The CDLC has joined other regional library councils to bring you the “Ask the Lawyer!” service, focusing on copyright, not-for-profit, and library operations issues.

How does the service work? A member and the Council ask a retained attorney to review our library-related questions. If the member agrees, the answer may be published as non-confidential guidance, or you may get a confidential reply that is shared only with the member and the Council (as joint clients).

Questions can address a range of issues, from privacy of circulation records, to concerns about employee safety. The only exceptions are current and threatened litigation (you need your own attorney to handle that), matters not relevant to libraries, and matters that would pose a conflict of interest with the Council.

So you can see the range and type of response to the publicly shared questions, below are two examples of published guidance from the service.

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**MEMBER QUESTION**

We have video recordings of campus speakers that we are interested in digitizing and publishing to an online platform. They are currently on VHS and/or DVD and available in the Library to be checked-out.

The speakers include writers and poets who recite their published, copyrighted works to the college audience. **Is it possible for us to post the recordings of these readings (as well as question and answer sessions) online?** Most likely there was no signed license agreement when filmed.

**WNYLRC ATTORNEY’S RESPONSE**

Part of the mission of higher education institutions is to bring important, provocative, and enlightening speakers to their communities. Over the years, this results in an impressive roster of authors, artists, professionals, politicians, comedians, dignitaries, and civic leaders, having spoken on campus. Sometimes, all or part of this roster was captured on film, video, or audio recording.

The rights to those recordings—and what can be done with them in the digital age—can present a complicated situation. Each individual recording comes with a suite of considerations that can make a digitization project difficult. But in a scenario like the one posed by the member, critical points of analysis can be assessed, so a way forward is found. Here are those critical points:

Assessment Point #1: Who owns the copyright (to the recording)?

First, it is useful to establish who owns the copyright to the actual recording. Since copyright to a recording vests in the person who created the recording, not the person being recorded (unless it was a selfie), this is sometimes easy to assess. As we say in the biz: “who pushed the ‘record’ button?”

If the recording was made by an employee of the institution, and there was no contractual agreement otherwise, then the copyright to the recording is owned by the institution. If it was
recorded by a student who just happened to be there, or a third-party attendee, the school doesn’t own it (which becomes an issue in the subsequent steps). Awareness of this factor is a good starting point for what lies ahead.

If your institution owns the copyrights to the recording, you can skip points #2, #3 and #4, below.

Assessment Point #2: Is this recording part of the library’s collection?
Just because the educational institution owns the physical copy doesn’t mean it is part of the library’s collection. For purposes of numbers 3 and 4, below, if your institution doesn’t own the recording, in order to convert and/or conserve it under Copyright Act Section 108 (the section giving special rights to certain libraries), the original recording must be formally cataloged and included in the library’s collection.

Assessment Point #3: Is the library in a position to convert the copy to a digital medium?
If the copy is formally a part of the library’s collection, and it is on a format considered “obsolete” under section 108 of the Copyright code (so long as the devices are no longer manufactured, VHS is, for example, is considered “obsolete”), the library may convert it to a digital format, and loan it out as provided by the §108. NOTE: this does NOT mean you can include it in an online digital collection, for anyone to access any time, but it takes you one step closer to it!

Assessment Point #4: Does the library need to conserve the copy?
If the original copy is deteriorating, it may be duplicated as set forth in Section 108. NOTE: this also does NOT mean you can include it in an online digital collection, but it makes sure than once you can, your original copy is safe, and backed up for posterity.

Assessment Point #5: Did the institution have any right to record, and/or to use the image of the person who was recorded?
This requires scouring the contracts of the institution. Most speaker contracts these days include terms controlling the right (or not) to make a recording, but, as reflected in the scenario posed by the member, in the past this was not the case. This assessment is critical, especially since at academic institutions, other departments at the institution may want to use the content to promote and celebrate the institution…but in New York, the commercial use of a person’s image, without their written consent, can carry both civil and criminal penalties.

Assessment Point #6: Are there any concerns with trademark?
The risk posed in #5 is increased if the speaker’s name and image is currently being used for purposes of a trademark (like “Maya Angelou” which is protected under Federal Trademark 86978575), or if a trademark was on display during the presentation. This means any arguably commercial use (like selling copies, putting it on the school’s website or catalog, or selling a t-shirt promoting the collection) should only be done in consultation with an attorney.

Assessment Point #7: Are there other copyright concerns?
This is the meat in the sandwich of the member’s scenario. Going through the above steps, even if an institution:
1) owns the recording;
2) includes the recording in the library’s catalog;
3) meets the 108 criteria to convert it from an obsolete format;
4) meets the 108 criteria to make preservation copies;
5) has permission to use the name and likeness of the speaker in any and all formats, for whatever reason, forever;
6) verifies there are no trademarks involved…
…if the speaker read a copyrighted work during the recording, that “performance” of a copyrighted work MIGHT be subject to its own copyright, and thus, bring with it a host of new restrictions, cramping the bounds of your digital usage.

What a pain, right?

Fortunately, there is solution. For any library at an educational institution contemplating digitizing the institution’s recorded guest speakers, if the written record doesn’t reflect clear permission to record and use the content, writing to the original speaker, or the current copyright owners, to ask for permission, may be the best solution. A sample request, with the variables notes in CAPS, is right here:

Dear NAME:

You may recall speaking at INSTITUTION on DATE. During that performance, you read [INSERT TITLE(S)] (hereinafter, the "Works").

Our on-campus library seeks to include a copy of that performance, recorded on FORMAT, in an online, digital collection to be called TITLE (the “Collection”). We would like to include the recording in an online Collection, so it may be accessed by the public, for purposes of enjoyment and scholarship.

To that end, we ask the following:

1. Are you the sole copyright owner of the Works? Yes No

2. If you are not the owner, do you retain the right to give permission for their reproduction, distribution, performance, and display? Yes No

If you are not the copyright holder, or do not hold the rights, please let us know who does:

__________________________________________________________

If you are the copyright holder, please consider the below requests:

3. Copyright License
May [INSTITUTION] have a non-transferable, irrevocable license to reproduce, duplicate, display, perform, and, by virtue of the recording being part of the Collection, prepare a derivative work of, the Work(s), solely as performed by you and recorded by INSTITUTION on DATE? Yes No

SIGNATURE:_____________________________

DATE:_____________________

Image Release
We would like to use your name and picture to promote the Collection. May [INSTITUTION] use your name and likeness, including but not limited to photos or images of you, the recorded sound of your voice, for the purpose of promoting the Collection in hard copy, on the institution’s website, and via any other medium existing now, or later developed? Yes No

SIGNATURE:_____________________________
Thank you for considering this request. I included a self-addressed, stamped envelope, in the hope of a favorable reply.

Of course, the risk of asking is that they say “no”…and that they demand you stop using the recording of the derivative work! That is why in all of this, any contracts should be assessed by an attorney, so the rights of your institution are protected, and any requests for permissions should be carefully considered prior to submitting the request.

So, the answer is (and I appreciate it took a long time to get there!): unless the recording were news coverage—which is assessed under a different array of laws—permission (given either at the time of the arrangement, or many years later) for digital duplication and distribution is required, but can be arranged well after the event.

1 NOTE: This approach is for educational institutions that were also the original recorders of the work to be digitized, who are seeking a wide degree of latitude on their use. This approach is NOT suggested for digitization efforts involving content generated by third parties at non-educational institutions. It also does not cover recordings of musical works (that would be a whole other answer!).

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MEMBER QUESTION

We have a request from a patron from another state for scans or photocopies of music scores that we own and that are still under copyright. They are rare and only a few libraries have them across the country. The patron does not intend to perform the music, only to study the scores. Is it fair use to copy or scan them for the patron who is writing a doctoral thesis?

WNYLRC ATTORNEY’S RESPONSE

Short answer: The proposed copying would not be a permitted, duplication or Fair Use without some additional steps consistent with the four Fair Use factors.

Long answer: This is a great question, as it marries the practical consideration of access with the scary question of a liability for infringement. To answer it, there are a few initial points of priority….

First, it is critical to note that Section 108 (a) of the Copyright Act, which would normally allow for one copy of a work to be provided to fulfill this request, expressly excludes musical works (see Section 108 (i)).

Second: Because of the Section 108 (a) exclusion, it is important to distinguish: while the patron may have a Fair Use defense if they duplicate the work for the purposes of scholarship, the library, in simply making the copy to provide easier access to a remote patron, might not.

Third, as plaintiffs can sue “innocent infringers,” careful steps should be taken to ensure the library could not be viewed as a part of the chain of infringement, if the patron ends up not having a valid Fair Use defense for any copy or derivative work they generate.
Fourth, while this scenario does not state the original copy requires archiving, it sounds as if you have a rare and precious copy, so we’ll draw a bit from the law, case law and guidance covering the protection of deteriorating/rare documents.

And now...how do you enable the proposed access, but keep the library safe? By ensuring 108(c) and the “Fair Use” factors are on your side, whether you send them a scanned copy, or loan a physical copy.

Digital copy
Informed by the latest case law and guidance, the following steps could help claim Fair Use for providing the proposed copy digitally:

Step 1: As the Code of Best Practices for Fair Use in Academic and Research Libraries (www.arl.org/focus-areas/copyright-ip/fair-use/code-of-best-practices) puts it: “Providing [digital] access to published works that are available in unused copies on the commercial market at reasonable prices should be undertaken only with careful consideration, if at all.” It is essential to verify that the works, or a licensed copy, are not commercially available. This is essential for 108(c), too.

Step 2: It is best if the transformation of format is not an ad hoc effort, but rather is part of an effort to promote a special resource of your library. Making the digital copy a part of “special collection”—for instance, of rare music scores—will give you a stronger Fair Use defense.

Step 3: Again from the Code: “The Fair Use case will be stronger when the availability of the material is appropriately publicized to scholars in the field and other persons likely to be especially interested.” In other words, once you have the collection digitized, don’t let it be just that ad hoc project—promote it.

Step 4: Use appropriate technological controls (digital watermarks, etc.) to restrict the access, limit duplication, and ensure proper attribution of materials in the collection. That way, any eventual copying or derivative work generated by the patron is separate and distinct from the access provided by the library.

Step 5: As with any digital collection, make sure the library has an easily found way for people to register privacy or intellectual property concerns related to digital collections.

Physical copy
What if you just want to provide them with a physical copy? Following Section 108(c)’s rules for duplicating deteriorating copies, you can generate a copy for preservation purposes, loaning it to them with the expectation that it will be returned. Just take care that the work is not commercially available, and that the original copy is not available while the preservation copy is out on loan.

[NOTE: 108(c) bars a digital copy made on this basis from leaving your institution.]

Overall
The bar on Section 108 (a) applying to musical works makes this a bit more challenging than the usual duplication request, but with some care, access can be provided.

Further, if the patron wants to make a copy of what your library loans them (either digitally, or in hard copy), if their use is as you describe, they may have their own Fair Use defense. This will mean both the library and the patron can stand on separate, but solid, copyright ground.

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