



## Ownership in institutional sound recordings

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**Abstract:**

*American colleges and universities are prolific producers of copyrighted recorded material. In the normal course of executing their educational missions, colleges and universities produce numerous recordings of concerts and recitals by faculty, students, and guest artists. Depending on the institution and its facilities, resources, and policies in place, institutions could potentially produce hundreds of recordings in any given semester. However, the legal ability of colleges and universities to use these institutionally-produced sound recordings is the subject of much uncertainty. The legal issues surrounding ownership of these recordings are especially unclear, and those are examined here. The paper looks both at recordings fixed before 15 February 1972 (which are protected by state laws) and at recordings fixed after that date (which are governed by federal law), with special attention to the circumstances under which the institution may be a joint author.*

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**Introduction**

Performing arts programs at American colleges and universities are prolific producers of copyrighted recorded material. In the normal course of executing their educational missions, colleges and universities produce concerts by school orchestras, bands, and choirs, and recitals by faculty, students, and guest artists. Depending on the institution

and its facilities, resources, and policies in place, schools might record some or all of these events—potentially hundreds of recordings produced in any given semester.<sup>1</sup>

These recordings represent an astonishing array of musical output. The nature of the academic environment and the incentives it creates to explore previously underappreciated or unknown ideas and works mean that many of these recordings will contain performances of musical works which are unlikely to be available in recording anywhere else.<sup>2</sup> In particular, compositions by students or faculty associated with the institution will frequently receive their premiere performance during these events, often never to be recorded again. In addition, American colleges and universities graduate thousands of performing musicians each year, many of whom go on to celebrated careers and whose early recordings may prove to be useful to researchers studying music pedagogy<sup>3</sup> or performance practice,<sup>4</sup> or to those studying the career of a particular performer or teacher. Recordings produced by these institutions offer a priceless record of the early stages of some of the most significant artists of the twentieth century.

These recordings, which we'll call institutional sound recordings (ISRs), inevitably (hopefully!) end up in a library somewhere, very often in the music or performing arts libraries of the institution in question. But what these libraries can and cannot do with them is a source of much confusion. In the community of music librarians, messages frequently appear in email lists asking for guidance on one or more aspects of school recordings. Because of the legal uncertainty surrounding these recordings they are frequently ignored. However, these often-unique recordings are also at great risk, since the media for capturing sound recordings have frequently been unstable. Some media, such as shellac discs, age well but deteriorate quickly with each playing; others, such as compact discs (CDs) are unaffected by use, but are chemically unstable. In light of their uniqueness, these recordings deserve far more attention than the evidence would suggest they are given.

Critical to copyright issues surrounding libraries' use of ISRs is the question of ownership. In cases where the institution itself proves to be the owner, significant hurdles are removed from the libraries' use of the recordings, but if the institution proves not to be the owner, or if ownership is in question, the identity of the owner or potential owners

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<sup>1</sup> For example, the Jacobs School of Music at Indiana University listed 738 concerts on its calendar in the first half of 2011 (January 1 - June 30) alone. Information obtained August 2011 from Jacobs School events calendar, available online: <http://music.indiana.edu/events/>.

<sup>2</sup> Commercial recording producers are necessarily limited by what is likely to produce commercial return. Concerts by professional musicians may include many of these works, but the contractual arrangements made in producing the concerts frequently mean the recordings are unavailable to the public, even though recordings are typically made "for archival purposes."

<sup>3</sup> An example might be to examine different schools of thought in tone production; one might for example study the evolution and influence of the "Cleveland School" of playing timpani by examining the recordings of its early students in Cleveland and those of other students as they spread to positions of influence elsewhere in the country.

<sup>4</sup> For example, a study of the editorial decisions made with respect to the performance of classical repertoire, where accommodations are frequently made for modern instruments and their enhanced capabilities.

will be necessary information should permission be sought for a given use. For recordings produced today, ownership is governed by federal law, though how those laws apply ownership to ISRs is unclear. Ownership in the copyright of sound recordings is further complicated by the fact that federal copyright was not available for sound recordings in the United States until 1972<sup>5</sup>, and when it was made available copyright was not retroactively extended on the federal level.<sup>6</sup> Thus, pre-1972 recordings receive their protection at the state level, either through criminal or civil statutes specifically addressing recordings, or through a variety of legal theories including common law copyright, unfair competition/misappropriation, conversion, right of publicity, or unauthorized distribution.<sup>7</sup> Ownership could, in theory, vary depending on which cause of action was pursued.

### **Pre-1972 recordings**

Because federal law does not apply to recordings fixed prior to February 15 1972, ownership of these sound recordings varies from state to state. Of the 50 states and the District of Columbia, all but two have some form of criminal law governing sound recordings<sup>8</sup> and of the remaining states, only nine apply those laws to non-commercial activity.<sup>9</sup> This does not mean, however, that libraries need not be concerned with non-commercial ISR usage if they are located in one of the remaining forty-two states, since the absence of applicable criminal statutes still leaves open the door for liability under civil law, and in nearly every state civil liability is left undefined by statute.<sup>10</sup> Furthermore in states with criminal statutes, the definition of “owner” is often ambiguous, and so the result is that most of the liability libraries might carry in the use of ISRs would be determined by courts based on any common law theories and precedents which might be in existence in that state.

Definitions of ownership under criminal statutes, even though they are not directly applicable in civil cases, may still be useful, since a court might consider these in the absence of court precedent. Though the laws vary from state to state, many of the states’

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<sup>5</sup> Specifically, February 15 1972. *Sound Recordings Act*, Pub. L. No. 92-140, 85 Stat. 39 (1971).

<sup>6</sup> 17 U.S.C. § 301(c) (sound recordings prior to Feb. 15, 1972 are not preempted by federal law until Feb. 15, 2067).

<sup>7</sup> Program on Information Justice and Intellectual Property (PIJIP), *Protection for Pre-1972 Sound Recordings under State Law and its Impact on Use by Nonprofit Institutions: a 10- State Analysis*, Council on Library and Information Resources, Publication #146 (September 2009), available at <http://www.loc.gov/rr/record/nrpb/pub146.pdf>.

<sup>8</sup> Only Indiana and Vermont have no criminal provisions. United States Copyright Office, *Survey of State Criminal Laws for Pre-1972 Sound Recordings*. Available at [http://www.copyright.gov/docs/sound/20111212\\_survey\\_state\\_criminal\\_laws\\_%20ARL\\_%20CO\\_%20v2.pdf](http://www.copyright.gov/docs/sound/20111212_survey_state_criminal_laws_%20ARL_%20CO_%20v2.pdf)

<sup>9</sup> Only Alabama, Georgia, Iowa, Minnesota, Nebraska, Nevada, and Rhode Island have adopted laws that potentially apply criminal sound recordings copying laws to non-commercial activity. *Survey of State Criminal Laws, supra*.

<sup>10</sup> The sole exception appears to be California, which recognizes ownership of sound recordings, though fails to define “author” and does not specify what remedies are available to a plaintiff. Cal. Civ. Code § 980(2).

definitions of ownership are either very similar to, or verbatim copies of, other states' language. Thirteen states define ownership of rights to sound recordings as the person who owns the physical master upon which the sounds were first fixed.<sup>11</sup> While this notion of intellectual property presents its own problems, such as the question of whether there is an owner when the master has been destroyed, in many cases ISRs held by institutional libraries will constitute the master recordings under the statutory definition, and in such cases the institution itself would be the "owner," assuming that a court adopts the same definition in a civil case.

The remainder of the states define ownership in terms of the owner of sounds embodied in a master.<sup>12</sup> This language is more ambiguous, but appears to point to a model similar to the federal law, where ownership of the intellectual property is distinct from ownership of the physical property. Unfortunately, this leaves open the definition of "owner," since none of the statutes define how the intellectual ownership vests, and so it would appear that they defer back to the common law for solving disputes over original ownership.

In eleven states, ownership in criminal statutes is further defined to include, as an alternative, "the person who owns the rights to record or to authorize the recording of a live performance."<sup>13</sup> In states where this is the case, where the recording was made under their auspices such as recordings made in the institution's own performance venue, the institution, as the authorized recording agent, may be able to argue that it is the rightful owner, or at least joint owner, of the recordings in question.

In the absence of statutory guidance, a court would turn to common law principles as established in their particular state. Depending on the state, common law ownership might vest in the owner of the physical master, or it might follow a theory of intellectual ownership such as that adopted by federal law, considering any implied contracts, the intent of the parties as to ownership when the recording was fixed, the nature of the various parties contribution, and other factors (discussed in more detail below).

The tying of intellectual ownership to physical property is one that is no longer in use for most of intellectual property law due to federal preemption; however, it has been used in the past by state courts when determining ownership of unpublished works and other works within their purview, which still includes pre-1972 sound recordings. Perhaps the

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<sup>11</sup> Those states are Connecticut (Conn. Gen. Stat. Ann. § 53-142b (a)), Georgia (Ga. Code Ann. § 16-8-60), Hawaii (Haw. Rev. Stat. Ann. § 482C-1), Illinois (720 Ill. Comp. Stat. Ann. 5/16-7(b)(2)), Maine (Me. Rev. Stat. Ann. tit. 10 § 1261.3), Massachusetts (Mass. Gen. Laws Ann. ch. 266 § 143), Minnesota (Minn. Stat. Ann. § 325E.17), Mississippi (Miss. Code Ann. § 97-23-87(1)(b)), Nebraska (Neb. Rev. Stat. Ann. § 28-1323), Nevada (Nev. Rev. Stat. Ann. § 205.217), Oklahoma (Okla. Stat. Ann. tit. 21 § 1975), Pennsylvania (18 Pa. Cons. Stat. Ann. § 4116(a)), and Rhode Island (R.I. Gen. Laws. § 6-13.1-15). In addition, the District of Columbia's definition includes language which could be interpreted as expressing this principle.

<sup>12</sup> The two most common phrasings are: "the person who owns the original fixation of sounds embodied in the master..." (17 states) and "the person who owns the sounds fixed in the master..." (12 states)

<sup>13</sup> Quoting Ala. Code 1975 § 13A-8-80. The states are Alabama, Arizona, Arkansas, Florida, Illinois, Kansas, New Jersey, New York, North Carolina, Rhode Island, and Virginia.

most famous precedent for tying ownership to physical media under the common law comes from the case of *Pushman v. New York Geographic Society*.<sup>14</sup> In this case, New York's highest court held that, in the case of common law copyrights in paintings, "an artist must, if he wishes to retain or protect the reproduction right, make some reservation of that right when he sells the painting." The common law copyright is somewhat different where recordings are concerned, since traditionally the common law right involves works that have not been published, and are therefore not widely distributed as many commercial sound recordings are.<sup>15</sup> In the case of ISRs, though, as stated above, in most if not all cases, the ISRs held by libraries are unique instances of the recordings in question, or will often qualify as the "master" recording under most definitions of the term. Like the painting in *Pushman*, they would appear to be unique manifestations of the embodied works of authorship (the recording), and so a court might draw an analogy to the principles established in *Pushman*.

In addition to looking to federal laws for guidance, it is also possible that the language contained in treaties may inform a state court's findings. In particular, the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms is a treaty into which the United States entered in 1971. The treaty awards rights in recordings to the "producer of phonograms," which it defines as the person or legal entity who "first fixes the sounds of a performance or other sounds." Since the person who fixes the sounds is the recording engineer, and the legal entity which employs the recording engineer in the case of IRs is normally the institution, the institution may be able to argue that under this common law definition of authorship, it is the owner of the intellectual rights to the recording.<sup>16</sup>

It is worth mentioning one exception to the rule that pre-1972 recordings are governed by state laws. In 1994, Congress passed the Uruguay Round Agreements Act which, among other things, brought some pre-1972 recordings produced outside the United States under federal copyright protection.<sup>17</sup> It seems unlikely that Congress intended the law to apply to recordings produced within the United States; however, the requirements for eligibility

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<sup>14</sup> 287 N.Y. 302 (N.Y., 1942). The central ruling in *Pushman* was reaffirmed by the same court in *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562 (2002).

<sup>15</sup> The case of *Ingram v. Bowers*, 57 F.2d. 65 (2d Cir., 1932) an earlier federal case, is sometimes invoked in the context of sound recordings because it made a similar pronouncement that the copyright in a recording, if there was one, "became embodied in the matrices ... and it passed with the property in them." Unfortunately, this case is of limited use; since it involved a contract in which Enrique Caruso had explicitly granted "all rights" to the recording company, there was no need to rule on who the initial owner of the recordings was because any rights Caruso had, if any, were transferred by contract.

<sup>16</sup> The state of Delaware appears to be unique in referring to the treaty in its criminal statutes. Del. C. § 920(a) (Stating that the transfer of recorded sounds is a class G felony "provided, that such owner is domiciled or has its principal place of business in a country which is a signatory to the [treaty]")

<sup>17</sup> United States Copyright Office, *Federal Copyright Protection for Pre-1972 Sound Recordings, a Report of the Register of Copyrights* (Washington, DC, December, 2011), p.18. Available at <http://www.copyright.gov/docs/sound/pre-72-report.pdf>. See generally 17 U.S.C. 104A

are written in such a way that a student who is a foreign national would seem to qualify.<sup>18</sup> In cases where the recording is made by such a student, the state laws would be irrelevant, since they would be preempted by federal law. In most such cases, federal law would apply as discussed below. However, due to the shorter terms available for sound recordings in many countries, some recordings may have had their copyright “restored,” and then subsequently entered the public domain in their source country (in the present case, the student’s country of origin), causing it to enter the federal public domain. The law is ambiguous as to whether a “restored work” whose federal term has expired can once again be covered under state law, but recent case law suggests this would be unlikely.<sup>19</sup>

### **Recordings since 1972**

Recordings made on or after February 15, 1972 are subject to federal law, and the copyright is vested “in the author or authors of the work,” with joint authors owning an equal share in the copyright of the work.<sup>20</sup> Unfortunately, the law fails to define “author,” leaving ambiguous the question of who may claim ownership.<sup>21</sup> With rare exception, recordings are necessarily collaborative, involving various combinations of, at a minimum, performers, producers, and technicians (such as recording engineers).<sup>22</sup> In the case of ISRs, common examples include performances by soloists (often with accompaniment), chamber ensembles (small ensembles, typically 3-8 performers, each playing a different part), or large ensembles (such as choirs, orchestras, wind ensembles, or jazz ensembles), with the number of performers ranging from one to (in the extreme) over one thousand.<sup>23</sup> Therefore, the principle task in determining ownership for recordings under federal copyright is to sort out which of the various actors qualify as “authors.” Libraries holding collections of ISRs have an interest in the institution being at least a joint owner, since all of the work’s authors are considered co-owners for the

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<sup>18</sup> See 17 U.S.C. § 104(h)(6) (definition of restored work. To summarize, the requirements are that the work not be in the public domain in the source country, that the work be “in the public domain in the United States due to...lack of subject matter protection in the case of sound recordings fixed before February 15, 1972,” and that at least one right holder was a national or resident of country that is a member of the WIPO Phonograms treaty).

<sup>19</sup> See *Golan v. Holder* (565 U.S. \_\_\_\_ (2012)) (Holding that restoration of copyright does not violate the constitutional requirement of “limited times” because “a period of exclusivity must begin before it may end.” In the current discussion, the term would have begun and ended; by extension, no further protection under state laws should be available once federal has been applied).

<sup>20</sup> 17 U.S.C. § 201(a)

<sup>21</sup> See Marshall W. Woody, “Comment: The Collaborative Calamity: Moving Joint Authorship Analysis Toward Statutory Uniformity,” *UMKC Law Review* 80: 514. (“The statutory definition of ‘author’ is conspicuously absent in the ‘definitions’ section of the Act” (citing 17 U.S.C. § 101))

<sup>22</sup> An exception might be a solo performer who produces her own performance and personally sets up and operates any equipment used to record the performance.

<sup>23</sup> For example, Gustav Mahler’s *Symphony no. 8* is also called the “Symphony of a Thousand,” and though Mahler himself did not call for one thousand performers, modern performances do occasionally take the name literally.

purposes of copyright.<sup>24</sup> Under U.S. law, all co-owners, whether one or one thousand, may exercise the full scope of exclusive rights over the work, independently of and without consulting the other authors, with the only requirement being accounting for profits.<sup>25</sup> The question of authorship is thus of paramount importance in the matter of ISRs.

The Copyright Act's failure to define "author" is not generally problematic when there is a clear case of sole authorship, but it is very problematic when one or more parties are trying to claim joint ownership of another's work. The law does define works of joint authorship as "work[s] prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."<sup>26</sup> This definition presents three elements, each of which must be satisfied for a work to be one of joint authorship: First, there must be more than one author; second, the authors, in creating the work, must have intended their contributions to be merged into a single work; and finally the authors' contributions must be inseparable or interdependent parts of the whole. The case law has refined these requirements. The leading case appears to be *Childress v. Taylor*, in which the Second Circuit ruled that, to be considered a work of joint authorship, each author's contribution must itself be copyrightable,<sup>27</sup> and the authors must have intended joint authorship at the time of creation of the work.<sup>28</sup>

In considering the requirement that a contribution be individually copyrightable as a condition of authorship, courts have observed that this by itself is not sufficiently limiting in many cases, opening the doors of authorship to many that Congress probably never intended to include, such as editors, costume designers, and consultants.<sup>29</sup> The *Childress* court indicated that the extent of a contributor's decision-making authority is an important factor in deciding whether that contributor is an "author." In *Aalmuhammed v. Lee*, the Ninth Circuit agreed, holding that, in addition to the definition suggested by *Childress*, an author is one who "superintends a work by exercising control...or the

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<sup>24</sup> 17 U.S.C. § 201(a)

<sup>25</sup> H.R. Rep. no. 94-1476 at 121 (1976). "Under the bill, as under the present law, coowners of a copyright would be treated generally as tenants in common, with each coowner having an independent right to use or license the use of a work, subject to a duty of accounting to the other coowners for any profits."

<sup>26</sup> 17 U.S.C. § 101

<sup>27</sup> This notion has not been entirely without dispute. Nimmer and Patry have both argued against such a rule, arguing that non-copyrightable elements can nonetheless be critical to the creation of a work (one person maybe the idea generator, for example). See Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 6.07. A contrary opinion exists in the 7th Circuit, arguing that, in the case of mixed media works, contributors of ideas and other non-copyrightable material can be joint authors. See *Gaiman v. McFarlane* 360 F.3d 644, 652 (7th Cir, 2004), and Teresa Huang, "Annual Review 2005: Part II: Entertainment Law And New Media: V. Copyright In Entertainment Law And New Media: A. Note And Brief: Gaiman v. McFarlane: The Right Step in Determining Joint Authorship for Copyrighted Material" *Berkeley Technology Law Journal* 20: 673 (2005).

<sup>28</sup> *Childress v. Taylor*, 945 F. 2d 500 (2d Cir., 1991).

<sup>29</sup> See for example *Thomson v. Larson*, 147 F. 3d 195 (2d Cir., 1998) (Dramaturge's contribution held not to justify joint authorship)

inventive mastermind who creates, or gives effect to the idea.”<sup>30</sup> The *Aalmuhammed* court further stated that for there to be joint authors, the “audience appeal” of the work must depend on the contributions of both authors.<sup>31</sup>

The requirement that authors intend to be joint authors (as refined from the intent merely to contribute to a single work as specified in the statute) has been held by many courts to be the “touchstone” for determining whether there is joint authorship in a work.<sup>32</sup> Both the *Childress* and *Aalmuhammed*, courts ruled that, in the absence of a contract, joint authorship requires that there be what the 9th Circuit called “objective manifestations of a shared intent to be coauthors.” Examples of how a collaborator viewed her contributions might include “how a collaborator regarded herself in relation to the work in terms of billing and credit, decision-making, and the right to enter into contracts.”<sup>33</sup> There is little if any guidance from the Supreme Court, but as nearly every Circuit has endorsed some form of the two-part *Childress* test, for the time being it appears to be determinative.<sup>34</sup>

The third requirement, that the contributions be inseparable or interdependent, specifies that the intention be not just to create a single joint work, but that contributions be combined into an organic unit. In *Aalmuhammed*, the court used the example of Gilbert and Sullivan, each of whom wrote copyrightable works (lyrics and music, respectively), but each of whose works was intended to be a part of a single, final product (the operetta). On the other hand, if the estate of Robert Frost were today to license a composer to create a song cycle based on the poet’s words, the estate would not presumably be able to claim joint authorship on the new work, absent a written agreement to the contrary, because Frost wrote the poem without the intention of its being part of the song cycle. The joint works definition in the law allows for inseparable or interdependent contributions, the former being those where the contributions cannot stand on their own (the House Report uses the example of a jointly written novel<sup>35</sup>) and the latter those where the independent contributions can stand on their own but are less meaningful (as in the Gilbert and Sullivan example).

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<sup>30</sup> *Aalmuhammed v. Lee*, 202 F.3d., 1227 (9th Cir., 2000)

<sup>31</sup> *Aalmuhammed v. Lee*, *supra*, citing *Edward B. Marks Music v. Jerry Vogel Music* 140 F.2d 266 (2nd Cir. 1944)

<sup>32</sup> *Thomson v. Larson*, *Childress v. Taylor*, *Aalmuhammed v. Lee*, et al.

<sup>33</sup> *Thomson v. Larson*, *supra*, at 201.

<sup>34</sup> It is not within the scope of this paper to argue for a change in interpretation, but the *Childress* opinion has not been without controversy. See especially *supra* note 28; also, Lior Zemer, “Symposium: Constitutional Challenges to Copyright: Is Intention to Co-Author an ‘Uncertain Realm of Policy’?” *Columbia Journal of Law and the Arts* 30: 611 (Spring, 2007) and Mary La France, “Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors” *Emory Law Journal* 50: 193 (Winter, 2001).

<sup>35</sup> H.R. Rep. 94-1476 at 157 (1976)

## Recordings since 1972: Synthesis

Based on this discussion, who owns ISRs fixed after 1972? Clearly there are many moving parts which could impact a court's decision in the matter, many of which will be dependent on the individual facts in the case. The United States Copyright Office has stated that, in any given recording, the likely authors are the performer(s), the producer(s) or both.<sup>36</sup> At least one other candidate for authorship is the recording engineer who presides over the creation of the sound recording.<sup>37</sup>

### PRODUCERS AND TECHNICIANS

In most, though not all cases, the “producer” of an ISR will be the institution itself. It is unclear whether, and under what circumstances, an institution's contribution as producer rises to the level of authorship, and the answer to the question will vary with the individual circumstances. Congress certainly contemplated joint ownership of sound recordings when it was constructing the Copyright Act. The House Report states that authorship in a sound recording is typically shared between the performer(s) and “the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling them to make the final sound recording.” At the same time, it notes that not all contributions by the latter are significant enough to constitute authorship or even constitute a copyrightable element.<sup>38</sup> Congressional testimony by the Register of Copyrights implies that at least in the case of commercial recordings, there is a presumption of joint authorship in the contributions of parties other than the performer,<sup>39</sup> but commercial recordings typically involve significant pre- and post-production elements (such as microphone placement and mixing) which are less likely to be present in a typical ISR. An institutional claim to joint authorship under the Copyright Act will thus depend on the extent of its involvement in the production of the recording. That involvement may take two forms: institutional participation itself, and individual participation of its employees under the work for hire doctrine.

For an institutional authorship claim to meet the first prong of the *Childress* test, the institution will need to show that it has made a copyrightable contribution to the work. Merely setting up the recording session and supplying resources (such as a venue and recording equipment) is unlikely to qualify on its own.<sup>40</sup> The institution's claims to

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<sup>36</sup> United States Copyright Office, *Federal Copyright Protection*, at 140. “Under Federal law the owner of the sound recording will generally be, in the first instance, the performer(s) whose performance is recorded, the producer of the recording, or both.”

<sup>37</sup> Nimmer, *supra* § 2.10[A][2b]

<sup>38</sup> H.R. Rep. 94-1476 at 56 (1976)

<sup>39</sup> *Work Made For Hire and Copyright Corrections Act of 2000: Hearings on H.R. 5107, before the Subcommittee on Courts and Intellectual Property, Committee on the Judiciary, 106th Cong. (2000)* (statement of Marybeth Peters, the Register of Copyrights). (“Typically, a commercial sound recording will be a work of joint authorship by a number of contributors”)

<sup>40</sup> See *Forward v. Thorogood* 985 F.2d 604 (1st Cir., 1993) (setting up a recording session does not create ownership in a recording), and *Feist Publications v. Rural Telephone Service*, 449 US 340 (rejecting “sweat of the brow” as a basis for copyrightability).

copyrightability will more generally come from the work of individuals employed by them. Under the work for hire doctrine, works of authorship that are “prepared by [employees] within the scope of [their] employment” are, absent written agreements to the contrary, owned by their employers.<sup>41</sup> In the case of ISRs, those contributions will come from either faculty or from recording engineers.

Faculty contributions will come in a variety of forms, all of which might be considered within the scope of the individual’s employment. She might, for example, be performing on a solo recital, advising one or more students in preparation for their recitals, or serving as conductor of that ensemble. The student advisory role would appear not to meet the requirements of “superintendence” as dictated by *Aalmuhammed*—the student may, in the moment of performance, take or leave any of the suggestions received. The solo or joint faculty recital would by contrast vest authorship in the faculty member, as discussed below, and that authorship could pass to the institution as a work for hire, though this status would be affected by any institutional copyright ownership policies, as discussed below.<sup>42</sup> Likewise, the faculty member who is at the helm of a large ensemble such as an orchestra or choir is generally doing so in the scope of her employment. In the latter case, the institution probably has a strong claim to authorship as the *per se* author, since the ensemble is as much the author as the conductor, and the ensemble is a product of the institution.<sup>43</sup>

The other individual through which an institution may claim a copyrightable contribution is the recording technician, whose contribution Nimmer equates with that of a photographer’s “capturing and photographically processing light images.”<sup>44</sup> The performer on a sound recording is a presumptive owner of a performance under the common law, but the performance itself is not a subject of copyright except in cases where the performance was recorded illegally.<sup>45</sup> The recording itself cannot survive in a tangible form without the contribution of the recording engineer, and the engineers work is clearly meaningless without the performer’s work. Since the sound recording necessarily consists of these two elements (performance and production) which are interdependent, it follows that the work is eligible for joint work status. However, to show a copyrightable contribution, the engineer (or the institution as employer) would need to show that she had supplied the “modicum of intellectual labor” required for

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<sup>41</sup> 17 U.S.C. § 201(b); see also the definition of “work made for hire” in 17 U.S.C. § 101

<sup>42</sup> In addition, academic faculty are, by tradition, generally exempted from the work-for-hire doctrine with respect to articles and lectures they produce (though this is strictly a common law application), and faculty recitals are arguably equivalent to the written materials produced by non-music faculty. See generally, Corynne McSherry, *Who Owns Academic Work? Battling for control of intellectual property* (Cambridge, MA: Harvard U.P., 2001), Chapter 3.

<sup>43</sup> See for example *Waring v. WDAS Broadcasting Station*, 327 Pa. 433, 442 (Pa., 1937) (“While the major part of the credit for the work of the orchestra is probably due to...[the] conductor, the performance is that of the orchestra...and represents their collective talent and labor... [None] of them can claim an individual property right in the composite production. It is the corporation...which alone is entitled to assert and enforce the right of property in its rendition.”)

<sup>44</sup> *Nimmer, supra* § 2.10[A]2b

<sup>45</sup> 17 U.S.C. § 1101 (Providing civil remedies against bootleg recordings). See also 18 U.S.C. § 2319A, making criminal penalties available in the case of commercial use of bootleg recordings.

copyright.<sup>46</sup> Simply pressing a button to start and stop a recording session would likely not suffice, but pre- or post-processing would quickly meet this standard.

The other requirement for an institution to meet under *Childress* is that of intent to be a joint author. In *Aalmuhammed*, the court indicated a distinct preference for a contract.<sup>47</sup> Some institutions may require, as a condition of employment or matriculation, agreements as to the institution's rights with respect to recordings and other material produced using university resources. Very common are what are frequently called "Copyright Ownership Policies" which govern the nature of the relationship between the institution and its constituents. In many cases, these policies specifically abdicate any ownership in material—the University of California's policy, for example, vests all rights in student works "with the originator." (i.e., the student)<sup>48</sup> A policy which indicates the institution's intention to be joint author in cases where it can show a copyrightable contribution would certainly meet the intent standard as specified in *Childress*. Absent such a declaration, the institution may have a claim for joint authorship if it made its intention known in other ways, such as through billing ("Anywhere State University College of Music Presents:") on concert programs, recording labels and other instances of the final product.<sup>49</sup>

#### PERFORMERS

In the case of ISRs, the performers are normally students or faculty of the institution. Though not discussed in any statute, the court in *Childress* recognized the concept of the "dominant author," a contributor whose work is so embodied in the collaboration that the only question remaining is whether that person is the sole author of the work. The court stated that "care must be taken to guard against the risk that a sole author is denied exclusive authorship status simply because another person renders some form of assistance."<sup>50</sup> In the realm of ISRs (and indeed all most recordings), the performer inevitably has the greatest claim toward being the dominant author, since her performance is the *sine qua non* of the recording. The example of a pianist's senior recital—where a single performer's live performance is recorded—might be the definitive example. Under *Childress*, it is difficult to imagine a situation where the pianist in the example is not an author of the final recorded work; the performance, once fixed, is clearly copyrightable expression which is contributed entirely by the performer, and the performer, whose performance will often have been submitted in partial fulfillment of degree requirements, will certainly have intended authorship, which could likely be demonstrated by, among other things, the solo billing on the recital's program. Furthermore, based on *Aalmuhammed*, the audience appeal (to the extent there is any) will normally turn exclusively on the contribution offered by the solo performer. In such cases, the performer will be at least joint author, and very likely the sole author.

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<sup>46</sup> *Feist Publications v. Rural Telephone Service*, 449 US 340, quoting *Nimmer*, *supra* § 1.06[C][1].

<sup>47</sup> *Aalmuhammed v. Lee*, *supra*.

<sup>48</sup> University of California Policy on Copyright Ownership, August 19, 1992. Available at <http://www.ucop.edu/ucophome/coordrev/policy/8-19-92att.html>.

<sup>49</sup> *Thomson v. Larsen*, *supra*.

<sup>50</sup> *Childress v. Taylor*, *supra*, at 202.

The calculations become more complex when more performers are added. Most recitalists (non-keyboard instrumentalists at least) will make use of an accompanist (sometimes who are sometimes staff or faculty performing within the scope of their employment), and very often multiple performers will be added for chamber music. Since few recitals will involve contracts stating who is considered the author for purposes of the performance, a court would have to evaluate the relative contributions of the various performers. As a general rule, an accompanist probably wouldn't have had the necessary intent to be a joint author in a recital, despite making a significant contribution. Likewise, when the performance is occurring within the context of a capstone recital, normally that student might be presumed to be the "author" for purposes of copyright. However, a court might award joint authorship in these cases if the performer can show intent—perhaps the concert program did not single out the solo recitalist and instead listed the accompanist equally, for example. From an institutional library's point of view, the presence of multiple joint authors may be a benefit, since any one of those joint authors would be able to authorize a particular use of the recording.

The authorship in recordings of large ensembles has already been discussed, but it bears repeating that the individual performers in such cases generally do not have standing to be considered authors with the exception of the conductor and, possibly, performers who are performing as featured soloists (as in the case of a concerto). As stated, at least one court has found that performances by such ensembles constitute corporate authorship, rather than personal authorship, and so the institution is probably the sole author in such cases. However, even in the alternative where corporate authorship is not found, the conductor is normally the only person who, under the *Aalmuhammed* test, exercises sufficient superintendence over the performance as to be considered an author. In such cases, it seems likely that the institution will continue to be at least a co-owner of the recording, either as joint author (because the performance would normally be within the curricular requirements for the ensemble or because of corporate authorship), or sole author, as owner of the conductor's contribution through the work for hire doctrine.<sup>51</sup>

#### FINAL CONSIDERATIONS AND CONCLUSION

Two final points need to be made in this discussion. First, this paper has not considered the possibility that one or more authors of the recording may have, through contract or some other legal instrument (such as a will), transferred some or all of her interests to heirs or other parties. With ISRs potentially dating to the mid-1930s, it is entirely possible that rights to recordings have passed through more than one generation, and so there maybe multiple owners of rights formerly owned by one person. Second, the underlying works in a sound recording—normally musical works—are also subject to copyright and a further layer of complexity which must be taken into account.

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<sup>51</sup> Due to the curricular nature of most such recordings and the presence of numerous other performers, a faculty member's retaining sole authorship of such a recording would seem very different from, and much less likely than the normal circumstances where a faculty member might retain authorship, either under university policies granting ownership of personal works to faculty or under the *sui generis* exemption from work for hire authorship mentioned above (*supra* note 43).

Establishing ownership is only the first step in determining what libraries may do with their ISRs, but it is also a crucial one. Though there are many more areas of confusion which need study with respect to these incredibly valuable recordings, it is hoped that this study has helped to begin the process of demystifying them.