

Rights Review for Sound Recordings: Strategies Using Risk and Fair Use Assessments

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ABSTRACT

The access and use of sound recordings in cultural heritage institutions is highly limited by multiple barriers including format degradation, obsolescence, and the difficulty of identifying rights holders. Digitization is the recommended best practice to preserve degrading and obsolete materials. However, overlapping layers of rights and orphan works result in archives limiting access to digitized sound recordings to the reading room or, fearing legal repercussions, avoiding digitization altogether. We propose that a genre-based rights review process based on risk management and a fair use approach can be used to address legal limitations to access. We believe other cultural heritage institutions can apply the tools and methods developed in this project to increase access and use of their own unique historical recordings.

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KEY WORDS

Digitization, Rights review, Sound recordings, Access,
Fair use, Copyright, Rights

Institutional Context and Project Background

The Bentley Historical Library (BHL) at the University of Michigan was founded in 1935 and charged with collecting and preserving the history of both the university and the state of Michigan. It holds within its collections over 22,000 sound recordings in formats spanning the history of recorded sound. These recordings are a rich resource for the study of institutional history and Michigan history. They include interviews, oral histories, musical performances, radio programs, and much more.

In an effort to preserve¹ these, the Bentley launched a pilot digitization project in 2012 that focused on an initial selection of 1,600 recordings on magnetic tape. This project has provided a model for large-scale digitization at the Bentley. Since then, several additional digitization projects covering other formats have been completed, raising the total number of digitized sound recordings to more than 6,000.

Yet the Bentley, like many other cultural heritage institutions, is confronting the challenge of providing access to these newly digitized audio treasures due to limitations imposed by copyright law. Within these recordings, overlapping layers of rights, orphan works, and third-party rights prevent the library from sharing beyond the physical building.² Bentley standard procedure during collection accessioning is to have collection donors transfer their rights to the Regents of the University of Michigan. However, the donor cannot transfer third-party rights subsiding in the material. For this reason, each case needs to be reviewed to determine how broadly the Bentley can provide access.

The large number of sound recordings at the Bentley makes this impractical. This is particularly so when considering the ongoing large-scale digitization at the library that creates an ever-growing amount of digitized material to be made available in some way.

As part of its mission, the Bentley aims to support research and education through its collections. This means that both preservation concerns and user access to collections are priorities for the library. In pursuit of these goals, the Bentley decided to develop a new rights review process for sound recordings with the goal of determining how broadly it could provide access to these recordings. The new process was to explore a risk management approach. In 2016, the library developed a project with the following goals:

- Research access practices at other institutions working with large amounts of digitized audio.
- Define a process and workflow for the review of sound recordings at the Bentley.
- Find or design a scalable rights review process.
- Develop risk assessment tools to guide the work.
- Review recordings from the pilot digitization project.

The result of this project was the development of a genre-based rights review process combining fair use evaluation with a risk management approach. Ultimately, we learned that applying this approach could expand access to 43 percent of the Bentley's digitized audio content.

This project has received the Bentley administration's support, from the development process to the decision to open 2,456 recordings for streaming access to the UM community and, in many cases, the world. Through this decision, the library seeks to further the university's commitments to academics and research. The Bentley presents this as a method and a toolkit that other cultural heritage institutions can apply to increase access and use of unique historical recordings.

Phase One: Research and Development of Rights Review Tools

In the summer of 2016, the Curation Division of the Bentley Library began a pilot project to assess the risk of opening our digitized recorded sound collections to online access. During this first stage, we set out to examine the current landscape of copyright, fair use, and related archival practices. We next reviewed other cultural heritage institutions' practices with a focus on their strategies and tools for digitization, dealing with sound recording copyrights, and access policies regarding these materials. We also explored the metadata associated with the selected subset of our project recordings to see what we could discover to help streamline the review process. The following sections describe in detail what we learned from each examination and how these shaped our methods and tools.

THE LEGAL LANDSCAPE: COPYRIGHT, FAIR USE, AND ARCHIVAL BEST PRACTICES

Copyright and fair use issues in recorded sound collections have been written about extensively over the past twenty years, especially in the Tim Brooks–edited “Copyright and Fair Use” column of the *ARSC Journal* and the spate of publications emerging from the Council on Library and Information Resources since the establishment of the National Recordings Preservation Board in 2000.³ Reports from the Register of Copyrights also indicate that, though we still await changes to the code, the U.S. Copyright Office is fully aware of the shortcomings of Title 17 to address the rapid changes in technology and society that have enabled mass digitization and dramatically increased the (potential) accessibility of public archives.⁴ In the absence of legislative action, the judiciary has taken the lead in supporting accessibility. Courts have ruled repeatedly in favor of fair use in recent years, particularly—but not necessarily—when the use is “transformative” (unfortunately, a still ill-defined term).⁵

The libraries and archives community has recognized for some time that we must act quickly to preserve our aural heritage, most urgently because the fast-decaying magnetic tape format predominates in sound collections.⁶ This cannot be accomplished by locating rights holders and seeking permissions for every item. It is well known that securing permissions from rights holders for the use of archival materials is a difficult and labor-intensive process for textual materials.⁷ Due to the overlapping layers of rights in recorded sound materials, this difficulty increases exponentially. In the Bentley's holdings, for instance, the vast majority of sound recordings are unpublished and noncommercial, and at least one right—that of the engineer/producer of the recording—is orphaned in nearly every case.⁸ Although not the focus of this article, other legal considerations, such as accessibility for users with disabilities, exist in providing access to digital content online.⁹

This inarguable fact forces a direct confrontation between archival ethics and the law. Section 108 exemptions for libraries/archives preservation reproduction do not apply to recordings fixed before 1972 because they are not subject to federal statutes. Without the guarantee of these reproduction rights, duplication for preservation becomes illegal infringement. As the National Recording Preservation Board succinctly puts it, "Were copyright law followed to the letter, little audio preservation would be undertaken. Were the law strictly enforced, it would brand virtually all audio preservation as illegal."¹⁰ An orthodox adherence to Title 17 ensures sound recordings will wither and die on the vine. This would be nothing less than a fundamental dereliction of duty on the part of archives, charged as they are with the preservation of records for the benefit of current and future generations.¹¹

Fortunately, emerging best practices within U.S. libraries and archives and codes promulgated by legal institutes and professional associations¹² endorse using Section 107 fair use rights to go forward with the proactive digitization of at-risk materials and many orphan works. The Library Copyright Alliance (LCA) (representing the American Library Association, the Association for College and Research Libraries, and the Association of Research Librarians) now argues that legislation is no longer necessary for their members' uses because other legal developments, primarily regarding copyright's fair use doctrine, are sufficient to allow for many uses of orphan works. Consequently, fair use evaluations are being undertaken more frequently and by more institutions, and, as the LCA report notes, "The more they engage in these activities, the more confident libraries become with their fair use analysis concerning the mass digitization of presumptively orphan works."¹³ Additionally, Eric Harbeson points out that Section 504(c)(2) of the copyright code allows a "secondary line of defense," after fair use, for nonprofit schools, libraries, and archives: the "reasonable belief" defense.¹⁴ The code makes clear that libraries and archives cannot be held liable

for statutory damages for copyright infringement if the infringer “believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use.”¹⁵ As of August 2017, no archives have been sued over digitization projects for access, as pointed out by Peter Hirtle.¹⁶ Some may consider the Hathi Trust case an exception to this, but it is important to point out that in this case, an archives was not sued and that search and accessibility were considered transformative enough and fair use.¹⁷

Harbeson also explains that fair use evaluations like these are becoming more and more common has legal implications. Widespread practice in a community reflects “community standards” as much as more formal best practices codes; and community standards, rooted in court rulings, can provide a strong basis for reasonable belief. “Even if a court later rules that practice to be unfair,” Harbeson writes, “the fact that the practice has been widely understood to be fair can point to a reasonable belief that it was fair. This gives use communities a certain power over their destiny: they can, to some extent, shape fair use standards in ways that might or might not be in their interests, by following common practices.”¹⁸ But what are today’s common practices among institutions engaged in mass digitization?

TOWARD COMMUNITY STANDARDS: COMMON PRACTICES AT FIVE INSTITUTIONS

After reviewing the literature on current best practices standards, recent judicial opinions, and other articles encouraging a bolder approach to fair use than we currently employ at the Bentley, we determined that Section 107 limitations on exclusive rights provide far more flexibility in allowing users access to digitized content than Section 108, and we therefore developed policies and tools to leverage our Section 107 rights. We next reviewed the actual practice at four U.S. research libraries/archives and one U.K. institution to get a better understanding of emerging community standards in allowing public access to digitized archival materials.¹⁹ These institutions were the Wellcome Library, Duke University, the University of North Carolina at Chapel Hill, the UCLA Special Collections Library, and Pacifica Radio Archives. They reflect a diversity in size, geography, and collection composition; most primarily digitize and provide access to textual materials, but we found that all provide useful lessons for our project.

Our study first looked at the Wellcome Library (WL) digitization project, a massive endeavor to make 30 million pages of archives and library materials accessible by 2020.²⁰ Although the application of fair use exemptions differs in the United Kingdom (where it is known as “fair dealing”²¹), enough overlap exists to make an examination of the WL’s general principles and approach useful.

The project is unusually risk-comfortable. The fundamental rule for archival materials is *managing* rather than *eliminating* risk, which means in practice that no attempt will be made to contact all rights holders, but only those who “appear to present a risk.”²² Permission from the named creator of a collection is assumed to already be in place; the analysis concerns third-party copyright holders within specific collections. The WL’s process focuses on anticipating litigants and emphasizes identifying the higher-risk copyright holders (for example, the author/creator is a well-known literary figure, broadcaster, or artist; or the author/creator/literary estate/publisher is known to actively defend copyrights; or the relationship between the holding institution and the author/creator/publisher is awkward). Next, a search is made for these higher-risk entities, and permissions are sought. The WL manages access through different layers of restrictions, including agreeing to terms of use, user registration, and limiting some items (especially potentially sensitive materials) to the premises. Finally, a strong takedown policy is in place and easily visible.

The four other institutions studied reinforce the WL’s general approach—anticipating and heading off litigants—and use several safety valves to assuage aggrieved parties by responding quickly to any concerns that arise. However, the WL risk-management strategy hinges on aggressive permission-seeking, which is extremely resource intensive. Institutions without such resources, unable to locate and petition hundreds of rights holders, cannot reasonably assume as much risk nor open as much material online as the WL.

Our study of the policies of Duke University focused on a description of the principles behind the AdViews project, a digital collection of historical television commercials, by Kevin L. Smith, former director of Scholarly Communications.²³ Smith argues strenuously against what he deems “self-censorship” in the archives and library worlds and for a much higher tolerance of copyright infringement to keep digital collections complete and to fulfill institutional missions. Like the Wellcome Library, Smith argues for a risk-management strategy centered on anticipating and heading off potential litigants more than observing the letter of the law. His principles are, first, to reduce the number of risky items a collection contains and, second, to reduce the number of people likely to want to sue. The strategies he suggests are simple: ask permission from those most likely to object to digital display (not every rights holder, but large, prominent ones); have a take-down policy prepared in advance; and recognize that a strong fair use argument will support many collections, especially when such an argument is a “back-stop” or “last line of defense” as part of a larger strategy.

Smith’s article echoes the general method of the Wellcome Library but is noticeably more parsimonious regarding how many entities to search for and seek permissions from. Both reinforce the idea of a community standard around seeking permissions selectively and implementing a strong take-down policy

should objections arise. They differ on how high the risk must be before seeking permissions, with Smith notably more liberal, a difference largely attributable to the greater elasticity of the U.S. fair use principle than the U.K. analog, fair dealing.

Our study of the University of North Carolina (UNC) focused on the methods articulated in its project to digitize manuscripts in the Southern Historical Collection, particularly the “decision matrix” employed.²⁴ The matrix is a scoring tool to create priorities for digitization at the collection level. A nine-page questionnaire, though its questions skew heavily toward manuscript materials, is designed to encompass all media types in the special collections. It takes a holistic approach to evaluating collections, examining not just rights and restrictions but content, research value, and risks for obsolescence/degradation. In particular, the UNC decision matrix contains many more questions about donor agreements and restrictions than our previous examples. After evaluating a collection with the matrix, it is sorted into one of four groups according to its assessed level of risk. As a last step, selected collections are evaluated at the item level for personalities in the materials known to be, or thought likely to be, litigious.²⁵ Unlike the Wellcome Library, UNC’s method does not include tiered levels of access for users, but rather is fully open.

The Special Collections Library (SCL) at UCLA includes a risk assessment procedures report as part of a larger body of instructions that details the library’s entire end-to-end digitization process, from selection to web architecture to user experience.²⁶ Whereas previous examples primarily emphasized risk reduction, the SCL stresses fair use and its thorough documentation. The layers of documentation provide proof that due diligence is performed and is copiously recorded and vetted. The implication, of course, is that proof of serious, thoughtful fair use judgments will indemnify UCLA Special Collections (as a public, nonprofit, academic library) from infringement suits. Permission requests play a part in UCLA’s digital project workflow but are not the linchpin that they are for the Wellcome and Duke libraries.

Pacifica Radio Archives (PRA) “risk factor assessment”²⁷ tool is a straightforward chart that asks the archivist to sort each item, at the item level, into one of three categories of risk (low, medium, and high) for each of seven questions. This document is useful because it is media-specific, pointing to several essential questions pertaining to sound recording as a whole, with several particularly tailored to radio—a major portion of our collection under review. Although PRA’s tool approach focuses mainly on risk, its risk matrix model was significant to our review method.

Based on the common practices of these institutions, we developed a review workflow that includes four tools to assess risk, to evaluate the strength

of a fair use defense, and to document due diligence and reasonable belief. They are discussed in greater detail in the following sections.

Since the completion of this initial research phase, we have learned of more recent work in mass digitization projects for audiovisual materials and efforts to provide access by addressing rights. The American Archive for Public Broadcasting (AAPB) recently presented its work on exposing digital collections at scale by using fair use, broadcast genres, and tiers or “buckets” of different types of access.²⁸ Likewise, Indiana University’s Media Digitization Preservation Initiative 2 (MDPI) is another example of innovative approaches to provide access to digitized audiovisual content. Its efforts have focused on a rights review management system.²⁹ Both of these examples show a growing need to address rights status for digitized audiovisual materials; the need and desire to increase access and scalability; and a need to understand how practices in this field are evolving.

THE GENRE METHOD

Before the development of review tools, we set out to analyze the content we would be evaluating for rights. Existing metadata for this content revealed that available genre information could inform and improve review processes and tools. Our research had shown that different levels of inherent risk subsided in different genres of material and presented different requirements when it came to evaluating rights. For example, potentially infringing creative, profit-earning works (symphonies, poetry readings, etc.) is far riskier than infringing extemporaneous conversations. The former are copyrightable, while the latter are not; the former have a profit incentive (and a solid constitutional protection guarantee);³⁰ the latter generally do not.

It became clear that larger, umbrella groupings based on genre could be formed with recordings of the same base risk level. Accordingly, we identified the following five primary genres: spoken word, oral history, music, documentary, and literary. This “genre method” became a way of grouping content to more efficiently assess risk and fair use for thousands of recordings.

The reason the genre method works is that most collections are not nearly as eclectic as they may appear at first. We have found that about nine out of ten of our collections are completely or very nearly homogeneous in primary genre. This allows us to scale our risk evaluations, because we can now conduct them at the collection level rather than at the item level. When a collection consists of more than one primary genre, it must be divided accordingly into homogeneous subgroups for evaluative purposes.

In short, genre is the first factor to consider when determining how risky expanding access to a recorded sound collection is, for two reasons: different general risk levels inhere in different genres, and the specific questions a reviewer

must ask when reviewing a collection vary according to genre. This second fact led to the first of four modifications to the Information Gathering Questionnaire that resulted in five separate questionnaires, one tailored to each primary genre.

This study of our data allowed us to gain a good overview of our test batch and prioritize our rights review process. Knowing unpublished spoken word recordings generally are the lowest risk and have strong fair use defenses, we planned to review these first (25% of the total number of collections tested). Published spoken word recordings generally are low risk and have the strongest fair use defense (38% of collections), and so were prioritized second. Next came documentaries, oral histories, music, and finally literary readings. Already, we could see that, considering the spoken word genre alone, nearly two-thirds of our collections were potentially low-risk, strong fair use defense collections, and needlessly being restricted.

THE FOUR TOOLS

In setting out to develop our own tools and workflow, we determined that a strategy of managing, not avoiding, risk was best in line with our institutional goals. As such, our judgments needed to account for both the likelihood of a use attracting litigants (termed the *risk level*), and the strength of our fair use defense should a complaint arise (the *fair use strength*). To achieve this, we developed four tools to review the contents' rights status, risk level, and fair use defense strength. We applied these tools after determining the genre groupings in a collection.

- Information Gathering Questionnaire: documentation of the collection's gift agreement, known rights holders, existing restrictions, etc. (see Appendix 1).
- Fair Use Assessment Checklist: identification of potential issues related to fair-use factors (i.e., the purpose of the use, nature of the copyrighted works, amount/substantiality of the portion used, and the effect of the use on the works' market value) (see Appendix 2).
- Fair Use Statement: documentation of the potential strength of fair use exemptions for the collection (weak, medium, or strong), with an explanation of the findings based upon responses to the checklist (see Appendix 3).
- Risk Assessment Rubric: placement of the collection on a spectrum of risk (high, medium, low, or none) based upon the risks associated with public access to content under U.S. copyright law (see Appendix 4).

First is the Information Gathering Questionnaire, which collects details such as the existence of a gift agreement, whether any restrictions exist, and whether

Table 1. The Five Primary Genres

Primary Genre	Examples	Standard Risk Level	Complicating Factors
Spoken word, excluding oral history	Public interviews, debates, talk shows, addresses, sermons, lectures, etc.	Low risk: Extemporaneous speech not copyrightable. Scripted speeches mostly have a civic/educational goal, no market	Speech aired on a still-existing, for-profit station; speeches of persons with literary estates
Oral history	Never-published interviews requiring interviewee releases	High risk: Extemporaneous speech not copyrightable, but best practices in oral history make subject privacy paramount. Increased statutory and sensitivity risks regarding personally identifiable information and privacy concerns. Contracts between subject and interviewer regarding future use may exist.	Risk reduced when interviewee releases are on file
Music	Live performances and prerecorded music	High risk: Compositions assumed to be copyrighted and income producing	Risk reduced if underlying material is in public domain and performers have transferred rights
Documentaries	Scripted nonfiction programs	Medium risk: Productions, scripts assumed to be copyrighted, but often made by non-profits for educational purposes only	Produced by still-existing, for-profit station; use of third-party copyrighted content
Literary	Prose, poetry, and drama	High risk: Compositions assumed to be copyrighted and income producing	Risk reduced if material is clearly in public domain

any potential copyright holders are known or identifiable. This step always requires consulting the donor file and the finding aid and sometimes requires consulting the catalog record and the audio preservation database and listening to samples of the item. This tool is an adaptation of the one used by UNC in the Southern Historical Collections project, additionally informed by UCLA practices.

Next, the Fair Use Assessment Checklist evaluates the collection for the strength of its fair use defense, balancing each of the four fair use factors outlined in Section 107 of U.S. copyright law: purpose and character of use, nature of the copyrighted work(s), amount and substantiality of the portion to be used, and effect of use on the potential market for the work. It is adapted from a schema for evaluating the four factors employed by UCLA, based on the original by Kenneth D. Crews.³¹ This checklist has achieved widespread community use and is additionally employed by Cornell University, Columbia University, and many other institutions. It has been lightly modified for our purposes.

Third, the Fair Use Statement tool asks the analyst to examine the checklist and judge whether the four factors weigh toward a strong, medium, or weak fair use defense. The analyst then drafts a statement explaining the rationale for the ruling on each of the four factors and the overall judgment. This tool was inspired by UCLA practices and is especially important for documenting good-faith belief as well as due diligence. Of special importance is questioning the “transformativeness” of the use. At the Bentley, we ask: Have modifications been made? How is value being added? And is the proposed use markedly different than the original use?

Finally, the Risk Assessment Rubric is used to assess a specific risk level. Each collection/subgroup is sorted into one of four categories: High, medium, low, or none. The analyst drafts a brief “risk assessment statement” summarizing the rationale for the assigned level of risk.

While a general and preliminary risk level can be assigned to a collection on genre alone to prioritize the digitization and the risk evaluation processes, the Risk Assessment Rubric provides a more thorough and refined judgment based on the specific characteristics of a collection (the genre method is detailed in the following section). It focuses on copyright law itself without regard to fair use defenses, aiming to elucidate the degree of exposure to legal action the wide release of the collection might engender. The rubric is primarily drawn from a similar tool in use at the Pacifica Radio Archive, with modifications informed by the practices at all four of the other examined institutions.

Implicit in these tools is that the Bentley draws a distinction between *risk level* and *fair use strength*. We define *risk level* as the likelihood of attracting complainants or litigation. We define *fair use strength* as our judgment, informed by case law, that our use would be found fair in a hypothetical court challenge. While these two attributes are related, it is useful to disentangle them and evaluate them separately.

Phase Two: Developing the Rights Review Process

With the four tools in hand, we began a pilot test to review 1,600 recordings that had already been digitized as part of a 2012 preservation reformatting project. The tests revealed ways to improve our definitions of risk level and fair use strength to more closely match the type of materials found in rare and unique archival sound recordings. Most important, it affirmed that a high level of homogeneity of content within each collection does indeed exist, which reinforced the appropriateness of the “genre method” of grouping recordings before applying the four tools.

RISK LEVELS

In assessing potential risks under copyright law, the Curation Division defined four discrete risk levels to help quantify the Bentley's potential exposure to legal action. The criteria were lightly revised throughout the pilot phase, resulting in these final definitions (see also Appendix 4, Risk Assessment Rubric):

- **No Risk:** Indicates that the deed of gift allows for digitization and/or assigns the creators' copyright to the Regents of the University of Michigan. It is also employed when the collection (or a specific grouping thereof) DOES NOT include items with third-party copyrights. In general, public domain status is not evaluated because virtually no sound recordings are in the public domain as federal copyright law does not apply to pre-1972 sound recordings.
- **Low Risk:** Generally denotes that the deed of gift allows for digitization and/or assigns copyrights to the Regents of the University of Michigan but also indicates that the collection DOES include some items with third-party copyrights. This level is also applicable to collections (or subgroups thereof) for which the creator is dead and has no literary estate, and content was created with academic and/or personal intent.
- **Medium Risk:** Used with collections (or subgroups thereof) that include excerpts or small amounts of creative works but do not use "the heart" of a work. This level is also employed with radio programs that lack station identification and collections with many orphan works. Medium risk may also be assigned to collections where the author/creator is alive or known to have a literary estate, but materials were created with academic and/or personal intent.
- **High Risk:** Those collections in which rights have not been transferred; releases do not exist; the author/creator is a well-known literary figure, broadcaster, or artist; the materials appear to have been published/broadcast and/or prepared for commercial gain; a non-University of Michigan-owned station ID is announced; large amounts of third-party creative works are present; or any other indications of restrictions or special sensitivity are noted.

FAIR USE STRENGTH LEVELS

An evaluation of the strength of fair use defenses for the digitization and dissemination of sound recordings complement the levels of risk associated with copyright law. Our checklist is modeled on a basic template used by

libraries at Cornell, Columbia, UCLA, and many more institutions. The process is a balancing test that assesses whether a proposed use “favors” or “disfavors” a fair use exemption in each of the four factors.³² As the Columbia Copyright Advisory Office (CCAO) notes, “This flexible approach to fair use is critical in order for the law to adapt to changing technologies and to meet innovative needs of higher education.”³³ Not all factors need to weigh either for or against fair use, but overall, the factors will usually lean one direction or the other. The CCAO also points out that “the relative importance of factors is not always the same” and individual analysis is necessary to reach a conclusion. There is no hard and firm rule regarding fair use. In our collection, the most salient factors have tended to be nature of copyrighted work and potential market effect, as our purpose for use (educational) and amount to be used (entire) are usually consistent.

The Curation Division has established three separate fair use defense categories (see also Appendix 2, Fair Use Assessment Checklist):

- **Strong Defense:** Indicates a majority of items “favoring fair use” have been checked. That the proposed use is transformative (factor 1) and that no significant market effect is expected (factor 4) are particularly important. A “strong” assessment also usually pertains only to factual items (factor 2) that do not infringe on third-party rights in large or substantial amounts (factor 3).
- **Medium Defense:** Indicates a balance between the two columns of the checklist (“favoring” vs. “disfavoring” fair use). The chief distinction between a medium and a strong defense is most often that the proposed use is not transformative (factor 1) or that the work infringed upon is creative or unpublished (factor 4).
- **Weak Defense:** Applies to proposed uses that cannot reasonably be viewed as transformative (factor 1) and/or that are likely to have a market effect (factor 4). It also applies to unpublished works for which rights have not been transferred and to oral histories with no releases and/or clear provenance (factor 2).

THE REVIEW PROCESS WORKFLOW IN BRIEF

Figure 1 summarizes the stages of the rights review process discussed. The full assessment workflow can range from ten minutes to nearly an hour, depending on the size and complexity of the collection. For a complete, detailed description of the rights review and risk assessment workflow, please see Appendix 5.



FIGURE 1. The review process workflow in brief

THE REVIEW PROCESS CLOSE UP

Appendix 6 provides four sample evaluations. Each represents a collection with a different risk level: none, low, medium, and high. This section will walk through parts of those assessments to illustrate how determinations are made, some typical characteristics of specific genres, and where gray areas reside that can make judgment calls difficult for the analyst.

The Hilary Whittaker Papers (see Appendix 6.1) represents a typical no-risk collection: a small, homogeneous collection (in this case, one item); no third-party rights; creator transferred copyright to UM Regents; and a clear gift agreement detailing this transfer is on file. Small collections allow for sampling a larger percent of the collection to increase certainty that no third-party rights are present. In the case of Whittaker’s recording, an on-the-spot description of an earthquake in Morocco, the entire file can be heard in under three minutes. Because no third-party rights subside in the item, no fair use analysis or risk assessment is necessary.

The Karoub Family Papers (see Appendix 6.2) likewise is typical of a low-risk collection, many of which are small (this one is three items). Rights have been transferred to the regents and a gift agreement exists. However, as is the case with many low-risk collections, this collection cannot be assessed at no risk because third-party rights may be contained within. Imam Karoub reads religious poetry and religious songs on the tape, and, while these works were probably created before 1923 (given their devotional nature), it is possible they were not. No greater level of certainty can be attained at this time due to another challenge to performing fair use analysis: foreign languages. It is, of course, not reasonable to expect the analyst to be fluent in every language contained in the archives. Nevertheless, linguistic ignorance has the effect of increasing uncertainty and, therefore, risk. The analyst must make a judgment call about the likelihood of third-party rights being infringed based on the date of the recording, the type of content, and the description. This point also emphasizes the importance of adding good descriptive metadata to each item during the digitization or QC process. This greatly reduces the need for sampling, and the evaluation process moves rapidly. Inadequate metadata can sometimes slow the

process to a crawl, as the analyst must sample many different time points in a file to confirm homogeneity of content and genre.

Things get trickier at the medium-risk level. A good example is the Henry Russel Lectureship Committee Papers (see Appendix 6.3). The committee itself is a university organ, and the regents hold copyright to its papers. But in these recordings—keynote addresses by junior faculty detailing their research—the committee probably holds no more than the right of audio engineer; each respective faculty member owns the main content—scripted speeches. The Risk Evaluation Rubric shows the two criteria that place this collection in the “medium” category, the most relevant being “The author/creator is alive or known to have a literary estate, but materials were created with academic intent.” The Fair Use Assessment shows the factors favoring and disfavoring fair use almost equally balanced. That these works were delivered publicly, are used for educational purposes, and will have no significant market effect supports fair use of these lectures. But the creative nature of the works and the use of the “heart” of the works disfavor fair use. On the whole, the fair use defense likely comes down to the “transformative” factor: would contextualizing these lectures together and opening access to them as a historic group be “transformative enough”? The “transformative” factor has become perhaps the most preeminent in recent legal rulings, but it is notoriously difficult to judge. The analyst must assess whether the use seems defensibly transformative. In this case, the analyst concluded it did not, and the balance of factors resulted in a fair use defense of “medium.”

Evaluating high-risk collections can be very simple, or it can be as complex as medium-risk evaluations. For example, all music and literary sound recordings (poetry readings, radio plays, and so on) begin at the high-risk level and rarely escape it. Only one-third of collections in the music genre and *no* collections in the literary genre have a risk level lower than “high” (see Figure 3). For these two genres, risk assessment tends to be straightforward. This point will be discussed further in the Findings and Recommendations section.

The Ruth Ellis Papers (see Appendix 6.4) highlights the importance of good description and sampling recordings when in doubt about their content. At first glance, the collection appears to be low or medium risk, as it is in the spoken word genre, a broadcast interview, and made for public media (NPR), which is less risky than commercial radio. But an important concern for previously aired materials is whether there is a market for it—or more loosely, whether it can still generate income. The NPR website, where ads are displayed to generate revenue, still hosts this interview, though seventeen years old. The analyst must do this sort of work when the fourth fair use factor, “significant market effect,” is in question. In this case, our use could indeed negatively impact an important NPR income stream. Second, the amount proposed to be used (factor 3) clearly exceeds what is necessary for educational purposes: Ellis only appears in a few short clips

Table 2. Item Counts per Risk Level–Fair Use Combinations

Risk Level	Fair Use Defense	Item Count	Percentage of Total
No risk		55	1%
Low risk Total: 1,521 items (27%), 49 collections	Strong	1,248	22%
	Medium	273	5%
	Weak	0	0%
Medium risk Total: 916 items (18%), 35 collections	Strong	475	8%
	Medium	405	7%
	Weak	36	1%
High risk Total: 3,091 items (55%), 46 collections	Strong	486	9%
	Medium	947	17%
	Weak	1,658	30%
	TOTAL	5,583	

within one of four segments in this hour-long program. Researchers interested in Ellis would only need those clips or at most that one segment. For all of these reasons, this collection earns a “high” risk rating and a “weak” fair use rating.

It is important to again emphasize that the strength of a fair use defense and the overall risk level are not synonymous. That is, a low-risk item does not always have a strong fair use defense; likewise, the use of high-risk items is not always weakly supported. Risk level and fair use defense strength must be considered separately.

Phase Three: Making Access a Reality

We were pleased with the results of our pilot project and proceeded to apply our review process to all our digitized recordings.

The assessments prepared through August 2017 cover 5,583 of 6,392 (87%) of the digitized sound recordings in the Bentley Historical Library. The BHL holds over 22,000 sound recordings on physical media; the assessments thus cover nearly a quarter of its audio holdings. Table 2 summarizes these findings.

ACCESS LEVELS

With this data in hand, we could clearly see that almost half of our digitized sound recordings are low or medium risk. We next needed to decide how much material to open and in what way. As the Bentley’s mission is, first, to serve the educational and research needs of the university community, and in considering the capabilities of our current access platform, the Bentley Digital Media Library,

Table 3. The Three Access Categories

Access Level	Definition
Open	Recordings may be streamed by anyone, anywhere, and at any time.
UM domain	Recordings may be streamed from University of Michigan domain.
Reading room only	Recordings may only be streamed from computers in the Bentley's IP address range.

the library decided to implement a tiered system of access that would allow three different degrees of streaming access to Bentley digital media content (see Table 3).

Next, we needed to decide which risk–fair use combinations to associate with each access category. Given that there are ten distinct combinations of risk level and fair use strength, we were able to make a more nuanced division of the access categories, applied as shown in Table 4.

Combining the data in Table 2 with the access profiles in Table 4, we see that 28% of the digital sound recordings we have reviewed could be opened to public access, and an additional 15% could be opened to the university community. The 13% of sound recordings that have yet to be reviewed appear to be composed of a comparable mix of genres as the portion that has already been reviewed. Overall, the Bentley has the potential of making 43% of our digitized sound recordings more available to our users.

TAKE-DOWN POLICY

Under Section 108 of U.S. copyright law, the Bentley Historical Library has a right to provide on-site (i.e., “reading-room only”) access to digital surrogates of analog sound recordings. For all recordings, clear and actionable take-down

Table 4. Relationship between Risk Level, Fair Use Defense, and Access Profile

Risk Level	Fair Use Defense	Access Profile
No risk		Open (Public Access)
Low risk	Strong	Open (Public Access)
	Medium	Open (Public Access)
	Weak	UM only
Medium risk	Strong	UM only
	Medium	UM only
	Weak	Reading Room only
High risk	Strong	Reading Room only
	Medium	Reading Room only
	Weak	Reading Room only

procedures will allow the Bentley to mitigate risks associated with providing access and respect the prerogatives of rights holders. As Kevin L. Smith writes, “a responsive take-down policy will inevitably have the effect of preventing most complaints from ever becoming lawsuits.”³⁴ A good take-down policy is a near-universal practice among hosts of digital collections, and each of the five institutions studied for this project all had clear and easy-to-find notices.

What We Learned

OUTCOMES

The Bentley launched this project during the summer of 2016 with the aim of developing tools and a process to review sound recordings at scale and increase access to them. After a year, the Bentley had developed tools and a review process, and had completed a pilot review project for 5,583 recordings. This resulted in the following outcomes:

- Provided an opportunity to reconceptualize rights review, digitization, and curation work in an integral way, as well as associated workflows.
- Completed rights reviews for nearly a quarter of the Bentley’s sound recordings.
- Increased access to 43% of the Bentley’s sound recordings.
- Produced rights review documentation demonstrating due diligence and ability to facilitate reference requests and other inquiries regarding our sound recordings.
- Developed robust project documentation including rights review tools, reports, collection assessments, workflow guidelines.

Given the legal nature of this project, the Bentley is submitting this review process, and access determinations made, to University General Counsel for approval and additional institutional support.

FINDINGS

Through this project we have also identified four key findings.

The Genre Approach

One of the strengths of this rights review process is how it is designed to handle rights review not only by individual recording but also by genre groupings. This method—dividing each collection into one of five groups to establish a baseline risk level—is the key to reviewing collections efficiently and at

scale, and to moving beyond item-level rights reviews. In our initial review of recorded sound holdings, we discovered that nine out of ten of our sound collections are wholly or nearly homogeneous in the identified genres, making this method especially powerful; only a tenth of collections required detailed sorting of individual items into different genres. For institutions with more heterogeneous collections, separating items within mixed collections into their respective genre groupings may take more time but will still be faster and more efficient than reviewing each item individually. As such, the genre approach is the cornerstone of the Bentley review process.

Digitize First

Our project revealed that we can achieve a much more accurate rights review when content has already been digitized. With a digital file, we have access to additional content information that can otherwise be unavailable on labels and containers, such as speakers and broadcast station information. Previous to our review work, this information was collected during the quality control and description process, when genre was also determined. Reviewing after digitizing proved efficient and accurate, and it became essential to our methodology. Digitizing before reviewing rights diverges from current practice in the field, which calls for acquiring rights information in advance. This might be the determining factor for recordings getting digitized or not. Our project revealed that digitizing in advance can result in higher accuracy in a rights review.

Music and Literature—Lower Priority

Our project has shown that certain genres have inherent traits that usually prevent expanding access and can be considered lower priorities for review. Musical performance and literary works can be very homogeneous compared to most genres, as both tend toward high risk. These show inherent risk and tend toward weaker fair use defenses. Review of musical performances showed that about two-thirds of music collections would remain limited to the reading room. Figure 2 also demonstrates higher risk levels for these two genres. For this reason, we recommend these two genres be considered a lower priority for review and reading room access be applied as the default access level. In this way, review efforts can be made more efficient by focusing attention on other genres that might result in wider access.

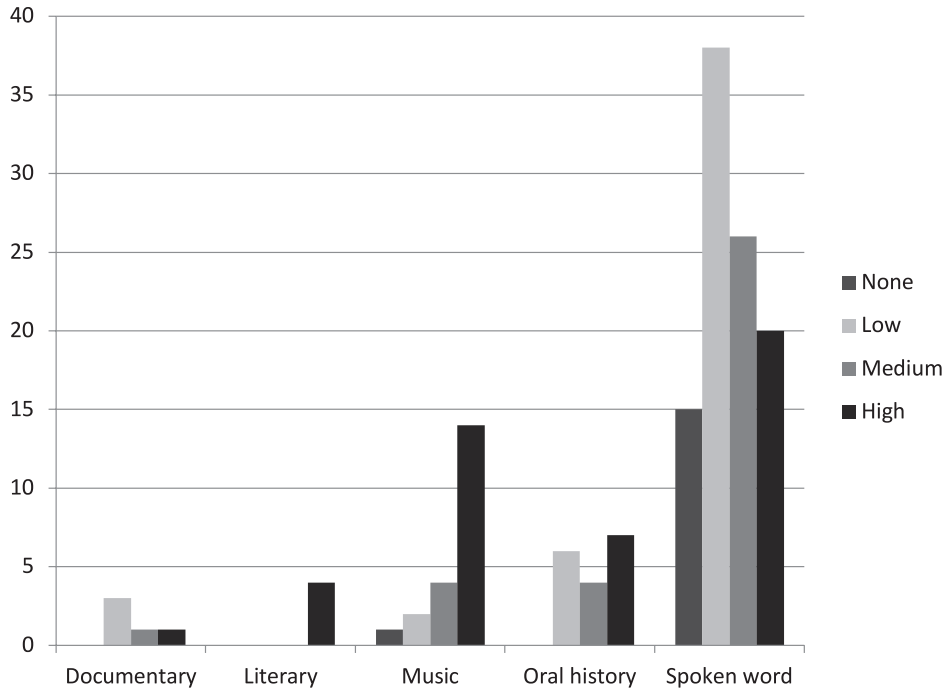


FIGURE 2. Risk distribution among collections, by genre

Restricting a Few to Open Many

In reviewing high-risk materials, we learned that the risk levels or fair use defenses of some collections can be markedly improved by flagging or restricting a few items that contain content at a much higher risk level (for example, one sermon by Martin Luther King Jr. in a collection of hundreds of sermons by Detroit ministers). But again, this requires the analyst to examine the collection much more closely. The curation archivists must decide whether such a collection is of high enough priority to warrant taking a deep dive into the collection to identify and restrict these red-flag items.

Areas for Improvements

This project also revealed several challenges and necessary improvements. Two of the most pressing are the need for both consistent description and dedicated staff.

In testing our review tools, particularly the Information Gathering Questionnaire, the need for more consistent description during quality assessment and description stages preceding rights review became evident. We found that descriptions of recordings in our database were not always consistent in

the type of information included. Radio station identifiers and other types of information had not always been collected during the earlier stages of quality control and description. As a result, we revised our QC and description guidelines to ensure these steps were always part of our workflow.

The Bentley's Rights Review project yielded robust documentation and guidelines for the review process. However, adequate staffing is necessary to analyze and review the Bentley's content. To carry out rights review work, the Bentley needs an analyst with a working knowledge of copyright law as it pertains to libraries and archives. This knowledge can be taught, along with the archival knowledge needed to carry out the work. However, it is necessary to consider the high learning curve involved, time invested in training, and turnover common with graduate student employees. Having dedicated trained staff will result in consistency, efficiency, and institutional knowledge. It will also support ongoing digitization work at the Bentley, as well as reviews for reference requests for audiovisual materials.

Conclusion

The Bentley Historical Library is committed to enabling access to its collections to further research, teaching, and learning. To fulfill our mission, we have employed innovative methods to find realistic solutions to the challenges presented by archival sound recording copyrights. We present this genre-based rights review process based on a risk management and fair use approach as a way to address legal limitations to access. Methods and tools developed here are rooted in the law, in emerging archival best practices, and in the real tools used each day by similar institutions.

We believe the tools and methods developed in this project can be applied by other cultural heritage institutions to increase access and use of their historical recordings. We hope these can be further improved as others apply, test, and try them.

Appendix 1: Information Gathering Questionnaire

Information gatherers should look in the following locations to answer these questions: Finding aid (if any), catalog record (if no finding aid), donor file and deed of gift, Beal database, and, for oral history collections, the oral history master list spreadsheet. If further questions arise, consult the project lead.

1. Are the materials in the collection largely *homogeneous* (of the same genre and by the same creator) or *heterogeneous* (of multiple genres, and with multiple original creators)?
☐ Homogeneous ☐ Heterogeneous
2. What is the primary genre of the material in the collection or sub-grouping?
☐ Spoken word, excluding oral history (public interviews, debates, talk shows, addresses, news, sermons, lectures, and meetings)
☐ Oral history (never-published or broadcast interviews)
☐ Music ("live" performances and pre-recorded music)
☐ Documentary (scripted non-fiction programming)
☐ Literary (readings of prose and poetry, drama)
☐ Please refer below to the specific set of questions for each genre.

A. Spoken word, excluding oral history

1. Is a gift/transfer agreement on file?
☐ Yes ☐ No ☐ Deposit agreement only
2. Did the creator(s) transfer copyright to UM or otherwise grant permission to provide public access? ☐ Yes ☐ No

Note: Sound recordings usually contain many layers of rights. A transfer agreement covers the creator(s)' rights only. Be sure to evaluate third-party rights.

3. If the material was originally a broadcast, did it originate on a UM-owned station (WUOM, WCBN, WOLV)? ☐ Yes ☐ No ☐ N/A
4. Are there any restrictions to providing access, due to donor agreement, statute, or sensitive personal information, privacy concerns, etc.?
☐ Yes ☐ No

Please specify: _____

5. Are there any third parties who hold rights over the material (e.g., do the recordings include music, literary readings, third-party radio programs, scripted addresses, etc.)? ☐ Yes ☐ No ☐ Unknown

6. If there are third party materials, is there sufficient argument for fair use?
[Complete Fair Use Assessment, below]
7. Are there known litigious entities associated with the collection/
sub-group? ☐ Yes ☐ No

Please specify: _____

B. Oral history

For questions 1 & 2, check the “oral history master list.xlsx” spreadsheet. If the information is not recorded there, check the donor file followed by the collection itself.³⁵

1. Is a gift/transfer agreement on file, or are the interviews a work-for-hire by BHL staff? ☐ Yes ☐ No ☐ Deposit agreement only
2. Are releases with the interviewee(s) in the donor file or in the collection?
☐ Yes ☐ No
3. Did the creator(s) transfer copyright to UM or otherwise grant permission to provide public access? ☐ Yes ☐ No

Note: Sound recordings usually contain many layers of rights. A transfer agreement covers the creator(s)’ rights only. Be sure to evaluate third-party rights.

4. Are there any restrictions to providing access, due to donor agreement, statute, or sensitive personal information, privacy concerns, etc.?
☐ Yes ☐ No

Please specify: _____

5. Are there any third parties who hold rights over the material?
E.g., do the recordings include music, literary readings, third-party radio programs, etc? Or, is the collection donor neither interviewer nor interviewee (making all parties in the recording “third parties”)? ☐ Yes ☐ No ☐ Unknown
6. If there are third party materials, is there sufficient argument for fair use?
[Complete Fair Use Assessment, below]
7. Are there known litigious entities associated with the collection/
sub-group? ☐ Yes ☐ No

Please specify: _____

C. Music

1. Is a gift/transfer agreement on file?
☐ Yes ☐ No ☐ Deposit agreement only

2. Did the creator(s) transfer copyright to UM or otherwise grant permission to provide public access? ☐ Yes ☐ No

Note: Sound recordings usually contain many layers of rights. A transfer agreement covers the creator(s)' rights only. Be sure to evaluate third-party rights.

3. If the material was originally a broadcast, did it originate on a UM-owned station (WUOM, WCBN, WOLV)? ☐ Yes ☐ No ☐ N/A
4. Are there any restrictions to providing access, due to donor agreement, statute, or sensitive personal information, privacy concerns, etc.? ☐ Yes ☐ No

Please specify: _____

5. Are there any third parties who hold rights over the material (e.g., commercially produced sound recordings, composers other than the collection creators, etc.)? ☐ Yes ☐ No ☐ Unknown
6. If there are third party materials, is there sufficient argument for fair use? [Complete Fair Use Assessment, below]
7. Are there known litigious entities associated with the collection/sub-group? ☐ Yes ☐ No

Please specify: _____

D. Documentary

Use Checklist A, "Spoken word, excluding oral history."

E. Literary

1. Is a gift/transfer agreement on file? ☐ Yes ☐ No ☐ Deposit agreement only
2. Did the creator(s) of the collection transfer copyright to UM or otherwise grant permission to provide public access? ☐ Yes ☐ No

Note: Sound recordings usually contain many layers of rights. A transfer agreement covers the creator(s)' rights only. Be sure to evaluate third-party rights.

3. Did the creator(s) of the copyrighted literary works transfer copyright to UM or otherwise grant permission to provide public access? ☐ Yes ☐ No
4. Are there any other third parties (besides the literary creator) who hold rights over the material (e.g., do the recordings include music, scripted addresses, etc.)? ☐ Yes ☐ No ☐ Unknown

5. If the material was originally a broadcast, did it originate on a UM-owned station (WUOM, WCBN, WOLV)? ☐ Yes ☐ No ☐ N/A
6. Are there any restrictions to providing access, due to donor agreement, statute, or sensitive personal information, privacy concerns, etc.? ☐ Yes ☐ No ☐

Please specify: _____

7. If the literary author has not transferred copyright and/or other third party rights exist, is there sufficient argument for fair use? [Complete Fair Use Assessment, below]
8. Are there known litigious entities associated with the collection/sub-group? ☐ Yes ☐ No

Please specify: _____

Appendix 2: Fair Use Assessment Checklist

Purpose and character of use (transformative factor)

Favoring Fair Use	Disfavoring Fair Use
<input type="checkbox"/> Educational [i.e. teaching, research, scholarship, criticism, comment]	<input type="checkbox"/> Commercial or entertainment use
<input type="checkbox"/> Transformative [work differs from the original presentation or is transformed to serve a new purpose]	<input type="checkbox"/> Non-transformative or exact replica of work for original purpose
<input type="checkbox"/> Non-commercial use	<input type="checkbox"/> For-profit use

Nature of the copyrighted work(s)

Favoring Fair Use	Disfavoring Fair Use
<input type="checkbox"/> Factual	<input type="checkbox"/> Creative
<input type="checkbox"/> Published	<input type="checkbox"/> Unpublished

Amount and substantiality of the portion used

Favoring Fair Use	Disfavoring Fair Use
<input type="checkbox"/> Small quantity	<input type="checkbox"/> Large portion or entire work
<input type="checkbox"/> Portion used is not central to the whole of the work	<input type="checkbox"/> Portion used is central to the work
<input type="checkbox"/> Amount is appropriate for educational purposes	<input type="checkbox"/> Includes more than is necessary for educational purposes

Effect of use on the potential market for the work

Favoring Fair Use	Disfavoring Fair Use
<input type="checkbox"/> No significant market effect	<input type="checkbox"/> Major effect on potential market
<input type="checkbox"/> One or few copies to be distributed	<input type="checkbox"/> Many copies to be distributed
<input type="checkbox"/> If previously published/broadcast, no longer in print/accessible	<input type="checkbox"/> Able to obtain permission to use work(s)
<input type="checkbox"/> Restricted access [e.g. by UM IP or credentialed login]	<input type="checkbox"/> Will be making publicly available on the Web
<input type="checkbox"/> One-time use	<input type="checkbox"/> Repeated or long-term use

Appendix 3: Fair Use Statement Template

Collection Description: _____

Description of Proposed Fair Use Items:

Please note if the items covered by this Fair Use Statement comprise all the collection's sound recordings or a subset. _____

Note: This Fair Use Statement applies to proposed uses of this material by the Bentley Historical Library only. It is the responsibility of anyone interested in reproducing, broadcasting or publishing content from the Bentley Historical Library collections to determine copyright holders and secure permissions or perform a diligent fair use analysis accordingly.

Using the assessment checklist above, briefly describe:

1. The transformative nature of the proposed use. (Have modifications been made? How is value being added? Is the proposed use markedly different than the original use?)
2. Why the amount used is required.
3. An explanation of your assessment of effects on the potential market.
4. Explain why the use of the work(s) is important to the project, either in spite of selecting factors disfavoring fair use or in bolstering the argument for fair use. If the items under consideration are orphans, indicate it here and include a statement such as: "In the risk assessment report, X item was found to be an orphan work, therefore the effect on the market is low."

Drafted by: _____ Date: _____

Appendix 4. Risk Assessment Rubric

Risk level	Criteria
High	<p>The author/creator is a well-known literary figure, broadcaster, or artist</p> <p>The author/creator/literary estate/publisher is known to actively defend copyrights</p> <p>The relationship between the holding institution and the author/creator/publisher is awkward or strained</p> <p>The material appears to have been published/broadcast and/or prepared for commercial gain, rather than to advance academic knowledge or in a for-profit environment.</p> <p>Limitations/restrictions by donor explicit</p> <p>Contains "large amount"³⁶ of music not in public domain</p> <p>Contains "large amount" of a total literary work not in public domain</p> <p>Contains "large amount" of a broadcast excerpted in a new recording</p> <p>Non-WUOM station ID announced</p>
Medium	<p>The author/creator has (or had) a high public profile</p> <p>The author/creator is alive or known to have a literary estate, but materials were created with academic and/or personal intent</p> <p>Materials include mostly orphan works</p> <p>Materials were created by local and/or state government agencies</p> <p>Indications of limitations or restrictions by donor</p> <p>No production credits and source cannot be located after a good-faith search</p> <p>Contains "small amount" of music not in public domain</p> <p>Contains "small amount" of a total literary work not in public domain</p> <p>Contains "small amount" of a broadcast excerpted in a new recording</p> <p>Radio program with no station ID</p>
Low	<p>Materials include some orphan works</p> <p>Creator is dead, has no literary estate, and materials were created with academic and/or personal intent</p> <p>Deed of gift allows for digitization and/or assigns copyrights to the Regents and the project DOES include items with third-party copyrights</p> <p>Materials were created by federal government agencies and therefore are likely public domain</p> <p>No music used in program or recording except public domain</p> <p>No literature recited or performed except public domain</p> <p>No excerpts from third-party programs occur in a radio program, or it can be demonstrated that producer was granted usage of that excerpt by licensee</p> <p>Radio program has WUOM ID and no apparent music or literature</p>
None	<p>Deed of gift allows for digitization and/or assigns copyrights to the Regents and the project DOES NOT include items with third party copyrights.</p>

Risk evaluation statement:

Appendix 5: Risk and Fair Use Review Workflow

1. Export a manifest of digitized sound recordings for a given collection with genre information from the database. Alternatively a list of recordings and genre information can be used for this purpose.
2. Sort each item on the manifest into one of the five primary genres:
(a) Spoken word excl. oral history, (b) Oral history, (c) Music, (d) Documentaries, or (e) Literary.

If a collection contains only one primary genre, prepare only one assessment and one manifest. If the collection contains multiple primary genres, the original manifest must be sorted into as many separate manifests as necessary and a separate assessment prepared for each manifest. For each subgroup, apply the four assessment tools.

3. Information Gathering Questionnaire: Consult necessary documentation and resources to determine the existence/status of gift agreement, restrictions, and identifiable rights holders.
4. Fair Use Assessment Checklist: Evaluate the strength of the collection's fair use defense using the four-factor test.
5. Fair Use Statement template: Examine the balance of factors on the checklist and judge whether the four factors weigh toward a strong, medium, or weak fair use defense. Draft a statement explaining the rationale for the ruling using each of the four factors.
6. Risk Assessment Rubric: Select the risk factors that describe the collection and assign one of the four risk levels (high, medium, low, or none) according to the highest level selected. Draft a brief "risk assessment statement" summarizing the rationale for the assigned level of risk.
7. Supervisor reviews the assessments and approves or suggests revisions.
8. Collect completed tools used in assessment and append a manifest of all associated sound recordings. Keep for collection records.
9. Update ArchivesSpace records for all recordings in the subgroup to include appropriate "Conditions Governing Access" notes as well as links to the completed survey forms and documentation.
10. Apply the appropriate access profile to materials in the digital media library (either retroactively or upon upload to the platform).

Appendix 6: Sample Evaluations

6.1 No risk

Hilary Whittaker papers (1 item) Donor # 5166

1. Are the materials in the collection largely *homogeneous* (of the same genre and by the same creator) or *heterogeneous* (of multiple genres, and with multiple original creators)?
☒ Homogeneous ☐ Heterogeneous
2. What is the primary genre of the material in the collection or sub-grouping?
☒ Spoken word, excluding oral history (public interviews, debates, talk shows, addresses, news, sermons, lectures, and meetings)
☐ Oral history (never-published or broadcast interviews)
☐ Music ("live" performances and pre-recorded music)
☐ Documentary (scripted non-fiction programming)
☐ Literary (readings of prose and poetry, drama)

Spoken word, excluding oral history

3. Is a gift/transfer agreement on file? ☒ Yes ☐ No
4. Did the creator(s) transfer copyright to UM or otherwise grant permission to provide public access? ☒ Yes ☐ No
5. If the material was originally a broadcast, did it originate on a UM-owned station (WUOM, WCBN, WOLV)? ☐ Yes ☐ No ☒ N/A
6. Are there any restrictions to providing access, due to donor agreement, statute, or sensitive personal information? ☐ Yes ☒ No

Please specify: _____

7. Are there any third parties who hold rights over the material (e.g., do the recordings include music, literary readings, third-party radio programs, scripted addresses, etc.)? ☐ Yes ☒ No ☐ Unknown
 8. If there are third party materials, is there sufficient argument for fair use? [Complete Fair Use Assessment, below]
 9. Are there known litigious entities associated with the collection/ sub-group? ☐ Yes ☒ No
-

Fair Use Assessment
Purpose and character of use (transformative factor)

Favoring Fair Use	Disfavoring Fair Use
<input checked="" type="checkbox"/> Educational [i.e. teaching, research, scholarship, criticism, comment]	<input type="checkbox"/> Commercial or entertainment use
<input checked="" type="checkbox"/> Transformative [work differs from the original presentation or is transformed to serve a new purpose]	<input type="checkbox"/> Non-transformative or exact replica of work for original purpose
<input checked="" type="checkbox"/> Non-commercial use	<input type="checkbox"/> For-profit use

Nature of the copyrighted work(s)

Favoring Fair Use	Disfavoring Fair Use
<input checked="" type="checkbox"/> Factual	<input type="checkbox"/> Creative
<input type="checkbox"/> Published	<input checked="" type="checkbox"/> Unpublished

Amount and substantiality of the portion used

Favoring Fair Use	Disfavoring Fair Use
<input type="checkbox"/> Small quantity	<input checked="" type="checkbox"/> Large portion or entire work
<input type="checkbox"/> Portion used is not central to the whole of the work	<input checked="" type="checkbox"/> Portion used is central to the work
<input checked="" type="checkbox"/> Amount is appropriate for educational purposes	<input type="checkbox"/> Includes more than is necessary for educational purposes

Effect of use on the potential market for the work

Favoring Fair Use	Disfavoring Fair Use
<input checked="" type="checkbox"/> No significant market effect	<input type="checkbox"/> Major effect on potential market
<input type="checkbox"/> One or few copies to be distributed	<input checked="" type="checkbox"/> Many copies to be distributed
<input type="checkbox"/> If previously published/broadcast, no longer in print/accessible	<input type="checkbox"/> Able to obtain permission to use work(s)
<input type="checkbox"/> Restricted access [e.g. by UM IP or credentialed login]	<input type="checkbox"/> Will be making publicly available on the Web
<input type="checkbox"/> One-time use	<input checked="" type="checkbox"/> Repeated or long-term use

Fair Use Statement

Collection description: Hilary Whittaker papers. An on-the-spot news broadcast from Morocco on the occasion of a devastating earthquake, 1960.

Description of proposed fair use items: All 1 items.

Using the assessment checklist above, briefly describe:

1. The transformative nature of the proposed use. (Have modifications been made? How is value being added? Is the proposed use markedly different than the original use?)
2. Why the amount used is required.
3. An explanation of your assessment of effects on the potential market.
4. Explain why the use of the work(s) is important to the project, either in spite of selecting factors disfavoring fair use or in bolstering the argument for fair use. If the items under consideration are orphans, indicate it here and include a statement such as: "In the risk assessment report, X item was found to be an orphan work, therefore the effect on the market is low."

Rights transferred to BHL. No infringement. No fair use statement necessary.

Drafted by: Jeremy Evans

Date: 8/9/2016

Risk level	Criteria
High	<p>The author/creator is a well-known literary figure, broadcaster, or artist</p> <p>The author/creator/literary estate/publisher is known to actively defend copyrights</p> <p>The relationship between the holding institution and the author/creator/publisher is awkward</p> <p>The material appears to have been published/broadcast and/or prepared for commercial gain, rather than to advance academic knowledge or in a for-profit environment.</p> <p>Limitations/restrictions by donor explicit</p> <p>Contains "large amount" of music not in public domain</p> <p>Contains "large amount" of a total literary work not in public domain</p> <p>Contains "large amount" of a broadcast excerpted in a new recording</p> <p>Non-WUOM station ID announced</p>
Medium	<p>The author/creator has (or had) a high public profile</p> <p>The author/creator is alive or known to have a literary estate, but materials were created with academic and/or personal intent</p> <p>Materials include mostly orphan works</p> <p>Materials were created by local and/or state government agencies</p> <p>Indications of limitations or restrictions by donor</p> <p>No production credits and source cannot be located after a good-faith search</p> <p>Contains "small amount" of music not in public domain</p> <p>Contains "small amount" of a total literary work not in public domain</p> <p>Contains "small amount" of a broadcast excerpted in a new recording</p> <p>Radio program with no station ID</p>
Low	<p>Materials include some orphan works</p> <p>Creator is dead, has no literary estate, and materials were created with academic and/or personal intent</p> <p>Deed of gift allows for digitization and/or assigns copyrights to the Regents and the project</p> <p>DOES include items with third-party copyrights</p> <p>Materials were created by federal government agencies and therefore are likely public domain</p> <p>No music used in program or recording except public domain</p> <p>No literature recited or performed except public domain</p> <p>No excerpts from third-party programs occur in a radio program, or it can be demonstrated that producer was granted usage of that excerpt by licensee</p> <p>Radio program has WUOM ID and no apparent music or literature</p>
None	<u>Deed of gift allows for digitization and/or assigns copyrights to the Regents and the project DOES NOT include items with third party copyrights.</u>

Risk Assessment Statement

**No risk.
Items**

Master_WAV_file	ItemPartTitle	CollItemNo	ItemTitle	ItemDate
86314-SR-1-1.wav	[Part 1]	86314-SR-1	Recording describing earthquake in Morocco	1960 March 15

6.2 Low risk

Karoub Family papers (3 items) Donor # 9616

1. Are the materials in the collection largely *homogeneous* (of the same genre and by the same creator) or *heterogeneous* (of multiple genres, and with multiple original creators)?
☒ Homogeneous ☐ Heterogeneous
2. What is the primary genre of the material in the collection or sub-grouping?
☒ Spoken word, excluding oral history (public interviews, debates, talk shows, addresses, news, sermons, lectures, and meetings)
☐ Oral history (never-published or broadcast interviews)
☐ Music ("live" performances and pre-recorded music)
☐ Documentary (scripted non-fiction programming)
☐ Literary (readings of prose and poetry, drama)

Spoken word, excluding oral history

3. Is a gift/transfer agreement on file? ☒ Yes ☐ No
4. Did the creator(s) transfer copyright to UM or otherwise grant permission to provide public access? ☒ Yes ☐ No
5. If the material was originally a broadcast, did it originate on a UM-owned station (WUOM, WCBN, WOLV)? ☐ Yes ☐ No ☒ N/A
6. Are there any restrictions to providing access, due to donor agreement, statute, or sensitive personal information? ☐ Yes ☒ No

Please specify: _____

7. Are there any third parties who hold rights over the material (e.g., do the recordings include music, literary readings, third-party radio programs, scripted addresses, etc.)? ☐ Yes ☒ No ☐ Unknown
 8. If there are third party materials, is there sufficient argument for fair use? [Complete Fair Use Assessment, below]
 9. Are there known litigious entities associated with the collection/sub-group? ☐ Yes ☒ No
-

Fair Use Assessment
Purpose and character of use (transformative factor)

Favoring Fair Use	Disfavoring Fair Use
<input checked="" type="checkbox"/> Educational [i.e. teaching, research, scholarship, criticism, comment]	<input type="checkbox"/> Commercial or entertainment use
<input checked="" type="checkbox"/> Transformative [work differs from the original presentation or is transformed to serve a new purpose] [some uses]	<input checked="" type="checkbox"/> Non-transformative or exact replica of work for original purpose [other uses]
<input checked="" type="checkbox"/> Non-commercial use	<input type="checkbox"/> For-profit use

Nature of the copyrighted work(s)

Favoring Fair Use	Disfavoring Fair Use
<input checked="" type="checkbox"/> Factual [spoken elements]	<input checked="" type="checkbox"/> Creative [musical & sermon elements]
<input type="checkbox"/> Published	<input checked="" type="checkbox"/> Unpublished

Amount and substantiality of the portion used

Favoring Fair Use	Disfavoring Fair Use
<input type="checkbox"/> Small quantity	<input checked="" type="checkbox"/> Large portion or entire work
<input type="checkbox"/> Portion used is not central to the whole of the work	<input checked="" type="checkbox"/> Portion used is central to the work
<input checked="" type="checkbox"/> Amount is appropriate for educational purposes	<input type="checkbox"/> Includes more than is necessary for educational purposes

Effect of use on the potential market for the work

Favoring Fair Use	Disfavoring Fair Use
<input checked="" type="checkbox"/> No significant market effect	<input type="checkbox"/> Major effect on potential market
<input type="checkbox"/> One or few copies to be distributed	<input checked="" type="checkbox"/> Many copies to be distributed
<input type="checkbox"/> If previously published/broadcast, no longer in print/accessible	<input type="checkbox"/> Able to obtain permission to use work(s)
<input type="checkbox"/> Restricted access [e.g. by UM IP or credentialed login]	<input type="checkbox"/> Will be making publicly available on the Web
<input type="checkbox"/> One-time use	<input checked="" type="checkbox"/> Repeated or long-term use

Fair Use Statement

Collection description: Karoub Family papers. Imam Hussein Karoub praying, singing, reading poetry, and holding a discussion, 1961.

Description of proposed fair use items: All 3 items.

Using the assessment checklist above, briefly describe:

1. The transformative nature of the proposed use. (Have modifications been made? How is value being added? Is the proposed use markedly different than the original use?)
2. Why the amount used is required.
3. An explanation of your assessment of effects on the potential market.
4. Explain why the use of the work(s) is important to the project, either in spite of selecting factors disfavoring fair use or in bolstering the argument for fair use. If the items under consideration are orphans, indicate it here and include a statement such as: "In the risk assessment report, X item was found to be an orphan work, therefore the effect on the market is low."

The Karoub Family has signed over copyright to BHL. This fair use analysis only applies to any third party rights that may be implicated in the music or poetry performed by Imam Karoub, if they are not in the public domain.

Making these recordings accessible is a transformative use to most audiences because they would serve an educational purpose for students and researchers of the early history of Arab-Americans in Michigan, rather than serving the original purpose of presenting Imam Karoub to a contemporary audience. It is conceivable, though, that some audiences may access the works for their original purpose of artistic pleasure or religious education, meaning some uses could be non-transformative.

The full amount of the performances would be needed by students and researchers, but not those who are listening for pleasure. Expanding access to these recordings would have no effect on the market because no market appears to exist.

Despite the factors disfavoring fair use, which are chiefly the use of whole/substantial parts of the work and that this work is previously unpublished, fair use is still supported because these factors are greatly outweighed by the other factors. Additionally, the amount used is appropriate for educational purposes, as these recordings are of enormous historical value to students and scholars if they can be heard in full.

Drafted by: Jeremy Evans

Date: 8/9/2016

Risk level	Criteria
High	<p>The author/creator is a well-known literary figure, broadcaster, or artist</p> <p>The author/creator/literary estate/publisher is known to actively defend copyrights</p> <p>The relationship between the holding institution and the author/creator/publisher is awkward</p> <p>The material appears to have been published/broadcast and/or prepared for commercial gain, rather than to advance academic knowledge or in a for-profit environment.</p> <p>Limitations/restrictions by donor explicit</p> <p>Contains "large amount" of music not in public domain</p> <p>Contains "large amount" of a total literary work not in public domain</p> <p>Contains "large amount" of a broadcast excerpted in a new recording</p> <p>Non-WUOM station ID announced</p>
Medium	<p>The author/creator has (or had) a high public profile</p> <p>The author/creator is alive or known to have a literary estate, but materials were created with academic and/or personal intent</p> <p>Materials include mostly orphan works</p> <p>Materials were created by local and/or state government agencies</p> <p>Indications of limitations or restrictions by donor</p> <p>No production credits and source cannot be located after a good-faith search</p> <p>Contains "small amount" of music not in public domain</p> <p>Contains "small amount" of a total literary work not in public domain</p> <p>Contains "small amount" of a broadcast excerpted in a new recording</p> <p>Radio program with no station ID</p>
Low	<p>Materials include some orphan works</p> <p>Creator is dead, has no literary estate, and materials were created with academic and/or personal intent</p> <p>Deed of gift allows for digitization and/or assigns copyrights to the Regents and the project DOES include items with third-party copyrights</p> <p>Materials were created by federal government agencies and therefore are likely public domain</p> <p>No music used in program or recording except public domain</p> <p>No literature recited or performed except public domain</p> <p>No excerpts from third-party programs occur in a radio program, or it can be demonstrated that producer was granted usage of that excerpt by licensee</p> <p>Radio program has WUOM ID and no apparent music or literature</p>
None	<p>Deed of gift allows for digitization and/or assigns copyrights to the Regents and the project DOES NOT include items with third party copyrights.</p>

Risk Assessment Statement

If it were to be discovered that third-party rights subside in the music or poetry, then the risk level would be low, because the portion used is small. However, if not, then the risk level would be none. Summary: *Low* risk.

After performing the fair use analysis, I believe the fair use defense for this collection is *strong*.

Items

Master_WAV_file	ItemPart Title	CollItem No	ItemTitle	ItemDate
0580-SR-1-1.wav	[Part 1]	0580-SR-1	Imam Hussein Karoub recitation of the Athan, conversation with Wajih Salah of the United Nations, singing and poetry reading	1961 January
0580-SR-1-2-1.wav	[Part 2]	0580-SR-1	Imam Hussein Karoub recitation of the Athan, conversation with Wajih Salah of the United Nations, singing and poetry reading	1961 January
0580-SR-1-2-2.wav	[Part 2]	0580-SR-1	Imam Hussein Karoub recitation of the Athan, conversation with Wajih Salah of the United Nations, singing and poetry reading	1961 January

6.3 Medium risk

Henry Russel Lectureship Committee papers (12 recordings) Donor # 6536

1. Are the materials in the collection largely *homogeneous* (of the same genre and by the same creator) or *heterogeneous* (of multiple genres, and with multiple original creators)?
☒ Homogeneous ☐ Heterogeneous
2. What is the primary genre of the material in the collection or sub-grouping?
☒ Spoken word, excluding oral history (public interviews, debates, talk shows, addresses, news, sermons, lectures, and meetings)
☐ Oral history (never-published or broadcast interviews)
☐ Music ("live" performances and pre-recorded music)
☐ Documentary (scripted non-fiction programming)
☐ Literary (readings of prose and poetry, drama)

Spoken word, excluding oral history

3. Is a gift/transfer agreement on file?
☒ ☐ Yes ☐ No ☐ Deposit agreement only
4. Did the creator(s) transfer copyright to UM or otherwise grant permission to provide public access? ☒ Yes ☐ No
5. If the material was originally a broadcast, did it originate on a UM-owned station (WUOM, WCBN, WOLV)? ☐ Yes ☐ No ☒ N/A

Note: Sound recordings usually contain many layers of rights. A transfer agreement covers the creator(s)' rights only. Be sure to evaluate third-party rights.

6. Are there any restrictions to providing access, due to donor agreement, statute, or sensitive personal information, privacy concerns, etc.?
☐ Yes ☒ No

Please specify: _____

7. Are there any third parties who hold rights over the material (e.g., do the recordings include music, literary readings, third-party radio programs, scripted addresses, etc.)? ☒ Yes ☐ No ☐ Unknown
8. If there are third party materials, is there sufficient argument for fair use? [Complete Fair Use Assessment, below]
9. Are there known litigious entities associated with the collection/sub-group? ☐ Yes ☒ No

Please specify: _____

Fair Use Assessment
Purpose and character of use (transformative factor)

Favoring Fair Use	Disfavoring Fair Use
<input checked="" type="checkbox"/> Educational [i.e. teaching, research, scholarship, criticism, comment]	<input type="checkbox"/> Commercial or entertainment use
<input checked="" type="checkbox"/> Transformative [work differs from the original presentation or is transformed to serve a new purpose]	<input type="checkbox"/> Non-transformative or exact replica of work for original purpose
<input checked="" type="checkbox"/> Non-commercial use	<input type="checkbox"/> For-profit use

Nature of the copyrighted work(s)

Favoring Fair Use	Disfavoring Fair Use
<input type="checkbox"/> Factual	<input checked="" type="checkbox"/> Creative
<input checked="" type="checkbox"/> Published [delivered publicly]	<input type="checkbox"/> Unpublished

Amount and substantiality of the portion used

Favoring Fair Use	Disfavoring Fair Use
<input type="checkbox"/> Small quantity	<input checked="" type="checkbox"/> Large portion or entire work
<input type="checkbox"/> Portion used is not central to the whole of the work	<input checked="" type="checkbox"/> Portion used is central to the work
<input checked="" type="checkbox"/> Amount is appropriate for educational purposes	<input type="checkbox"/> Includes more than is necessary for educational purposes

Effect of use on the potential market for the work

Favoring Fair Use	Disfavoring Fair Use
<input checked="" type="checkbox"/> No significant market effect	<input type="checkbox"/> Major effect on potential market
<input type="checkbox"/> One or few copies to be distributed	<input checked="" type="checkbox"/> Many copies to be distributed
<input checked="" type="checkbox"/> If previously published/broadcast, no longer in print/accessible	<input type="checkbox"/> Able to obtain permission to use work(s)
<input type="checkbox"/> Restricted access [e.g. by UM IP or credentialed login]	<input type="checkbox"/> Will be making publicly available on the Web
<input type="checkbox"/> One-time use	<input checked="" type="checkbox"/> Repeated or long-term use

Fair Use Statement

Collection description: Henry Russel Lectureship Committee (UM) sound recordings. Addresses presented by notable senior faculty, 1975-2004.

Description of proposed fair use items: All 12 items.

Please note if the items covered by this Fair Use Statement comprise all the collection's sound recordings or a subset. SUBSET

Note: This Fair Use Statement applies to proposed uses of this material by the Bentley Historical Library only. It is the responsibility of anyone interested in reproducing, broadcasting or publishing content from the Bentley Historical Library collections to determine copyright holders and secure permissions or perform a diligent fair use analysis accordingly

Using the assessment checklist above, briefly describe:

1. The transformative nature of the proposed use. (Have modifications been made? How is value being added? Is the proposed use markedly different than the original use?)
2. Why the amount used is required.
3. An explanation of your assessment of effects on the potential market.
4. Explain why the use of the work(s) is important to the project, either in spite of selecting factors disfavoring fair use or in bolstering the argument for fair use. If the items under consideration are orphans, indicate it here and include a statement such as: "In the risk assessment report, X item was found to be an orphan work, therefore the effect on the market is low."

Making these recordings accessible is a transformative use because they now serve an educational purpose of a historical nature for students and researchers of the University of Michigan. This differs from the original purpose of presenting faculty members' original research.

The amount proposed to be used is required because to extract portions of individual recordings is pernicious to their character as historical artifacts, which need to be perceived in their totality by students and researchers.

Our use is not expected to affect the market for these items because no market exists.

Despite the factors disfavoring fair use, which are chiefly the use of whole/substantial parts of the works and that creative performances are included, access is supported by a fair use defense because these factors are outweighed by the other factors. Additionally, the amount used is appropriate for educational purposes, as these recordings are of historical value to students and scholars if it can be heard in full.

Drafted by: Jeremy Evans

Date: 1/20/2017

Risk Evaluation

Risk level	Criteria
High	<p>The author/creator is a well-known literary figure, broadcaster, or artist</p> <p>The author/creator/literary estate/publisher is known to actively defend copyrights</p> <p>The relationship between the holding institution and the author/creator/publisher is awkward or strained</p> <p>The material appears to have been published/broadcast and/or prepared for commercial gain, rather than to advance academic knowledge or in a for-profit environment.</p> <p>Limitations/restrictions by donor explicit</p> <p>Contains "large amount" of music not in public domain</p> <p>Contains "large amount" of a total literary work not in public domain</p> <p>Contains "large amount" of a broadcast excerpted in a new recording</p> <p>Non-WUOM station ID announced</p>
Medium	<p><u>The author/creator has (or had) a high public profile</u></p> <p><u>The author/creator is alive or known to have a literary estate, but materials were created with academic and/or personal intent</u></p> <p>Materials include mostly orphan works</p> <p>Materials were created by local and/or state government agencies</p> <p>Indications of limitations or restrictions by donor</p> <p>No production credits and source cannot be located after a good-faith search</p> <p>Contains "small amount" of music not in public domain</p> <p>Contains "small amount" of a total literary work not in public domain</p> <p>Contains "small amount" of a broadcast excerpted in a new recording</p> <p>Radio program with no station ID</p>
Low	<p>Materials include some orphan works</p> <p>Creator is dead, has no literary estate, and materials were created with academic and/or personal intent</p> <p>Deed of gift allows for digitization and/or assigns copyrights to the Regents and the project</p> <p>DOES include items with third-party copyrights</p> <p>Materials were created by federal government agencies and therefore are likely public domain</p> <p>No music used in program or recording except public domain</p> <p>No literature recited or performed except public domain</p> <p>No excerpts from third-party programs occur in a radio program, or it can be demonstrated that producer was granted usage of that excerpt by licensee</p> <p>Radio program has WUOM ID and no apparent music or literature</p>
None	<p>Deed of gift allows for digitization and/or assigns copyrights to the Regents and the project</p> <p>DOES NOT include items with third party copyrights.</p>

Risk Assessment Statement

The chart shows that is a medium risk collection, due to the creative rights the various authors (UM faculty members) retain in their original speeches. The risk is medium, not high, because the materials were made with academic intent.

Summary: *Medium* risk.

After performing a fair use analysis, I believe the fair use defense for this collection is *medium*. The fair use defense hinges on whether the use would be deemed "transformative enough."

Items

Master_WAV_file	ItemPartTitle	CollItemNo	ItemTitle	ItemDate
8724-SR-1-1.wav	[Side 1; no Side 2]	8724-SR-1	Henry Russel Lectureship - Bernard Agranoff	1988
8724-SR-2-1.wav	[Side 1; no Side 2]	8724-SR-2	Leslie Bassett: Shape of Content	1984 March 21
8724-SR-3-1.wav	[Side 1; no Side 2]	8724-SR-3	Henry Russel Lectureship - Minor J. Coon	1984 March 21
8724-SR-4-1.wav	[Side 1; no Side 2]	8724-SR-4	Henry Russel Lectureship - Thomas M. Donahue	1986
8724-SR-5-1.wav	[Side 1]	8724-SR-5	Henry Russel Lectureship - Sidney Fine	1985
8724-SR-5-2.wav	[Side 2]	8724-SR-5	Henry Russel Lectureship - Sidney Fine	1985
8724-SR-6-1.wav	[Side 1]	8724-SR-6	The 1975 Russel Lecture: "Image, Illustration, Instrument: The Map Through History" George Kish, geographer	1975 March 25
8724-SR-6-2.wav	[Side 2]	8724-SR-6	The 1975 Russel Lecture: "Image, Illustration, Instrument: The Map Through History" George Kish, geographer	1975 March 25
8724-SR-7-1.wav	[Side 1]	8724-SR-7	Gérard A. Mourou "Ultra High Intensity Lasers" "A Revolutionary Tool in Engineering, Physics, and Medicine"	2002 March 12
8724-SR-7-2.wav	[Side 2]	8724-SR-7	Gérard A. Mourou "Ultra High Intensity Lasers" "A Revolutionary Tool in Engineering, Physics, and Medicine"	2002 March 12
8724-SR-8-1.wav	[Side 1]	8724-SR-8	Henry Russel Lecture [Maris Vinovskis]	2004 March 09
8724-SR-8-2.wav	[Side 2]	8724-SR-8	Henry Russel Lecture [Maris Vinovskis]	2004 March 09

6.4 High risk

Ruth Ellis papers (2 items) Donor #: 8774

1. Are the materials in the collection largely *homogeneous* (of the same genre and by the same creator) or *heterogeneous* (of multiple genres, and with multiple original creators)?
☒ Homogeneous ☐ Heterogeneous
2. What is the primary genre of the material in the collection or sub-grouping?
☒ Spoken word, excluding oral history (public interviews, debates, talk shows, addresses, news, sermons, lectures, and meetings)
☐ Oral history (never-published or broadcast interviews)
☐ Music ("live" performances and pre-recorded music)
☐ Documentary (scripted non-fiction programming)
☐ Literary (readings of prose and poetry, drama)

Spoken word

3. Is a gift/transfer agreement on file? ☒ Yes ☐ No ☐ Deposit agreement only
4. Did the creator(s) transfer copyright to UM or otherwise grant permission to provide public access?
☒ Yes ☐ No

Note: Sound recordings usually contain many layers of rights. A transfer agreement covers the creator(s)' rights only. Be sure to evaluate third-party rights.

5. If the material was originally a broadcast, did it originate on a UM-owned station (WUOM, WCBN, WOLV)? ☐ Yes ☒ No ☐ N/A
6. Are there any restrictions to providing access, due to donor agreement, statute, or sensitive personal information, privacy concerns, etc.?
☐ Yes ☒ No
☐ Please specify:
7. Are there any third parties who hold rights over the material (e.g., do the recordings include music, literary readings, third-party radio programs, scripted addresses, etc.)? ☒ Yes ☐ No ☐ Unknown
8. If there are third party materials, is there sufficient argument for fair use? [Complete Fair Use Assessment, below]
9. Are there known litigious entities associated with the collection/sub-group? ☐ Yes ☒ No

Please specify: _____

Fair Use Assessment
Purpose and character of use (transformative factor)

Favoring Fair Use	Disfavoring Fair Use
<input checked="" type="checkbox"/> Educational [i.e. teaching, research, scholarship, criticism, comment]	<input type="checkbox"/> Commercial or entertainment use
<input type="checkbox"/> Transformative [work differs from the original presentation or is transformed to serve a new purpose]	<input checked="" type="checkbox"/> Non-transformative or exact replica of work for original purpose
<input checked="" type="checkbox"/> Non-commercial use	<input type="checkbox"/> For-profit use

Nature of the copyrighted work(s)

Favoring Fair Use	Disfavoring Fair Use
<input checked="" type="checkbox"/> Factual	<input type="checkbox"/> Creative
<input checked="" type="checkbox"/> Published	<input type="checkbox"/> Unpublished

Amount and substantiality of the portion used

Favoring Fair Use	Disfavoring Fair Use
<input type="checkbox"/> Small quantity	<input checked="" type="checkbox"/> Large portion or entire work
<input type="checkbox"/> Portion used is not central to the whole of the work	<input checked="" type="checkbox"/> Portion used is central to the work
<input type="checkbox"/> Amount is appropriate for educational purposes	<input checked="" type="checkbox"/> Includes more than is necessary for educational purposes

Effect of use on the potential market for the work

Favoring Fair Use	Disfavoring Fair Use
<input checked="" type="checkbox"/> No significant market effect	<input type="checkbox"/> Major effect on potential market
<input type="checkbox"/> One or few copies to be distributed	<input checked="" type="checkbox"/> Many copies to be distributed
<input type="checkbox"/> If previously published/broadcast, no longer in print/accessible	<input type="checkbox"/> Able to obtain permission to use work(s)
<input type="checkbox"/> Restricted access [e.g. by UM IP or credentialed login]	<input type="checkbox"/> Will be making publicly available on the Web
<input type="checkbox"/> One-time use	<input checked="" type="checkbox"/> Repeated or long-term use

Fair Use Statement

Collection Description: Ruth Ellis papers. Interview on “Living on Earth” (NPR), 2000.

Description of Proposed Fair Use Items: 2 items.

Please note if the items covered by this Fair Use Statement comprise all the collection’s sound recordings or a subset. ALL

Note: This Fair Use Statement applies to proposed uses of this material by the Bentley Historical Library only. It is the responsibility of anyone interested in reproducing, broadcasting or publishing content from the Bentley Historical Library collections to determine copyright holders and secure permissions or perform a diligent fair use analysis accordingly.

1. Using the assessment checklist above, briefly describe:
2. The transformative nature of the proposed use. (Have modifications been made? How is value being added? Is the proposed use markedly different than the original use?)
3. Why the amount used is required.
4. An explanation of your assessment of effects on the potential market.
5. Explain why the use of the work(s) is important to the project, either in spite of selecting factors disfavoring fair use or in bolstering the argument for fair use. If the items under consideration are orphans, indicate it here and include a statement such as: “In the risk assessment report, X item was found to be an orphan work, therefore the effect on the market is low.”

Making these recordings accessible is perhaps a transformative use, for those researching Ellis’s life, but for those accessing the tape for other purposes, the use is not transformative. For example, the first side of this tape includes 4 segments, none of which feature Ellis at all (only one program on side 2 does). Making those recordings available is probably not a transformative use; the reasons they would be accessed now are likely the same they were in 2000 (though this may change as 2000 recedes into history).

The amount proposed to be used exceeds that which is necessary for students and researchers of Ellis because she occupies a very small portion of these programs. Only those portions directly related to Ellis would need to be extracted for the core purpose of this collection.

It is possible our use could affect a market for these shows. PRI handles the archive for this program, which is still in production, and this episode is readily available on their web site. Although the shows are made under a nonprofit model, there is an argument that we would be siphoning off potential donors.

On the whole, the four-factor test weighs heavily against fair use.

Drafted by: Jeremy Evans

Date: 10/28/16

Risk Evaluation	
Risk level	Criteria
High	The author/creator is a well-known literary figure, broadcaster, or artist The author/creator/literary estate/publisher is known to actively defend copyrights The relationship between the holding institution and the author/creator/publisher is awkward or strained The material appears to have been published/broadcast and/or prepared for commercial gain, rather than to advance academic knowledge or in a for-profit environment. Limitations/restrictions by donor explicit Contains large amount of music not in public domain Contains large amount of a total literary work not in public domain Contains large amount of a broadcast excerpted in a new recording Non-WUOM station ID announced
Medium	The author/creator has (or had) a high public profile The author/creator is alive or known to have a literary estate, but materials were created with academic and/or personal intent Materials include mostly orphan works Materials were created by local and/or state government agencies Indications of limitations or restrictions by donor No production credits and source cannot be located after a good-faith search Contains small amount of music not in public domain Contains small amount of a total literary work not in public domain Contains small amount of a broadcast excerpted in a new recording Radio program with no station ID
Low	Materials include some orphan works Creator is dead, has no literary estate, and materials were created with academic and/or personal intent Deed of gift allows for digitization and/or assigns copyrights to the Regents and the project DOES include items with third-party copyrights Materials were created by federal government agencies and therefore are likely public domain No music used in program or recording except public domain No literature recited or performed except public domain No excerpts from third-party programs occur in a radio program, or it can be demonstrated that producer was granted usage of that excerpt by licensee Radio program has WUOM ID and no apparent music or literature
None	Deed of gift allows for digitization and/or assigns copyrights to the Regents and the project DOES NOT include items with third party copyrights.

Risk Assessment Statement

Because this recording is of a broadcast clearly identified as being from NPR radio, and because the program has an active web site that hosts this episode, the risk level is high.

Summary: High risk.

After performing the fair use analysis, I believe that a fair use defense for using this collection is *weak*.

Items

Master_WAV_file	ItemPartTitle	CollItemNo	ItemTitle	ItemDate
0047-SR-1-1.wav	[Side 1]	0047-SR-1	"Living on Earth," National Public Radio broadcast with Ruth Ellis	2000 January 07
0047-SR-1-2.wav	[Side 2]	0047-SR-1	"Living on Earth," National Public Radio broadcast with Ruth Ellis	2000 January 07

NOTES

- ¹ International Association of Sound and Audiovisual Archives' TC-03 states that "Long-term preservation of audio (and implicitly also for video) can only be achieved by converting contents into files, and by maintaining these files like any other computer data." IASA, *The Safeguarding of the Audio Heritage: Ethics, Principles and Preservation Strategy: IASA-TC 03* (Canberra, Aus.: International Association of Sound and Audiovisual Archives).
- ² 17 U.S. Code § 108 (b)(2) and (c)(2) enumerate libraries' and archives' right to produce and distribute three preservation copies of an unpublished work or three replacement copies of a published work as long as "any such copy or phonorecord that is reproduced in digital format is not otherwise distributed in that format and is not made available to the public outside the premises of the library or archives."
- ³ Works reviewed for this study include June M. Besek, *Copyright Issues Relevant to Digital Preservation and Dissemination of Pre-1972 Commercial Sound Recordings by Libraries and Archives* (Washington, D.C.: Council on Library and Information Resources/Library of Congress, 2005); Besek, *Copyright and Related Issues Relevant to Digital Preservation and Dissemination of Unpublished Pre-1972 Sound Recordings by Libraries and Archives* (Washington, D.C.: Council on Library and Information Resources/Library of Congress, 2009); Peter Jaszi with Nick Lewis, *Copyright and Related Issues Relevant to Digital Preservation and Dissemination of Unpublished Pre-1972 Sound Recordings Under State Law and Its Impact on Use by Nonprofit Institutions: A 10-State Analysis* (Washington, D.C.: Council on Library and Information Resources/Library of Congress, 2009); Rob Bamberger and Sam Brylawski, *The State of Recorded Sound Preservation in the United States: A National Legacy at Risk in the Digital Age* (Washington, D.C.: Council on Library and Information Resources/Library of Congress, 2010); and Brenda Nelson-Strauss, Alan Gevinson, Sam Brylawski, and Patrick Loughney, *The Library of Congress National Recording Preservation Plan* (Washington, D.C.: Council on Library and Information Resources/Library of Congress, 2012).
- ⁴ The problem of the inapplicability of federal copyright protection to sound recordings fixed before 1972 continues to stymie archivists and librarians because it leaves those recordings under state law only, which is often of indefinite term. This leads to the absurd situation wherein every sound recording ever made, as far back as Edison's early experiments, must be assumed to be under copyright until 2067, that is, a full ninety-five-year term after federal protection becomes effective. See 17 U.S.C. §301(c) and U.S. Copyright Office Circular 56, "Copyright Registration for Sound Recordings" (2014), <https://www.copyright.gov/circs/circ56.pdf>. For the Copyright Office's attempts to encourage Congress to address this issue as well as the orphan works problem, see *Federal Copyright Protection for Pre-1972 Sound Recordings* (2011), <https://www.copyright.gov/docs/sound/pre-72-report.pdf>, and *Orphan Works and Mass Digitization* (2015), <https://www.copyright.gov/orphan/reports/orphan-works2015.pdf>.
- ⁵ See, for example, *Authors Guild v. Google, Inc.*, No. 13-4829 (2d Cir. 2015); *Cambridge University Press, et al. v. Albert, et al.*, No. 12-14676 (11th Cir. 2014); *Authors Guild, Inc. v. HathiTrust*, No. 12-4547 (2d Cir. 2014); *Oracle America, Inc. v. Google Inc.*, No. 3:2010cv03561—Document 2070 (N.D. Cal. 2016).
- ⁶ Bamberger and Brylawski, *The State of Recorded Sound Preservation in the United States: A National Legacy at Risk in the Digital Age*, 13.
- ⁷ A 2010 University of North Carolina study is one of the most vivid examples of the futility and expense associated with clearing rights for these types of collections. The study focused on a collection of more than 8,400 documents relating to early nineteenth-century correspondence of a prominent politician. After spending more than 450 hours attempting to obtain copyright permissions, the researchers were able to identify over 3,000 individual authors, but could identify dependable contact information for only four rights holders. Maggie Dickson, "Due Diligence, Futile Effort: Copyright and the Digitization of the Thomas E. Watson Papers," *American Archivist* 73, no. 2 (2010): 626–36.
- ⁸ For more on this right, see Peter B. Hirtle, Emily Hudson, and Andrew T. Kenyon, *Copyright and Cultural Institutions: Guidelines for Digitization for U.S. Libraries, Archives, & Museums* (Cornell University Library, 2009): 55–56, 217–20, <http://hdl.handle.net/1813/14142>.
- ⁹ In the course of this project, the Department of Justice issued a statement clarifying accessibility requirements under the Americans with Disabilities Act (ADA) when it found that freely available video lectures from the University of California, Berkeley, were noncompliant due to a lack of

closed-caption transcriptions. In March 2017, the university removed over 20,000 videos from YouTube and other streaming services to await transcription. This highlights the importance of factors beyond copyright—in this case, accessibility—that must be considered when deciding to open digitized sound recordings to the public. See U.S. Department of Justice Civil Rights Division, “The United States’ Findings and Conclusions Based on its Investigation Under Title II of the Americans with Disabilities Act of the University of California at Berkeley, DJ No. 204-11-309” (2016), https://www.ada.gov/briefs/uc_berkeley_lof.pdf; UC Berkeley Public Affairs, “Campus Message on Course Capture Video, Podcast Changes,” UC Berkeley, Berkeley News (March 1, 2017), <http://news.berkeley.edu/2017/03/01/course-capture>.

¹⁰ Bamberger and Brylawski, *The State of Recorded Sound Preservation in the United States: A National Legacy at Risk in the Digital Age*, 7.

¹¹ See the Society of American Archivists, Code of Ethics for Archivists (2005; rev. 2012), https://www2.archivists.org/statements/saa-core-values-statement-and-code-of-ethics#code_of_ethics.

¹² These include Prudence S. Adler, Patricia Aufderheide, Brandon Butler, and Peter Jaszi, *Code of Best Practices for Fair Use in Academic and Research Libraries* (Washington, D.C.: Association of Research Libraries Publications, 2012); Patricia Aufderheide, David R. Hansen, Meredith Jacob, Peter Jaszi, and Jennifer M. Urban, *Statement of Best Practices in Fair Use of Collections Containing Orphan Works for Libraries, Archives, and Other Memory Institutions* (Washington, D.C.: Center for Media and Social Impact, 2014); Society of American Archivists, *Orphan Works: Statement of Best Practices* (Chicago: Society of American Archivists, 2009); Brandon Butler, “Audio Preservation: The Legal Context,” in *ARSC Guide to Audio Preservation*, ed. Sam Brylawski, Maya Lerman, Robin Pike, and Kathlin Smith (Eugene, Ore.: CLIR, ARSC, and Library of Congress, 2015), 152–67; and Brandon Butler and Peter Jaszi, “Fair Use and Sound Recordings: Lessons from Community Practice,” *ARSC Guide to Audio Preservation* (Eugene, Ore.: CLIR, ARSC, and Library of Congress, 2015), 194–222. The *Code of Best Practices for Fair Use in Academic and Research Libraries* was coordinated by the Association of Research Libraries, the Center for Social Media at American University, and the Washington College of Law at American University. It has been endorsed by the American Library Association, the Art Libraries Society of North America, the Association of College and Research Libraries, the College Art Association, and the Music Library Association. The *Statement of Best Practices in Fair Use of Collections Containing Orphan Works for Libraries, Archives, and Other Memory Institutions* was coordinated by the Center for Media and Social Impact, the Washington College of Law, and the UC Berkeley College of Law. It has been endorsed by over twenty-five major institutions and associations, including the Digital Public Library of America, the California Digital Library, and the Association for Recorded Sound Collections.

¹³ Library Copyright Alliance, “Response of the Library Copyright Alliance to the Copyright Office’s Orphan Works Report” (2015), 3, <http://www.librarycopyrightalliance.org/storage/documents/Reflections-on-the-Copyright-Offices-Orphan-Works-Report.pdf>.

¹⁴ Eric Harbeson, “Reviewing the ARSC Guide: Best Practices in Light of the Authors Guild Decisions,” *ARSC Journal* 48, no. 1 (2017): 215.

¹⁵ For the full text of Section 503, see <https://www.copyright.gov/title17/92chap5.html>.

¹⁶ Peter Hirtle, “Intellectual Property Legislation and Litigation Update,” presented at the Annual Meeting of the Society of American Archivists, Portland, Oregon, August, 2017.

¹⁷ *Hathi Trust Authors Guild, Inc. v. HathiTrust*, No. 12-4547 (2d Cir. 2014).

¹⁸ Harbeson, “Reviewing the ARSC Guide: Best Practices in Light of the Authors Guild Decisions,” 216. It is important to note that Harbeson stresses that community standards are not the only factor and are superseded by judicial rulings: “[T]he community use argument is not without its limitations. An infringer’s argument that she had reasonably believed that her use was fair based on a common understanding may work in the absence of guidance from courts, but much less so if a court has already advised otherwise. For this reason, any community understanding of fair use within its practices must necessarily evolve as the courts give us new guidance.”

¹⁹ The best general summary of emerging community standards for recorded sound collections is Butler and Jaszi, “Fair Use and Sound Recordings: Lessons from Community Practice,” 194–222.

²⁰ Victoria Stobo, Ronan Deazley, and Ian G. Anderson, “Copyright and Risk: Scoping the Wellcome Digital Library Project,” *Research Council UK Centre for Copyright and New Business Models in the Creative Economy (CREATE)*, Working Paper no. 2013/10 (2013): 7, doi: 10.5281/zenodo.8380.

- ²¹ For more on fair dealing in the United Kingdom, see U.K. Copyright Service, "Using the Copyright of Others" (2009; rev. 2017), https://www.copyrightservice.co.uk/copyright/p27_work_of_others. For more on the differences between fair use and fair dealing, including in a Canadian context, see Giuseppina D'Agostino, "Healing Fair Dealing? A Comparative Copyright Analysis of Canadian Fair Dealing to UK Fair Dealing and US Fair Use," *Comparative Research in Law & Political Economy* 3, no. 5 (2007).
- ²² Stobo et al., "Copyright and Risk: Scoping the Wellcome Digital Library Project," 56.
- ²³ Kevin L. Smith, "Copyright and Risk Management: Principles and Strategies for Large-Scale Digitization Projects in Special Collections," *Research Library Issues*, no. 279 (2012): 17–24.
- ²⁴ Tim West, Kirill Fesenko, and Laura Clark Brown, "Extending the Reach of Southern Sources: Proceeding to Large-Scale Digitization of Manuscript Collections," final grant report for the Andrew W. Mellon Foundation, University of North Carolina at Chapel Hill, 2009, http://docsouth.unc.edu/watson/archivalmassdigitization/download/extending_the_reach.pdf.
- ²⁵ We believe recorded sound archives interested in increasing remote access could dramatically lower risk by working together to foster a collaborative record of known litigious entities.
- ²⁶ UCLA Library Special Collections and UCLA Library, "Library Special Collections Risk Assessment Guidelines," *UCLA Library Special Collections Digital Project Toolkit* (2015), http://www.library.ucla.edu/sites/default/files/Guidelines_RiskAssessment.pdf.
- ²⁷ Jolene Beiser and Joseph Gallucci, "Risk Factor Assessment for Tapes at Pacifica Radio Archives," *Pacifica Radio Archives* (2012; rev. 2014), <http://files.archivists.org/conference/dc2014/materials/508-BeiserB.pdf>. This decision matrix was presented at a conference of the Council of State Archivists, the National Association of Government Archives and Records Administrators, and the SAA, held August 15, 2014, in Washington, D.C. See also Garvey Schubert Barer Law, "Pacifica Radio Archives Preservation and Access Project: Digitization, Preservation and Distribution," white paper (2012), https://www.pacificaradioarchives.org/sites/default/files/fileattachments/digitization_preservation_and_distribution1.pdf.
- ²⁸ Casey Davis Kaufman, Jay Fialkov, and Hope O'Keefe, "Put It on Your Bucket List: Navigating Copyright to Expose Digital AV Collections at Scale," presented at the Annual Conference of the Association of Moving Image Archivists, New Orleans, Louisiana, December, 2017, https://www.slideshare.net/WGBH_Archives/put-it-on-your-bucket-list-navigating-copyright-to-expose-digital-av-collections-at-scale.
- ²⁹ Pantaloni Nazareth, "Sizing Up MDPI Phase 2, We're Gonna Need a Bigger Tote," presented at the Annual Conference of the Association of Moving Image Archivists, New Orleans, Louisiana, December, 2017.
- ³⁰ The ultimate origin of all U.S. copyright and patent law, Article I, Section 8 of the Constitution, makes clear its intent to protect and promote creative works: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."
- ³¹ Kenneth D. Crews, "Checklist for Fair Use," *Copyright Management Center IUPUI* (2003). The original can be found archived at <http://hdl.handle.net/2450/3439>.
- ³² Again, those four factors are 1) the purpose of the use, 2) the nature of the copyrighted works, 3) the amount/substantiality of the portion used, and 4) the effect of the use on the works' market value.
- ³³ Kenneth D. Crews, "Fair Use," *Columbia Copyright Advisory Office*, <https://copyright.columbia.edu/basics/fair-use.html>.
- ³⁴ Smith, "Copyright and Risk Management: Principles and Strategies," 20.
- ³⁵ An internal report on our oral history collections revealed it was difficult to identify if releases existed for collections. This was a result of these sometimes being filed within the collection and other times with the donor files.
- ³⁶ This is an informed judgment based on the size and substantiality of copyrighted material proposed to be used in relation to the size of the whole body of sound recordings in the collection. In many cases an evaluation of "large" and "small" can begin at above or below 25%.

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