A CASE STUDY IN COPYRIGHT FOR AUDIO ARCHIVES: UNTANGLING RIGHTS ISSUES FOR UNPUBLISHED ORPHAN WORKS AT THE AUSTIN HISTORY CENTER

John Schooley
School of Information
INF 392L Audio Preservation and Reformatting
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American copyright law has been described as "extremely complex,"¹ and, less charitably, as “complicated, counterintuitive, impenetrable, unfair, and unreasonable.”² These descriptions are especially appropriate in describing copyright law as it applies to sound recordings. The various issues associated with copyright and sound recordings are problematic for sound archives. The desire of archivists to preserve audio recordings and make them available to the public frequently clashes with copyright law in its current state. “The laws have become so skewed toward the interests of present-day ‘rights holders’ that, almost without notice or even intent, most of the recorded past has been locked up for generations to come—perhaps forever. Permission is required to hear it.”³ As a result, many recordings of historical and cultural importance languish, unheard, and may ultimately disappear.

Copyright law pertaining to sound recordings is far more restrictive than the law for any other type of intellectual property,⁴ and is fraught with details, exceptions, and gray areas that are often confusing to the nonprofessional. Faced with the complexity of

² Litman, Jessica, Ethical disobedience, Ethics and Information Technology, Vol. 5, 2003, p217
³ Brooks, Tim, Only in America: The Unique Status of Sound Recordings under U.S. Copyright Law and How It Threatens Our Audio Heritage, American Music, Volume 27, Number 2, Summer 2009, p125
⁴ Brooks, Tim, Copyright and Historical Sound Recordings: Recent Efforts to Change U.S. Law, Notes, March 2009, p465
current laws, archives and libraries have historically chosen to err on the side of caution when dealing with the legalities of copyright and sound recordings. Caution on the part of curators of sound collections has unfortunately resulted in a "chilling effect" in which "important historic sound material, once placed into archives, then cannot be heard or used, except under the most restrictive conditions."

The internet age has made the dissemination of sound recordings easier than ever. The cost of equipment and software for digitizing sound recordings, which was prohibitive just a few years ago, has fallen substantially. Most archives now have an internet presence, and with it, the infrastructure to make digitized recordings available to users via the web. Unfortunately, fears regarding copyright often prevent these archives from making their audio holdings available online, or in some cases even copying material for preservation purposes. In describing the situation, archivist Carlos Hagen commented, "The unbelievable and frightening paradox is that in an age of technology, an age which recognizes the crucial significance of communications, so many librarians of the new media…seem intent on returning to the Middle Ages when scholars had to travel from one country to another for the purpose of consulting unique research material." These words, written in 1972, remain an accurate description of the situation today. Even if librarians and archivists are not “intent on returning to the Middle Ages,” copyright regulations leave archivists who wish to follow the letter of the law severely constrained. One way to demonstrate the challenges archivists face regarding copyright

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5 Brooks, Ibid.
6 Brooks, Copyright and Historical Sound Recordings, p 466
7 Hagen, Carlos, Struggle of Sound Archives in the United States, Library Trends, July 1972, p45
is to take specific examples of recordings and attempt to determine both their copyright status, and what archives can legally do with the recordings.

AIRCHECKS AT THE AUSTIN HISTORY CENTER

The Austin History Center (AHC) is the historical archives for the city of Austin, and Travis County, Texas. The AHC holdings contain what one would expect to find in a local historical archives: microfilmed newspapers, biographical material about local residents, books about local history or by local authors, maps and real estate information, and government documents. In addition to these materials, the AHC also has a small collection of audio recordings.

Austin's official city motto is "Live Music Capital of the World," but the recorded music holdings at the AHC are modest. The bulk of the audio at the AHC consists of oral history interviews, with some miscellaneous recordings that are neither oral histories nor music. Among these miscellaneous recordings are a handful of interviews conducted by dj Art Young for a morning radio program on Austin radio station KRMH-FM. The tapes include Young interviewing local residents and, in some cases, visiting musicians and celebrities. Actor Leonard Nimoy, and New Orleans pianist Professor Longhair, are two of the better-known interview subjects.

KRMH-FM, or "KARMA"-FM, a short-lived progressive FM radio station in Austin, began broadcasting in 1971.\(^8\) KRMH was sold a few years later, in 1976, and the call letters were retired.\(^9\) The recordings that survive in the AHC holdings are unique

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\(^8\) FM Station Will Open June 1\(^{st}\), Austin American Statesman, Austin, TX, May 17, 1971
\(^9\) Cockerill, Bill, FCC approves KRMH sale to Pioneer for $526,000, Daily Texan, Austin, TX, June 22, 1976
historical documents, offering a fascinating glimpse of Austin in the early 1970s and of the development of FM radio programming in the southwest.

Recordings like these are rare. These recordings of radio station broadcasts, called "airchecks," have survived from a small number of sources, largely by happenstance. Casual listeners who recorded their favorite radio programs at home sometimes made airchecks. Djs are another source of airchecks, recording their own programs for personal evaluation and review, or as audition tapes which served as a kind of audio resume when job hunting. Companies collected and distributed airchecks, including advertising agencies verifying that commercials were aired, or as a service to radio industry subscribers who wished to hear what records or promotions were being used by stations around the country. In a few instances, record companies compiled LPs featuring samples of djs as promotional items. A small but dedicated community of aircheck collectors exists, who focus on recordings from the era before media consolidation homogenized radio programming.\(^\text{10}\)

Finding a previously unheard interview with a celebrity such as Leonard Nimoy in the holdings is a pleasant surprise for an archive like the AHC. This kind of item could be used to increase the archives' public profile. Making this interview available online, on the AHC web page or blog, could attract web traffic and serve as an inexpensive promotional tool. Would making the recordings available online be legal? There are really two questions involved: what is the copyright status of these recordings? And, how can they be used by the archive?

\(^\text{10}\) Brouder, Ed, *Those Oldies But Goodies Remind Me Of You... Collecting Airchecks*, Discoveries, May 1998
The first question is the most complex. Airchecks such as those in the AHC collection fall under the umbrella of "unpublished orphan works," whose definition is convoluted even by the standards of audio copyright. To understand this definition, it is helpful to first review what sort of works are considered “published,” and then how a lack of documentation can leave some recordings as “orphans.”

**PUBLICATION**

First, it is helpful to review international obligations regarding what is considered "publication.” The United States is a party to The Berne Convention for the Protection of Literary and Artistic Works, commonly known as the Berne Convention, an international agreement governing copyright. The Berne convention excludes certain uses of creative works from qualifying as "publication," such as performance of a musical or theatrical work. However, these works may still be protected by copyright if they are "disclosed," which means that they are brought to the public’s attention in a manner that differs from publication. Radio broadcasts fall into this category of unpublished works that have been disclosed to the public.\(^\text{11}\)

Domestically, according to the 1976 Copyright Act, copyright begins when a work is fixed in a tangible medium, rather than with any type of publication. The definition of "publication" also changed with the 1976 Copyright act, such that "a public performance or display of a work does not of itself constitute publication.”\(^\text{12}\)

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Copyright Act, a work is considered “published” only when copies are distributed to the public “by sale or other transfer of ownership, or by rental, lease, or lending.” Under both international and domestic definitions, recordings such as those at the AHC are considered unpublished.

How long are unpublished recordings protected by copyright? Prior to the 1976 Copyright Act, there was no Federal copyright protection for sound recordings; they were covered by laws varying from state to state. This changed with the 1976 Copyright Act, which fixed the copyright term for sound recordings, but the results were complex. Unpublished audio recordings have a different copyright term than published works. Works created but not published before January 1, 1978 (which includes the KRMH examples), were given the same term as works created on or after January 1, 1978: life of the author plus 70 years. Anonymous and pseudonymous works, and works made for hire, are protected 95 years from creation, or 120 years from publication.

The majority of issues involving audio copyright deal with music, and often involve two copyrights – one for the particular musical performance, and one for the underlying musical work that is being performed. Recordings of theatrical works or readings of published books also involve copyrights of both the underlying work (the play or book) and the performance. Because the KRMH recordings are spontaneous interviews, not performances, there is no underlying musical or theatrical work to copyright. However, there are still two copyright holders: the interviewer and interviewee. The KRMH recordings might be considered “works for hire,” as Young was

13 Besek, Ibid.
14 Besek, Copyright and Related Issues, p7
15 Besek, Ibid.
a paid employee of the station when conducting the interviews. If so, the radio station would own the copyright to his portion of the interview, while the interviewee owns their answers. It is even possible that there are three copyright interests involved, with the radio station, the dj, and the interviewee all having copyright claims. The law for these types of situations is far from clear, and it is currently impossible to give a precise answer. Bruce Epperson, an attorney who serves on the Copyright and Fair Use Committee of the Association of Recorded Sound Collections (ARSC), summarizes the situation as follows: “The general rule, which I admit has many exceptions, is that there is no common, shared, cooperative property called "information" in American society. Any written document produced after 1927 belongs to someone. Any photograph produced after 1927 belongs to someone. Any musical work produced after 1909 belongs to someone. It is probably the case that every sound recording made after 1909, musical or otherwise, belongs to someone.”

So, the answer to our first question is: yes, the materials are under copyright. If the KRMH recordings are given an arbitrary creation year of 1974 for the purposes of this example, even in the best-case scenario they are covered by copyright until the year 2044, before even factoring in the life of the author. In the worst case, the copyright would extend until the year 2069, plus the life of the author. Should the missing copyright holders appear today and “publish” their recordings in some way, then we would have to add 120 years, in which case the recordings would enter the public domain in the year 2130.

16 Besek, June, Copyright and Related Issues, p46-52
17 Epperson, Bruce, email to author, April 2010
Can they be used by the AHC? Since the recordings are under copyright, any legal use would first involve contacting the copyright holder to ask for permission. This is where the fact that these recordings are “orphans” comes into play.

**ORPHAN WORKS**

The United States Copyright Office uses the term “orphan works” to describe “the situation where the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner.”18 In his paper “The Effect of Orphan Works on Libraries: The 2005 U.S. Copyright Office Roundtables,” Jerry McBride, head librarian at the Stanford University Music Library and Archive of Recorded Sound, summarizes the current situation regarding orphan works:

Why do situations like this exist? Over the years, the United States copyright laws have extended the length of copyright... The increased term lengths, plus the instantaneous granting of copyright protection at the moment of creation, combine to create a large number of orphan works, because it can be difficult to locate the heirs thirty, fifty, or more years after an author’s death.19

KRMH-FM was sold in 1976, the call letters changed, and subsequently the ownership of the station changed several more times in the years following, making finding out who actually owns the copyright for these recordings extremely difficult. The dj who conducted the interviews cannot be found, nor can the interviewees, some of

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whom are now deceased. Without the ability to obtain consent from these parties, the degree to which archives may legally make use of the recordings is limited.

Some allowances are made for “fair use,” which Epperson describes as “legitimate, non-commercial uses for educational, academic, cultural, or social gain that do not displace or replace the commercial potential of the original work to the true owner, whoever or wherever they may be.”20 While it would appear that use of the recordings by the AHC would clearly be considered fair use, exactly how much access fair use permits archives to offer is unclear. Open-access internet availability that permits copying of the material in total is often believed to violate fair use, while on-line textual excerpts are usually thought not to. “Brief video/audio clips that still allow copying are a grey area,”21 says Epperson. While the streaming of audio clips would probably be allowed under fair use, as an attorney, Epperson is still hesitant to give the green light for such use by archives. He offers the following disclaimer: “Any on-line use beyond brief, textual excerpts for non-remunerative uses with a clear academic or scholarly purpose should not be attempted without consulting counsel familiar with the laws and court interpretations of one's home state.”22 Given the expense of consulting legal counsel, most archives, already suffering from shrinking funding or facing budget cuts, would probably chose to do nothing. “Most intellectual property officers advise their institutions to carefully avoid any off-premises availability of copyrighted recordings, no matter what their age.”23 In most cases, the tapes are returned to the shelf, unheard by the public.

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20 Epperson, Ibid.
21 Epperson, Ibid.
22 Epperson, Ibid.
23 Brooks, Only in America, p127
BUT, WILL ANYONE CARE?

Writing in 1972 about the state of sound archives in the United States, Carlos B. Hagen noted, "Copyright has become a sort of artificial, self-induced phantom for librarians." While copyright fears have kept many archival sound recordings in the vaults, private citizens have proven to be less concerned about copyright violations. The online community of aircheck collectors is an example.

Joe Roberts, who maintains an aircheck website, says, “My particular site has been up for around three years, and no one has ever told me to ‘cease and desist.’” Richard Irwin’s Reelradio.com site has had only one legal complaint from a copyright holder in its fourteen-year history, regarding an early aircheck by Howard Stern. “I understand the entire incident was quite humorous to him,” says Irwin, “and he spent a minute or so on his morning show making fun of REELRADIO. [Copyright owner] CBS, of course, claimed they had been damaged as a result of the presentation of a 15-year old aircheck. The whole thing was a farce, but the law is the law, and we were in no position to fight it.”

“A copyright violation really doesn’t exist until someone who owns the copyright complains,” says Irwin. “The plain fact is, REELRADIO wouldn't exist if the copyright owners that are still in business requested that the recordings be removed. Radio is a strange business with a very short memory. The manager of a station today probably could not care less about anything that doesn't create revenue. Recordings of a radio station from decades ago, when it was under different ownership and management, are of

24 Hagen, Struggle of Sound Archives, 45
25 Roberts, Joe, email to author, April 2010
26 Irwin, Richard, email to author, April 2010
little concern.” Irwin remains nonchalant regarding copyright violations. “Worst case, someone would ask you to remove it, but who would you damage?”

Epperson takes copyright concerns more seriously. “Information does not exist outside capitalism in this land. It is, if anything, hyper capitalist,” he warns. Institutions such as archives are more constrained by copyright law than are private citizens, because the deeper pockets of these organizations mean they have more to lose in the event of a lawsuit. “Copyright law does not provide for incarceration, so [copyright violators] have nothing to lose,” Epperson explains. “An institution like the University of Texas, for example, has a lot to lose; hence, it will follow the law.”

Nevertheless, the attitude of archivists toward copyright is probably overly conservative. Tim Brooks, chair of the Copyright and Fair Use Committee of ARSC, reminds us, “No university has ever been sued for making available early recordings, no matter what the law says.” By preserving and making available historical sound recordings, institutions can help set a precedent that such use is acceptable. “The more institutions that do so, in a way that does not infringe on rights holders’ revenues and for obviously pro-social purposes, the harder it becomes to justify overly broad laws that operate mostly on fear.”

While the recordings held by the AHC may technically be under copyright, the danger of litigation from copyright holders for making the recordings available to the public via the web is negligible. The technology of the web makes widespread

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27 Irwin, Ibid.
28 Epperson, Ibid.
29 Epperson, Ibid.
30 Brooks, Copyright and Historical Sound Recordings, p473
31 Brooks, Ibid.
dissemination of archival audio a possibility for archives, and the benefits of greater access and public visibility outweigh the risks of copyright infringement. Archives such as the AHC should be encouraged to make unique recordings available, rather than allowing them to languish, unheard by the public. To be more concerned with following the letter of the law, rather than with the preservation of the cultural record, is a misapplication of archivists’ priorities. If the preservation and dissemination of historical material potentially means the violation of laws that are “complicated, counterintuitive, impenetrable, unfair, and unreasonable,” and that offer little threat of legal consequences for either archivists or their institutions, then a reasonable argument can be made for violating the law rather than allowing the destruction of history. As Thoreau stated, “I think that we should be men first, and subjects afterward. It is not desirable to cultivate a respect for the law, so much as for the right.”

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32 Thoreau, Henry David, *Civil Disobedience*, 1849
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