

KIR TSAENG v. JOHN WILEY & SONS, INC.

568 U.S. ____, 133 S.Ct. 1351 (2013)

SUPREME COURT OF THE UNITED STATES

Decided March 19, 2013

19 **JUSTICE BREYER delivered the opinion of the Court.**

20 Section 106 of the Copyright Act grants “the owner of copyright under this title” certain “exclusive rights,” including the right “to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership.” 17 U. S. C. §106(3). These rights are qualified, however, by the application of various limitations set forth in the next several sections of the Act, §§107 through 122. Those sections, typically entitled “Limitations on exclusive rights,” include, for example, the principle of “fair use” (§107), permission for limited library archival reproduction, (§108), and the doctrine at issue here, the “first sale” doctrine (§109).

21 Section 109(a) sets forth the “first sale” doctrine as follows:

22 “Notwithstanding the provisions of section 106(3) [the section that grants the owner exclusive distribution rights], the owner of a particular copy or phonorecord *lawfully made under this title* . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or [...] phonorecord.” (Emphasis added.)

23 Thus, even though §106(3) forbids distribution of a copy of, say, the copyrighted novel Herzog without the copyright owner’s permission, §109(a) adds that, once a copy of Herzog has been lawfully sold (or its ownership otherwise lawfully transferred), the buyer of *that copy* and subsequent owners are free to dispose of it as they wish. In copyright jargon, the “first sale” has “exhausted” the copyright owner’s §106(3) exclusive distribution right.

24 What, however, if the copy of Herzog was printed abroad and then initially sold with the copyright owner’s permission? Does the “first sale” doctrine still apply? Is the buyer, like the buyer of a domestically manufactured copy, free to bring the copy into the United States and dispose of it as he or she wishes?

25 To put the matter technically, an “importation” provision, §602(a)(1), says that

26 “[i]mportation into the United States, without the authority of the owner of copyright under this title, of copies . . . of a work that have been acquired outside the United States is an infringement of the exclusive right to distribute copies . . . *under section 106 . . .*” 17 U. S. C. §602(a)(1) (2006 ed., Supp. V) (emphasis added).

27 Thus §602(a)(1) makes clear that importing a copy without permission violates the owner’s exclusive distribution right. But in doing so, §602(a)(1) refers explicitly to the §106(3) exclusive distribution right. As we have just said, §106 is by its terms “[s]ubject to” the various doctrines and principles contained in §§107 through 122, including §109(a)’s

“first sale” limitation. Do those same modifications apply—in particular, does the “first sale” modification apply—when considering whether §602(a)(1) prohibits importing a copy?

- 28 In *Quality King Distributors, Inc. v. L'anza Research [3] Int'l, Inc.*, 523 U. S. 135, 145 (1998), we held that §602(a)(1)'s reference to §106(3)'s exclusive distribution right incorporates the later subsections' limitations, including, in particular, the “first sale” doctrine of §109. Thus, it might seem that, §602(a)(1) notwithstanding, one who buys a copy abroad can freely import that copy into the United States and dispose of it, just as he could had he bought the copy in the United States.
- 29 But *Quality King* considered an instance in which the copy, though purchased abroad, was initially manufactured in the United States (and then sent abroad and sold). This case is like *Quality King* but for one important fact. The copies at issue here were manufactured abroad. That fact is important because §109(a) says that the “first sale” doctrine applies to “a particular copy or phonorecord *lawfully made under this title.*” And we must decide here whether the five words, “lawfully made under this title,” make a critical legal difference.
- 30 Putting section numbers to the side, we ask whether the “first sale” doctrine applies to protect a buyer or other lawful owner of a copy (of a copyrighted work) lawfully manufactured abroad. Can that buyer bring that copy into the United States (and sell it or give it away) without obtaining permission to do so from the copyright owner? Can, for example, someone who purchases, say at a used bookstore, a book printed abroad subsequently resell it without the copyright owner's permission?
- 31 In our view, the answers to these questions are, yes. We hold that the “first sale” doctrine applies to copies of a copyrighted work lawfully made abroad.

I

A

- 33 Respondent, John Wiley & Sons, Inc., publishes academic textbooks. Wiley obtains from its authors various foreign and domestic copyright assignments, licenses and [...] permissions—to the point that we can, for present purposes, refer to Wiley as the relevant American copyright owner. [...] Wiley often assigns to its wholly owned foreign subsidiary, John Wiley & Sons (Asia) Pte Ltd., rights to publish, print, and sell Wiley's English language textbooks abroad. [...] Each copy of a Wiley Asia foreign edition will likely contain language making clear that the copy is to be sold only in a particular country or geographical region outside the United States. [...]
- 34 For example, a copy of Wiley's American edition says, “Copyright © 2008 John Wiley & Sons, Inc. All rights reserved. . . . Printed in the United States of America.” J. Walker, *Fundamentals of Physics*, p. vi (8th ed. 2008). A copy of Wiley Asia's Asian edition of that book says:
- 35 “Copyright © 2008 John Wiley & Sons (Asia) Pte Ltd[.] All rights reserved. This book is authorized for sale in Europe, Asia, Africa, and the Middle East only and may be not exported out of these territories. Exportation from or importation of

this book to another region without the Publisher's authorization is illegal and is a violation of the Publisher's rights. The Publisher may take legal action to enforce its rights. . . . Printed in Asia." J. Walker, *Fundamentals of Physics*, p. vi (8th ed. 2008 Wiley Int'l Student ed.).

- 36 Both the foreign and the American copies say:
- 37 "No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means . . . except as permitted under Sections 107 or 108 of the 1976 United States Copyright Act." [...]
- 38 The upshot is that there are two essentially equivalent versions of a Wiley textbook, [...] each [...] version manufactured and sold with Wiley's permission: (1) an American version printed and sold in the United States, and (2) a foreign version manufactured and sold abroad. And Wiley makes certain that copies of the second version state that they are not to be taken (without permission) into the United States. [...]
- 39 Petitioner, Supap Kirtsaeng, a citizen of Thailand, moved to the United States in 1997 to study mathematics at Cornell University. [...] He paid for his education with the help of a Thai Government scholarship which required him to teach in Thailand for 10 years on his return. [...] Kirtsaeng successfully completed his undergraduate courses at Cornell, successfully completed a Ph. D. program in mathematics at the University of Southern California, and then, as promised, returned to Thailand to teach. [...] While he was studying in the United States, Kirtsaeng asked his friends and family in Thailand to buy copies of foreign edition English- language textbooks at Thai book shops, where they sold at low prices, and mail them to him in the United States. [...] Kirtsaeng would then sell them, reimburse his family and friends, and keep the profit. [...]

B

- 41 In 2008 Wiley brought this federal lawsuit against Kirtsaeng for copyright infringement. [...] Wiley claimed that Kirtsaeng's unauthorized importation of its books and his later resale of those books amounted to an infringement of Wiley's §106(3) exclusive right to distribute as well as §602's related import prohibition. [...] Kirtsaeng replied that the books he had acquired were "lawfully made" and that he had acquired them legitimately. [...] Thus, in his view, §109(a)'s "first sale" doctrine permitted him to resell or otherwise dispose of the books without the copyright owner's further permission. [...]
- 42 The District Court held that Kirtsaeng could not assert the "first sale" defense because, in its view, that doctrine does not apply to "foreign-manufactured goods" (even if made abroad with the copyright owner's permission). [...] The jury then found that Kirtsaeng had willfully infringed Wiley's American copyrights by selling and importing without authorization copies of eight of Wiley's copyrighted titles. And it assessed statutory damages of \$600,000 (\$75,000 per work). [...]
- 43 On appeal, a split panel of the Second Circuit agreed with the District Court. [...] [...]
- 44 We granted Kirtsaeng's petition for certiorari to consider this question in light of different views among the Circuits. Compare [...] (case below) ("first sale" doctrine does

not apply to copies manufactured outside the United States), with *Omega S. A. v. Costco Wholesale Corp.*, 541 F. 3d 982, 986 (CA9 2008) (“first sale” doctrine applies to copies manufactured outside the United States only if an authorized first sale occurs within the United [...] States), *aff’d* by an equally divided court, 562 U. S. (2010), and *Sebastian Int’l, Inc. v. Consumer Contacts (PTY) Ltd.*, 847 F. 2d 1093, 1098, n. 1 (CA3 1988) (limitation of the first sale doctrine to copies made within the United States “does not fit comfortably within the scheme of the Copyright Act”).

II

- 46 We must decide whether the words “lawfully made under this title” restrict the scope of §109(a)’s “first sale” doctrine geographically. The Second Circuit, the Ninth Circuit, Wiley, and the Solicitor General (as *amicus*) all read those words as imposing a form of *geographical* limitation. The Second Circuit held that they limit the “first sale” doctrine to particular copies “made in territories *in which the Copyright Act is law*,” which (the Circuit says) are copies “manufactured domestically,” not “outside of the United States.” [...] Wiley agrees that those five words limit the “first sale” doctrine “to copies made in conformance with the [United States] Copyright Act *where the Copyright Act is applicable*,” which (Wiley says) means it does not apply to copies made “outside the United States” and at least not to “foreign production of a copy for distribution exclusively abroad.” [...] Similarly, the Solicitor General says that those five words limit the “first sale” doctrine’s applicability to copies “‘*made subject to and in compliance with [the Copyright Act],*’” which (the Solicitor General says) are copies “made in the United States.” [...] And the Ninth Circuit has held that those words limit the “first sale” doctrine’s applicability (1) to copies lawfully made in the United States, and (2) to copies lawfully made outside the United States but initially sold in the United States with the copyright owner’s permission. [...]
- 47 Under any of these geographical interpretations, §109(a)’s “first sale” doctrine would not apply to the Wiley Asia books at issue here. And, despite an American copyright owner’s permission to *make* copies abroad, one who *buys* a copy of any such book or other copyrighted work—whether at a retail store, over the Internet, or at a library sale—could not resell (or otherwise dispose of) that particular copy without further permission.
- 48 Kirtsaeng, however, reads the words “lawfully made under this title” as imposing a *non-geographical* limitation. He says that they mean made “in accordance with” or “in compliance with” the Copyright Act. [...] In that case, §109(a)’s “first sale” doctrine would apply to copyrighted works as long as their manufacture met the requirements of American copyright law. In particular, the doctrine would apply where, as here, copies are manufactured abroad with the permission of the copyright owner. See §106 (referring to the owner’s right to authorize).
- 49 In our view, §109(a)’s language, its context, and the common-law history of the “first sale” doctrine, taken together, favor a *non-geographical* interpretation. We also doubt that Congress would have intended to create the practical copyright-related harms with which a geographical interpretation would threaten ordinary scholarly, artistic, commercial, and consumer activities. [...] We consequently conclude that Kirtsaeng’s nongeographical reading is the better reading of the Act.

A

- 51 The language of §109(a) read literally favors Kirtsaeng’s nongeographical interpretation, namely, that “lawfully made under this title” means made “in accordance with” or “in compliance with” the Copyright Act. The language of [...] §109(a) says nothing about geography. The word “under” can mean “[i]n accordance with.” 18 Oxford English Dictionary 950 (2d ed. 1989). See also Black’s Law Dictionary 1525 (6th ed. 1990) (“according to”). And a nongeographical interpretation provides each word of the five-word phrase with a distinct purpose. The first two words of the phrase, “lawfully made,” suggest an effort to distinguish those copies that were made lawfully from those that were not, and the last three words, “under this title,” set forth the standard of “lawful[ness].” Thus, the nongeographical reading is simple, it promotes a traditional copyright objective (combatting piracy), and it makes word-by-word linguistic sense.
- 52 The geographical interpretation, however, bristles with linguistic difficulties. [...]

B

- 61 Both historical and contemporary statutory context indicate that Congress, when writing the present version of §109(a), did not have geography in mind. In respect to history, we compare §109(a)’s present language with the language of its immediate predecessor. That predecessor said:
- 62 “[N]othing in this Act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work *the possession of which has been lawfully obtained.*” Copyright Act of 1909, §41, 35 Stat. 1084 (emphasis added).
- 63 [...]The predecessor says nothing about geography (and Wiley does not argue that it does). So we ask whether Congress, in changing its language implicitly *introduced* a geographical limitation that previously was lacking. [...] A comparison of language indicates that it did not. The [...] predecessor says that the “first sale” doctrine protects “the transfer of any copy *the possession of which has been lawfully obtained.*” The present version says that “*the owner* of a particular copy or phonorecord lawfully made under this title is entitled to sell or otherwise dispose of the possession of that copy or phonorecord.” What does this change in language accomplish?
- 64 The language of the former version referred to those *who are not owners* of a copy, but mere possessors who “lawfully obtained” a copy. The present version covers only those who are *owners* of a “lawfully made” copy. Whom does the change leave out? Who might have lawfully *obtained* a copy of a copyrighted work but not *owned* that copy? One answer is owners of movie theaters, who during the 1970’s (and before) often *leased* films from movie distributors or filmmakers. [...] Because the theater owners had “lawfully obtained” their copies, the earlier version could be read as allowing them to sell that copy, *i.e.*, it might have given them “first sale” protection. Because the theater owners were lessees, not owners, of their copies, the change in language makes clear that they (like bailees and other lessees) cannot take advantage of the “first sale” doctrine. [...]

- 65 This objective perfectly well explains the new language of the present version, including the five words here at issue. Section 109(a) now makes clear that a lessee of a copy will *not* receive “first sale” protection but one who *owns* a copy *will* receive “first sale” protection, *provided*, of course, that the copy was “*lawfully made*” and not pirated. The new language also takes into account that a copy may be “lawfully made under this title” when the copy, say of a phonorecord, comes into its owner’s possession through use of a compulsory license, which “this title” provides for elsewhere, namely, in §115. [...]
- 66 Other provisions of the present statute also support a nongeographical interpretation. For one thing, the statute phases out the “manufacturing clause,” a clause that appeared in earlier statutes and had limited importation of many copies (of copyrighted works) printed outside the United States. [...] The phasing out of this clause sought to equalize treatment of copies manufactured in America and copies manufactured abroad. [...]
- 67 [...] The “equal treatment” principle, however, is difficult to square with a geographical interpretation of the “first sale” clause that would grant the holder of an American copyright (perhaps a foreign national[...]) permanent control over the American distribution chain (sales, resales, gifts, and other distribution) in respect to copies printed abroad but not in respect to copies printed in America. And it is particularly difficult to believe that Congress would have sought this unequal treatment while saying nothing about it and while, in a related clause (the manufacturing phase-out), seeking the opposite kind of policy goal. [...]
- 68 Finally, we normally presume that the words “lawfully made under this title” carry the same meaning when they appear in different but related sections. [...] But doing so here produces surprising consequences. Consider:
- 69 (1) Section 109(c) says that, despite the copyright owner’s exclusive right “to display” a copyrighted work (provided in §106(5)), the owner of a particular copy “lawfully made under this title” may publicly display it without further authorization. To interpret these words geographically would mean that one who buys a copyrighted work of art, a poster, or even a bumper sticker, in Canada, in Europe, in Asia, could not display it in America without the copyright owner’s further authorization.
- (2) Section 109(e) specifically provides that the owner [...] of a particular copy of a copyrighted video arcade game “lawfully made under this title” may “publicly perform or display that game in coin-operated equipment” without the authorization of the copyright owner. To interpret these words geographically means that an arcade owner could not (“without the authority of the copyright owner”) perform or display arcade games (whether new or used) originally made in Japan. [...]
- (3) Section 110(1) says that a teacher, without the copyright owner’s authorization, is allowed to perform or display a copyrighted work (say, an audiovisual work) “in the course of face-to-face teaching activities”—unless the teacher knowingly used “a copy that was not lawfully made under this title.” To interpret these words geographically would mean that the teacher could not (without further

authorization) use a copy of a film during class if the copy was lawfully made in Canada, Mexico, Europe, Africa, or Asia.

(4) In its introductory sentence, §106 provides the Act's basic exclusive rights to an "owner of a copyright under this title." The last three words cannot support a geographic interpretation.

- 70 Wiley basically accepts the first three readings, but argues that Congress intended the restrictive consequences. And it argues that context simply requires that the words of the fourth example receive a different interpretation. Leaving the fourth example to the side, we shall explain in Part II–D, *infra*, why we find it unlikely that Congress would have intended these, and other related consequences.

C

- 72 A relevant canon of statutory interpretation favors a nongeographical reading. "[W]hen a statute covers an issue previously governed by the common law," we must presume that "Congress intended to retain the substance of the common law." [...]
- 73 The "first sale" doctrine is a common-law doctrine with an impeccable historic pedigree. In the early 17th century Lord Coke explained the common law's refusal to permit restraints on the alienation of chattels. Referring to Littleton, who wrote in the 15th century, [...] Lord Coke wrote:
- 74 "[If] a man be possessed of . . . a horse, or of any other chattell . . . and give or sell his whole interest . . . therein upon condition that the Donee or Vendee shall not alien[ate] the same, the [condition] is voi[d], because his whole interest . . . is out of him, so as he hath no possibilit[y] of a Reverter, and it is against Trade and Traffi[c], and bargaining and contracting betwee[n] man and man: and it is within the reason of our Author that it should ouster him of all power given to him." [...]
- 75 A law that permits a copyright holder to control the resale or other disposition of a chattel once sold is similarly "against Trade and Traffi[c], and bargaining and contracting." [...]
- 76 With these last few words, Coke emphasizes the im[.]portance of leaving buyers of goods free to compete with each other when reselling or otherwise disposing of those goods. American law too has generally thought that competition, including freedom to resell, can work to the advantage of the consumer. [...]
- 77 The "first sale" doctrine also frees courts from the administrative burden of trying to enforce restrictions upon difficult-to-trace, readily movable goods. And it avoids the selective enforcement inherent in any such effort. Thus, it is not surprising that for at least a century the "first sale" doctrine has played an important role in American copyright law. See *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339 (1908)[...].
- 78 The common-law doctrine makes no geographical distinctions; nor can we find any in *Bobbs-Merrill* (where this Court first applied the "first sale" doctrine) or in §109(a)'s predecessor provision, which Congress enacted a year later. [...] Rather, as the Solicitor

General acknowledges, “a straightforward application of *Bobbs-Merrill*” would not preclude the “first sale” defense from applying to authorized copies made overseas. [...] And we can find no language, context, purpose, or history that would rebut a “straightforward application” of that doctrine here.

- 79 The dissent argues that another principle of statutory interpretation works against our reading, and points out that elsewhere in the statute Congress used different words to express something like the non-geographical reading we adopt. *Post*, at 8–9 (quoting §602(a)(2) (prohibiting the importation of copies “the making of which either constituted an infringement of copyright, or which would have constituted an infringement of copyright if this title had been applicable” (emphasis deleted))). Hence, Congress, the dissent believes, must have meant §109(a)’s different language to mean something different (such as the dissent’s own geographical interpretation of §109(a)). We are not aware, however, of any canon of interpretation that forbids interpreting different words used in different parts of the same statute to mean roughly the same thing. Regardless, were there such a canon, the dissent’s interpretation of §109(a) would also violate it. That is because Congress elsewhere in the 1976 Act included the words “manufactured in the United States or Canada,” 90 Stat. 2588, which express just about the same geographical thought that the dissent reads into §109(a)’s very different language.

D

- 81 Associations of libraries, used-book dealers, technology companies, consumer-goods retailers, and museums point to various ways in which a geographical interpretation would fail to further basic constitutional copyright objectives, in particular “promot[ing] the Progress of Science and useful Arts.” U. S. Const., Art. I, §8, cl. 8.
- 82 The American Library Association tells us that library collections contain at least 200 million books published abroad (presumably, many were first published in one of [...] the nearly 180 copyright-treaty nations and enjoy American copyright protection under 17 U. S. C. §104[...]); that many others were first published in the United States but printed abroad because of lower costs; and that a geographical interpretation will likely require the libraries to obtain permission (or at least create significant uncertainty) before circulating or otherwise distributing these books. [...]
- 83 How, the American Library Association asks, are the libraries to obtain permission to distribute these millions of books? How can they find, say, the copyright owner of a foreign book, perhaps written decades ago? They may not know the copyright holder’s present address. [...] And, even where addresses can be found, the costs of finding them, contacting owners, and negotiating may be high indeed. Are the libraries to stop circulating or distributing or displaying the millions of books in their collections that were printed abroad?
- 84 Used-book dealers tell us that, from the time when Benjamin Franklin and Thomas Jefferson built commercial and personal libraries of foreign books, American readers have bought used books published and printed abroad. [...] But under a geographical interpretation a contemporary [...] tourist who buys, say, at Shakespeare and Co. (in Paris), a dozen copies of a foreign book for American friends might find that she had violated

the copyright law. The used book dealers cannot easily predict what the foreign copyright holder may think about a reader's effort to sell a used copy of a novel. And they believe that a geographical interpretation will injure a large portion of the used-book business.

- 85 Technology companies tell us that “automobiles, microwaves, calculators, mobile phones, tablets, and personal computers” contain copyrightable software programs or packaging. [...] Many of these items are made abroad with the American copyright holder's permission and then sold and imported (with that permission) to the United States. [...] A geographical interpretation would prevent the resale of, say, a car, without the permission of the holder of each copyright on each piece of copyrighted automobile software. Yet there is no reason to believe that foreign auto manufacturers regularly obtain this kind of permission from their software component suppliers, and Wiley did not indicate to the contrary when asked. [...] Without that permission a foreign car owner could not sell his or her used car.
- 86 Retailers tell us that over \$2.3 trillion worth of foreign goods were imported in 2011.[...] And, many of these items bear, carry, or contain copyrighted “packaging, logos, labels, and product inserts and instructions for [the use of] everyday packaged goods from floor cleaners and health and beauty products to breakfast cereals.” [...] The retailers add that American sales of more [...] traditional copyrighted works, “such as books, recorded music, motion pictures, and magazines” likely amount to over \$220 billion. [...] A geographical interpretation would subject many, if not all, of them to the disruptive impact of the threat of infringement suits. [...]
- 87 Art museum directors ask us to consider their efforts to display foreign-produced works by, say, Cy Twombly, René Magritte, Henri Matisse, Pablo Picasso, and others. [...] A geographical interpretation, they say, would require the museums to obtain permission from the copyright owners before they could display the work[...]—even if the copyright owner has already sold or donated the work to a foreign museum. [...] What are the museums to do, they ask, if the artist retained the copyright, if the artist cannot be found, or if a group of heirs is arguing about who owns which copyright? [...]
- 88 These examples, and others previously mentioned, help explain *why* Lord Coke considered the “first sale” doctrine necessary to protect “Trade and Traffi[c], and bargaining and contracting,” and they help explain *why* American copyright law has long applied that doctrine. [...]
- 89 Neither Wiley nor any of its many *amici* deny that a geographical interpretation could bring about these “horribles”—at least in principle. Rather, Wiley essentially says that the list is artificially invented. [...] It points out that a federal court first adopted a geographical interpretation more than 30 years ago. [...] Yet, it adds, these problems have not occurred. Why not? Because, says Wiley, the prob[...]lems and threats are purely theoretical; they are unlikely to reflect reality. [...]
- 90 We are less sanguine. For one thing, the law has not been settled for long in Wiley's favor. [...] [...] [...]

- 91 For another thing, reliance upon the “first sale” doctrine is deeply embedded in the practices of those, such as book sellers, libraries, museums, and retailers, who have long relied upon its protection. Museums, for example, are not in the habit of asking their foreign counterparts to check with the heirs of copyright owners before sending, *e.g.*, a Picasso on tour. [...] That inertia means a dramatic change is likely necessary before these institutions, instructed by their counsel, would begin to engage in the complex permission-verifying process that a geographical interpretation would demand. And this Court’s adoption of the geographical interpretation could provide that dramatic change. These intolerable consequences (along with the absurd result that the copyright owner can exercise downstream control even when it authorized the import or first sale) have understandably led the Ninth Circuit, the Solicitor General as *amicus*, and the dissent to [...] adopt textual readings of the statute that attempt to mitigate these harms. [...] But those readings are not defensible, for they require too many unprecedented jumps over linguistic and other hurdles that in our view are insurmountable. [...]
- 92 Finally, the fact that harm has proved limited so far may simply reflect the reluctance of copyright holders so far to assert geographically based resale rights. They may decide differently if the law is clarified in their favor. Regardless, a copyright law that can work in practice only if unenforced is not a sound copyright law. It is a law that would create uncertainty, would bring about selective enforcement, and, if widely unenforced, would breed disrespect for copyright law itself.
- 93 Thus, we believe that the practical problems that petitioner and his *amici* have described are too serious, too extensive, and too likely to come about for us to dismiss them as insignificant—particularly in light of the evergrowing importance of foreign trade to America. [...]

IV

- 122 For these reasons we conclude that the considerations supporting Kirtsaeng’s nongeographical interpretation of the words “lawfully made under this title” are the more persuasive. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.
- 123 *It is so ordered.*
- 133 **JUSTICE GINSBURG, with whom JUSTICE KENNEDY joins, and with whom JUSTICE SCALIA joins except as to Parts III and V–B–1, dissenting.**
- 134 “In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress.” [...] Instead of adhering to the Legislature’s design, the Court today adopts an interpretation of the Copyright Act at odds with Congress’ aim to protect copyright owners against the unauthorized importation of low-priced, foreign made copies of their copyrighted works. The Court’s bold departure from Congress’ design is all the more stunning, for it places the United States at the vanguard of the movement for “international exhaustion” of copyrights—a movement the United States has steadfastly resisted on the world stage.

135 To justify a holding that shrinks to insignificance copyright protection against the unauthorized importation of foreign-made copies, the Court identifies several “practical problems.” [...] The Court’s parade of horrors, however, is largely imaginary. Congress’ objective in enacting 17 U. S. C. §602(a)(1)’s importation prohibition can be honored without generating the absurd consequences hypothesized in the Court’s opinion. I dissent [...] from the Court’s embrace of “international exhaustion,” and would affirm the sound judgment of the Court of Appeals.

I

137 Because economic conditions and demand for particular goods vary across the globe, copyright owners have a financial incentive to charge different prices for copies of their works in different geographic regions. Their ability to engage in such price discrimination, however, is undermined if arbitrageurs are permitted to import copies from low-price regions and sell them in high-price regions. The question in this case is whether the unauthorized importation of foreign-made copies constitutes copyright infringement under U. S. law.

138 To answer this question, one must examine three provisions of Title 17 of the U. S. Code: §§106(3), 109(a), and 602(a)(1). Section 106 sets forth the “exclusive rights” of a copyright owner, including the right “to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.” §106(3). This distribution right is limited by §109(a), which provides: “Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.” Section 109(a) codifies the “first sale doctrine,” a doctrine articulated in *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 349–351 (1908), which held that a copyright owner could not control the price at which retailers sold lawfully purchased copies of its work. The first sale doctrine recognizes that a copyright owner should not be permitted to exercise perpetual control over the distribution of copies of a copyrighted work. At some point—ordinarily the time of the first commercial sale— [...] the copyright owner’s exclusive right under §106(3) to control the distribution of a particular copy is exhausted, and from that point forward, the copy can be resold or otherwise redistributed without the copyright owner’s authorization.

139 Section 602(a)(1) [...]—last, but most critical, of the three copyright provisions bearing on this case—is an importation ban. It reads:

140 “Importation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work that have been acquired outside the United States is an infringement of the exclusive right to distribute copies or phonorecords under section 106, actionable under section 501.”

141 In *Quality King Distributors, Inc. v. L’anza Research Int’l, Inc.*, 523 U. S. 135, 143–154 (1998), the Court held that a copyright owner’s right to control importation under §602(a)(1) is a component of the distribution right set forth in §106(3) and is therefore subject to §109(a)’s codification of the first sale doctrine. *Quality King* thus held that the importation

of copies *made in the United States* but sold abroad did not rank as copyright infringement under §602(a)(1). [...]

- 142 Important to the Court’s holding, the copies at issue in *Quality King* had been “ ‘lawfully made under [Title 17]’ ”—a prerequisite for application of §109(a). [...] Section 602(a)(1), the Court noted, would apply to “copies that were ‘lawfully made’ not under the United States Copyright Act, but instead, under the law of some other country.” [...] Drawing on an example discussed during a 1964 public meeting on proposed revisions to the U. S. copyright laws,[...] the Court stated:
- 143 “If the author of [a] work gave the exclusive United States distribution rights— enforceable under the Act—to the publisher of the United States edition and the exclusive British distribution rights to the publisher of the British edition, . . . presumably only those [copies] made by the publisher of the United States edition would be ‘lawfully made under this title’ within the meaning of §109(a). The first sale doctrine would not provide the publisher of the British edition who decided to sell in the American market with a defense to an action under §602(a) (or, for that matter, [...] to an action under §106(3), if there was a distribution of the copies).” [...]
- 145 The Court does not deny that under the language I have quoted from *Quality King*, Wiley would prevail. [...] Nevertheless, the Court dismisses this language, to which all Members of the *Quality King* Court subscribed, as ill-considered dictum. [...] I agree that the discussion was dictum in the sense that it was not essential to the Court’s judgment. [...] But I disagree with the Court’s conclusion that this dictum was ill considered. Instead, for the reasons explained below, I would hold, consistently with *Quality King*’s dictum, that §602(a)(1) authorizes a copyright owner to bar the importation of a copy manufactured abroad for sale abroad.

II

- 147 The text of the Copyright Act demonstrates that Congress intended to provide copyright owners with a potent [...] remedy against the importation of foreign-made copies of their copyrighted works. As the Court recognizes, [...] this case turns on the meaning of the phrase “lawfully made under this title” in §109(a). In my view, that phrase is most sensibly read as referring to instances in which a copy’s creation is governed by, and conducted in compliance with, Title 17 of the U. S. Code. This reading is consistent with the Court’s interpretation of similar language in other statutes. [...] It also accords with dictionary definitions of the word “under.” See, *e.g.*, American Heritage Dictionary 1887 (5th ed. 2011) (“under” means, among other things, “[s]ubject to the authority, rule, or control of”).
- 148 Section 109(a), properly read, affords Kirtsaeng no defense against Wiley’s claim of copyright infringement. The Copyright Act, it has been observed time and again, does not apply extraterritorially. [...] The printing of Wiley’s foreign manufactured textbooks therefore was not governed by Title 17. The textbooks thus were not “lawfully made [...] under [Title 17],” the crucial precondition for application of §109(a). And if §109(a) does not apply, there is no dispute that Kirtsaeng’s conduct constituted copyright infringement

under §602(a)(1).

- 149 The Court’s point of departure is similar to mine. According to the Court, the phrase “lawfully made under this title” means made ‘in accordance with’ or ‘in compliance with’ the Copyright Act.” [...] But the Court overlooks that, according to the very dictionaries it cites, [...] the word “under” commonly signals a relationship of subjection, where one thing is governed or regulated by another. [...] Only by disregarding this established meaning of “under” can the Court arrive at the conclusion that Wiley’s foreign-manufactured textbooks were “lawfully made under” U. S. copyright law, even though that law did not govern their creation. It is anomalous, however, to speak of particular conduct as “lawful” under an inapplicable law. For example, one might say that driving on the right side of the road in England is “lawful” under U. S. law, but that would be so only because U. S. law has nothing to say about the subject. The governing law is English law, and English law demands that driving be done on the left side of the road.[...]
- 150 The logical implication of the Court’s definition of the word “under” is that *any* copy manufactured abroad—even a piratical one made without the copyright owner’s authorization and in violation of the law of the country where it was created—would fall within the scope of §109(a). Any such copy would have been made “in accordance with” or “in compliance with” the U. S. Copyright Act, in the sense that manufacturing the copy did not violate the Act (because the Act does not apply extraterritorially).
- 151 The Court rightly refuses to accept such an absurd conclusion. Instead, it interprets §109(a) as applying only to copies whose making actually complied with Title 17, or would have complied with Title 17 had Title 17 been applicable (*i.e.*, had the copies been made in the United States). [...] Congress, however, used express language when it called for such a counterfactual inquiry in 17 U. S. C. §§602(a)(2) and (b). See §602(a)(2) (“Importation into the United States or exportation from the United States, without the authority of the owner of copyright under this title, of copies or phonorecords, the making of which either constituted an infringement of copyright, or *which would have constituted an infringement of copyright if this title had been applicable*, is an infringement of the exclusive right to distribute copies or phonorecords under section 106.” (emphasis added)); §602(b) (“In a case where the making [9] of the copies or phonorecords *would have constituted an infringement of copyright if this title had been applicable*, their importation is prohibited.” (emphasis added)). Had Congress intended courts to engage in a similarly hypothetical inquiry under §109(a), Congress would presumably have included similar language in that section. [...]
- 152 Not only does the Court adopt an unnatural construction of the §109(a) phrase “lawfully made under this title.” Concomitantly, the Court reduces §602(a)(1) to insignificance. As the Court appears to acknowledge, [...] the only independent effect §602(a)(1) has under today’s decision is to prohibit unauthorized importations carried out by persons who merely have possession of, but do not own, the imported copies. [...] If this is enough to avoid rendering §602(a)(1) entirely “superfluous,” [...] it hardly suffices to give the owner’s importation right the scope Congress intended it to have. Congress used broad language in §602(a)(1); it did so to achieve a broad objective. Had Congress intended simply to provide a copyright remedy against larcenous lessees, licensees, consignees, and bailees of films and other copyright-protected goods, [...] it likely would have used

language tailored to that narrow purpose. [...]

- 153 The Court’s decision also overwhelms 17 U. S. C. §602(a)(3)’s exceptions to §602(a)(1)’s importation prohibition. [...] Those exceptions permit the importation of copies without the copyright owner’s authorization for certain governmental, personal, scholarly, educational, and religious purposes. [...] Copies imported under these exceptions “will often be lawfully made gray market goods purchased through normal market channels abroad.” [...] But if, as the Court holds, such copies can in any event be imported by virtue of §109(a), §602(a)(3)’s work has already been done. For example, had Congress conceived of §109(a)’s sweep as the Court does, what earthly reason would there be to provide, as Congress did in §602(a)(3)(C), that a library may import “no more than five copies” of a non-audiovisual work for its “lending or archival purposes”?
- 154 The far more plausible reading of §§109(a) and 602(a), then, is that Congress intended §109(a) to apply to copies made in the United States, not to copies manufactured and sold abroad. That reading of the first sale and importation provisions leaves §602(a)(3)’s exceptions with real, meaningful work to do. [...] In the range of circumstances covered by the exceptions, §602(a)(3) frees individuals and entities who purchase foreign-made copies abroad from the requirement they would otherwise face under §602(a)(1) of obtaining the copyright owner’s permission to import the copies into the United States.[...]

III

- 156 The history of §602(a)(1) reinforces the conclusion I draw from the text of the relevant provisions: §109(a) does not apply to copies manufactured abroad. Section 602(a)(1) was enacted as part of the Copyright Act of 1976[...]. That Act was the product of a lengthy revision effort overseen by the U. S. Copyright Office. [...] In its initial 1961 report on recommended revisions, the Copyright Office noted that publishers had “suggested that the [then-existing] import ban on piratical copies should be extended to bar the importation of . . . foreign edition[s]” in violation of “agreements to divide international markets for copyrighted works.” [...] The Copyright Office originally recommended against such an extension of the importation ban, reasoning that enforcement of territorial restrictions was best left to contract law. [...]
- 157 Publishing-industry representatives argued strenuously against the position initially taken by the Copyright Office. [...]
- 160 After considering comments on its 1961 report, the Copyright Office “prepared a preliminary draft of provisions for a new copyright statute.” [...] Section 44 of the draft statute addressed the concerns raised by publishing-industry representatives. In particular, §44(a) provided:
- 161 “Importation into the United States of copies or records of a work for the purpose of distribution to the public shall, if such articles are imported without the authority of the owner of the exclusive right to distribute copies or records under this title, constitute an infringement of copyright actionable under section 35 [*i.e.*, the section providing for a private cause of action for copyright infringement].” [...]

- 163 The next step in the copyright revision process was the introduction in Congress of a draft bill on July 20, 1964. [...] After another round of public comments, a revised bill was introduced on February 4, 1965. [...] In language closely resembling the statutory text later enacted by Congress, §602(a) of the 1965 bill provided:
- 164 “Importation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work for the purpose of distribution to the public is an infringement of the exclusive right to distribute copies or phonorecords under section 106, actionable under section 501.” [...]
- 166 The current text of §602(a)(1) was finally enacted into law in 1976. [...] The House and Senate Committee Reports on the 1976 Act demonstrate that Congress understood, as did the Copyright Office, just what that text meant. Both Reports state:
- 167 “Section 602 [deals] with two separate situations: importation of ‘piratical’ articles (that is, copies or phonorecords made without any authorization of the [...] copyright owner), and unauthorized importation of copies or phonorecords that were lawfully made. *The general approach of section 602 is to make unauthorized importation an act of infringement in both cases*, but to permit the Bureau of Customs to prohibit importation only of ‘piratical’ articles.” [...]
- 168 In sum, the legislative history of the Copyright Act of 1976 is hardly “inconclusive.” [...] To the contrary, it confirms what the plain text of the Act conveys: Congress intended §602(a)(1) to provide copyright owners with a remedy against the unauthorized importation of foreign-made copies of their works, even if those copies were made and sold abroad with the copyright owner’s authorization.[...]

IV

- 170 Unlike the Court’s holding, my position is consistent with the stance the United States has taken in international trade negotiations. This case bears on the highly contentious trade issue of interterritorial exhaustion. The issue arises because intellectual property law is territorial in nature, [...] which means that creators of intellectual property “may hold a set of parallel” intellectual property rights under the laws of different nations. Chiappetta, *The Desirability of Agreeing to Disagree: The WTO, TRIPS, International IPR Exhaustion and a Few Other Things*, 21 Mich. J. Int’l L. 333, 340–341 (2000) (hereinafter Chiappetta). There is no international con[...]sensus on whether the sale in one country of a good incorporating protected intellectual property exhausts the intellectual property owner’s right to control the distribution of that good elsewhere. Indeed, the members of the World Trade Organization, “agreeing to disagree,”[...] provided in Article 6 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), [...] that “nothing in this Agreement shall be used to address the issue of . . . exhaustion.” See Chiappetta 346 (observing that exhaustion of intellectual property rights was “hotly debated” during the TRIPS negotiations and that Article 6 “reflects [the negotiators]’ ultimate inability to agree” on a single international standard). Similar language appears in other treaties to which the United States is a party. See World Intellectual Property Organization (WIPO) Copyright Treaty, Art. 6(2), Dec. 20, 1996, S. Treaty Doc. No. 105–17, p. 7 (“Nothing in this Treaty shall affect the freedom of Contracting Parties to

determine the conditions, if any, under which the exhaustion of the right [to control distribution of copies of a copyrighted work] applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author.”); WIPO Performances and Phonograms Treaty, Art. 8(2), Dec. 20, 1996, S. Treaty Doc. No. 105–17, p. 28 (containing language nearly identical to Article 6(2) of the WIPO Copyright Treaty).

- 171 In the absence of agreement at the international level, each country has been left to choose for itself the exhaustion framework it will follow. One option is a national exhaustion regime, under which a copyright owner’s right [...] to control distribution of a particular copy is exhausted only within the country in which the copy is sold. [...] Another option is a rule of international exhaustion, under which the authorized distribution of a particular copy anywhere in the world exhausts the copyright owner’s distribution right everywhere with respect to that copy. [...] The European Union has adopted the intermediate approach of regional exhaustion, under which the sale of a copy anywhere within the European Economic Area exhausts the copyright owner’s distribution right throughout that region. [...] Section 602(a)(1), in my view, ties the United States to a national-exhaustion framework. The Court’s decision, in contrast, places the United States solidly in the international- exhaustion camp.
- 172 Strong arguments have been made both in favor of, and in opposition to, international exhaustion. [...] International exhaustion subjects copyright-protected goods to competition from lower priced imports and, to that extent, benefits consumers. Correspondingly, copyright owners profit from a national-exhaustion regime, which also enlarges the monetary incentive to create new copyrightable works. [...]
- 173 Weighing the competing policy concerns, our Government reached the conclusion that widespread adoption of the international-exhaustion framework would be inconsistent with the long-term economic interests of the United States. [...] Accordingly, the United States has steadfastly “taken the position in international trade negotiations that domestic copyright owners should . . . have the right to prevent the unauthorized importation of copies of their work sold abroad.” [...] The United States has “advanced this position in multilateral trade negotiations,” including the negotiations on the TRIPS Agreement. [...] It has also taken a dim view of our trading partners’ adoption of legislation incorporating elements of international exhaustion. [...]
- 174 Even if the text and history of the Copyright Act were ambiguous on the answer to the question this case presents— which they are not[...]—I would resist a holding out of accord with the firm position the United States has taken on exhaustion in international negotiations. *Quality King*, I acknowledge, discounted the Government’s concerns about potential inconsistency with United States obligations under certain bilateral trade agreements. [...] That decision, however, dealt only with copyright-protected products made in the United States. [...] *Quality King* left open the question whether owners of U. S. copyrights could retain control over the importation of copies manufactured and sold abroad—a point the Court obscures[...]. The Court today answers that question with a resounding “no,” and in doing so, it risks undermining the United States’ credibility on the world stage. While the Government has urged our trading partners to refrain from adopting international-exhaustion regimes that could benefit consumers within their

borders but would impact adversely on intellectual-property producers in the United States, the Court embraces an international-exhaustion rule that could benefit U. S. consumers but would likely [...] disadvantage foreign holders of U. S. copyrights. This dissonance scarcely enhances the United States’ “role as a trusted partner in multilateral endeavors.” [...]

V

176 I turn now to the Court’s justifications for a decision difficult to reconcile with the Copyright Act’s text and history. [...]

B

180 The Court sees many “horribles” following from a holding that the §109(a) phrase “lawfully made under this title” does not encompass foreign-made copies. [...] If §109(a) excluded foreign-made copies, the Court fears, then copyright owners could exercise perpetual control over the downstream distribution or public display of such copies. A ruling in Wiley’s favor, the Court asserts, would shutter libraries, put used-book dealers out of business, cripple art museums, and prevent the resale of a wide range of consumer goods, from cars to calculators. [...] Copyright law and precedent, however, erect barriers to the anticipated horrors.[...]

1

182 Recognizing that foreign-made copies fall outside the ambit of §109(a) would not mean they are forever free of the first sale doctrine. As earlier observed, [...] the Court stated that doctrine initially in its 1908 *Bobbs-Merrill* decision. At that time, no statutory provision expressly codified the first sale doctrine. Instead, copyright law merely provided that copyright owners had “the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending” their works. [...]

183 In *Bobbs-Merrill*, the Court addressed the scope of the statutory right to “vend.” In granting that right, the Court held, Congress did not intend to permit copyright owners “to fasten . . . a restriction upon the subsequent alienation of the subject-matter of copyright after the owner had parted with the title to one who had acquired full dominion over it and had given a satisfactory price for it.” [...] “[O]ne who has sold a copyrighted article . . . without restriction,” the Court explained, “has parted with all right to control the sale of it.” [...] Thus, “[t]he purchaser of a book, once sold by authority of the owner of the copyright, may sell it again, although he could not publish a new edition of it.” [...]

184 Under the logic of *Bobbs-Merrill*, the sale of a foreign-manufactured copy in the United States carried out with the copyright owner’s authorization would exhaust the copyright owner’s right to “vend” that copy. The copy could thenceforth be resold, lent out, or otherwise redistributed without further authorization from the copyright owner. Although §106(3) uses the word “distribute” rather than “vend,” there is no reason to think Congress intended the word “distribute” to bear a meaning different from the construction the Court gave to the word “vend” in *Bobbs-Merrill*. [...] Thus, in accord with *Bobbs-Merrill*, the first authorized distribution of a foreign-made copy in the United States

exhausts the copyright owner's distribution right under §106(3). After such an authorized distribution, a library may lend, or a used-book dealer may resell, the foreign made copy without seeking the copyright owner's permission. [...]

- 185 For example, if Wiley, rather than Kirtsaeng, had imported into the United States and then sold the foreign made textbooks at issue in this case, Wiley's §106(3) distribution right would have been exhausted under the rationale of *Bobbs-Merrill*. Purchasers of the textbooks would thus be free to dispose of the books as they wished without first gaining a license from Wiley.
- 186 This line of reasoning, it must be acknowledged, significantly curtails the independent effect of §109(a). If, as I maintain, the term "distribute" in §106(3) incorporates the first sale doctrine by virtue of *Bobbs-Merrill*, then §109(a)'s codification of that doctrine adds little to the regulatory regime.[...] Section 109(a), however, does serve [...] as a statutory bulwark against courts deviating from *Bobbs-Merrill* in a way that increases copyright owners' control over downstream distribution, and legislative history indicates that is precisely the role Congress intended §109(a) to play. [...]
- 187 In any event, the reading of the Copyright Act to which I subscribe honors Congress' aim in enacting §109(a) while the Court's reading of the Act severely diminishes §602(a)(1)'s role. [...] [...]

2

- 189 Other statutory prescriptions provide further protection against the absurd consequences imagined by the Court. For example, §602(a)(3)(C) permits "an organization operated for scholarly, educational, or religious purposes" to import, without the copyright owner's authorization, up to five foreign-made copies of a non-audiovisual work— notably, a book—for "library lending or archival purposes." [...]
- 190 The Court also notes that *amici* representing art museums fear that a ruling in Wiley's favor would prevent museums from displaying works of art created abroad. [...] These *amici* observe that a museum's right to display works of art often depends on 17 U. S. C. §109(c). [...] That provision addresses exhaustion of [...] a copyright owner's exclusive right under §106(5) to publicly display the owner's work. Because §109(c), like §109(a), applies only to copies "lawfully made under this title," *amici* contend that a ruling in Wiley's favor would prevent museums from invoking §109(c) with respect to foreign-made works of art. [...]
- 191 Limiting §109(c) to U. S.-made works, however, does not bar art museums from lawfully displaying works made in other countries. Museums can, of course, seek the copyright owner's permission to display a work. Furthermore, the sale of a work of art to a U. S. museum may carry with it an implied license to publicly display the work. [...] Displaying a work of art as part of a museum exhibition might also qualify as a "fair use" under 17 U. S. C. §107. [...]
- 192 The Court worries about the resale of foreign-made consumer goods "contain[ing] copyrightable software programs or packaging." [...] [...] Although this question strays far

from the one presented in this case and briefed by the parties, principles of fair use and implied [...] license (to the extent that express licenses do not exist) would likely permit the car to be resold without the copyright owners' authorization.[...]

- 193 Most telling in this regard, no court, it appears, has been called upon to answer any of the Court's "horribles" in an actual case. Three decades have passed since a federal court first published an opinion reading §109(a) as applicable exclusively to copies made in the United States. [...] Yet Kirtsaeng and his supporting *amici* cite not a single case in which the owner of a consumer good authorized for sale in the United States has been sued for copyright infringement after reselling the item or giving it away as a gift or to charity. The absence of such lawsuits is unsurprising. Routinely suing one's customers is hardly a best business [...] practice.[...] Manufacturers, moreover, may be hesitant to do business with software programmers taken to suing consumers. Manufacturers may also insist that software programmers agree to contract terms barring such lawsuits.[...]

VI

- 196 To recapitulate, the objective of statutory interpretation is "to give effect to the intent of Congress." [...] Here, two congressional aims are evident. First, in enacting §602(a)(1), Congress intended to grant copyright owners permission to segment international markets by barring the importation of foreign-made copies into the United States. Second, as codification of the first sale doctrine underscores, Congress did not want the exclusive distribution right conferred in §106(3) to be boundless. Instead of harmonizing these objectives, the Court subordinates the first entirely to the second. [...]
- 197 Rather than adopting the very international-exhaustion rule the United States has consistently resisted in international-trade negotiations, I would adhere to the national-exhaustion framework set by the Copyright Act's text and history. Under that regime, codified in §602(a)(1), Kirtsaeng's unauthorized importation of the foreign-made textbooks involved in this case infringed Wiley's copyrights. I would therefore affirm the Second Circuit's judgment.[...]