

**MISINTERPRETING THE RECORD RENTAL  
AMENDMENT: *BRILLIANCE AUDIO v. HAIGHTS  
CROSS COMMUNICATIONS***

Sean N. Kass\*

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I. INTRODUCTION

The first sale doctrine is the default rule governing second-order distribution of copies of copyrighted works.<sup>1</sup> The doctrine is codified in 17 U.S.C. § 109(a), which provides that “the owner of a particular copy or phonorecord . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”<sup>2</sup> In addition to the right of resale, the first sale doctrine’s “otherwise dispose” language has generally been interpreted to permit the rental, lease, or lending of a lawfully purchased copy without the consent of the copyright owner.<sup>3</sup> In 1984, Congress passed an exception to the first sale doctrine that has become known as the Re-

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1. This Note argues for a particular interpretation of the Record Rental Amendment to the first sale doctrine for copyright. Although the Note describes the first sale doctrine for trademark *infra* Part II.B, the remainder of the Note will focus exclusively on the copyright doctrine.

2. See 17 U.S.C. § 109(a) (2000).

3. 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.12(B)(1)(a) (2007).

cord Rental Amendment (“the Amendment”).<sup>4</sup> The Amendment eliminates the owner’s ability to rent, lease, or lend a lawfully purchased copy of a sound recording without the authorization of the copyright holder.<sup>5</sup>

The interaction between the first sale doctrine and the Amendment determines the scope of resale and lending rights enjoyed by the lawful purchaser of a copy of a sound recording. The first sale doctrine is a limitation on the copyright holder’s traditional exclusive rights to sell or distribute his work. The Amendment, on the other hand, restores some of the copyright holder’s exclusive rights by abridging the purchaser’s ability to rent, lease, or lend certain copyrighted works. Extending the Amendment therefore limits the first sale doctrine, which in turn expands the exclusive rights of the copyright holder. Limiting the scope of the Amendment expands the rights of purchasers under the first sale doctrine, which in turn restricts the exclusive rights of the copyright holder.

In *Brilliance Audio, Inc. v. Hights Cross Communications, Inc.*,<sup>6</sup> the U.S. Court of Appeals for the Sixth Circuit held that the Amendment to the first sale doctrine applies only to sound recordings of musical works.<sup>7</sup> It was the first time that a court had placed such a restriction on the Amendment.<sup>8</sup> If widely accepted, the Sixth Circuit’s reasoning would mean that purchasers of non-musical sound recordings,<sup>9</sup> such as audio books and podcasts, would have substantially more freedom under the first sale doctrine than purchasers of musical sound recordings.<sup>10</sup>

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4. Pub. L. No. 98-450, 98 Stat. 1727 (1984) (codified as amended at 17 U.S.C. § 109(b) (2000)).

5. 17 U.S.C. § 109(b)(1)(A). *See* fig. 1.

6. 474 F.3d 365 (6th Cir. 2007).

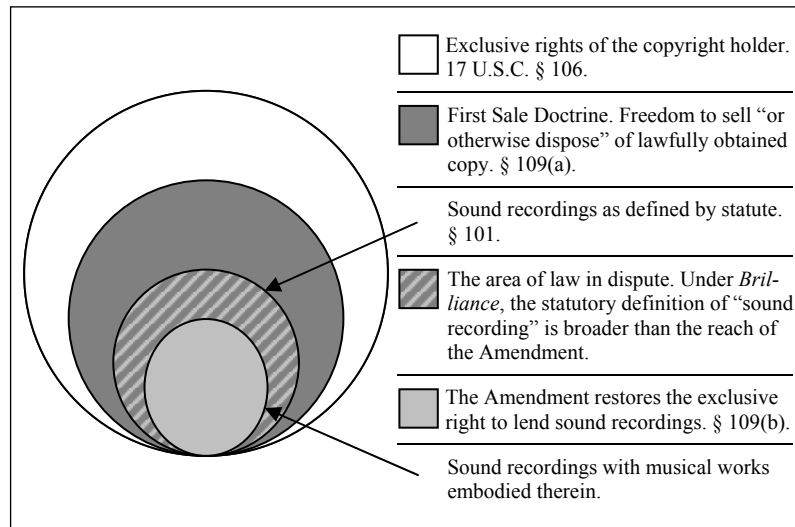
7. *Id.* at 374.

8. *Id.* at 368.

9. This Note uses “non-musical sound recordings” as a shorthand term for sound recordings without any musical works. Sound recordings that include musical works will be rendered “musical sound recordings.”

10. In recent years, the Sixth Circuit has given special protection to sound recordings including musical works. In *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005), the court of appeals held that the de minimis defense to copyright infringement does not apply to musical sampling, stating that “a sound recording owner has the exclusive right to ‘sample’ his own recording” and demanding that creators either “[g]et a license or do not sample.” *Id.* at 801; *see also id.* at 804 (distinguishing cases that involve only infringement of the underlying musical compositions, rather than the sound recordings).

Figure 1: Interaction Between the First Sale Doctrine and the Record Rental Amendment



This interpretation of the Amendment's scope has occurred at a time when the market for non-musical recordings is rapidly expanding.<sup>11</sup> For example, non-musical programming has increased with the popularity of the podcast medium.<sup>12</sup> According to a 2006 survey, 12% of adult Internet users have downloaded a podcast at one time or another.<sup>13</sup> That percentage is likely to increase as more American adults purchase MP3 players.<sup>14</sup> Podcast content is now available from traditional media sources, including ABC, NBC, BBC, NPR, ESPN, and VH1.<sup>15</sup>

This Note argues that the *Brilliance* majority should not have declared the statutory text ambiguous, misread the legislative history, and overlooked critical policy issues. Part II sets forth the facts of the case, the relevant procedural history, and the Sixth Circuit's holdings on the plaintiff's trademark and copyright claims. Part III addresses the merits of the Sixth Circuit's reasoning. Part III.A argues that, con-

11. Figure 1 describes the interaction between the first sale doctrine, the Amendment, and the majority's holding in *Brilliance*.

12. See Matthew J. Astle, *Will Congress Kill the Podcasting Star?*, 19 HARV. J.L. & TECH. 161, 168 (2005).

13. MARY MADDEN, PEW INTERNET & LIFE PROJECT, MEMO: PODCAST DOWNLOADING 1 (2006), available at [http://www.pewinternet.org/pdfs/PIP\\_Podcasting.pdf](http://www.pewinternet.org/pdfs/PIP_Podcasting.pdf).

14. See *id.* at 2 (finding that 20% of American adults currently own MP3 players).

15. See Astle, *supra* note 12, at 168; Posting of Jon Pettit to Bostonist, *ISGM "Concert" Is Too Legit to Quit*, (Feb. 6, 2007), [http://bostonist.com/2007/02/06/isgm\\_concert\\_is\\_too\\_legit\\_to\\_quit.php](http://bostonist.com/2007/02/06/isgm_concert_is_too_legit_to_quit.php).

trary to the majority's finding, the Amendment is not "inescapably ambiguous" and that it was therefore improper to use the Amendment's legislative history and the attendant policy concerns to interpret the statute. Part III.B contends that even if the statute could be considered ambiguous, the majority misinterpreted the legislative history of the Amendment. Part III.C argues that while some policy concerns favor the majority's interpretation, the majority failed to consider some positive benefits that would result from an expansive interpretation of the Amendment; moreover, the majority failed to provide an adequate reason for distinguishing musical sound recordings from non-musical recordings.

## II. BACKGROUND

### *A. Facts and Procedural History*

The plaintiff, Brilliance Audio ("Brilliance"), produces sound recordings of literary works for retail and library distribution.<sup>16</sup> These works, known as audio books, are produced under exclusive licensing agreements with publishers and authors for the sound recording rights to their works.<sup>17</sup> Brilliance has amassed a substantial portfolio of audio books under such agreements and holds registered copyrights in these recordings, which are marketed and sold under the trademarked "Brilliance" brand name.<sup>18</sup> Brilliance produces and markets two different versions of its audio books, retail editions and library editions, which "are packaged and marketed differently."<sup>19</sup>

The defendant, Hights Cross Communications ("Hights"), also produces audio books, and is one of Brilliance's competitors. Hights allegedly repackaged Brilliance's retail editions as library editions and used the Brilliance trademark without Brilliance's permission.<sup>20</sup> Brilliance further alleged that Hights rented the repackaged audio recordings to paying customers.<sup>21</sup>

Brilliance filed suit in the Western District of Michigan, claiming that Hights's alleged repackaging amounted to trademark infringement, trademark dilution, unfair competition, and copyright infringement.<sup>22</sup> The district court granted Hights's motion to dismiss for

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16. Brilliance Audio, <http://www.brillianceaudio.com> (last visited Dec. 1, 2007).

17. *Brilliance Audio, Inc. v. Hights Cross Comm'ns Inc.*, 474 F.3d 365, 368 (6th Cir. 2007).

18. Complaint and Jury Demand at ¶¶ 9, 16, 18, *Brilliance Audio, Inc. v. Hights Cross Comm'ns*, No. 1:04-CV-396, 2004 WL 3132255 (W.D. Mich. Dec. 30, 2004), 2004 WL 2234803.

19. *Id.* ¶ 19.

20. *Id.* ¶¶ 24, 33.

21. *Id.* ¶ 20.

22. *See id.* ¶¶ 27–56.

failure to state a claim.<sup>23</sup> Brilliance appealed the decision to the U.S. Court of Appeals for the Sixth Circuit.

### B. Brilliance's Trademark Infringement Claims

Before the Sixth Circuit turned to the plaintiff's copyright claims, the court reversed the district court's dismissal of Brilliance's trademark claims. The court of appeals unanimously disagreed with the lower court's holding that Haight's use of the Brilliance mark was protected by the first sale doctrine.<sup>24</sup> In the trademark context, the first sale doctrine generally permits resale of an item bearing a trademark.<sup>25</sup> After recognizing the general application of the doctrine, the court of appeals examined two exceptions.<sup>26</sup> If a party's conduct falls within either exception, the first sale doctrine does not provide a defense to claims of trademark infringement.

Under the first exception, a party is not protected by the first sale doctrine if the public is not adequately informed that the product has been repackaged.<sup>27</sup> Relying on *Prestonettes, Inc. v. Coty*<sup>28</sup> and *Enesco Corp. v. Price/Costco Inc.*,<sup>29</sup> the court of appeals reasoned that the manufacturer may be harmed if repackaging results in a lower quality product, and consumers, recognizing the trademark on the repackaged product, then associate the lower quality product with the original manufacturer.<sup>30</sup> Under the second exception, a party is not protected by the first sale doctrine if that party uses the trademark to sell goods that are "*materially different* than those sold by the trademark owner."<sup>31</sup> In both circumstances, the court explained, the party's actions dilute the trademark's value as an identifier of goods of a particular type and quality.<sup>32</sup>

Applying these two exceptions to the facts alleged in the complaint, the Sixth Circuit concluded that Brilliance's allegations were sufficient to state a claim.<sup>33</sup> With respect to the first exception, Brilliance alleged that Haight did not provide consumers with adequate

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23. Brilliance Audio, Inc. v. Haight's Cross Commc'ns, Inc., No 1:04-CV-396, 2004 WL 3132255, at \*1 (W.D. Mich. Dec. 30, 2004), *aff'd in part, rev'd in part*, 474 F.3d 365 (6th Cir. 2007).

24. Brilliance Audio, Inc. v. Haight's Cross Commc'ns, Inc., 474 F.3d 365, 369 (6th Cir. 2007).

25. *Id.*

26. *Id.* at 369–70.

27. Enesco Corp. v. Price/Costco Inc., 146 F.3d 1083, 1085–86 (9th Cir. 1998).

28. 264 U.S. 359, 368–69 (1924).

29. 146 F.3d 1083, 1085–86 (9th Cir. 1998).

30. *Brilliance*, 474 F.3d at 370.

31. *Id.* at 370 (quoting *Davidoff & CIE, S.A. v. PLD Int'l Corp.*, 263 F.3d 1297, 1302 (11th Cir. 2001)).

32. *Id.* at 369–371.

33. *Id.* at 370–71.

notice that it was repackaging Brilliance products.<sup>34</sup> Brilliance's complaint further alleged that Haight's repackaging led consumers to believe that the two companies had an ongoing relationship under which Haight had authorization to repackage Brilliance products.<sup>35</sup> In addition, the complaint alleged that Haight's repackaging of Brilliance's retail editions as library editions confused consumers about which product they were purchasing.<sup>36</sup> The court of appeals held that the facts alleged fell within the notification exception to the first sale doctrine.<sup>37</sup>

With respect to the second exception, the court of appeals held that the district court erred in dismissing Brilliance's claim that the repackaged products were materially different because "an allegation of a material difference cannot properly be dismissed on 12(b)(6) grounds."<sup>38</sup> Relying on *Davidoff & CIE v. PLD International*,<sup>39</sup> the court of appeals reasoned that a difference between two products is material if the difference is "one that consumers consider relevant to a decision about whether to purchase a product."<sup>40</sup> The court stated that materiality is a fact-based inquiry with a deliberately low threshold.<sup>41</sup> The court relied on Brilliance's claim that the retail and the library editions were different because they were packaged and marketed differently.<sup>42</sup> While acknowledging "some ambiguity" as to whether the two products were actually different or whether only the packaging and marketing were different, the court of appeals concluded that Brilliance had alleged sufficient facts that fell within the material difference exception.<sup>43</sup> The court of appeals accordingly reversed the district court's dismissal of Brilliance's trademark infringement claims.<sup>44</sup>

### C. Brilliance's Copyright Infringement Claims

While the panel was unanimous with respect to the trademark issues, the panel disagreed about the viability of Brilliance's copyright claims. The central copyright issue in the case was whether the Record Rental Amendment ("the Amendment") should be interpreted to exclude *all* sound recordings from the scope of the first sale doctrine,

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34. *Id.* at 370–71.

35. *Id.* at 369.

36. *Id.* at 371.

37. *Id.*

38. *Id.* at 370.

39. 263 F.3d 1297 (11th Cir. 2001).

40. *Brilliance*, 474 F.3d at 370 (quoting *Davidoff*, 263 F.3d at 1302).

41. *Id.* (quoting *Davidoff*, 263 F.3d at 1302).

42. *Id.* at 371.

43. *Id.*

44. *Id.* at 368.

or alternately, whether the Amendment should be interpreted so that the first sale doctrine allows the rental of non-musical sound recordings. Generally, the first sale doctrine permits the owner of a particular copy of a copyrighted work to “dispose of it in any manner he or she wishes.”<sup>45</sup> The Amendment limits that right for some works. In relevant part, the Amendment states:

Notwithstanding the provisions of subsection (a), unless authorized by the owners of copyright in the sound recording or the owner of copyright in a computer program (including any tape, disk, or other medium embodying such program), and in the case of a sound recording in the musical works embodied therein, neither the owner of a particular phonorecord nor any person in possession of a particular copy of a computer program (including any tape, disk, or other medium embodying such program), may, for the purpose of direct or indirect commercial advantage, dispose of, or authorize the disposal of, the possession of that phonorecord or computer program (including any tape, disk, or other medium embodying such program) by rental, lease, or lending, or by any other act or practice in the nature of rental, lease, or lending.<sup>46</sup>

To resolve the case, the court of appeals was required to interpret the meaning of 17 U.S.C. § 109(a) and (b). The majority noted that it should consider legislative history when interpreting the statute only if the statute is “inescapably ambiguous.”<sup>47</sup> If, instead, “the language of the statute is clear, then the inquiry is complete, and the court should look no further.”<sup>48</sup> The plaintiff argued that the Amendment requires two separate permissions for the lending of sound recordings: the permission of the copyright holders in all sound recordings, whether or not the recordings contain musical works, and the permission of the copyright holder in any underlying musical work that the sound recordings contain.<sup>49</sup> The defendant argued that the Amendment requires only the permission of the copyright holder in sound recordings that contain musical works.<sup>50</sup> According to the majority in *Brilliance*, because “both parties have laid out plausible readings of the statutory

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45. *Id.*

46. 17 U.S.C. § 109(b)(1)(A) (2000) (emphasis added). Non-profit libraries and non-profit educational institutions are expressly exempted from § 109(b)(1)(A). *Id.*

47. *Id.* (citing *Garcia v. United States*, 469 U.S. 70, 76 n.3 (1984)).

48. *Id.* (citing *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 185 n.29 (1978)).

49. *Id.* at 372.

50. *Id.*

language, we find that the language of § 109(b)(1)(A) is not unambiguous.”<sup>51</sup> Apparently finding “not unambiguous” equivalent to “inescapably ambiguous” for the purposes of statutory interpretation, the majority then considered the legislative history and policy rationales of the Amendment.<sup>52</sup>

Citing the House and Senate Committee reports prepared prior to the Amendment’s enactment, the majority emphasized the extent to which the reports referred to the rental and copying of musical recordings.<sup>53</sup> These reports found that musical sound recordings had replay value because consumers listened to such works repeatedly.<sup>54</sup> According to the reports, this replay value makes musical sound recordings “susceptible to extensive home taping,” which could result in decreased sales.<sup>55</sup> The majority also gave weight to the reports prepared when the Amendment was amended in 1988; the court noted that the House report explicitly stated that the Amendment did not apply to sound recordings of literary works.<sup>56</sup> Relying on the findings in the reports, the court further reasoned that sound recordings of literary works do not have the repeated appeal or replay value of musical recordings.<sup>57</sup> According to the court of appeals, the legislative history indicated that Congress purposefully distinguished between musical and non-musical recordings because consumers do not listen to non-musical recordings over and over again.

The court concluded that the Amendment reflected Congress’s “specific policy choice that personal property rights in a certain type of work — sound recordings of musical works — should give way to ensure that copyright owners receive the protections envisioned by the Copyright Act as a whole.”<sup>58</sup> Noting that the Amendment altered the traditional copyright bargain by providing an exception to the copy-

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51. *Id.* The majority’s opinion addressed the party’s statutory interpretations in merely two sentences:

One reading requires only the consent of the copyright owner in sound recordings containing musical works, as well as consent from the copyright owner in those musical works. The statute may also be read, however, to mandate obtaining permission from the copyright owners of all sound recordings and additionally to require the consent of the copyright owner in the work being recorded, if it is a musical work.

*Id.*

52. *Id.* at 372.

53. *Id.* at 372–73.

54. *See id.* at 373 (quoting H.R. REP. No. 100-776, at 3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4339, 4341).

55. *Id.* at 373 (quoting H.R. REP. No. 100-776, at 3, *reprinted in* 1988 U.S.C.C.A.N. at 4341).

56. *Id.* (quoting H.R. REP. No. 100-776, at 3, *reprinted in* 1988 U.S.C.C.A.N. at 4341).

57. *Id.* (quoting H.R. REP. No. 100-776, at 3, *reprinted in* 1988 U.S.C.C.A.N. at 4341) (“It is less likely, on the other hand, that literary works invite the same kind of long-term, repeated enjoyment by consumers.”).

58. *Id.* at 374.



right holder's exclusive control over the work's distribution, the court stated that it was reluctant to expand the scope of the exception beyond musical sound recordings.<sup>59</sup> The court therefore held that the Amendment applies only to sound recordings that contain musical works.<sup>60</sup>

Judge Cornelia Kennedy wrote separately, concurring in part and dissenting in part. She agreed with the majority's holding that the alleged actions constituted trademark infringement and, consequently, that the defendant's 12(b)(6) motion should be denied as to the trademark claims.<sup>61</sup> However, she argued that the defendant's actions did give rise to a cognizable copyright claim.<sup>62</sup> Unlike the majority, Judge Kennedy did not read the Amendment to apply only to musical sound recordings. Instead, she interpreted the statute to apply to all sound recordings. In particular, she read the phrase "in the case of a sound recording in the musical works embodied therein" as creating a special provision for sound recordings that contain musical works.<sup>63</sup> According to Judge Kennedy, § 109 broadly prohibits the rental, lease, or lending of *any* sound recording without the permission of the sound recording's copyright holder. In the case of a musical recording, the Amendment also prohibits the rental, lease, or lending of the recording without the permission of the copyright holder(s) of the musical work(s) contained in the sound recording. Under this interpretation, Brilliance alleged a valid copyright claim because Haight's leased Brilliance's copyrighted sound recordings to others without obtaining Brilliance's permission.<sup>64</sup> Judge Kennedy further argued that the majority's examination of the statute's legislative history was unnecessary because the plain meaning of the statutory text was not inescapably ambiguous.<sup>65</sup>

### III. ANALYSIS

#### *A. Plain Language of the Amendment*

This Note concludes — like Judge Kennedy — that the court should not have considered legislative history because the plain language of the Amendment is not "inescapably ambiguous."<sup>66</sup> As the majority recognized, "[i]f the language of the statute is clear, then the

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59. *Id.*

60. *Id.*

61. *Id.* (Kennedy, J., concurring in part and dissenting in part).

62. *Id.* at 374–75.

63. *See id.* at 375 (quoting 17 U.S.C. § 109(b)(1)(A) (2000)).

64. *Id.*

65. *Id.* (citing *Garcia v. United States*, 469 U.S. 70, 76 n.3 (1984)).

66. *Id.* (quoting *Garcia*, 469 U.S. at 76 n.3).

inquiry is complete, and the court should look no further.”<sup>67</sup> Yet after dutifully reciting this canon of statutory interpretation, the majority summarily concluded that § 109(b)(1)(A) is “inescapably ambiguous” because “both parties have laid out plausible readings of the statutory language.”<sup>68</sup>

Unfortunately, the majority opinion does not provide much additional explanation. After stating this conclusion, the opinion devotes the next two sentences to summarizing each party’s argument.<sup>69</sup> Evidently content to equate disagreement among the parties with inescapable ambiguity in the statutory language, the majority concluded that “the meaning of the statute cannot be determined merely by reference to the statutory text.”<sup>70</sup> If the majority’s analytic approach were accepted, nearly every question of statutory interpretation would be “inescapably ambiguous” and require recourse to legislative history. In an adversarial system of justice, the fact that intelligent lawyers propose construct alternative interpretations of a statute should not be sufficient to establish that the statute is “inescapably ambiguous,”<sup>71</sup> especially when one of the proposed interpretations is inconsistent with the meaning of terms defined elsewhere in the same statute. In this Section, this Note argues that the majority should have confined its analysis to the text of the statute.

The most plausible reading of § 109(b)(1)(A) is a reading that is consistent with the rest of the Copyright Act. In the Act, “[s]ound recording” is defined to mean any work “that result[s] from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.”<sup>72</sup> As the majority conceded, the statutory definition of sound recording encompasses both musical and non-musical works.<sup>73</sup> Even when an act of Congress lacks a section with definitions, courts should endeavor to interpret identical words used in different parts of the act consistently.<sup>74</sup> Section 109(b)(1)(A) does not redefine “sound recording,” so the term should have the same meaning as provided in § 101 of the Copyright Act. For the scope of § 109(b)(1)(A) to be limited to musical works, the term “sound recording” would have to be expressly qualified to

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67. *Brilliance*, 474 F.3d. at 371 (majority opinion) (citing *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 185 n.29 (1978)).

68. *Id.* at 372.

69. *Id.*; see *supra* note 51 and accompanying text.

70. *Brilliance*, 474 F.3d at 372.

71. *Id.* at 371 (quoting *Garcia*, 469 U.S. at 76 n.3).

72. 17 U.S.C. § 101 (2000).

73. *Brilliance*, 474 F.3d at 373.

74. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995) (“The term should be construed, if possible, to give it a consistent meaning throughout the Act.”).

limit the Amendment's application to some subset of sound recordings.

The term "sound recording" appears twice in the first sentence of § 109(b)(1)(A), which states:

Notwithstanding the provisions of subsection (a), unless authorized by the owners of copyright in the sound recording or the owner of copyright in a computer program (including any tape, disk, or other medium embodying such program), and in the case of a sound recording in the musical works embodied therein, neither the owner of a particular phonorecord nor any person in possession of a particular copy of a computer program (including any tape, disk, or other medium embodying such program), may, for the purposes of direct or indirect commercial advantage, dispose of, or authorize the disposal of, the possession of that phonorecord or computer program (including any tape, disk, or other medium embodying such program) by rental, lease, or lending, or by any other act or practice in the nature of rental, lease, or lending.<sup>75</sup>

In the first instance, "unless authorized by the owners of copyright in the sound recording or the owners of copyright in a computer program," the term "sound recording" is unqualified. However, in the second instance, "and in the case of a sound recording in the musical works embodied therein," the term is qualified by the phrase "in the musical works embodied therein."

The majority interpreted the modifying clause to limit the class of applicable sound recordings covered by the Amendment to those recordings containing musical works. But the modifying clause, "in the musical works embodied therein," should not be read to restrict the scope of the Amendment. As the Supreme Court has recognized in other contexts, "[h]ad Congress intended to restrict [the statute], it presumably would have done so expressly."<sup>76</sup> The more plausible reading of the Amendment is that the modifying clause sets forth an additional condition (obtaining the permission of the copyright owner of any underlying musical work) for the subset of sound recordings that contain musical works. Under this reading, the modifying clause requires the authorization of the copyright owner of any underlying musical work; it does not change the initial provision requiring the

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75. 17 U.S.C. § 109(b)(1)(A) (2000).

76. *Russello v. United States*, 464 U.S. 16, 23 (1983); *see also* *N. Haven Bd. of Edu. v. Bell*, 456 U.S. 512, 521 (1982); *United States v. Naftalin*, 441 U.S. 768, 773–74 (1979).

authorization of the copyright owner of the sound recording. Therefore, the statute should be read to require the authorization of the copyright owner of the sound recording regardless of whether the recording contains any musical works.

The definition of “sound recording” also favors this reading of the statute. Because the term “sound recording” encompasses all types of recorded sound, it is not coextensive with the subset of sound recordings to which “in the musical works embodied therein” could logically apply. In order for § 109(b)(1)(A) to have an intelligible meaning, the tension between the broader and narrower classes of sound recordings must be resolved. There are two options. First, the statutory definition of “sound recording” in § 101 could prevail and “in the musical works embodied therein” could be read to add an additional requirement for a subset of sound recordings. This reading represents Judge Kennedy’s position. Alternatively, the modifying clause “in the musical works embodied therein” could be read to limit the application of § 109(b)(1)(A) to musical sound recordings. The majority adopted this second interpretation.

But if, as the majority held, § 109(b)(1)(A) covered only sound recordings of musical works, the first reference to the term “sound recording” should instead be to “musical sound recording” or “sound recording of musical works.” In order for the modifying clause “and in the musical works embodied therein” to achieve the limiting effect that the majority has attributed to it, the modifying clause must be linked to the first use of “sound recording.” Discounting the fact that the first instance of the term is unqualified by focusing on the latter, qualified instance violates another canon of statutory construction: when specific language is used in one place but omitted in another, “it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”<sup>77</sup> The modifying clause is not attached to the first use of the term “sound recording.” Indeed, in the first instance, “sound recording” is not limited or modified. The resulting implication is clear: “sound recording” should have its full statutory meaning in § 109(b)(1)(A).

The majority’s interpretation is also inconsistent with the broad statutory definition of “phonorecord.” The word “phonorecord,” which appears unqualified in the first sentence of § 109(b)(1)(A),<sup>78</sup> has a similarly broad definition that also results in interpretive inconsistencies if the majority’s reading is accepted. “Phonorecord” is defined in § 101 of the Copyright Act as a “material object[] in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later devel-

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77. *Russello*, 464 U.S. at 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

78. *See* 17 U.S.C. § 109(b)(1)(A).

oped, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>79</sup> Like the definition of “sound recording,” the definition of “phonorecord” includes recordings of both musical and non-musical works. The term’s definition includes a copy of *any* type of recorded sound.

In both cases in which the term “phonorecord” appears in § 109(b)(1)(A), “the owner of a particular phonorecord”<sup>80</sup> and “the possession of that phonorecord,”<sup>81</sup> the scope of the term is not limited or modified. The majority’s determination that § 109(b)(1)(A) applies only to sound recordings of musical works, and therefore phonorecords containing sound recordings of musical works, does not comport with the statutory definition of either “sound recording” or “phonorecord.”

Several unexpected results follow from the majority’s interpretation. If the majority is correct that the phrase “in the musical works embodied therein” limits the application of the Amendment, then sound recordings of musical works *not* protected by copyright are also excluded from the protections afforded by the Amendment. The majority did not consider the modifying clause in its entirety, which requires that a lender obtain the authorization of the copyright holders in the embodied musical works.<sup>82</sup> If a sound recording contains a musical composition, but that composition is not under copyright, it is impossible to obtain authorization from the copyright holder of the underlying musical work, because there is no copyright holder. Consequently, if the majority’s view applies, the Amendment’s provisions do not apply to at least one class of musical sound recordings: sound recordings that contain only musical compositions already in the public domain.

Suppose, for example, that the New York Philharmonic releases a recording of Tchaikovsky’s 1812 Overture, which was written in 1880.<sup>83</sup> Suppose further that the recording is widely praised by classical music enthusiasts as the most authentic performance of the piece by a major orchestra. The majority in *Brilliance* reasoned that § 109(b)(1)(A) was enacted to curtail the problem of illegal taping of musical recordings, especially those that people listen to repeatedly.<sup>84</sup> The New York Philharmonic’s recording of the 1812 Overture would certainly fall within that category. Yet, if the authorization of a copy-

79. *Id.* § 101.

80. *Id.* § 109(b)(1)(A).

81. *Id.*

82. *See id.*

83. *See* Tchaikovsky: 1812 Overture, <http://www.classical.net/music/comp.lst/works/tchaikov/1812.html> (last visited Dec. 1, 2007); *see also* Wikipedia, *1812 Overture*, [http://en.wikipedia.org/1812\\_Overture](http://en.wikipedia.org/1812_Overture) (as of Dec. 1, 2007, 5:12 GMT).

84. *Brilliance*, 474 F.3d at 373.

right holder “in the musical works embodied therein”<sup>85</sup> is read as a limiting the Amendment’s application, then § 109(b)(1)(A) would not apply to the Philharmonic recording because the 1812 Overture was written before 1923 and, consequently, is no longer protected by copyright in the United States.<sup>86</sup> The majority’s holding would thus permit anyone who purchases a copy of the Philharmonic recording to rent, lease, or lend it without any authorization from the Philharmonic, even though the Philharmonic recording is protected by copyright and the Philharmonic is the owner of the copyright in the sound recording. As this example suggests, the primary purpose of the statute — protection of the rights of copyright holders — would be compromised for a significant class of copyrighted sound recordings.

This example suggests that § 109(b)(1)(A) should be interpreted as applying to all sound recordings, and as imposing an extra condition on sound recordings containing copyrighted musical works: the authorization of the copyright owner of the underlying musical works. Therefore, if the sound recording does not contain any copyrighted musical works, lenders need only obtain the authorization from the copyright holder in the sound recording; since there are no copyrighted musical works, the additional requirement for such musical works does not apply.<sup>87</sup> This reading still gives the special treatment to musical recordings contemplated by the legislative history and relied upon by the majority: before a sound recording with a copyrighted musical work can be rented, leased, or lent, the lender must obtain authorization from both the owner of the copyright in the sound recording and the owner of the copyright in the underlying musical work.<sup>88</sup> The only authorization required to rent sound recordings

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85. 17 U.S.C. § 109(b)(1)(A).

86. See U.S. COPYRIGHT OFFICE, CIRCULAR NO. 22, HOW TO INVESTIGATE THE COPYRIGHT STATUS OF A WORK 7 (2006), available at <http://www.copyright.gov/circs/circ22.pdf> (“[T]he U.S. copyright in any work published or copyrighted prior to January 1, 1923, has expired by operation of law, and the work has permanently fallen into the public domain in the United States”).

87. See *Brilliance*, 474 F.3d at 375 (Kennedy, J. concurring in part and dissenting in part).

88. But see Ryan Vacca, *Expanding Preferential Treatment Under the Record Rental Amendment Beyond the Music Industry*, 11 LEWIS & CLARK L. REV. (forthcoming 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=968691](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=968691) (concluding that, based on the history and text of the Amendment, the *Brilliance* court was likely correct in confining the Amendment’s preferential treatment to musical sound recordings, but suggesting that Congress should amend the Amendment to include non-musical sound recordings). Under the reading of the Amendment that Judge Kennedy advances, the Amendment requires the authorization of the copyright owner of the sound recording as well as the authorization of the copyright owner of any musical works contained in the recording. Therefore, if there were two musical works in a recording, three authorizations would be required — one from the owner of the copyright in the sound recording and one from each of the owners of the copyright in the musical works. If a recording has no musical works, only one authorization — from the copyright owner of the sound recording — would be required.

without musical works, such as the audio books at issue in *Brilliance*, should be that of the copyright owner of the sound recording.

There is at least one more reason why the Amendment should not be interpreted as distinguishing between sound recordings that contain musical compositions and sound recordings that do not. Producers of non-musical sound recordings could easily include token musical works in their otherwise non-musical sound recordings and thus qualify for the protections of the Amendment. According to the majority's interpretation, the result would have been different if Brilliance had included music on its audio recordings, particularly music for which it owns the copyrights. Suppose, for example, Brilliance were to purchase or produce an instrumental jingle to be played either in between chapters or in the background of its audio books. Under the majority's interpretation, since Brilliance would own the copyrights to the musical work included in the recording, the recording would be protected under the Amendment and could not be rented, leased, or lent without Brilliance's authorization. It would also likely be illegal for a purchaser to excise the musical works and then rent or lease the remainder of the recording because the resulting work would probably be considered a derivative work in violation of 17 U.S.C. § 106(2).<sup>89</sup> Thus, under the majority's interpretation, Brilliance and other producers of non-musical sound recordings could fall within the Amendment under the majority's interpretation merely by including copyrighted musical works within their recordings.

### *B. Legislative History of the Amendment*

As Judge Kennedy explained in her separate opinion, the Supreme Court has recognized two problems with the use of legislative history to interpret the meaning of a statute.<sup>90</sup> First, legislative history is "often murky, ambiguous, and contradictory."<sup>91</sup> Second, the use of legislative history as a tool of statutory interpretation "may give unrepresentative committee members — or, worse yet, unelected staffers and lobbyists — both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text."<sup>92</sup> For these reasons, the Supreme Court has repeatedly stated that "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material."<sup>93</sup>

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89. 17 U.S.C. § 106(2) (2000).

90. *Brilliance*, 474 F.3d at 375.

91. *Id.* (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005)).

92. *Id.*

93. *Id.*

Despite the Supreme Court's warnings about the shortcomings of legislative history, the majority in *Brilliance* relied heavily on the legislative history to interpret the Amendment. In particular, the court of appeals focused on statutory amendments and congressional committee reports. Referring to a different amendment designed to expand the scope of § 109(b) to include computer software, the majority explained that “[w]hen evidence surfaced of a new class of works in need of § 109(b) protection . . . Congress amended the statute to explicitly exempt the works from the first sale doctrine.”<sup>94</sup> The court of appeals reasoned that “[a]bsent such an express statement from Congress regarding audiobooks . . . we see no reason to extend § 109(b) beyond its original context.”<sup>95</sup>

The majority's analogy is not persuasive because, unlike computer software, non-musical sound recordings (including audio books) were already included in the statute. In its unamended, originally enacted form, the Amendment read:

Notwithstanding the provisions of subsection (a), unless authorized by the owners of copyright in the sound recording and in the musical works embodied therein, the owner of a particular phonorecord may not, for purposes of direct or indirect commercial advantage, dispose of, or authorize the disposal of, the possession of that phonorecord by rental, lease, or lending, or by any other act or practice in the nature of rental, lease, or lending.<sup>96</sup>

The majority finds it significant that computer programs were added to the enumerated list of works in § 109(b)(1)(A), while non-musical sound recordings were not.<sup>97</sup> Even in its unamended form, however, the Amendment referred only to “sound recordings” and did not qualify the term with any reference to musical works. Instead, the pre-1990 text of the Amendment referred to “underlying musical works” only after the phrase “in the sound recording.” The second phrase, “in the musical works embodied therein” is joined to the first phrase by a conjunction; like “in the sound recording,” the second phrase's referent is “the owners of the copyright.” Because the Amendment's first use of the term “sound recordings” was not qualified by reference to musical works, the original version of the Amendment already applied to all sound recordings, including those lacking musical works. Con-

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94. *Id.* at 374 (majority opinion).

95. *Brilliance*, 474 F.3d at 374.

96. Pub. L. No. 98-450, 98 Stat. 1727 (1984) (codified as amended at 17 U.S.C. § 109(b) (2000)).

97. *See Brilliance*, 474 F.3d at 374.



gress did not need to amend § 109(b)(1)(A) to include non-musical sound recordings because they were already included in the statute's plain language. Indeed, if Congress had intended to exclude non-musical sound recordings from the protection of § 109(b)(1)(A), it seems unlikely that it would have relied on such an awkward construction, when it could have easily excluded non-musical sound recordings by expressly referring to "musical sound recordings" or "sound recordings including underlying musical works."

The legislative history of the Amendment demonstrates that musical sound recordings were intended to be within the scope of § 109(b)(1)(A). Contrary to the majority's interpretation, this history does not, however, indicate that Congress intended to *exclude* non-musical recordings. As the majority readily admits, the specific references to "the health of America's musical community,"<sup>98</sup> "musical creativity,"<sup>99</sup> and "music publishers,"<sup>100</sup> in the House and Senate reports should not necessarily be considered dispositive.<sup>101</sup> On the contrary, these references show only that the committee was concerned about protecting musical recordings; they do not indicate whether Congress intended to include or exclude non-musical recordings.

The majority relied heavily on a 1988 House Report, citing the report for the proposition that "the specific problem addressed then was that consumers listen repeatedly to musical works" and that "[t]he problems addressed by the Act in 1984 do not relate to recorded literary works."<sup>102</sup> The emphasis given to the report, however, seems questionable given that the legislative history in this instance is at best "murky, ambiguous, and contradictory."<sup>103</sup> As the Supreme Court has noted, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."<sup>104</sup>

Indeed, the 1984 House Report expressly states the opposite, that "the terms 'sound recording' and 'phonorecord' are intended to have the same meaning as defined in sec[ti]on 101 of the Copyright Act."<sup>105</sup> If, as the 1984 House Report states, "sound recording" retains its statutory meaning, then § 109(b)(1)(A) must apply to *all* sound recordings, not just those that contain musical works. Moreover, the

98. *Id.* (quoting S. REP. NO. 98-162, at 2 (1984)).

99. *Id.* at 372 (quoting S. REP. NO. 98-162, at 3).

100. *Id.*

101. *Id.* at 373.

102. *Brilliance*, 474 F.3d at 373 (quoting H.R. REP. NO. 100-776, at 3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4339, 4341).

103. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

104. *Rusello v. United States*, 464 U.S. 16, 26 (1983) (quoting *Jefferson County Pharm. Ass'n v. Abbott Labs.*, 460 U.S. 150, 165 n.27 (1983)); *see also* *United States v. Clark*, 445 U.S. 23, 33 n.9 (1980) ("[T]he views of some Congressmen as to the construction of a statute adopted years before by another Congress have 'very little, if any, significance.'" (quoting *United States v. Sw. Cable Co.*, 392 U.S. 157, 170 (1968))).

105. H.R. REP. NO. 98-987, at 4 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2898, 2831.

1984 House Report explicitly includes non-musical sound recordings within the ambit of the Amendment. According to the report, the purpose of the statute was “to prohibit the rental, lease, or lending of phonorecords of copyrighted sound recordings *and* musical works for commercial advantage without the permission of the copyright owners.”<sup>106</sup> The report discussed both phonorecords of sound recordings and phonorecords of musical works, suggesting that the Amendment was motivated by the desire to protect both sound recordings and musical works. These statements are evidence that the Amendment was designed to provide protection for copyrighted sound recordings regardless of whether they also embody a copyrighted musical work. The majority was aware of the 1984 House Report, but dismissed it as insignificant, concluding that the statement regarding the meaning of “sound recording” and “phonorecord” was made only “to clarify that § 109(b) did not apply to motion pictures, which were specifically excluded, or to computer programs.”<sup>107</sup>

The majority is probably correct that Congress intended the statement in the 1984 House Report to clarify that audiovisual works are not included in § 109(b). Nevertheless, the impetus behind the committee’s statement does not change its meaning. The House Committee plainly states that sound recording had the “same meaning as defined in sec[ti]on] 101,”<sup>108</sup> a definition that includes non-musical recordings. Like the statements made in the 1988 House Report, this committee statement does not conclusively determine the scope of § 109(b). However, it does cast serious doubt on the antithetical statement made in the House report that was relied on by the majority. At a minimum, the majority should have noted the shortcomings of relying on a single committee report in the face of conflicting legislative history.

### *C. Policy Rationale of the Amendment*

The majority determined that the positive benefits generally associated with the first sale doctrine were a sufficient reason to avoid limiting the doctrine further than necessary. The majority, however, neglected to balance these benefits against the positive effects of limiting the application of the first sale doctrine to certain classes of works. The same concerns that motivate limiting the first sale doctrine’s application to musical sound recordings also justify limiting it for non-musical sound recordings. Expanding the Amendment’s exception will ensure that consumers have access to non-musical sound recordings on the secondary market, while ensuring that copyright

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106. *Id.* at 1, *reprinted in* 1984 U.S.C.C.A.N. at 2898 (emphasis added).

107. *Brilliance*, 474 F.3d at 373.

108. H.R. REP. NO. 98-987, at 4, *reprinted in* 1984 U.S.C.C.A.N. at 2831.

holders of such recordings do not lose the benefit of their copyright. The majority should not have distinguished between musical and non-musical sound recordings based on the latter's supposed lack of replay value without more evidence that the markets for both types of work were in fact different.

The majority dutifully recites the traditional reasons why the first sale doctrine should be preserved as completely as possible. The first rationale for the first sale doctrine is that, after the initial sale, the copyright owner's exclusive right to distribute the specific copy at issue "is no longer needed because the owner has received the desired compensation for that copy."<sup>109</sup> In addition, the first sale doctrine is traditionally justified as a limitation on the exclusive rights of the copyright holder that is necessary to preserve the rights of the purchaser. In the words of the majority, "[t]he first sale doctrine ensures that the copyright monopoly does not intrude on the personal property rights of the individual owner, given that the law generally disfavors restraints of trade and restraints on alienation."<sup>110</sup> Professor R. Anthony Reese has identified additional benefits of the first sale doctrine, including increased access to copyrighted works.<sup>111</sup> Reese also notes that the first sale doctrine promotes consumer privacy by permitting consumers to gain access to copyrighted works without revealing their identity to the copyright owner.<sup>112</sup> For these reasons, the first sale doctrine is "a major bulwark in providing public access" to copyrighted works.<sup>113</sup>

However, limiting the scope of the Amendment could have negative effects on consumers. When the first sale doctrine is in effect, the person who buys a copy of a copyrighted work for personal use pays the same price as the person who buys a copy with the intention of renting or leasing it for profit. A consumer buying a copy for personal use must pay a higher price than he would if purchasers were not permitted to rent, lease, or lend copies without the permission of the copyright owner.<sup>114</sup> On the other hand, a commercial enterprise that buys a copy with the intention of renting or leasing it for profit pays a

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109. *Brilliance*, 474 F.3d at 373 (citing *Parfums Givenchy, Inc. v. C & C Beauty Sales, Inc.*, 832 F. Supp. 1378, 1389 (C.D. Cal. 1993)).

110. *Id.* at 374 (citing *Sebastian Int'l, Inc. v. Consumer Contacts (PTY Ltd.)*, 847 F.2d 1093, 1096 (3d Cir. 1988)); see also Eric Matthew Hinkes, *Access Controls in the Digital Era and the Fair Use/First Sale Doctrines*, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 685, 688 (2007) ("The goal of the first sale doctrine was to balance copyright owners' exclusive rights with the public's right to enjoy and exchange copyrighted material for the public benefit. It encourages and allows the dissemination of copyrighted works . . .").

111. R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577, 577 (2003).

112. *Id.* at 584.

113. *Id.* at 577.

114. See William W. Fisher III, *Property and Contract on the Internet*, 73 CHI. KENT L. REV. 1203, 1236 (1997).

price below what it would have to pay if purchasers were not permitted to rent, lease, or lend copies without the permission of the copyright owner.<sup>115</sup> Because the copyright owner cannot charge a higher price to commercial purchasers planning to rent or lease their copies for profit, such enterprises profit at the expense of those purchasing copies for personal use.

The first sale doctrine does not permit copyright holders to remedy this situation by engaging in price discrimination, even though such a practice generally leads to higher profits for the copyright holder.<sup>116</sup> Copyright holders cannot set different prices for different users because “[c]ustomers do not wear tags saying ‘commercial user’ or ‘consumer user.’”<sup>117</sup> Even if the copyright holder were able to distinguish between commercial and consumer users, “a consumer could buy the [copyrighted work] and resell to a commercial user.”<sup>118</sup> Such arbitrage would ultimately induce copyright owners to raise the price for all users in order to recoup the losses they would suffer when consumers resell their copies to commercial users.<sup>119</sup> For these reasons, “[t]he conditions allowing price discrimination are not satisfied in many markets for copyrighted works.”<sup>120</sup> In the copyright context, arbitrage is a direct result of the first sale doctrine. If consumers could not resell their copies of copyrighted works, there would be no opportunity for arbitrage.<sup>121</sup>

Section 109(b)(1)(A) limits the protections to lenders afforded by the first sale doctrine. When the Amendment applies, the right to rent, lease, or lend a copy of a copyrighted work does not transfer with the copy. Consumers are thus prohibited from renting, leasing, or lending their phonorecords of copyrighted sound recordings without the authorization of the copyright owner.<sup>122</sup> This limitation permits price discrimination. Since the right to rent, lease, or lend a copy of the sound recording is separable from the ownership of a copy, the copyright owner is able to charge different prices for a personal use copy versus a copy that includes the right to rent or lease the work. As a result, the copyright owner could require each class of purchaser to pay a price that more closely matches expected utility.<sup>123</sup> The individ-

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115. *See id.* Because the Amendment targets only those purchasers seeking to rent, lease, or lend phonorecords for “direct or indirect commercial advantage,” it does not prohibit personal purchasers from engaging in non-commercial rental, lease, or lending. 17 U.S.C. § 109(b)(1)(A) (2000); *see also* Vacca, *supra* note 88.

116. *See* Michael J. Meurer, *Price Discrimination, Personal Use, and Piracy: Copyright Protection of Digital Works*, 45 *BUFF. L. REV.* 845, 897 (1997).

117. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1450 (7th Cir. 1996).

118. *Id.*

119. *See id.*

120. Meurer, *supra* note 116, at 851.

121. *Id.* at 850.

122. 17 U.S.C. § 109(b)(1)(A) (2000).

123. Fisher, *supra* note 114, at 1238.

ual or business purchasing a copyrighted work for rental or leasing is no longer assured of profiting at the consumer's expense. Hence, although the majority correctly observed that § 109(b)(1)(A) may alter the conventional scheme, their analysis failed to recognize that this alteration leads to more desirable economic outcomes.

Price discrimination yields a number of other benefits. For example, it increases the incentive for artists to produce and distribute creative sound recordings by enabling producers to charge different prices to different classes of consumers (i.e., commercial purchasers versus personal consumers).<sup>124</sup> More importantly, price discrimination “reduce[s] the number of consumers who are priced out of the market.”<sup>125</sup> The majority seems to believe that because the Amendment expands the scope of copyright protection in certain circumstances, limiting its scope will necessarily increase the number of works available to the public. However, that may not be the case because “[p]rice discrimination often enables a larger group of poor consumers to gain access to a product — and to pay less than their wealthy counterparts.”<sup>126</sup> In this view, overall accessibility of non-musical sound recordings will increase if the Amendment applies to such recordings.

Whatever Congress's motivation in creating an exception to the first sale doctrine, from a policy standpoint there is no justifiable reason to distinguish between musical and non-musical sound recordings. In *Brilliance*, the majority reasoned that the Amendment applies only to musical sound recordings because consumers listen to musical recordings more times than they listen to non-musical recordings, and are therefore more likely to make infringing copies of musical recordings they have borrowed.<sup>127</sup> According to the majority, because non-musical sound recordings lack the specter of massive infringement that attends musical sound recordings, they do not require the protection provided by the Amendment.<sup>128</sup>

This analysis, however, fails to recognize that there are many non-musical sound recordings that consumers do listen to repeatedly. Popular comedians, for example, frequently release recordings of their work, some of which are very highly regarded. In fact, for each year from 1994 to 2003, the Recording Academy presented a Grammy

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124. *Id.*

125. William Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 168, 197 (Stephen R. Munzer ed., 2001). Professor Fisher argues that these effects, which promote utilitarian and social-planning objectives, “create[] a nonobvious *prima facie* case for the expansion of opportunities for price discrimination.” *Id.* at 198.

126. *Id.* at 197.

127. *Brilliance*, 474 F.3d at 373 (quoting H.R. REP. NO. 100-776, at 3 (1988), *reprinted in* 1998 U.S.C.C.A.N. 4339, 4341).

128. *See id.*

award to the producer of the Best Spoken Comedy Album.<sup>129</sup> The list of winners includes a number of standout comedians, such as George Carlin (three times), Chris Rock (twice), Robin Williams, Mel Brooks, and Al Franken.<sup>130</sup> A copyrighted sound recording of one of George Carlin's famous routines likely has a high degree of replay value for his fans. Such a recording would implicate precisely the same copyright concerns as a musical sound recording, unless one were to place a higher value on musical works than on comedic works. These concerns also apply to a number of other types of non-musical recordings that people listen to repeatedly, including motivational recordings, self-help recordings, and recordings designed to teach users to speak a foreign language. Nevertheless, the majority's holding prohibits unauthorized rental, lease, or lending of musical recordings while permitting unauthorized rental, lease, or lending of non-musical recordings.

#### IV. CONCLUSION

The Sixth Circuit's ruling in *Brilliance v. Hights* was misguided in several respects. This Note argues that the majority's holding is premised on an incorrect interpretation of the Record Rental Amendment. As Judge Kennedy argued, the phrase on which the majority relies ("and in the case of a sound recording in the musical works therein") does not exclude non-musical sound recordings from the reach of the Amendment. Rather, it provides a special condition for the subset of sound recordings that include musical works. The legislative history cited by the majority indicates only that musical sound recordings were included in the Amendment's exception, not that non-musical sound recordings were *excluded*. Most importantly, the majority should never have considered the legislative history of § 109(b)(1)(A) in the first place, because the meaning of the statute is clear on its face. The majority's policy analysis is similarly short-sighted. Although some policy concerns favor a broad application of the first sale doctrine, there are clear benefits associated with including non-musical sound recordings in the scope of the Amendment.

Whether the majority's holding was right or wrong, the policy concerns raised in this Note may soon be resolved through other channels. Technological advances that limit purchasers' ability to

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129. Wikipedia, *Grammy Award for Best Comedy Album*, [http://en.wikipedia.org/wiki/Grammy\\_Award\\_for\\_Best\\_Comedy\\_Album](http://en.wikipedia.org/wiki/Grammy_Award_for_Best_Comedy_Album) (as of Dec. 1, 2007, 10:41 GMT); Grammy Award Winners, [http://www.grammy.com/GRAMMY\\_Awards/Winners/](http://www.grammy.com/GRAMMY_Awards/Winners/) (last visited Dec. 1, 2007).

130. Wikipedia, *Grammy Award for Best Spoken Comedy Album*, [http://en.wikipedia.org/wiki/Grammy\\_Award\\_for\\_Best\\_Spoken\\_Comedy\\_Album](http://en.wikipedia.org/wiki/Grammy_Award_for_Best_Spoken_Comedy_Album) (as of Dec. 1, 2007, 10:41 GMT); Grammy Award Winners, [http://www.grammy.com/GRAMMY\\_Awards/Winners/](http://www.grammy.com/GRAMMY_Awards/Winners/) (last visited Dec. 1, 2007).

rent, lease, or lend phonorecords are changing the legal landscape. Digital Rights Management (“DRM”) systems tailored to prevent resale or rental are becoming increasingly prevalent. Even if such measures are not completely effective, the anti-circumvention provisions of the Digital Millennium Copyright Act<sup>131</sup> make it illegal for a user to circumvent technological protection measures designed to restrict access to a copyrighted work. Consequently, if the copyright holder employs a DRM system to prevent the rental of a sound recording, it would be illegal for an owner of a copy to circumvent that system and rent the phonorecord, regardless of whether such activity would be permitted by the Amendment. It is important to remember that “the effects of the first sale doctrine have been the effects of a particular legal rule operating in markets in which copyrightable works have been disseminated in large part by the distribution of freely-transferable physical copies.”<sup>132</sup> As digital copies with restricted transferability become the norm, methods of distribution are likely to change, and the law regarding the first sale doctrine and, in particular, the rental, lease, or lending of sound recordings, may need to be amended yet again.

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131. 17 U.S.C. § 1201(a) (2000).

132. Reese, *supra* note 111, at 579.