

# 09-4896-CV

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United States Court of Appeals  
*for the*  
Second Circuit

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JOHN WILEY & SONS, INC.,

*Plaintiff-Appellee,*

– v. –

SUPAP KIRTSANG, doing business as Bluechristine99,

*Defendant-Appellant,*

JOHN DOE 1-5,

*Defendant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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**BRIEF FOR *AMICUS CURIAE* NEW YORK INTELLECTUAL  
PROPERTY LAW ASSOCIATION IN SUPPORT OF  
PLAINTIFF-APPELLEE**

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**CORPORATE DISCLOSURE STATEMENT**  
**(Federal Rule of Appellate Procedure 26.1)**

Counsel of record for *amicus curiae* New York Intellectual Property

Law Association certifies the following:

1. The full name of every party or *amicus* represented by me is:  
New York Intellectual Property Law Association.
2. The party represented by me as *amicus curiae* is the real party  
in interest.
3. The parent companies, subsidiaries (except wholly owned  
subsidiaries), and affiliates that have issued shares to the public, of the party or  
*amicus* represented by me are: None.

Dated: March 8, 2010

Respectfully submitted,

NEW YORK INTELLECTUAL PROPERTY  
LAW ASSOCIATION

By: \_\_\_\_\_  
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## STATEMENT OF INTEREST OF *AMICUS CURIAE*

The New York Intellectual Property Law Association (“NYIPLA” or the “Association”) is a bar association of more than 1,600 attorneys whose professional interests and practices lie principally in the areas of patents, copyrights, trademarks, trade secrets, and other forms of intellectual property. Since its founding in 1922, NYIPLA has been committed to maintaining the integrity of the U.S. intellectual property laws and the proper application of those laws.<sup>1</sup>

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<sup>1</sup> The NYIPLA and its undersigned counsel represent that they have authored this brief, that no party or counsel for a party in this proceeding authored any part of this brief, and that no person other than the NYIPLA and its members or its counsel, including any party or counsel for a party, made any monetary contribution intended to fund the preparation or submission of the brief. The parties were provided with timely notice of the intent to file this brief, and they have consented to its filing.

The arguments set forth in this brief were approved on or about March 6, 2010, by an absolute majority of the total number of officers and members of the Board of Directors (including those who did not vote for any reason, including recusal), but may not necessarily reflect the views of a majority of the members of the NYIPLA or of the organizations with which those members are affiliated. After reasonable investigation, the NYIPLA believes that no person who voted in favor of the brief, no attorney in the firms or companies with which such persons are associated, and no attorney who aided in preparation of this brief represents a party in this litigation. Some such persons may represent entities that have an interest in other matters that may be affected by the outcome of this proceeding.

## SUMMARY OF ARGUMENT

The copyright laws provide a “first sale doctrine” that limits copyright owners’ ability to restrict disposition of particular copies that have been “lawfully made under this title” and legally acquired by a third-party. 17 U.S.C. § 109(a). This issue on which this brief is submitted is whether copies lawfully made overseas are “lawfully made under” Title 17 and thus freely importable into the United States. To state the question is to answer it: copies of works printed overseas are neither lawfully nor unlawfully made under the laws of the United States. Thus, the first sale doctrine does not apply to them.

As in the case at bar, such copies may not be counterfeit or piratical, in that the overseas printer may have rights granted by the rightful owner of the overseas copyright (who may be American or non-American). But they are made under and subject to the laws of another nation, not under the laws of the United States.<sup>2</sup>

Defendant and his supporting *amici* read “lawfully made under this title” to mean effectively “not in violation of the U.S. copyright laws.” This reading has several problems. First, even counterfeits made wholly overseas are not made in violation of the U.S. copyright laws, which have no extraterritorial effect. The first sale defense plainly cannot apply to such copies. *See* 17 U.S.C. § 602(b) (“In a

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<sup>2</sup> The NYIPLA takes no positions on the other issues presented in this appeal.

case where the making of the copies or phonorecords would have constituted an infringement of copyright if this title had been applicable, their importation is prohibited.”). Second, it would render superfluous 17 U.S.C. § 602(a), which provides a nuanced scheme governing importation that distinguishes among different categories of works made overseas. If Section 109(a) were read as broadly as defendant contends, the balance and distinctions of Section 602(a) would be trumped by the broad brush of Section 109(a).

Defendant’s reading of Section 109(a) is also inconsistent with available legislative history, which demonstrates a clear intent to generally prohibit the unlicensed importation of copies made overseas, even copies made lawfully under foreign law. Such importation, often referred to as parallel import or gray market, undermines the ability of copyright owners to make and sell their works in developing nations, where economic realities may require lower prices.

## **LEGAL ARGUMENT**

### **I. The Statutory Language Shows That the First Sale Doctrine Applies Only to Copies Lawfully Made in the United States**

The Copyright Act of 1976 generally prohibits unauthorized importation of copies made and acquired abroad. 17 U.S.C. § 602(a) (“Importation into the United States, without the authority of the owner of the copyright under this title, of copies . . . of a work that have been acquired outside the United States is an infringement . . . under section 106.”).

The district court correctly determined that the first sale doctrine codified in 17 U.S.C. § 109(a)—which applies to owners of copies “lawfully made under this title”—does not apply to copies made outside the United States. Because the copyright laws have no extraterritorial operation, *Update Art, Inc. v. Modiin Publishing, Ltd.*, 843 F.2d 67, 73 (2d Cir. 1988), copies made overseas are not “made under” the U.S. copyright laws. This is true if such copies are made (i) with permission of an American rights owner who also owns non-U.S. rights, (ii) with permission of a non-U.S. rights owner who may or may not also hold U.S. rights, or (iii) under provisions of applicable foreign law that authorize manufacture even without permission of the copyright owner. These copies are not counterfeit or piratical, but without a territorial nexus to the U.S. their manufacture and sale are not subject to U.S. copyright law and they are not “lawfully made under this title.” See P. Goldstein, *Goldstein on Copyright*, § 16.0 at 16:1-16:2 (2d ed. 1998) (“lawfully made under this title” in section 109(a) means “lawfully made in the United States” because the rights provided in Title 17 extend no further than the Nation’s borders).

Defendant’s reliance on *Quality King Distributors, Inc. v. L’Anza Research International, Inc.*, 523 U.S. 135, 146 (1998), is misplaced. The issue in *Quality King* was whether Section 109(a) applied to reimportation of copies lawfully made in the U.S. and then exported. In examining the meaning of Section 602(a), the

Court wrote that it applied to “copies that are neither piratical nor ‘lawfully made under this title,’” observing that this category “encompasses copies that were ‘lawfully made’ not under the United States Copyright Act, but instead, under the law of some other country.” *Id.* at 146-47.

Although the issue at bar here was not before the Court, its analysis of Section 602(a) suggests that it had in mind the different fact pattern, which is presented here, of importation of non piratical works that were not made in the United States. The leading treatises agree: “At the very least, the Court’s insistence, and Justice Ginsburg’s concurring observation . . . indicates an intention not to disturb lower court holdings that the first sale defense is unavailable to importers who acquire ownership in the United States of copies lawfully made abroad but unlawfully imported into the United States.” 2 *Goldstein on Copyright* § 7.6.1.2.a at 7:144; 2 Melville B. Nimmer and David Nimmer, *Nimmer on Copyright* § 8.12[B][6][c] (Matthew Bender, Rev. Ed.) (noting that after *Quality King* “the Copyright Act . . . should still be interpreted to bar the importation of gray market goods that have been manufactured abroad”).

This distinction between copies that are lawfully made under the laws of another country and counterfeit or piratical copies finds support in Section 602(b), which forbids importation of copies made abroad if their printing would have been infringing if it had occurred in the United States. 17 U.S.C. § 602(b) (“In a case

where the making of the copies or phonorecords would have constituted an infringement of copyright if this title had been applicable, their importation is prohibited.”). That section also demonstrates the difference between (i) works that are lawfully made abroad, but whose importation is an act of infringement, and (ii) works that are counterfeit or piratical, by prohibiting the Customs Service from preventing importation of the former. *Id.* This limitation on Customs’ authority only makes sense if the importation of copies lawfully made abroad (under foreign law) was prohibited in the first place. If such importation was not prohibited, there would be no need to provide that Customs may not seize them at the border.

## **II. The Legislative History Shows That Section 602(a) Was Intended Generally to Prohibit Parallel Import of Copies Made Lawfully Abroad**

The long drafting process that led to the 1976 Copyright Act demonstrates that after much debate on the scope of the importation right, Congress intended to provide copyright holders with robust protection against parallel imports.

The Copyright Office’s first report on potential revisions to the copyright laws recognized that certain countries (including the United Kingdom) barred parallel imports, but suggested that U.S. copyright holders should not have such rights, because restricting distribution was a private commercial matter and its regulation by the copyright laws would require the Customs Service to enforce what were nothing more than private contracts. Staff of House Comm. on the

Judiciary, 87th Cong., 1st Sess., *Copyright Law Revision Part I: Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* 126 (Comm. Print 1961).

This report prompted industry opposition from stakeholders that argued they could not rely on breach-of-contract suits to enforce agreements limiting importation into the U.S. by foreign distributors. Staff of House Comm. on the Judiciary, 88th Cong., 1st Sess., *Copyright Law Revision Part 2: Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* 212 (Comm. Print 1963) (testimony of American Book Publishers Council that such lawsuits are “expensive, burdensome, and, for the most part, ineffective”).

The Copyright Office then proposed prohibiting parallel importation but not involving the Customs Service to police it. It provided alternative provisions, both affording copyright owners the right to prevent parallel importation. Under one, the Customs Service was not required to seize such copies but would notify the copyright owner of potentially infringing imports. The other permitted Customs to seize piratical copies but not “lawfully made” copies, and also provided for notification with respect to the latter. Staff of House Comm. on the Judiciary, 88th Cong., 2d Sess., *Copyright Law Revision Part 3: Preliminary Draft for Revised*

*U.S. Copyright Law and Discussions and Comments on the Draft 32-34* (Comm. Print 1964).

In its comments on the draft bill, the Copyright Office noted that the importation right protected against both piratical copies and foreign-produced copies that “were made under proper authority but that, if sold in the United States,” would violate the copyright holder’s exclusive distribution right. Staff of House Comm. on the Judiciary, 88th Cong., 2d Sess., *Copyright Law Revision Part 4: Further Discussion and Comments on Preliminary Draft for Revised U.S. Copyright Law 203* (Comm. Print 1964). Indeed, the General Counsel of the Copyright Office specifically noted that despite the alternative provisions for Customs enforcement (noted above), the proposed subsection barring parallel importation “is the same in each case.” *Id.* at 204. The Copyright Office’s Supplementary Report also showed a clear understanding that Section 602 generally prohibits parallel importation:

In the second situation covered by section 602, the copies or phonorecords were lawfully made but their distribution in the United States would violate the exclusive rights of the U.S. copyright owner . . . . [I]t would not be practicable for the Bureau of Customs to enforce a prohibition . . . . “where the copies or phonorecords were lawfully made.” On the other hand, as noted above, unauthorized importation in this situation for the purpose of public distribution in the United States would be an infringement and could be enjoined.

Staff of House Comm. on the Judiciary, 89th Cong., 1st Sess., *Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill 149-50* (Comm. Print 1965). This was also reflected in a committee report, which recognized that the provision prevented parallel importation but that Customs, as a practical matter, could not be expected to enforce this aspect of copyright owners' privileges:

The second situation covered by section 602 is that where the copies or phonorecords were lawfully made but their distribution in the United States would infringe the U.S. copyright owner's exclusive rights. As already said, the mere act of importation in this situation would constitute an act of infringement and could be enjoined. However, in cases of this sort it would be impracticable for the United States Customs Service to attempt to enforce the importation prohibition . . . .

S. Rep. No. 94-473, at 152 (1975).<sup>3</sup>

The legislative history makes clear that after many years of considered thought and analysis, and numerous drafts and commentary, Congress enacted legislation providing copyright owners with expanded rights that would protect them from the potential harms of parallel importation.

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<sup>3</sup> Many aspects of the Copyright Act were revised during the drafting and comment period which lasted over a decade.

### **III. The Restrictions on Parallel Imports Imposed by Sections 109(a) and 602(a) Are Economically Rational**

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#### **A. Permitting Parallel Imports That Are Sold at a Lower Price Overseas to Undermine the U.S. Market May Lead to Less Overseas Dissemination of U.S. Works or Less Publishing Overall**

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Because creating a robust demand for literary works in developing countries may require publishers to sell books more cheaply than in the United States, a copyright holder that wants to enter an emerging market may have to lower its prices to the level that market will bear. *Cf. Parfums Givenchy, Inc. v. C&C Beauty Sales, Inc.*, 832 F. Supp. 1378, 1390 (C.D. Cal. 1993) (explaining phenomenon with respect to luxury goods). The availability of low-priced parallel imports in the U.S. lowers the price U.S. consumers are willing to pay. *See* Christopher A. Mohr, *Comment: Gray Market Goods and Copyright Law: An End Run Around Kmart v. Cartier*, 45 Cath. U. L. Rev. 561, 572-73 (Winter 1996).

An inability to restrict parallel imports may reduce rights holders' investments in their works or cause them to stop selling in developing countries. *Id.*; *see also Weil Ceramics & Glass, Inc. v. Dash*, 878 F.2d 659, 668 (3d Cir. 1989) (describing with reference to consumer goods how manufacturer concerned about competition from parallel imports may elect to stop selling its goods abroad); Elin Dugan, Note, *United States of America, Home of the Cheap and the Gray: A Comparison of Recent Court Decisions Affecting the U.S. and European Gray*

*Markets*, 33 Geo. Wash. Int'l L. Rev. 397, 406 (2001) (“By not selling the goods abroad, manufacturers can simply eliminate the source of discounted products.”). Such an outcome thwarts the purpose of the Copyright Act, which is to encourage and reward creative endeavors in order to promote the wide availability of literature, music, and other arts. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 545-46, 558 (1985). It is also—at least with respect to works that reflect and embody the academic, creative, or technological vitality of the United States—contrary to the Nation’s interest in making the fruits of its endeavors widely available abroad. *See, e.g.*, Mutual Educational and Cultural Exchanges Act of 1961, 22 U.S.C. § 2451 (purpose in part “to increase mutual understanding between the people of the United States and the people of other countries by means of educational and cultural exchange”).<sup>4</sup>

Although it may seem inequitable for U.S. consumers to pay more for a work than consumers in the developing world, the alternatives are worse. First, the rights owner may (as noted above) elect not to sell its works overseas to protect the

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<sup>4</sup> Because this case concerns textbooks, this brief’s discussion focuses on literary works. However, it should be noted that the issues presented here are not limited to literary works. For example, *Omega S.A. v. Costco Wholesale Corp.*, 541 F.3d 982 (9th Cir. 2008), concerned the application of Sections 109(a) and 602(a) to watches manufactured in Switzerland with a copyrighted logo. As *amicus* Costco notes in its brief, a petition for certiorari in *Omega* is pending (No. 08-1423), and the Supreme Court has invited the Solicitor General to file a brief expressing the views of the United States. 130 S. Ct. 356 (2009).

more lucrative U.S. market from low-priced parallel imports, which diminishes the availability of books in foreign markets.

Second, if the rights holder sells overseas and suffers reduced sales in the U.S. because the market is undercut by parallel imports, the economic incentive to publish is reduced and less money is available to fund smaller or riskier publishing endeavors that may not be profitable. This is of concern for an industry that is reported to work on the understanding that as many as seventy percent of books will make little or no profit for the publisher.<sup>5</sup>

**B. Application of Sections 109(a) and 602(a) Cannot Rationally Depend on the Form of Business Relationship Between the U.S. Copyright Owner and the Foreign Publisher**

Defendant argues that the discussion in *Quality King* that distinguished between goods made in the U.S. and legitimate goods made abroad was in the context of the financial impact on the rights holder, *i.e.*, whether the U.S. copyright owner would be deprived of its “reward” if foreign copies displace sales in the United States. Defendant’s Brief at 16. This “reward analysis” does not make economic sense.

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<sup>5</sup> Motoko Rich, “Math of Publishing Meets the E-Book,” *New York Times* B1 (March 1, 2010).

Consider first the simplest case: an American author who herself prints her work overseas and personally sells those copies outside the print shop. She receives an economic reward from her overseas activities.

If this author instead sets up a wholly owned foreign corporation to handle the overseas printing and sales, she still gets an economic reward. Under both cases, defendant and his *amici* would say that the copies printed and sold overseas can be imported into the U.S. without restriction.

What if the author instead negotiates an arms-length agreement with an unaffiliated foreign company? At least according to Costco, the copies made abroad under this relationship are what the Supreme Court had in mind when it discussed a British publisher who owns the British copyright to a work:

If the author of [a] work gave the exclusive United States distribution rights—enforceable under the Act—to the publisher of [a] United States edition and the exclusive British distribution rights to the publisher of [a] British edition. . . presumably only those made by the publisher of the United States edition would be “lawfully made under this title” within the meaning of § 109(a). The first-sale doctrine would not provide the publisher of the British edition who decided to sell in the American market with a defense to an action under § 602(a) (or, for that matter, to an action under § 106(3), if there was a distribution of the copies).

*Quality King*, 541 U.S. at 148. And according to Costco, these copies may not be freely imported:

If a copyright owner grants one entity exclusive American publishing rights and grants another entity exclusive British publishing rights, books published by the first entity, whether manufactured in the

United States or abroad, are “lawfully made under this title” (i.e., the Copyright Act). Those manufactured by the second entity, even if manufactured domestically, however, are not lawfully made under “this title,” because the manufacturer did not hold U.S. rights. They are lawfully made under British law.

Costco Brief at 8.

But this analysis ignores the fact that the U.S. author still enjoys an “economic reward” from the overseas copies. To be sure, the way it is calculated may be different, and the author may receive less of the profit. But whether the transaction is a lump-sum payment, a per-unit royalty, or a percent of sales, the U.S. author nevertheless earns an economic reward from the foreign publishing.

It makes no sense to distinguish the discussion in *Quality King* of different publishers in the U.S. and Britain from the case here of a foreign affiliate of a U.S. publisher by resorting to an “economic reward” analysis. Just as the plaintiff in the case at bar presumably gets some sort of consideration (an “economic reward”) from its Asian affiliate, so too does the U.S. rights holder in the *Quality King* hypothetical because the British publisher has most certainly paid (given an “economic reward”) for the British publication rights.

Assuming that the work originated in the United States, an economic reward to the U.S. rights holder for lawful overseas publication is a given, though perhaps varying in amount and allocation depending on how the transaction is arranged. Nothing in the statute or cases suggests that the right to prevent importation of

foreign-made copies depends on the structure of the relationship between the U.S. rights holder and the lawful foreign publisher. Stated differently, there is no basis to distinguish between a U.S. copyright owner who arranges for overseas printing by a related corporation and a U.S. copyright owner who instead arranges for overseas printing by an unaffiliated corporation.

### **CONCLUSION**

For the reasons stated above, the NYIPLA respectfully submits that the first sale defense of 17 U.S.C. § 109(a) does not apply to copies manufactured abroad by, or under the authority of, a U.S. copyright holder.

Dated: March 8, 2010

Respectfully submitted,

NEW YORK INTELLECTUAL PROPERTY  
LAW ASSOCIATION

By: \_\_\_\_\_  
CHARLES A. WEISS  
Chair, Amicus Committee

STATE OF NEW YORK     )  
  )  
COUNTY OF NEW YORK    )

ss.:

**AFFIDAVIT OF SERVICE  
BY OVERNIGHT FEDERAL  
EXPRESS NEXT DAY AIR**

I, \_\_\_\_\_, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

**On March 8, 2010**

deponent served the within:

**BRIEF FOR *AMICUS CURIAE* NEW YORK INTELLECTUAL PROPERTY LAW ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLEE**

**upon:**

**SEE ATTACHED SERVICE LIST**

the address(es) designated by said attorney(s) for that purpose by depositing 2 true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York, and served electronically via e-mail.

**Sworn to before me on March 8, 2010**

**Mariana Braylovskaya**  
Notary Public State of New York  
No. 01BR6004935  
Qualified in Richmond County  
Commission Expires March 30, 2010

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**Job # 218930**

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