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

2 (11:05 a.m.)

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

6 Mr. Rosenkranz.

7 ORAL ARGUMENT OF E. JOSHUA ROSENKRANZ

8 ON BEHALF OF THE PETITIONER

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

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

17 Ours is the only one consistent with a  
18 400-year common law history, and 65-year-old right that  
19 was in the statute through 1976, and consistent with the  
20 principle that Congress doesn't abolish those things  
21 without being clear.

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

1     imagined asking for back then.

2                     Ours --

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

7                     That is essentially your argument.

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

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

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

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

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

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

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

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

1 follow the national exhaustion.

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

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

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

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

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

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

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

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

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

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

14 JUSTICE SCALIA: No?

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

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

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

3           JUSTICE SCALIA: Right.

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

6           JUSTICE SCALIA: Okay.

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

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

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

22          JUSTICE KAGAN: No.

23          MR. ROSENKRANZ: Yes. So --

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



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

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

7                   MR. ROSENKRANZ: Counterfeit.

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

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

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

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

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

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

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

14 MR. ROSENKRANZ: Yes.

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

17 MR. ROSENKRANZ: Yes.

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

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

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

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

8                   MR. ROSENKRANZ:  If --

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

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

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

1 Doctrine applies to where this title does apply.

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

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

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

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

17 MR. ROSENKRANZ: Yes. In 2008 --

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

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

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

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

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

6 MR. ROSENKRANZ: Well, Your --

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

11 MR. ROSENKRANZ: Correct.

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

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

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

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

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

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

13                  So is there --

14                  MR. ROSENKRANZ: No.

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

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

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

25                  MR. ROSENKRANZ: A motivation for 602.

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

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

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

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

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

23                  I mean, a copyright weapon gives you  
24   injunctive relief, gives you multiples of damages which  
25   you don't get out of a contract remedy.



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

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

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

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

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

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

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

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

23           I believe it can be reconciled, certainly in  
24   result.  What you had there was the foreign distributor  
25   who had only British rights importing directly into the

1 United States. There was never a first sale.

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

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

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

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

24 So let me just give you an example. Section  
25 110, the classroom provision. Wiley acknowledges this

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

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

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

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

23 JUSTICE GINSBURG: Has that ever happened?  
24 I mean, the Ninth Circuit cases have been around for  
25 some time. Has any manufacturer ever moved abroad?

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

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

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

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

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

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

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

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

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

24 JUSTICE KAGAN: Mr. Rosenkranz, can I take  
25 you back to Justice Ginsburg's opening question? Just

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

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

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

25           If I may reserve the rest of my time for

1     rebuttal.

2                   CHIEF JUSTICE ROBERTS:  Thank you, counsel.

3                   MR. ROSENKRANZ:  Thank you, Your Honors.

4                   CHIEF JUSTICE ROBERTS:  Mr. Olson.

5                   ORAL ARGUMENT OF THEODORE B. OLSON

6                   ON BEHALF OF THE RESPONDENT

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

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

16                  602(a) is broader than 6 -- 109(a), because  
17    it encompasses copies not subject to the first-sale  
18    doctrine, for example copies made under the law of  
19    another country.  These are the words of every member of  
20    this Court in the Quality King case.

21                  Now, referring to it as dicta misstates what  
22    was going on in the Quality King case.  The argument was  
23    that if you interpret 602(a) and 109(a) as allowing a  
24    defense, a first-sale defense, you emasculate Section  
25    602(a), and so the Court was explaining on page 147 and



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

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

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

14 MR. OLSON: I do.

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

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

24 JUSTICE BREYER: You don't need that.

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

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

6 MR. OLSON: That's --

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

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

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

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

21 JUSTICE BREYER: Oh, fair use.

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

25 JUSTICE SOTOMAYOR: I'm sorry. Is your

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

6 MR. OLSON: It says --

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

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

13 JUSTICE SOTOMAYOR: So deal with the wife.

14 MR. OLSON: -- for lending purposes.

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

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

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

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

24 JUSTICE SOTOMAYOR: No, to keep for  
25 yourself. As far as I understand --

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

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

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

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

16 MR. OLSON: Well, and this --

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

22 Now, under your reading -- now, this is one  
23 of their horrors, I gather, and I want to know your  
24 answer to it. Under their reading, the millions of  
25 Americans who buy Toyotas could not resell them without

1 getting the permission of the copyright holder of every  
2 item in that car which is copyrighted.

3 MR. OLSON: There may be --

4 JUSTICE BREYER: Is that right?

5 MR. OLSON: There may be just --

6 JUSTICE BREYER: Am I right or am I wrong?  
7 Am I off base or am I wrong -- am I right?

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

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

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

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

1 Picasso comes to the United States, and they can't  
2 display it without getting permission from the five  
3 heirs who are disputing ownership of the Picasso  
4 copyrights.

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

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

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

18 JUSTICE BREYER: But we need to --

19 JUSTICE SOTOMAYOR: Don't those horrors --

20 JUSTICE KENNEDY: We need to know about  
21 those hypotheticals in order to decide this case.

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

23 JUSTICE KENNEDY: You're aware of the fact  
24 that if we write an opinion with the -- with the rule  
25 that you propose, that we should, as a matter of common

1 sense, ask about the consequences of that rule. And  
2 that's what we are asking.

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

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

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

23 JUSTICE SOTOMAYOR: But he's selling it  
24 no -- no differently than Quality King was -- or the  
25 Quality King --

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

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

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

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

18           MR. OLSON: I -- there -- there is a body of  
19 the government of the United States that is entitled and  
20 capable of fixing this. These parade of horrors have  
21 been -- people have been arguing about these for years.  
22 For 30 years, the statute has been interpreted the way  
23 that we are suggesting that it should be under this  
24 title, which this Court earlier this year, in another  
25 case, in the Novo Nordisk case, specifically said, under



1     this title means pursuant to the provisions of this  
2     title.

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

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

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

19                JUSTICE KAGAN: Well, Mr. Olson, can I just  
20    take you to --

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

22                JUSTICE KAGAN: Please.

23                MR. OLSON: With respect to those other  
24    provisions, Justice Ginsburg, the -- the government  
25    specifically goes over each one of those, but each one

1 of those, if you interpret the statute as under this  
2 title as pursuant to this title, each one of those  
3 provisions makes sense in the context in which that term  
4 is used there.

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

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

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

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

23 But what Mr. Rosenkranz essentially says --  
24 he doesn't say it in these words, but he says, "The  
25 focus of this provision is on 'lawfully made.'" That is

1 what the focus is on. It's on "lawfully made" as  
2 opposed to "unlawfully made."

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

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

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

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

19 MR. OLSON: It --

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

24 MR. OLSON: I think under this title means  
25 that it was made pursuant to the provisions of the

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

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

10 MR. OLSON: Because the --

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

13 MR. OLSON: The main -- main --

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

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

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

1 Toyota without the -- without looking -- displaying the  
2 Picasso without the permission of the copyright holder,  
3 who may or may not be Toyota itself.

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

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

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

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

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

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

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

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

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

1 to address this gray market problem.

2 Isn't that correct?

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

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

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

1 section 602(a)(1).

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

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

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

23           So it seems to me that this does make  
24 perfect sense. And it makes -- there is not going to be  
25 a perfect solution in every case. The Court has dealt



1 with that frequently with respect to copyright laws.  
2 But if you interpret it as my opponent interprets it,  
3 you are opening the door to commercial enterprises  
4 precisely like this.

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

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

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

25           Congress can address that if that should

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

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

6                   Mr. Stewart.

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

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

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

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

25                  MR. STEWART:   I think there are two related

1 reasons, and one of them is the dictum, but I'll get to  
2 that second.

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

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

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

22 It didn't use the phrase "market  
23 segmentation," but clearly, the point was the same. You  
24 are authorizing copies to be made abroad for  
25 distribution only in that place, not for redistribution

1 here.

2 And so --

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

9 MR. STEWART: That's correct.

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

13 MR. STEWART: That's correct.

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

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

1 made under this title" to encompass both foreign-made  
2 and domestic-made copies, without doing damage to the  
3 copyright holder's ability to segment markets.

4 On the other hand --

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

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

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

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

1 sued for copyright infringement.

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

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

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

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

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

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

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

17           Now -- namely the resale in violation of  
18    restrictions on resale. How can you now say it's now an  
19    infringement of the exclusive right to distribute? And  
20    it would be a particularly difficult argument for the  
21    copyright owner to make because what the House Report  
22    said in 1909, it didn't say exactly that it was  
23    codifying the holding of Bobbs-Merrill; it said that it  
24    was amending the statute in other respects, and it  
25    wanted to make clear that there was no intent to enlarge

1 the exclusive right to vend.

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

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

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

23 CHIEF JUSTICE ROBERTS: Well, it's not that  
24 complicated under the Petitioner's approach. It says  
25 once you've you had a first sale, that's it.



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

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

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

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

22           MR. STEWART: I -- I give two answers for  
23 that. And the first is that Coke was saying that, in  
24 most circumstances at least, a sale is sufficient in  
25 order to divest the owner of his prior right to control

1 distribution, but it doesn't say that a sale is  
2 necessary.

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

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

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

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

1 would occur, if Petitioner's position were accepted?

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

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

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

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

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Mr. Rosenkranz, you have four minutes.

22 REBUTTAL ARGUMENT OF E. JOSHUA ROSENKRANZ

23 ON BEHALF OF THE PETITIONER

24 MR. ROSENKRANZ: Thank you,

25 Mr. Chief Justice.

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

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

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

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

1 was six years after this statute was passed.

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

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

23 So unless there are further questions from  
24 the Court -- I saw, I just realized I said the same  
25 thing twice incorrectly to Justice Ginsburg. 905 and

1 906 are examples of international -- exhaustion.

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

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

7 The case is submitted.

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

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