

EXPANDING PREFERENTIAL TREATMENT UNDER THE RECORD RENTAL AMENDMENT BEYOND THE MUSIC INDUSTRY

by
Ryan Vacca*

This Article explores the development of copyright law's first sale doctrine and the Record Rental Amendment (RRA) in light of the Sixth Circuit's interpretation of the RRA in Brilliance Audio, Inc. v. Hights Cross Communications, Inc. This Article does not take issue with the court's conclusion, but instead uses the differing conclusions of the majority and dissent to illustrate that the RRA exception is in need of Congressional clarification. This Article also examines whether the Record Rental Amendment should be amended to include audiobooks and other non-musical works, concluding that they should. The author then proposes two alternative amendments to the RRA; one to expand its scope to cover non-musical phonorecords, and one to clarify that it does not.

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* B.A. Amherst College, 2001; J.D. University of Missouri-Columbia, 2004. The author is an associate at Stinson Morrison Hecker LLP in St. Louis, Missouri and practices in the firm's Intellectual Property and Products Liability divisions. The author gratefully thanks Ryan Burke and Allison Sonneveld for their significant contributions, insight, and comments. They are not responsible for any errors, for which the author accepts all responsibility.

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I. INTRODUCTION

In January 2007, the Sixth Circuit Court of Appeals decided *Brilliance Audio, Inc. v. Hights Cross Communications, Inc.*¹ and answered a lingering question concerning the Copyright Act that had persisted for over twenty years. The court decided whether the protections offered to the music industry under the poorly drafted Record Rental Amendment of 1984 (Act) also extended to audiobooks.² This Act deprives owners of tapes and compact discs from renting those items to others without the consent of the copyright owners of the recorded song and the written lyrics and music—a right historically granted to all purchasers of books, magazines, albums, tapes, and compact disks under the first sale doctrine.

Ultimately, the court held the protections granted by the Record Rental Amendment were limited to the music industry.³ However, both the majority and vigorous dissenting opinions highlighted the differing interpretations of the Act's applicability and set the stage for a circuit split.

This Article explores the text and historical developments of copyright law's first sale doctrine and the Record Rental Amendment and how the Sixth Circuit interpreted it. Moreover, this Article examines whether the Record Rental Amendment should be amended to include audiobooks and other non-musical works and ultimately suggests two alternative amendments Congress should adopt to resolve future conflicts and avoid a split amongst the circuits.

II. COPYRIGHT PROTECTION AND THE FIRST SALE DOCTRINE

A. *The Exclusive Right to Distribute*

The Intellectual Property Clause of the Constitution grants Congress the power “To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁴ Consistent with this power, Congress has, over the

¹ 474 F.3d 365 (6th Cir. 2007).

² *Id.* at 368.

³ *Id.* at 374.

⁴ U.S. CONST., art. I, § 8, cl. 8.

years, adopted a series of Copyright Acts.⁵ Today, the Copyright Act provides copyright owners with several exclusive rights,⁶ including the right “to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.”⁷

Before discussing what this right entails, a couple terms must be defined. “Phonorecords” are defined as “material objects in which sounds, other than those accompanying a motion picture or other audiovisual work,⁸ are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”⁹ Phonorecords include the material object in which the sounds are first fixed.¹⁰ Examples of phonorecords are compact discs (“CDs”), tapes, and vinyl albums.

“Copies” are defined as “material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”¹¹ Copies include “the material object, other than a phonorecord, in which the work is first fixed.”¹² Examples of a copy would be a book containing a copyrighted story and a magazine or newspaper containing a copyrighted article. For our purposes, the only difference is phonorecords apply to sounds while copies apply to everything else.

Thus, the exclusive right to distribute copies or phonorecords to the public means the copyright owner of a song or story can sell a CD or book containing

⁵ See WILLIAM F. PATRY, PATRY ON COPYRIGHT § 1:1.1-7 (Thomson West 2007) (noting Congress created the initial copyright act in 1790 and made omnibus revisions in 1831, 1870, 1909, and 1976).

⁶ See 17 U.S.C. § 106 (2000), which grants to copyright owners the rights:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

⁷ *Id.* § 106(3).

⁸ Audiovisual works are defined as:

works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

17 U.S.C. § 101 (2000).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

the song or story and has the power to exclude others from engaging in these activities.¹³ Although the right to distribute applies to copies and phonorecords, this Article is primarily concerned with the distribution of phonorecords.

B. The First Sale Doctrine: An Exception to Exclusivity

Although the Copyright Act purports to grant copyright owners the exclusive right to distribute phonorecords and copies of their works, this exclusive right is not without bounds. The first sale doctrine is an exception restricting this exclusive distribution right. It attempts to balance the rights of copyright owners with the rights of purchasers of phonorecords and copies.

1. The First Sale Doctrine in its Current Form

In general, the first sale doctrine provides that once the copyright owner has transferred ownership of a particular phonorecord or copy, the new owner can redistribute by resale, rental, or loan, *that* copy without the consent of the copyright owner and without infringing the copyright owner's exclusive right of distribution.¹⁴ The doctrine is codified in section 109(a) of the 1976 Copyright Act.¹⁵ Section 109(a) states, in relevant part:

Notwithstanding the provisions of section 106(3) [the exclusive right to publicly distribute], the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, *without the authority of the copyright owner*, to sell or otherwise dispose of the possession of that copy or phonorecord.¹⁶

In other words, once a consumer buys a phonorecord or copy, the copyright owner's permission is unnecessary for the consumer to sell, trade, or otherwise dispose of *that* phonorecord or copy.¹⁷ The consumer is, in effect, authorized to distribute that particular phonorecord or copy. It is important to note that under section 109(a), the consumer is only exempted from the exclusive right to distribute. The same is not true for the other exclusive rights granted by the Copyright Act.¹⁸ It is also worth noting that although named the "first sale doctrine," the disposition of the phonorecord or copy may be made

¹³ MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.11[A] (Matthew Bender & Co., Inc. 2006) [hereinafter NIMMER].

¹⁴ Judith K. Smith, *The Computer Software Rental Act: Amending the 'First Sale Doctrine' to Protect Computer Software Copyright*, 20 LOY. L.A. L. REV. 1613, 1624 (1987).

¹⁵ The Copyright Act does permit a purchaser of a copy to publicly display that copy without violating the copyright owner's exclusive right to publicly display the copyrighted work. See 17 U.S.C. § 109(c) (2000).

¹⁶ *Id.* § 109(a) (emphasis added).

¹⁷ Cary T. Platkin, *In Search of a Compromise to the Music Industry's Used CD Dilemma*, 29 U.S.F. L. REV. 509, 514–15 (1995).

¹⁸ NIMMER, *supra* note 13, § 8.12[D] (citing *Design Options, Inc. v. BellePointe, Inc.*, 940 F. Supp. 86, 91 (S.D.N.Y. 1996) (reproduction); *Midway Mfg. Co. v. Strohon*, 564 F. Supp. 741, 745 (N.D. Ill. 1983) (adaptation); and *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 160 (3d Cir. 1984) (performance)). But see *supra* note 15 (discussing the right to publicly display a copy).

by gift, devise, or operation of law without upsetting the legal effect of the doctrine.¹⁹

If, on the other hand, the copyright owner does not wholly divest itself of title in the phonorecord or copy embodying the copyrighted work (e.g. the song or the story), then the first sale doctrine is inapplicable. For example, if the copyright owner leased the phonorecord or copy, then the lessee would infringe the copyright owner's distribution right if, without the copyright owner's consent, the lessee sold, leased, or lent the phonorecord or copy to another.²⁰ Therefore, if I write a song, record myself singing it, put this recording on a CD (a phonorecord), lend it to you, and you in turn sell it on eBay, then you will have not only unlawfully sold my CD, you will have also committed copyright infringement by exercising my exclusive right to distribute my song. Thus, "mere authorized possession of a [phonorecord or copy], if title in the tangible [phonorecord or copy] does not pass to the possessor, does not trigger the limitation of Section 109(a), and hence does not affect the copyright owner's rights under Section 106(3)."²¹ Under the same line of reasoning, licensing a phonorecord or copy is also not covered under the first sale doctrine.²²

2. *The Historical Development of the First Sale Doctrine*

Reviewing the genesis and historical development of the first sale doctrine is useful in understanding its original purpose and continued validity. The first sale doctrine's origin is confused at best. Some have linked the doctrine to the Sherman Act's prohibition against restraints on trade.²³ Others argue it derives from the English common law rules disapproving of restraints on the alienation of property as this was viewed as elemental to ownership.²⁴ In 1907, the Sixth Circuit, commenting on restrictions upon sales and resales, stated:

A prime objection to the enforceability of such a system of restraint upon sales and prices is that they offend against the ordinary and usual freedom of traffic in chattels or articles which pass by mere delivery. The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally

¹⁹ John M. Kernochan, *The Distribution Right in the United States of America: Review and Reflections*, 42 VAND. L. REV. 1407, 1410 (1989); NIMMER, *supra* note 13, § 8.12[B][1][a]. See also Christopher Phelps & Assocs., LLC v. Galloway, 477 F.3d 128, 142–43 (4th Cir. 2007) (holding that entry of judgment in a copyright infringement suit transforms a copy from unlawful to lawful for purposes of the first sale doctrine).

²⁰ NIMMER, *supra* note 13, § 8.12[B][1][a] (citing Schuchart & Assocs. v. Solo Serve Corp., 220 U.S.P.Q. 170, 1983 WL 1147 (W.D. Tex. 1983)).

²¹ *Id.*

²² Microsoft Corp. v. Harmony Computers & Elecs., Inc., 846 F. Supp. 208, 212–13 (E.D.N.Y. 1994); ISC-Bunker Ramo Corp. v. Altech, Inc., 765 F. Supp. 1310, 1314 (N.D. Ill. 1990).

²³ Sharon Billington, *Relief from Online Used Book Sales During New Book Launches*, 29 COLUM. J.L. & ARTS 497, 512 (2006).

²⁴ Kernochan, *supra* note 19, at 1412; David H. Horowitz, *The Record Rental Amendment of 1984: A Case Study in the Effort to Adapt Copyright Law to New Technology*, 12 COLUM.-VLA J.L. & ARTS 31 (1987).

regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand.²⁵

Two related socioeconomic arguments have also been put forth. One is that the first sale doctrine permits access to works where the copyright owner might otherwise suppress the information.²⁶ The second is the doctrine “creates secondary markets, which lead to more affordable used versions of copyrighted works and helps to serve members of the public who lack the means or opportunity to buy the items new.”²⁷

Some commentators identify the Supreme Court’s 1908 decision *Bobbs-Merrill Co. v. Straus*²⁸ as the origin of the first sale doctrine under U.S. copyright law.²⁹ However, earlier precedent for the first sale doctrine existed at least as far back as 1894.³⁰ Notwithstanding the foregoing, *Bobbs-Merrill* lays a strong foundation for the historical discussion of the first sale doctrine.

In *Bobbs-Merrill*, the plaintiff was the copyright owner of a novel entitled *The Castaway*.³¹ One of the initial pages of the book contained a notice: “The price of this book at retail is one dollar. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright.”³² The defendant purchased copies of *The Castaway* from wholesalers and, with knowledge of the notice, sold copies at the retail level for eighty-nine cents without the consent of the plaintiff.³³ The plaintiff sued arguing the defendant infringed upon the plaintiff’s exclusive right to “vend” by selling *The Castaway* at less than one dollar per copy.³⁴ The Court rejected this argument and held:

To add to the right of exclusive sale the authority to control all future retail sales . . . would give a right not included in the terms of the statute, and, in our view, extend its operation, by construction, beyond its meaning, when interpreted with a view to ascertaining the legislative intent in its enactment.³⁵

²⁵ John D. Park & Sons Co. v. Hartman, 153 F. 24, 39 (6th Cir. 1907).

²⁶ Billington, *supra* note 23, at 508.

²⁷ *Id.*

²⁸ 210 U.S. 339 (1908).

²⁹ See Glen O. Robinson, *Personal Property Servitudes*, 71 U. CHI. L. REV. 1449, 1470 (2004); Platkin, *supra* note 17, at 515–16.

³⁰ See *Harrison v. Maynard, Merrill & Co.*, 61 F. 689 (2d Cir. 1894). For a thorough examination of the historical analysis of the first sale doctrine, including its relationship with copyright, antitrust, and patent cases, see Billington, *supra* note 23, at 512–24.

³¹ *Bobbs-Merrill Co.*, 210 U.S. at 341.

³² *Id.*

³³ *Id.* at 341–42.

³⁴ The Copyright Act in effect in 1908 granted copyright owners the “sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending.” See *id.* at 348.

³⁵ *Id.* at 351.

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Interestingly, the Court in *Bobbs-Merrill* appeared to base its decision merely on the statutory language of the Copyright Act and did not articulate a policy basis for this reading.³⁶

In 1909, a year after *Bobbs-Merrill* was decided, Congress revised the Copyright Act and, for the first time, codified the first sale doctrine.³⁷ Section 27 of the 1909 Copyright Act provided:

The copyright is distinct from the property in the material object copyrighted, and the sale or conveyance, by gift or otherwise, of the material object shall not of itself constitute a transfer of the copyright, nor shall the assignment of the copyright constitute a transfer of the title to the material object; but nothing in this title shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained.³⁸

Like the Court in *Bobbs-Merrill*, Congress indicated no policy basis in either the statute or the legislative history to show why the first sale doctrine was advisable.³⁹ The most illuminating comment is in the House Report on the 1909 Act explaining, “it would be most unwise to permit the copyright proprietor to exercise any control whatever over the article which is the subject of copyright after said proprietor has made the first sale.”⁴⁰

The next major revision to the Copyright Act occurred in 1976, which codified the first sale doctrine in section 109(a).⁴¹ This reaffirmation of the first sale doctrine originally read:

Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.⁴²

This codification of the first sale doctrine is similar, but not identical to section 27 of the 1909 Copyright Act.⁴³ In particular, it reflected the distinction drawn between the definitions of copies and phonorecords. Nonetheless, it is clear Congress was merely confirming the principle and not substantively changing it.⁴⁴

³⁶ Robinson, *supra* note 29, at 1470. For an interesting discussion about the case history of *Bobbs-Merrill* and the associated antitrust litigation, see Billington, *supra* note 23, at 519–22.

³⁷ Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075.

³⁸ 17 U.S.C. § 27 (1946 & Supp. III 1950). The copyright laws were codified as Title 17 of the United States Code in 1947 and the first sale doctrine was renumbered section 27. See Platkin, *supra* note 17, at 516 n.45.

³⁹ Robinson, *supra* note 29, at 1471.

⁴⁰ H.R. REP. NO. 60-2222, at 19 (1909).

⁴¹ 17 U.S.C. § 109(a) (1976).

⁴² *Id.*

⁴³ NIMMER, *supra* note 13, § 8.12[B].

⁴⁴ The House Report for section 109 indicates that:

[Section 109(a)] restates and confirms the principle that, where the copyright owner has transferred ownership of a particular copy or phonorecord of a work, the person to

III. THE RECORD RENTAL AMENDMENT: AN EXCEPTION TO THE EXCEPTION

A. *The Historical Context*

Soon after the 1976 Copyright Act was passed, the record industry began to lobby Congress for an exception to the first sale doctrine.⁴⁵ In the early 1980s, the Japanese record rental business was booming.⁴⁶ By 1983, there were more than 1,600 rental shops.⁴⁷ In a survey conducted in Japan, over ninety-seven percent of rental customers stated they made home recordings of the records they rented.⁴⁸ Furthermore, more than sixty-one percent of those customers loaned or gave copied tapes to others, thus further expanding the number of phonorecords generated by rented albums.⁴⁹ As a result of this widespread rental market, retail sales for records plummeted thirty percent.⁵⁰ The success of record rental businesses began spreading to other countries and hit the United States in September 1981, in Providence, Rhode Island.⁵¹

The record industry complained that the record rental business was a growing phenomenon and piracy threatened enormous financial losses.⁵² As a result of this threat, the record industry argued, “[T]he quantity and diversity of new musical releases available to consumers [would] diminish” and “prices of prerecorded discs and tapes [would] likely . . . be forced upward.”⁵³

Of additional concern to the record industry was the introduction of the CD. The CD not only provided better sound quality than a record, “it was not subject to the wear and tear and consequent degradation of listening quality

whom the copy or phonorecord is transferred is entitled to dispose of it by sale, rental, or any other means. Under this principle, which has been established by the court decisions and section 27 of the present law, the copyright owner’s exclusive right of public distribution would have no effect upon anyone who owns “a particular copy or phonorecord lawfully made under this title” and who wishes to transfer it to someone else or to destroy it.

H.R. REP. NO. 94-1476, at 79 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5693. Section 109(a) was again amended in 1994 pursuant to the Uruguay Round Agreements Act and added a second sentence to address works of foreign origin resurrected from the United States’ public domain. NIMMER, *supra* note 13, § 8.12[B]; *see also* Act of Dec. 8, 1994, Pub. L. No. 103-465, § 514(b), 108 Stat. 4809. The 1994 amendment is beyond the scope of this Article and irrelevant for this discussion; as such, it is sufficient to note that the codification of the first sale doctrine today is identical to that of 1976.

⁴⁵ Platkin, *supra* note 17, at 517.

⁴⁶ Horowitz, *supra* note 24, at 32.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 33.

⁵² Smith, *supra* note 14, at 1636.

⁵³ *Audio and Video First Sale Doctrine: Hearings on H.R. 1027, H.R. 1029 and S. 32 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 98th Cong. 19–20 (1985) (joint statement of AGAC/The Songwriters Guild, the National Association of Recording Merchandisers, The National Music Publishers’ Association and The Record Industry Association of America).

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experienced with [records].”⁵⁴ This new technology supplemented the record industry’s fear that what happened in Japan with records would occur in the United States, but at an increased level.

In 1983, at the record industry’s urging, Congress examined the impact of phonorecord rentals.⁵⁵ From its investigation, Congress learned that record stores were renting phonorecords for twenty-four to seventy-two hour time periods for fees of 99¢ to \$2.50 per phonorecord while selling blank audio cassette tapes at the same time.⁵⁶ “It was obvious that virtually everyone obtaining phonorecords by rental did so for the sole purpose of making audio tape reproductions of the rented material.”⁵⁷ In fact, one of the nearly two hundred commercial record rental stores advertised “NEVER, EVER BUY ANOTHER RECORD.”⁵⁸ Another simply stated “SAVE MONEY, RENT ANY LP OR 45, TAKE IT HOME PUT IT ON TAPE AND RETURN IT.”⁵⁹

Congress was persuaded. Despite nearly a century of the first sale doctrine remaining largely undisturbed, Congress made a drastic change in 1984, which created an exception to the first sale doctrine (i.e. an exception to the exception to exclusivity). The exception was the Record Rental Amendment (the “RRA exception”).⁶⁰

B. Section 109(b)(1)(A)

The current version of section 109(b)(1)(A) of the Copyright Act, which codified the RRA exception, states in relevant part:

Notwithstanding the provisions of subsection (a) [the first sale doctrine], 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

⁵⁴ Horowitz, *supra* note 24, at 33.

⁵⁵ Lawrence J. Glusman, *It’s My Copy, Right? Music Industry Power to Control Growing Resale Markets in Used Digital Audio Recordings*, 1995 WIS. L. REV. 709, 720 (1995).

⁵⁶ H.R. REP. NO. 98-987, at 2 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2898, 2899; NIMMER, *supra* note 13, § 8.12[B][7].

⁵⁷ NIMMER, *supra* note 13, at § 8.12[B][7].

⁵⁸ H.R. REP. NO. 98-987, at 2 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2898, 2899.

⁵⁹ Horowitz, *supra* note 24, at 33, citing *Audio and Video First Sale Doctrine: Hearings on H.R. 1027, H.R. 1029, S. 31* 98th Cong. 31 (1983–84) (joint statement of AGAC/The Songwriters Guild, The National Association of Recording Merchandisers, The National Music Publishers’ Association and the Recording Industry of America).

⁶⁰ Record Rental Amendment Act of 1984, Pub. L. No. 98-450, 98 Stat. 1727 (codified at 17 U.S.C. § 109(b)(1) (1984)). For a complete history of the Record Rental Amendment of 1984, see generally Horowitz, *supra* note 24.

lending, or by any other act or practice in the nature of rental, lease, or lending.⁶¹

Much of the verbosity of this sentence was added by the Computer Software Rental Amendments Act of 1990.⁶² Prior to this amendment, the RRA exception read, in relevant part:

Notwithstanding the provisions of subsection (a) [the first sale doctrine], 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.⁶³

A few comments about the boundaries of the RRA exception are necessary before applying it to the problem raised in this Article.

First, a discussion of sound recordings and musical works is helpful. The Copyright Act defines sound recordings as “works that result 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.”⁶⁴ In other words, except for soundtracks and sounds accompanying audiovisual works,⁶⁵ sound recordings are the audible parts of a copyrighted work; this is in contrast to the written part of the copyrighted work. The Copyright Act does not define the term “musical works,” but this generally refers to the tangible expression that may later be used to create a sound recording. An example may clarify the meaning of these terms. When a songwriter writes lyrics or prepares the written music for song, this would be considered the musical work and is entitled to copyright protection. If the songwriter then goes to the studio to record the song, the result is a sound recording (i.e. what you hear on the radio). As described *supra*, the sound recording will be embodied in a phonorecord, such as a CD.⁶⁶ But sound recordings are not limited to those based upon musical works. As noted in the definition of sound recordings, these sounds can also include spoken words or

⁶¹ 17 U.S.C. § 109(b)(1)(A) (2000).

⁶² Pub. L. No. 101-650, 104 Stat. 5089 (1990) (codified at 17 U.S.C. § 109(b)(1) (1990)). This act added computer software to the items partially exempted from the first sale doctrine. Much has been written on this topic, but is beyond the scope of this Article. For additional information see NIMMER, *supra* note 13, § 8.12[B][8]. For the sake of completeness, it should be noted that section 109(b) also contains a limited exception for nonprofit libraries. 17 U.S.C. § 109(b)(2)(A) (2000). This nonprofit library exception is really an exception to the exception to the exception to exclusivity.

⁶³ Record Rental Amendment Act of 1984, Pub. L. No. 98-450, 98 Stat. 1727 (codified at 17 U.S.C. § 109(b)(1)).

⁶⁴ 17 U.S.C. § 101 (2000).

⁶⁵ See *supra* note 8 for the definition of “audiovisual works.”

⁶⁶ See *supra* notes 9–10 and accompanying text.

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other sounds.⁶⁷ An example of a sound recording not containing musical works is an audiobook.⁶⁸

Second, and as a corollary to the first point, it should be noted that there are two potential consents that must be obtained. One is from the copyright owner of the sound recording. The other is from the copyright owner of the musical work. Although these may be the same person, they can be, and often are, different. Thus, if I write a song and you record it with my permission,⁶⁹ then someone wishing to rent the CD with your recording would need both of our consents.

Third, the RRA exception only limits the first sale doctrine as it pertains to renting, leasing, lending, or “any other act or practice in the nature of rental, lease, or lending.”⁷⁰ Purchasers of phonorecords are free to sell their phonorecord pursuant to the first sale doctrine without fear of infringing the copyright owner’s exclusive right to distribute.⁷¹

Fourth, it should be noted that the RRA exception only applies to phonorecords and not copies.⁷² As noted *supra*, phonorecords are the material objects embodying sounds, whereas copies, in essence, embody everything else.⁷³ Sheet music would be an example of a copy. Therefore, the purchaser of sheet music would be permitted to rent, lease, or lend the sheet music to others pursuant to the first sale doctrine without running afoul of the RRA exception.

Fifth, the RRA exception only forbids renting, leasing, lending, and the like if done “for the purposes of direct or indirect commercial advantage.”⁷⁴ Although not in the context of the RRA exception, this phrase has been interpreted in reference to other sections of the Copyright Act to mean “for profit.”⁷⁵ Thus, one who simply lends a phonorecord to a friend and does not charge would not fall within the ambit of the RRA exception.

⁶⁷ 17 U.S.C. § 101.

⁶⁸ *Brilliance Audio, Inc. v. Haight Cross Communications, Inc.*, 474 F.3d 365, 368 (6th Cir. 2007).

⁶⁹ My permission is needed because I have the exclusive right to prepare derivative works from my written song, such as a sound recording thereof. *See* 17 U.S.C. § 106(2).

⁷⁰ *Id.* § 109(b)(1)(A). The “any other act or practice in the nature of rental, lease, or lending” language used in the RRA exception was intended “to cover transactions which common sense indicates are equivalent to rentals, but which may be disguised in an attempt to avoid liability under the law.” H.R. REP. NO. 98-987, at 4 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2898, 2901. The House Report gives the following example:

[A] retailer who “sold” an album to be “bought back” a few days later, or a club organized to lend records to its members who paid a membership fee rather than a direct rental fee, would be performing acts or practices in the nature of rental, lease, or lending and would be in violation of the law unless permission of the copyright owners had been obtained.

⁷¹ *See* 17 U.S.C. § 109(a); NIMMER, *supra* note 13, § 8.12[B][7][a].

⁷² NIMMER, *supra* note 13, § 8.12[B][7][a].

⁷³ *See supra* notes 9–12 and accompanying text; *see also* 17 U.S.C. § 101 (2006).

⁷⁴ 17 U.S.C. § 109(b)(1)(A).

⁷⁵ NIMMER, *supra* note 13, § 8.12[B][7][b].

With these boundaries of the RRA exception established, it is clear that one who purchases a CD containing music may not rent, lease, or lend it out for commercial advantage without securing the proper consents.

IV. IS THE RECORD RENTAL AMENDMENT EXCEPTION LIMITED TO MUSICAL PHONORECORDS?

Although the RRA exception clearly prevents the renting, leasing, or lending of musical phonorecords,⁷⁶ a question remains as to its applicability to non-musical phonorecords, such as audiobooks or stand-up comedy albums. This precise question was recently addressed as a matter of first impression by the Sixth Circuit in *Brilliance Audio, Inc. v. Hights Cross Communications, Inc.* and led to a split opinion by the panel.⁷⁷

In *Brilliance Audio*, the plaintiff was in the business of producing and selling audiobooks.⁷⁸ The plaintiff had exclusive agreements with publishers and authors to prepare sound recordings based on literary works.⁷⁹ As a result, the plaintiff owned copyrights in the sound recordings.⁸⁰ The defendant, a competitor of the plaintiff, was alleged to have purchased the plaintiff's audiobooks, repackaged and relabeled them as its own, and then distributed them by rental, lease, and lending without authority from the plaintiff.⁸¹ The plaintiff filed suit alleging, inter alia, copyright infringement based upon its exclusive right to distribute.⁸² The defendant moved to dismiss the copyright infringement claim arguing it was protected by the first sale doctrine.⁸³ The plaintiff argued audiobooks fell within the RRA exception and therefore the defendant's renting, leasing, and lending of the audiobooks were not protected under the first sale doctrine unless the plaintiff's consent was obtained.⁸⁴ The district court held the RRA exception only applied to musical phonorecords, not recorded literary works, and dismissed the plaintiff's claims.⁸⁵

On appeal, the Sixth Circuit was presented with the question of whether the RRA exception to the first sale doctrine applies to all phonorecords or only

⁷⁶ See, e.g., *A&M Records, Inc. v. A.L.W., Ltd.*, 855 F.2d 368 (7th Cir. 1988).

⁷⁷ *Brilliance Audio, Inc. v. Hights Cross Communications, Inc.*, 474 F.3d 365, 374 (6th Cir. 2007).

⁷⁸ *Id.* at 368.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 369.

⁸² *Id.* The plaintiff also brought trademark infringement, unfair competition, and trademark dilution claims. The district court dismissed these claims under trademark law's application of the first sale doctrine, but the Sixth Circuit reversed and remanded for additional proceedings on these claims. *Id.* at 374. Because of the different purposes of trademark and copyright law, application of the first sale doctrine in the trademark context is not germane to the discussion of the first sale doctrine in the copyright context.

⁸³ *Brilliance Audio, Inc. v. Hights Cross Communications, Inc.*, 77 U.S.P.Q.2d 1236 (W.D. Mich. 2004), *rev'd on other grounds*, *Brilliance Audio, Inc.*, 474 F.3d at 374.

⁸⁴ *Id.* at 1240.

⁸⁵ *Id.* at 1241.

phonorecords of musical works.⁸⁶ The plaintiff sought a broad reading of the RRA exception, which included all phonorecords.⁸⁷ Under this approach, audiobooks would fall within the bounds of the RRA exception and others would be prohibited from renting, leasing, or lending audiobooks without the copyright owner's authority. The defendant, on the other hand, sought a reading of the RRA exception, limiting it to musical phonorecords, thus causing audiobooks to remain under the protection of the first sale doctrine and outside the bounds of infringement.⁸⁸

A. *The Majority Opinion*

The majority began its analysis by noting that it first must try to determine Congress' intended meaning of the RRA exception and to do this, it must first look to the language of the statute itself.⁸⁹ The court acknowledged two potential readings of the RRA exception.

The first potential reading was that "the statute applies only when a sound recording has 'musical works embodied therein,'" because "[e]xtending the exception to audiobooks would read the 'musical works' clause out of the statute."⁹⁰ In other words, the consent of the copyright owner of the musical sound recordings is required as well as the consent of the copyright owner of the underlying musical work.⁹¹ Under this reading, only musical sound recordings are encompassed by the RRA exception.

The second potential reading of the RRA exception was that "the statute requires obtaining the permission of the owner of the copyright in the sound recording regardless of whether the second permission—that of the copyright in the underlying work—is needed."⁹² In other words, "For a musical recording, the second permission is necessary; for a recording of a literary work, it is not."⁹³

The court found both readings to be plausible, thus creating an ambiguity in the RRA exception.⁹⁴ Because the statutory text was not clear, the court

⁸⁶ *Brilliance Audio, Inc.*, 474 F.3d at 368.

⁸⁷ *Id.* at 372.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* The Sixth Circuit is not alone in its belief that the statutory language is ambiguous and there are two plausible interpretations. Professor Nimmer states:

Apparently, there is no legislative history relating to this issue, and the language of Section 109(b)(1)(A) itself is ambiguous. . . . This may be read as requiring the consent of only those copyright owners of sound recordings that in fact embody musical works (as well as of the copyright owners of such musical works). Alternatively, it may be read as requiring the consent of the copyright owners of all sound recordings, as well as the consent of the copyright owners of any musical works that may be embodied therein, but as not requiring the consent of the copyright owners of any literary or dramatic works that may be embodied therein.

noted it should look to other authority to discern its meaning.⁹⁵ The court's reasoning was guided by the legislative history, the context in which the statute was passed, and policy rationales.⁹⁶

The court recognized that when the RRA exception was adopted in 1984, the exclusive focus was on protecting the music industry.⁹⁷ In support of this argument, the court cited the Senate and House Report accompanying the RRA exception which specifically referred to the dangers to recording companies, music publishers, and songwriters.⁹⁸ The court further cited the House Report accompanying the 1988 extension of the RRA exception.⁹⁹ This report stated that the Register of Copyrights had questioned whether the RRA exception applied only to musical works or whether it extended to recorded literary works.¹⁰⁰ In response, the report concluded:

It is less likely . . . that literary works invite the same kind of long-term, repeated enjoyment by consumers. The problems addressed by the [RRA] in 1984 do not relate to recorded literary works, nor did the testimony in support of the legislation. In addition, during the 1988 hearings, no specific problems regarding the rental of recorded literary works were raised. The Committee concludes that if problems do arise, they may be addressed when the new five year "sunset" provision expires.¹⁰¹

Despite this legislative history suggesting a musical focus, the court recognized that although "Congress intended to address concerns with musical recordings, as opposed to non-musical recordings, is not necessarily dispositive."¹⁰² This is because Congress can write a statute to cover present concerns, but also has the power to address unforeseeable future concerns.¹⁰³

Nonetheless, the court also reasoned that the RRA exception should be construed narrowly because it upset the balance established in the first sale doctrine.¹⁰⁴ When Congress passed the RRA exception, the court explained, it made a specific policy choice that effectively altered the traditional copyright bargain and extended the copyright monopoly.¹⁰⁵ Given the alteration to the balance between copyright owners and personal property owners, the court concluded that it would not broadly construe the RRA exception without an

NIMMER, *supra* note 13, § 8.12[B][7][c].

⁹⁵ *Brilliance Audio, Inc.*, 474 F.3d at 372 (describing other authority as including "other statutes, interpretations by other courts, legislative history, policy rationales, and the context in which the statute was passed").

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 373.

¹⁰⁰ H.R. REP. NO. 100-776, at 3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4339, 4341.

¹⁰¹ *Id.* See *infra* Part V.A.3. for criticism of this argument restricting the RRA exception to musical sound recordings.

¹⁰² *Brilliance Audio, Inc.*, 474 F.3d at 373.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 373-74.

express statement from Congress to include non-musical phonorecords within its scope.¹⁰⁶

B. The Dissenting Opinion

Judge Cornelia Kennedy, in her dissenting opinion,¹⁰⁷ concluded the RRA exception does apply to non-musical phonorecords. She interpreted the clause “in the case of a sound recording in the musical works embodied therein” to mean:

if a sound recording containing musical works is the object of the rental, lease, or lending, then the person engaging in such activities can only lawfully do so with the authorization of the owner of the copyright for the sound recording and the owner of the copyright for the musical works contained in the sound recording.¹⁰⁸

Because audiobooks were not musical sound recordings, Judge Kennedy found this clause of the RRA exception inapplicable and only the general provision regarding sound recordings applied.¹⁰⁹

Judge Kennedy then addressed the majority’s reliance on the RRA exception’s legislative history. First, citing the Supreme Court’s recent criticism of reliance upon legislative history, Judge Kennedy found it to be murky, ambiguous, and contradictory.¹¹⁰ Second, she found reliance upon legislative history gave unrepresentative committee members or unelected staffers and lobbyists the power “to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.”¹¹¹ Judge Kennedy concluded that because she felt the text of the RRA exception was clear, there was no reason to resort to the legislative history.¹¹²

C. The Better-Reasoned Approach

The majority opinion in *Brilliance Audio* appears to be better reasoned, but not necessarily correct. Although Judge Kennedy clearly believed the RRA exception was unambiguous, she failed to address the majority’s belief that the RRA exception lent itself to two interpretations. Judge Kennedy merely asserted that the plain reading of the text was the way she read it. She gave no explanation as to why the other posited interpretation of the text was erroneous. Although her apprehensiveness of relying on legislative history and other indicia of Congressional intent may be well-founded, the basis for her

¹⁰⁶ *Id.*

¹⁰⁷ Judge Kennedy concurred with the majority’s decision regarding the trademark infringement claims, but dissented as to the copyright infringement issue.

¹⁰⁸ *Brilliance Audio, Inc.*, 474 F.3d at 375 (Kennedy, J., dissenting).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (citing *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546 (2005)).

¹¹¹ *Id.*

¹¹² *Id.*

interpretation of the statutory text is not articulated and provides no foundation for reaching her ultimate conclusion.

On the other hand, the majority's approach at least attempted to explain how the RRA exception could be read in two contrasting ways. However, the majority's statement that reading the statute as including all phonorecords would "read the 'musical works' clause out of the statute"¹¹³ may be exaggerated. As argued by the plaintiff and recognized by the court, the statute could be read to apply to all phonorecords, causing the "musical works clause" to require the consent of the copyright owner in the musical work if the sound recording were a musical sound recording.¹¹⁴ This interpretation does not read the "musical works clause" *out of* the statute; it merely modifies the application of the statute and does not necessarily create any internal inconsistencies. Despite this overemphasis on reading the "musical works clause" out of the statute, the majority opinion's approach is better-reasoned than the dissent, although not necessarily the best reading of the RRA exception.

V. SHOULD THE RRA EXCEPTION BE LIMITED TO MUSICAL PHONORECORDS?

Notwithstanding the decision in *Brilliance Audio* and this Article's post-decision observation, there exists a possibility that other circuits confronted with this same question could come to a different result. Just as one third of the judges in *Brilliance Audio* interpreted the RRA exception differently, it is not unimaginable that a different panel of judges could have decided two to one the other way. For this reason, a normative look at whether the RRA exception *should* apply to non-musical sound recordings is appropriate. This question is not whether the Sixth Circuit correctly interpreted the RRA exception. Rather, the question is whether the RRA exception should be amended to include non-musical phonorecords within its purview.

The question can be analyzed and critiqued through three different lenses. First, the scope of the RRA exception can be viewed through a legislative history lens to see if the rationales underlying the exception applied equally to non-musical sound recordings as they did to musical sound recordings. Likewise, the legislative history should be examined for support that the RRA exception does apply to non-musical sound recordings. In addition, the RRA exception's legislative history distinguishing musical from non-musical phonorecords should be scrutinized.

Second, the scope of the RRA exception can be viewed through a contemporaneous lens. Under this lens, one should look to see if today's market for and threats to non-musical phonorecords is congruent to those posed to the music industry in 1984.

Third, the scope of the RRA exception can be viewed through a prospective lens to see what the future may hold for both musical and non-musical phonorecords, whether there is any justification for treating them

¹¹³ *Brilliance Audio, Inc.*, 474 F.3d at 372.

¹¹⁴ *Id.*

differently, and whether an entirely new approach to the rental-market is warranted. Each of these approaches is explored *infra*.

A. *The Legislative History Lens*

The first approach to determine whether the RRA exception should apply to non-musical phonorecords is to view the questions through a legislative history lens. The legislative history presents three questions. First, did the legislative history's stated rationales underlying the exception apply equally to non-musical and musical phonorecords? Second, does the legislative history provide any support that the RRA applies to non-musical phonorecords? Third, does the legislative history distinguishing musical phonorecords from non-musical phonorecords make sense?

1. *Underlying Rationales*

Three underlying rationales for the RRA exception stand out. First, the legislative history concluded "that the nexus of commercial record rental and duplication may directly and adversely affect the ability of copyright holders to exercise their reproduction and distribution rights under the copyright act."¹¹⁵ This rationale merely concludes that if there are easy ways to infringe and renting helps the infringers accomplish their goal, then copyright owners will have difficulty enforcing their exclusive rights. This rationale applies equally well to non-musical phonorecords. Copying non-musical phonorecords in the 1980s was just as easy as copying musical phonorecords. If someone rented non-musical phonographs, then this would, just as in the musical phonorecord context, help the infringing consumers accomplish their presumed goal of copying the phonorecord. Thus, the copyright owners of non-musical sound recordings would be just as deprived of enforcing their exclusive rights to distribute and reproduce. Therefore, this rationale provides no basis for restricting the RRA exception to musical phonorecords.

The second rationale included in the legislative history is that sales of CDs were increasing, they were relatively indestructible, and their reproductions were of high quality.¹¹⁶ This rationale applies equally to non-musical phonorecords. CDs containing non-musical sound recordings were just as indestructible and their reproductions were of equally high quality. There does not appear to be any data suggesting that the sales of CDs in the non-musical market were any different from the musical market. This rationale also provides no basis for restricting the RRA exception to musical phonorecords.

The third rationale included in the legislative history is that blank tapes were sold in the same establishment where phonorecords were rented.¹¹⁷ There is no legislative history commenting one way or the other about non-musical phonorecords being rented at record rental stores. With respect to blank tapes being sold, it might have been that blank tapes were not sold in the same stores

¹¹⁵ H.R. REP. NO. 98-987, at 2 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2898, 2899; H.R. REP. NO. 100-776, at 3-4 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4339, 4341.

¹¹⁶ H.R. REP. NO. 100-776, at 2, *reprinted in* 1988 U.S.C.C.A.N. 4339, 4340.

¹¹⁷ H.R. REP. NO. 98-987, at 2, *reprinted in* 1984 U.S.C.C.A.N. 2898, 2899.

where non-musical phonorecords were rented. However, the relatively cheap nature of blank tapes would not have made it difficult to copy the non-musical phonorecord. On the other hand, there may be merit to the fact that non-musical phonorecords, such as audiobooks or stand-up comedy albums, were not rented at these two hundred stores. The legislative history is simply silent on these issues.

As a whole, the rationales contained in the legislative history provide little, if any, support for distinguishing musical from non-musical phonorecords. As a result, there is little, if any, reason for limiting the RRA exception only to musical phonorecords.

2. *Support for Extension to Non-Musical Phonographs*

There is some legislative history supporting the notion that the RRA exception applies to non-musical phonorecords. The 1984 House Report notes that “the terms ‘sound recording’ and ‘phonorecord’ are intended to have the same meaning as defined in section 101 of the Copyright Act. [The RRA exception] thus does not apply to the music or *other sounds* accompanying a motion picture or other audiovisual work.”¹¹⁸ The reference to “other sounds” in this context suggests the RRA exception was intended to apply to non-musical sound recordings embodied in phonorecords. If the RRA exception only applied to musical sound recordings, then there would be no need to refer to the “other sounds” being excluded when they are associated with audiovisual works.

The Sixth Circuit in *Brilliance Audio* stated that this legislative commentary was intended to clarify that the RRA exception did not apply to motion pictures.¹¹⁹ This is doubtful. The House Report speaks in terms of “music or other sounds accompanying a motion picture or other audiovisual work.”¹²⁰ The focus of that sentence is the music and sounds, not the motion picture or other audiovisual work. If Congress meant what the Sixth Circuit believes, it could have simply said the RRA exception “does not apply to motion pictures or other audiovisual works.” The Sixth Circuit’s misunderstanding should not mislead those considering whether the RRA exception should apply to non-musical phonorecords.

Admittedly, the legislative history is sparse with respect to non-musical phonorecords. However, the statement that the phrases “sound recording” and “phonorecord” are to maintain their meaning as defined in the Copyright Act speaks volumes about the RRA exception’s intended applicability. Although the record industry bore the brunt of the lobbying efforts, as the Sixth Circuit pointed out in *Brilliance Audio*, Congress could have legislatively addressed issues beyond those brought to its attention by a specific lobby.¹²¹ In other words, it is not just the squeaky wheel that may get the Congressional grease.

¹¹⁸ *Id.* at 4, reprinted in 1984 U.S.C.C.A.N. 2898, 2901 (emphasis added).

¹¹⁹ *Brilliance Audio, Inc.*, 474 F.3d at 373.

¹²⁰ H.R. REP. NO. 98-987, at 4, reprinted in 1984 U.S.C.C.A.N. 2898, 2901.

¹²¹ *Brilliance Audio, Inc.*, 474 F.3d at 373.

3. *The Sensibility of the Stated Distinguishing Feature*

The last item to consider under the legislative history lens is the specific argument set forth in the 1988 House Report finding the RRA exception did not apply to non-musical phonorecords. When the RRA exception was up for renewal, the Register of Copyrights inquired as to whether it extended to recorded literary works.¹²² The Report concludes that the RRA exception did not extend to recorded literary works because “[i]t is less likely . . . that literary works invite the same kind of long-term, repeated enjoyment by consumers.”¹²³ In other words, the Report found the feature causing musical and non-musical works to be treated differently under the RRA exception was that consumers repeatedly listen to musical works, whereas they only listen to non-musical works once.¹²⁴

This argument makes no sense. The problem faced by the record industry was that because consumers could rent phonorecords, the record industry was being deprived of the opportunity to sell phonorecords to those consumers. The record industry was not concerned that consumers were listening to the phonorecords repeatedly; it was concerned they were not purchasing new phonorecords, which resulted in lower sales for the record industry.

For example, in the musical context, the consumer would rent the CD, probably copy it, and listen to it multiple times. The consumer never purchased the CD. Therefore, the record industry was only selling one CD (to the record store), rather than selling multiple CDs (one to each consumer who rented). The record industry has little incentive or practical recourse to stop consumers from listening to copied albums on multiple occasions. On the other hand, it has a great incentive to stop the rental market completely. Killing this market causes those consumers who were renting CDs to now purchase the same.¹²⁵ This increase in sales results in additional profits for the record company.

In the non-musical context, the consumer would rent an audiobook, listen to it, may or may not copy it or ever listen to it again. Regardless of how often the consumer listens to the audiobook, the consumer never purchases it. Just as in the musical context, the audiobook manufacturer only sells one audiobook (to the record store) rather than multiple audiobooks (one to each consumer who rented). It does not matter whether the consumer wants to listen to the audiobook multiple times or only once.

The problem, as far as the record company or audiobook manufacturer is concerned, is that the CD or audiobook is *available for rent*. The rental is what inhibits sales and profits. Therefore, the legislative history’s distinction between musical and non-musical phonorecords is really a distinction without a difference.

¹²² H.R. REP. NO. 100-776, at 3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4339, 4341.

¹²³ *Id.*

¹²⁴ This argument has also been made by commentators predicting whether the RRA exception applies to non-musical phonorecords. *See* NIMMER, *supra* note 13, § 8.12[B][7][c].

¹²⁵ Presumably not every rental consumer would become a purchasing consumer as there is some elasticity for musical phonorecords.

Notwithstanding the irrelevance of the multiple listening argument, it is also not necessarily the case that consumers only listen to non-musical sound recordings one time. It is not uncommon for consumers of stand-up comedy sound recordings to listen to the routines several times. Thus, the factual basis for this distinction is suspect.¹²⁶ For these reasons, this piece of legislative history should not be relied upon in determining whether the RRA exception should apply to non-musical phonorecords.

B. The Contemporaneous Lens

The second approach to determine whether the RRA exception should apply to non-musical phonorecords is to view the question through a contemporaneous lens to see how the non-musical phonorecord industry compares to the musical phonorecord industry of 1984. Depending on the similarities shared between these industries, an extension of the RRA exception to non-musical phonorecords might be warranted.

In the early 1980s, there were approximately 200 rental stores throughout the United States renting musical phonorecords for twenty-four to seventy-two hour periods for fees ranging from 99¢ to \$2.50 per phonorecord.¹²⁷ Moreover, the stores also sold blank audio cassette tapes at the same time.¹²⁸ Also, it should be remembered that Congress passed the RRA exception despite its recognition that the number of record rental retailers was relatively small, because the development of inexpensive audio taping equipment and CDs gave the commercial rental of phonorecords the *prospects* of a viable business venture.¹²⁹

Today's non-musical phonorecord rental market is quite extensive. Several online rental establishments exist for audiobooks.¹³⁰ These online audiobook rental establishments offer various pricing options, including monthly or annual

¹²⁶ See also NIMMER, *supra* note 13, § 8.12[B][7][c] n.138 (noting that the underlying assumption for this reasoning is open to serious question).

¹²⁷ See *supra* notes 56–59 and accompanying text.

¹²⁸ *Id.*

¹²⁹ H.R. REP. NO. 98-987, at 2 n.6 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2898, 2899 n.6.

¹³⁰ See, e.g., Booksfree.com, <http://www.booksfree.com>; Audiobooks.com, <http://www.audiobooks.com>; Simply Audiobooks, <http://www.simplyaudiobooks.com>; On the Go Books, <http://www.onthegobooks.com>; Recorded Books, LLC, <http://www.recordedbooks.com>; Audio Diversions, <http://www.audiodiversions.com>.

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subscriptions, permitting the customer to unlimited rentals,¹³¹ or renting per audiobook.¹³²

Beyond the online establishments, physical rental markets also exist. For example, Cracker Barrel Old Country Store with 553 company-owned units in forty-one states¹³³ offers its customers a selection of over 200 audiobook titles at every location.¹³⁴ These audiobooks can be purchased at any location and can be returned for the purchase price minus a \$3.49 per week charge.¹³⁵ In comparison to the 99¢ to \$2.50 rental fees for one to three days of use in the early 1980s, a one week rental for \$3.49 is proportionally cheaper.¹³⁶

The Cracker Barrel Old Country Store rental program alone is already more widespread than the threat of 200 rental establishments facing the music industry in the early 1980s. The online rental establishments pose an increased risk over physical locations because of their ability to easily transact business with consumers throughout the country (and the world). In fact, one of the major limitations on rental establishments in the early 1980s was that their consumers were generally from a local geographic range. The presence of an online rental market for non-musical phonorecords extinguishes this limitation. The combination of physical and online rental establishments demonstrates that the rental market facing non-musical phonorecords is more developed and extensive than that facing the music industry in the early 1980s when the RRA exception was adopted.

Another concern in the early 1980s was that blank audio cassette tapes were fairly cheap and facilitated copying.¹³⁷ Today, blank CDs can be purchased at any electronics retailer for a negligible cost (less than 30¢ per CD). Again, today's low cost of blank media is similar to, if not cheaper than, the blank audio cassettes of the early 1980s. This too shows the similarities between the musical phonorecord rental market of the early 1980s, when the RRA exception was enacted, and the non-musical phonorecord rental market of today.

¹³¹ See, e.g., Booksfree.com, Available Membership Plans, http://www.booksfree.com/available_plans.shtml (subscriptions ranging from \$9.99 to \$37.99 per month); Audiobooks.com, How to Rent, <http://www.audiobooks.com/php/howto.php?cmd=Rent&h=1> (subscriptions ranging from \$30.00 to \$50.00 per month); Simply Audiobooks' Rental Club, <http://www.simplyaudiobooks.com/Learn-More-Rent/dp/45/> (subscriptions ranging from \$14.95 to \$39.95 per month or from \$11.95 to \$36.95 per year); On the Go Books, http://www.onthegobooks.com/aux_page.php?page_key=aux_page_3 (subscriptions ranging from \$16.95 to \$37.95 per month or from \$11.95 to \$33.95 every six months).

¹³² See, e.g., Recorded Books, <http://www.recordedbooks.com>; Audio Diversions <http://www.audiodiversions.com/>.

¹³³ Cracker Barrel Old Country Store, Press Kit: Information About the Cracker Barrel Old Country Store, http://www.crackerbarrel.com/mediaroom-presskit.cfm?doc_id=1118.

¹³⁴ Audio Book Rental from Cracker Barrel, http://www.crackerbarrel.com/trip-booksaudio.cfm?doc_id=48.

¹³⁵ *Id.*

¹³⁶ This, of course, ignores the time value of money issue, which further strengthens the argument that today's rental rates are equal to or less than those in the early 1980s.

¹³⁷ See Horowitz, *supra* note 24, at 33 (noting that blank audio cassettes were offered for sale, frequently at substantial discounts).

Again, it is important to remember that in the early 1980s, Congress was concerned with the *prospects* of a viable rental market.¹³⁸ Today's non-musical phonorecord rental market is more than a prospect—it is a reality. The market is more extensive and less expensive than what faced the music industry in the early 1980s and the media for copying these works is comparable. The music industry appears pleased (or at least not displeased) with the additional protection the RRA exception granted and the success it had at eliminating phonorecord rentals. There have been no efforts on the music industry's part to repeal the RRA exception. Presumably, the non-musical phonorecord industry would be equally pleased with the same results (i.e. fewer rentals, increased sales, and increased profits).

Looking at the RRA exception through a contemporaneous lens demonstrates that the problems faced by the industries during their respective time periods are sufficiently similar. Thus, the contemporaneous lens suggests and provides strong support for Congress amending the RRA exception to include non-musical phonorecords.

C. *The Prospective Lens*

The third approach to determine whether the RRA exception should apply to non-musical phonorecords is to view the question through a prospective lens to see what the future may hold for both musical and non-musical sound recordings and whether there is any justification for treating them differently under the RRA exception. This section will initially explore the impact of downloadable media upon the first sale doctrine and RRA exception. Because of the changing technological and legal landscapes, an entirely new approach to rental markets is suggested. Lastly, this section analyzes the future of non-downloadable phonorecords to determine whether different treatment of musical and non-musical phonorecords is warranted.

1. *The Future Concerning Downloadable Sound Recordings*

Downloading audiobooks and music has been on the rise. The audiobook sector showing the most growth was downloadable sales.¹³⁹ Downloads accounted for 6% of sales of audiobooks in 2004, but increased to 9% in 2005.¹⁴⁰ The same appears true for musical sound recordings. In the music industry, the percentage of sales via digital download increased from 0.2% in 2001 to 5.7% in 2005.¹⁴¹ Although these rises were concerned with sales, not rentals, it does not seem unreasonable that audiobook rentals could follow the same course if a downloadable rental market were created (e.g. the ability to rent MP3s). As of today, there do not appear to be any downloadable rentals for

¹³⁸ See *supra* note 129 and accompanying text.

¹³⁹ Audio Publishers Association, Audio Publishers Association (APA) Fact Sheet (2005), http://www.audiopub.org/files/public/APA_Fact_Sheet.pdf.

¹⁴⁰ Audio Publishers Association, *Audio Publishing Industry Continues to Grow; Shows 4.7% Increase in Sales*, at 2, <http://www.audiopub.org/files/public/APASalesSurveyResultsFactSheet2006COMPLETE.pdf>.

¹⁴¹ Recording Industry Association of America, 2005 Consumer Profile, <http://www.riaa.com> (follow "Consumer Trends" hyperlink; then follow "2005" hyperlink).

audiobooks, but that could change if an entrepreneurial audiobook listener thought there was a market.

If a download rental market were created, then the music, audiobook, and stand-up comedy industries would not necessarily be concerned for two reasons. The first reason is the use of digital rights management (“DRM”). DRM refers collectively to technologies used by copyright owners to control access to and usage of digital media in an effort to enforce copyrights and prevent infringement.¹⁴² Using DRM, a copyright owner can encode each electronic work with an array of “technological fences” to control the work’s subsequent use.¹⁴³ An example of DRM is Apple’s iTunes, which encodes songs to prevent consumers from posting them online in a readable format for others to listen to.¹⁴⁴ This, to a certain extent, prevents unlawful copying and distribution. DRM could also be utilized in the download rental market to restrict or prevent copying and to self-terminate after the rental period expires.

The second reason the music, audiobook, and stand-up comedy industries would not necessarily be concerned with download rental markets is because there currently is no digital first sale doctrine. It must be remembered that the Copyright Act’s first sale doctrine is only applicable to owners of particular copies or phonorecords and copies, and phonorecords are material objects.¹⁴⁵ A downloaded file, such as an MP3, is not itself a material object.¹⁴⁶ Once the file is burned to a CD, then the CD becomes a phonorecord, but the file itself does not constitute a material object. As such, a renter of downloadable music or audiobooks would not be protected by the first sale doctrine.

Nonetheless, there is a real possibility that Congress could change the Copyright Act to create a digital first sale doctrine that would grant consumers of downloaded music, audiobooks, or comedy routines the right to resell and rent these files. In 2001, the Copyright Office, as requested by Congress when it enacted the Digital Millennium Copyright Act (“DMCA”), prepared a report addressing the relationship between existing and emergent technology, and section 109 of the Copyright Act.¹⁴⁷ In its report, the Copyright Office did not recommend amending the Copyright Act to expand the first sale doctrine to digital transmissions of copyrighted works.¹⁴⁸ Proponents of a digital first sale doctrine drew an analogy between transmitting digital works and circulating goods in the physical realm, but this analogy was rejected by the Copyright Office because it ultimately relied upon either a voluntary or automatic deletion

¹⁴² Justin Graham, *Preserving the Aftermarket in Copyrighted Works: Adapting the First Sale Doctrine to the Emerging Technological Landscape*, 2002 STAN. TECH. L. REV. 1, 29 (2002).

¹⁴³ *Id.*

¹⁴⁴ Steve Jobs, *Thoughts on Music*, Feb. 6, 2007, <http://www.apple.com/hotnews/thoughtsonmusic>.

¹⁴⁵ 17 U.S.C. § 109(a).

¹⁴⁶ See Brian Mencher, *Digital Transmissions: To Boldly Go Where No First Sale Doctrine Has Gone Before*, 10 UCLA ENT. L. REV. 47, 63 (2002).

¹⁴⁷ U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT (2001), available at <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf>.

¹⁴⁸ *Id.* at 80.

of the file, both of which were unworkable at the time.¹⁴⁹ However, the report acknowledged that changes could occur in the market that may invite Congress to revisit the issue.¹⁵⁰ As discussed, *supra*, the technological landscape has changed substantially since 2001, with DRM now becoming standard in the online music industry.¹⁵¹ The notion of DRM being unworkable is, and will continue to be, outdated. As stated by one commentator, DRM “is the wave of the present and the future.”¹⁵² Therefore, it is not unlikely that Congress may revisit the issue of creating a digital first sale doctrine that includes, not only copies and phonorecords, but also extends to non-tangible files that can be transferred without the need of a physical and tangible embodiment.

If Congress created a digital first sale doctrine, but failed to amend the RRA exception, then the music and audiobook industries would face a major problem—the RRA exception would not apply to these digital files. Again, there would be no material object for the sound recording, and thus no phonorecord to protect under the RRA exception.

With the legal protection gone, the music, audiobook, and stand-up comedy industries are only left with DRM to protect their copyrights. And although this may very well be sufficient,¹⁵³ it has been noted that DRM is a cat-and-mouse game where hackers successfully discover methods to work around the DRM and the copyright owners must employ new technologies to stay ahead of the game.¹⁵⁴ Moreover, there is a movement underway to sell digital sound recordings that are free of DRM technology.¹⁵⁵ Given these potential struggles facing the industries, is there an alternative solution benefiting both the industries and consumers?

One approach is for the industries to promote licensing, rather than sales, of musical and non-musical sound recordings, because the first sale doctrine does not apply to licensed phonorecords.¹⁵⁶ As suggested by one commentator, consumers will likely prefer to license sound recordings if they can be assured that technological advances will not leave them with outdated media.¹⁵⁷

The argument is as follows. As technology advances, most digital files will become obsolete to the consumer within approximately five years.¹⁵⁸ The industries can provide up-to-date sound recording files and offer consumers an

¹⁴⁹ *Id.* at 97–98.

¹⁵⁰ *Id.* at 100.

¹⁵¹ *See generally* Jobs, *supra* note 144.

¹⁵² Graham, *supra* note 142, at 29.

¹⁵³ LAWRENCE LESSIG, CODE: AND OTHER LAW OF CYBERSPACE 126 (1999) (arguing DRM will increasingly displace law as the primary defender of intellectual property in cyberspace).

¹⁵⁴ Jobs, *supra* note 144.

¹⁵⁵ Apple Unveils Higher Quality DRM-Free Music on the iTunes Store, <http://www.apple.com/pr/library/2007/04/02itunes.html>.

¹⁵⁶ *See generally* Eurie Hayes Smith IV, *Digital First Sale: Friend or Foe?*, 22 CARDOZO ARTS & ENT. L.J. 853 (2005); *see also supra* note 22 and accompanying text.

¹⁵⁷ Hayes Smith, *supra* note 156, at 859–60.

¹⁵⁸ *Id.* at 859.

option between purchasing and licensing the file.¹⁵⁹ If the consumer purchases the file, the consumer alone is responsible for any losses, deletions, or corruptions that occur.¹⁶⁰ The purchasing consumer would also be permitted to sell, rent, or otherwise dispose of the file pursuant to the first sale doctrine.¹⁶¹ Over time, the purchased file will become obsolete and increasingly unusable, forcing the consumer to purchase an updated version of the sound recording.¹⁶²

On the other hand, if the consumer opted to license the sound recording, their rights could be limited to the specific rights granted by the industries under the license agreement.¹⁶³ And while the consumers would not own a copy of the file, they would be given additional benefits, including the right to access multiple file formats and replacement for lost, deleted, or corrupted files.¹⁶⁴ Keeping the costs of licensing below the costs of purchasing should lead consumers away from purchasing and towards licensing.¹⁶⁵

In this scenario everyone wins. The consumers have the option of choosing which rights best suit them, but will more likely choose the licensing option given the cheaper price and additional benefits. For the industries, two benefits inure. First, a stream of income would result for each sound recording licensed and for any fees involved with updating or replacing licensed files.¹⁶⁶ Second, the number of purchasers of sound recording files, as opposed to licensees, would decline, thus reducing the number of individuals able to assert the first sale doctrine defense.¹⁶⁷

Therefore, if we look towards the future of music and audiobooks, we can see that although the problem facing the music and audiobook industry is not an immediate threat, there is a practical, technological, and mutually agreeable way to avoid the potential problem.

2. *The Future of Traditional Phonorecord Rentals*

Notwithstanding the shift to non-phonorecord downloadable media, there still exists a phonorecord market for musical and non-musical works. The Sixth Circuit's decision in *Brilliance Audio* provides an incentive to those wishing to enter the non-musical phonorecord rental market. As of now, they are free to rent non-musical phonorecords under the first sale doctrine without fear of infringement claims based on the RRA exception. As explained, *supra*, the rental market facing audiobook publishers is more extensive than what the music industry faced in the early 1980s.¹⁶⁸ Although the uncertainty of the RRA exception's applicability to non-musical phonorecords may have previously caused those considering entering the rental market to pause or

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 859–60.

¹⁶⁵ *Id.* at 860.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *See supra* Part V.B.

abstain, this anxiety-causing hurdle has been removed and exacerbates the problem facing the audiobook industry to levels well beyond what faced the music industry in the early 1980s. Therefore, even if DRM is successful and Congress refuses to expand the first sale doctrine to digital, non-tangible formats, viewing this problem under the prospective lens still suggests amending the RRA exception to expressly include non-musical phonorecords.

VI. SUGGESTED AMENDMENTS TO THE COPYRIGHT ACT

After looking at the issue through these three different lenses, it seems that Congress should amend the RRA exception to include non-musical phonorecords within its ambit. The legislative history lens suggests the underlying rationales for the RRA exception apply almost equally to non-musical phonorecords as it did to musical phonorecords.¹⁶⁹ Moreover, there is legislative history suggesting expansion and the legislative history's argument for distinguishing these phonorecords makes no sense.¹⁷⁰ Likewise, the contemporaneous and prospective lenses also promote expanding the RRA exception's scope to non-musical phonorecords. The contemporaneous lens shows the threat of rental markets facing the non-musical sound recording industry is more extreme than that facing the music industry in the 1980s.¹⁷¹ The prospective lens demonstrates that the current state of the law and possible development will only fuel this rental market growth.¹⁷²

Even if Congress chooses not to expand the scope of the RRA exception, it should be amended nonetheless. As it stands now, it is poorly drafted. To avoid a future split in the circuits and to further advise audiobook publishers, authors and stand-up comics who record their works, and consumers about their rights with respect to the rental market of phonorecords, Congress should amend the RRA exception. Two options are provided, *infra*, depending on which option Congress chooses.

A. *Expanding the Scope of Sound Recordings*

If Congress determines the scope of the RRA exception should be expanded to include all phonorecords, consistent with the Sixth Circuit's dissent in *Brilliance Audio*, then the following amendment to the first sentence of section 109(b)(1)(A) should be made:

Notwithstanding the provisions of subsection (a), unless authorized by the owners of copyright in the sound recording, *and if a musical sound recording then the owners of copyright in the musical works embodied therein, or the owner of copyright in a computer program (including any tape, disk, or other medium embodying such program)*, 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

¹⁶⁹ See *supra* Part V.A.1.

¹⁷⁰ See *supra* Part V.A.2. and V.A.3.

¹⁷¹ See *supra* Part V.B.

¹⁷² See *supra* Part V.C.2.

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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.¹⁷³

This amendment moves the clause referring to “the owners of copyright in the musical works embodied therein” so it follows the clause referring to musical sound recordings. The splicing of the two clauses referring to sound recordings in the current version of the RRA¹⁷⁴ and inserting a reference to computer programs between them adds confusion to this already-disoriented statute. In addition, this amendment adds a clause clarifying that consent of the copyright owner of the musical works is only necessary *if* the sound recording is a musical sound recording. Otherwise, only the consent of the copyright owner of the sound recording is necessary. The use of the if/then language of this clause leaves open the option that sound recordings other than musical sound recordings are encompassed by the RRA exception.

B. Limiting Sound Recordings to Musical Works

If Congress determines the scope of the RRA exception should be limited to musical phonorecords, consistent with the majority’s decision in *Brilliance Audio*, then the following amendment to the first sentence of section 109(b)(1)(A) should be made:

Notwithstanding the provisions of subsection (a), *unless authorized by the owners of copyright in the musical sound recording and the owners of copyright in the musical works embodied therein, or the owner of copyright in a computer program (including any tape, disk, or other medium embodying such program)*, neither the owner of a particular musical 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.¹⁷⁵

This amendment adds the modifier “musical” before “sound recording” and “phonorecord” to limit the scope. Moreover, this amendment, like the amendment expanding the RRA exception’s scope, moves the clause referring to “the owners of copyright in the musical works embodied therein” so it follows the clause referring to musical sound recordings.¹⁷⁶ As discussed *supra*,

¹⁷³ Emphasis added to illustrate changes in the statute.

¹⁷⁴ See 17 U.S.C. § 109(b)(1)(A).

¹⁷⁵ Emphasis added to illustrate changes in the statute.

¹⁷⁶ See *supra* Part VI.A.

the splicing of the two clauses and inserting the reference to computer programs between them causes more confusion than already exists.¹⁷⁷

VII. CONCLUSION

For over twenty years, the courts have not had an opportunity to determine whether the RRA exception applies to non-musical phonorecords. Surprisingly, this poorly phrased statute had largely managed to escape judicial attention. However, the Sixth Circuit's decision in *Brilliance Audio* finally answered this lingering question.

Given the historical background of the first sale doctrine and the RRA exception, it may be that the Sixth Circuit decided the issue correctly. This Article does not take issue with the court's conclusion, but instead uses the differing conclusions of the majority and dissent to illustrate that the RRA exception is in need of Congressional clarification.

Congress, standing at the crossroads between these interpretations, has the power to clarify the scope of the RRA and direct the courts and the public as to what are and are not protected activities under the Copyright Act. By viewing the issue through three different lenses, Congress should see that expanding the scope of the RRA exception to include non-musical phonorecords is justified. If it agrees, a proposed amendment to the RRA exception is detailed, *supra*.¹⁷⁸ However, there is also support for limiting the RRA exception in the way set forth by the Sixth Circuit's majority in *Brilliance Audio*. If Congress determines the RRA exception should remain limited in scope, then a proposed amendment to the RRA is also detailed, *supra*.¹⁷⁹ Regardless of Congress' ultimate decision on how to amend the RRA exception, it is without doubt that this statute needs Congressional attention. The existence and recent and potential growth of an audiobook rental market will only be increased by the Sixth Circuit's decision in *Brilliance Audio*, thus inviting future uncertainty and a potential split amongst the circuits on the issue. A minor amendment to the RRA exception can save the courts, the audiobook and comedy industries, and consumers from wasting time and money further litigating this issue.

¹⁷⁷ *Id.*

¹⁷⁸ *See supra* Part VI.A.

¹⁷⁹ *See supra* Part VI.B.