No. 11-697

IN THE
Supreme Court of the United States

SUPAP KIRTSAENG, D/B/A BLUECHRISTINE99,
Petitioner,

v.

JOHN WILEY & SONS, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE MOTION PICTURE ASSOCIATION OF AMERICA, INC. AND THE RECORDING INDUSTRY ASSOCIATION OF AMERICA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

JENNIFER L. PARISER
RECORDING INDUSTRY
ASSOCIATION OF AMERICA
1025 F Street, NW
Washington, DC 20004
(202) 775-0101
jpariser@riaa.com
Counsel for the RIAA

SETH P. WAXMAN
Counsel of Record
RANDOLPH D. MOSS
CATHERINE M.A. CARROLL
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com
Counsel for the MPAA

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

CONSTITUTIONAL PROVISIONS

STATUTES

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

INTEREST OF AMICI CURIAE[1]

The Motion Picture Association of America, Inc. (MPAA) is a not-for-profit trade association founded in 1922 to address issues of concern to the U.S. motion picture industry. Its members include Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc. MPAA's members and their affiliates are the leading producers and distributors of filmed entertainment in the theatrical, television, and home entertainment markets.

The Recording Industry Association of America (RIAA) is a nonprofit trade association founded in 1952 representing the American recording industry. RIAA's record company members include Universal Music Group, Sony Music Entertainment, Warner Music Group, and EMI Music North America. RIAA's members create, manufacture, and/or distribute approximately 85 percent of all legitimate sound recordings produced and sold in the United States.

Copyright protection is essential to the health of the motion picture and music industries and the U.S. economy as a whole. Like the sale of "pirated" copies, unauthorized importation of copies of protected works made overseas and intended only for sale in a foreign market can undercut or eliminate the economic benefit that Congress intended to provide under the Copyright Act. Were this Court to reverse settled law and accept

---

[1] Letters consenting to the filing of this brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amici, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

Petitioner's interpretation of the first sale doctrine, MPAA's and RIAA's members and affiliates could face a significant threat of harm from unauthorized importation, contrary to the balance of rewards and incentives Congress struck in the Copyright Act.

SUMMARY OF ARGUMENT

Enacted to "promote the Progress of Science and useful Arts" by stimulating creativity for the public benefit, U.S. Const. art. I, § 8, cl. 8, the Copyright Act grants copyright holders an exclusive right to control the first sale of tangible copies of protected works, including the right to obtain whatever economic benefits flow from that first sale. In general, once that first sale of a particular tangible copy is made and the copyright holder has realized the economic benefit afforded under the Copyright Act, it has exhausted its exclusive distribution right.

Section 109(a) of the Copyright Act limits the applicability of the first sale doctrine to cases involving tangible copies that were "lawfully made under" the Act. When read in light of the presumption against extraterritorial application of U.S. law and in the context of the Copyright Act as a whole, that language must be understood to refer to copies that are lawfully made in the United States. That is the only reading that gives meaningful effect to Congress's purpose in prohibiting unauthorized importation under § 602. That reading also best serves the purposes of the Copyright Act and the first sale doctrine. If a copyright owner makes or authorizes the making of tangible copies of a protected work outside the United States for distribution exclusively outside the United States, the copyright owner has not fully exercised or benefited from—much less exhausted—its exclusive distribution right under U.S.

copyright law, and it has not reaped the full economic benefit that Congress intended to provide as an incentive for creative activity.

Kirtsaeng and his amici contend that if the Court accepts this natural reading, economic ruin will follow for a litany of interested parties, from commercial retailers to charitable organizations to factory workers to flea-market sellers. This is a curious position, considering that courts have recognized for nearly 30 years that § 109(a) applies only to copies made in the United States, yet there is no evidence this long-recognized principle has actually impaired any important secondary markets or led to imposition of liability on well-meaning librarians, teachers, or garage-sale hosts. Indeed, almost every court to have considered the issue has come out the same way, and Congress has amended the Copyright Act on numerous occasions without disturbing that construction.

The absence of any evidence supporting Kirtsaeng's dire predictions should come as no surprise. This settled understanding of the first sale doctrine has long functioned effectively in conjunction with importation laws, contractual arrangements, and business practices to protect the rights of copyright owners while ensuring a free flow in commerce of copies of copyrighted works. In the motion picture industry, for example, studios' ability to treat national markets separately for purposes of the timing, promotion, or content of theatrical and home video releases can be critical to a film's commercial success. In the music industry, recordings are often released at different times in different countries, depending on the strategic considerations of the local territory. Unauthorized importation could undercut these practices and reduce the value of U.S. movie and music copyrights, particularly where

exclusive distribution rights are held by different entities in different markets. The settled understanding of the first sale doctrine, together with laws against unauthorized importation, protects those practices. At the same time, contractual arrangements facilitate broad public distribution of authorized tangible copies of protected works. Movie studios, for example, regularly authorize distribution of copies of protected works in the United States by retailers or rental services such as Netflix. Such arrangements can allow for distribution of copies made outside the United States. By the same token, numerous exceptions and defenses throughout the Copyright Act—including exceptions to liability for unauthorized importation under § 602—shield isolated acts of importation or distribution that pose only insubstantial harm to the copyright owner.

While Kirtsaeng's parade of horribles is thus unfounded, the threat posed by his preferred view of the first sale doctrine is very real. Extending the first sale doctrine to copies made abroad for distribution in a foreign market could impede authors' ability to control entry into distinct markets, limit their flexibility to adapt to market conditions, or undermine territorial licensing agreements. If accepted, Kirtsaeng's view of the first sale doctrine could thus prevent U.S. copyright holders from obtaining the economic reward Congress intended to provide under U.S. law to motivate investment in creative activity.

ARGUMENT

I. THE FIRST SALE DOCTRINE DOES NOT APPLY TO COPIES MANUFACTURED ABROAD FOR SALE IN A FOREIGN MARKET

A. The Text, Structure, And Purposes Of The Copyright Act Support The Judgment Below

As part of a landmark revision of the Copyright Act in 1976, Congress enacted 17 U.S.C. § 602(a), prohibiting the "[i]mportation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work that have been acquired outside the United States." Pub. L. No. 94-553, § 101, 90 Stat. 2541, 2589 (1976). At the same time, Congress amended the first sale doctrine, as codified at 17 U.S.C. § 109(a), to apply only to copies that are "lawfully made under this title."

In *Quality King Distributors, Inc.* v. *L'anza Research International, Inc.*, 523 U.S. 135 (1998), this Court held that the first sale doctrine imposes a limitation on § 602(a) in cases involving "round trip" reimportation of copies of protected works that are manufactured in the United States. This case presents the distinct question whether the first sale doctrine applies also to copies of protected works that are manufactured and sold abroad and imported into the United States without the copyright owner's authorization. With respect to *this* question, the court of appeals' analysis best harmonizes the text, structure, and purposes of the Copyright Act. Indeed, Kirtsaeng's contrary interpretation deprives § 602(a) of meaningful effect in the very circumstances Congress intended that provision to address. Courts have accordingly long read § 109(a) to apply only to copies made in the United States, and Congress has implicitly approved this interpretation.

1. The text of § 109(a) limits the first sale doctrine to copies lawfully made in the United States

Section 109(a) provides that, notwithstanding the copyright owner's exclusive right to distribute copies of a protected work under 17 U.S.C. § 106(3),

> the owner of a particular copy or phonorecord *lawfully made under this title*, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

(Emphasis added.) By its terms, this defense applies only to copies "lawfully made under" Title 17 of the United States Code. A copy that is not made *subject to* or *pursuant to* the U.S. Copyright Act, however, cannot be "lawfully made *under*" that Act. Because a copy made outside the United States is not made subject to or pursuant to U.S. law, it is not "lawfully made under" the Copyright Act.

That natural reading of § 109(a) finds support in the "'longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Morrison* v. *National Austl. Bank, Ltd.*, 130 S. Ct. 2869, 2877 (2010) (quoting *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (*Aramco*)). Unless Congress has "'clearly expressed'" an "'affirmative intention …' to give a statute extraterritorial effect," courts "'presume [the statute] is primarily concerned with domestic conditions.'" *Id.*; *see Restatement (Second) of Foreign Relations Law of the United States* § 38 (1965). This presumption carries particular weight in the intellectual property context,

where the need to avoid international conflicts of law is acute and where "foreign law 'may embody different policy judgments about the relative rights of inventors, competitors, and the public'" in intellectual property. *Microsoft Corp.* v. *AT&T Corp.*, 550 U.S. 437, 454-455 (2007); *see United Dictionary Co.* v. *G&C Merriam Co.*, 208 U.S. 260, 264 (1908); 7 *Patry on Copyright* § 25:86 (2010).

Consistent with that presumption, when Congress intends a law to apply extraterritorially—including the Copyright Act—it says so expressly. *See, e.g.*, 17 U.S.C. §§ 104(b)(2), 602(b); *Aramco*, 499 U.S. at 258-259 (citing statutes). Here, in contrast, nothing in § 109(a) expresses any intent that the making of copies abroad should be considered to occur "under" U.S. law for purposes of the first sale doctrine. Leading treatises thus agree that the phrase "lawfully made under this title" as used in § 109(a) must mean "lawfully made in the United States," Patry & Martin, *Copyright Law and Practice* 182-183 (2000 Supp.), and that "the first sale defense is unavailable" with respect to copies lawfully made abroad but unlawfully imported into the United States, 2 *Goldstein on Copyright* § 7.6.1.2(a) (3d ed. Supp. 2011); *see also* Patry & Martin, *Copyright Law and Practice* 183 n.84, 210-213; 2 *Nimmer on Copyright* § 8.12[B][6][c] (rev. ed. 2011); 4 *Patry on Copyright* § 13:44 (2012).[2]

---

[2] In *Quality King*, the Court noted that applying § 109(a) to copies made *in the United States* but initially sold abroad would not constitute extraterritorial application of U.S. law. 523 U.S. at 145 n.14. In doing so, the Court assumed the copies were "lawfully made under the Act" and *subsequently* sold abroad. *Id.* That holding thus did not extend U.S. law to govern the making of copies abroad, as Kirtsaeng's interpretation would here.

2. Construing § 109(a) to apply only to copies made in the United States is most consistent with § 602(a) and *Quality King*

As the court of appeals observed, the foregoing reading of § 109(a) "best comports with both § 602(a)(1) and [this] Court's opinion in *Quality King*." 654 F.3d 210, 220 (2d Cir. 2011). As Respondent has demonstrated (Br. 38-42), Congress adopted § 602(a)(1) to protect against the harmful consequences of unauthorized importation and to allow copyright owners to maintain control over their entry into different markets without losing the value of their rights under U.S. law, including by entering into market allocation agreements or territorial licensing arrangements. *See also* 654 F.3d at 221 ("[Section 602(a)(1)] is obviously intended to allow copyright holders some flexibility to divide or treat differently the international and domestic markets for the particular copyrighted work.").

The court of appeals correctly determined that, under Kirtsaeng's interpretation of § 109(a), § 602(a)(1) would fail to serve that function. 654 F.3d at 221 (noting that, under Kirtsaeng's view of § 109(a), "the mandate of § 602(a)(1) … would have no force in the vast majority of cases"). As this Court recognized in *Quality King*, § 602(a)(1) "applies to a category of copies that are neither piratical nor 'lawfully made under this title'"—namely, "copies that were 'lawfully made' … under the law of some other country." 523 U.S. at 147. Section 602(a)(1)'s ban on importation of authorized copies acquired abroad serves to protect market allocation agreements under which the copyright owner authorizes the making of copies abroad for distribution exclusively in foreign markets. *Id.* at 147-148. Under

Kirtsaeng's reading of § 109(a), however, § 602(a)(1) could no longer meaningfully advance that purpose.

Kirtsaeng claims (Br. 43-46) it is "irrelevant" that his reading of § 109(a) defeats the intended purpose of § 602(a)(1), so long as § 602(a)(1) could retain some marginal role in other circumstances. Kirtsaeng hypothesizes, for example, that § 602(a)(1) is not rendered totally superfluous by his reading of § 109(a) because it could continue to prohibit unauthorized importation by non-owners such as "rogue distributors," as well as importation of copies that were "lawfully made" under foreign law but not U.S. law. As a matter of statutory interpretation, however, a reading of § 109(a) that deprives § 602(a)(1) of substantial "meaningful effect" or renders it "'insignificant" in the vast majority of cases in which it was intended to apply is little better than an interpretation that reads it out of the statute altogether. *New Process Steel, L.P.* v. *NLRB*, 130 S. Ct. 2635, 2640 (2010); *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 467 (1998) (Scalia, J., dissenting).

And that is precisely the consequence of Kirtsaeng's reading. Given that importation "typical[ly]" entails a transfer of title, *Quality King*, 523 U.S. at 152, Kirtsaeng's suggestion that § 602(a)(1) would still prohibit unauthorized importation by non-owners leaves little role for that provision to play. Nor is it sufficient that § 602(a)(1) would still bar importation of copies that would be unauthorized if U.S. copyright law applied but are legally made under the laws of some other country. *Cf.* Pet. Br. 45-46. Limiting § 602(a)(1) in that manner would defeat its purpose of prohibiting unauthorized importation where the copyright owner had authorized the making of copies abroad for distribution only in foreign markets. As this Court specifically stated in *Quality King*, the "category of

copies that are neither piratical *nor 'lawfully made under this title*'" includes foreign editions made pursuant to a market allocation agreement or copies made by a publisher holding only foreign distribution rights. 523 U.S. at 147-148 (emphasis added). Kirtsaeng's reading, contrary to that holding, strips § 602(a)(1) of meaning in those cases.

3. The court of appeals' interpretation of § 109(a) is the only reading that serves the purposes of the Copyright Act and the first sale doctrine

Consistent with its constitutional underpinnings, *see* U.S. Const. art. I, § 8, cl. 8, the Copyright Act was designed to "stimulate artistic creativity for the general public good" by "secur[ing] a fair return for an author's creative labor." *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151, 156 (1975) (internal quotation marks omitted). The Act "must be construed in light of this basic purpose." *Id.*; *see Bobbs-Merrill Co.* v. *Straus*, 210 U.S. 339, 346 (1908).

To fulfill this purpose, Congress granted authors an exclusive right to distribute tangible copies of a protected work. 17 U.S.C. § 106(3). That exclusive distribution right and the other rights conferred by the Copyright Act serve "'to motivate the creative activity of authors and inventors by the provision of a special reward,'" while also "'allow[ing] the public access to the products of their genius after the limited period of exclusive control has expired.'" *Harper & Row, Publishers, Inc.* v. *Nation Enters.*, 471 U.S. 539, 546 (1985). The "special reward" the Copyright Act provides to a copyright owner is the right to obtain a royalty for his or her work and the increased market return made possible during the period of exclusivity.

The first sale doctrine limits a copyright owner's ability to control future sales of a tangible copy of a protected work, but only after he has placed that copy into the stream of commerce and obtained the economic reward made possible by the copyright *under U.S. law*. Once the copyright owner has "exhausted his exclusive statutory right to control its distribution," the copy may be freely sold and resold by subsequent purchasers. *Quality King*, 523 U.S. at 152; *see Bobbs-Merrill*, 210 U.S. at 349-351. The doctrine thus enables copyright owners to realize the economic benefit (or royalty) Congress intended to provide as an incentive for creative activity, while limiting any restraints on alienation of a particular copy to its first sale.

Applying the first sale doctrine to copies manufactured and distributed abroad does not serve these purposes. A copyright owner that makes and sells copies exclusively in foreign markets does not benefit from U.S. copyright protection at the first sale and cannot be said to have "exhausted" its exclusive distribution right. *Quality King*, 523 U.S. at 152. While a copyright owner who makes copies in a foreign country exclusively for sale in that market might realize an economic benefit under the laws of that country, he does not realize the separate benefit Congress intended to make available in the United States as an incentive to promote creative activity. *See Harper & Row*, 471 U.S. at 546. Yet under Kirtsaeng's view, that copyright owner would be deemed to have exhausted his rights under U.S. law before fully exercising or benefiting from them. *See Burke & Van Heusen, Inc.* v. *Arrow Drug, Inc.*, 233 F. Supp. 881, 884 (E.D. Pa. 1964) ("[T]he ultimate question under the 'first sale' doctrine is whether or not there has been such a disposition of the copyrighted article that it may fairly be said that the copy-

right proprietor has received his reward for its use."); 7 *Patry on Copyright* § 25:18 ("For purposes of the first sale doctrine … copyright is quite 'territorial' since an authorized sale or other distribution of a copy ends the copyright owner's control in that territory (*but not others*) over further distribution or public display of that copy." (emphasis added)).

4. Courts have long held that the first sale doctrine does not apply to copies made and sold abroad, and Congress has acquiesced in that interpretation

Contrary to Kirtsaeng's rhetoric, the court of appeals' holding that the first sale doctrine does not apply to copies manufactured and distributed outside the United States was far from novel. This interpretation of the 1976 Act was first adopted in 1983, and nearly all subsequent decisions have adhered to that view. Moreover, although Congress has amended the Copyright Act numerous times, it has refrained from revising § 109(a) to overturn or modify that established construction. In light of this history, the longstanding construction of § 109(a) is entitled to particular respect.

The first case to consider the relationship between the prohibition on unauthorized importation in 17 U.S.C. § 602(a) and the first sale defense of § 109(a) was *Columbia Broadcasting System, Inc.* v. *Scorpio Music Distributors, Inc.*, 569 F. Supp. 47 (E.D. Pa. 1983). The district court there held that the phrase "lawfully made under this title" in § 109(a) limits the first sale defense to copies "which have been legally manufactured and sold within the United States." *Id.* at 49. In so holding, the court relied on the text of § 109(a) and the presumption against extraterritoriality, as well as the view that a contrary interpretation "would undermine the

purpose of the statute" by precluding the copyright owner from "exercis[ing] control over copies of the work which entered the American market in competition with copies lawfully manufactured and distributed under this title." *Id.* at 49-50.

The Third Circuit affirmed the district court's holding in *Scorpio* without comment, and courts in that circuit and elsewhere have continued to follow that interpretation in cases involving copies manufactured and distributed abroad. *Scorpio Music Distribs., Inc.* v. *CBS, Inc.*, 738 F.2d 424 (3d Cir. 1984); *see also, e.g.*, *T.B. Harms Co.* v. *Jem Records, Inc.*, 655 F. Supp. 1575, 1582-1583 (D.N.J. 1987) (following *Scorpio*); *cf. Sebastian Int'l, Inc.* v. *Consumer Contacts (PTY) Ltd.*, 847 F.2d 1093, 1098 (3d Cir. 1988) (holding that first sale doctrine precluded liability under § 602(a) for reimportation of goods manufactured in the United States and distributed abroad, but distinguishing *Scorpio* and similar cases). By 1996, one court observed that "[t]he courts … appear to be in agreement" that "sales *abroad* of foreign manufactured United States copyrighted materials do not terminate the United States copyright holder's exclusive distribution rights in the United States under §§ 106 and 602(a)." *Summit Tech., Inc.* v. *High-Line Med. Instruments Co.*, 922 F. Supp. 299, 312 (C.D. Cal. 1996) (internal quotation marks omitted).[3]

---

[3] *See also, e.g.*, *Omega S.A.* v. *Costco Wholesale Corp.*, 541 F.3d 982, 985 (9th Cir. 2008), *aff'd by an equally divided Court*, 131 S. Ct. 565 (2010); *Parfums Givenchy, Inc.* v. *Drug Emporium, Inc.*, 38 F.3d 477, 481-482 (9th Cir. 1994); *BMG Music* v. *Perez*, 952 F.2d 318, 319 (9th Cir. 1991); *Microsoft Corp.* v. *Big Boy Distrib. LLC*, 589 F. Supp. 2d 1308, 1317 (S.D. Fla. 2008); *Pearson Educ., Inc.* v. *Liao*, 2008 WL 2073491, at *3 (S.D.N.Y. May 13, 2008); *Swatch S.A.* v. *New City Inc.*, 454 F. Supp. 2d 1245, 1254 (S.D. Fla.

Against the backdrop of this precedent, Congress has repeatedly amended the Copyright Act without overturning or modifying courts' construction of the phrase "lawfully made under this title."[4] As Respondent has shown (Br. 34, 36-37), many of those amendments were adopted in direct response to judicial interpretations of the Act. *See, e.g.*, 1 *Patry on Copyright* § 1:92 (2009) (describing 1992 amendments to fair use doctrine responding to two Second Circuit decisions); *see also id.* §§ 1:96, 1:101. Indeed, Congress has specifically amended § 109(a) in response to judicial decisions or other developments without revising courts' interpretation of "lawfully made under this title." For example, prompted by the advent of the compact disc, Congress added subsection (b) to § 109 in 1984 to create an exception to the first sale doctrine in the context of rental, lease, or lending of sound recordings. *See* Record Rental Amendment of 1984, Pub. L. No. 98-450, § 2, 98 Stat. 1727, 1727; *see also* 1 *Patry on Copyright* § 1:86. In response to a Fourth Circuit decision, Congress adopted a similar amendment in 1990 to revise the first sale doctrine in the context of the commercial rental of software. *See* Computer Software Rental Amendments Act of 1990, Pub. L. No. 101-650, tit. 8, §§ 802-803, 104 Stat. 5134, 5134-5135 (amending § 109(b) and adding § 109(e)); 1 *Patry on Copyright*

2006); *UMG Recordings, Inc.* v. *Norwalk Distribs., Inc.*, 2003 U.S. Dist. LEXIS 26302, at *6-9, 14 (C.D. Cal. Mar. 13, 2003); *Lingo Corp.* v. *Topix, Inc.*, 2003 WL 223454, at *4 (S.D.N.Y. Jan. 31, 2003).

[4] *See* U.S. Copyright Office, *Statutory Enactments Contained in Title 17 of the United States Code*, http://www.copyright.gov/title17/92preface.html (last visited Sept. 6, 2012) (listing 62 amendments since 1983); 1 *Patry on Copyright* §§ 1:71-1:116 (discussing amendments).

§ 1:91; Resp. Br. 33-35. And in 1994, Congress amended § 109(a) to accommodate multilateral agreements on copyright restoration. *See* Uruguay Round Agreements Act, Pub. L. No. 103-465, § 514(b), 108 Stat. 4809, 4981 (1994).

Courts presume that Congress is "aware of … earlier judicial interpretations and, in effect, adopt[s] them" when it revises statutory language without reversing the judicial construction. *Keene Corp.* v. *United States*, 508 U.S. 200, 212 (1993) (citing *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978)). Here, Congress has repeatedly amended the Copyright Act in response to changing circumstances or judicial decisions construing the Act, including the first sale doctrine. Because it has not done so with respect to application of the first sale doctrine to copies manufactured and sold abroad, the governing presumption is that Congress is aware of courts' interpretation of § 109(a) and has seen no reason to reverse it. *Keene*, 408 U.S. at 212.

B. Kirtsaeng's Arguments Lack Merit

1. *Quality King* does not support Kirtsaeng's interpretation of § 109(a)

Contending that the question presented here is "essentially the same" as the issue in *Quality King*, Kirtsaeng emphasizes this Court's holding that the prohibition on unauthorized importation in § 602(a)(1) is limited by the first sale doctrine of § 109(a). Pet. Br. 19-23, 38. That holding, however, does not support Kirtsaeng's interpretation of the phrase "lawfully made under this title."

The copies at issue in *Quality King* were legally manufactured in the United States—and thus "'lawfully made under this title,'" 523 U.S. at 145—then distribut-

ed abroad before being reimported into the United States without permission. *Id.* at 138-139. As Justice Ginsburg's concurring opinion made explicit, the decision did not "resolve cases in which the allegedly infringing imports were manufactured abroad." *Id.* at 154; *see United States* v. *Stanley*, 483 U.S. 669, 680 (1987) ("no holding can be broader than the facts before the court").

Far from contesting Justice Ginsburg's conclusion, the Court emphasized that § 109(a)—unlike the pre-1976 codification of the first sale doctrine—"does not apply to 'any copy'; it applies only to a copy that was 'lawfully made under this title.'" 523 U.S. at 143 n.9. Significantly, the Court distinguished between copies "lawfully made under this title" and copies "'lawfully made' not under the United States Copyright Act, but instead, under the laws of some other country." *Id.* at 147. And it gave as an example of the category of copies that would be "neither piratical nor 'lawfully made under this title'" copies that were authorized to be published and sold exclusively in foreign markets. In such a case, the Court made clear, "the first sale doctrine would *not* provide … a defense" to a publisher who had permission to make and sell copies abroad—copies that would thus be "lawfully made" under U.S. law if it applied (*cf.* Pet. Br. 24)—but who instead "decided to sell in the American market." 523 U.S. at 148 (emphasis added). That conclusion fully supports affirmance of the decision below.

2. Kirtsaeng's position finds no support in the text of the Copyright Act

Kirtsaeng equates (Br. 24) the phrase "lawfully made under this title" with a requirement that the making of the copy *would have been* "'*in accordance*

with'" the U.S. Copyright Act had it applied. But that is not what Congress said, and Kirtsaeng provides no reason to replace the words Congress used with words that have a very different meaning and invite very different consequences. Any doubt on that score is removed by reference to two subsections in § 602. Section § 602(a)(2) distinguishes between "infringement of copyright" under U.S. law, and acts "which would have constituted an infringement of copyright *if this title had been applicable*," (emphasis added). Similarly, § 602(b) refers to circumstances "where the making of the copies … would have constituted an infringement of copyright *if this title had been applicable*," (emphasis added). Thus, when Congress intends to regulate the making of copies "'in accordance with the Copyright Act'" even where that Act does not apply (*cf.* Pet. Br. 24)—and thus intends to engage U.S. courts in the complex task of determining how U.S. law would apply in foreign countries in conjunction with foreign law—it knows how to say so. It did not say so in § 109(a).

Nor is Kirtsaeng's position helped by the explicit reference to the place of manufacturing in the now-expired "manufacturing provision," which provided that

> the importation into or public distribution in the United States of copies of a work consisting preponderantly of nondramatic literary material that is in the English language and is protected *under this title* is prohibited unless the portions consisting of such material have been *manufactured in the United States or Canada.*

17 U.S.C. § 601 (emphasis added). Kirtsaeng reads (Br. 28-29) this provision to mean that a copy can be manufactured outside the United States and also be "protected 'under [Title 17].'" But that reading makes an

incorrect apples-to-oranges comparison: one phrase refers to "*works*" that are "protected under this title," the other refers to "*copies*" that are "manufactured in the United States or Canada."[5] Moreover, Congress's use of specific language applying § 601 to copies manufactured *outside* the United States contrasts sharply with § 109(a), where Congress indicated no similar intent to apply the law extraterritorially.[6]

As Respondent has shown (Br. 26-35), Kirtsaeng's reliance on other provisions of the Copyright Act that employ the phrase "lawfully made under this title" also fails. Section 106, for example (Pet. Br. 33), refers only to the legal concept of a "copyright under this title," which is expressly defined in § 104—in language sufficiently clear to overcome the presumption against extraterritoriality—to include works first published abroad, *supra* n.5. It does not address conduct, such as

---

[5] Kirtsaeng's analysis of § 104 (Br. 29-32) makes the same mistake. Section 104 defines the *works* that are subject to protection "under this title." It does not address which *copies* of those works infringe the U.S. copyright. Moreover, by explicitly stating that works published overseas may be protected "under this title," Congress expressed a clear intent in § 104 to apply U.S. law extraterritorially and to encompass overseas conduct within the phrase "under this title." Section 109(a) contains no such language.

[6] Kirtsaeng's amici claim Congress could not have intended to introduce a "place of manufacture" requirement in § 109(a) while simultaneously "remov[ing] place of manufacture as a relevant factor" by repealing § 601. eBay Br. 19; *see id.* at 16-20; Costco Br. 24-26; Goodwill Br. 22-23. That conclusion does not follow. In repealing § 601, Congress enabled authors to make copies abroad *without* losing access to, or rights in, the U.S. market. Properly construed, § 109 serves the same purpose. Kirtsaeng's reading would have the opposite effect: authors that make copies overseas would risk losing the ability to control entry into the U.S. market or losing substantial value of their U.S. copyright.

the "making" of a copy, that can sensibly be thought of as occurring in a particular location. *See* Resp. Br. 28-29. Section 1004(b) of the Audio Home Recording Act, unlike § 109(a), also expresses a clear congressional intent to reach goods manufactured abroad. Contrary to Kirtsaeng's claim (Br. 35-36), no tension between that provision and § 1006(a)(1)(A) results from the court of appeals' reading of "lawfully made under this title" because § 1004(b) governs payments *into* a royalty fund by importers of digital audio recording media, while § 1006 governs the distribution of royalties *from* that fund to authors of musical works. *See* Resp. Br. 32-33.

Kirtsaeng also cites (Br. 34-35, 36-37) statutory exceptions to infringement liability in §§ 109(c), 109(e), and 110(1) that use the phrase "lawfully made under this title." The most important lesson to be gleaned from these provisions is that Congress is fully capable of crafting exceptions precluding liability when, in Congress's view, the balance of circumstances tips against broader copyright protection. In the decades since courts first began to construe § 109(a) to apply only to copies made in the United States, however, Congress has sensibly taken no action to alter that result, and none of the consequences Kirtsaeng predicts have materialized. In any event, for the reasons Respondent states (Br. 29-32, 33-35), Kirtsaeng's reliance on those exceptions is misplaced.[7]

---

[7] Kirtsaeng's analysis assumes that "lawfully made under this title" must have the same meaning in every place it appears. In fact, "[a]lthough [courts] generally presume that identical words used in different parts of the same act are intended to have the same meaning, the presumption is not rigid, and the meaning [of the same words] well may vary to meet the purposes of the law." *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001) (internal quotation marks omitted). That is particularly so

Kirtsaeng's contentions thus cannot overcome what the text of § 109(a), the presumption against extraterritoriality, settled precedent, and the purposes of the Copyright Act make clear: The first sale doctrine does not apply to unauthorized importation of tangible copies made outside the United States.[8]

II. EXTENDING THE FIRST SALE DOCTRINE TO COPIES MANUFACTURED ABROAD FOR SALE IN FOREIGN MARKETS COULD PRODUCE HARMFUL CONSEQUENCES CONTRARY TO THE PURPOSE OF THE COPYRIGHT ACT

Kirtsaeng's interpretation of § 109(a), if accepted, would undermine the copyright protection on which artistic fields like the motion picture and music industries depend for their economic viability. As in other creative fields, these industries rely on the ability to divide

---

when the provisions address different concerns and the operation of one provision could be "set awry" by the interpretation that best serves the purposes of another. *Id.* Here, infringement of the rights to public display or performance poses different concerns than infringement of the exclusive distribution right; and, unlike § 109(a), the provisions Kirtsaeng cites need not be construed to harmonize with § 602(a)(1).

[8] As Respondent has discussed (Br. 55-56), this case does not present, and the Court need not decide, the question whether the first sale doctrine applies to copies manufactured abroad but imported into and sold in the United States with the copyright owner's permission. In practice, that question is likely academic. *Authorized* importation into the United States of copies made abroad occurs pursuant to contractual arrangements that benefit both the copyright owner and the importer. Copyright owners have no reason to attack these distribution networks. In the unlikely event the issue were ever litigated and application of the natural reading of "lawfully made under this title" resulted in anomalous or unintended consequences, that result should be resolved by Congress, not by construing § 109(a) to "effectively nullify Congress's clear policy choice … that market segmentation be permitted." U.S. Br. 28, *Costco* v. *Omega*, No. 08-1423, O.T. 2010.

rights across markets and to plan for and control the timing and manner of the release of their works in different markets around the world. Unauthorized importation of home video discs and CDs into the U.S. market could undercut these practices and, in doing so, undermine copyright owners' ability to recoup their investment in creative activity.[9]

A. Undermining Copyright Owners' Control Over Entry Into Different Markets Threatens The Value Of Their Copyright

When copyright owners distribute tangible copies of creative works in a foreign market, they recoup the economic benefit made possible by the copyright law of that country, which may be substantially less generous or well enforced than U.S. copyright law. They do not realize the separate benefit Congress intended them to derive from their U.S. copyright. If those copies are imported into the United States without permission, the copyright owner might never obtain that full benefit.

For example, when unauthorized importers purchase CDs or video discs in other markets and resell them in the United States, the importer undercuts the economic benefit Congress intended to provide to stimulate artistic activity.[10] This result is most stark when

---

[9] As used in this brief, the phrase "video discs" includes DVDs, Blu-Ray discs, and any other optical discs used for viewing movies at home. "CDs" refers to compact discs used for listening to sound recordings.

[10] Due to certain technical features, some video discs manufactured for sale in other markets cannot be played back satisfactorily or at all on U.S. televisions and disc players, but that fact does not answer these concerns. Studios' use of those technical features varies, and a substantial proportion of discs still play per-

the U.S. distribution rights are held by a company that has no distribution rights in the other markets—a common arrangement in the motion picture and music industries. In such a case, unauthorized importation of copies of a movie or sound recording made and sold in a foreign market by the entity holding the foreign distribution rights can prevent the U.S. copyright owner from realizing the benefit of its rights under U.S. law, even if it has yet to sell a single theater ticket, CD, or home video disc anywhere. Moreover, the threat of that possibility can constrain the copyright owner's flexibility to enter into foreign markets or undertake beneficial licensing of distribution rights, contrary to Congress's intent in enacting § 602(a). Resp. Br. 38-42; *see* 4 *Patry on Copyright* § 13:42.

Those harms, in turn, could have deleterious consequences for the U.S. economy as a whole. As of 2010, the motion picture and television industry supported 2.1 million jobs and nearly $143 billion in total wages in the United States. MPAA, *The Economic Contribution of the Motion Picture & Television Industry to the United States*, http://www.mpaa.org/Resources/6f8617ae-bdc7-4ff2-882e-746b1b23aba9.pdf (last visited Sept. 7, 2012) ("*Economic Contribution*"). In addition to the major motion picture studios, the industry supports a nationwide network of

---

fectly well in the United States. Indeed, with the shift to high-definition technologies such as Blu-Ray, one of the main technical impediments to using video discs manufactured abroad for home entertainment in the U.S. is becoming increasingly obsolete. If anything, the adverse consequences for the motion picture industry that arise from unauthorized importation could thus pose an even more serious concern as more markets move to high-definition home entertainment technology. http://www.amazon.co.uk/Now-Thats-What-Call-Music/dp/B0089MSEEU/ref=sr_1_1?ie=UTF8&qid=1346783469&sr=8-1.

nearly 95,000 businesses throughout the 50 States. *Id.* The music industry employed over 25,000 paid employees as of 2004. Siwek, Institute for Policy Innovation, Report No. 188, *The True Cost of Sound Recording Piracy to the U.S. Economy* 2 (2007) ("*True Cost*"). The industry supports many smaller businesses such as retail stores, distribution companies, recording studios, and music professionals. The retail trade alone generates over $7 billion from the sale of sound recordings. *Id.* Maintaining robust copyright protection is thus crucial to preserving not only the health of these creative fields themselves, but also their substantial contributions to the national economy.

B. The Ability To Treat National Markets Separately Is Important To The Success Of The Motion Picture And Music Industries

Ignoring the purposes of § 602(a), Kirtsaeng fails to acknowledge any legitimate reasons for treating national markets separately. But cultural, economic, and other differences at times provide good reason for motion picture and music companies to tailor theatrical releases and CD and home video disc sales to the particular characteristics and economic conditions of each market. *See* Resp. Br. 46-49. Unauthorized importation can threaten these practices—and thus the value of the copyright—by disrupting exclusive licenses or interfering with the copyright holder's flexibility to adapt to differences across markets. Moreover, a copyright owner's loss of control over entry into particular markets may increase the risk that entering those markets will diminish valuable rights under U.S. copyright law.

1. *Dividing rights across markets.* In the movie industry, distribution rights to particular films are commonly held by different companies in different

countries. For example, to obtain financing for a new film, a studio might sell or license distribution rights in smaller, strategic markets while retaining the rights—and the prospect of a sound return—in larger markets like the United States. *See* Barfield & Groombridge, *The Economic Case for Copyright Owner Control over Parallel Imports*, 1 J. World Intell. Prop. 903, 930 (1998). Likewise, record companies often license the distribution of sound recordings in foreign territories as a way of utilizing the licensee's superior distribution capability in a particular region, enhancing revenue for the record company and the licensee. When rights are held separately in this way, the U.S. rights holder cannot distribute copies in a foreign market where rights are held by another entity. Yet if copies made in that market by the foreign rights holder are imported without authorization into the United States, they could undercut revenue for the company holding the rights in the United States. Indeed, under Kirtsaeng's view, there would effectively be no such thing as exclusive distribution rights for the U.S. copyright holder if copies made abroad by the foreign rights holder could be freely imported behind the shield of the first sale doctrine. As the Court recognized in *Quality King*, 523 U.S. at 147-148, however, Congress enacted § 602(a) largely to protect such ubiquitous market arrangements from unauthorized importation of both piratical *and* legitimate foreign copies.

2. *Timing releases differently in different markets*. For many reasons, studios often release new movies in theaters and on disc at different times in different markets. This longstanding practice, known as "windowing," may be driven by the content of the movie: A movie marketed as a summer blockbuster is unlikely to be released at the same time in Australia as in Europe

and North America. In other cases, the timing decision is tied to promotional strategies. "Hype" around a movie's release can contribute greatly to its commercial success. But creating hype depends on close control over the timing of entry into the market. For example, timing a release to coincide with a promotional tour by actors or artists associated with the work can build excitement and a "crescendo of demand" around the work's release that facilitates its widest possible dissemination. Barfield & Groombridge, 1 J. World Intell. Prop. at 929. Similarly, filmmakers might find it desirable to delay a movie's release in large markets until a movie has enjoyed success in smaller markets or film festivals. Record companies likewise time the release of recordings in different markets to capitalize on promotional opportunities such as when an artist will be on tour or available to promote the album. Under Kirtsaeng's view, however, a studio could not release a movie on home video disc in one market while the movie was still in theaters in the United States, even if there were a strong business case for doing so, without incurring risk that unauthorized importation of those discs into the United States could detract from the success of the U.S. theatrical release. *Id.* at 930.[11] Similar-

[11] For example, the suspense film *Taken* was released on DVD in Mexico in November 2008, but did not open in U.S. theaters until January 2009. The docudrama *Miss Bala* was released on DVD in Mexico on January 12, 2012, but did not open in U.S. theaters until January 20, 2012. The Mexican DVDs, which were manufactured in Mexico, were compatible with U.S. televisions and DVD players. Given the staggered release windows, unauthorized importation of copies of the Mexican DVDs could have significantly diminished the success of the U.S. theatrical releases and undercut the value of the U.S. distributor's rights. Studios also release DVDs abroad ahead of U.S. DVD release. For example, Mexican- and Brazilian-manufactured DVDs of the film *Rio*, which were compatible with U.S. televisions and DVD players,

ly, a company that obtains the exclusive U.S. distribution rights for a successful foreign film might not benefit fully from those rights if copies made and sold abroad for the original foreign release could be imported into the United States.

3. *Combating piracy and unauthorized importation.* The ability to stagger the timing of releases into different markets can also prove useful in combating piracy. For example, in countries where piracy is prevalent, a copyright owner might release the DVD and Blu-Ray versions of a film early to compete with and deter piracy activity. *See* Cheng, *Fox to Sell Low-Cost DVDs in China To Combat Piracy* (Nov. 13, 2006); Cheng, *Paramount and Warner Bros. Market $3 DVDs in China* (Nov. 7, 2007). If those early-release video discs could lawfully be imported into the United States while the film was still showing in U.S. theaters, they could undercut the success of the theatrical release. Record companies also stagger their releases around the world and engage in other practices in an effort to combat rampant music piracy. Congress could not have intended copyright owners who find it necessary to adapt their marketing strategies to conditions in countries where copyright protection is less stringently enforced to risk undercutting or losing the economic benefit of their rights under U.S. copyright law in doing so.

4. *Varying content by market.* Unlike the commercial goods at issue in *Costco* and *Quality King*, original creative works are often tailored in content to better respond to regional conditions and tastes. In the motion picture context, for example, a studio might release different versions of the same movie in different

---

were released a month before U.S.-manufactured DVDs of the film were released in North America.

markets to adapt to local language, taste, and humor, or simply to make different artistic statements.[12] Versions may also vary to comply with different decency standards in different countries, and foreign-made copies of movies do not always include the ratings information with which U.S. consumers are familiar. Treating international markets differently for these purposes is perfectly legitimate. Yet under Kirtsaeng's view, a studio that followed this strategy would face the threat that foreign versions of movies—which might be less well received by U.S. audiences than a version specifically tailored to U.S. tastes—could become widely available in the United States, yielding negative reviews and depressing sales of the U.S. version. *See* Craig et al., *Culture Matters: Consumer Acceptance of U.S. Films in Foreign Markets*, 13 J. Int'l Mktg. 80, 82-83, 97 (2005). Sound recordings are also edited to comport with local views of language and decency. Similarly, due to differences in royalty obligations in different countries, foreign-manufactured CDs may contain many more music tracks than comparable U.S. ver-

---

[12] *See, e.g.*, Alternate Versions for *Austin Powers: International Man of Mystery* (1997), http://www.imdb.com/title/tt0118655/alternateversions (describing different jokes, editing, and content in U.S. and United Kingdom versions); Alternate Versions for *Schindler's List* (1993), http://www.imdb.com/title/tt0108052/alternateversions (comparing Israeli and other versions); Alternate Versions for *E.T.: The Extra-Terrestrial* (1982), http://www. imdb.com/title/tt0083866/alternateversions (describing alteration in Japanese version to accommodate cultural differences); Alternate Versions for *The Shining* (1980), http://www.imdb.com/title/tt0081505/alternateversions (describing changes in content and editing made by director Stanley Kubrick for U.S. and European theatrical and home video releases); Alternate Versions for *Casablanca* (1942), http://www.imdb.com/title/tt0034583/alternateversions (describing deletion of "all scenes with Major Strasser and all references to Nazism" for post-war German release).

sions.[13] Record companies should not be deprived of the right to control how their works are received in the United States.

5. *Fostering local distribution networks.* Of the 2.1 million jobs in the United States supported by the motion picture industry, over 400,000 are involved in the distribution of motion pictures and television shows to consumers. MPAA, *Economic Contribution*. The recorded music industry supports a similar array of "downstream" businesses including retail stores, which generate over $7 billion annually. Siwek, *True Cost* 2. Treating markets separately permits copyright owners to develop stable networks of distributors whose familiarity with the market helps ensure that new theatrical, home video, and music releases are optimally packaged and advertised. Local distributors can "customize the products to meet local market demands, including dubbing/sub-titling, duplication of the customized product, [or] special packaging and advertising." Barfield & Groombridge, 1 J. World Intell. Prop. at 930. Local distribution networks also aid the copyright owner in policing against piracy and copyright infringement by monitoring sales and distribution and keeping track of the provenance of different batches of copies. Unauthorized importation, however, can disrupt these networks.

---

[13] *Compare* http://www.amazon.com/Now-43-Thats-What-Music/dp/B008BCH9NU/ref=sr_1_1?ie=UTF8&qid=1346783574&sr=8-1&keywords=now+music (listing 22 tracks on U.S. version of 2012 edition of "Now That's What I Call Music!"), *with* http://www.amazon.co.uk/Now-Thats-What-Call-Music/dp/B0089MSEEU/ref=sr_1_1?ie=UTF8&qid=1346783469&sr=8-1 (listing 44 tracks on United Kingdom version).

C. Kirtsaeng's Policy Arguments Are Unrealistic And Cannot Overcome The Statute's Text And Purpose

The foregoing strategies and practices are facilitated by importation laws and contractual arrangements that protect copyright owners' rights while largely precluding the unfounded and unrealistic parade of horribles that Kirtsaeng and his amici predict will result if this Court affirms the decision below. Even if their concerns were well taken, however, the proper forum in which to resolve them would be Congress, not this Court.

As an initial matter, the improbable concern that limiting the first sale doctrine to copies made in the United States will result in unintended liability for unwary teachers, librarians, garage-sale and flea-market proprietors, or donors to charity trivializes the threat to copyright protection posed by Kirtsaeng's interpretation of § 109(a). The genuine threat at issue is the prospect of systematic, unauthorized importation on a mass scale of copies of movies, sound recordings, or other protected works that could undercut the market for copies intended for sale in the United States or constrain copyright holders' ability to control the timing and terms of entry into different markets. Kirtsaeng and his amici point to no evidence to suggest that the existing rule, which protects against such harmful, mass-scale unauthorized importation, has deterred legitimate activity by teachers or librarians or invited unwarranted enforcement actions.

Congress has also crafted numerous exceptions and defenses throughout the Copyright Act that might apply should any of the reckless enforcement actions Kirtsaeng and his amici posit ever actually occur. For

example, incidental importation by tourists or libraries of limited numbers of copies of protected works made overseas is permitted under the Copyright Act. 17 U.S.C. § 602(a)(3)(B), (C); *see also, e.g.*, Art Museum Br. 13 n.17 (arguing that fair use and other defenses would preclude liability for public display of foreign-made works of art even if § 109(c) applied only to U.S.-made works); American Library Ass'n Br. 28-30 (listing numerous "protections Congress has provided specifically to [libraries]"). Nothing would prevent Congress from enacting additional defenses or exceptions if it ever perceived the need.

Kirtsaeng's dire predictions about the "gray market" are likewise one-sided and overstated. He and his amici fail even to acknowledge contrary evidence concerning the value of parallel imports (or lack thereof), and the numerous legitimate reasons for treating national markets separately. For example, one article cited by amici discusses evidence that "billion[s] [of dollars] in cannibalized sales" may "stifle the incentive to innovate." Autrey & Bova, Harv. Bus. Sch. Accounting & Mgmt. Unit Working Paper No. 09-098, *Gray Markets and Multinational Transfer Pricing* 1 (2009). Another source reports that gray markets cause companies to "suffer from price erosion, brand damage, and … inadequate customer service." KPMG LLP, *Effective Channel Management Is Critical in Combating the Gray Market and Increasing Technology Companies' Bottom Line* 3 (2008).

At the same time, contractual arrangements readily permit companies to import copyrighted goods for resale in U.S. secondary markets. Copyright holders have every incentive to enter into such agreements to facilitate the distribution of their works. Many movie studios, for example, have entered into contracts with Netflix, a

popular movie rental service, authorizing Netflix's distribution of copyrighted home video discs. Such an arrangement can be highly valuable to both the distributor and the copyright owner, which obtains access to a broad customer base and benefits from the rental service's promotional efforts. Kirtsaeng's suggestion (Br. 4, 57) that a movie studio would abandon those arrangements and exploit its copyright to "shut down" or "demolish" such a profitable and mutually beneficial distribution network is unfounded, to say the least.

Kirtsaeng and his amici also contend that adopting the court of appeals' interpretation of § 109(a) would create a harmful incentive for copyright owners to "outsource" manufacturing to other countries. As discussed, however, *supra* Part II.B, producers of creative works must take numerous considerations into account when making manufacturing and marketing decisions across different markets. Kirtsaeng ignores this context and ignores—again—the absence of any evidence that any economic harm has befallen domestic manufacturers as a result of courts' longstanding view that § 109(a) does not apply to copies made abroad for sale in foreign markets.

Ultimately, the policy arguments advanced by Kirtsaeng and his amici reduce to the proposition that copyright owners should not be permitted to realize the separate benefit made possible by their U.S. copyright. In place of that economic benefit, Kirtsaeng and his amici prefer a system euphemistically referred to as "arbitrage": "Merchants buy goods where they are cheap and sell them where they are more expensive." Pet. Br. 15. Congress, however, made a different choice. It determined that providing a limited economic benefit to copyright holders through the exclusive distribution right and protecting international licensing

arrangements from unauthorized importation would most effectively spur creation of new artistic works for the public good. *See Twentieth Century Music Corp.*, 422 U.S. at 156; *Harper & Row*, 471 U.S. at 546. And it has regularly revisited and adjusted those rights to achieve the "difficult balance between the interests of authors and inventors in the control and exploitation of their writing and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand." *Sony Corp. of Am.* v. *Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). As this Court has repeatedly recognized, "it is generally for Congress, not the courts, to decide how best to pursue [those] objectives." *Eldred* v. *Ashcroft*, 537 U.S. 186, 212 (2003).

CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted.

JENNIFER L. PARISER
RECORDING INDUSTRY ASSOCIATION OF AMERICA
1025 F Street, NW
Washington, DC 20004
(202) 775-0101
jpariser@riaa.com

Counsel for the RIAA

SETH P. WAXMAN
Counsel of Record
RANDOLPH D. MOSS
CATHERINE M.A. CARROLL
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

Counsel for the MPAA

SEPTEMBER 2012