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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument first this morning in Case 08-1423, Costco  
5 Wholesale Corporation v. Omega.

6 Mr. Englert.

7 ORAL ARGUMENT OF ROY T. ENGLERT, JR.,  
8 ON BEHALF OF THE PETITIONER

9 MR. ENGLERT: Mr. Chief Justice, and may it  
10 please the Court:

11 This case is a repeat of Quality  
12 King v. L'anza with only one pertinent difference. Both  
13 cases involve goods not authorized for importation into  
14 the United States. Both cases involve arguments that  
15 the first sale doctrine must be narrowly construed, thus  
16 the Copyright Act's importation ban, section 602(a), be  
17 given less than its supposedly intended scope. The only  
18 difference is place of manufacture of the goods.  
19 Quality King involved U.S. manufactured goods; this case  
20 involves goods made in Switzerland.

21 According to the Ninth Circuit in Omega,  
22 Congress intended to treat foreign manufactured goods  
23 better in this respect than goods made in the United  
24 States. It is wildly implausible that Congress had any  
25 such intent.

1                   From 1790 to 1891, foreigners were  
2   categorically ineligible to hold U.S. copyrights. From  
3   1891 to 1986, the United States discriminated against  
4   foreign manufacturing of copyrighted goods through a  
5   series of so-called manufacturing clauses, including  
6   section 601 of the 1976 Act. If Congress intended to  
7   make the first sale doctrine discriminate in favor of  
8   foreign manufacturing at the same time, one would expect  
9   some note to be taken of that fact in the legislative  
10  history, but none is. And yet the Ninth Circuit held  
11  that Congress in 1976 altered the long-established first  
12  sale doctrine to make it uniquely favorable to foreign  
13  manufacturing of copyrighted goods and did so through  
14  the obscure phrase, "lawfully made under this title," in  
15  section 109.

16                  No one in all the briefs in this case has  
17  identified a single reason why Congress would have  
18  wanted to do so. Moreover, the words "lawfully made  
19  under this title" are used elsewhere in the Copyright  
20  Act, and they never mean what the Ninth Circuit said  
21  they mean in section 109.

22                  Most instructive is the very next section  
23  after section 109, section 110, which governs  
24  educational use of copyrighted works and was enacted  
25  contemporaneously with 109. In describing the kinds of

1 works teachers may show students in their classroom  
2 without fear of copyright liability, Congress referred  
3 to works lawfully made under this title. Our briefs  
4 have pointed out the absurdity of construing the phrase  
5 in section 110 to mean made in the United States, and  
6 it's very revealing how Respondent and its amici have  
7 tried to answer that point.

8 Omega says "lawfully made under this title"  
9 means either made in the United States or authorized for  
10 distribution in the United States. That argument gives  
11 up any pretense --

12 JUSTICE SOTOMAYOR: Would you clarify for me  
13 what your exact meaning is? There -- your blue brief  
14 and your reply brief appear to give two different  
15 meanings.

16 MR. ENGLERT: I hope not, Your Honor. I  
17 believe our --

18 JUSTICE SOTOMAYOR: Your reply brief  
19 suggests that if Omega grants foreign reproduction and  
20 distribution rights but retains U.S. rights, that the  
21 first sale doctrine would allow Omega to bar  
22 importation.

23 MR. ENGLERT: If it grants exclusive foreign  
24 distribution.

25 JUSTICE SOTOMAYOR: Why does it matter?

1 Because your blue brief says that "lawfully made" means  
2 anything that was made with Omega's consent or  
3 authority. So why the difference at all?

4 MR. ENGLERT: It matters, Your Honor,  
5 because of the underlying rationale of the first sale  
6 doctrine and the underlying rationale of the import ban  
7 in section 602.

8 The purpose of the first sale doctrine is to  
9 make sure that the copyright owner gets one and only one  
10 recompense for each copy, for each lawfully made copy.

11 JUSTICE SOTOMAYOR: So if he sells his  
12 rights to a foreign manufacturer and distributor, he  
13 gets paid for those rights. Why should he now have any  
14 additional rights to bar that authorized copy --

15 MR. ENGLERT: The reason, Your --

16 JUSTICE SOTOMAYOR: -- from being imported  
17 into the United States?

18 MR. ENGLERT: Yes, Your Honor. The --

19 JUSTICE SOTOMAYOR: I -- I don't understand  
20 what --

21 MR. ENGLERT: The reason is to give effect  
22 to the examples given in the legislative history of  
23 section 602.

24 JUSTICE SOTOMAYOR: Not -- you mean to the  
25 examples in the legislative history or in the examples

1 in Quality King?

2 MR. ENGLERT: Oh. The Quality King has a  
3 paragraph, much discussed in the briefs, which cites to  
4 the legislative history of section 602 and in  
5 particular, cites to witness statements that are in the  
6 committee prints that are part of the legislative  
7 history of section 602.

8 JUSTICE SOTOMAYOR: So do you think that  
9 there is a difference between assigning a copyright to a  
10 foreign entity or merely licensing a foreign entity?  
11 One of the criticisms of your approach is that you would  
12 draw a line between those two.

13 MR. ENGLERT: We don't draw a line between  
14 those two, Your Honor.

15 The line is -- depends on whether the  
16 copyright owner has given exclusive foreign rights to  
17 someone else. And the reason the exclusivity of the  
18 foreign rights matters is because that is the example  
19 given in the legislative history of 602 and in the  
20 paragraph in Quality King.

21 And to give meaning to section 602 and to be  
22 completely consistent with the rationale of the first  
23 sale doctrine, one must draw some line. Drawing a line  
24 between the U.S. manufacturer and the foreign  
25 manufacturer makes no sense. It's not consistent with

1 the purposes of anything.

2 Drawing a line between the exclusive grant  
3 of rights, whether by license or assignment to a foreign  
4 manufacturer -- or a foreign distributor, rather, and  
5 not granting such exclusive rights is perfectly  
6 consistent with the rationale --

7 JUSTICE BREYER: You are talking about the  
8 first sale doctrine. The perfectly consistent rationale  
9 would be whether there is a first sale. So -- so 109,  
10 though it doesn't say it, but if you look at the history  
11 and title, there has to be a transfer.

12 So in fact, if a British publisher with a  
13 British right given by an American author or publisher  
14 makes this, 109 doesn't apply -- I mean, 109 doesn't  
15 apply until there's a sale.

16 Now, that makes -- you -- you haven't  
17 adopted that. Nobody -- I guess maybe one of the amicus  
18 briefs does, but I don't see why that isn't perfectly  
19 sensible and I find no authority against it.

20 MR. ENGLERT: Well, Your Honor, since that's  
21 a -- a broader position than ours, and we would --

22 JUSTICE BREYER: I know it is, but it -- the  
23 trouble with your position is it gets everybody, I  
24 think, going to be -- I mean, I don't know what all  
25 these contracts say. There are hundreds of thousands of



1     them, if not millions. What I don't see is why you  
2     don't just say: The first sale doctrine has always  
3     meant there was a transfer or sale.

4                     It meant that in 1792, when I took Phil  
5     Arita's antitrust course, and he used to bring it up.  
6     You go back to the 18th century. It's always meant  
7     there has to be a sale or transfer. So why don't we  
8     just read 109 that way, and there you give meaning to  
9     everything, and there is just no problem?

10                    Now, I raise that not because -- I raise it  
11     because since there's only a few people really  
12     supporting this, there must be some problem with what I  
13     say. So what is it?

14                    MR. ENGLERT: Well, the issue, Your Honor --  
15     and you're putting me in a position of arguing against  
16     myself a little bit, but the issue is a fair reading of  
17     the legislative history of section 602 -- not the text,  
18     but the legislative history -- is that Congress did  
19     intend to allow certain blocking of imported goods when  
20     there had been --

21                    JUSTICE BREYER: Of course, if you say there  
22     has to be a first sale, there is no problem. You block  
23     that British manufacturer from sending his books to the  
24     United States, but you don't block the person to whom he  
25     sells it. Gives meaning to everything.

1 MR. ENGLERT: Okay, Your Honor.

2 JUSTICE BREYER: I mean, no, I'm putting  
3 that to you, because since you haven't advocated it, I  
4 must be missing something, and I'm not an expert in  
5 copyright law. What am I missing?

6 MR. ENGLERT: Well, there is a dictum in  
7 this Court's opinion in Quality King that suggests that  
8 if a publisher and a -- an American publisher gives  
9 exclusive rights to a British publisher, if an American  
10 author or a British author gives exclusive territorial  
11 rights to two different publishers, then 602 retains  
12 meaning in that --

13 JUSTICE KENNEDY: Exactly, and that's what  
14 it does under my theory, because there has been no first  
15 sale.

16 MR. ENGLERT: No, but -- with respect, Your  
17 Honor, it's my understanding of both the legislative  
18 history and this Court's dictum that they refer to  
19 second and subsequent sales.

20 JUSTICE BREYER: Oh, you mean you are  
21 talking about jobbers? Somebody goes and buys, and so  
22 they're -- and so then you lose, because if that's what  
23 we are supposed to follow, those excerpts in the  
24 legislative history, then it would mean that a person  
25 who buys from the British publisher cannot import into

1 the United States because 109 doesn't apply.

2 MR. ENGLERT: No, that's not what the  
3 example means. It doesn't say categorically all second  
4 sales from British publishers are not subject to the  
5 first sale doctrine. What it says is in a situation in  
6 which rights have been divided and exclusive territorial  
7 rights have been given in two different countries, or to  
8 put it in copyright language, in the language you also  
9 used in the legislative history, when the copyright  
10 owner has divided its rights because an innovation of  
11 the '76 act, the Copyright Act, the copyrights became  
12 divisible.

13 JUSTICE SCALIA: Where do you get that in  
14 the text? I mean, that's lovely, and you're saying that  
15 what Justice Breyer suggests makes perfect sense except  
16 for dictum and legislative history. Does your position  
17 make any sense with regard to text?

18 MR. ENGLERT: Yes, absolutely, Your Honor.

19 JUSTICE SCALIA: Where? Where is that  
20 limitation in the text?

21 MR. ENGLERT: The other side's effort to  
22 read 602 broadly has no support in the text after  
23 Quality King, but --

24 JUSTICE SCALIA: I'm talking about your --

25 MR. ENGLERT: I understand.

1 JUSTICE SCALIA: -- your limitation on  
2 exclusive rights abroad versus nonexclusive rights  
3 abroad. Where can you possibly find that in the text?

4 MR. ENGLERT: You cannot.

5 JUSTICE SCALIA: Oh. Well, that's the end  
6 of it for me.

7 MR. ENGLERT: Let us --

8 JUSTICE BREYER: I have to say, I didn't  
9 even see it in the legislative history. I didn't think  
10 they made a big deal about jobbers. I like history  
11 here. Go back to 1792.

12 JUSTICE GINSBURG: Mr. Englert, also talk  
13 about what, if anything, 602(a)(1) does, then. It seems  
14 602(a)(2) is dealing with infringing goods, with pirated  
15 goods. So given the first sale doctrine as you construe  
16 it, what does 602(a)(1) protect?

17 MR. ENGLERT: 602(a)(1) is limited to  
18 imports and doesn't confer a private right of action.  
19 602(a)(2), which was enacted after the Ninth Circuit  
20 ruled in this case, adds a private right of action and  
21 adds exports. But it is -- 602(a)(2) is a new statute.  
22 It was not part of the 1976 Copyright Act. So it -- it  
23 is a subsection in which Congress expanded on what was  
24 already prohibited in 602(a)(1).

25 Now, with respect to text, the text that the

1 Court is construing is five words, "lawfully made under  
2 this title." And those five words are used several  
3 places in the Copyright Act, including section 110, "for  
4 educational use." The government says "lawfully made  
5 under this title" can mean two different things in  
6 section 109 and section 110, provisions of the same  
7 chapter of the Copyright Act enacted contemporaneously.

8 As a fallback position, the government says  
9 there is nothing wrong with having copyright liability  
10 for teachers who show foreign-made films in the  
11 classroom as long as they know they weren't made in the  
12 United States. So, for example, showing an Ingmar  
13 Bergman film, The Seventh Seal, in class would be  
14 copyright infringement according to the government.

15 Even the people who make movies don't agree  
16 with that argument. The Motion Picture Association of  
17 America has filed an amicus brief in this case, and on  
18 page 19 of its brief, the MPAA says that the result the  
19 government says is A-OK is, quote, "a nonsensical and  
20 unintended consequence." The MPAA goes on to say there  
21 is no evidence that such liability has ever been  
22 imposed, but that argument misses the point. We are  
23 trying to ascertain what Congress meant by using the  
24 phrase "lawfully made under this title," not making a  
25 policy argument about consequences, and section 110

1 remains a powerful argument that Congress didn't use the  
2 phrase to mean "made in the United States."

3           There is nothing extraterritorial about  
4 construing "lawfully made in this title" as a choice of  
5 law clause, which means: Lawfully made according to  
6 standards of the U.S. Copyright Act anywhere in the  
7 world. In that respect, this case is no different from  
8 Quality King, in which the court rejected an  
9 extraterritoriality argument in a two-sentence footnote.

10           JUSTICE SCALIA: You don't really mean --  
11 your position is that "lawfully made under this title"  
12 means that -- means "would have been lawfully made under  
13 this title if this title governed." Isn't that  
14 basically what you are saying?

15           MR. ENGLERT: Yes.

16           JUSTICE SCALIA: Okay. But there is another  
17 provision of the statute -- I forget where it is --  
18 which says that in so many words.

19           MR. ENGLERT: Not quite, Your Honor. In  
20 section 602(a)(2) and in section 602(b), Congress used  
21 the phrase, "would have constituted an infringement if  
22 this title had been applicable," and it says --

23           JUSTICE SCALIA: "If this title had been  
24 applicable," right? We say "applicable." Much  
25 prettier.

1                   MR. ENGLERT:   Okay, sir.   Yes, that is the  
2   phrase Congress used to express a certain disfavored  
3   class of goods, goods that would have been infringing if  
4   this title would have been applicable.   110 -- 109,  
5   excuse me, and 110 are a different purpose.   They are  
6   the purpose of favoring goods, goods that have been  
7   lawfully made under this title.

8                   So, yes, Congress could have chosen to use a  
9   variation of the phrase "if this title had been  
10   applicable" under 109, but it didn't.   And we are left  
11   with the language Congress enacted, but it is language  
12   that Congress uses at least four different places in the  
13   Copyright Act, and we have a pretty good idea that it  
14   doesn't mean "made in the United States" and it doesn't  
15   mean what Omega says it means, which is "made in the  
16   United States or authorized at any time for distribution  
17   in the United States."

18                  JUSTICE GINSBURG:   May I ask you -- I see  
19   that 602(a) is now broken into (1) and (2) and it's  
20   602(b) that you put entirely in quotes.   But what does  
21   602(a) shelter?   How does it coexist with the first sale  
22   doctrine?

23                  MR. ENGLERT:   Well, Your Honor, as you know,  
24   there is no reference in the legislative history to the  
25   interaction between 602(a) and 109, and therefore, this

1 Court had to address that question for the first time in  
2 Quality King, and the Court rejected the argument that  
3 109 is inapplicable to imported goods altogether.

4 The Court did say in a dictum which has been  
5 discussed already this morning that if a British and an  
6 American publisher divide rights, then section 602(a)  
7 does have a role to play. But the Court did not say  
8 books manufactured in Britain are not subject to the  
9 first sale doctrine.

10 JUSTICE GINSBURG: There was a concurring  
11 opinion that says -- that said this case is about a  
12 round trip and doesn't talk to goods that --

13 MR. ENGLERT: Correct, and the concurring  
14 opinion cited two distinguished copyright treatises that  
15 suggested there was some concern about  
16 extraterritoriality in this case. Well, even the  
17 government has conceded there is no concern about  
18 extraterritoriality in this case, so the rationale of  
19 those treatises, learned though they are, is undermined.

20 If one looks more closely at those  
21 treatises, they argue the language is so plain that it  
22 can only be construed one way. The government concedes  
23 that's not true. They argue extraterritoriality, as  
24 I've already said, and they argue that this court's  
25 dictum in Quality King -- the later additions to those



1     treatises argue that this Court's dictum in *Quality King*  
2     drew a distinction based on place of manufacture, but  
3     it's only the concurring opinion, not the dictum in the  
4     court's opinion that mentions place of manufacture. So  
5     it's a very thin reed to say that the case turned on  
6     place of manufacture. And again, one can find nothing  
7     in the *Quality King* dictum, nothing in the legislative  
8     history of 602, nothing in the legislative history of  
9     109 that talks about place of manufacture.

10                 JUSTICE SCALIA: And nothing in the text  
11     that supports your position.

12                 MR. ENGLERT: No. What supports our  
13     position, Your Honor, is the text of 109, the use of the  
14     phrase "lawfully made under this title," and the use of  
15     that phrase "elsewhere in the Copyright Act."

16                 JUSTICE SCALIA: You pulled out of the sky  
17     this distinction between having created exclusive rights  
18     abroad and having created nonexclusive rights abroad.  
19     Where does that come from?

20                 MR. ENGLERT: That comes from the  
21     legislative history, Your Honor. And for those who  
22     prefer not to look at legislative history --

23                 JUSTICE SCALIA: You use --

24                 MR. ENGLERT: -- that distinction may not  
25     hold up. But if that distinction doesn't hold up --

1 JUSTICE SCALIA: I don't know why using --

2 MR. ENGLERT: -- that strengthens my  
3 position.

4 JUSTICE SCALIA: Did the legislative history  
5 suggest what part of the text this -- this novel  
6 suggestion was based upon?

7 MR. ENGLERT: It does not. The relevant  
8 legislative history is witness statements.

9 JUSTICE BREYER: I do read legislative  
10 history, but I didn't really find anything that said  
11 that they were worried about an American and a British  
12 publisher dividing rights, and they want them to do  
13 that. There is no problem with that, because there has  
14 never been a sale. So they divide the rights.

15 And there isn't even a problem with -- with  
16 buyers from the British publisher, because a reasonable  
17 vertically imposed territorial agreement or other  
18 restriction on resale is lawful.

19 MR. ENGLERT: Well, if --

20 JUSTICE BREYER: And if it's reasonable,  
21 they don't even need copyright.

22 MR. ENGLERT: That was not true at the time.

23 JUSTICE BREYER: If it isn't reasonable, why  
24 should they have it?

25 MR. ENGLERT: Pardon me, Justice Breyer.

1 JUSTICE BREYER: That's all you -- yes, I  
2 just want you to respond.

3 MR. ENGLERT: It was not lawful at the time  
4 of the enactment of this statute. This Court had not  
5 yet decided GTE Sylvania, and territorial restrictions  
6 were per se unlawful at the time Congress enacted this  
7 statute.

8 JUSTICE BREYER: Here. But in Europe, I  
9 guess, they were lawful.

10 MR. ENGLERT: I don't know the state of the  
11 law in Europe.

12 JUSTICE BREYER: I think -- I think it's  
13 always been true.

14 MR. ENGLERT: But, again, what the Court has  
15 asked me many questions about is whether I'm giving too  
16 broad a scope to section 602 and too narrow a scope to  
17 section 109.

18 Our position is that section 109 has a  
19 necessarily broad reach, and we have tried to  
20 accommodate the legislative history and the dictum in  
21 Quality King to give some role for section 602 to play  
22 in the case of nonpiratical goods. If the Court wants  
23 to reject anything, if it wants to reconsider the dictum  
24 in Quality King or not rely on legislative history, that  
25 makes my position --

1 JUSTICE BREYER: My question really wasn't  
2 to argue with you. My question was: Where in the  
3 legislative history does it say that the point of 602 is  
4 to prevent a foreign publisher from selling copies to a  
5 distributor and then that distributor resells them to  
6 the United States? I'm not saying it doesn't; it's just  
7 that I didn't focus on those particular words directly.

8 MR. ENGLERT: And Justice Breyer, to be fair  
9 about what the legislative history says, it is  
10 statements by witnesses. It is not statements by  
11 committee, so it's a little bit hard to tell where  
12 they're drawing the line.

13 JUSTICE BREYER: Oh. In other words,  
14 somebody wanted that. I understand the industry wanted  
15 it. But -- but I -- is there anything in there that  
16 suggests that this is what Congress wanted to do,  
17 members of Congress? Even I draw the line somewhere.

18 (Laughter.)

19 MR. ENGLERT: Yes. Yes.

20 JUSTICE SCALIA: Let me write that down.

21 (Laughter.)

22 MR. ENGLERT: Justice Breyer, we do know  
23 that section 602(a) has some role to play. And when  
24 this Court was trying to figure out in Quality King what  
25 role it had to play it did look to the statements of

1 Mrs. Harriet Pilpel, Mr. Horace Manges from the American  
2 Book Publishers Council. And those are the statements  
3 that the Court said in dicta presumably reflected  
4 congressional intent, and so I am relying on those  
5 statements for the limitation of section 109 to  
6 accommodate section 602.

7 But again, if the Court disagrees with me  
8 and wants to give less of a role to 602 and more of a  
9 role to section 109, that is, of course, further  
10 assistance to my position.

11 I would like to reserve the balance of my  
12 time for rebuttal.

13 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
14 Englert.

15 Mr. Panner.

16 ORAL ARGUMENT OF AARON M. PANNER

17 ON BEHALF OF THE RESPONDENT

18 MR. PANNER: Mr. Chief Justice, and may it  
19 please the Court:

20 Section -- section 602(a)(1) allows the  
21 distribution of foreign-made copies abroad without the  
22 U.S. copyright holder forfeiting the exclusive right to  
23 distribute copies domestically, which is guaranteed by  
24 section 106(3), and that provision applies in this case.  
25 And unlike in Quality King, section 109(a) provides

1 Costco with no defense because the copies at issue were  
2 not lawfully made under this title. That is, the making  
3 of the copies was not subject to or governed by U.S.  
4 copyright law.

5 The decision of the court of appeals should  
6 not be affirmed for three basic reasons, and the first  
7 depends on the plain language of section 109(a), which  
8 applies only to copies that were lawfully made under  
9 this title.

10 JUSTICE ALITO: What do you say "made"  
11 means?

12 MR. PANNER: Well, "made" certainly includes  
13 the creation of the physical copy. It also includes the  
14 addition of any necessary intellectual property rights  
15 that would permit distribution in the United States.

16 So that is to say that we understand section  
17 109(a) should be read to reach a situation in which copy  
18 has been subject to an authorized sale in the United  
19 States.

20 JUSTICE ALITO: See, I'm with you, and I  
21 think you -- the text supports you up to the point where  
22 you add the qualification. But once you've added that  
23 qualification, I think you're -- you're outside the  
24 text, just as Costco is outside the text with the  
25 qualification that they had.

1                   MR. PANNER: I don't think so, Your Honor,  
2   and let me try to explain why. Section 202 of the Act  
3   draws a -- a distinction between the material object and  
4   the intellectual property rights that are involved in  
5   the copyright. And it makes sense. The word "made" is  
6   not -- does not correspond to the word "reproduced" in  
7   section 106(1). It's a broader term that can also refer  
8   to the addition of these necessary intellectual property  
9   rights.

10                   And the -- what is, I think, important is  
11   the decision whether the copy was lawfully made under  
12   this title will, of course, be made at the time of the  
13   sale. It is not -- the decision doesn't need to be made  
14   at the time of -- of manufacture, because the question  
15   is: How should section 109(a) or another provision  
16   apply to that particular copy?

17                   JUSTICE KENNEDY: Well, in their brief, the  
18   brief for the National Library Association indicates at  
19   the bottom -- the American Library Association indicates  
20   at the bottom of page 38 that "made" might mean cause to  
21   exist, cause to appear, and so that it applies the first  
22   time that U.S. copyright law lawfully could apply; so  
23   that if you lawfully import it into the United States,  
24   it would then apply at that time.

25                   MR. PANNER: Well, I think that that

1     probably gets us to pretty much the same place,  
2     Justice Kennedy.  I think the point is --

3                 JUSTICE KENNEDY:  And it makes the exemption  
4     work, then, too.

5                 MR. PANNER:  That's correct, Your Honor.  
6     And the -- that also gives effect to the language of  
7     602(a)(1), because section 602(a)(1) is actually written  
8     in a very broad term.  It's written to apply to copies  
9     that have been acquired outside of the United States.  I  
10    think -- that is, I think, an answer, Justice Breyer, to  
11    your objection that any sort of sale ought to suffice.

12                Section 602(a)(1) is designed to permit a  
13    U.S. copyright owner to exclude legitimate copies, and  
14    if you ask where Congress said that, it's right in the  
15    House Committee report, in the legislative history.

16                JUSTICE BREYER:  And it can.  It can exclude  
17    legitimate copies before there's a first sale.

18                MR. PANNER:  But the --

19                JUSTICE BREYER:  And the -- the --  
20    question is -- I mean, the text seems to say 602 expands  
21    or falls within 106.  All right?

22                So that's what it says.  It says -- it says  
23    it's an infringement of the exclusive right to  
24    distribute copies.  That's the 106 right.

25                MR. PANNER:  That's correct.



1 JUSTICE BREYER: And then 109 is an  
2 exception from 106. So it's automatically an exception  
3 from 602.

4 MR. PANNER: And I think --

5 JUSTICE BREYER: Now, that's the text. And  
6 therefore, you are back at what the meaning of 109 is,  
7 if I understand your argument. And it seems to me  
8 that's the choice. If you are going to take 109  
9 literally, then everything that comes into the United  
10 States can't, without the permission of the copyright  
11 holder, but for the exception in (a)(3), and a library  
12 that brings them in under (a)(3) cannot even lend out  
13 the books. That's one choice.

14 And the other choice is to say that  
15 "lawfully made" means it's made without contravening any  
16 provision of the Act, if the Act were applicable.

17 MR. PANNER: Well, Your Honor --

18 JUSTICE BREYER: What's a third choice?  
19 Maybe you want a third choice.

20 MR. PANNER: Well, a small qualification,  
21 Your Honor. The exception in section 602(a)(3) does  
22 allow libraries to lend copies that are imported  
23 pursuant to that section. It's for archival or lending  
24 purposes.

25 But in any event, I think that that's -- I

1 don't want to get caught up on the small point. The  
2 more significant point is that section 602(a)(1) is  
3 designed to permit a U.S. copyright owner -- as Costco  
4 admits, it's designed to permit a U.S. copyright owner  
5 to exclude legitimate copies that are made overseas.

6 If the only issue were one of contract,  
7 there would be no need for section 602(a)(1) because  
8 there would be no need to create a copyright remedy  
9 where contractual remedies are sufficient; that is, in  
10 circumstances where there is privity between the U.S.  
11 copyright owner or the U.S. copyright owner's direct  
12 party and the foreign copyright owner.

13 JUSTICE BREYER: That's why I started with  
14 the first sale doctrine, because if you apply the first  
15 sale doctrine as it traditionally has been applied and  
16 if you believe that 109 incorporates that, there is  
17 loads of room for 602(a)(1) to act. That's all the  
18 instances where the British publisher published -- makes  
19 the book. What they do is they have a license and they  
20 try to send it to the United States and they can't  
21 without permission because of 602(a)(1), and then 109  
22 doesn't come into play because there's been no first  
23 sale. That's the part of this case that I'm finding the  
24 hardest, because, literally, 109(a) -- as you correctly  
25 point out, 109 doesn't say that literally.

1                   MR. PANNER: Well, Your Honor, section  
2   602(a)(1) refers specifically to copies that have been  
3   acquired outside of the United States. So it does not  
4   make sense to say that it's limited to the publisher,  
5   because the publisher hasn't acquired the copies. It  
6   has produced the copies.

7                   JUSTICE BREYER: That's all right.

8                   MR. PANNER: So I think that the difficulty  
9   with Costco's reading, by contrast -- and I think that  
10  some of the Court's questions brought that out this  
11  morning -- is that either they -- Costco's reading tends  
12  to eliminate any practical effect for section 602(a)(1)  
13  by making it not apply to legitimate copies or it makes  
14  substantive rights turn on formalities of title, which  
15  is quite inconsistent with the structure of the  
16  Copyright Act, which actually goes out of its way to  
17  make clear that the nature of the rights that are held  
18  by the copyright owner, which is defined to mean the  
19  owner of any of the many rights that comprise the  
20  copyright, are the same regardless of whether there's  
21  been a transfer.

22                   And so when Costco says, for example, that  
23  Omega would have the right to exclude foreign-made  
24  copies that were produced by a transferee, but cannot do  
25  so if it manufactures the copy abroad itself, it really

1 draws a distinction that has absolutely no basis in the  
2 text of the Copyright Act and that would make  
3 substantive rights, the value of the rights under  
4 602(a)(1) and 106(3), turn on formalities and, again,  
5 transfers that really should make no difference in terms  
6 of the substantive rights that are available to the  
7 copyright owner.

8 JUSTICE SCALIA: It seems to me -- why  
9 didn't they say -- instead of "lawfully made under this  
10 title," why didn't they just say "made in the United  
11 States"?

12 MR. PANNER: Well, Your Honor --

13 JUSTICE SCALIA: I mean, that's what you say  
14 it means. "Made under this title" means "made in the  
15 United States."

16 MR. PANNER: That is not our position, Your  
17 Honor. Our position is that "lawfully made under this  
18 title" would include a copy that was manufactured in the  
19 United States, but that it is not so limited, and that  
20 if you look at section 1(e) of our brief, we discuss the  
21 fact that an interpretation of "lawfully made under this  
22 title" to include a copy that includes the necessary  
23 licenses for distribution in the United States is a  
24 consistent reading -- is consistent with the language of  
25 that provision and gives -- and is consistent with the

1 traditional understanding that section 109(a) is  
2 intended to reflect an exhaustion principle.

3 So where a U.S. copyright owner has  
4 exhausted rights with respect to a particular copy by  
5 having been compensated for a right that has been  
6 invested into that copy, that can be included in the  
7 making.

8 JUSTICE SCALIA: That's just not in the  
9 text. I mean, like the other side, in order to make  
10 your theory of the text appear reasonable, you have to  
11 bring in a skyhook with a limitation that finds no basis  
12 in the text.

13 MR. PANNER: I don't think so, Your Honor.  
14 Again, there is -- because the textual evidence is that  
15 there is a distinction between reproduction, which is  
16 the narrow term used in section 106(1), and the broader  
17 term that is used in section 109(a), which is "made" --  
18 and again, that inquiry is always going to occur at the  
19 time of the challenged sale in the United States.

20 And so the question is as to that topic.

21 JUSTICE SOTOMAYOR: Then you are trying to  
22 rewrite Quality King. Now you are saying that the  
23 entire premise of Quality King is wrong.

24 MR. PANNER: Not at all, Your Honor, because  
25 in Quality King, what the Court held was that a copy

1     that is made in the United States is lawfully made under  
2     this title.

3                   JUSTICE SOTOMAYOR:   Where in Quality King do  
4     you see anything Quality King turning on where the goods  
5     were made?

6                   MR. PANNER:   Well, Your Honor, the reason --

7                   JUSTICE SOTOMAYOR:   I read the decision and  
8     it barely mentions that, if at all.   Its whole premise  
9     was on what the owner did:   Did the owner sell this  
10    copy?

11                  MR. PANNER:   I don't think so, Your Honor.  
12    What -- there was no challenge in Quality King to the  
13    idea that the copy was lawfully made under this title,  
14    precisely because the copy was made in the United States  
15    where the Copyright Act governs.

16                  This Court said in our Descani case that the  
17    natural reading under this title is subject to or  
18    governed by this title, and therefore it is a perfectly  
19    straightforward reading of the text.

20                  JUSTICE SCALIA:   But you don't say that.   I  
21    mean, you bring in this other qualification.

22                  MR. PANNER:   But Your Honor, again, the  
23    distinction is between the question whether -- what the  
24    conduct that is being addressed is simply the  
25    manufacture.   That's the case here.

1           There's -- all that happened here is that  
2   the copies were manufactured in Switzerland and sold in  
3   Switzerland for distribution abroad. That does not  
4   implicate U.S. copyright law at all. U.S. copyright law  
5   provides the copyright owner with certain rights to  
6   exclude. It has no right to exclude the making of a  
7   copy, whatever you want to say the making means, in  
8   Switzerland. And it is for that reason that the Ninth  
9   Circuit correctly determined that the copies at issue  
10  here were not lawfully made under this title.

11           JUSTICE ALITO: How often does this  
12  situation --

13           JUSTICE SCALIA: But it would be lawfully  
14  made under this title, even though it was made -- you  
15  know, made abroad, if what?

16           MR. PANNER: If it were made, for example,  
17  pursuant to a license that allowed for distribution in  
18  the United States, there would be an affirmative  
19  exercise of the exclusive right that the copyright  
20  holder has under section 106(3) with respect to that  
21  particular copy. And so it makes perfect sense to say  
22  that that copy is lawfully made under this title,  
23  because you need to look to U.S. law to determine  
24  whether the making of that copy -- even though it took  
25  place overseas, for example -- was governed by -- was

1 lawful as determined by the rights that are granted --

2 JUSTICE SCALIA: Is isn't the making that is  
3 rendered lawful. It's the importation into the United  
4 States that is rendered lawful by the agreement that you  
5 are relying upon.

6 MR. PANNER: Well, Your Honor, the -- the  
7 making -- the question is whether it was lawfully made  
8 under this title. If it was made for distribution in  
9 the United States, it could only be lawfully made for  
10 distribution in the United States if the appropriate  
11 rights were granted by the owner of those rights. And  
12 that is why it makes perfect sense to say --

13 CHIEF JUSTICE ROBERTS: So you are saying --  
14 you are saying that whether or not it's lawfully made  
15 depends on something that happens after it's made?

16 MR. PANNER: In a particular case, it might  
17 be, Your Honor, but in the typical case -- let's say the  
18 Heartland case -- if a manufacturer has a license under  
19 U.S. copyright to distribute in the United States, it  
20 could be lawfully made at that time.

21 But I think, Justice Alito, you were going  
22 to ask a question about how often the situation arises,  
23 and I think it's important to point out that there is no  
24 case that Costco has pointed to, and we are not aware of  
25 them, where a U.S. copyright owner has sought to



1 challenge the resale of a copy where there was an  
2 acknowledged, authorized sale in the United States.

3 Obviously, this is a significant issue to  
4 bringing --

5 CHIEF JUSTICE ROBERTS: Well, they still  
6 have that right. You say there is no case. But under  
7 what theory of yours do they not have that right?

8 MR. PANNER: Because if the sale is  
9 authorized in the United States, then that copy would be  
10 considered lawfully made because it includes the  
11 license. That copy carries with it a license to be  
12 distributed in the United States, which would include  
13 then the right for a lawful owner to resell it. Again,  
14 that's consistent with the language of "made" and it  
15 gives proper effect both to section 602(a)(1), which is  
16 clearly intended to allow the owner of the U.S.  
17 distribution right to exclude legitimate copies that  
18 were made overseas, and it also sensibly construes  
19 section 109(a) to give affect to the exhaustion  
20 principle that underlies it. Which is where a U.S.  
21 copyright owner has exercised his U.S. distribution  
22 rights with regard to a particular copy.

23 JUSTICE GINSBURG: Mr. Panner, can you  
24 answer Mr. Englert's point what earthly sense would it  
25 make to prefer goods that are manufactured abroad over

1 those manufactured in the United States?

2 MR. PANNER: Your Honor, it doesn't create  
3 any sort of a preference, as Mr. Englert -- Mr. Englert  
4 suggests that this is somehow -- prefers the -- the --  
5 the copies that are made abroad. But in the same  
6 breath, he suggests that this will actually promote the  
7 sale of U.S. -- U.S.-manufactured goods because  
8 foreign-manufactured goods may therefore be of suspect  
9 legitimacy for purposes of resale in the United States.

10 But the key point is that in Quality King  
11 this Court looked at the language of section 109(a), and  
12 it says -- and -- and -- and it emphasized that to  
13 determine the scope of the first sale doctrine that text  
14 is what matters. And it says section 109(a) applies to  
15 goods that are lawfully made under this title.

16 There was no dispute that goods that are  
17 reproduced in the United States are lawfully made under  
18 this title, because one must have a U.S. -- the U.S.  
19 right in order to lawfully make a copy in the United  
20 States.

21 JUSTICE BREYER: There's a whole brief filed  
22 that traces the history of that language, and I think  
23 comes to a somewhat different conclusion. Do you want  
24 to say anything about that? It was on the other side.

25 MR. PANNER: Well, I think that the --

1 the -- the tracing of the language is -- is helpful,  
2 actually, to understand how section -- the current  
3 section 60 -- excuse me current section 109(a) differs  
4 from section 27, which is, in section 27, what happened  
5 was is that Congress codified in 1909 the idea that the  
6 material object is different from the copyright. And  
7 when it did that, it added that language as a tag-on to  
8 that principle to ensure that it did not end up  
9 overruling legislatively Bobbs-Merrill.

10 And when the -- when the Congress recodified  
11 the provision in 1976, it actually took section 202, put  
12 it separately, and it -- it codified 109(a) in a way  
13 that is significantly different and then it says  
14 notwithstanding the rights under 106(3) the owner of a  
15 copy lawfully made under this title is entitled to  
16 resell it.

17 And that needs to then be read in harmony  
18 with section 602(a)(1), which after all, was part of the  
19 same act in 1976, it must be read in such a way as to  
20 give section rule 602(a)(1) sufficient room to perform  
21 the function that it was intended to perform, which is  
22 to ensure that a U.S. copyright owner could protect  
23 domestic distribution rights against competition from  
24 legitimate foreign copies. And that's what it -- that's  
25 precisely what's at issue here.

1 JUSTICE ALITO: How often do issues  
2 involving 602(a)(1) come up with respect to things like  
3 books, musical recordings, movies, as opposed to the  
4 copyrighted -- the -- the -- the material that is  
5 copyrighted here, a little -- a little insignia, a place  
6 to a label -- put on a label or put on a -- on goods?

7 MR. PANNER: Thank you, Your Honor, that's a  
8 very good question. There are a number of cases coming  
9 up right now through the Second Circuit that involved  
10 textbooks. This has been -- this has been applied to  
11 all sorts of traditional copyrighted materials, and  
12 indeed that's why the amici who have filed in this case  
13 are not at all limited but include all of the  
14 traditional copyright industries, software, publishing,  
15 movies, music.

16 And, indeed, Costco does not argue that  
17 there is any legal significance to the fact that -- to  
18 the nature of the image or the fact that it -- that it  
19 is placed on a watch, because I think that Costco is  
20 quite aware that what is really at stake here is whether  
21 section 602(a)(1) will continue to provide effective  
22 protection for the exclusive --

23 JUSTICE BREYER: The other side, if you go  
24 to -- you go to -- go to Home Depot and buy a desk, and  
25 how do you know -- are you worried that maybe on this

1 desk it says there was a restriction somewhere, you  
2 could only use it for homes and not for offices? Does  
3 that kind of thing worry you?

4 MR. PANNER: No, Your Honor, it doesn't.

5 JUSTICE BREYER: And the reason it doesn't  
6 is because there is a first sale doctrine. Now, aren't  
7 you importing those very things that don't worry us  
8 about Home Depot into the entire world of books,  
9 everything you are talking about?

10 CHIEF JUSTICE ROBERTS: You may answer,  
11 counsel.

12 MR. PANNER: Thank you, Mr. Chief Justice.

13 I don't think so. And the reason why is  
14 because, first of all this doctrine has existed for  
15 nearly 30 years. It's hornbook law that -- that the  
16 first sale doctrine does not provide a defense in  
17 circumstances where a -- a -- a copyrighted article is  
18 manufactured or reproduced abroad. That has been  
19 well --

20 CHIEF JUSTICE ROBERTS: That was first. Do  
21 you have a second quickly?

22 MR. PANNER: Thank you, Your Honor.

23 And I forgotten what it was.

24 (Laughter.)

25 CHIEF JUSTICE ROBERTS: Thank you,

1 Mr. Panner.

2 MR. PANNER: Thank you.

3 CHIEF JUSTICE ROBERTS: Mr. Stewart?

4 ORAL ARGUMENT OF MALCOLM L. STEWART,

5 ON BEHALF OF THE UNITED STATES,

6 AS AMICUS CURIAE, SUPPORTING RESPONDENT

7 MR. STEWART: Mr. Chief Justice, and may it  
8 please the Court:

9 If the government's interpretation of  
10 section 109(a) is a little bit different from either of  
11 the parties, since I want to make clear precisely what  
12 it is, in our view, the words "lawfully made under this  
13 title" mean made subject to and in accordance with Title  
14 17. And because the Copyright Act doesn't apply abroad,  
15 in order for a copy to be made subject to Title 17, it  
16 would have to be created in the United States.

17 Now, I think our interpretation of the  
18 statute still gives it a slightly different meaning from  
19 the alternative "lawfully made in the United States,"  
20 because at least in theory, it would be possible for the  
21 creation of a copy to entail a violation of  
22 environmental laws, workplace safety laws, minimum wage  
23 laws, et cetera. And it wouldn't be accurate to  
24 characterize a copy made in that way as lawfully made in  
25 the United States, but it would be made -- it would be

1 lawfully made under this title, because it would be made  
2 subject to and in a manner consistent with the  
3 requirements of the Copyright Act.

4 Now, with respect to the types of copyright  
5 materials at issue here, the watches are clearly very  
6 different from what Congress had in mind when it enacted  
7 section 602(a)(1). But in other respects, what Omega  
8 was trying to do in this case was exactly what Congress  
9 intended to allow when it expanded the importation  
10 provisions beyond restrictions on importation of radical  
11 copies. The ideal was to allow a copyright owner to  
12 segment markets either to give -- either retain for  
13 itself or to give to another entity exclusive rights  
14 within the United States, but give other rights abroad  
15 to other producers.

16 And consequently, we argued in Quality King  
17 and we are arguing here that the Court should construe  
18 section 109(a) in a way that doesn't prevent section  
19 602(a) from performing that function.

20 And the Court in Quality King grappled with  
21 the question of whether applying the -- section 109(a)  
22 to the labels that were at issue in that case would have  
23 the effect of negating 602(a)(1) and the Court said no  
24 it wouldn't, because section 109(a) applies only to  
25 copies that are lawfully made under this title. And the

1 Court specially said it wouldn't apply to copies that  
2 were made -- lawfully made under the law of the foreign  
3 country.

4 Now, the Court didn't refer specifically to  
5 the place of manufacture. In giving the example of the  
6 British publisher who would be creating copies under the  
7 law of Great Britain, it didn't specifically say that's  
8 because British law would apply when the copies are made  
9 in England. But I think that's the necessary inference,  
10 because the Court's analysis made quite clear that it  
11 viewed a particular copy as being lawfully made under  
12 the law of one and only one question --

13 JUSTICE ALITO: Well, what is your answer to  
14 the argument that if "lawfully made under this title"  
15 means basically made in the United States, that provides  
16 a great incentive to manufacture goods abroad and that  
17 can't possibly be what Congress intended?

18 MR. STEWART: Well, I think there are -- I  
19 think we would say a couple of things. The question has  
20 been raised whether this gives favored status to a  
21 foreign manufactured goods. And in one sense our  
22 reading -- from -- from the perspective of the copyright  
23 owner, it's true, that this creates something of  
24 potential incentive to manufacture abroad. Now, from  
25 the perspective of the potential importer, you could say



1    this makes foreign manufactured goods disfavored because  
2    they were harder to get into the country than would be  
3    the case if they had been manufactured within the United  
4    States and had then been sent abroad and -- and  
5    reimported.

6                   I guess the best we can say about the  
7    treatment from the copyright owners' prospective, the  
8    differential treatment of foreign and domestic  
9    manufactured goods is that at least with respect to  
10   goods that were made within the United States, the  
11   copyright owner has exercised rights under United States  
12   law.  He has -- it has exercised its exclusive right to  
13   produce the copies in the first instance, whereas the  
14   manufacturer in Omega's position by creating and then  
15   selling the watches abroad, never exercised any of its  
16   Title 17 rights.

17                  And the theory underlying the first sale  
18   doctrine tracing it back to -- to Bobbs-Merrill, the  
19   first articulation by this Court of the -- the doctrine  
20   of the copyright context, the theory is that a copyright  
21   owner who sells the goods, places them in the stream of  
22   commerce, has exercised, as the Court put it in  
23   Bobbs-Merrill, its exclusive right to vend, and  
24   therefore it can claim no more rights under the  
25   copyright laws.

1                                   Omega with respect to the  
2 watches at issue here, never exercised any its rights  
3 under title 17, not -- not when the watches were made  
4 and not when they were sold.

5                   I do also want to address the question of  
6 what happens in the circumstance where Omega  
7 manufactures watches abroad, but then voluntarily  
8 imports them into the United States, sells them here;  
9 can it place restrictions on resale because I think it's  
10 an important policy question and here again we get to  
11 the same point in the end as the Respondents do, but we  
12 have a somewhat different textual route to get there.

13                   Our view is that in that circumstance  
14 section 109(a) still would not apply, because even  
15 though the goods were imported into the United States,  
16 they were made abroad, and that's what counts for  
17 determining whether they were lawfully made under this  
18 title. But section 109(a) is simply a safe harbor. It  
19 doesn't prohibit anything. Section 109(a) says if your  
20 conduct falls within these contours then what you are  
21 doing is legal, whether or not it would otherwise  
22 violate the copyright act.

23                   But if there is a dispute as to whether  
24 section 109(a) applies, and a court held that it  
25 doesn't, the consequence is not necessarily that the

1     conduct is unlawful. The consequence is that you look  
2     to other provisions of title 17 to see whether it is  
3     lawful or not.

4                   JUSTICE KENNEDY: Well, in your example, if  
5     there is a lawful importation of the foreign-made good,  
6     then if you interpret "made" as causing to exist of  
7     appear or under these laws, as the library brief  
8     suggests, the first sale doctrine would operate.

9                   MR. STEWART: I think we would say the first  
10    sale doctrine as articulated in Bobbs-Merrill would  
11    operate, but we wouldn't place this within section  
12    109(a).

13                   CHIEF JUSTICE ROBERTS: Well, that's the  
14    problem I have with your position. You are suddenly  
15    saying a copyright -- these issues have to be resolved  
16    not within the confines of the Copyright Act, but then  
17    you have to look to -- to common law as well, which is a  
18    very confused situation.

19                   MR. STEWART: I think we would still be  
20    looking to other provisions of the Copyright Act rather  
21    than to common law. That is, in the hypothetical I  
22    describe, clearly there could be no violation of  
23    602(a)(1), because the copies would have been imported  
24    by Omega itself. And so the question is if Omega sells  
25    them within the United States and the buyer attempts to

1 resell them, would that be an infringement of Omega 17's  
2 rights? And the only claim that Omega could -- I mean  
3 that -- Omega could plausibly make in that circumstance  
4 would be to say, that is a violation of my exclusive  
5 right to distribute copies to the public protected by  
6 section 106(3).

7                   And I think the response would be under  
8 Bobbs-Merrill, the Court already held that once the  
9 copyright owner exercised its exclusive right to vend --  
10 the word which appeared at the statute at the time --  
11 once it had exercised its exclusive right to vend the  
12 copies, it was done with them and had no more rights to  
13 assert.

14                   And there is no reason to give the right to  
15 vend -- the right to distribute under the current law a  
16 broader reading than the right to vend had at that time,  
17 simply because Congress has enacted section 109.

18                   And -- so I think that the -- it would still  
19 be the case that in order to prevail in a copyright  
20 suit, Omega would have to show that not only that  
21 section 109 was inapplicable, but there was a violation  
22 of the exclusive rights and I don't think it would be  
23 able to do that here.

24                   Now in Bobbs-Merrill, the Court was  
25 certainly drawing on common law principles but it said

1 in the end, its words: "This is exclusively a question  
2 of statutory interpretation." It -- it based its  
3 holding on the language of the Copyright Act as it  
4 existed at that time, specifically the exclusive right  
5 to vend; and the exclusive right to distribute copies to  
6 the public is no different for these purposes under the  
7 current statute.

8 JUSTICE BREYER: I found the brief I was  
9 looking for which is the American Intellectual Property  
10 Law Association. And they trace this back to Professor  
11 Nimmer's 1965 letter, and they say that the point there  
12 was that they were reading Bobbs-Merrill as it was a  
13 pre-emption question, that they thought that the  
14 copyright law was not pre-empting State law of contract,  
15 and State law of contract had the exception in it which  
16 applied the first sale doctrine. Now if that's the  
17 reasoning, that reasoning would seem to me to apply. We  
18 could look up what the State law is, but my guess is  
19 that the first sale doctrine applies just as much to  
20 goods that come from abroad as to goods that are here at  
21 home.

22 MR. STEWART: I -- I think with -- with  
23 respect to the pre-emption question, what they had in  
24 mind was a situation in which Omega sells the watch to a  
25 reseller -- to a retailer on condition, for instance,

1     that the retailer only sell them in a particular way, or  
2     do particular types of advertising, and the reseller  
3     sells them in violation.

4                 JUSTICE BREYER:   What Nimmer said is, he  
5     said we want to be sure in his -- in bill back in '64,  
6     '65 -- not to invalidate any State law contractual  
7     restriction on the right of the owner of the particular  
8     copy to dispose, exhibit, et cetera the same.

9                 MR. STEWART:   Exactly.   I think the language  
10    was chosen in part at least to make clear that although  
11    Omega under in that hypothetical circumstance would have  
12    no remedy under the Copyright Act, it might potentially  
13    have a breach of contract suit against the retailer if  
14    the retailer had breached the agreement with Omega, and  
15    that nothing was -- in the Federal law was intended to  
16    preempt the State law contractual remedies that would  
17    otherwise be available.   And I think the language  
18    adequately accomplishes that purpose.

19                JUSTICE SOTOMAYOR:   So why don't we let --

20                MR. STEWART:   I'm sorry?

21                JUSTICE SOTOMAYOR:   Why don't we let  
22    contract law control the violations of any agreements  
23    with foreigners?

24                MR. STEWART:   Well, I think --

25                JUSTICE SOTOMAYOR:   With respect to

1 manufacturing and distribution?

2 MR. STEWART: I think in 1960 -- may I?

3 CHIEF JUSTICE ROBERTS: Very briefly.

4 MR. STEWART: Because many of the people  
5 with which Congress were concerned would not be in  
6 privity of contract with the U.S. copyright owner.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 Mr. Englert, you have nine minutes  
9 remaining.

10 REBUTTAL ARGUMENT OF ROY T. ENGLERT, JR.,  
11 ON BEHALF OF THE PETITIONER

12 MR. ENGLERT: Thank you, Your Honor.

13 Justice Ginsberg asked Mr. Panner what  
14 policy Congress could have had in mind to give this  
15 different status to foreign-made goods than to U.S. made  
16 goods, and Mr. Panner's answer, and Mr. Stewart said  
17 something similar, was that in one respect Congress is  
18 disfavoring foreign goods under their interpretation by  
19 making them harder to import. That's not true.

20 Under both of their theories, as long as the  
21 manufacturer chooses to authorize importation, which is  
22 Omega's test, or as long as an authorized first sale  
23 takes place in the United States, then the first sale  
24 doctrine does apply. So the copyright holder has  
25 control under their theory and it's not harder to import

1 the goods.

2 In the briefs in this case you will not find  
3 anyone making any policy argument as to what Congress  
4 could have had in mind to favor foreign-manufactured  
5 goods.

6 The heart of Mr. Panner's argument was that  
7 Costco's position either eliminates any significant role  
8 for section 602(a)(1) or makes section 602(a)(1) turn on  
9 formalities of transfer of title. Neither of those  
10 propositions is true. This Court in *Quality King*  
11 addressed the role that section 602(a)(1) has to play if  
12 section 109 is applicable to imported goods, and the  
13 answer was it still applies to nonowners. That was the  
14 Court's first answer.

15 The dictum that has been much discussed this  
16 morning was another answer but the Court's first answer  
17 was that it still applies to nonowners, and because, for  
18 example, software is licensed there is a very live issue  
19 about whether the first sale doctrine applies to  
20 lawfully acquired copies of -- of software. So  
21 602(a)(1) has a role to play under anyone's  
22 interpretation.

23 Now Mr. Panner asserts that our answers to  
24 some of the questions that the Court has asked in our  
25 efforts to harmonize our position with the dictum in



1     Quality King make 602(a)(1) turn on formalities of  
2     transfer of title. Our position can perhaps be  
3     criticized and has been criticized this morning not for  
4     having a textual basis, but it cannot be criticized for  
5     making anything turn on formalities.

6             Our position turns on the economic realities  
7     of the situation. If the copyright owner gets its one  
8     reward, the first sale doctrine applies; if the  
9     copyright owner doesn't get its run reward, because for  
10    example it has given the exclusive foreign manufacturing  
11    rights to someone else, and retained or assigned or  
12    licensed the exclusive U.S. manufacturing rights, then  
13    602(a)(1) has a role to play. So neither of Mr.  
14    Panner's criticisms of our position is correct.

15            Mr. Panner asserted that section 109(a)  
16    differs from section 27, the predecessor statute in the  
17    1947 Act, which in turn was Section 41 of the 1909 Act.  
18    This Court said the exact opposite in Quality King.

19            It said there is no evidence of any attempt  
20    to narrow the first sale doctrine through the language  
21    of section 109(a). And if one looks at the House  
22    report -- again, getting into legislative history, which  
23    some members of the Court do not like to get into -- but  
24    if one looks at the House report, the first sentence of  
25    the relevant part of the House report is section 109(a)

1 restates and confirms the principle that where the  
2 copyright owner has transferred ownership of a  
3 particular copy or phonorecord of a work, the person to  
4 whom the copy or phonorecord is transferred is entitled  
5 to dispose of it by sale, rental or other means. No  
6 hint that using "lawfully made" under this title to  
7 narrow the doctrine.

8           The last sentence of the relevant part of  
9 the House report: To come within the scope of section  
10 109(a) a copy or phonorecord must have been lawfully  
11 made under this title though not necessarily with the  
12 copyright owner's authorization. For example, any  
13 resale of an illegally pirated phonorecord would be an  
14 infringement, but the disposition of a phonorecord  
15 legally made under the compulsory licensing provisions  
16 of section 115, would not.

17           So what does the House report on section 109  
18 tell us? It tells us that lawfully made under this  
19 title was intended to expand the category of covered  
20 works beyond just those made by the copyright owner, or  
21 with the authorization of the copyright owner. But  
22 under Omega's and the government's position, that phrase  
23 is used to contract the scope of the first sale doctrine  
24 in derogation of the common law, imposing a restraint on  
25 alienation for foreign-made goods that is not imposed on

1 U.S.-made goods.

2           With respect to the policy incentives that  
3 it creates it's undeniable that it creates an incentive  
4 for outsourcing of manufacture. The government admitted  
5 that in its cert stage brief, and again, in its brief in  
6 this Court. Obviously if Congress wants to create an  
7 incentive for outsourcing, that's probably within its  
8 power as long as it can be said somehow to advance  
9 science and the useful arts; but there is simply not a  
10 shred of evidence in text or legislative history that  
11 Congress intended to encourage outsourcing; quite the  
12 contrary.

13           The very controversial section 601, the  
14 adjacent section to section 602, required that  
15 nondramatic literary works in the English language be  
16 manufactured in the United States or Canada or else they  
17 would not be eligible for a U.S. copyright. So we know  
18 that the 1976 Congress wanted to favor the domestic  
19 printing industry, not to disfavor it; and yet their  
20 interpretation of 602 and 109 would disfavor domestic  
21 printing industry and any domestic manufacturing  
22 industry. Thank you.

23           CHIEF JUSTICE ROBERTS: Thank you, counsel.  
24 The case is submitted.

25           (Whereupon, at 11:00 a.m., the case in the

1   above-entitled matter was submitted.)

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