

FINDING TRADITIONAL CONTOURS IN THE COMMON LAW

*Brandy Karl**

Prior to 1972, the Copyright Act did not extend subject matter protection to sound recordings. In 1971, Congress amended the Copyright Act to include sound recordings in copyright's subject matter protection. The Copyright Act explicitly removes sound recordings fixed before February 15, 1972 ("pre-1972 sound recordings") from preemption; if they are protected by copyright at all, are protected by state common law – and mostly by the rapidly developing doctrine of common law copyright infringement in New York state.

In 2005, New York's Court of Appeals in *Capitol Records v. Naxos of America* ("Naxos"), laid down a sweeping pronouncement that common law copyright infringement protected sound recordings from unauthorized reproduction. The scope of New York common law copyright infringement extends to all pre-1972 sound recordings fixed anywhere in the world, whether extraterritorial copyrights that may have subsisted in the works had expired or not. Furthermore, New York considers even "published" sound recordings to be unpublished, sweeping as many sound recordings into the arms of the common law as possible.

Earlier this year Yoko Ono Lennon and EMI, along with other owners and licensees of the "Imagine" recording by John Lennon filed simultaneous suits in federal and New York state courts for the alleged copyright infringement by the producers of the documentary *Expelled* of the composition and sound recording rights, respectively.

The documentary used 15 seconds of the song to critique its anti-religion message in a larger discussion about the place of religion in academic and scientific debate. It's a straightforward critical fair use, and largely uninteresting as a matter of federal fair use law.

However, against the backdrop of the Naxos decision, the New York case in the *Imagine* litigation raises two major questions: what exactly is the scope of common law copyright infringement, and is it susceptible to First Amendment review? Despite the so-called "scholarly" opinion in Naxos, we don't know the answer to the first question, and can't begin with the second question until we do.

This article explores the traditional contours of common law copyright infringement in two respects: what constitutes a "reproduction" of a sound recording under common-law copyright infringement, and does the common law recognize some version of fair use? We know from *Eldred* that fair use is a traditional contour of copyright law; is it also a contour of common law infringement, or only of federal copyright law? Common law copyright in sound recordings arose largely as a measure to protect against record piracy. Because of this history, it is unlikely that a short excerpt would even be considered a reproduction under the common law.

* Residential Fellow, Stanford Center for Internet and Society. I participated in defending this case at the district court level. The views I express here are my own, and should not be attributed to the defendants, the other attorneys and firms involved in the defense of this matter, or to Stanford Law School.

The treatment of fair use by New York courts is more of a puzzle – it has only been discussed once, and not at all in the context of sound recordings. This article traces the history of fair use and the history of common law copyright in sound recordings to determine that fair use – or a strict interpretation of the reproduction doctrine – should be a traditional contour of common-law copyright. I also argue that should the courts in this case find that fair use is not a part of the law, that common-law copyright is an impermissible burden on speech imposed by the state and should be subject to First Amendment review. Furthermore, I argue that the definition of traditional contours is not as narrow as previous scholars and courts have suggested; the traditional contours of copyright are more than merely the First Amendment safeguards.