

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 SUPAP KIRTSANG, DBA :

4 BLUECHRISTINE99 :

5 Petitioner : No. 11-697

6 v. :

7 JOHN WILEY & SONS, INC. :

8 - - - - - x

9 Washington, D.C.

10 Monday, October 29, 2012

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 11:05 a.m.

15 APPEARANCES:

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17 behalf of Petitioner.

18 THEODORE B. OLSON, ESQ., Washington, D.C.; on behalf of
19 Respondent.

20 MALCOLM L. STEWART, ESQ., Deputy Solicitor General,
21 Department of Justice, Washington, D.C.; for United
22 States, as amicus curiae, supporting Respondent.

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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 11-696 -- 697, Kirtsaeng v. John Wiley & Sons.

Mr. Rosenkranz.

ORAL ARGUMENT OF E. JOSHUA ROSENKRANZ

ON BEHALF OF THE PETITIONER

MR. ROSENKRANZ: Thank you, Mr. Chief Justice, and may it please the Court:

This case presents a stark choice between two plausible definitions of the phrase, lawfully made under this title. Our definition is the more consistent with the English language, and is the only definition that does not do mischief with the same use of that phrase each time it's repeated.

Ours is the only one consistent with a 400-year common law history, and 65-year-old right that was in the statute through 1976, and consistent with the principle that Congress doesn't abolish those things without being clear.

Ours gives the copyright owners much of what they asked for when they were seeking an importation provision, just not everything; whereas, Wiley's grants them rights far beyond anything that anyone could have

1 imagined asking for back then.

2 Ours --

3 JUSTICE GINSBURG: But your reading -- your
4 reading is essentially, once a copy is sold anywhere,
5 the copyright owner loses control of distribution
6 everywhere.

7 That is essentially your argument.

8 MR. ROSENKRANZ: That is correct,
9 Your Honor. And to put a finer point on it, ours is
10 that lawfully made under this title means made wherever,
11 in a way that satisfies U.S. copyright standards, made
12 in accordance with --

13 JUSTICE GINSBURG: So -- but -- so this
14 notion of sold anywhere, end of distribution rights
15 everywhere, that has been called, I think, the universal
16 exhaustion principle.

17 MR. ROSENKRANZ: International exhaustion.
18 Yes, Your Honor.

19 JUSTICE GINSBURG: And we are told that no
20 country has adopted that international exhaustion
21 regime, that most countries adhere to the national
22 exhaustion regime, which nobody is contesting here.
23 That is, if it's manufactured in the United States and
24 sold in the United States, that copy belongs to the
25 person who purchased it, end of case. But if the

1 exhaustion doctrine applies only nationally, then your
2 argument is asking for something that runs against the
3 regime that is accepted in most places.

4 MR. ROSENKRANZ: Your Honor, I have a few
5 answers to that. The first is it is not true that no
6 country adopts national exhaustion. Congress adopted
7 national exhaustion in sections 905 and 906 6 years
8 after the statute was passed, as to microchips.

9 But second, Wiley is making the point that
10 there is now a norm. They say most States -- most
11 countries, that is. Back in 1976 Wiley is not even
12 arguing that there was any international norm, much less
13 that the drafters of the statute were focused on
14 international norms; and the truth is that there isn't
15 an international consensus around national exhaustion.
16 We know that for a fact. In 1994 when 125 nations got
17 together, they -- they agreed to disagree on
18 international copyright exhaustion principles, and they
19 codified that disagreement, to each his own, in the
20 TRIPS agreement.

21 JUSTICE GINSBURG: Well, let's take, for
22 example, the European Union, the position in -- in those
23 countries. Suppose we -- we just transformed --
24 transferred this case to one of those countries, the
25 exact same case; and my understanding is that they would

1 follow the national exhaustion.

2 MR. ROSENKRANZ: No, Your Honor, not to
3 quibble; they don't follow national exhaustion. They
4 follow regional exhaustion. So --

5 JUSTICE GINSBURG: Yes, but not -- not
6 exhaust -- you sell a copy in -- in Thailand; then it's
7 home free all over the world.

8 MR. ROSENKRANZ: Agreed, Your Honor, but it
9 is regional, it's not national. And -- and the point
10 here is we've got to of course read what Congress wrote.
11 What Congress wrote was "lawfully made under this
12 title," not "lawfully made in the United States," or not
13 "lawfully made under this title and made in the United
14 States." When Congress wants to say that, Congress says
15 that very explicitly.

16 JUSTICE SCALIA: Do you mean by "lawfully
17 made under this title," simply lawfully made in a manner
18 that does not violate United States copyright law?

19 MR. ROSENKRANZ: No, Your Honor. Just, I --
20 I would say "lawfully made under this title" means
21 lawfully made in a manner that does not violate the
22 standards articulated.

23 JUSTICE SCALIA: The standards, okay. So --
24 so it could be lawfully made in England, let's say; in a
25 country that has compulsory licensing, it could be

1 lawfully made there, but it would not be lawfully made
2 under our -- under our copyright law, because we don't
3 have that.

4 MR. ROSENKRANZ: Yes, Your Honor. Let me
5 give a -- an example that actually is consistent with
6 what --

7 JUSTICE SCALIA: So -- so at least they are
8 correct in contending that what you are arguing for is
9 -- is not lawfully made under -- lawfully made if the
10 United States copyright law had applied where it was
11 made; is that what you are saying?

12 MR. ROSENKRANZ: No, Your Honor. And the
13 reason is --

14 JUSTICE SCALIA: No?

15 MR. ROSENKRANZ: -- that that statute that
16 you just described would only do a third of the job of
17 the first-sale doctrine. Everyone agrees the first-sale
18 doctrine applies at a minimum to products made in the
19 United States. And if you use that counterfactual, if
20 U.S. law had applied, it would indicate that it, the
21 first-sale doctrine, does not apply in situations where
22 it was made in the United States. So the
23 counterfactual --

24 JUSTICE SCALIA: I don't -- I don't follow
25 that.

1 MR. ROSENKRANZ: So the first-sale doctrine
2 applies to goods made in the United States --

3 JUSTICE SCALIA: Right.

4 MR. ROSENKRANZ: -- and to goods made
5 outside of the United States, is our argument.

6 JUSTICE SCALIA: Okay.

7 MR. ROSENKRANZ: If it applies in the United
8 States, if we're talking about goods made in the United
9 States, the counterfactual "if this title had applied"
10 would not work, because this title does apply to the
11 goods made in the United States, and that's the core of
12 the first-sale doctrine.

13 JUSTICE KAGAN: So, Mr. Rosenkranz, is
14 what -- is your theory of this statute essentially that
15 this language means non-piratical copies as that is
16 defined by U.S. copyright law?

17 MR. ROSENKRANZ: Yes, Your Honor, if I may
18 just change one word, because "piratical" is a
19 mischievous word. Back in the day when the -- when the
20 1976 statute was passed, "piratical" meant unlawful
21 under the laws of other countries.

22 JUSTICE KAGAN: No.

23 MR. ROSENKRANZ: Yes. So --

24 JUSTICE KAGAN: I said as defined by U.S.
25 copyright law.

1 MR. ROSENKRANZ: Absolutely. And -- and the
2 key --

3 JUSTICE KAGAN: So that's, that's what the
4 statute means. It's -- the statute in your view is
5 setting up a distinction between piratical, pirated,
6 whatever the term is -- copies --

7 MR. ROSENKRANZ: Counterfeit.

8 JUSTICE KAGAN: -- and other copies, and
9 saying that that distinction should be measured by U.S.
10 copyright law?

11 MR. ROSENKRANZ: That is right. And Your
12 Honor, the reason was -- what was driving copyright
13 owners crazy was this notion that there were lawless
14 states out there that had no significant copyright
15 protection. And we were applying their standards to
16 products that were infiltrating the U.S. market. And
17 one of the most important things to underscore here,
18 which I think got lost in the Costco argument, is that
19 the space -- that 602 does an enormous amount of work
20 even with 109, the first-sale doctrine, carved out of
21 it.

22 Copyright owners wanted three things out of
23 the 1976 Act with respect to importation, and they got
24 two and a half of them. The first was what we've just
25 been talking about, Your Honor. It was driving them

1 crazy that there were lawless states out there; they
2 gave the example of Russia, which -- where an agency
3 approved the making and distribution within Russia of
4 classic English language works. They got imported to
5 the U.S. and they were competing with U.S. works, U.S.
6 copies within our domestic market. And they got their
7 wish to shut that down, to use U.S. law as the standard
8 for those works.

9 Secondly, they got coverage for copies that
10 were lawfully made, but stolen. And this was the one
11 ask that the film industry had. We see it in the
12 colloquies. They rented films abroad. The films --
13 that was their business model. The films would get
14 stolen; and the U.S. market would be awash with stolen
15 films. And so they wanted to shut down, with the
16 importation provision, those stolen goods coming into
17 the U.S. market.

18 And the third thing that they wanted is --
19 is what's been dominating this debate. But it's only
20 the third thing, and that was help dividing geographic
21 markets, so that they could go after the rogue
22 distributors, yes, but also go after the downstream
23 sales. They got half of that. They got a cause of
24 action against the rogue distributors. They did not get
25 a cause of action that went downstream.

1 JUSTICE SOTOMAYOR: Mr. Rosenkranz, can I
2 ask you, just -- it is a practical question, but I think
3 it has theoretical impact. A manufacturer can choose to
4 contract or a copyright holder choose to contract with
5 someone here to manufacture their goods. They could
6 contract with someone abroad, anywhere in the world,
7 directly. They can choose to license their trademark
8 and permit a distributor abroad to manufacture under
9 their U.S. copyright; or they can permit the licensee to
10 register the copyright abroad and distribute. In your
11 definition of "lawfully made under this title," does
12 "lawfully made under this title" apply to all of those
13 situations, i.e. --

14 MR. ROSENKRANZ: Yes.

15 JUSTICE SOTOMAYOR: -- I think clearly to
16 the manufacturer who manufactures abroad --

17 MR. ROSENKRANZ: Yes.

18 JUSTICE SOTOMAYOR: -- clearly to the
19 manufacturer who licensed a distributor to do it for it.
20 But does it also apply to the -- to the copyright owner
21 who basically gives the copyright to a foreign
22 distributor and lets the foreign distributor -- register
23 it abroad?

24 MR. ROSENKRANZ: Yes, Your Honor. The only
25 question under our definition is, was the making lawful,

1 which is to say, was it authorized, whether it's by
2 transfer of licensing or by transfer of copyright or in
3 any other way? Is it lawful as measured by U.S.
4 standards? And -- and that --

5 JUSTICE SOTOMAYOR: That is -- that is
6 broader than I thought. And I'm not quite sure why you
7 don't mean if this title applied. Because if the --

8 MR. ROSENKRANZ: If --

9 JUSTICE SOTOMAYOR: -- the manufacturer who
10 is manufacturing under the English copyright, because
11 the distributor has an English copyright, is not
12 manufacturing under the U.S. copyright, they are
13 manufacturing under the English copyright.

14 MR. ROSENKRANZ: Right. And, Your Honor,
15 the reason that the language works the way we've
16 described is because we are not focusing on whether the
17 making was under this title; we're focusing on whether
18 it was lawful under this title. Does this -- would this
19 title, when you apply it to wherever it happens to be,
20 whether in the United States or abroad, would this title
21 say that this is authorized?

22 Now, let me just circle back again. The
23 reason if this title had been applicable doesn't work is
24 because there are enormous numbers of situations,
25 probably three-quarters of them, that the First Sale

1 Doctrine applies to where this title does apply.

2 And so trying to say where -- you know, if
3 this title had applied would work for foreign goods
4 coming in, but not for U.S. goods, which is the core of
5 the First Sale Doctrine.

6 JUSTICE BREYER: But you don't have to
7 say -- you can say both, either it was manufactured
8 directly and received an American copyright and
9 satisfied all the conditions, or, if that wasn't the
10 case, it was manufactured in a way that satisfied the
11 conditions of the American statute, even though, for
12 technical reasons, it didn't apply.

13 MR. ROSENKRANZ: Yes, Your Honor. And, in
14 fact, (a)(2) --

15 JUSTICE BREYER: That's what your argument
16 is, I take it.

17 MR. ROSENKRANZ: Yes. In 2008 --

18 JUSTICE BREYER: So we are off on a kind of
19 curly cue here.

20 MR. ROSENKRANZ: Yes, Your Honor. But -- so
21 what Congress did was to find a much simpler, more
22 efficient way to say all of that.

23 In 2008, it figured that out and put --

24 JUSTICE BREYER: I took it that the reason
25 they wrote -- or changed the statute was just because

1 they were worried about bailees or lessees or somebody
2 under the old statutes not satisfying the first -- they
3 were worried about that -- somebody -- a printer
4 lawfully obtains a book, and he shouldn't have advantage
5 of the First Sale Doctrine.

6 MR. ROSENKRANZ: Well, Your --

7 JUSTICE BREYER: He's in the middle of
8 printing it. And therefore you have to change the
9 language. So they changed the language to lawfully made
10 under this title.

11 MR. ROSENKRANZ: Correct.

12 JUSTICE BREYER: Am I right; or, if I am
13 wrong, why did they change it?

14 MR. ROSENKRANZ: Your Honor, that is exactly
15 right. And just not to diminish it --

16 JUSTICE GINSBURG: Did they give all
17 rights -- wasn't there also the question of allowing
18 manufacturers to segment markets so we'd have the
19 copyright by abroad, governed by foreign law, copyright
20 in the United States governed by U.S. law? Wasn't
21 segmentation of the market allowing people to do just
22 what these people are doing?

23 MR. ROSENKRANZ: So, Justice Ginsburg, my
24 answer to Justice Breyer was about why the language in
25 109 was changed, that is, from obtained possession to

1 lawfully made.

2 And that was -- what Justice Breyer pointed
3 out was exactly why, because -- and not to minimize
4 bailees, bailees was the movie industry problem.
5 Bailees was stealing things from the manufacturers'
6 loading docks or from shippers. But, yes, Your Honor,
7 there was also a segment of the publishing industry that
8 wanted that third thing.

9 JUSTICE BREYER: I couldn't find a word. I
10 could not find a word of that in the legislative
11 history. Irwin Karp, who was the strongest
12 representative for the publishers, said you couldn't do
13 that ten years earlier.

14 So is there --

15 MR. ROSENKRANZ: No.

16 JUSTICE BREYER: No, but you just said yes
17 in answer to Justice Ginsburg's question. So she'll
18 find exactly what there is there, so I would like to
19 know what it is.

20 MR. ROSENKRANZ: Your Honor, I -- I was
21 answering yes to was this a motivation of the
22 publishers. And if I misunderstood the question, Your
23 Honor --

24 JUSTICE KAGAN: But a motivation for 109, or
25 a motivation for 602?

1 MR. ROSENKRANZ: A motivation for 602.

2 When the conversation turned to 109,
3 Your Honor, not a word was uttered about dividing
4 distribution or divided markets. It was all about this
5 problem --

6 JUSTICE KAGAN: So on 602, you said that one
7 of the things that they wanted was the segmentation of
8 markets. They got half of it. They got the rogue
9 distributors' half.

10 And I guess Mr. Olson makes the point, and
11 it seems a good one, it's like that's a crazy half to
12 have gotten. That's the kind that they don't need
13 because they have a contractual remedy about -- against
14 the distributors.

15 And then they don't get people like,
16 frankly, your client, who are rogue something else,
17 with no contractual privity. And what sense does that
18 make?

19 MR. ROSENKRANZ: Well, it makes perfect
20 sense, Your Honor. Obviously, you know, the industry,
21 at least back in 1976, did not get everything that they
22 wanted. What they got was a much more powerful weapon
23 than a contract.

24 I mean, a copyright weapon gives you
25 injunctive relief, gives you multiples of damages which

1 you don't get out of a contract remedy.

2 But to Justice Breyer's point, because I
3 think it's an important one, when you go to the
4 history -- and I think you are right, Your Honor, that
5 there is exactly one spot in the drafting history where
6 the relationship between 602 and 109 was discussed. It
7 was that conversation between Clark and Goldman, who was
8 the general counsel of the copyright office.

9 It's on pages 11 to 12 of our reply brief.
10 It's recited in extensive detail in the amicus brief
11 that Costco submitted. And here's what happened. They
12 got their importation provision. And Karp says, now,
13 wait a minute, I don't get it. You have got this
14 importation provision, and you've got this First Sale
15 Doctrine. They are at war with each other. Which one
16 wins?

17 They seem to be agreeing that first sale
18 wins, but they realize that there is this problem. And
19 what they do, the general counsel of the copyright
20 office says, we obviously haven't thought this through.
21 We need to do more work on this, says the librarian of
22 Congress. And the next thing that happens, you see it
23 in a red line on page 13 of our reply brief, is that for
24 the first time in the drafting history, the two are
25 reconciled by making 602 subordinate to 109, in exactly

1 the way that Quality King found it to be.

2 So the copyright owners got half the loaf.

3 It may not have been the half that was more important to
4 them, but they got a lot more from the extension of the
5 -- the importation provision.

6 JUSTICE KAGAN: Mr. Rosenkranz, there is
7 that passage in Quality King, which is, I think it's
8 fair to say, unfortunate to your position. Is your
9 basic view of that passage that it was simply
10 ill-considered dicta that we should ignore?

11 MR. ROSENKRANZ: To put it bluntly, yes.
12 That's my ultimate position. But I do think it can be
13 reconciled with our position.

14 Let's start with the question presented in
15 Quality King is exactly the question that is presented
16 here, and the Court answered it yes, that is, do
17 imports -- is 109 applicable to imports.

18 The whole driving logic of Quality King is
19 about 109 trumping 602. And it's only in that part IV,
20 where the court is rebutting various attacks on its
21 position, that it gets to that dictum, and that dictum
22 is in the third tier explanation to one of five
23 rebuttals.

24 I believe it can be reconciled, certainly in
25 result. What you had there was the foreign distributor

1 who had only British rights importing directly into the
2 United States. There was never a first sale.

3 JUSTICE KAGAN: Well, in result, but not in
4 reasoning. The passage specifically says this was
5 presumably not to be lawfully made under this title.

6 MR. ROSENKRANZ: And I have an -- I agree
7 with you, Your Honor. I have an explanation. I offer
8 it tentatively. I'm not sure whether it's right or not,
9 either as to what the Court intended or under the
10 statute.

11 My hunch is the Court was thinking about a
12 scenario where the British publisher only needs 10,000
13 copies to cover Britain; but, instead, what it does is
14 to print 100,000 copies. Everyone would know that that
15 is not authorized, it's not lawfully made under this
16 title, because the intent is to send it over to the
17 United States. So it's not lawfully made at that
18 moment.

19 Let me also just mention an important
20 undergirding to our position, which is that our position
21 is the only one that does not make a complete hash out
22 of every uses of the same phrase -- every use of the
23 same phrase in the rest of the statute. Wiley's reading
24 makes almost all of them nonsensical.

25 So let me just give you an example. Section

1 110, the classroom provision. Wiley acknowledges this
2 is the result, but doesn't explain why Congress would
3 ever have wanted it. The result is that a teacher can
4 go and buy a Beethoven record and play it to her class
5 if it was made in the United States. But if she flips
6 one past it to the next Beethoven record that happens to
7 have been made in Asia, she can't play that for her
8 class.

9 Or section 109(c), the public display, the
10 Buffalo Cafe owner is allowed to purchase something in
11 the United States and put it up on her walls, you know,
12 say, a picture of Niagara Falls. That is permissible,
13 if it was made in the United States. But off the same
14 retail rack, she flips one past; if it was made in Asia,
15 it's not permissible.

16 Nor does Wiley explain why Congress would
17 adopt an exception to the First Sale Doctrine that is
18 not at all about sales, that is only about where copies
19 were made.

20 So a U.S. manufacturer who wants to sell
21 into the U.S. market has this incentive to go and send
22 jobs overseas. It's an irresistible incentive if the
23 law is -- if this Court says the law is what Wiley says.

24 JUSTICE GINSBURG: Has that ever happened?
25 I mean, the Ninth Circuit cases have been around for

1 some time. Has any manufacturer ever moved abroad?

2 MR. ROSENKRANZ: Your Honor, I'm sure it
3 has. They haven't announced it. Now, let me just be
4 clear. The Ninth Circuit came out with its opinion,
5 this Court has intervened twice, so the law has never
6 been settled in Wiley's favor. The courts were split.

7 The moment that a manufacturer learns that
8 this Court says you get what we've called the Holy Grail
9 of manufacturing, endless eternal downstream control
10 over sales and rentals, you can ruin secondary markets
11 that are competing with you, the moment that happens,
12 that will be yet another reason for manufacturers
13 silently to decide that they're headed -- that they're
14 sending their manufacturing overseas.

15 JUSTICE SCALIA: Of -- of those -- of those
16 courts that did hold the way your -- your opponent
17 would -- would have it, am I correct that only one of
18 them adopted the absolutist rule?

19 MR. ROSENKRANZ: Well, Your Honor, there are
20 only three courts of appeals that have weighed in, but
21 yes, the Second Circuit is the only one that has adopted
22 the absolutist rule, and that's yet another problem with
23 Wiley's position. Wiley urges its position as a matter
24 of statutory interpretation, but is refusing to stand by
25 it. The moment it gets past the language of the

1 statute, every argument it makes is an argument that is
2 about tempering what -- you know, like a sky hook coming
3 down from on high, tempering its interpretation in a
4 manner that is completely inconsistent with the
5 statutory language.

6 JUSTICE KENNEDY: The government argues in
7 effect for -- what we might call it -- a common law
8 adaptation of Bobbs-Merrill.

9 MR. ROSENKRANZ: Yes, Your Honor, which --
10 which is even -- creates even more mischief. The
11 government's position, as I understand it, is 109
12 doesn't have to do any work. In service of giving more
13 berth, you know, greater magnitude to 602, we're going
14 to make 109 completely superfluous because Bobbs-Merrill
15 does all of the work.

16 Now, 109 Congress said -- it put into the
17 statute, it said it on every recodification to codify
18 Bobbs-Merrill, and the government is now making 109
19 completely irrelevant, but picking and choosing,
20 deciding that it wants the limitation on us from 109,
21 but borrowing from Bobbs-Merrill some reservoir of law
22 that modifies the first-sale doctrine.

23 If there are no further questions, I would
24 like --

25 JUSTICE KAGAN: Mr. Rosenkranz, can I take

1 you back to Justice Ginsburg's opening question? Just
2 as a matter of copyright theory, I had always understood
3 copyright to -- a copyright holder has a kind of a
4 bundle of rights. It's not one right that applies
5 everywhere in the world. It's you have your U.S. rights
6 and you have your Chinese rights, you have your rights
7 under each jurisdiction's law.

8 And your position is essentially to say that
9 when I sell my Chinese rights to somebody, I'm also
10 selling my U.S. rights to that same person, because the
11 person who has the Chinese rights can just turn around
12 and import the goods. I mean, that's the nature of your
13 position, isn't it, that your U.S. rights are always
14 attached when you sell more -- your rights under the
15 jurisdiction of another country?

16 MR. ROSENKRANZ: Well -- so first, Your
17 Honor, back in 1976, this notion of geographic division
18 was very, very new, so it's not at all clear what
19 Congress was thinking with that -- with respect to that.
20 But secondly, no, we're not -- we're not saying that
21 when the owner sells his Chinese -- its Chinese rights
22 to the Chinese company, it is selling all rights.
23 Certainly, the Chinese company cannot sell everywhere,
24 but after that first sale, all of the manufacturer's
25 rights are cut off.

1 If I may reserve the rest of my time for
2 rebuttal.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 MR. ROSENKRANZ: Thank you, Your Honors.

5 CHIEF JUSTICE ROBERTS: Mr. Olson.

6 ORAL ARGUMENT OF THEODORE B. OLSON

7 ON BEHALF OF THE RESPONDENT

8 MR. OLSON: Mr. Chief Justice, and may it
9 please the Court:

10 Petitioner's commercial enterprise is
11 precisely what Section 602(a)(1) was enacted to address,
12 an international gray market in copyrighted works. This
13 Court unanimously recognized in the Quality King case
14 that 602(a)(1) encompasses copies of books that were
15 lawfully made not under the United States' Copyright
16 Act, but under the law of some other country.

17 602(a) is broader than 6 -- 109(a), because
18 it encompasses copies not subject to the first-sale
19 doctrine, for example copies made under the law of
20 another country. These are the words of every member of
21 this Court in the Quality King case.

22 Now, referring to it as dicta misstates what
23 was going on, on the Quality King case. The argument
24 was that if you interpret 602(a) and 109(a) as allowing
25 a defense, a first-sale defense, you emasculate Section

1 602(a), and so the Court was explaining on page 147 and
2 148, I believe, why there were three reasons why 602(a)
3 would have viability. And one of those reasons had to
4 do with direct action against someone that was engaged
5 in pirating, and some of it had to do with bailees and
6 lessees. These are relatively small problems either
7 otherwise dealt with by contract law or otherwise dealt
8 with by the provisions of the statute.

9 But the third reason for the Court's
10 interpretation and its decision in that case was
11 precisely the case that we're talking about here.

12 JUSTICE ALITO: Well, it may be important
13 dictum, but do you really want to argue it wasn't
14 dictum?

15 MR. OLSON: I do.

16 JUSTICE ALITO: It was the holding of the
17 case?

18 MR. OLSON: It was the holding of the case
19 in the sense that it was necessary, the Court felt. And
20 we could -- you know, I don't -- I don't feel I want to
21 spend a lot of time arguing what the word "dicta" means,
22 but it was a necessary ingredient to what the Court felt
23 was an explanation for why it was deciding the case that
24 it was deciding.

25 JUSTICE BREYER: You don't need that.

1 JUSTICE KAGAN: It wasn't necessary, was it?

2 JUSTICE BREYER: Your -- 602(a) has plenty
3 of meaning. I mean, an American copyright holder
4 licenses a British company to publish the work under
5 British copyright law. 602(a) says he can't import the
6 books into the United States, period.

7 MR. OLSON: That's --

8 JUSTICE BREYER: Now, the only -- so there's
9 plenty of meaning there. The question is what happens
10 when he sells it to his bookstore and you or I go in and
11 buy it and we want to give a copy to our wife when we
12 get back to the United States. The question is, did --
13 is that unlawful?

14 MR. OLSON: Well, we're -- well, if we're
15 reading the provisions of the statute, is that copy --
16 now, there are exceptions for the books that are brought
17 in --

18 JUSTICE BREYER: No, no exception I take it
19 once I bring back five copies and I give one to my son.

20 MR. OLSON: Well, there are fair use
21 exceptions and there's --

22 JUSTICE BREYER: Oh, fair use.

23 MR. OLSON: -- other exceptions and -- and
24 there are exceptions for the one that you bring back for
25 your wife and your --

1 JUSTICE SOTOMAYOR: I'm sorry. Is your
2 reading now that when the library imports in a book or a
3 film or whatever it's importing in, it goes to the
4 customs agent and it says to the customs agent: I don't
5 have the express authorization of the copyright owner,
6 but I'm a library, so I can import this book in?

7 MR. OLSON: It says --

8 JUSTICE SOTOMAYOR: I'm -- I'm a person
9 who's bought the book in England and I'm bringing it to
10 my wife? What provision gives me the right to do that?

11 MR. OLSON: The provisions in the statute
12 that deal with the libraries talk about bringing --
13 importing books for lending --

14 JUSTICE SOTOMAYOR: So deal with the wife.

15 MR. OLSON: -- for lending purposes.

16 JUSTICE SOTOMAYOR: How does the wife get
17 her book?

18 MR. OLSON: What I'm -- what I'm --

19 JUSTICE SOTOMAYOR: No, no. Is there --
20 what provision gives the wife a right under your
21 reading?

22 MR. OLSON: With respect to the copy brought
23 in, in the suitcase for -- to give to a -- a family
24 member or to turn over to someone else?

25 JUSTICE SOTOMAYOR: No, to keep for

1 yourself. As far as I understand --

2 MR. OLSON: Oh, to keep for yourself --

3 JUSTICE SOTOMAYOR: -- your reading, I
4 brought it abroad, I can't import it in.

5 MR. OLSON: What -- I believe that that is
6 covered by the various provisions of the copyright
7 statute. And the question is, is it covered by section
8 2 -- 602(a)(1)? Yes, it's an import of an acquired
9 copy. Do you have a defense under the first-sale
10 doctrine? And I go to the exact explicit language of
11 the statute. There may be exceptions under other
12 provisions of the copyright law, but the first-sale
13 doctrine, 109(a) specifically says "lawfully made under
14 this title."

15 JUSTICE BREYER: The reason -- what I was
16 trying to bring up and I didn't do it artfully --

17 MR. OLSON: Well, and this --

18 JUSTICE BREYER: -- is, imagine Toyota, all
19 right? Millions sold in the United States. They have
20 copyrighted sound systems. They have copyrighted GPS
21 systems. When people buy them in America, they think
22 they're going to be able to resell them.

23 Now, under your reading -- now, this is one
24 of their horrors, I gather, and I want to know your
25 answer to it. Under their reading, the millions of

1 Americans who buy Toyotas could not resell them without
2 getting the permission of the copyright holder of every
3 item in that car which is copyrighted?

4 MR. OLSON: There may be --

5 JUSTICE BREYER: Is that right?

6 MR. OLSON: There may be just --

7 JUSTICE BREYER: Am I right or am I wrong?

8 Am I off base or am I wrong -- am I right?

9 MR. OLSON: There are other defenses, but
10 that is not this case. This case is not --

11 JUSTICE BREYER: Well, how do you
12 distinguish? How do you distinguish?

13 MR. OLSON: The government -- the government
14 would argue for a broader interpretation under what was
15 made under this statute, whether that would include the
16 importation or the distribution in commerce. That's an
17 argument that the government makes, but it's not
18 necessary to decide this case.

19 JUSTICE BREYER: Now, explain to me, because
20 they're horribles if I summarize them, millions and
21 millions of dollars' worth of items with copyrighted
22 indications of some kind in them that we import every
23 year; libraries with three hundred million books bought
24 from foreign publishers that they might sell, resale, or
25 use; museums that buy Picassos that now, under our last

1 case, receive American protection as soon as that
2 Picasso comes to the United States, and they can't
3 display it without getting permission from the five
4 heirs who are disputing ownership of the Picasso
5 copyrights.

6 Those are some of the horribles that they
7 sketch. And if I am looking for the bear in the mouse
8 hole, I look at those horribles, and there I see that
9 bear.

10 So I'm asking you to spend some time telling
11 me why I'm wrong.

12 MR. OLSON: Well, I'm -- first of all, I
13 would say that when we talk about all the horribles that
14 might apply in cases other than this -- museums, used
15 Toyotas, books and luggage, and that sort of thing --
16 we're not talking about this case. And what we are
17 talking about is the language used by the statute that
18 does apply to this case. And that --

19 JUSTICE BREYER: But we need --

20 JUSTICE SOTOMAYOR: Don't those horribles --

21 JUSTICE BREYER: -- interpretation --

22 JUSTICE KENNEDY: But you have to look at
23 those hypotheticals in order to decide this case.

24 MR. OLSON: Well, and that's --

25 JUSTICE KENNEDY: You're aware of the fact

1 that if we write an opinion with the -- with the rule
2 that you propose, that we should, as a matter of common
3 sense, ask about the consequences of that rule. And
4 that's what we are asking.

5 MR. OLSON: And -- exactly, Justice Kennedy.
6 And that's what you were doing in the -- in the Quality
7 King, when we were -- we were discussing with
8 Justice Alito whether this is dicta or not. The Court
9 was specifically saying what it would apply to, and
10 it -- what -- what the Court was talking about in that
11 case was books made not pursuant to title, but pursuant
12 to some other country's copyright law. This copyright
13 law provisions --

14 JUSTICE SOTOMAYOR: Why is it that a U.S.
15 copyright owner who contracts in England to make
16 books -- he doesn't have an English copyright, he just
17 simply chooses that place to manufacture as opposed to
18 the U.S. -- why is he making that copy under English law
19 and not under his rights of U.S. copyright?

20 MR. OLSON: Well, if he is doing -- if he is
21 manufacturing the book in England, he's not -- because
22 the copyright law does not have extraterritorial
23 application, he is not making those copies under this
24 title. And this Court --

25 JUSTICE SOTOMAYOR: But he's selling it

1 no -- no differently than Quality King was -- or the
2 Quality King --

3 MR. OLSON: But the problem is -- the
4 statutes may not be perfect with respect to this, and
5 there may be horrors that occur under one set of
6 interpretations of the statute, and the other
7 interpretation of the statute is to interpret it as --
8 as the petitioner --

9 JUSTICE SOTOMAYOR: Mr. Olson, we know from
10 the Karp exchange that the response was, this is
11 something that we have to study with care, in 1976.

12 The parade of horrors is now causing the
13 Solicitor General and at least one, if not two, courts
14 of appeals to write exceptions into the language to take
15 care of what they perceive as horrors.

16 Isn't it incumbent upon us to give the
17 statute what is plainly a more rational plain meaning
18 than to try to give it a meaning and then fix it because
19 we understand that the meaning doesn't make sense?

20 MR. OLSON: I -- there -- there is a body of
21 the government of the United States that is entitled and
22 capable of fixing this. These parade of horrors have
23 been -- people have been arguing about these for years.
24 For 30 years, the statute has been interpreted the way
25 that we are suggesting that it should be under this

1 title, which this Court earlier this year, in another
2 case, in the Novo Nordisk case, specifically said, under
3 this title means pursuant to the provisions of this
4 title.

5 This Court said that before in -- in the
6 Ardestani case. The under this title occurs not only in
7 section 109(a), but under this title occurs in 602(a)
8 itself; and then under this section appears twice in
9 section 602(a) --

10 JUSTICE GINSBURG: Mr. Rosenkranz told us
11 that under this title means different things in other
12 sections, and he gave a number of examples.

13 MR. OLSON: Yes, and -- and in each case --
14 first of all, if the interpretation that my opponent is
15 arguing for was the law, that -- those are the words
16 that are in 602(b) and 602(a)(2). So Congress could
17 have used those words that our opponents are arguing
18 for, and did use those words, one of which was written
19 on the same time in the same -- passed in the same time,
20 in 1976, that 602(a)(1) was.

21 JUSTICE KAGAN: Well, Mr. Olson, can I just
22 take you to --

23 MR. OLSON: With respect to those other --

24 JUSTICE KAGAN: Please.

25 MR. OLSON: With respect to those other

1 provisions, Justice Ginsburg, the -- the government
2 specifically goes over each one of those, but each one
3 of those, if you interpret the statute as under this
4 title as pursuant to this title, each one of those
5 provisions makes sense in the context in which that term
6 is used there.

7 And -- and there is only one real way to
8 interpret under this title in the provisions in 109(a)
9 in -- in conjunction with 602(a)(1), and that is the way
10 the Court decided it in the Quality King case,
11 specifically looking at this question.

12 Now the facts were slightly different in the
13 sense that that was a round trip; this isn't a round
14 trip.

15 JUSTICE KAGAN: Can I take you back to the
16 words here, lawfully made under this title, which you
17 say clearly means what you say it means.

18 So, I find this language a little bit
19 perplexing, and I can kind of see it both ways. So what
20 you say is made under this title, that must mean made in
21 the United States, and lawfully, just as this little
22 word that's -- that modifies that basic phrase, made
23 under this title, which means made in the United States.

24 But what Mr. Rosenkranz essentially says --
25 he doesn't say it in these words, but he says, "The

1 focus of this provision is on 'lawfully made'." That is
2 what the focus is on. It's on lawfully made as opposed
3 to unlawfully made.

4 Now, when we just say lawfully made, you
5 know, we need something to measure, well, how do we know
6 whether it's lawfully made? Well, you look to the rules
7 in the copyright law.

8 So if you just -- if you focus more on the
9 lawfully word, lawfully made, and then under this title
10 doesn't mean made in the United States, it means
11 lawfully made under the rules of this title.

12 MR. OLSON: Lawfully made under this title
13 is lawfully made under the copyright laws of the United
14 States. It can't say, lawfully made in the United
15 States, because then something might --

16 JUSTICE KAGAN: Well, lawfully made, under
17 the rules of the United States, regardless where the
18 thing was manufactured, is what I'm saying. That's the
19 way -- it just seems to me as though --

20 MR. OLSON: It --

21 JUSTICE KAGAN: -- you are saying made must
22 be manufactured. But lawfully made is a lawfully made
23 copy. How do we know if it's lawfully made? We look to
24 this title.

25 MR. OLSON: I think under this title means

1 that it was made pursuant to the provisions of the
2 copyright law. I can't imagine the difficulties that
3 would ensue with litigation over whether or not
4 something made in another country, made under another
5 country's different laws -- and they vary enormously
6 throughout the world -- whether that was somehow
7 compatible with the laws of the United States.

8 JUSTICE BREYER: But what about litigation
9 in this respect? I want to bring you back to the
10 horribles.

11 MR. OLSON: Because the --

12 JUSTICE BREYER: The main point is that
13 horribles haven't occurred. Right?

14 MR. OLSON: The main -- main --

15 JUSTICE BREYER: Sometimes horribles don't
16 occur because no one can believe it.

17 Now, for example, I believe there is going
18 to be a storm, but it hasn't started yet.

19 So I would like to know -- I would like to
20 know, if you were the lawyer for the Toyota distributor,
21 and if you were the lawyer for the Metropolitan Museum
22 of Art, or you are the lawyer for a university library,
23 and your client comes to you and says, my God, I just
24 read the Supreme Court opinion. It says that we can't
25 start selling these old books or -- or lending them or

1 putting them in our word processor or reselling the
2 Toyota without the -- without looking -- displaying the
3 Picasso without the permission of the copyright holder,
4 who may or may not be Toyota itself.

5 What, as their lawyer, do you tell them? Do
6 you tell them, hey, no problem; or, do you tell them,
7 you might become a law violator; or, do you tell them, I
8 better litigate this? What do you tell them?

9 MR. OLSON: Well, each one of those
10 situations that you posit, Justice Breyer, has a whole
11 panoply of set of facts.

12 With respect to the museums, with respect to
13 the person bringing books into the United States, there
14 are other defenses, including fair use. There are other
15 defenses under the copyright law. But -- and one of the
16 things is that, to a certain extent, if you're going to
17 use the product created by someone else in a way that's
18 contemplated by the copyright laws, maybe it's required
19 that you actually comply with the copyright laws by
20 going to the owner of the copyright and saying, look,
21 here's what I propose to do, can I have a license to do
22 this? It's a nonprofit. It's a museum. And I'm --

23 CHIEF JUSTICE ROBERTS: Counsel, you said
24 there are other defenses, including fair use. In -- in
25 the catalogue that Justice Breyer recited, are all those

1 fair uses?

2 MR. OLSON: No. And some of -- but -- but
3 they're --

4 CHIEF JUSTICE ROBERTS: Well, which ones
5 are -- I mean, I'm -- it seems unlikely to me that, if
6 your position is right, that a court would say, it's a
7 fair use to resell the Toyota, it's a fair use to
8 display the Picasso.

9 MR. OLSON: It may be a fair use. It may be
10 an implied license, for example, with respect to
11 copyrighted items or trademarked items that appear in a
12 product that was licensed abroad. The government has
13 offered another alternative interpretation of the word
14 "made," as putting it in the flow of commerce. That
15 might deal with some of these situations.

16 But the point I guess I am making,
17 Mr. Chief Justice, is that Congress was clearly
18 intending to talk about the vast gray market problem.
19 This provision --

20 JUSTICE KAGAN: Well, intending where? I
21 mean, I -- you spend a lot of time talking about the
22 legislative history and the purposes behind 602. But
23 the language that we're supposed to be interpreting is
24 the language in section 109. And the language in
25 section 109, as far as I can see, there's really nothing

1 to support your argument that that language was intended
2 to address this gray market problem.

3 Isn't that correct?

4 MR. OLSON: Well, no. I think that section
5 109 and 602(a) were adopted in the same statute. They
6 were put in the draft of the statute at the same time,
7 in 1964.

8 JUSTICE KAGAN: But you know, section 109 is
9 just a rewording of a prior provision that you would
10 clearly lose under, where the prior wording had nothing
11 to do with where any product was manufactured. And what
12 you're suggesting is that we should read this change in
13 wording -- which actually, there's a real theory behind
14 what the change in wording meant that has nothing to do
15 with the place of manufacture, that we should read it as
16 incorporating a place of manufacture requirement,
17 because there was a separate debate going on in section
18 602 about that question.

19 MR. OLSON: But the -- but the two pro --
20 what I'm -- I guess what I'm trying to explain is that
21 the two were enacted at the same time. They were out
22 there and available to the public for 12 years before
23 they were finally adopted. These parade of horrors
24 could have been addressed by Congress in a different way
25 at the time, and the interpretation -- this is a -- 109

1 is a defense -- is offered as a defense to section -- to
2 section 602(a)(1).

3 So what does it mean? What provide -- what
4 is the defense that's provided? And you then have to
5 interpret, "made under this" -- "lawfully made under
6 this title." What does that mean?

7 And you have done that in the Quality King
8 case. You explained in the Quality King unanimously
9 that it makes a difference because you are exhausting --
10 Congress intended to allow segmentation of the market.
11 It only makes sense to interpret it this way if you
12 allow segmentation of the market pursuant to these
13 provisions, because it is exhausting the copyright under
14 the laws of the United States once you make a sale of a
15 product produced in the United States subject to the
16 United States' copyright laws.

17 You are not exhausting your U.S. copyright
18 when you make something, or allow something to be made
19 abroad. You are not exhausting that copyright. You
20 have not done that yet. So the first sale is not
21 something that happens abroad that uses up the copyright
22 laws -- of the protection under the copyright laws of
23 the United States.

24 So it seems to me that this does make
25 perfect sense. And it makes -- there is not going to be

1 a perfect solution in every case. The Court has dealt
2 with that frequently with respect to copyright laws.
3 But if you interpret it as my opponent interprets it,
4 you are opening the door to commercial enterprises
5 precisely like this.

6 It's not necessary in this case to decide
7 every single permutation of a problem that someone
8 crosses a border with a product, but this section 602
9 specifically contemplates products that are acquired
10 abroad and then brought back into the United States.
11 Here, we have a commercial enterprise doing exactly what
12 is contemplated by the people who were talking about
13 602(a) and section 109 when the two were adopted at the
14 same time.

15 JUSTICE GINSBURG: Mr. Olson, do you have an
16 answer to the outsourcing problem and the charges that
17 if you read the statute as you are urging, then you are
18 inviting the outsourcing of manufacturing jobs?

19 MR. OLSON: There are several answers to
20 that. One, that's Congress's concern. And -- and there
21 is no evidence that that would really actually happen.
22 And Congress was concerned with creating a segmentation
23 of the market. But it's entirely speculative as to
24 whether or not people are going to start manufacturing
25 books or other items outside the United States.

1 Congress can address that if that should
2 become a problem, but it's not something that was
3 suggested as a part of what was taking place at that
4 time.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 Mr. Olson.

7 Mr. Stewart.

8 ORAL ARGUMENT OF MALCOLM L. STEWART,
9 FOR UNITED STATES, AS AMICUS CURIAE,
10 SUPPORTING THE RESPONDENT

11 MR. STEWART: Mr. Chief Justice, and may it
12 please the Court:

13 I would like to discuss -- begin by
14 discussing our Bobbs-Merrill argument, because it's a
15 part of our brief that's different from both the
16 parties' submissions, and I do think it's very important
17 to understanding the practical implications of the
18 Court's decision.

19 JUSTICE GINSBURG: Mr. Stewart, may I ask
20 you a preliminary question? In Quality King the
21 government took the position that the Petitioner is
22 taking here. What led the government to change its
23 mind? Was it just what has been called "dictum" in
24 Quality King, or is there another reason why the
25 government has switched sides?

1 MR. STEWART: I think there are two related
2 reasons, and one of them is the dictum, but I'll get to
3 that second.

4 I think in both cases, our overriding
5 objective was to offer a reading of section 109(a) that
6 would not supersede, or would not effectively negate the
7 importation prohibition in section 602(a)(1), because
8 from the Copyright Office's perspective, we agree with
9 Mr. Olson that the primary reason for the enactment of
10 602(a)(1) was to facilitate market segmentation. And
11 the argument we made in Quality King was you can
12 accomplish that; you can prevent section 109(a) --

13 JUSTICE SOTOMAYOR: Could you point to
14 something in the legislative history to support that?

15 MR. STEWART: I think the best thing I could
16 point to is a report of the Registrar of Copyrights that
17 was issued in 1965, in which the Copyright Office
18 identified as one of the circumstances that would be
19 covered by the importation ban, the situation in which,
20 quote, "the copyright owner had authorized the -- the
21 manufacture of copies in a foreign country for
22 distribution only in that country."

23 It didn't use the phrase "market
24 segmentation," but clearly, the point was the same. You
25 are authorizing copies to be made abroad for

1 distribution only in that place, not for redistribution
2 here.

3 And so --

4 JUSTICE KAGAN: So Mr. Stewart, if I
5 understand your argument, both here and in Quality King
6 you want the copyright holder to have some control over
7 importation, but at the same time you don't want the
8 copyright holder to have control over all downstream
9 sales.

10 MR. STEWART: That's correct.

11 JUSTICE KAGAN: And that's what your
12 Bobbs-Merrill argument is designed to do. It's designed
13 to prevent that.

14 MR. STEWART: That's correct.

15 JUSTICE KAGAN: Coming back to Justice
16 Ginsburg's question, do you think that truly the way to
17 do those two things, to give the copyright holder
18 control over importation, but not over downstream sales,
19 that our problem really is, do you think in your heart
20 of hearts that we got it wrong in Quality King?

21 MR. STEWART: Well, we lost that case 9-0,
22 and so I am not arguing too vociferously that the Court
23 should change its opinion. But yes, we think that we
24 still would adhere to our view that section 109(a)
25 should not be read as a limitation on section 602(a)(1).

1 If the Court had gone that path, it could read "lawfully
2 made under this title" to encompass both foreign-made
3 and domestic-made copies, without doing damage to the
4 copyright holder's ability to segment markets.

5 On the other hand --

6 JUSTICE SOTOMAYOR: So you get what you
7 wanted anyway? That's really the bottom line. We undo
8 Quality King, except that the price is that people have
9 to ship their manufacturing abroad.

10 MR. STEWART: Well, we're not urging the
11 Court to take that course, but yes, that would have been
12 one way to accomplish the same objective. And so --

13 JUSTICE KAGAN: So you are essentially
14 saying that the appropriate way to read this statute, to
15 make sense of all of its provisions, is to give the
16 copyright holder control over the importation, to give
17 Wiley the ability to go after this importer, Mr.
18 Kirtsaeng, but to find a way to stop it there?

19 MR. STEWART: I think that's correct, but I
20 think our Bobbs-Merrill argument does provide a very
21 principled way to stop it there without going back on
22 what the Court said in Quality King. That is,
23 Bobbs-Merrill was a 1908 case in which the publisher
24 sold books to retailers on the proviso that they not be
25 sold at retail for less than a specified amount. One of

1 the retailers violated that resale restriction and was
2 sued for copyright infringement.

3 And this Court in *Bobbs-Merrill* said --
4 parsed the statutory language, which at that time gave
5 the copyright owner the exclusive right to vend copies
6 of the work.

7 JUSTICE ALITO: But you're saying
8 *Bobbs-Merrill* means something beyond section 109, but
9 when -- the 1909 Copyright Act said that it was
10 codifying the holding in *Bobbs-Merrill*, and the 1976
11 statute, which is now before us, said it wasn't changing
12 the meaning of the earlier law. So I don't know how --
13 *Bobbs-Merrill* wasn't a constitutional decision, it was a
14 question of statutory interpretation.

15 So how does some sliver of *Bobbs-Merrill*
16 still survive all of this?

17 MR. STEWART: Maybe I can put it this way:
18 If I buy a piratical copy of a book, one that was
19 illegally made without the consent of the copyright
20 owner, and all I do is read it and put it on my shelf, I
21 can't rely on 109(a) because the copy was not lawfully
22 made under this title. But I still couldn't be held
23 liable for copyright infringement because there is no
24 exclusive right to read the book or to own it. I
25 wouldn't have been infringing any of the copyright

1 owner's rights.

2 And so in order to have a valid claim for
3 copyright infringement, the copyright holder would have
4 to show both that 109(a) was inapplicable, and that what
5 the defendant was doing was a violation, an infringement
6 of one of the exclusive rights.

7 And Mr. Rosenkranz seems to postulate a
8 situation in which a cagey manufacturer would locate its
9 facilities overseas, make the copies there, import them
10 into the United States, sell them in this country,
11 subject to conditions on resale.

12 And if the goods were resold in violation of
13 those restrictions, the copyright owner would sue for
14 infringement. And I think the first argument the
15 defendant would make is that is exactly the conduct that
16 the Court in *Bobbs-Merrill* said did not infringe the
17 exclusive right to vend.

18 Now -- namely the resale in violation of
19 restrictions on resale. How can you now say it's now an
20 infringement of the exclusive right to distribute? And
21 it would be a particularly difficult argument for the
22 copyright owner to make because what the House Report
23 said in 1909, it didn't say exactly that it was
24 codifying the holding of *Bobbs-Merrill*; it said that it
25 was amending the statute in other respects, and it

1 wanted to make clear that there was no intent to enlarge
2 the exclusive right to vend.

3 And so the Plaintiff, in Mr. Rosenkranz's
4 hypothetical, would in effect be arguing that by
5 codifying section 109(a), Congress had implicitly
6 expanded the scope of the implicit -- of the exclusive
7 right to vend or distribute, even though it said it was
8 doing the various opposite.

9 CHIEF JUSTICE ROBERTS: That's an awfully
10 difficult maze for somebody to -- to get through. You
11 have to start with the difficulty of the language here,
12 and then you have to proceed and put the Quality King
13 gloss over it; and, when you finally get to that point,
14 you say, well, now you've got to read Bobbs-Merrill and
15 figure out how the common law governs all that.

16 MR. STEWART: But I think that would be true
17 under anybody's reading. That is, once a court in a
18 case determined for whatever reason that section 109(a)
19 was inapplicable, it didn't provide a safe harbor, the
20 next step could never be simply to proceed to judgment
21 and say that there was infringement. The next step
22 would always have to be to look at what the defendant
23 had done --

24 CHIEF JUSTICE ROBERTS: Well, it's not that
25 complicated under the Petitioner's approach. It says

1 once you've you had a first sale, that's it.

2 MR. STEWART: The other point I would make
3 about the Petitioner's approach is that it -- it really
4 has no grounding in the statutory text. That is, the
5 Petitioner is arguing that if the publisher in Thailand,
6 if the manufacturer of the books had shipped them
7 directly into this country, that person could have been
8 sued for infringement for the importation and --

9 JUSTICE BREYER: Well, the word has
10 grounding. It is Coke upon Littleton, 1628, where it
11 says that if a man be possessed of a chattel and give or
12 sell his whole interest upon a condition, that condition
13 is no good. And Coke says, and that's how it should be.

14 And now that's picked up in Bobbs-Merrill;
15 it's picked up in Dr. Miles. It's been the law.

16 Now if, in fact, there are two ways of
17 interpreting the statute, and one is consistent with
18 that basic principle of commercial law, and the other
19 produces some of the complexities that you have just
20 mentioned, isn't it better to go with the common law and
21 simply reaffirm a principle that's been in the
22 commercial law almost forever?

23 MR. STEWART: I -- I give two answers for
24 that. And the first is that Coke was saying that, in
25 most circumstances at least, a sale is sufficient in

1 order to divest the owner of his prior right to control
2 distribution, but it doesn't say that a sale is
3 necessary.

4 And my point is that when Mr. Rosenkranz
5 says the hypothetical foreign publisher who makes copies
6 with authorization but ships it into the -- them into
7 the United States without could be held liable for
8 infringement, there is nothing in section 109(a) that
9 would allow a court to draw that distinction; that is,
10 although 109(a) is sometimes referred to as a
11 codification of the First Sale Doctrine, it doesn't
12 require an antecedent first sale.

13 So as long as the foreign publisher was the
14 owner of the books at the time -- time they were
15 manufactured, if those books were lawfully made under
16 this title, under Petitioner's reading they could be
17 imported and distributed.

18 We know also that this was not an oversight,
19 that Congress didn't intend the provision to be subject
20 to a sort of implicit first authorized sale requirement,
21 because the language was intended to cover copies that
22 were made pursuant to a compulsory license.

23 JUSTICE ALITO: Which of the following is
24 worse: All of the horrors that the Petitioner
25 outlines to the extent they are realistic, or the

1 frustration of market segmentation, to the extent that
2 would occur, if Petitioner's position were accepted?

3 MR. STEWART: Well, if they actually
4 happened, then I think the -- the horribles would be
5 worse. But, as I say, we -- we feel that we have
6 offered a reading of all the statutory provisions
7 together that would avoid both.

8 The other couple of things I would say as to
9 why a first sale by itself --

10 JUSTICE ALITO: If the -- if that middle
11 ground is -- were found to be not viable, which of the
12 two sets of consequences is worse from the government's
13 perspective, or can you not say?

14 MR. STEWART: I would say that the
15 consequence that all foreign-made goods, even if
16 imported into the United States with the authorization
17 of the U.S. copyright owner, are subject to continuing
18 licensing requirements, etc., I would say that would be
19 worse than the frustration of market segmentation that
20 would occur under Petitioner's view.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Mr. Rosenkranz, you have four minutes.

23 REBUTTAL ARGUMENT OF E. JOSHUA ROSENKRANZ

24 ON BEHALF OF THE PETITIONER

25 MR. ROSENKRANZ: Thank you,

1 Mr. Chief Justice.

2 I just want to step back and take a look at
3 what the government's doing here. After eloquently
4 arguing in *Quality King* in the last two pages of its
5 brief that our position on the meaning of this language
6 is right, it's saying our position is wrong. And then,
7 it's trying to come up with a middle ground that has
8 absolutely no basis in the statute.

9 If *Bobbs-Merrill* provides the content for
10 the First Sale Doctrine, then what does section 109 do?
11 And so the government is creating a scenario in which,
12 in order to save 602 from being superfluous in the way
13 it is described, although we believe it's not
14 superfluous at all, it is making 109 superfluous.

15 Justice Kagan asked a question about
16 essentially sentence diagramming. Our view is that
17 under this title modifies lawfully. You use the U.S.
18 metric of U.S. law to figure out whether it's lawful.
19 The government's and Wiley's position is that under this
20 title modifies both made and lawfully. And at least the
21 way I learned grammar, you can't use the same phrase to
22 modify both terms.

23 I want to correct something that I said to
24 Justice Ginsburg because I said it backwards. 905 and
25 906 are examples of the United States Congress in a

1 copyright context applying national exhaustion, and that
2 was six years after this statute was passed.

3 To Justice Breyer's question, the bear is
4 there. It is very much there. The only reason no one
5 has ever pursued these legal arguments is that the legal
6 arguments that are the baseline for all of this have yet
7 to be accepted by this Court. But I have not heard any
8 argument for why the vast majority of them will not
9 necessarily obtain, and they are not in any of the
10 briefs. To use the Toyota example, there simply is no
11 other defense. There is none. Fair use doesn't apply
12 to the vast majority of the scenarios that I've just
13 described.

14 Finally, outsourcing: Congress did not want
15 U.S. jobs to go overseas. Congress in the very same
16 statute in section 601 was hoarding manufacturing jobs
17 to the United States; and as the government said on the
18 last page of its Quality King, "it is highly unlikely
19 that the same Congress that hoarded jobs in the United
20 States was prepared to tolerate a situation in which
21 there was eternal downstream control" that the copyright
22 owners would be encouraged to seize by sending jobs
23 overseas.

24 So unless there are further questions from
25 the Court -- I saw, I just realized I said the same

1 thing twice incorrectly to Justice Ginsburg. 905 and
2 906 are examples of international -- exhaustion.

3 Unless there are further questions, I thank
4 the Court and respectfully request that the Court
5 reverse the judgment below.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel,
7 counsel.

8 The case is submitted.

9 (Whereupon, at 12:05 p.m., the case in the
10 above-entitled matter was submitted.)

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