No. 11-697

In The
Supreme Court of the United States

SUPAP KIRTSAENG
D/B/A BLUECHRISTINE99,

Petitioner,

v.

JOHN WILEY & SONS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICI CURIAE* PUBLIC KNOWLEDGE, ELECTRONIC FRONTIER FOUNDATION, AND U.S. PUBLIC INTEREST RESEARCH GROUP IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

Public Knowledge, the Electronic Frontier Foundation, and U.S. PIRG respectfully submit this brief to urge the Court to grant Kirtsaeng's petition for writ of certiorari.[1] Public Knowledge is a nonprofit public interest organization devoted to protecting citizens' rights in the emerging digital information culture and focused on the intersection of intellectual property and technology. Public Knowledge seeks to guard the rights of consumers, innovators, and creators at all layers of our culture through legislative, administrative, grassroots, and legal efforts, including regular participation in copyright and other intellectual property cases that threaten consumers, trade, and innovation.

The Electronic Frontier Foundation (EFF) is a nonprofit civil liberties organization working to protect consumer interests, innovation, and free expression in the digital world. EFF and its more than 13,000 dues-paying members have a strong interest in assisting the courts and policy-makers in striking the appropriate balance between intellectual property and the public interest.

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[1] No counsel for a party authored this brief in whole or in part, nor made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, or their counsel, made a monetary contribution to its preparation or submission. Petitioner has consented to the filing of this brief and has filed a letter with the Court granting blanket consent. Respondent has granted written consent to the filing of this brief. Parties have been given at least ten days notice of *amici*'s intention to file this brief.

U.S. PIRG, the federation of state Public Interest Research Groups, is a national, nonprofit, non-partisan consumer advocacy organization that stands up to powerful special interests on behalf of the American public. U.S. PIRG has long worked to promote the public interest on issues of consumer protection and affordable higher education, and believes an expansive interpretation of the first sale doctrine is in the best interest of students and consumers.

SUMMARY OF ARGUMENT

This case presents a circuit split on a crucial issue that will only grow in significance as new technologies continue to facilitate the global distribution of goods. The Second Circuit has held that foreign-manufactured goods that contain copies of copyright-protected works – from textbooks to hair care products with copyrighted labels – are immune from the limitations of the first sale doctrine of Section 109(a) of the Copyright Act. Under this interpretation, those goods can never be resold, lent, or given away without the permission of the copyright owner, even if that copyright owner sold the product within the United States.

The Second Circuit's interpretation not only erroneously precludes Section 109(a) from applying to copies manufactured outside of the United States, it deepens the circuit split on this issue by explicitly rejecting the Ninth Circuit's exception for foreign-manufactured copies sold with the copyright owner's permission within the United States. If the Court interprets the importation right of Section 602(a)(1) to be subject to the first sale doctrine of Section 109(a), it can resolve the circuit split while avoiding absurd results in secondary markets and redistribution channels.

ARGUMENT

The Court should grant the writ of certiorari because the decision below is erroneous and, if left undisturbed, threatens significant harm to consumers and businesses engaged in legitimate commerce involving goods manufactured abroad.

I. The Second Circuit's Interpretation of 17 U.S.C. § 109 Extends and Deepens the Existing Circuit Split Regarding the Relationship Between Sections 109 and 602.

Three circuit courts have now considered the intersection between Sections 109(a) and 602(a) of the Copyright Act. *See John Wiley & Sons, Inc. v. Kirtsaeng*, 654 F.3d 210 (2d Cir. 2011); *Omega S.A. v. Costco Wholesale Corp.*, 541 F.3d 982 (9th Cir. 2008); *Sebastian Int'l, Inc. v. Consumer Contacts (PTY) Ltd.*, 847 F.2d 1093 (3d Cir. 1988). As petitioner notes (Pet. 5-10), each one has come to a different conclusion, resulting in a clear circuit split.

The decision that is the subject of this petition, however, is particularly troubling, as it adopts the most extreme interpretation of Sections 109(a) and 602(a) thus far, concluding that every resale of a foreign-manufactured copy requires the copyright owner's permission, no matter how many times the copy has changed hands since the copyright owner first distributed that copy. In so doing, the Second Circuit rejected not only the Third Circuit's interpretation, but also the Ninth Circuit's exception for works distributed in the United States with the copyright owner's permission.

A. In the Decision Below, the Second Circuit Adopted the Most Severe Interpretation of Sections 109(a) and 602(a) Thus Far.

The decision below sets forth the most recent and most extreme interpretation of Sections 109 and 602 of the Copyright Act. *See* 17 U.S.C. §§ 109, 602 (2006). In *John Wiley & Sons, Inc. v. Kirtsaeng*, the United States Court of Appeals for the Second Circuit held that Section 109 never applies to copies manufactured outside of the United States. 654 F.3d 210, 224 (2d Cir. 2011). The court reasoned that the phrase "lawfully made under this title" means "lawfully made within the United States," rather than "made according to the laws of title 17." The court, however, had significant difficulty determining how best to interpret Section 109(a), declining to rely upon the literal meaning of the text because the court concluded the text is "simply unclear." *Id.* at 219-20 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1356 (1976) and *Kucana v. Holder*, 130 S. Ct. 827, 835 (2010)).

Instead, the court based its interpretation upon the effects that interpretation would have on another section of the Copyright Act. The court observed that "the mandate of § 602(a)(1) . . . would have no force in the vast majority of cases if the first sale doctrine was interpreted to apply to every work manufactured abroad," and this theoretical result "militates in favor of" restricting Section 109(a) to domestically-manufactured works. *Id.* at 221. However, the court reached this conclusion without analyzing either the congressional intent behind Section 602(a) or empirical evidence regarding the number of importation lawsuits that would actually be affected. The court admitted that its decision covered "a particularly difficult question of statutory construction," made "[w]ithout further guidance from the Supreme Court" after *Omega S.A. v. Costco Wholesale Corp.*, and that the court's decision might lead to consequences "that were not foreseen by Congress." *Id.* at 218, 222.

The Second Circuit's approach is distinct from the Ninth Circuit's, which created an exception for foreign-manufactured goods sold domestically with the copyright owner's permission. *See infra* Section I.B. The Court of Appeals for the Third Circuit has taken yet another view, expressing "uneasiness" with the conclusion that Section 109(a) only limits the distribution right of domestically-made copies. *Sebastian Int'l, Inc. v. Consumer Contacts (PTY) Ltd.*, 847 F.2d 1093, 1098 n.1 (3d Cir. 1988). As the *Sebastian Int'l* court noted: "When Congress considered the place of manufacture to be important, as it did in the manufacturing requirement of section 601(a), the statutory language clearly expresses that concern." *Id*. Unlike the Ninth Circuit, the Third Circuit also ruled that "the place of sale is not the critical factor in determining whether section 602(a) governs." *Id.* at 1099. Three federal courts of appeals have weighed in on this question and each has arrived at a different answer, making this Court's guidance particularly useful for courts, copyright owners, and distributors alike.

B. The Second Circuit Has Rejected the Ninth Circuit's Exception for Foreign-Manufactured Goods Sold in the United States with the Copyright Owner's Permission.

In the decision below, the Second Circuit specifically rejected the Ninth Circuit's rule that Section 109(a) applies to foreign-manufactured goods sold in the United States with the permission of the copyright owner. *See John Wiley & Sons, Inc. v. Kirtsaeng*, 654 F.3d at 221; *contra Omega S.A. v. Costco Wholesale Corp.*, 541 F.3d at 986. Although the Ninth Circuit acknowledged that Section 109(a) generally limits Sections 106(3) and 602(a), *see Omega S.A. v. Costco Wholesale Corp.*, 541 F.3d at 985, the court decided that copyright law required a "more robust" presumption against extraterritoriality than other areas of law, and therefore concluded that the Copyright Act must be interpreted to presumptively not touch any conduct occurring abroad, even when the conduct has harmful effects within the United States. *Id.* at 988. In contrast, the Second Circuit found the presumption against extraterritorial application more complicated, particularly considering that Section 104 explicitly contemplates copyright protection for works published in certain foreign countries, and consequently did not apply a more robust presumption. *John Wiley & Sons, Inc. v. Kirtsaeng*, 654 F.3d at 219-20 (citing 17 U.S.C. § 104(b)(2) (2006)).

The Ninth Circuit also concluded that this interpretation of the first sale and importation provisions would have "untenable" policy consequences, and so created an exception for foreign-manufactured goods that have been sold within the United States with the copyright owner's permission, even though this exception lacks any apparent foundation in the text or legislative history of the statute. *See Omega S.A. v. Costco Wholesale Corp.*, 541 F.3d at 986. The Second Circuit noted that the Ninth Circuit's exception has not been followed by other circuits, and declined to adopt the Ninth Circuit's interpretation. *John Wiley & Sons, Inc. v. Kirtsaeng*, 654 F.3d at 221. This conflict between the two circuits throws many secondary markets across the country into legal uncertainty.

II. The Second Circuit's Erroneous Interpretation of Section 109(a) Will Impair Trade, Innovation, and the Free Market for Copies of Copyright-Protected Goods.

The decision below, if left undisturbed, poses enormous potential consequences for secondary markets and consumers. Contrary to the established principle that statutes should be interpreted to avoid absurd results, the Second Circuit's interpretation gives copyright owners the right to indefinitely control all redistribution of copies of works manufactured abroad. This erroneous reading imposes a variety of harms on consumers and retailers alike.

A. Sections 109 and 602 Should Be Interpreted to Avoid Manifestly Absurd Results.

The Second and Ninth Circuit's interpretations of Section 109(a) both lead to manifestly absurd results. Courts have long recognized the principle that a statute's language should be interpreted to avoid absurd results. *See*, *e.g.*, *United States v. Wilson*, 503 U.S. 329, 334 (1992). Courts appeal primarily to the words of a statute without forgetting that "statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." *Pub. Citizen v. United States Dep't of Justice*, 491 U.S. 440, 455 (1989) (quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.) (Hand, J.), *aff'd*, 326 U.S. 404 (1945)). As a matter of statutory interpretation, the practical ramifications of a particular reading may suggest to the court whether Congress was likely to have intended that interpretation when it enacted the law. *See Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) ("[F]requently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.").

The first sale doctrine, codified at 17 U.S.C. § 109, embodies Congress's intent to prevent copyright owners from exercising authority over physical copies after they have exhausted their ownership interest in those copies. *See* H.R. REP. NO. 2222, 60th Cong., 2d Sess. 19 (1909) ("[I]t would be most unwise to permit the copyright proprietor to exercise any control whatever over the article which is the subject of copyright after said proprietor has made the first sale"). This follows from the well-established principle that ownership of the physical object containing a copyright-protected work is distinct from ownership of the copyright itself. *See* 17 U.S.C. § 202 (2006); *Stevens v. Gladding*, 57 U.S. 447, 452-53 (1855). *See also* H.R. REP. NO. 987, 98th Cong., 2d Sess. 2, *reprinted in* 1984 U.S.C.C.A.N. 2899 ("the first sale doctrine has its roots in the English common law rule against restraints on alienation of property").

As this Court noted in *Quality King Distributors, Inc. v. L'anza Research International, Inc.*, "[t]here is no reason to assume that Congress intended either § 109(a) or the earlier codifications of the [first sale] doctrine to limit its broad scope." 523 U.S. 135, 152 (1998). The House Report from Congress's enactment of the current version of the first sale doctrine does not even mention place of manufacture. In fact, the Report states that "Section 109(a) restates and confirms the principle that, where the copyright owner has transferred ownership of a particular copy . . . of a work, the person to whom the copy . . . is transferred is entitled to dispose of it by sale, rental, or any other means." H.R. REP. NO. 94-1476 at 79, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5693.

The decision below, in particular, interprets Section 109 so narrowly that Section 602 could entirely preclude secondary markets for all works that have been manufactured abroad. This would both interfere with individuals' established rights in their own personal property and impose substantial costs on consumers and businesses that operate in resale markets across many different commercial industries, contrary to the purposes of the Copyright Act and decades of legal interpretation.

B. The Second Circuit's Decision Permits Copyright Owners to Indefinitely Control the Distribution of All Foreign-Manufactured Copies.

Like the Ninth Circuit, the Second Circuit has concluded that the first sale doctrine does not allow buyers to distribute copies if the copies were originally manufactured abroad. Unlike the Ninth Circuit's interpretation, however, the Second Circuit's reading of Sections 109 and 602 permits no exception for foreign-manufactured goods that are sold within the United States with the permission of the copyright holder. As a result, absent the permission of the copyright holder, any distribution of any foreign-manufactured copy could infringe copyright. This result undoes 150 years of common and statutory law establishing that the rightful owner of a physical copy of a work can dispose of that copy as he or she wishes. *See Sebastian Int'l, Inc. v. Consumer Contacts, Ltd.*, 847 F.2d 1093, 1096 (3d Cir. 1988) ("The first sale rule is statutory, but finds its origins in the common law aversion to limiting the alienation of personal property.") (citing *Burke & Van Heusen, Inc. v. Arrow Drug, Inc.*, 233 F. Supp. 881, 883 (E.D. Pa. 1964); Richard Colby, *The First Sale Doctrine – The Defense That Never Was?*, 32 J. COPYRIGHT SOC'Y U.S.A. 77, 89 (1984); H.R. REP. NO. 987, 98th Cong., 2d Sess. 2, *reprinted in* 1984 U.S.C.C.A.N. 2899; 2 M. NIMMER, THE LAW OF COPYRIGHT § 8.12 (1987)). Additionally, nearly any goods can have copies of copyrighted works affixed to them or incorporated into the goods' packaging, making the consequences of the Second Circuit's interpretation difficult to understate. *See*, *e.g.*, *Quality King Distribs., Inc. v. L'anza Research Int'l, Inc.*, 523 U.S. 135 (1998) (copyright lawsuit over labels affixed to hair care products).

1. New Impediments to the Resale of Lawfully Purchased Goods Harm Consumers and Businesses.

The Second Circuit's interpretation of Sections 109 and 602 is dangerous for both consumers and businesses that operate in resale markets. The court's reading of Section 109 effectively removes a vast swath of copyright-protected goods from the shelter of the first sale doctrine. This precludes secondary markets for many goods entirely and creates substantial uncertainty for many other goods if the owner does not know where every copyrightable component of the product was manufactured. By extending liability for selling, lending, or otherwise disposing of lawfully purchased copies of copyright-protected works, the Second Circuit has exposed to copyright infringement liability actors ranging from homeowners holding a weekend garage sale, to used car dealerships, to companies that provide online platforms for reselling goods.

Of course, the decision below has a particularly direct impact on the market for used textbooks. Students in the United States have suffered from price discrimination by textbook publishers for years, and only recently have tools like more efficient shipping technology and the Internet enabled students to access lawfully purchased textbooks at more affordable prices. In 2005, the United States Government Accountability Office found that college textbook prices in the United States have risen 186% in the last two decades – more than twice the rate of inflation. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, COLLEGE TEXTBOOKS: ENHANCED OFFERINGS APPEAR TO DRIVE PRICE INCREASES (July 2005), *available at* http://www.gao.gov/assets/250/247332.pdf. In the 2003-2004 school year, the average estimated cost of textbooks for full-time students at four-year public institutions in the United States was $898 per year. *Id.* at 2. Industry representatives and public interest groups have expressed concern that publishers unnecessarily raise textbook prices by revising textbooks frequently, publishing custom textbooks, issuing books in loose-leaf form, and making material available online through the use of a temporary password. *Id.* at 18-21. Publishers maintain these high prices, in part, by taking steps to isolate the United States market, where market conditions allow them to extract higher prices from students, while selling textbooks just above cost to students in other countries. *Id.* at 21-22. If the Second Circuit's decision is reversed, publishers will still be free to engage in the same marketing practices they currently use, but may also face legitimate competition from the books they have sold at lower prices in other parts of the world.

To be clear, however, the potential impact of the decision reaches well beyond redistributions of textbooks, or even classic copyright-protected works like sound recordings, audiovisual works, compositions, paintings, drawings, and sculptures. Today, a wide range of other commercial products also contain copyright-protected computer programs, such as automobiles, microwaves, calculators, mobile phones, tablets, and personal computers. Moreover, the packaging for a product often contains copies of copyright-protected visual art. *See*, *e.g.*, *Denbicare U.S.A. Inc. v. Toys "R" Us, Inc.*, 84 F.3d 1143, 1145 (9th Cir. 1996) (plaintiff's lawsuit based in part on copyright infringement of the packaging for its non-copyrighted product).

Further, since the Second Circuit's interpretation hinges upon the place of manufacture, individuals or entities may be liable for infringement even if they purchased the product in the United States. Service providers that provide online platforms for resale marketplaces, such as eBay or Amazon.com, could be threatened with secondary liability for hosting offers for infringing sales on their websites. Such websites would have a strong incentive to stop hosting the sale of many used books and other products entirely.

Finally, given that the distribution right of Section 106(3) covers far more than sales, the ramifications of the decision below are not limited to for-profit sales. Thus, an interpretation of Section 109(a) that allows the distribution right to be resurrected at any point in the chain of ownership would also inhibit actors from lending or giving away copies of copyright-protected works that were manufactured abroad. Libraries, which rely heavily upon the first sale doctrine to lend copies of books to the public, are especially vulnerable under the Second Circuit's stripped-down version of Section 109(a). Without the protection of Section 109(a) for foreign-printed books, libraries could be forced to affirmatively research the place of manufacture for every book they acquire, even if that acquisition is completed within the United States, and either refuse to stock foreign manufactured copies of books or seek countless licenses from copyright owners to offer those books to the public. Similarly, individuals would be unable to loan a book, magazine, or newspaper to a friend if the copy was created abroad. This would have a particularly harsh effect on individuals who speak and read foreign languages, because foreign-language products are more likely to come from foreign publishers.

By inhibiting the public's ability to transfer ownership, even gratuitously, of foreign-manufactured copies, the Second Circuit's interpretation could even impair charitable giving. For example, the very popular and successful Marine Toys for Tots Foundation collects presents for economically disadvantaged children in the weeks surrounding Christmas. For sixty-three years, Toys for Tots has collected donated toys from the public and distributed more than 400 million toys to more than 188 million children. *Origin and Evolution of Toys for Tots*, MARINE TOYS FOR TOTS FOUNDATION (last visited Jan. 3, 2012), http://www.toysfortots.org/about_toys_for_tots/toys_for_tots_program/origin_and_evolution.asp. Under the Second Circuit's interpretation of Section 109(a), both Toys for Tots and the individuals donating toys to Toys for Tots are liable for copyright infringement for all copyrightable toys or toy packages that were manufactured outside of the United States.[2]

The Second Circuit's decision has enormous impact upon a wide variety of product industries, and imposes tangible harms on consumers who would otherwise participate in the resale market for lawfully purchased goods.

2. Copyright Owners May Attempt to Seize Indefinite Control Over Distribution by Moving Their Manufacturing Activities Abroad.

The decision below could also encourage copyright owners to deliberately foreclose secondary markets by moving their manufacturing operations abroad. As discussed above, copyright owners would gain

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[2] Toys may be subject to copyright protection in a number of ways, so long as they are not uncopyrightable as useful articles. *See*, *e.g.*, *Hasbro Bradley, Inc. v. Sparkle Toys, Inc.*, 780 F.2d 189, 192 (2d Cir. 1985) (holding that transforming robotic action figure qualifies for copyright protection). An action figure may receive copyright protection as a sculptural work, a coloring book may contain copyright-protected graphic or pictorial works, or a doll may sing a copyright-protected song via a copyright-protected sound recording.

substantial new control over the distribution of copies of their works if they could exercise exclusive authority over a copy every time it changes hands. This power is potentially very lucrative for manufacturers who wish to prevent consumers from buying used copies or borrowing copies from friends. If a consumer has no access to a used or borrowed copy of a work, she must purchase a new copy at a substantially higher cost than she would have otherwise faced. The Second Circuit's decision thus gives copyright owners a perverse incentive to move manufacturing or other production activities out of the United States to retain indefinite control over copies of their works.

Put another way, the decision below encourages at least two perverse outcomes: American consumers lose access to affordable used copies of products, and companies move American manufacturing and related jobs overseas. It is difficult to imagine that Congress intended these results.

3. The Lower Court's Interpretation of "Lawfully Made Under This Title" Could Also Preclude Consumers from Displaying Their Lawfully Acquired Copies.

The courts' interpretation of the phrase "lawfully made under this title" for the purposes of Section 109(a) could also have far-reaching consequences for other provisions of the Copyright Act that use the same phrase. If future court decisions follow the

Second Circuit's interpretation of this phrase, the application of all of these provisions will be limited to copies manufactured in the United States.

For example, Section 109(c) of the Copyright Act also uses the phrase "lawfully made under this title" to grant the owner of a copy the right to publicly display that copy. 17 U.S.C. § 109(c). Courts have repeatedly interpreted this phrase to preclude applying Section 109(c) to copies "created in violation of the artist's rights," not merely copies made outside of the United States. *See Mass. Museum of Contemporary Art Found., Inc. v. Buchel*, 593 F.3d 38, 63-64 (1st Cir. 2010); *Cariou v. Prince*, 784 F. Supp. 2d 337, 356 (S.D.N.Y. 2011) (paintings may not be publicly displayed under Section 109(c) because the paintings infringed plaintiff's copyrights); *Hoepker v. Kruger*, 200 F. Supp. 2d 340, 342 (S.D.N.Y. 2002) (defendant may publicly display a lawfully owned copy of a photograph under Section 109(c) despite the fact that the photograph was made in Germany).

If "lawfully made under this title" in Section 109(c) is interpreted identically to the Second Circuit's reading of "lawfully made under this title" in Section 109(a), every owner of a copy of a copyright-protected work, particular visual artworks, would need to obtain a license to display that copy if the work was created outside of the United States. Museums, particularly those with substantial collections of foreign paintings, photographs, drawings, and sculptures, would need to obtain a new license for every piece of foreign-made art in their collections, or hide those collections from the public indefinitely. Businesses, libraries, and any other entity with a physical space open to the public would need to remove all foreign artworks from their lobbies, hallways, and other public spaces. Again, Congress could not have intended a result that so manifestly contravenes sound public policy and common sense.

C. The Decision Below Would Authorize Copyright Owners to Enjoin Parallel Imports, Contrary to Congressional Intent and Consumers' Interest.

Parallel imports benefit both consumers who rely upon affordable access to goods and businesses that routinely bring lawfully purchased goods into the United States for resale. Contrary to congressional intent, the decision below would allow copyright owners to unilaterally block all parallel imports for goods they had already sold and parted with.

The increase in parallel importation in recent years is a result of cost reductions from new and improved technologies. This means that, when importers market their products at inflated prices in some geographical markets but not others, they face competition from their own products sold at lower prices elsewhere. This is not a new phenomenon: historically, new technology has consistently broken down barriers to market entry and encouraged healthy competition between providers. In 2000, "the U.S. market for gray goods [was] somewhere between $10 and $20 billion a year." Olga Kharif, *The Global Economy's Gray-Market Boom*, BUSINESSWEEK ONLINE (Nov. 30, 2000), *available at* http://www.businessweek.com/bwdaily/dnflash/nov2000/nf20001130_555.htm. The parallel market in information technology alone was estimated to have grown to more than $40 billion per year by 2009. Romana Autrey & Francesco Bova, *Gray Markets and Multinational Transfer Pricing*, Harv. Bus. School Working Paper No. 09-098, at 1 (Feb. 25, 2009), *available at* http://www.hbs.edu/research/pdf/09-098.pdf.

Restrictions on parallel importation of legally purchased products impose serious economic consequences. Such restrictions create an "export subsidy" that United States consumers must pay, encourage rent-seeking behavior by producers, and use government resources to protect producers against arbitrage. *See* Michael J. Meurer, *Copyright Law and Price Discrimination*, 23 CARDOZO L. REV. 55, 143-44 (2001). Restricting parallel importation encourages copyright owners to make socially wasteful investments to maintain extra profits they receive from price discrimination. *Id.* at 101 (specifying lobbying, litigation, entry deterring practices, measuring different markets' valuations, enforcing contracts to prevent arbitrage, and designing special distribution systems as examples of the costs of rent-seeking). The Second Circuit's decision here creates an explicit and extensive parallel importation restriction, but these serious consequences were not intended or even contemplated by Congress, either in enacting federal copyright law generally or in creating Section 602 of the Copyright Act.

Federal copyright law was created with the purpose of "stimulat[ing] artistic creativity for the general public good." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability to literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor."). *See also Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors."). Copyright law was not created for the purpose of restricting parallel imports or making United States consumers subsidize price discrimination in foreign markets. Copyright owners cannot look to copyright law to insulate their business models from international trade or allow them to implement discriminatory pricing on a global scale.

Moreover, there is no suggestion in the legislative history of Section 602 that Congress intended the provision to utilize copyright law to enforce private parties' price discrimination, nor to restrict international trade of many products, some with only a tenuous connection to copyright. Subsequently enacted federal statutes demonstrate a continued understanding and intent that parallel imports remain legal and continue to benefit consumers. *See*, *e.g.*, Stop Counterfeiting in

Manufactured Goods Act, Pub. L. No. 109-181, § (b)(3)(B), 120 Stat. 285, 287 (codified as amended at 18 U.S.C. § 2320(e)(b) (2006)) (explicitly exempting authorized uses of marks from the act's prohibitions on the import of "counterfeit marks"); 151 Cong. Rec. S12714-01 (2005) (statement of Rep. Lofgren) ("Parallel markets are those in which third parties lawfully obtain goods and make them available in discount stores. Not only has this practice been upheld by the Supreme Court, but it also saves consumers billions of dollars each year. . . . We now have a bill that protects manufacturers, targets illegitimate actors, protects consumers, and leaves the legitimate parallel market unscathed.").

III. The Current Circuit Split Can Be Resolved by Adopting an Alternative Interpretation.

This Court could resolve the conflict between the circuit courts in a way that is both consistent with Sections 109(a) and 602(a) and avoids the extreme practical ramifications of the Second Circuit's interpretation. To accomplish this, the Court should interpret Section 109(a) to apply to all copies make legally according to Title 17 of the United States Code.

A. The Text of the Copyright Act Weighs in Favor of Applying the First Sale Doctrine to Works Manufactured and Sold Abroad.

Federal law grants to copyright owners the exclusive right "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." 17 U.S.C. § 106(3) (2006). This right is subject to the limitations and exceptions set out in Sections 107 through 122 of the Copyright Act. § 106. One of those limiting provisions is Section 109, which "restates and confirms" the first sale doctrine. H.R. REP. NO. 1476, 94th Cong., 2d Sess., 79 (1979). Section 109(a) of the Copyright Act states: "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." § 109(a).

Section 602(a)(1) of the Copyright Act provides that "[i]mportation 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." § 602(a)(1). This subsection establishes that an importation constitutes an infringement of the copyright owner's distribution right when the importation is conducted without the copyright owner's permission. Because a violation of Section 602(a)(1) is a violation of the copyright owner's Section 106(3) distribution right, and Section 106(3) is subject to the limitations of Section 109(a), then Section 602(a)(1) is also subject to the first sale doctrine. No other language in the Copyright Act suggests that importation is a type of distribution that is untethered by Section 109(a). This interpretation also comports with the rest of Title 17. As this Court has explained: "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their pace in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). Other sections of Title 17 demonstrate that Congress is capable of explicitly limiting a section's application to the place of manufacture when it chooses to do so. *See* 17 U.S.C. §§ 401(a), 601 (2006).

B. Under this Interpretation, Section 602 Still Has a Purpose in the Statutory Scheme.

If this Court decides that Section 602(a)(1) is subject to the limitations of the first sale doctrine, Section 109(a) does not render Section 602(a)(1) moot any more than it does Section 106(3). Section 602(a)(1) would primarily act to clarify and confirm that importation is included under the umbrella of distribution for the purposes of Section 106, a conclusion not necessarily evident, as importation itself does not always require a transfer of ownership. To be sure, Section

109(a) substantially limits the application of Section 602(a), to the extent that copyright owners attempt to control the importation of copies of their works after the copyright owners have already exhausted their distribution right over those particular copies. But the right to prevent the redistribution of copies already sold is simply not within the exclusive rights granted to copyright owners under United States law.

Section 602(a)(2) outlines the specific terms of an infringement case, providing that the importation of copies, "the making of which either constituted an infringement of copyright, or which would have constituted an infringement of copyright if this title had been applicable," also constitutes an infringement of the distribution right and is actionable under Sections 501 and 506. 17 U.S.C. § 602(a)(2). Thus, the first two subsections of Section 602(a) establish two different circumstances in which an importation constitutes an infringement of the copyright owner's distribution right: (1) under Section 602(a)(1), when the importation (for instance, by a non-owner) is made without the copyright owner's permission;[3] and (2) under Section

[3] Such an importation would differ from the instant case when a foreign manufacturer is licensed to produce copies, but is not "the owner" of the copies under Section 109(a), and performs an unauthorized importation. Thus, a publisher with exclusive British distribution rights would not be protected by the first sale doctrine if it sold copies of the book in the United States but did not own those copies. *See Quality King Distribs., Inc. v. L'anza Research Int'l, Inc.*, 523 U.S. 135, 148 (1998) (footnotes omitted).

602(a)(2), when the importation is unauthorized *and* the items are or would have been infringing. Both of these provisions are limited by the first sale doctrine, although this does not prejudice a copyright owner's rights under any of the other exclusive rights granted by Section 106.

Thus, Section 602(a) can be interpreted in a way that comports with the statute's text and congressional intent while avoiding absurd practical results.

CONCLUSION

For the aforementioned reasons, the Court should grant the writ of certiorari. This case presents the Court with an opportunity to correct the decision below while resolving an increasingly deep circuit split on an issue of extreme importance to consumers, retailers, and copyright owners in industries spanning the United States economy.

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