

**Legal Issues for Audio Digitization**

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**Legal Issues for Audio Digitization-**

- Copyright
  - audio-specific and digital-specific issues
  - underlying rights issues
- Privacy
- Defamation
- Other Underlying Sensitive Issues (Cultural Sensitivity, Human Rights, Right of Publicity, etc.)

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**Why is © a bigger issue for Digital than for Analog?**

- More people have access to the Digital, so it's easier for a litigious person to find it and complain
- While we have clear preservation reformatting rights to make back-up copies on the same type of media, it's not crystal clear that we have those same rights if we change the substrate media from analog to digital

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**Why is © a bigger issue for Media than for Text?**

- Section 108 of the © law (Library Exceptions) treats Media different from Text
- “The rights of reproduction and distribution under this section do not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than an audiovisual work dealing with news, except that no such limitation shall apply with respect to rights granted by subsections (b), (c), and (h), or with respect to pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to works of which copies are reproduced or distributed in accordance with subsections (d) and (e).”

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**Why is © a bigger issue for Audio than for other Media types?-**

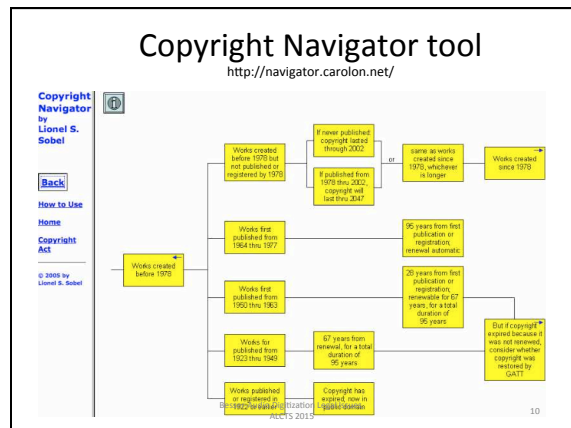
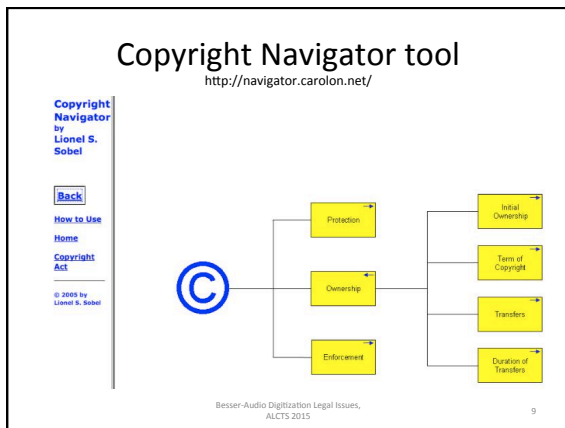
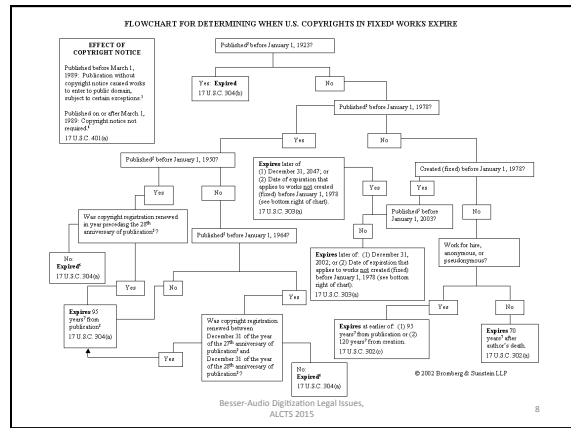
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**Just figuring out when © expires is complicated**

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### Pragmatic Considerations: Public Domain-Unpublished Works

Type of Work	Copyright Term	in US public domain as of 1/2009
Unpublished works	Life of the author + 70 years	Works from authors who died before 1939
Unpublished anonymous and pseudonymous works, and works made for hire (corporate authorship)	120 years from date of creation	Works created before 1889
Unpublished works when the death date of the author is not known	120 years from date of creation	Works created before 1889



### Peter Hirtle's "Copyright Term and the Public Domain in the United States"

<http://copyright.cornell.edu/resources/publicdomain.cfm>

**Copyright Term and the Public Domain in the United States**  
1 January 2011<sup>1</sup>

Never Published, Never Registered Works <sup>2</sup>		
Type of Work	Copyright Term	What was in the public domain in the U.S. as of 1 January 2011 <sup>3</sup>
Unpublished works	Life of the author + 70 years	Works from authors who died before 1941
Unpublished anonymous and pseudonymous works, and works made for hire (corporate authorship)	120 years from date of creation	Works created before 1891
Unpublished works when the death date of the author is not known <sup>4</sup>	120 years from date of creation <sup>5</sup>	Works created before 1891 <sup>6</sup>

Works Registered or First Published in the U.S.		
Date of Publication <sup>7</sup>	Conditions <sup>8</sup>	Copyright Term <sup>9</sup>
Before 1923	None	None. In the public domain due to copyright expiration
1923 through 1977	Published without a copyright notice	None. In the public domain due to failure to register

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### It's much more complex for Audio

- Any audio recorded before 1972 did not fall under Federal copyright law
- So these recordings are subject to State laws, which vary from state to state

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## It's much more complex for Audio

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## And others are even more upset than us

**A Seismic Ruling On Pre-1972 Sound Recordings and State Copyright Law—Flo & Eddie v. Sirius XM Radio (Guest Blog Post)**

October 1, 2014, by Eric Saltman, in copyright, derivative liability

By Tyler Orlan

[Eric's intro in Tyler's cover email to me, he told me the ruling was "hug", as in 1906-San-Francisco-earthquake hugs. It literally could result in undoing 75 years of copyright history.]

A federal court in California has held that a California statute, Civil Code §980(a)(2), protects sound recordings fixed before February 15, 1972 against unauthorized public performance. The ruling is a victory for Flo & Eddie, Inc., a corporation that owns the rights to sound recordings made in the 1950s by the musical group The Turtles, including the hit song "Happy Together"; and a defeat for Sirius XM Radio, which tried to convince the court that California law only prohibited unauthorized reproductions and sale, and did not extend to public performances. More generally, it is a huge victory for sound recording copyright owners and a big defeat for broadcasters, one that threatens to undo a 75-year-old consensus that state law does not provide a public performance right for sound recordings.

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## Fall 2014 Calif Court Ruling Flo & Eddie vs. Sirius XM Radio

- Pre-1972 sound recordings don't include public performance rights
- In California, any digital radio needs to separately negotiate licenses with audiorecording (performance) rightsholders for any works fixed before February 15, 1972

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## Background: Underlying Rights

- Archives may have a right to the whole but not have a right to the components.
- Third party information, underlying rights are often granted for a limited time or a particular kind of use, or a particular geographic region. This is particularly salient for multimedia works.
- *Eyes on the Prize*, I-early 1987; II 1990
  - became unavailable due to lapsed underlying rights by mid 90s
  - Jan-Feb 2005 *Eyes on the Screen* civil disobedience
  - Aug 2005 Grants for clearing rights (\$600K Ford, \$250K anonymous) announced
  - Needed to clear video from 82 archives, 273 stills from 93 archives, 120 song titles, many of which weren't able to be cleared (so were either silent, or had substitutions)
  - \$850K was just for fees for content-holders, and didn't cover all the research, writing, begging, legal wrangling, ...

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## photos in Barbara Kruger works-

It's a Wonderful Life

Kruger's Untitled 1990 (It's a small world but not if you have to clean it)

underlying image from Thomas Hoepfer's "Charlotte as seen by Thomas." Originally published in German photography magazine Foto Prisma in 1960

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## Re-showing 1970 Earth Day documentary

The Prairie Killers Besser-Audio Digitization Legal Issues The Chain of Life

This episode focuses on the prairie of the... A road to the... This, the first episode in the series, was...

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## Underlying Rights are everywhere

- The copyrighted music playing in the background of an audiotaped interview (even someone passing by in the street with a boom box or loud car radio)
- The music used in radio show where the producer only got one-time broadcast rights, 10-year non-theatrical distribution rights, ...
- The web page that displays a copyrighted photo by linking to it (not actually copying it)
- ...

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## Underlying rights

- Impacts many different types of records and collections
  - 3rd party information, underlying rights (from collage to incidental capture (music playing in background of famous person's home movie))
  - Rights granted for limited time or for particular use or particular geographic region
- Often impacts the Archive's ability to show works to researchers; sometimes inhibits the Archive's ability to make preservation copies
- Some European countries have exemptions for "incidental capture"

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## This is not only a problem for film/video producers, but also for archives & exhibitors

- If the producer relies upon "fair use" or "public domain" instead of clearing ©, everyone downstream insists upon indemnification
- A distributor won't handle a work that hasn't explicitly cleared every tiny © hurdle
- An exhibition venue (a broadcaster or even an archive) will be reluctant to exhibit a work unless every single sub-piece has cleared ©
- A funding agency often won't give resources to an archive wanting to restore a work unless they're convinced that it can be shown or copied without © restrictions
- Even professional organization such as AMIA insists that we sign a contract stating that we've cleared © for every little thing we want to show as part of a conference Talk-

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## AMIA Conf Recording Contract

- 1. You hereby grant AMIA permission to record, edit, transcribe, duplicate, distribute, and publicly perform your presentation as delivered at this program, in any and all media now existing or hereafter developed, throughout the world.
- 4. You warrant that your presentation and any other material you submit are original with you, and/or licensed for this purpose, and that their publication will not infringe on the rights of others, and that you have full power to grant this license. Should your presentation or other materials require permission from another for use by AMIA, you agree to obtain that permission from the copyright proprietor consistent with this Agreement and, on request, to provide a copy of it to AMIA.

(underlining added)

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## SAA Contract for "Legal Issues" curriculum development

- 3. I agree not to incorporate into the course materials package copies, concepts, models, or materials from sources that are copyrighted and for which permission has not been secured.
- 2. I agree that SAA shall own copyright to the course and all related materials which are identified in this agreement. I will request written permission from SAA prior to using any part of the course materials for any other purpose than an SAA-sponsored workshop

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## ALCTS Speaker Agreement Letter

- "...You represent and warrant that you have secured permission to use or reproduce all materials and content not in the public domain or by you. You further represent and warrant that you are the sole creator and copyright owner of the presentation and have full power to enter into this agreement. You shall indemnify and hold ALA harmless against loss, including reasonable attorney's fees, or liabilities occasioned by any breach of these warranties."
- (what about **Fair Use**?)

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## How to Cope /© Complexity? (1/3)

- Don't look for absolutes; employ Risk Assessment
- Try to anticipate issues before they become problems
  - Whenever possible, get donor and other agreements and releases at point of accession/ingest that cover potential future issues. If you record Oral Histories, try to get a summary of the release on the recording itself.
  - Any restrictions in Donor Agreements should be "machine actionable", and try to have your system send notices that it is time to lift a restriction
  - If appropriate, get donors to execute Creative Commons licenses
- Show good faith
  - Act in an ethically sound way
  - Be as concerned about your responsibilities to stakeholders as you are to following the letter of the law
  - Try to balance creators' needs (© & privacy) w/users' needs (access)

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## How to Cope /© Complexity? (2/3)

- Develop internal guidelines and try to follow them
  - Internal guidelines should be close to "best practices" in the archival field (or related fields)
  - Guidelines should include "due diligence"
- Keep detailed records of any rights searches you've done, any release forms received, etc.
- Be clear that if you've made mistakes, you will try to act quickly to rectify them
  - For Orphan works put online, state clearly that a known rights holder should contact you
  - Have a take-down policy that lets you respond quickly to what appear to be legitimate requests

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## How to Cope /© Complexity? (3/3)

- On streaming or download pages, state clearly that:
  - you have put in significant time trying to verify and credit all appropriate parties
  - you would appreciate any corrections because you want to be accurate
  - if someone feels that their rights have been violated, they should contact you immediately (and give them a contact email address)

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## Dealing with Counsel

- A single lawyer assigned to a much larger entity than the Library (a city government or university) might not be well-versed in © law
- Lawyers tend to be over-cautious; they want to prevent even the possibility of any trouble
- A lawyer who does not work regularly with libraries probably does not understand library world mandates or ethics ranging from access mandates, to donor or 3<sup>rd</sup> party protection, to dissemination of records, to maintaining authenticity
- If your lawyer is not regularly familiar with our field, you will need to stress the aforementioned mandates/ethics, and you may need to point them to: lawyers who regularly work with the field, online resources and guides or particular cases in the area of issue (© section 108, fair use, defamation, etc.)
- Your Counsel should be working for you and with you

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## Well-intentioned practice (W-IP) for putting digitized collections of unpublished materials online

- Prepared by OCLC Research
- Endorsed by SAA Council
- "to develop streamlined, community-accepted procedures for managing copyright in the digital age that would cut costs and boost confidence in libraries' and archives' ability to increase access to unpublished materials online."

-<http://www.oclc.org/news/releases/2011/201153.htm>

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## There will never be a single Formula for handling © Issues

- © Law is too complex, and hinges on what may seem like minor details that differ from one collection to another
- In each group of collections, we need to assess risks, and ideally follow a copyright audit check-list

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## Columbia U © Advisory Office

- Fair Use Checklist  
<http://copyright.columbia.edu/copyright/fair-use/fair-use-checklist/>
- Checklist on Copies for Private Study  
<http://copyright.columbia.edu/copyright/libraries-and-copyright/copies-for-private-study/>
- Checklist on Copies for Preservation or Replacement  
<http://copyright.columbia.edu/copyright/files/2009/10/copyrightchecklist108preservation.pdf>

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## Privacy is part of Library and Archive Ethical Standards

- “Archivists protect the privacy rights of donors and individuals or groups who are the subject of records. They respect all users’ right to privacy by maintaining the confidentiality of their research and protecting any personal information collected about them in accordance with the institution’s security procedures.”

-<http://www2.archivists.org/standards/code-of-ethics-for-archivists>

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## Protecting Privacy of Users

- ISPs, corporate content providers, & libraries all have written policies designed to protect the privacy of their users
- One of the main techniques that libraries and some ISPs use is to delete information (circulation records, older email) regularly, so that they won’t have it when a subpoena comes
- Part of a Data Retention Policy includes eliminating data

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## EFF’s “Develop a Data Retention and Destruction Policy” (1/3)

<https://ssd.eff.org/your-computer/protect/retention>

- This is called a “document retention policy,” and it’s your best defense against a subpoena — they can’t get it if you don’t have it. And the only way to make sure you don’t have it is to establish a policy that everyone follows. Set a clear written policy for the length of time documents are kept (both electronic and paper documents). Having a written policy and following it will help you if you are accused of destroying documents to hide evidence.
- **Web Browsers:** You need to take regular steps to clear out all the stuff it’s been storing, such as a history of the web sites you’ve visited and the files you’ve downloaded, cached copies of web pages, and cookies from the web sites you visit... In particular, it’s a bad idea to have the browser save your passwords for web sites, and it’s a bad idea to have it save the data you’ve entered into web forms.

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## EFF’s “Develop a Data Retention and Destruction Policy” (2/3)

- **IM:** Many instant messaging (IM) clients are set by default to log all of your IM conversations. You should check the software’s preferences so you know what it’s doing, and figure out how these logs fit into your retention policy. Will you clean them out every month? Every week? Or will you take the simple route and just set the preferences so that your IM client doesn’t log any messages at all?
- **Minimize computer logging:** If you run a network, an email server or a web server, you should consider reducing or eliminating logging for those computer and network services, to protect the privacy of your colleagues and your clients.

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## EFF’s “Develop a Data Retention and Destruction Policy” (3/3)

- **When you delete computer files, really delete them:** When you put a file in your computer’s trash folder and empty the trash, you may think you’ve deleted that file — but you really haven’t. Instead, the computer has just made the file invisible to the user, and marked the part of the disk drive that it is stored on as “empty” — meaning, it can be overwritten with new data. But it may be weeks, months, or even years before that data is overwritten, and the government’s computer technicians can often retrieve data that has been overwritten by newer files. Indeed, no data is ever really deleted, just overwritten over time, and overwritten again.
- **Summary:** For example, your written policy could mandate that, at the end of each week you should:
  - Delete any emails or other documents that are scheduled for deletion under your policy.
  - Clear your browser of all logs.
  - Run your secure-deletion software to overwrite all of the newly deleted stuff.

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### 3<sup>rd</sup> Parties & Personal records

- As number of records increases w/digital, so does the amount of personal (as opposed to corporate or governmental) and 3<sup>rd</sup> party material
- A similar increase in personal and 3<sup>rd</sup> party material comes from collecting email, chats, tweets, etc.

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### Protecting Privacy of Donors & 3<sup>rd</sup> Parties

- The only way to try to protect this material is:
  - De-accessioning (but sometimes this involves important records where only small parts are sensitive)
  - Embargoing until the sensitive becomes far less sensitive (ie. Named people die)
  - Redacting the sensitive parts
    - Within the archival records
    - Upon disclosing the records
  - Coding names to protect privacy, human rights, prevent defamation, ...

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### Protecting Privacy from Govt Intrusion

- Patriot Act & National Security Letters
- Promise of Confidentiality vs complying w/ subpoena
  - Subpoena of Boston College Oral Histories <http://chronicle.com/article/The-Whole-Story-Behind-the/128137/>
- Compliance w/subpoena possibly endangering lives
  - Subpoenaing records of undercover agent <http://www.courthousenews.com/2011/12/07/42035.htm>

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### Defamation (libel & slander)

- In some jurisdictions, even non-digital oral histories constitute “published” material in terms of defamation (Calif Supreme Court ruling on Bancroft <http://www2.archivists.org/news/2007/california-court-rules-on-defamation-and-oral-history>)
- So, web-published oral histories (and likely other types of records) should certainly be considered “published”, and subject to defamation suits

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### Other Underlying Sensitive Issues— Examples (1/2)

- Human Rights
  - Genocide testimony (can result in revenge on family members)—Rwanda
  - Documentation of oppression of women (Witness in Congo, RAWA in Afghanistan)
- Laws of different countries
  - France, Germany--Nazi advocacy or revisionism
  - Turkey--Armenian records about post-WWI era using word “genocide”

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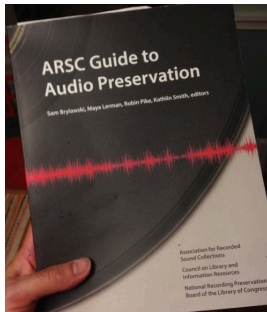
### Other Underlying Sensitive Issues-- Examples (2/2)

- Pornography
- Right of Publicity
  - “use of a person’s name, likeness, or other personal attribute”
  - Each state has a different law on this
- Traditional Knowledge (new WIPO protections proposed)
  - tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields
  - knowledge systems, creations, innovations and cultural expressions which: have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and, are constantly evolving in response to a changing environment

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### Further Reading



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### Further Reading

- Brandon Butler, “Audio Preservation: The Legal Context”, chapter 8 of ARSC Guide to Audio Preservation, CLIR, May 2015 <http://www.clir.org/pubs/reports/pub164>
- Brandon Butler and Peter Jaszi, Fair Use and Sound. Recordings: Lessons from Community Practice, Appendix A of ARSC Guide to Audio Preservation, CLIR, May 2015 <http://www.clir.org/pubs/reports/pub164>

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### Maybe we have to violate the law?



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### Legal Issues for Audio Digitization

- Peter Hirtle's © Chart <http://copyright.cornell.edu/resources/publicdomain.cfm>
- <http://www.librarycopyrightalliance.org/>
- International Study on the Impact of Copyright Law on Digital Preservation (2008) <http://eprints.qut.edu.au/14035/>
- <http://besser.tsoa.nyu.edu/howard/Papers/interpares-copyright.pdf>
- <http://www.copyright.gov/orphan/>
- <http://www.section108.gov/>
- <http://besser.tsoa.nyu.edu/howard/Copyright/commons.html>
- [http://books.nap.edu/html/digital\\_dilemma/](http://books.nap.edu/html/digital_dilemma/)
- <http://www.copyright.gov/>

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<http://tinyurl.com/alctsac15>

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