

No. 11-697

IN THE
Supreme Court of the United States

SUPAP KIRTSANG, D/B/A BLUECHRISTINE99,
Petitioner,

v.

JOHN WILEY & SONS, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF OF *AMICUS CURIAE* INTELLECTUAL
PROPERTY OWNERS ASSOCIATION
IN SUPPORT OF NEITHER PARTY**

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Intellectual Property Owners Association (IPO) is a trade association representing companies and individuals in all industries and fields of technology who own or are interested in intellectual property rights.¹ IPO's membership includes more than 200 companies and more than 12,000 individuals who are involved in the association either through their companies or as inventors, authors, executives, law firms, or attorney members. Founded in 1972, IPO represents the interests of all owners of intellectual property. IPO regularly represents the interests of its members before Congress and government entities and has filed *amicus curiae* briefs in this Court and other courts on significant issues of intellectual property law. The IPO Board of Directors approved the filing of this brief. A list of IPO board members can be found in the Appendix.²

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel made a monetary contribution to its preparation or submission. Respondent consented to the filing of this brief through a letter submitted to the Court on June 18, 2012. *Amicus curiae* requested consent to file this brief from petitioner on June 28, 2012. Petitioner consented to this brief through a letter to IPO on July 6, 2012.

2. IPO procedures require approval of positions in briefs by a two-thirds majority of directors present and voting.

INTRODUCTION

This case presents the important question of whether the “first-sale doctrine,” as codified in section 109(a) of the Copyright Act of 1976 (the “Act”), which permits the owner of a copy of a work that is “lawfully made under this title” to sell that copy without the permission of the copyright owner, creates a broad exception to the right afforded under section 602(a) of the Act to treat the unauthorized importation of copies acquired outside of the United States as an act of infringement.

This Court previously considered the applicability of section 109(a) of the Act to works made and initially sold outside of the United States in *Costco Wholesale Corp. v. Omega S.A.*, 130 S. Ct. 2089 (2010). Although the questions posed by this case are similar, this case is different from *Costco* in at least two respects: (a) unlike *Costco*, in which the watches at issue were made and sold by the same entity which owned the U.S. copyright, the books in this case were made and sold by Wiley Asia, a different, albeit related, entity which had no rights whatsoever under the U.S. Copyright; and (b) in *Costco*, the copyrighted work consisted of a small engraving on the back of Omega’s unpatented watches that was apparently intended for the sole purpose of preventing their unauthorized importation and had no independent value, whereas in this case the primary value of the books at issue was their copyrighted content.³

3. Indeed, upon remand, the district court dismissed the *Costco* case on the ground that the plaintiff had misused its copyright. See, *Omega S.A. v. Costco Wholesale Corp.*, no. CV-04-05443, slip op. (Nov. 9. 2011).

SUMMARY OF ARGUMENT

IPO urges this Court to affirm the Second Circuit's decision on at least three grounds:

- A. The statutory language of the Copyright Act, its legislative history and the prior decision of this Court in *Quality King Distribs., Inc. v. L'Anza Research Int'l, Inc.*, 523 U.S. 135 (1998) all support the conclusion that section 109(a) is limited in its effect to copies that are manufactured in the United States and that the unauthorized importation of the books into the United States was an infringing act under section 602(a) of the Act.
- B. The underlying rationale behind the "first-sale doctrine," as established by this Court in *Bobbs-Merrill Co., v. Straus*, 210 U.S. 339 (1909), has no applicability here since U.S. copyright law has no extra-territorial effect and Wiley has never exercised any of its exclusive rights under the U.S. Copyright Act with respect to the books at issue in this case.
- C. A contrary result would disrupt the long established business practices of copyright-based industries and discourage the widespread dissemination of copyrighted educational materials in developing nations.

ARGUMENT

A. Section 109(a) of the Copyright Act Applies Only to Copies of Copyrighted Works That are Manufactured in the United States

Section 602(a)(1) of the Copyright Act provides, with very limited and specific express exceptions, that the importation, without the authority of the “owner of the copyright under this title,” of any copies of a work acquired outside the United States is an infringement of the copyright owner’s distribution right. Section 109(a) of the Act, on the other hand, provides that the owner of a copy of a work that is “lawfully made under this title” is free to sell or dispose of “that copy” without the permission of the copyright owner. The petitioner argues that the effect of section 109(a) is to create a broad exception to section 602(a)(1) that would permit the importation and resale for profit of unlimited copies of works acquired abroad without the permission of the U.S. copyright owner, so long as they were initially made and sold under the conditions that would have been lawful had those events occurred in this country. IPO believes that neither the language of the statute, its legislative history nor the prior decision of this court in the *Quality King* case supports such a result.

1. The express language of section 109(a) limits its applicability to copies made in the United States

On their face, sections 109(a) and 602(a)(1) of the Copyright Act appear to be entirely consistent and independent of each other. Section 109(a) limits the right of copyright owners to prevent the resale of copies of works where the copies were “lawfully made under this title”:

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.*

17 U.S.C. 109(a) (emphasis added).

On the other hand, Section 602(a) expressly provides that it is an act of infringement to import copies of a work that were acquired outside of the United States without the authority of the copyright owner “under this title:”

(1) Importation into the United States, without the authority of the owner of copyright *under this title*, of copies or phonorecords of a work that *have been acquired outside the United States* is an infringement of the exclusive right to distribute copies or phonorecords under section 106, actionable under section 501.

17 U.S.C. 602(a)(1) (emphasis added).

It has long been established that the Copyright Act has no application outside the United States. *See, e.g. United Dictionary Co. v. C. Merriam Co.*, 208 U.S. 260, 264 (1908) (holding that authorizing the publication of a work in England without the notice required by U.S. law did not affect the U.S. copyright); *Update Art, Inc. v. Modiin Pub., Ltd.*, 843 F.2d 67, 73 (2d Cir. 1988) (“It is well established that copyright laws generally do not have extraterritorial application.”). *See also* P. Goldstein, *Copyright* §16.0, pp. 16:1-16:2 (2d ed. 1998) (“Copyright

protection is territorial. The rights granted by the United States Copyright Act extend no farther than the nation's borders.”).

The plain meaning of the words “under this title,” is that they refer to Title 17 of the United States Code - the title in which they appear. As a result, section 109(a) has no applicability to copies, such as the books in this case, that were manufactured outside of the United States – *i.e.*, not “under this title.” By importing and selling those books, Kirtsaeng has infringed Wiley’s exclusive distribution rights under section 602(a)(1), which prohibits their unauthorized importation, as well as section 106(3), which prohibits their sale.

In order to fit this case within the statutory language of section 109(a), petitioner is constrained to argue that the term “lawfully made under this title” really means “would have been lawfully made if it were made under this title.” However, as demonstrated by the other provisions of section 602 of the Act, if that is what Congress meant, it would have said precisely that. Thus, for example, section 602(a)(2) prohibits the importation and exportation of copies “the making of which either constituted an infringement of copyright, or which would have constituted an infringement of copyright *if this title were applicable*” (emphasis added.) Similarly, section 602(b) permits the seizure by U.S. Customs and Border Protection of copies whose making “would have constituted an infringement of copyright *if this title were applicable*” (emphasis added), but not of copies that were otherwise “lawfully made.” Thus, Congress was perfectly capable of making, and did in fact make, a clear distinction between copies that were lawfully made “under this title” and those that would have infringed “if this title were applicable.”

The conclusion that section 109(a) of the Act was not intended to create a broad, *implicit* exception to section 602(a)(1) is further buttressed by the limitations Congress has placed on the three *express* exceptions that are set forth in section 602(a)(3). Section 602(a)(3) permits importation of (a) copies for the use of governmental bodies *other than schools* (17 U.S.C. §602(a)(3)(A)); (b) a single copy for the private use of a person arriving in the United States and “forming part of such person’s personal baggage”(17 U.S.C. §602(a)(3)(B)); and (c) a single copy for use by an organization “operated for scholarly, educational or religious purposes and not for personal gain” and no more than five copies for its “library lending and archival purposes.” (17 U.S.C. §602(a)(3)(C)).

The argument espoused by petitioner in this case would create an implied exception to section 602(a) that is far broader than the express limitations enumerated in the section and would effectively eliminate the very specific limitations on those exceptions that Congress imposed. For example, it would permit school systems to buy an unlimited number of foreign versions of the textbooks for by their students, despite the limitation of section 602(a)(3)(A) and, most importantly, it would permit the broad importation of unlimited copies by any one at all for commercial resale, despite the effort of Congress to limit private importation to a single copy carried by travelers for their personal use and by educational or religious institutions for use without personal gain. *See* §602(a)(3) (B). Indeed, the proposed exception is so broad that the rights afforded under section 602(a)(1), and its carefully drawn exceptions, would be reduced to the exclusion of little more than “piratical copies.” *See, Quality King, 523 U.S. at 146-7.*

2. The legislative history of the Act demonstrates that Congress intended to permit U.S. owners to prevent the importation of works acquired outside the U.S. even if they were otherwise “lawfully made.”

A review of the legislative history of section 602 provides further support for the view that Congress intended subsection 602(a)(1) to apply to *all* works acquired abroad, even if “lawfully made,” and that it was only subsection 602(b), which permits seizure by customs, that was to be limited to works that would have been “lawfully made” had they been made in the United States:

Section 602 deals with two separate situations: importation of “piratical” articles (that is, copies or phonorecords made without any authorization of the copyright owner), *and unauthorized importation of copies or phonorecords that were lawfully made.* The general approach of section 602 is to make unauthorized importation an act of infringement *in both* cases, but to permit the Bureau of Customs to prohibit importation only of “piratical” articles.

(Joint statement by both houses of Congress: H.R. Rep. No. 1476, 94th Cong., 2d Sess. 169 (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5785 and S. Rep. No. 473, 94th Cong., 1st Sess. 151 (1975), hereinafter referred to as the “Joint Report.” (Emphasis added.)) Indeed, after re-stating the “general rule [of section 602(a)] that unauthorized importation is an infringement merely if the copies or phonorecords ‘have been acquired abroad,’ and then enumerating the three exemptions to that rule, the Joint Report concludes:

If none of the three exemptions applies, *any* unauthorized importer of copies of phonorecords acquired abroad could be sued for damages and enjoined from making any use of them, even before any public distribution in this country has taken place.

Id. (emphasis added).

Subsection 602(a)(2), which was enacted in 2008,⁴ further perpetuates this distinction by adding the unauthorized *exportation* of works to the acts of infringement under section 602(a), but which, unlike section 602(a)(1), limits its scope to copies that “either constituted an infringement of copyright or which would have constituted an infringement of copyright if this title had been applicable.” The legislative history of that section confirms that, unlike section 602(a)(1), the scope of the provision was intended to be limited to “counterfeit or pirated goods.” (H.R. Rep. No. 617, 110th Cong., 2nd Sess. 25 (2008).

3. The Second Circuit’s holding is in accord with *Quality King* and other judicial authorities

As noted above, section 109(a) of the Act is limited by its terms to copies made “under this title,” while section 602(a) broadly prohibits the importation of works that were “acquired outside the United States.” In cases such as the present, where the copies involved were both made and acquired by the importer outside the United States,

4. Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. 110-403, Sec. 1(a), 122 Stat. 4256 (2008).

there is no overlap between those sections. However, it is possible for copies of a work to be made lawfully in this country, exported, purchased abroad and reimported to this country. That was the situation that arose in in *Quality King*, and the Court held, under those facts, that section 109(a) would apply and that the owner of the copies was free to import and sell them in the United States without the authority of the copyright owner.

In reaching that result, however, the opinion makes it quite clear that the Court would have reached a different result had the copies involved not been made in the United States. Specifically, in response to the argument advanced by L'Anza that applying the first sale doctrine would render section 602(a) superfluous, Justice Stevens' opinion for the Court points to three instances where the section still applies:

First, even if § 602(a) did apply only to piratical copies, it at least would provide the copyright holder with a private remedy against the importer, whereas the enforcement of § 602(b) is vested in the Customs Service. Second, because the protection afforded by §109(a) is available only to the “owner” of a lawfully made copy (or someone authorized by the owner), the first sale doctrine would not provide a defense to a § 602(a) action against any non-owner such as a bailee, a licensee, a consignee, or one whose possession of the copy was unlawful. *Third, § 602(a) applies to a category of copies that are neither piratical nor “lawfully made under this title.” That category encompasses copies that were “lawfully made” not under*

the United States Copyright Act, but instead, under the law of some other country.

523 U.S. 146-7 (emphasis added and footnotes omitted).

Similarly, in its discussion of the potential adverse effect on the publishing industry (a matter of particular concern to IPO), the opinion once again emphasizes that, even if lawfully made under the law of other countries, copies acquired abroad would not qualify for application of the first sale doctrine:

Even in the absence of a market allocation agreement between, for example, a publisher of the U.S. edition and a publisher of the British edition of the same work, each such publisher could make lawful copies. If the author of the work gave the exclusive U.S. distribution rights -- enforceable under the Act -- to the publisher of the U.S. edition and the exclusive British distribution rights to the publisher of the British edition, however, presumably *only those made by the publisher of the U.S. edition would be “lawfully made under this title” within the meaning of § 109(a). The first sale doctrine would not provide the publisher of the British edition who decided to sell in the American market with a defense to an action under §602(a) (or, for that matter, to an action under § 106(3), if there was a distribution of the copies).*

Id. (emphasis added and footnotes omitted).

Finally, the opinion's statement in response to the argument that application of the first sale doctrine to section 602(a) would make the exceptions to section 602(a) superfluous resolves any conceivable doubt on the point:

The argument that the statutory exceptions to § 602(a) are superfluous if the first sale doctrine is applicable rests on the assumption that the coverage of that section is co-extensive with the coverage of §109(a). But since it is, in fact, broader because it encompasses copies that are not subject to the first sale doctrine -- *e.g., copies that are lawfully made under the law of another country* -- the exceptions do protect the traveler who may have made an isolated purchase of a copy of a work that could not be imported in bulk for purposes of resale.

523 U.S. at 148 (emphasis added).

In her concurring opinion in *Quality King*, Justice Ginsburg also emphasized that the Court's holding was limited to the facts presented in that case, where the copies were made in the United States and exported by the copyright owner, and that it does not apply to copies that were neither made nor first sold in the United States:

This case involves a "round trip" journey, travel of the copies in question from the United States to places abroad, then back again. I join the Court's opinion recognizing that we do not today resolve cases in which the allegedly infringing imports were manufactured abroad.

523 U.S. at 154 (*citing* W. Patry, *Copyright Law and Practice* 166-70 (1997 Supp.)) (commenting that provisions of Title 17 do not apply extraterritorially unless expressly so stated, hence the words “lawfully made under this title” in the “first sale” provision, 17 U.S.C. §109(a), must mean “lawfully made in the United States”).

In addition to the Second Circuit decision on appeal here, other courts that have had the opportunity to examine the question since *Quality King* have consistently concluded that, in a case such as the present, where the copyrighted material was first made and sold outside the United States and imported into the United States without the authority of the copyright holder, the first sale defense is inapplicable. *See, e.g., Pearson Education, Inc. v. Liao*, No. 07-Civ-2423 (SHS), 2008 WL 2073491, *3 (S.D.N.Y. May 13, 2008) (Stein, J.) (finding that the first sale doctrine did not apply where defendant acquired foreign editions of plaintiff’s textbooks in India and then imported them into the United States without plaintiff’s authorization and sold them over the internet); *Pearson Education, Inc. v. Kumar*, No. 07-Civ-9399 (CSH), 2010 WL 1609024, *6 (S.D.N.Y. Apr. 16, 2010) (on identical facts as presented in *Pearson Education, Inc. v. Liao*, finding that the first sale doctrine does not apply to copies of a copyrighted work manufactured abroad); *Swatch S.A. v. New City, Inc.*, 454 F. Supp.2d 1245, 1253-55 (S.D. Fla. 2006) (finding that the first sale defense was not applicable where watches were manufactured and first sold abroad and concluding: “Because defendant relies exclusively on the first sale protection of §109(a), without contesting the validity of Plaintiff’s copyrights or other relevant facts related to Plaintiff’s §602(a) claim of copyright infringement, summary judgment in favor of Plaintiff is

appropriate on [the copyright infringement claim]”); *UMG Recordings, Inc. v. Norwalk Distribs., Inc.*, No. SACV 02-1188 Doc. (Anx), 2003 U.S. Dist. LEXIS 26302, at * 11-14 (C.D. Cal. Mar. 13, 2003); *Parfums Givenchy, Inc. v. Drug Emporium*, 38 F.3d 477 (9th Cir. 1994) (holding that the importation right survives to a particular copy unless and until there has been a “first sale” in the United States).

B. The First-Sale Doctrine Does not Apply Since Wiley has not Exercised or Exhausted its U.S. Distribution Right With Respect to the Copies

Petitioner and several *amici* have argued that, even if section 109(a) does not literally apply, the principles that led to the development of the “first-sale doctrine,” as first enunciated by this Court in *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1909), remain applicable and that those principles dictate that Wiley, having authorized its subsidiary to manufacture and sell the textbooks at issue, cannot limit the right of subsequent purchasers to sell them in the United States.

That argument misses the point. The first sale doctrine may very well apply once a U.S. copyright owner has exhausted its U.S.-created distribution rights with respect to a copy made outside of the United States, such as, for example, by authorizing its importation and subsequent sale in the United States. Unlike the facts of this case, under that fact pattern the owner may be free to sell such copies without any further authorization from the copyright owner, even though the statutory language of section 109(a) does not expressly mandate such a result. However, the first sale doctrine has no application to a case such as the present, where the U.S. copyright owner

only authorized the manufacture and sale of the copies in jurisdictions where its U.S. copyright did *not* apply and never exercised its distribution right under section 106(3) of the Copyright Act.

The critical fact in this case is that the respondent Wiley has never exercised any of its exclusive rights granted by the U.S. Copyright Act with respect to the copies at issue. As discussed above, it is well established the U.S. Copyright Act has no extraterritorial effect. In particular, Wiley's U.S. copyright gave it no right to control the manufacture or distribution of copies in Thailand; those rights, if any, would only exist under the laws of the countries in which the books were manufactured and sold. And, since U.S. copyright law gave Wiley no rights under the law of the countries in which the books were made and sold, it can hardly be said that Wiley has ever exercised, much less exhausted, any of its rights under the U.S. Copyright Act with respect to those copies.

C. Application of the First Sale Doctrine to Imported Works Would Disrupt Industry Practices and Discourage the Worldwide Distribution of Copyrighted Works

Finally, as a matter of policy, IPO believes that it is important to affirm the decision below in order to preserve the long-established principle that the grant of authority to distribute copyrighted works in one jurisdiction confers no rights in another. That principle preserves the established business practices and existing agreements among copyright-based industries that are premised on the understanding that the copyright in a work can be assigned or exclusively licensed to a person in one

country without undermining the rights of the copyright owners in other jurisdictions. Accordingly, this principle promotes the worldwide distribution of copyrighted works by permitting authors and their publishers to distribute their works in a wide variety of markets using different versions, editions and pricing without undermining their economic value in other markets.

It has been a long established practice in copyright-based industries for owners who want to maximize the distribution of their works to use different publishers in different markets. This was historically due to a variety of factors that are particularly applicable to copies of copyrighted works, including the linguistic and cultural differences mandating the use of different versions of the works in different countries and the need for knowledge of and relationships with local distributors and retailers. Although large publishers, such as Wiley, may be able to establish affiliates to act as their local publisher in some countries, the holders of the rights in different countries are often unrelated and may well be competitors in the American market. Thus, the copyright industry has relied for decades on the law that a grant of rights in one jurisdiction does not grant rights in another. Indeed, the Copyright Act has long contained provisions such as are currently embodied in section 602 of the current Act, designed to protect U.S. copyright owners against efforts to subvert that practice by importing foreign versions of works even where they are lawfully made and sold in other countries.⁵

5. Prior to 1968, the Copyright Act of 1909 even prohibited U.S. publishers themselves from importing significant quantities of English language non-dramatic works that were not manufactured in the United States and Canada.

This Court expressly recognized the widespread and prevalent nature of that practice in *Quality King*, when it referenced comments made by the Register of Copyrights in a 1961 report to Congress:

When arrangements are made for both a U.S. edition and a foreign edition of the same work, the publishers frequently agree to divide the international markets. The foreign publisher agrees not to sell his edition in the United States, and the U.S. publisher agrees not to sell his edition in certain foreign countries.

Quality King, 523 U.S. at 147 (citing Copyright Law Revision: Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Cong., 1st Sess., 125-26 (H.R. Judiciary Comm. Print 1961)). Remarking on these comments by the Register of Copyright, the *Quality King* court further elaborated that, so long as the application of section 109(a) is limited to copies made in the United States, these longstanding industry practices would be preserved:

Even in the absence of a market allocation agreement between, for example, a publisher of the U.S. edition and a publisher of the British edition of the same work, each such publisher could make lawful copies. If the author of the work gave the exclusive United States distribution rights - enforceable under the Act - to the publisher of the United States edition and the exclusive British distribution rights to the publisher of the British edition, ... presumably only those made by the publisher of the United States edition would be “lawfully made under

this title” within the meaning of §109(a). The first sale doctrine would not provide the publisher of the British [i.e., foreign] edition who decided to sell in the American market with a defense to an action under § 602(a) (or, for that matter, to an action under § 106(3), if there was a distribution of the copies).

Id. at 148.

Today, where perfect digital copies of copyrighted works can be manufactured in unlimited quantities and distributed worldwide at virtually no cost, and there are huge differences in the enforceability of copyright laws from one country to another, the need to protect the holders of the exclusive rights in one jurisdiction from the unauthorized importation of foreign copies is stronger than ever. There is often no way to detect the difference between a copy that has been lawfully produced abroad and a counterfeit, and requiring the U.S copyright owner to prove that an imported copy was not “lawfully made,” particularly in countries where copyright enforcement is lax or non-existent, would place a virtually impossible burden on copyright owners seeking to protect their exclusive rights in the United States.

The textbook industry presents a good example of the consequences that could result from eliminating the right to prevent importation of copies that are made abroad. In a July 2005 report issued by the United States Government Accountability Office on the price of college textbooks, the GAO stated:

Textbooks developed for certain academic disciplines are more likely to have broader

international appeal than others, according to publishers. For example, the content in many mathematics, science and engineering textbooks is essentially global in its applicability ... If international demand for a textbook exists, publishers may sell the same textbook that is sold in the United States, an international edition produced with less expensive materials, or an adaptation of the textbook that includes locally relevant examples. In international markets where the primary language spoken is not English, publishers may sell the rights to translate the textbook into the local language.

U.S. Gov't Accountability Office, GAO-05-806 College Textbooks at pp. 21-22 (2005). Finding that publishers consider many different factors in pricing the textbooks sold abroad, including income level, cost of living, strength of currency, demand, etc., the report observes:

Publishers told us that they have to be particularly concerned about pricing at a level that is affordable to students in developing countries because of the threat of piracy in these countries.

In addition to income levels, differences in instructional styles and systems of higher education influence publishers' pricing decisions. For example, publishers told us that even though average income levels are high in the United Kingdom, textbooks tend to sell for lower prices than in the United States because the demand

for textbooks is lower. Specifically, they said that instructors in the United Kingdom are more likely to recommend several textbooks for students to consider, rather than requiring a specific textbook. Additionally, publishers told us that there is less demand for electronic and print supplements to support teaching and learning in non-U.S. markets. Publishers also told us that because higher education funding tends to be highly subsidized in the United Kingdom and European countries, students may not be willing to pay out-of-pocket costs for textbooks at U.S. prices. According to publishers, textbook prices in Canada and Australia tend to be similar to those in the United States because the instructional styles are similar in that instructors select specific textbooks for their classes. However, publishers noted that in these markets there is also greater demand for U.S. textbooks that have been adapted to the local culture or economy. In order for international pricing differences to persist, there must be barriers that limit mass importation of less expensive U.S. textbooks from other countries.

Id. at 22-23.

One effect of eliminating those barriers, by extending the first-sale doctrine to an unauthorized importer, would likely be that copyright owners would restrict the foreign sales of copies of their works to jurisdictions in which they could command a higher price and rigorously enforce their rights under the local copyright law, and refuse to sell

them anywhere else lest they undercut the market for the works elsewhere. Thus, the effect would not be to reduce prices in the U.S, but to discourage the dissemination of copyrighted works at reduced prices in developing nations. *See, e.g.,* NEW YORK TIMES, *Getting Textbooks Cheaper from India*, Mar. 29, 2006 (discussing the concerns of the Indian government that the widespread importation into the United States of textbooks sold at reduced prices in India will lead to a return to “the bad old days,” when to prevent infringement, American publishers sold only out-of-date textbooks to overseas markets). Thus, applying the “first-sale doctrine” to works that were made and sold abroad, but were not authorized for importation and sale in the United States, would not only be inconsistent with the language of the Copyright Act and the principles that underlie the “first-sale doctrine,” but would also discourage the international dissemination of copyrighted information throughout the world, including, particularly, developing nations.

CONCLUSION

The facts of this case do not support the application of section 109(a) because the copies were not “lawfully made under this title.” Nor do they justify the application of the general principles of the first-sale doctrine as developed by this Court, because the copyright owner has never exercised, at any time, its exclusive right under U.S. Copyright Law to distribute copies of its work in the United States. Moreover, extending the first-sale doctrine to permit the sale of copies in the United States without the authority of the U.S. copyright owner would defeat the purposes of section 602(a)(1) of the Act, disrupting the longstanding and ongoing business practices of copyright-

based industries and discouraging the dissemination of copyrighted works in developing countries..

For all of these reasons, IPO believes that the judgment of the Second Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

**APPENDIX — MEMBERS OF THE BOARD OF
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