Sociological Association, American Anthropological Association, and American Folklore Society all have statements of ethical conduct in research that can be found on their Web sites. While none of these professional standards address the duty to report a crime question directly, the American Sociological Association (ASA) indirectly considers it within the context of confidentiality. The section on Maintaining Confidentiality provides, "Confidential information provided by research participants, students, employees, clients, or others is treated as such by sociologists even if there is no legal protection or privilege to do so."[18] The section on Limits of Confidentiality instructs sociologists to ". . . inform themselves fully about laws and rules which may limit or alter guarantees of confidentiality."[19] Subsection (b) goes on to warn sociologists that "unanticipated circumstances whether they become aware of information that is clearly health or life threatening. . . . may force them to balance any guarantees of confidentiality with other principles in the Code of Ethics and applicable laws."[20] While 11.02 (b) clearly focuses on very contemporaneous threats or crimes, Subsection (a) seems to alert sociologists to the need to be

informed about state and federal laws that may require them to report information regarding a past crime.

Obviously, pledges of confidentiality in general certainly encourage research subjects to be more inclined to "tell all." Thus the ASA *Code of Ethics* seeks to put sociologists on notice that if they get into this type of situation, they should educate themselves regarding state and federal laws that might at some point impose on them a legal duty to breach a pledge of confidentiality.

Personal Ethics?

As Valerie Yow, a strong advocate for professional ethics in oral history research aptly notes, "Ethical issues, however, are even more difficult to solve than legal issues."[21] This would certainly be the case if one is faced with the decision about whether to report a past crime. Even if there is no clear-cut legal duty to report a past crime, as the U.S. Supreme Court notes, "Gross indifference to the duty to report known criminal behavior remains a badge of irresponsible citizenship."[22] So if an oral historian believes that he or she is morally bound to share with local authorities either the confession of an interviewee or his or her criminal accusation against someone else, this would be a matter of personal ethics. If one's moral compass leads to a decision to bring such information to the attention of the authorities, it would still be advisable to first try and corroborate the interviewee's confession or accusation before passing it on. Such corroboration is even more important if the interviewee has accused someone else of committing a crime. Unless the criminal act was one that was never discovered, a check of local newspaper files should be made to determine whether the reputed crime did indeed happen and along the lines that the interviewee claimed. Finally, before going to the police, it is advisable to ascertain that the alleged crime is indeed a felony and that prosecution of the perpetrator is not barred by a statute of limitations.

Conclusion

Anticipation and prevention are the two major watchwords of this book. Such emphasis on preventative law reflects a rapidly growing trend in all walks of life. A seemingly endless number of seminars and publications, for example, are available to help executives and human resource directors avoid legally unsound practices and policies. Prevention is even becoming more prevalent in general public education efforts. The Washington State Bar Association's Council on Public Legal Education, for example, maintains a Web site appropriately entitled *lawforWA.org*. Visitors to this Web site who click on the "Prevent and Solve Legal Problems" link are immediately informed that they "...will find resources for preventing common legal problems and for solving them if they exist." This is no empty promise. Thirty-four legal subtopics from administrative law to youth are available and each one provides a wealth of helpful resources to avoid legal problems.

Oral historians, of course, should always be active supporters of preventative law. Stated in more colloquial terms, an ounce of prevention is better than a pound of cure. And indeed it is if the cure involves paying legal fees, court costs, monetary damages, and even harming the reputation of the program. Even a successful defense against a lawsuit can be expensive, time-consuming, and have unpleasant public relations consequences. The overriding message of this book is that preventative law is the best legal protection that an individual or program can invest in.

Whenever I conduct workshops on legal issues involving oral history, I always present several hypothetical scenarios and then ask the attendees to think about how they might respond if it was their program or research that was in the crosshairs. My purpose in doing this is not only to come up with a sound legal strategy for each scenario but also to bring up a more fundamental issue, namely, whether there is a general plan in place to both prevent troublesome legal problems from arising and how to address them if they do. Such a contingency plan should not only include knowing whom to turn to for legal assistance but also involve a continuing legal assessment of both existing procedures and new initiatives.

Oral historians are fortunate that so few legal challenges have arisen to date. Such good fortune, however, must not foster a false sense of security or

complacency. The mind boggling expansion in the use of oral history and the increasing emphasis on more contemporary and controversial subjects will inevitably bring more legal challenges and lawsuits in their wake. The potential legal pitfalls outlined in this book are very real. Oral historians should in most instances, however, be able to continue to stay out of court by observing a few simple rules:

1. Develop and maintain the strongest possible professional ethics based on the *Principles and Best Practices* of the Oral History Association.
2. Anticipate potential legal problems and implement appropriate preventative measures.
3. Alert your staff to all potential areas of liability. If you work alone, then educate yourself.
4. Keep up-to-date on new legal developments just like you do with new equipment and scholarship.
5. Do not let financial considerations deter you from consulting a lawyer. Remember, preventative law is always far less expensive, nerve-wracking, and time-consuming than litigation.

Appendix 1: Sample Legal Release Forms

These forms are presented for informational purposes only. Some of the forms contain the names of fictitious Wisconsin entities for the sole purpose of illustration. In drafting these forms, no attempt was made to try and incorporate additional legal requirements that individual states may have for either deeds of gift or contracts. Anyone wishing to utilize any of these sample agreements should first consult with a knowledgeable attorney.

1. Deed of Gift
2. Deed of Gift with Restrictions
3. Contractual Agreement
4. Contractual Agreement with Restrictions
5. Deed of Gift: Volunteer Interviewer
6. Deed of Gift: Independent Researcher
7. Deed of Gift: Interviewer as Joint Author
8. Deed of Gift: Next of Kin
9. IRB Consent Form
10. IRB Consent Form & Deed of Gift
11. Permission to Use: Middle & High School
12. Work-Made-for-Hire Agreement
13. Assignment of Copyright in a Work Intended as a Work-Made-for-Hire

No. 1 Deed of Gift

The mission of the Longview Historical Center is to document the history of Northern Wisconsin. An important part of this effort is the collection of oral history interviews with knowledgeable individuals from all walks of life. In order for your interview/s to be placed in the Center's archive for future historical use, it will be necessary for you to sign this gift agreement. Before doing so, you should read it carefully and ask any questions you may have regarding its terms and conditions.

I, _____ [interviewee], of _____ [address, city, state, zip code], herein permanently donate and convey my oral history interview/s to the Longview Historical Center. In making this gift, I understand that I am conveying all right, title, and interest in copyright to the Center. In return, the Center grants me a non-exclusive license to utilize my interview/s during my lifetime. I also grant to the Center the right to use my name and likeness in any promotional materials for publications or projects. I further understand that I will have the opportunity to review and edit my interview/s before it is/they are made available for historical research whether in audio/video and/or transcript form. The Center will then make my interview/s available for research without restriction. Future uses may include quotation and publication or broadcast in any media, including the Internet.

_____	_____
Interviewee	Interviewer or Agent
_____	_____
Date	Date

No. 2 Deed of Gift with Restrictions

The mission of the Longview Historical Center is to document the history of Northern Wisconsin. An important part of this effort is the collection of oral history interviews with knowledgeable individuals from all walks of life. In order for your interview/s to be placed in the Center's archive for future historical use, it will be necessary for you to sign this gift agreement. Before doing so, you should read it carefully and ask any questions you may have regarding its terms and conditions.

I,_____[interviewee], of_____ [address, city, state, zip code] herein permanently donate and convey to the Longview Historical Center my oral history interview/s. In making this gift, I understand that I am conveying all right, title, and interest in copyright to the Longview Historical Center. In return, the Center grants to me a nonexclusive license to utilize my interview/s during my lifetime. I also grant to the Center the right to use my name and likeness in any promotional materials for publications or projects.

I further understand that I will have an opportunity to review and edit my interview/s before it is/they are made available for historical research whether in audio/video and/or transcript form. The Center will then make my interview/s available to researchers subject to the following restriction/s. Future uses may include quotation and publication or broadcast in any media, including the Internet.

Restrictions

_____ I wish to close my interviews until _____

_____ I wish to close specific portions of my interview/s until _____

_____ I wish to restrict access to on-site users until _____

_____ No researcher may quote from my interview/s without my permission until _____ I wish to be identified by a pseudonym and have all references from which my identity could be known redacted until _____

The Center agrees to take all reasonable steps to honor my restrictions. I understand, however, that the Center may not be able to uphold my restriction/s against either a freedom of information request or a subpoena.

_____	_____
Interviewee	Interviewer or Agent
_____	_____
Date	Date

No. 3 Contractual Agreement

The mission of the U.S. Army History Center is to document and preserve the individual histories of U.S. Army personnel in recent wars and conflicts. The goal of the Desert Storm Oral History Project is to record the experiences of participants in this war. To deposit your interview/s with the Center, it will be necessary for you to sign this agreement. Before doing so, you should carefully read it and ask any questions you may have regarding its terms and conditions.

In consideration for the audio and/or video recording, editing, processing and archiving of my interview/s by the Desert Storm Oral History Project,

I_____[interviewee], of_____ [address, city, state, zip code] herein permanently transfer to the U.S. Army History Center my interview/s. In doing so I understand that I am conveying all right, title, and interest in copyright to the Center. In return, the Center grants to me a nonexclusive license to utilize my interview/s during my lifetime. I also grant the Center the right to use my name and likeness in any promotional materials for publications or projects.

I understand that I will have the opportunity to review and edit my interview/s before it is/they are made available for historical research whether in audio/video and/or transcript

form. The Center will then make my interview/s available for research without restriction. Future uses may include quotation and publication or broadcast in any media, including the Internet.

_____	_____
Interviewee	Interviewer or Agent
_____	_____
Date	Date

No. 4 Contractual Agreement with Restrictions

The mission of the U.S. Army History Center is to document and preserve the individual histories of U.S. Army personnel in recent wars and conflicts. The goal of the Desert Storm Oral History Project is to record the experiences of participants in this war. To deposit your interview/s with the Center, it will be necessary for you to sign this agreement. Before doing so, you should carefully read it and ask any questions you may have regarding its terms and conditions.

In consideration for the audio and/or video recording, editing, processing and archiving of my interview/s by the Desert Storm Oral History Project, I _____ [name] of _____ [address, city, state, zip code] herein permanently transfer to the U.S. Army History Center my interview/s. In doing so I understand that I am conveying all right, title, and interest in copyright to the Center. In return the Center grants to me a nonexclusive license to utilize my interview/s during my lifetime. I also grant the Center the right to use my name and likeness in any promotional materials for publications or projects.

I further understand that I will have the opportunity to review and edit my interview/s before it is/they are made available for historical research whether in audio/video and/or transcript form. The Center will then make my interview/s available for research subject to the following restriction/s. Future uses may include quotation and publication or broadcast in any media, including the Internet.

Restrictions

_____ I wish to close my interviews until _____

_____ I wish to close specific portions of my interviews until _____

_____ I wish to restrict access to on-site users until _____

_____ No researcher may quote from my interview/s without my permission until _____

_____ I wish to be identified by a pseudonym and have all references from which my identity could be known redacted until _____

The Center agrees to take all reasonable steps to honor my restrictions. I understand, however, that the Center may not be able to uphold my restriction/s against either a freedom of information request or a subpoena.

_____	_____
Interviewee	Interviewer or Agent
_____	_____
Date	Date

No. 5 Deed of Gift: Volunteer Interviewer

The Milwaukee Neighborhoods Project is dedicated to the preservation of historic neighborhoods. To this end, oral history interviews are being conducted with elderly Milwaukeeans throughout the City. This project is partially funded by a grant from the Wisconsin Humanities Council and sustained for the most part by the work of volunteers. To ensure

that the interview/s that you conduct as a volunteer interviewer can be archived and used for research, you are asked to sign the following agreement. Before doing so, you should carefully read it and ask any questions regarding its terms and conditions.

I_____[interviewer] do herein permanently donate and convey all interviews that I conduct for the Milwaukee Neighborhoods Project to the Milwaukee Historical Society. In making this gift, I understand that I am conveying all right, title, and interest in copyright that I might hold as a joint author to the Society.

I understand that I will have the opportunity to review the interview/s before it is/they are made available for historical research whether in audio/video and/or transcript from. The Society will then make the interview/s available to researchers without restrictions. Future uses may include quotation and publication or broadcast in any media, including the Internet.

_____	_____
Project Director	Interviewer
_____	_____
Date	Date

No. 6 Deed of Gift: Independent Researcher

The Biography of Randall Towns Project

Ruth Allen Bates, Ph.D.

I am currently doing research for a biography on Randall Towns.

An important part of my research is the oral history interviews I am conducting with individuals who had significant contact with Mr. Towns during the course of his life. The purpose of the following agreement is to allow me to utilize your interview in my book and subsequently to donate it to a library or archive so that other researchers may be able to benefit from your historical recollections. Please read the agreement carefully before you sign it and feel free to ask any questions you may have regarding its terms and conditions.

I_____[interviewee] of_____ [address, city, state, zip code] do herein permanently donate and convey my oral history interview and other written material as noted, _____ to Ruth Allen Bates. In making this gift, I understand that I am assigning all right, title, and interest in copyright to Dr. Bates. By virtue of this assignment, Dr. Bates will have the right to freely use my interview/s and any other written materials specified above in her biography.

I further understand that once this study is completed, she will donate my interview and any written materials to an appropriate archive or library so that other researchers may be able to utilize them. This donation will include the transfer of all interest in copyright that I herein assigned. Dr. Bates agrees in turn to inform me of the library or archive that will ultimately be the repository of my interview/s and materials.

_____	_____
Interviewee	Dr. Ruth Allen Bates
_____	_____
Date	Date

No. 7 Deed of Gift: Interviewer as Joint Author

I_____, [interviewer] who conducted interviews for the _____ [program/project] with_____ [interviewee] on or about_____[date], for which no legal releases were executed, do herein permanently donate and convey said interview/s to the_____[archive/library]. In doing so, I understand that the

interview/s I conducted with _____ [interviewee] will be made available to researchers and may be quoted, published, or broadcast in any media, including the Internet that the_____ [archive/library] shall deem appropriate.

In making this gift, I fully understand that I am conveying all right, title, and interest in copyright which I have or may be deemed to have in the interview/s as a joint author. I further recognize the joint authorship in copyright that_____ [interviewee or his/her next of kin] holds in the interview/s. In consideration for my assignment of copyright, the _____[archive/library] agrees to release me from any claim that might arise from profits that are derived from the commercial use of the interview/s with_____ [interviewee].

_____	_____
Interviewer	Agent
_____	_____
Date	Date

No. 8 Deed of Gift: Next of Kin

In accordance with the willing participation of_____ [name of interviewee], in the _____[name of oral history project or program] on_____[date], at which time he/she provided interview/s to _____[name of receiving group or individual] for which no legal release was executed. As next of kin, I_____,[name & relationship] herein do permanently donate and convey to the _____ [name of archive/library] the interview/s with _____ [name of interviewee]. In doing so I understand that_____ interview/s will be made available to researchers and may be quoted, published, and broadcast in any media including the Internet.

I further acknowledge in making this gift that I am conveying all right, title, and interest in copyright to _____ interview/s [name of interviewee] to _____[archive or library].

_____	_____
Next of Kin	Authorized Agent
_____	_____
Date	Date

No. 9 IRB Consent Form

Lake Michigan University Laurie Bonner, History

"The Championship Years: Women's Basketball, 1992–2000"

I agree to be interviewed by Laurie Bonner for her dissertation. I understand that she is interviewing key players, coaches, and support personnel. I further understand that this consent form is intended to fully inform me of what I am being asked to do and my rights as a human subject.

Research Procedure

The interview will be recorded. It will last somewhere between 1 and 2 hours. If the researcher finds that more interview time is needed, she will work out a suitable time and date for this. Once my interview is completed, it will be edited and transcribed. I will be given an opportunity to make changes to my interview before a final transcript is completed. No one except Laurie Bonner will be able to access my interview until the final transcript is finished. After

I have given my approval to the final transcript, I will then be asked to sign a deed of gift conveying my interview to the Lake Michigan University Sports History Archive.

Confidentiality
Because the purpose of the interview is to secure specific factual information and insights about the greatest era in women's basketball at Lake Michigan University, allowing interviewees to remain anonymous is not an intended feature of this study. I do, however, have the right not to answer any questions that I consider uncomfortable or inappropriate. If the prospect of being personally identified in Ms. Bonner's dissertation, future publications, or in the interview is a concern at any time, I can either withdraw entirely from this study without any penalty or ask to be assigned a pseudonym, in which case all identifying information from my interview will be redacted.

Withdrawal without Prejudice
Participation in this study is strictly voluntary. Each interviewee is free to withdraw consent and cease all participation in this study at any time without any penalty whatsoever.

Risks and Benefits
There are no known risks or discomforts associated with your participation in this study. Although you may not receive any direct benefit from your participation, others may benefit from the knowledge that you provide to this study.

Costs and Payments
There is no cost to participate in this study nor will you be paid for your time. You will, however, receive a recording and transcript of your interview.

Questions and Concerns
If you have any questions or concerns about this study and the oral history interview process, you can call or e-mail Dr. John Ambrose, faculty advisor at (444) 765–4321 or jambrose@histLMU.edu. You may also contact the Human Subjects Research Office, at (444) 765–1234 or HSRO@LMU.edu.

Agreement
I have read the information contained in this consent form, and Laurie Bonner has offered to answer any questions I may have concerning the study. I hereby consent to participate in this study.

_____	_____
Interviewee	Researcher
_____	_____
Date	Date

No. 10 IRB Consent Form & Deed of Gift

Lake Michigan University Zach Thomas, Sociology

"Lake Michigan Dock Workers: 1970–2000"
I have been invited to provide an oral history interview for this dissertation research. I understand that Zach Thomas is interviewing dock workers like me about their work experiences and association with the United Dock Workers Union. I also understand that he may use material from my interview in his dissertation and possibly in subsequent publications. I further understand that he wishes to donate my interview to the Lake Michigan University Labor Archive to assist future researchers. Unless I indicated otherwise, there will be no restrictions on the use of my interview by either Zach Thomas or the Labor Archive.

Research Methodology and Interviewee Rights

This recorded interview will be conducted in the form of a guided conversation and will last 1–2 hours. I understand that I will be free to decline to answer any question that I consider to be uncomfortable or inappropriate. Moreover, I will have the right to stop my interview at any time without any negative consequences. There are no foreseeable risks to my participation and the benefit is the increased knowledge about maritime workers and unions. There is no cost to my participation in this study, and I will not receive any compensation except for a recording of my interview. I further recognize that since my interview will be donated to the Labor Archive, there is no assumption of confidentiality unless I specifically request it.

Deed of Gift

I _____ do herein permanently donate and convey to the Lake Michigan University Labor Archive, my interview conducted on _____. In making this gift, I understand that I am conveying all right, title, and interest in copyright to the Labor Archive. In return, the Archive grants me a nonexclusive license to utilize this interview during my lifetime.

I further understand that I will have the opportunity to review and edit my interview before it is made available for historical research whether in audio or transcript form. The Labor Archive will then make this interview available for research without restriction. Future uses may include quotation and publication or broadcast in any media, including the Internet.

Questions & Concerns

If you have any questions or concerns about this study or the oral history process, you can contact Dr. Blanche Rickey, faculty advisor at (777) 765–4321 or brickey@socLMU.edu. You may also contact the Human Subject Research Office at (777) 765–1234 or HSRO@LMU.edu.

Consent Confirmation

I have read this agreement and Zach Thomas offered to answer any questions I may have concerning this study. He also informed me that I could request to remain anonymous if I chose to do so. I hereby consent to participate in this study.

_____	_____
Interviewee	Researcher
_____	_____
Date	Date

No. 11 Permission to Use: Middle & High School

Students in my 11th Grade Social Studies class at Rib Mountain High School are conducting oral history interviews (audio or video taped) with community residents who experienced World War II either through military service or on the home front. Since you have agreed to be interviewed, it is important that you carefully read this agreement which explains how your interview will be used in this class project. If you have any questions regarding the terms and conditions of use, please ask your student interviewer or call me, Mr. Barry Bonduel at 555–5555.

I _____ [name of interviewee] of _____ [address]_____[city] _____[state & zip code] herein give my permission to_____[name of interviewer] to fully utilize my interview, including my name and likeness, in this class project. Once this project is completed, however, the audio or video recording of my interview as well as any transcript that was made shall be returned to me. No copies of my interview shall be retained by the interviewer, teacher, or school without my express permission.

_____	_____
Interviewee	Student Interviewer
_____	_____
Date	Date

No. 12 Work-Made-for-Hire Agreement

The Door County Historical Society is sponsoring a special project on historic resorts. In addition to collecting written sources, the Society wishes to conduct interviews with key individuals associated with the founding and/or management of these resorts. To that end, the Society wishes to hire _____, as an independent contractor to conduct interviews with the twelve (12) individuals whose names appear on the attached list. The purpose of this agreement is to outline the terms and conditions of your work including compensation and expenses.

Independent Contractor Status

For purposes of this agreement, you are an independent contractor and not an employee of the Society. In this capacity you agree to the following terms and rights consistent with your independent contractor status:

1. You have the right to perform services for others during the tenure of this agreement.
2. You have the sole right to control and direct the manner in which the interviews are conducted.
3. The Society will not withhold FICA from your compensation or make FICA payments on your behalf.
4. You are not eligible for employee benefits of any kind from the Society.

Copyright Ownership

The Door County Historical Society had conceived of any original work of authorship relating to the creation of oral histories with key individuals associated with historic resorts in Door County. Per this agreement, _____ is specially order and commissioned by the Society to conduct the interviews which are to be a part of the Society's archive as a collection, supplemental, or other category of work that is eligible to be treated as a Work-Made-for-Hire pursuant to 17 U.S.C. Sec. 101.

The Society and _____intend that the copyrights in the interviews he/she conducts are to be owned by the Society who is to be considered the author of such interview/s as defined in 17 U.S.C. Sec. 201. _____further agrees to present, explain, and secure signed deeds of gift for all of the interviews conducted pursuant to this agreement. The Society will supply the agreements for this purpose.

Compensation & Expenses

In consideration for the specially ordered and commissioned services addressed in this agreement, the Door County Historical Society agrees to pay _____, a flat fee of $250.00 for each recorded interview plus reasonable expenses for research, travel, and equipment. Payment will be made in two installments, with the first occurring upon receipt by the Society of the recordings and signed releases for six (6) of the interviewees and the remainder upon the completion and receipt of all interviews.

_____	_____
Independent Contractor	Agent Representative
_____	_____
Date	Date

No. 13 Assignment of Copyright in a Work Intended as a Work-Made-for-Hire

The Green County Historical Society is sponsoring a special project on historic Green Lake resorts. In addition to collecting written sources, the Society wishes to conduct interviews with key individuals associated with the founding and/or management of these resorts. To that end, the Society wishes to hire _____, as an independent contractor to conduct interviews with twelve (12) individuals whose names appear on the attached list. The purpose of this agreement is to outline the terms and conditions for your work, including compensation and expenses.

Independent Contractor Status

For purposes of this agreement you are considered to be an independent contractor and not an employee of the Society. In this capacity you agree to the following terms and rights consistent with your independent contractor status:

1. You have the right to perform services for others during the tenure of this agreement.
2. You have the sole right to control and direct the manner in which the interviews are conducted.
3. The Society will not withhold FICA from your compensation or make FICA payments on your behalf.
4. You are not eligible for employee benefits of any kind from the Society.

Copyright Ownership

The parties further agree that this specially commissioned or ordered work is a Work-Made-for-Hire, and that the Green County Historical Society for whom this work is prepared, shall own all right, title, and interest including copyright in said work.

The interviewer further agrees that in the event that the interviews he/she conducts are legally deemed not to be a Work-Made-for-Hire pursuant to 17 U.S.C. Sec (101), by virtue of this agreement he/she assigns to the Green County Historical Society all right, title, and interest including copyright that he may be entitled to claim as a joint author in these interviews. He/she further agrees to present, explain, and secure signed deeds of gift for the Society from each interview conducted pursuant to this agreement. The Society will provide the agreements for this purpose.

Compensation & Expenses

In consideration for the specially ordered and commissioned services addressed in this agreement, the Green County Historical Society agrees to pay _____, a flat fee of $250.00 for each recorded interview plus reasonable expenses for research, travel, and equipment. Payment will be made in two installments with the first coming upon receipt of the first six (6) interviews with signed releases and the remainder being paid upon the completion and receipt of the all interviews.

_____	_____
Independent Contractor	Agent/Representative
_____	_____
Date	Date

Appendix 2: Principles and Best Practices for Oral History

Adopted October, 2009

The Principles and Best Practices for Oral History update and replace the Oral History Evaluation Guidelines adopted in 1989, revised in 2000.

Introduction

Oral history refers both to a method of recording and preserving oral testimony and to the product of that process. It begins with an audio or video recording of a first person account made by an interviewer with an interviewee (also referred to as narrator), both of whom have the conscious intention of creating a permanent record to contribute to an understanding of the past. A verbal document, the oral history, results from this process and is preserved and made available in different forms to other users, researchers, and the public. A critical approach to the oral testimony and interpretations are necessary in the use of oral history.

The Oral History Association encourages individuals and institutions involved with the creation and preservation of oral histories to uphold certain principles, professional and technical standards, and obligations. These include commitments to the narrators, to standards of scholarship for history and related disciplines, and to the preservation of the interviews and related materials for current and future users.

Recognizing that clear and concise guide can be useful to all practitioners of oral history, the Oral History Association has since 1968 published a series of statements aimed at outlining a set of principles and obligations for all those who use this methodology. A history of these earlier statements, and a record of the individuals involved in producing them, is available on the Oral History Association webpage at http://www.oralhistory.org/. Building on those earlier documents, but representing changes in an evolving field, the OHA now offers *General Principles for Oral History* and *Best Practices for Oral History* as summaries of the organization's most important principles and best practices for the pre-interview preparation, the conduct of the interview, and the preservation and use of oral histories. These documents are not intended to be an inclusive primer on oral history; for that there are numerous manuals, guidebooks, and theoretical discussions. For the readers' convenience, a bibliography of resources is provided online at the Oral History Association website.

General Principles for Oral History

Oral history is distinguished from other forms of interviews by its content and extent. Oral history interviews seek an in-depth account of personal experience and reflections, with sufficient time allowed for the narrators to give their story the fullness they desire. The content of oral history interviews is grounded in reflections on the past as opposed to commentary on purely contemporary events.

Oral historians inform narrators about the nature and purpose of oral history interviewing in general and of their interview specifically. Oral historians insure that narrators voluntarily give their consent to be interviewed and understand that they can withdraw from the interview or refuse to answer a question at any time. Narrators may give this consent by signing a consent form or by recording an oral statement of consent prior to the interview. All interviews are conducted in accord with the stated aims and within the parameters of the consent.

Interviewees hold the copyright to their interviews until and unless they transfer those rights to an individual or institution. This is done by the interviewee signing a release form or in exceptional circumstances recording an oral statement to the same effect. Interviewers must insure that narrators understand the extent of their rights to the interview and the request that those rights be yielded to a repository or other party, as well as their right to put restrictions on the use of the material. All use and dissemination of the interview content must follow any restrictions the narrator places upon it.

Oral historians respect the narrators as well as the integrity of the research. Interviewers are obliged to ask historically significant questions, reflecting careful preparation for the interview and understanding of the issues to be addressed. Interviewers must also respect the narrators' equal authority in the interviews and honor their right to respond to questions in their own style and language. In the use of interviews, oral historians strive for intellectual honesty and the best application of the skills of their discipline, while avoiding stereotypes, misrepresentations, or manipulations of the narrators' words.

Because of the importance of context and identity in shaping the content of an oral history narrative, it is the practice in oral history for narrators to be identified by name. There may be some exceptional circumstances when anonymity is appropriate, and this should be negotiated in advance with the narrator as part of the informed consent process.

Oral history interviews are historical documents that are preserved and made accessible to future researchers and members of the public. This preservation and access may take a variety of forms, reflecting changes in technology. But, in choosing a repository or form, oral historians consider how best to preserve the original recording and any transcripts made of it and to protect the accessibility and usability of the interview. The plan for preservation and access, including any possible dissemination through the web or other media, is stated in the informed consent process and on release forms.

In keeping with the goal of long term preservation and access, oral historians should use the best recording equipment available within the limits of their financial resources.

Interviewers must take care to avoid making promises that cannot be met, such as guarantees of control over interpretation and presentation of the interviews beyond the scope of restrictions stated in informed consent/release forms, suggestions of material benefit outside the control of the interviewer, or assurances of an open ended relationship between the narrator and oral historian.

Best Practices for Oral History

Pre-Interview

1. Whether conducting their own research or developing an institutional project, first time interviewers and others involved in oral history projects should seek training to prepare themselves for all stages of the oral history process.
2. In the early stages of preparation, interviewers should make contact with an appropriate repository that has the capacity to preserve the oral histories and make them accessible to the public.
3. Oral historians or others responsible for planning the oral history project should choose potential narrators based on the relevance of their experiences to the subject at hand.
4. To prepare to ask informed questions, interviewers should conduct background research on the person, topic, and larger context in both primary and secondary sources
5. When ready to contact a possible narrator, oral historians should send via regular mail or email an introductory letter outlining the general focus and purpose of the interview,

and then follow- up with either a phone call or a return email. In projects involving groups in which literacy is not the norm, or when other conditions make it appropriate, participation may be solicited via face to face meetings.

6. After securing the narrator's agreement to be interviewed, the interviewer should schedule a non-recorded meeting. This pre-interview session will allow an exchange of information between interviewer and narrator on possible questions/topics, reasons for conducting the interview, the process that will be involved, and the need for informed consent and legal release forms. During pre-interview discussion the interviewer should make sure that the narrator understands:
   - oral history's purposes and procedures in general and of the proposed interview's aims and anticipated uses.
   - his or her rights to the interviews including editing, access restrictions, copyrights, prior use, royalties, and the expected disposition and dissemination of all forms of the record, including the potential distribution electronically or on-line.
   - that his or her recording(s) will remain confidential until he or she has given permission via a signed legal release.
7. Oral historians should use the best digital recording equipment within their means to reproduce the narrator's voice accurately and, if appropriate, other sounds as well as visual images. Before the interview, interviewers should become familiar with the equipment and be knowledgeable about its function.
8. Interviewers should prepare an outline of interview topics and questions to use as a guide to the recorded dialogue.

Interview

1. Unless part of the oral history process includes gathering soundscapes, historically significant sound events, or ambient noise, the interview should be conducted in a quiet room with minimal background noises and possible distractions.
2. The interviewer should record a "lead" at the beginning of each session to help focus his or her and the narrator's thoughts to each session's goals. The "lead" should consist of, at least, the names of narrator and interviewer, day and year of session, interview's location, and proposed subject of the recording.
3. Both parties should agree to the approximate length of the interview in advance. The interviewer is responsible for assessing whether the narrator is becoming tired and at that point should ask if the latter wishes to continue. Although most interviews last about two hours, if the narrator wishes to continue those wishes should be honored, if possible.
4. Along with asking creative and probing questions and listening to the answers to ask better follow-up questions, the interviewer should keep the following items in mind:
   - interviews should be conducted in accord with any prior agreements made with narrator, which should be documented for the record.
   - interviewers should work to achieve a balance between the objectives of the project and the perspectives of the interviewees. Interviewers should fully explore all appropriate areas of inquiry with interviewees and not be satisfied with superficial responses. At the same time, they should encourage narrators to respond to questions in their own style and language and to address issues that reflect their concerns.
   - interviewers must respect the rights of interviewees to refuse to discuss certain subjects, to restrict access to the interview, or, under certain circumstances, to choose anonymity. Interviewers should clearly explain these options to all interviewees.
   - interviewers should attempt to extend the inquiry beyond the specific focus of the project to create as complete a record as possible for the benefit of others.
   - in recognition of the importance of oral history to an understanding of the past and of the cost and effort involved, interviewers and interviewees should mutually strive to record candid information of lasting value.

5. The interviewer should secure a release form, by which the narrator transfers his or her rights to the interview to the repository or designated body, signed after each recording session or at the end of the last interview with the narrator.

Post-Interview

1. Interviewers, sponsoring institutions, and institutions charged with the preservation of oral history interviews should understand that appropriate care and storage of original recordings begins immediately after their creation.
2. Interviewers should document their preparation and methods, including the circumstances of the interviews and provide that information to whatever repository will be preserving and providing access to the interview.
3. Information deemed relevant for the interpretation of the oral history by future users, such as photographs, documents, or other records should be collected, and archivists should make clear to users the availability and connection of these materials to the recorded interview.
4. The recordings of the interviews should be stored, processed, refreshed and accessed according to established archival standards designated for the media format used. Whenever possible, all efforts should be made to preserve electronic files in formats that are cross platform and nonproprietary. Finally, the obsolescence of all media formats should be assumed and planned for.
5. In order to augment the accessibility of the interview, repositories should make transcriptions, indexes, time tags, detailed descriptions or other written guides to the contents.
6. Institutions charged with the preservation and access of oral history interviews should honor the stipulations of prior agreements made with the interviewers or sponsoring institutions including restrictions on access and methods of distribution.
7. The repository should comply to the extent to which it is aware with the letter and spirit of the interviewee's agreement with the interviewer and sponsoring institution. If written documentation such as consent and release forms does not exist then the institution should make a good faith effort to contact interviewees regarding their intent. When media become available that did not exist at the time of the interview, those working with oral history should carefully assess the applicability of the release to the new formats and proceed—or not—accordingly.
8. All those who use oral history interviews should strive for intellectual honesty and the best application of the skills of their discipline. They should avoid stereotypes, misrepresentations, and manipulations of the narrator's words. This includes foremost striving to retain the integrity of the narrator's perspective, recognizing the subjectivity of the interview, and interpreting and contextualizing the narrative according to the professional standards of the applicable scholarly disciplines. Finally, if a project deals with community history, the interviewer should be sensitive to the community, taking care not to reinforce thoughtless stereotypes. Interviewers should strive to make the interviews accessible to the community and where appropriate to include representatives of the community in public programs or presentations of the oral history material.

Notes

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30. "Oral History Interview Release Form," Division of Information Resources, Offices of Library & Management, Xavier University, www.Xavier.edu.

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Yow, Valerie Raleigh. *Recording Oral History: A Guide for the Humanities and Social Sciences.* 2nd ed. Walnut Creek, CA: AltaMira, 2003.

Recommended Web Sites

Copyright & Fair Use Center, Stanford University Libraries
http://fairuse.stanford.edu/
Articles, news, featured cases, blogs, and links to other useful Web sites.

Creative Commons
http://creativecommons.org/
A not-for-profit organization that encourages copyright holders to take a less restrictive view than copyright holders traditionally have of how their works may be utilized by others. They provide tools such as Creative Commons licenses that allow copyright holders to reserve certain rights but waive others for the benefit of future creators.

First Amendment Center
http://firstamendmentcenter.org/
Comprehensive research coverage of key First Amendment issues and topics, daily news, a library, links to other Web Sites, and analysis by respected legal specialists.

Institutional Review Blog
http://www.Institutionalreviewblog.com/2008/07/political-science-perspectives-on-irbs.html
News and commentary about IRBs' oversight of humanities and social science research.

Oral History Association
http://www.oralhistory.org/
Information on resources for historians, librarians and archivists, students, journalists, and teachers, including OHA publications and conferences. Provides links to the H-OralHist listserv, OHA Network, OHA Wiki, and *Oral History Review*.

United States Copyright Office
www.copyright.gov
Information on filing for copyright registration, enforcement, and laws, including more than seventy-five circulars and factsheets on key copyright issues such as *Copyright Basics*, *Works Made for Hire Under 1976 Copyright Act*, and *Copyright Registration for Online Works*.

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