

# Sound barriers: Oral history, copyright, and the OHRRG experience at the State Library of Western Australia

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## **Abstract**

**Introduction:** From 2010 to 2013 the State Library of Western Australian undertook a project to digitise its significant collection of oral histories. One of the key outcomes of this project was to make digitised oral histories available for access online; however copyright concerns were a major barrier to this outcome. Oral history as a medium is unique among the original materials collected by libraries, in that:

- Copyright in oral histories is not clear-cut, and different communities seem to have different understandings of this; and
- Oral histories are often bound by additional limitations, such as access and embargo agreements, informed consent practices, and privacy concerns

The purpose of this paper is to explore the challenges of copyright and oral history, and share how SLWA addressed these challenges to make digitised oral histories available online.

**Methods:** Detailed analysis and desktop research was undertaken, into SLWA's oral history collection, associated documents and existing agreements as well as relevant legislation, case law, and existing industry/community practices. Drawing on this, innovative approaches to the copyright issues inherent in digitising oral histories were developed, including:

- Policy on risk management, the interpretation of legacy agreements, and the public benefit in making materials available online.
- Oral history-specific protocols on when further permissions are or are not required.
- Protocols for orphan works, and notice and take-down procedures.
- Approaches for navigating the multiple interpretations of copyright in oral histories that exist within the community.

**Results:** It was found that there is uncertainty around rights in oral history recordings, in both a legal and practical sense, and a variety of approaches and understandings within the industry and community. While a challenge, this was not a barrier to achieving the outcomes of the project. The project's target for making interviews available online was met in 2013, and additional interviews continue to be released to the public. As a result, the voices and memories of Western Australians dating back to 1875, including artists, intellectuals, business people, immigrants, soldiers, families and ordinary people, whose stories are often lost to history, are now available online for everyone in the world.

**Conclusions:** The uncertainty around copyright in oral history is inconvenient, but it is not insurmountable. Through an understanding of the history of your collection, planning, and a consistent approach, it is very possible to tackle the copyright barriers to making oral history interviews available. There also seems to be great support for libraries to make oral histories available – nearly every rights-holder contacted for permission gave it without hesitation.

**Relevance:** Copyright and intellectual property concerns are a major barrier for any mass digitisation or digital collecting project. This is particularly true with oral history, where there is uncertainty around where copyrights exist, who owns them, and what can therefore be done with the oral history. Understanding and overcoming these challenges extends the boundaries of what can be achieved in providing access to content for clients.

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## **Introduction**

Digitisation supports key strategic purposes for libraries and other collecting institutions – by preserving content in collections and reducing handling of fragile artefacts, and by enabling greater public access to collections. Oral histories are strong candidates for digitisation. They are often unique materials existing in only one or a handful of copies, and are created on fragile media which run the risk of decay and obsolescence. However, copyright is a barrier for digitisation and access to oral histories. This is more so because the subsistence and ownership of copyrights in oral histories is uncertain in Australia. Established advice exists for oral histories in countries such as the United Kingdom and the United States, but copyright is slightly different in every jurisdiction, and there is a lack of well-accepted advice in Australia.

This paper discusses oral histories, copyright and digitisation, in the context of a mass oral history digitisation project undertaken at the State Library of Western Australia (SLWA). It also focuses on the Australian context – how copyright subsists in Australian oral histories, under Australian legislation. While it discusses legal issues, nothing in this paper is intended to constitute legal advice.

## **The OHRRG project**

SLWA's oral history collection was established in 1961, and is the largest in Australia outside of the National Library. The collection contains over 15,000 hours of recordings, representing interviews with over 7,500 Western Australians, and includes recollections dating back to the late nineteenth century. Recordings are held on a range of different formats, such as reel-to-reel tapes, digital audio tape, CDs, and born-digital formats, but over 90% of the collection is held on cassette tape.

From 2010 to 2013, SLWA undertook a project to digitise the oral histories held on cassette tape. This project was supported by a consortium of Western Australian historical associations and other stakeholders – the Oral History Records Rescue Group (OHRRG). The group sought, and was successful in receiving, funding from Lotterywest to progress the project. The primary purpose of the OHRRG project was preservation, but a key secondary purpose was to provide online access to digitised oral histories.<sup>1</sup> The initial target for the project was decidedly low – just 200 voices made available online. This reflected the uncertainty at the time around oral histories and copyright, and the anticipated difficulties in clearing copyright permissions to make interviews available online.

## **Copyright and oral history**

An oral history is a recording of a “planned interview with a person whose memories and perceptions of historical events are to be preserved as an aural record for future generations” (Reitz n.d.), generally in audio format, although video is becoming common. Practical elements distinguishing an oral history are:

- A recorded interview in question and answer format
- Conducted by a well-prepared interviewer with knowledge of the subject being discussed
- Conducted with a knowledgeable interviewee speaking from first-hand experience
- On a matter of historical interest
- That is made available to other researchers (Robertson 2006, p. 2)

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<sup>1</sup> For a detailed discussion of the history and technical details of the OHRRG project, see Beament, P & Blackford, L 2013, 'The Oral History Records Rescue Group (OHRRG) digitisation project at the State Library of Western Australia'. Paper presented at the IFLA World Library and Information Congress 2013. Available at: <http://library.ifla.org/244/1/146-beament-en.pdf> [30 November 2014].

The particular nature of an oral history interview influences the copyright that may subsist within it.

There is uncertainty under Australian legislation and case law as to the exact subsistence of copyrights in oral histories. As Robertson (2006, p. 15) states, “the question of who owns copyright in oral history is open to debate”. In fact, legal advice received by SLWA, when first reviewing our own practices towards copyright in commissioned interviews, stated “the meaning and effect of the law of copyright in the areas you have mentioned is rather unsettled.” (Crown Law Department 1982, pers. comm., 7 January).

### **Rights in the sound recording**

In Australia, copyright exists in sound recordings as “subject-matter other than works” (*Copyright Act 1968* (Cth) s 89). This copyright is separate and additional to any rights in the works that are recorded in that sound recording. The owner of the copyright in a sound recording is the “maker” of the recording; that is, the person who owned the first record embodying the recording, when that record was produced (*Copyright Act 1968* (Cth) s 22; s 97). Where a sound recording is commissioned, the person or body commissioning the recording would generally be the copyright owner (*Copyright Act 1968* (Cth) s 97). This extends to sound recordings made in the course of a person’s employment, as well.

For oral histories, this means that rights in the sound recording may be held by the oral historian, their employer, or the person or agency commissioning the interview, depending on the exact circumstances.

### **Copyright in underlying works**

Whether copyright subsists in the words of an oral history as a “literary work”, and who would own that copyright, is less clear. The *Copyright Act 1968* does not provide sufficient detail for the specific case of oral histories, and copyright in oral histories does not ever seem to have been addressed in Australian courts. Relevant cases relating to copyright in interviews or the spoken word, both in Australia and related jurisdictions, tend to address interviews and spoken words which are not recorded as sound, or the uses that can be made of recorded interviews, rather than the subsistence and ownership of copyright (Adeney 2011; MacQueen 2005).

In the absence of certainty, however, communities of practice still exist. In Australia, there seem to be two main interpretations of copyright in oral histories:

1. There is no copyright in any underlying work in an oral history interview, and the only copyright is that in the sound recording; or
2. The words in an oral history interview are protected as a literary work.

### **No copyright in any underlying work**

The interpretation that there is no copyrightable underlying work seems to stem from a narrow interpretation of the requirement that a work must be fixed in a material form to be copyrightable, and that fixing the work in material form must be done by the author. That is, in order to be considered the author and hold copyright in a work, a person must both create the work and be responsible for fixing it in a material form, for example by writing it down or recording it. Australian courts particularly have a history of interpreting authorship in this narrow way, requiring both creation and fixation (Adeney 2011).

Under this interpretation, a person who recorded themselves talking would be the author and rights holder of any underlying literary work. However, because an oral history interviewee

is not responsible for causing the words they are speaking to be recorded, they would not be considered to have authored a work for copyright to subsist in.

This interpretation is accepted in some sectors. For example, Murdoch University's Copyright Office advises that "there is no copyright in the spoken word, only in its tangible expression as a 'work', for example a transcription or sound recording. The copyright owner of that tangible expression is usually the person who physically makes the recording or transcription, not the person who speaks the words." (Murdoch University Library and Information Services n.d.) It is a common interpretation in the media industry, too. For example, Walker (2000) states, "following the requirement of material form, a person who makes a speech or who is interviewed by journalists has no copyright in what he or she has said unless the speaker or person interviewed has used notes."

### **Words in an oral history are a protected literary work**

The other interpretation is that the words in the oral history are protected as a literary work. This is the interpretation to which the Australian oral history community largely subscribes. Robertson (2006, p, 15) states that "the most common interpretation... is that there are two copyrights to be considered. There is copyright in the physical sound recording that usually belongs to the interviewer who supplied the recording media. There is also copyright in the recorded words." The Australian Copyright Council (2012) similarly advises that "There are two distinct copyrights in an oral history recording: one in the words of the oral history and one in the recorded sounds". In fact Murdoch University, quoted above stating there is no copyright in the underlying work, goes on to suggest that perhaps ethically, if not legally, the interviewee should have some rights in the interview (Murdoch University Library and Information Services n.d.).

The exact ownership of rights in the literary work is also not always clear. The Australian Copyright Council (2012) suggests: "Where an oral history is given as a monologue which the interviewer merely records, copyright in the interview will be owned solely by the person being interviewed. However, where an interview is structured, or where the taking down of the history has involved some skill on the part of the interviewer, copyright may be owned by both the interviewer and the person being interviewed, or even by the interviewer alone." Early commentators from the oral history community simplified this as the interviewer holding copyright in the sound recording, and the interviewee holding copyright in the words of the interview (Banki 1979). The ethics of oral history tend to emphasise the interviewee's rights and needs over that of the interviewer (Layman 2010), and this can lead oral historians to ignore any rights they themselves might have in an underlying work. Other commentators have suggested that the copyright "belongs to both the interviewer and the interviewee as joint contributors to the structure and content of the interview" (Robertson 2006, p. 15).

In addition, if either party is creating the oral history as an employee in the course of their ordinary employment, then the copyright in any underlying literary work would be vested in their employer (*Copyright Act 1968* (Cth) s 35).

## **Other potential rights**

Moral rights were introduced into the Copyright Act in 2000, and provide separate protections for authors of copyrighted works. These include the right to be attributed as an author, and the right to ensure that a work is not subjected to derogatory treatment. Moral rights only exist in relation to copyrightable material, and can only be held by natural persons, not corporations. They cannot be transferred to other parties or disposed of as copyright can (Arts Law Centre of Australia 2012).

Standard industry practices in libraries around identifying and describing collection materials, and respecting the integrity and provenance of materials, should generally ensure that any actual or potential moral rights in an oral history are not infringed.

Performer's rights were introduced in Australia for certain live performances occurring from 1 October 1989 onwards. These include "the reading, recitation or delivery of a literary work, or part of such a work, or the recitation or delivery of an improvised literary work" (*Copyright Act 1968* (Cth) s 248A). Under these changes, performers can grant or refuse permission to record, reproduce and communicate their performances, and have extensive rights relating to unauthorised recordings of performances (Australian Copyright Council 2014).

Amendments made in 2004 also gave performers part ownership of copyright in sound recordings (but not video) of their live performances, except where these were commissioned. These amendments applied to live performances occurring from 1 January 2005, but also altered the ownership of copyright in pre-existing sound recordings. For non-commissioned sound recordings of live performances made before this date, the performers now share copyright with the makers of the sound recording. However, the performers' rights in pre-existing recordings are limited. The prior copyright owner can keep exploiting the copyright as they did before; and the performers will have very limited capacity to control the use of the recording (Arts Law Centre of Australia 2012b).

It is not clear whether an oral history interview would qualify as a live performance. The conversational and informal nature of the interview might suggest that it is not a performance, and it is a broad interpretation to call a conversation an improvised literary work, as opposed to a speech or a lecture. All oral histories should be authorised, though, avoiding the restrictions on unauthorised recordings. Even if an interview did qualify as a protected live performance, this would really only affect oral histories created after 2005.

## **Duration of copyright**

Oral histories are usually unpublished materials, and copyright can last indefinitely for unpublished materials under Australian legislation (*Copyright Act 1968* (Cth) s 33; s 93). In any case, the relatively recent development of oral history as a discipline, and of commercially-available sound recording technologies, means that most oral histories in Australia would not have been created long enough ago to have moved into the public domain. It is likely that most, if not all, oral histories in Australian collecting institutions are still in copyright, and will remain so for years to come.

## **Interview agreements**

Oral history interviewees are often asked to sign various kinds of agreements or conditions of use forms, as part of their participation in the interview. This is considered good ethical practice (Oral History Australia n.d.), as well as legally prudent (Australian Copyright Council 2012). Almost all commentators recommend establishing a written agreement clarifying the ownership of rights, and approved uses of the interview.

Agreements may formalise the ownership of copyright in the interview, and can alter what might otherwise be the standard subsistence of rights. Because copyright is property, and can be assigned and given away (*Copyright Act 1968* (Cth) s 196), this is perfectly valid. Provided the actual rights holders in the oral history are parties to the agreement, then it should overrule whatever the standard subsistence of copyright might be.

Agreements also often include additional conditions, particularly options for the interviewee to place controls on the access and use of the interview. For example, whether there will be restrictions on accessing the interview or whether the interviewee's permission is required for certain uses. These conditions can tend to get conflated with copyright, when they may in fact be separate issues. However, any written agreement about the access to and use of an interview may still be enforceable, and breaching that agreement may create the risk of claims for breach of contract, rather than copyright infringement.

### **Implied license**

Even in the absence of an explicit agreement, a license to use a work may be implied from the way the copyright owner deals with the work. A commonly given example is that a person who writes a letter to the editor of a newspaper has provided implied permission for that letter to be published. This may be common where a work has been commissioned – engaging a person to create a work implies permission to use that work for the purpose for which it was created (McKeough, Stewart & Griffith 2004).

There is an argument that the willing participation in an oral history for a particular purpose implies permission to use the interview for that purpose. For example, if someone is interviewed for a research project, there may be implied license to use the work for reasonable research purposes, such as being quoted extensively in research outputs. If an oral history is created specifically for inclusion in a library collection, there may be an implied license to use the interview in normal practices for a library, including communication to the public.

### **In summary: Copyright in oral histories**

The exact subsistence of copyright in an oral history is unclear. However, as a general rule:

- The copyright in the sound recording will be owned by the creator of the recording, which may be the interviewer, or the body commissioning the interview, depending on circumstances.
- There are different interpretations as to whether copyright exists in an underlying literary work as well. Either:
  - There is no copyright in the underlying work; or
  - There is copyright in the underlying work, which may be held by the interviewer, the interviewee, or jointly, depending on their contributions.
- Moral rights will exist alongside whichever copyrights exist, but normal business practices in collecting institutions should mean that these aren't infringed.
- It is not clear whether performers' rights would exist in an oral history, although in practice this is only a consideration for interviews produced after 2005.
- Copyright in oral histories can last indefinitely.
- Oral histories are often bound by agreements covering the subsistence and ownership of copyright, and other conditions on the access and use of the interview. Other conditions may be enforceable as contracts, even if they are not copyright-specific.
- In the absence of an agreement, an implied license to use the oral history for certain purposes may exist.

## **SLWA's approach for the OHRRG project**

The OHRRG project was primarily a preservation project, with the digitisation itself covered by preservation exceptions in the Copyright Act. However, these exceptions don't allow those digitised copies to be made available online<sup>2</sup>. In principle, our approach to clearing rights for online access took the following steps:

1. Analyse the provenance of the interview to determine who may own the rights
2. Analyse any existing documentation about rights and access agreements.
3. If the interview can be made available online, following the information found in steps 1 and 2, do so.

For interviews that can't be made available online at that point:

4. If nothing explicitly limits the interview from being available (e.g. a restriction agreement), undertake a reasonable search to locate the rights holder/s.
  - a. If the rights holder/s can be found, request permission to make the interview available. If it is refused, that is the end of the matter.
  - b. If the rights holder/s can't be found after a reasonable search, decide whether or not to take a risk management approach in making the interview available online.
5. Have processes available to deal with complaints from rights holders who may emerge later, e.g. notice and take-down policies.
6. Document everything and ensure it is recorded through the organisation's corporate information management practices.

## **Provenance and documentation**

The first step was an analysis of the provenance of our oral histories, and of the agreements and contracts accompanying them. A sampling approach was taken, using the first tranche of interviews recommended for digitisation by the OHRRG committee. Figure 1 shows a summary of the most common provenance and rights agreements situations within the collection.

SLWA's oral history collection consists of a mix of interviews conducted by SLWA staff, interviews commissioned from external interviewers, and interviews acquired from other commissioning bodies and private individuals. SLWA's own practices around agreements for commissioned interviews varied over time. In the early years, no attempt was made to formalise agreements with interviewees. Later, practice was to have the interviewee read a statement aloud at the start of the interview, that they allowed SLWA to use the materials in the interview "as they see fit". It was not until the 1980s that SLWA started requiring formal written agreements with interviewees. These generally had the interviewees assign their rights to SLWA, but allowed them to place conditions on the access and use of the interviews.

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<sup>2</sup> It has been argued that s200AB might be suitable, however there has been reluctance amongst libraries to use it on a broad scale, because of uncertainty in its application, and whether mass digitisation would meet the requirement of a 'special case' (Australian Law Reform Commission 2013).

### **State Library Commissioned Interviews**

- Verbal statement of permission at the start of the recording
- Interviewee's copyright assigned to SLWA
- Interviewee's copyright assigned to SLWA, plus additional special conditions
- No evidence of assignment or permission relating to interviewee's copyright

### **Joint agency commissioned interviews**

- Interviewee's copyright assigned to SLWA and another agency jointly
- Interviewee's copyright assigned to SLWA and another agency jointly, plus additional special conditions

### **Donated or purchased interviews**

- Interviewee's copyright assigned to another agency (sometimes with permission for copies to be lodged with SLWA)
- Permission for SLWA to use the interview for research, publication and/or broadcasting
- Non-specific permission for the interview to be lodged in SLWA for various purposes , e.g. for research, publication and/or broadcasting; or it may or may not be used in a published work
- Permission to interviewer or interviewing agency to use the interview for research, publication and/or broadcasting, and for copies to be lodged in SLWA
- Rights reserved by interviewee or commissioning agency
- No evidence of assignment or permission relating to copyrights in the interview.

Figure 1: Common provenance and copyright situations in the SLWA oral history collection

The agreements and documentation accompanying donated interview varies immensely. Some documentation seems to have been supplied to confirm that interviewees consented to their interviews being deposited in the library. Some simply effect the donation of the tapes from the interviewer. Others are formal deeds of gift. Where interviews formed a discrete research project, we often received interviewee agreements created to suit the purposes of that project, but which weren't specific to SLWA in any way. Where agreements do reference SLWA, they often only address the interviewee's rights and interests, and may not cover the interviewer's rights, although the interviewer is often party or witness to the agreement as well. In addition, at least 30% of SLWA's oral histories have no documentation relating to the interview whatsoever.

## **Policy**

During the course of the project, and partly in response to it, SLWA developed its Original Material Collection Copyright and Access Policy. This policy covers a range of issues including special conditions and access, but a key policy for the OHRRG project is that "where uncertainty or ambiguity exists in historical copyright deeds, agreements or permissions for original materials, the interpretation shall favour allowing the State Library to provide the greater access to materials within the collection, both within the State Library building and in digital form online" (SLWA 2011). This policy provided a framework for making decisions about individual interviews, and meant that a calculated risk management approach could be taken to providing online access to digital oral histories, as appropriate to the circumstances of each interview.

Almost all oral histories are undertaken for non-commercial purposes, and are never intended to be exploited commercially. It was considered that the risk of litigation and damages for lost income was very low, and could be managed through an understanding of the individual interviews, and managing relationships with stakeholders and rights holders. The greatest risk was from breaches of agreements and loss of trust in SLWA as a responsible custodian of historical materials. This too could be managed through understanding and relationship management, as well as having appropriate policies and procedures in place to mitigate risks.

## Interpretation

SLWA developed a roughly standardised, but staged, approach to different rights situations. Figure 2 illustrates how the more common situations were interpreted and addressed. It is written in terms of probably and maybe because of the uncertainty around copyright ownership, and the meaning of various agreements. It should be noted that each interview was still considered on a case-by-case basis. For example, if the interviewee or their family was prominent or notably litigious, or the content was sensitive, we may have been more conservative than our standard approach would otherwise suggest.

Most interviews which were commissioned by SLWA, but not subject to any special conditions, were considered able to be communicated online. Our more recent interviewee agreements specifically assigned copyrights to SLWA, which avoided any uncertainty. The earlier practice of having a verbal statement of permission was considered a non-exclusive license, on the assumption that an interviewee who did not agree would not have recorded themselves saying it. For interviews which had been undertaken before it was SLWA practice to address interviewee rights or agreements in any way, it was decided to interpret the interviewee's willing participation in an interview to be incorporated into a publicly available library collection as an implied license to use that interview for SLWA's collecting purposes. This could include communication to the public.

For jointly commissioned interviews, it was past practice for both agencies to exercise their rights without reference to each other, and this has not generated any problems. However, there were very few agreements formalising this, and available information about joint copyright suggests that exercising rights may require the authorisation of both parties (Arts Law Centre of Australia 2010; Stone n.d.). For these interviews, we generally informed the other agency of SLWA's intentions to make the interviews available online, and confirmed they did not have any objections, and then made the interviews available.

The variety of documentation for donated interviews provided the greatest challenges for interpretation. However, there were some patterns which could be treated in consistent ways. For example, a number of agreements contained a clause permitting SLWA to use the interview for "research, publication and/or broadcasting", with the interviewee electing which of the three to allow. These agreements were developed before the time of the internet, so could not explicitly address online access. Where interviewees allowed all three activities, we interpreted this as allowing the broadest use possible, that online access could be in the spirit of the agreement. Allowing publication but not broadcasting was also open to interpretation. 'Broadcast' is defined in the Copyright Act in the same terms as in the *Broadcasting Services Act 1992*, and does not include "a service that makes programs available on demand on a point-to-point basis" (*Copyright Act 1968* (Cth) s 10). That is, communication over the internet is not considered broadcasting, although it may be considered publication. Because of this, we also interpreted permission for publication as allowing online access in many cases.

<b>Rights / permission situation</b>	<b>Put online without additional work?</b>	<b>Seek permission?</b>
SLWA commissioned interview, interviewee's rights assigned to SLWA	Yes	No need
SLWA commissioned interview, verbal permission on recording		
Permission for SLWA to use for research, publication and broadcasting		
Non-specific permission to use for research, publication and broadcasting		
Permission to SLWA or non-specific permission to use for research and publication	Probably	Generally no
SLWA commissioned interview, no evidence of agreement with interviewee; interview created before practice of formalising agreement		
Permission statement to SLWA less clear, e.g. permission to use in a published work, permission is unconditional		
Joint commissioned interview, interviewee's copyright assigned to agencies jointly	Probably not	Perhaps, case-by-case consideration
Permission to (non-SLWA) interviewer to use for research, publication and/or broadcasting		
Permission to SLWA or interviewer to use for research but not publication or broadcasting	Probably not	Probably
SLWA or jointly commissioned interview, subject to special conditions		
Published / commercially exploited interviews	No	Yes
Rights reserved by interviewee or interviewing agency		
Rights assigned to or obviously held by another agency		
Donated interview, no evidence of copyright assignment or permission		
Restricted interviews		
		No, abide by conditions
		No, abide by restriction

Figure 2: Common rights and permissions statuses and their interpretation and approach

Many agreements where interviewees granted permissions to SLWA did not specifically address rights belonging to the interviewer. However, the interviewer often signed the same agreement documents. In that case, we interpreted it as agreement from the interviewer for the same uses as permitted by the interviewee. There were also many agreements where the interviewee granted permissions to the interviewer, and the interviewer subsequently deposited the oral history with SLWA. In the absence of a specific agreement, it may be possible for the interviewer to sub-license the license granted to them by the interviewee, and where it appeared that this was the case, we took it in good faith that the interviewer was authorised to sub-license.

### Seeking permission

The decision of who to contact to seek permission was made based on existing documentation and provenance, and who the rights holders were likely to be. Where documentation suggested that one party held all rights, we only contacted them. Similarly, when documentation implied a particular interpretation of the existence of copyright, we were

informed by that interpretation. Where there was no documentation, we generally contacted both the interviewer and the interviewee. However, for interviews that were commissioned, we contacted the commissioning person or body first. This often uncovered further information about the interviews, and on some occasions the commissioning body asserted that they were the absolute rights holder, and could grant permissions themselves.

It was often necessary to determine whether a rights holder was still alive. As copyright in oral histories can last indefinitely, the ownership of the copyright will pass to the descendants of the original rights holder, in the absence of any other arrangements. There were also a number of special conditions applied to some interviews which only remained in force during the interviewee's lifetime, or occasionally control of special conditions passed to other people on the death of the interviewee. Where a rights holder had passed away, it was necessary to identify and contact their family for copyright clearance.

Assignment of copyright and exclusive licenses are required to be in writing and signed by the copyright owner, but non-exclusive licenses are not (Arts Law Centre of Australia 2010). Following this, we accepted any evidence that the rights holder granted permission to SLWA to make the interview available online. In practice, this was usually in the form of emails. Technically, it would have been possible to accept verbal permissions, but for record-keeping purposes we insisted on receiving at least something in writing.

### **Additional protocols**

Particularly because we were taking a controlled risk management approach in some cases, it was necessary to have other protocols in place to address issues that might arise out of this. One was notice and take-down procedures. All of SLWA's online oral histories have a disclaimer stating that objects have been made available in good faith, and inviting rights holders to contact SLWA if they feel materials have been made available without permission. We have internal processes to follow in the event that this occurs, including removing access to the item in question while negotiations are held with the complainant.

As part of the OHRRG project, we also developed processes for diligent search and orphan works. These follow the National and State Libraries Australasia position statement and procedural guidelines for reasonable search for orphan works (National and State Libraries Australasia 2010; 2011). If a rights holder could not be identified, or if after a reasonable search they could not be located, the work would be considered orphaned. Section 200AB of the Copyright Act might then be used to be able to make that particular interview available online. However, these processes were not actually put into practice for the OHRRG project. This was largely because we were able to identify many cases where contacting rights holders was not necessary, and we were able to locate nearly all of the rights holders we were searching for.

### **Outcomes and lessons learned**

The OHRRG project had a low target for making oral histories available online, which was able to be exceeded during the life of the project. The OHRRG committee chose which interviews they wanted to make available online. This selection was based on criteria of historical significance, interview quality, and providing a broad sample of SLWA's collection, but did not consider the copyright and permissions status of the interviews. In the context of the project, this was a perfectly legitimate approach. However, if pure numbers of online interviews had been a goal, it would have been more productive to focus on identifying all interviews for which copyright was already owned or cleared for online access, rather than focusing on significance.

Our experience was that, once they had been found and contacted, nearly all rights holders gladly gave permission for their interviews to be made available online. The greatest difficulty was not in negotiating permission, but in locating and contacting rights holders in the first place. It took on average one person-day to identify, locate, contact and negotiate with copyright holders for each interview. To date, we have not received a single complaint from an interviewee or potential rights holder about an interview being made available online.

Additional oral histories continue to be made available online, as resources to analyse their provenance and documentation permit. Resourcing is one of the key lessons of the OHRRG project. Clearing copyrights creates a substantial workload, which needs to be factored into any digitisation project. Even where there is no additional work to do in clearing rights, say if the works are in the public domain or the library already has permissions, it is still a workload to research, identify and record this.

## **Conclusion**

The uncertainty around the subsistence and ownership of copyrights in oral histories creates a particular barrier to fulfilling the access outcomes of an oral history digitisation project. However, this is not insurmountable. SLWA's OHRRG project demonstrates that with appropriate planning, understanding, policies, and resourcing, it is entirely possible to overcome this uncertainty. Oral histories can be digitised and made available online for the benefit of researchers and the public, and appropriate handling of copyright does not need to be a substantial barrier.

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