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GOTTA FIGHT FOR YOUR RIGHT TO PERFORM: SCOPE OF NEW YORK COMMON LAW COPYRIGHT FOR PRE-1972 SOUND RECORDINGS POST-NAXOS

I. INTRODUCTION

Although the Constitution endows Congress with the power “[t]o promote the . . . useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings,”¹ the States have been able to regulate copyrights up to the point federal law governs.² When Congress amended the Copyright Act in 1976, it preempted state and common copyright law while also creating a quirk in copyright law that made sound recordings prior to February 15, 1972 subject to state law.³ The existence of copyright protection for sound recordings in New York was unknown until the Court of Appeals, in *Capitol Records, Inc. v. Naxos of America, Inc. (Naxos I)*, held that a common law copyright does exist in that state.⁴ Despite this finding, the Court of Appeals did not define the scope of the copyright.⁵ It left unanswered whether New York’s common law copyright protected owners of sound recordings solely against unauthorized copying, or whether it was expansive enough to include rights not even given to them under federal law, namely a performance right for sound recordings.⁶

This paper argues that a performance right exists under New York common law copyright for pre-1972 sound recordings. Part I examines the development of copyright law in the United States to give background for the *Naxos I* case.⁷ Part II discusses *Naxos I*, including the facts, procedural

1. U.S. CONST. art. I, § 8, cl. 8.

2. See *Goldstein v. California*, 412 U.S. 546, 560 (1973). States have exercised that power both through their common law and through legislation. See, e.g., *Capitol Records, Inc. v. Naxos of Am., Inc.*, 830 N.E.2d 250, 256–57 (N.Y. 2005) [hereinafter *Naxos I*]; See also CAL. CIV. CODE § 980 (2007).

3. See 17 U.S.C. § 301(c) (2008).

4. See *Naxos I*, 830 N.E.2d at 265.

5. See *Naxos I*, 830 N.E.2d at 250.

6. See *id.*

7. As the New York Court of Appeals noted in *Naxos I*, “when examining copyright law ‘a page of history is worth a volume of logic.’” *Naxos I*, 830 N.E.2d at 254 (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)).

posture, and the holding of the case. Part III then discusses the historical scope of common law copyright protection and argues that there is a common law performance right for sound recordings.

II. THE DUAL SYSTEM OF COPYRIGHT LAW IN THE UNITED STATES

Prior to Congress's passage of the Copyright Act of 1976, copyright law in the United States consisted of a dual system of federal and state protection.⁸ Any works capable of copyright protection had a perpetual, common law copyright up to the point of publication.⁹ Infringement of this copyright was governed by state law.¹⁰ At the point of first publication, the law divested the owner of any common law copyright protection,¹¹ and the only copyright protection available was federal statutory protection, which limited the duration of copyright protection and provided other limits on the expansive monopoly.¹²

With the passage of the 1976 Copyright Act, Congress, for the most part, eliminated the dual system of copyright by expressly preempting any state or common law rights or remedies for any work covered by statutory copyright protection.¹³ This included unpublished works.¹⁴ However, Congress carved out certain exceptions to the preemption.¹⁵ Most importantly, the federal law does not preempt state or common law copyright protection over sound recordings fixed prior to February 15, 1972, and will not do so until February 15, 2067.¹⁶ Thus, prior to publication, state law determines the copyright protection of pre-1972 sound recordings. Notably, under New York common law, distributing phonorecords or performing a sound recording does not rise to "publication" for purposes of the copyright law.¹⁷ Since there is arguably no way to "publish" sound recordings, pre-1972 sound recordings enjoy common law protection even though

8. See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.02 (Matthew Bender, Rev. Ed. 2009).

9. See *id.*

10. See *id.*

11. See *id.* (noting that notwithstanding some statutory protection, the owner's work entered the public domain).

12. See *id.*; see also *Naxos I*, 830 N.E.2d at 256–57, 263 (noting that twelve of the first thirteen states, under the Articles of Confederation, passed copyright statutes, and that these statutes were superseded when Congress, under the Constitution, passed a federal copyright statute).

13. See 17 U.S.C. § 301(a) (2008).

14. *Id.*

15. See 17 U.S.C. § 301(b) (2008).

16. See 17 U.S.C. § 301(c) (2008).

17. See, e.g., *Naxos I*, 830 N.E.2d at 259–60, 264.

they are widely distributed and performed.¹⁸

On October 19, 1976, Congress passed the largest revision to the Copyright Act since 1909.¹⁹ The Act made explicit that sound recordings are copyrightable,²⁰ but it also explicitly withheld a performance right for those sound recordings.²¹ The Act also preempted all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished.²²

However, the Act specifically carved out an exception for sound recordings fixed before February 15, 1972.²³ Preemption of state or common law rights in these sound recordings will not occur until February 15, 2067.²⁴ Thus, Congress preserved the dual-system of copyright, with state protection (possibly) extending to sound recordings fixed prior to February 15, 1972, and federal protection extending to everything else.²⁵ Notably, twenty years later, Congress created a limited performance right in sound recordings by passing the Digital Performance Right in Sound Recordings Act of 1995 (DPRA).²⁶ This act added subsection six to section 106, which stated that the owner of a copyright to a sound recording has the exclusive right “to perform the copyrighted work publicly by means of a digital audio transmission.”²⁷ Section 114 was amended to set forth the requirements and limitations of this new right.²⁸ Currently, Congress is considering amending the Copyright Act to add a full performance right to sound recordings.²⁹ Regardless, Congress has not signaled any desire to extend

18. *See id.* at 250.

19. *See* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

20. 17 U.S.C. § 102(a)(7) (2006).

21. 17 U.S.C. § 114(a) (2006).

22. 17 U.S.C. § 301(a) (2008).

23. 17 U.S.C. § 301(c) (2008).

24. *Id.*

25. This seems strange because the intention of the revision was to create a uniform law. *See* H.R. REP. NO. 94-1476, at 129 (1976).

26. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1996) [hereinafter DPRA].

27. *Id.* at § 2. *See also* 17 U.S.C. § 106(6) (1996).

28. DPRA, Pub. L. No. 104-39 at § 3. *See also* 17 U.S.C. § 114 (1998); Digital Millennium Copyright Act, Pub. L. No. 105-304 § 405, 112 Stat. 2860, 2890-99 (1998) (further amending § 114).

29. *See* Performance Rights Act, S. 379, 111th Cong. § 2 (2009); Performance Rights Act, H.R. 848, 111th Cong. § 2 (2009). However, these bills simply delete “digital” from § 106(6), so they would not create a general performance right. For example, a musical composition played

federal protection to pre-1972 sound recordings.

III. *CAPITOL RECORDS, INC. v. NAXOS OF AMERICA, INC.*: COMMON LAW COPYRIGHT FOR PRE-1972 SOUND RECORDINGS COMES TO NEW YORK

Prior to 2004, the question of whether New York common law copyright protected sound recordings had never been answered by the Court of Appeals, New York's highest court.³⁰ Noting this, the Second Circuit, in *Capitol Records, Inc. v. Naxos of America, Inc. (Naxos II)*, hearing an appeal from the District Court's grant of summary judgment for the defendant, certified questions to the Court of Appeals.³¹ The Court of Appeals held that New York's common law copyright protected pre-1972 sound recordings until federal law preempts state protection in 2067.³²

Naxos I involved a dispute over 1930s sound recordings of classical musical performances by three world-renowned artists.³³ In 1996, EMI Records Limited, the owner of the sound recordings, granted Capitol Records, Inc. (Capitol) "an exclusive license to exploit the recordings in the United States."³⁴ Capitol used modern electronic methods to remaster the recordings and improve their audio quality.³⁵ Around the same time, Naxos of America (Naxos),³⁶ a manufacturer and distributor of phonorecords, wanted to preserve the recordings and distribute them.³⁷ It located copies of the original recordings and used its own process to restore their quality in the United Kingdom.³⁸ In 1999, Naxos began distributing the recordings in the United States.³⁹ Capitol demanded it cease and desist the distribution, but Naxos rebuffed the demand.⁴⁰ Capitol sued Naxos in 2002 in the district court for the Southern District of New York, claiming "common-law copyright infringement, unfair competition, misappropriation and

on television is entitled to royalties for that performance. Since the plain language of the statute is limited to audio transmissions, it would seem not to apply to television transmissions.

30. *Capitol Records, Inc. v. Naxos of Am., Inc.*, 372 F.3d 471, 484 (2d. Cir. 2004) [hereinafter *Naxos II*].

31. *Id.* at 484–85.

32. *Naxos I*, 830 N.E.2d at 263.

33. *Id.* at 252.

34. *Id.* at 253.

35. *Id.*

36. See *About Naxos.com*, NAXOS.COM, <http://www.naxos.com/aboutus.asp> (last visited Mar. 7, 2010).

37. *Naxos I*, 830 N.E.2d at 253.

38. *Id.*

39. *Id.*

40. *Id.*

unjust enrichment,” premised on New York state law.⁴¹ The court granted summary judgment for Naxos, concluding that “Capitol did not have intellectual property rights in the original recordings because its copyrights had expired in the United Kingdom.”⁴² On appeal, the Second Circuit concluded that this case raised “several unsettled issues of New York law” and certified three questions to the Court of Appeals.⁴³

To answer the certified questions, the Court of Appeals traced the history of common law copyright protection from the beginning in the United Kingdom to the present day in the United States.⁴⁴ Specifically, in New York, the Court noted that the first New York State Constitution “permitted the continuation of colonial common law, derived from English common law.”⁴⁵ The common law provided for perpetual copyright protection, absent abrogation by statute.⁴⁶ In 1786, the state legislature passed a copyright statute, which placed a copyright term of twenty-eight years after first publication.⁴⁷ After Congress passed a federal copyright statute that preempted any state copyright laws, the Court of Appeals held that “New York common law would provide copyright protection to a literary work up to the point that federal law governed.”⁴⁸ Accordingly, because federal copyright law did not protect sound recordings, New York common law could provide perpetual copyright protection to these recordings.⁴⁹ The court concluded that both the judiciary and the legislature intended to protect owners of sound recordings.⁵⁰ With the amendments to the Copyright Act giving federal protection to sound recordings, the court noted that the state

41. *Id.*

42. *Id.* (citing *Capitol Records, Inc. v. Naxos of Am., Inc.*, 262 F. Supp. 2d 204, 210 (S.D.N.Y. 2003)).

43. *Id.* (quoting *Capitol Records, Inc. v. Naxos of Am., Inc.*, 372 F.3d 471, 484–85 (2d Cir. 2004)). Those three questions were:

(1) Does the expiration of the term of a copyright in the country of origin terminate a common law copyright in New York?

(2) Does a cause of action for common law copyright infringement include some or all of the elements of unfair competition?

(3) Is a claim for common law copyright infringement defeated by a defendant’s showing that the plaintiff’s work has slight if any current market and that the defendant’s work, although using components of the plaintiff’s work is fairly to be regarded as a “new product?”

Id.

44. *Id.* at 253-62.

45. *Id.* at 262. *See also* N.Y. CONST. of 1777, art. XXXV.

46. *Naxos I*, 830 N.E.2d at 262-63.

47. *Id.* at 263 (citing Act of Apr. 29, 1786, L. 1786, ch. 54 (an act to promote literature)).

48. *Id.* (citations omitted).

49. *Id.*

50. *Id.*

common law protection had been abrogated in two respects: sound recordings made after February 15, 1972 do not have common law protection because they have federal protection; and the state common law protection is no longer perpetual since the federal law will preempt the state common law on February 15, 2067.⁵¹ Having concluded that New York common law copyright protected sound recordings made prior to February 15, 1972 until 2067, the court then determined that “the public sale of a sound recording . . . does not constitute a publication sufficient to divest the owner of common-law copyright protection.”⁵²

Turning to the certified questions, the court held that New York common law copyright protection extends to sound recordings even though they are in the public domain in the country of origin.⁵³ It also held that a common law “copyright infringement cause of action . . . consists of two elements: “(1) the existence of a valid copyright; and (2) unauthorized reproduction of the work protected by the copyright.”⁵⁴ Finally, the court noted that the popularity of a product, or the argument that it can be considered a new work, will not defeat a common law copyright claim.⁵⁵

Therefore, post-*Naxos I*, it is clear that New York extends common law copyright protection to sound recordings made before February 15, 1972.⁵⁶ However, the court did not determine the scope of that protection; namely, whether copyright protection extends to unauthorized public performances of the sound recording.⁵⁷ A discussion of the history of the bundle of rights under copyright law will shed some light on the subject.

IV. PUBLIC PERFORMANCE RIGHTS HISTORICALLY UNDER COPYRIGHT LAW

As noted above, Congress can enact as expansive a copyright statute as it wants, as long as it is limited to “writings”⁵⁸ and is of limited dura-

51. *Naxos I*, 830 N.E.2d at 263.

52. *Id.* at 264 (citations omitted). Interestingly, the court noted that this was the “law in this state for over 50 years,” yet it did not cite to a Court of Appeals opinion establishing that, instead relying on one Second Circuit decision, an Appellate Division decision, and two New York Supreme Court decisions, as well as an unsigned Note. *See id.*

53. *Id.* at 265.

54. *Naxos I*, 830 N.E.2d at 266. The court also held that a common law copyright infringement cause of action is not synonymous with an unfair competition cause of action. *Id.*

55. *Id.* at 266-67.

56. *Id.* at 263.

57. *See id.* (no discussion of the public performance issue).

58. “Writings” as interpreted by the Supreme Court is an expansive definition that is not limited to the literal written word. *See Burrows-Giles Lithographic Co. v. Sarony*, 111 U.S. 53,

tion.⁵⁹ As many commentators note, Congress has not exhausted this power.⁶⁰ Thus, even though sound recordings do not have a full statutory performance right, it is possible that a performance right exists under common law. Because the Copyright Act expressly permits state or common law remedies for pre-1972 recordings,⁶¹ it is important to look at the historical scope of common law copyright to determine the existence of a performance right.

Copyright is considered a property right. Under the common law, a copyright embodied similar rights to other common law property rights; principally, the exclusive right to possess, use, and dispose of the property.⁶² Blackstone noted the expansiveness of the common law copyright in his *Commentaries* when he wrote that any unauthorized use of a person's original work is "an invasion of his right of property."⁶³

Under the common law, unlike statutory copyright, this exclusive right, or monopoly over the literary work, existed into perpetuity.⁶⁴ However, publication of the work divested the owner of any common law copyright, and the work entered the public domain unless it obtained statutory protection.⁶⁵

By way of analogy, the common law rights given to unpublished plays are instructive. Like sound recordings and musical compositions, the real value of a play is its performance. In fact, plays—known as "dramatic compositions" under copyright law—received a statutory performance right prior to musical compositions.⁶⁶ However, the statutory rights only attached if the play was published; if the author merely wrote it down in manuscript form for the actors to memorize, then no statutory right attached because it was considered unpublished.⁶⁷ A play that existed only in

58 (1884) (holding that "writings . . . include[s] all forms of writing, printing, engraving, etching, etc. [sic], by which the ideas in the mind of the author are given visible expression").

59. STAFF OF H. COMM. ON THE JUDICIARY, 95TH CONG., REPORT ON PERFORMANCE RIGHTS IN SOUND RECORDINGS 15 (Comm. Print 1978).

60. *See, e.g., id.*

61. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

62. *See, e.g.,* Waring v. WDAS Broad. Station, Inc., 194 A. 631, 634 (Pa. 1937).

63. 2 WILLIAM BLACKSTONE, COMMENTARIES 405-06.

64. *See, e.g.,* *Naxos I*, 830 N.E.2d at 262-63.

65. *See, e.g., id.* at 257-58.

66. In 1856, Congress extended protection to "dramatic compositions" and included a public performance right for those particular works. *See* Act of Aug. 18, 1856, ch. 169, § 1, 11 Stat. 138, 138-39, reprinted in LIBRARY OF CONGRESS, COPYRIGHT ENACTMENTS, 1783-1900, at 41 (1900). It was not until 1897 that a public performance right was extended to musical compositions. *See* Act of Jan. 6, 1897, ch.4, 29 Stat. 481, 481-82 (amending 60 U.S. Rev. Stat. § 4966), reprinted in *id.* at 61-62 (1900).

67. *See* EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL

manuscript form enjoyed common law protection, and the owner of the play could restrain those from performing it.⁶⁸

Courts struggled with the issue of whether performing an unpublished play constituted publication such that the owner was divested of common law protection.⁶⁹ One New York case bears on this issue. In *Palmer v. DeWitt*, the New York Court of Appeals noted that, absent an intent to dedicate the work to the public, an author retains a right in the work and can prevent others from publishing it.⁷⁰ “The permission to act a play at a public theater does not amount to an abandonment by the author of his title to it, or to a dedication of it to the public.”⁷¹ Given that owners of unpublished plays had a common law right to restrain public performance of their works,⁷² it would not require any stretch of the law to hold that the same is true for sound recordings. First, plays can exist in unpublished form yet be widely distributed. As long as the play remained in manuscript form, it remained unpublished.⁷³ Similarly, a sound recording fixed onto a phonorecord is considered unpublished.⁷⁴ Both pre-1978 unpublished plays and unpublished pre-1972 sound recordings are governed by the common law.⁷⁵ Second, a performance right is necessary to protect the author’s interest in the most valuable aspect of the play and the sound recording—the effect the play or sound recording has on the viewing and listening public. People want to see plays performed on stage, and they want to listen to sound recordings being performed.

Given the nature of common law copyright, especially as it relates to

PRODUCTIONS 574 (Boston, MA, Little, Brown, and Co. 1879).

68. *See, e.g., id.*

69. In *Keene v. Wheatley*, a federal district court stated, in dicta, that public performance of an unpublished play was a limited publication such that a person, relying solely on memory, could also perform the play without violating the author’s rights. 14 F. Cas. 180, 201 (E.D. Pa. 1861) (No. 7644). However, a person writing down the play while watching an authorized performance and then using that manuscript to perform the play without authorization would be a violation. *Id.* at 204–05, 207. Commentators criticized this distinction, believing that any unauthorized performance would violate an author’s common law right. *See id.* Shortly after the *Wheatley* decision, Massachusetts’ highest court, following the reasoning in that case, held that if an owner publicly performs an unpublished play, then anyone, relying on his or her memory, can also perform that play. *Keene v. Kimball*, 82 Mass. (15 Gray) 545, 549–51 (1860). The Massachusetts court overruled this decision over twenty years later in *Tompkins v. Halleck*, and held that public performance of a play will not deprive the owner from prohibiting others from performing the play. 133 Mass. 32, 43–44 (Mass. 1882).

70. *Palmer v. De Witt*, 47 N.Y. 532, 543 (N.Y. 1872) (cited with approval in *Naxos I*).

71. *Id.*

72. *Id.*

73. *See DRONE, supra* note 67.

74. *Naxos I*, 830 N.E.2d at 264.

75. *Id.* at 263–64.

statutory copyright law, New York common law copyright arguably provides a performance right to pre-1972 sound recordings.⁷⁶ First, common law copyright exists to the point that there is no statutory abrogation.⁷⁷ Congress, in the 1976 Copyright Act, expressly carved out an exception to federal statutory protection.⁷⁸ Furthermore, New York has no statutory copyright law. Second, common law copyright attaches to “unpublished” material,⁷⁹ in other words, the monopoly extends only to first publication, and then that publication divests the owner of any copyright protection absent statutory protection.⁸⁰ The Court of Appeals expressly held that copying and distributing a phonorecord does not constitute publication of a sound recording such that the owner divests himself of copyright protection.⁸¹ By implication, the facts of the case suggest that performing a sound recording is not publication for purposes of copyright divestiture.⁸² Finally, common law copyright, because it is a property right,⁸³ is more expansive in its protections than statutory copyright.⁸⁴ Given that Congress has not exhausted the breadth of copyright protections and that it *could* provide a performance right in sound recordings,⁸⁵ it seems logical to argue that the common law must therefore embrace such a protection. Furthermore, commentators have noted that a common law copyright in a literary work can be infringed if that work is read in public.⁸⁶

Although a strong argument exists for extending a common law performance right to pre-1972 sound recordings, arguments also exist for finding no such performance right in the common law. First, copyright, as its name implies, has historically been limited to copying and distribution, and

76. *Id.*

77. *Id.* at 262-263.

78. 17 U.S.C. § 301(c) (2008).

79. NIMMER & NIMMER, *supra* note 8.

80. *Id.*

81. *Naxos I*, 830 N.E.2d at 264.

82. This proposition is also supported by case law. In other contexts, reading a manuscript or performing a play that had not been distributed did not divest the owners of copyright protection. *Tompkins v. Halleck*, 133 Mass. 32 (Mass. 1882). Thus, courts found copyright infringement where someone listening to the play copied it down and distributed it. *Keene v. Wheatley*, 14 F. Cas. 180, 201 (E.D. Pa. 1861) (No. 7644).

83. *See, e.g., Waring v. WDAS Broad. Station, Inc.*, 194 A. 631, 634 (Pa. 1937).

84. *See generally Naxos I*, 830 N.E.2d at 263.

85. *See, e.g., Performance Rights in Sound Recordings: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice*, 95th Cong. 3 (1978) (statement of Barbara Ringer, Register of Copyrights) (stating that “Congress is free to embrace additional subject matter and to extend exclusive rights under the umbrella Federal Copyright.”).

86. *See DRONE, supra* note 67.

any extension of the right has been by statute.⁸⁷ Thus, a performance right was never recognized at common law and is only a statutory creation. However, this argument ignores the Supreme Court's statement in *Wheaton v. Peters* that "the failure to assert any particular right may afford no evidence of the non existence [sic] of such right."⁸⁸ The ability to embody a particular performance into a tangible medium that can be replayed and redistributed endlessly did not exist in 17th century England. Prior to Thomas Edison's invention of the phonograph in the late 1800s, performances were ephemeral.⁸⁹ Thus, there was no need for judicial or legislative assistance to prohibit or restrict someone from reproducing that particular performance. Also, the fact that copyright originated in the context of copying books does not mean that the common law cannot evolve to embrace not only different subject matter, but also different rights. To believe otherwise would destroy common law protection for anything but unpublished books.

Another argument against extending a performance right is that the Court of Appeals in *Naxos I* outlined the elements for a copyright infringement claim, which necessarily limits the rights to copying and distribution. The court held that a "copyright infringement cause of action in New York consists of two elements: (1) the existence of a valid copyright; and (2) unauthorized reproduction of the work protected by the copyright."⁹⁰ While the court seems to implicitly reject a performance right, such a restrictive reading of the decision is not warranted. The Court of Appeals noted that "the copyright protection extended by state common law to sound recordings not covered by the federal Copyright Act is similar to the scope of common-law ownership rights in other forms of property . . ."⁹¹ One such right in property is the exclusive right to use the property.⁹²

87. Even the case law giving a common law performance right to unpublished plays established the right after federal law gave plays a performance right. See *Ferris v. Frohman*, 223 U.S. 424, 434 (1912). Arguably, then, it was the fact that the play was unpublished, and not the fact that every unpublished work has a performance right that established the scope of the common law performance right.

88. *Wheaton v. Peters*, 33 U.S. 591, 659 (1834).

89. See *United States v. Western Electric Co.*, 531 F.Supp. 894, 913 (D.N.J. 1981) (noting that Thomas Edison invented the phonograph in 1877).

90. *Naxos I*, 830 N.E.2d at 266 (emphasis added) (citation omitted).

91. *Naxos I*, 830 N.E.2d at 265. The court also noted that the original New York copyright statute "contemplated the existence of common-law copyright protections separate from statutory rights . . ." *Id.* at 257.

92. See *Novelty Crystal Corp. v. PSA Institutional Partners, L.P.*, 850 N.Y.S.2d 497, 501 (N.Y. App. Div. 2008) (citing *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945)). Also, nothing in the 1909 Copyright Act limited the common law right of an author to "prevent the copying, publication, or use of such unpublished work . . ." Copyright Act of 1909, Pub. L. No. 60-349, §2, 35 Stat. 1075, 1076 (emphasis added).

Since performing the sound recording is a use of the protected work, it follows that an owner could restrict, prohibit, or control such use of his property. Also, the Court of Appeals was simply responding to the facts of the case, which involved unauthorized reproduction.

V. CONCLUSION

Since the founding of this country, copyright has existed in both common law form at the state level and statutory form at the federal level.⁹³ In 2005, New York's highest court for the first time held that New York law recognized a common law copyright in sound recordings.⁹⁴ The court, however, did not define the scope of that protection. The court left unanswered the question of whether pre-1972 sound recordings, under common law copyright, have a performance right. Given the historical scope of common law copyright, the logical conclusion is that pre-1972 sound recordings enjoy a performance right under New York common law. Of course, the right may have little value at this point in time considering that the vast majority of sound recordings that are broadcast are protected under federal law.⁹⁵ However, if Congress does extend a performance right to sound recordings protected under federal law, then pre-1972 sound recording owners should consider enforcing their rights.

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93. *See generally Naxos I*, 830 N.E.2d at 257 (discussing the nature of federal and state copyright law at the time of the founding and shortly thereafter).

94. *See id.* at 265.

95. *See Naxos II*, 372 F.3d at 477 (stating that recordings made before 1972 are "neither protected nor preempted by federal copyright law . . .").