

Kirtsaeng v. John Wiley & Sons, Inc.

Supreme Court of the United States, 2013
2013 WL 1104736

Justice BREYER delivered the opinion of the Court.

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).

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

“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.)

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.

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?

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

“[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).

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?

In *Quality King Distributors, Inc. v. Lanza Research Int’l, Inc.*, 523 U.S. 135, 145, 118 S.Ct. 1125, 140 L.Ed.2d 254 (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.

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.

* * * *

I

A

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. See 654 F.3d 210, 213, n. 6 (C.A.2 2011). 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. App. to Pet. for Cert. 47a–48a. 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. 654 F.3d, at 213.

* * * *

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.

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. *Ibid.* 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

In 2008 Wiley brought this federal lawsuit against Kirtsaeng for copyright infringement. [Both the District Court and a split panel of the Second Circuit held that Kirtsaeng could not assert the “first sale” defense because the copies that had been made abroad were not “lawfully made under this title” within the meaning of § 109(a) of the Copyright Act.]

II

We must decide whether the words “lawfully made under this title” restrict the scope of § 109(a)’s “first sale” doctrine geographically.

* * * *

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. . . .

A

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 (combating piracy), and it makes word-by-word linguistic sense.

The geographical interpretation, however, bristles with linguistic difficulties. It gives the word “lawfully” little, if any, linguistic work to do. (How could a book be unlawfully “made under this title”?) It imports geography into a statutory provision that says nothing explicitly about it. And it is far more complex than may at first appear.

To read the clause geographically, Wiley, like the Second Circuit and the Solicitor General, must first emphasize the word “under.” Indeed, Wiley reads “under this title” to mean “in conformance with the Copyright Act where the Copyright Act is applicable.” Wiley must then take a second step, arguing that the Act “is applicable” only in the United States. And the Solicitor General must do the same.

One difficulty is that neither “under” nor any other word in the phrase means “where.” See, e.g., 18 Oxford English Dictionary, *supra*, at 947–952 (definition of “under”). It might mean “subject to,” see *post*, at ----, but as this Court has repeatedly acknowledged, the word evades a uniform, consistent meaning. See *Kucana v. Holder*, 558 U.S. 233, 245, 130 S.Ct. 827, 175 L.Ed.2d 694 (2010) (“‘under’ is chameleon”); *Ardestani v. INS*, 502 U.S. 129, 135, 112 S.Ct. 515, 116 L.Ed.2d 496 (1991) (“under” has “many dictionary definitions” and “must draw its meaning from its context”).

A far more serious difficulty arises out of the uncertainty and complexity surrounding the second step's effort to read the necessary geographical limitation into the word "applicable" (or the equivalent). Where, precisely, is the Copyright Act "applicable"? The Act does not instantly protect an American copyright holder from unauthorized piracy taking place abroad. But that fact does not mean the Act is inapplicable to copies made abroad. As a matter of ordinary English, one can say that a statute imposing, say, a tariff upon "any rhododendron grown in Nepal" applies to all Nepalese rhododendrons. And, similarly, one can say that the American Copyright Act is applicable to all pirated copies, including those printed overseas. Indeed, the Act itself makes clear that (in the Solicitor General's language) foreign-printed pirated copies are "subject to" the Act. § 602(a)(2) (2006 ed., Supp. V) (referring to 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"); Brief for United States 5. See also post, at ---- (suggesting that "made under" may be read as "subject to").

The appropriateness of this linguistic usage is underscored by the fact that § 104 of the Act itself says that works "subject to protection under this title" include unpublished works "without regard to the nationality or domicile of the author," and works "first published" in any one of the nearly 180 nations that have signed a copyright treaty with the United States. §§ 104(a), (b) (2006 ed.) (emphasis added); § 101 (2006 ed., Supp. V) (defining "treaty party"); U.S. Copyright Office, Circular No. 38A, International Copyright Relations of the United States (2010). Thus, ordinary English permits us to say that the Act "applies" to an Irish manuscript lying in its author's Dublin desk drawer as well as to an original recording of a ballet performance first made in Japan and now on display in a Kyoto art gallery.

The Ninth Circuit's geographical interpretation produces still greater linguistic difficulty. As we said, that Circuit interprets the "first sale" doctrine to cover both (1) copies manufactured in the United States and (2) copies manufactured abroad but first sold in the United States with the American copyright owner's permission.

We can understand why the Ninth Circuit may have thought it necessary to add the second part of its definition. As we shall later describe, without some such qualification a copyright holder could prevent a buyer from domestically reselling or even giving away copies of a video game made in Japan, a film made in Germany, or a dress (with a design copyright) made in China, even if the copyright holder has granted permission for the foreign manufacture, importation, and an initial domestic sale of the copy. A publisher such as Wiley would be free to print its books abroad, allow their importation and sale within the United States, but prohibit students from later selling their used texts at a campus bookstore. We see no way, however, to reconcile this half-geographical/ half-nongeographical interpretation with the language of the phrase, "lawfully made under this title." As a matter of English, it would seem that those five words either do cover copies lawfully made abroad or they do not.

In sum, we believe that geographical interpretations create more linguistic problems than they resolve. And considerations of simplicity and coherence tip the purely linguistic balance in Kirtsaeng's, nongeographical, favor.

B

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:

“[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).

[The Court argues that the change to the present version of § 109(a), which conditions the first sale defense on ownership rather than possession, was due to problems with bailees and lessees claiming that defence, particularly lessees of film prints in the motion picture industry.]

... [W]e normally presume that the words “lawfully made under this title” carry the same meaning when they appear in different but related sections. *Department of Revenue of Ore. v. ACF Industries, Inc.*, 510 U.S. 332, 342, 114 S.Ct. 843, 127 L.Ed.2d 165 (1994). But doing so here produces surprising consequences. Consider:

(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. Cf. *Red Baron–Franklin Park, Inc. v. Taito Corp.*, 883 F.2d 275 (C.A.4 1989).

(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.

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

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.” *Samantar v. Yousuf*, 560 U.S. ----, ----, n. 13, 130 S.Ct. 2278, 2289–2290, n. 13, 176 L.Ed.2d 1047 (2010). See also *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783, 72 S.Ct. 1011, 96 L.Ed. 1294 (1952) (“Statutes which invade the common law ... are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident”).

The “first sale” doctrine is a common-law doctrine with an impeccable historic pedigree. [The opinion notes that Lord Coke, the preeminent 17th-Century English jurist, described and supported the first sale doctrine.]

... American law too has generally thought that competition, including freedom to resell, can work to the advantage of the consumer. See, e.g., *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007) (restraints with “manifestly anticompetitive effects” are per se illegal; others are subject to the rule of reason (internal quotation marks omitted)); 1 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 100, p. 4 (3d ed. 2006) (“[T]he principal objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively”).

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.

The common-law doctrine makes no geographical distinctions; nor can we find any in *Bobbs–Merrill* [*v. Straus*, 210 U.S. 339 (1908)] (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. Brief for United States 27. And we can find no language, context, purpose, or history that would rebut a “straightforward application” of that doctrine here.

* * * *

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 ---- – ---- (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

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.

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.

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?

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. The dealers say that they have “operat[ed] ... for centuries” under the assumption that the “first sale” doctrine applies. 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.

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.

Retailers tell us that over \$2.3 trillion worth of foreign goods were imported in 2011. American retailers buy many of these goods after a first sale abroad. 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.

Art museum directors ask us to consider their efforts to display foreign-produced works by, say, Cy Twombly, Rene 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?

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.

* * * *

[T]he fact that harm [from a geographical interpretation] 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.

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 ever-growing importance of foreign trade to America. See The World Bank, Imports of goods and services (% of GDP) (imports in 2011 18% of U.S. gross domestic product compared to 11% in 1980), online at <http://data.worldbank.org/indicator/NE.IMP.GNFS.ZS?> (as visited Mar. 15, 2013, and available in Clerk of Court’s case file). The upshot is that copyright-related consequences along with language, context, and interpretive canons argue strongly against a geographical interpretation of § 109(a).

III

. . . Wiley and the dissent claim that a nongeographical interpretation will make it difficult, perhaps impossible, for publishers (and other copyright holders) to divide foreign and domestic markets. We concede that is so. A publisher may find it more difficult to charge different prices for the same book in different geographic markets. But we do not see how these facts help Wiley, for we can find no basic principle of copyright law that suggests that publishers are especially entitled to such rights.

The Constitution describes the nature of American copyright law by providing Congress with the power to “secur[e]” to “[a]uthors” “for limited [t]imes” the “exclusive [r]ight to their ... [w]ritings.” Art. I, § 8, cl. 8. The Founders, too, discussed the need to grant an author a limited right to exclude competition. Compare Letter from Thomas Jefferson to James Madison (July 31, 1788), in 13 Papers of Thomas Jefferson 440, 442–443 (J. Boyd ed. 1956) (arguing against any monopoly) with Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 14 id., at 16, 21 (J. Boyd ed. 1958) (arguing for a limited monopoly to secure production). But the Constitution’s language nowhere suggests that its limited exclusive right should include a right to divide markets or a concomitant right to charge different purchasers different prices for the same book, say to increase or to

maximize gain. Neither, to our knowledge, did any Founder make any such suggestion. We have found no precedent suggesting a legal preference for interpretations of copyright statutes that would provide for market divisions.

To the contrary, Congress enacted a copyright law that (through the “first sale” doctrine) limits copyright holders’ ability to divide domestic markets. And that limitation is consistent with antitrust laws that ordinarily forbid market divisions. Cf. *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49–50, 111 S.Ct. 401, 112 L.Ed.2d 349 (1990) (per curiam) (“[A]greements between competitors to allocate territories to minimize competition are illegal”). Whether copyright owners should, or should not, have more than ordinary commercial power to divide international markets is a matter for Congress to decide. We do no more here than try to determine what decision Congress has taken.

* * * *

IV

For these reasons we conclude that the considerations supporting Kirtsaeng’s non-geographical 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.

Justice KAGAN, with whom Justice ALITO joins, concurring.

I concur fully in the Court’s opinion. Neither the text nor the history of 17 U.S.C. § 109(a) supports removing first-sale protection from every copy of a protected work manufactured abroad. I recognize, however, that the combination of today’s decision and *Quality King Distributors, Inc. v. L’anza Research Int’l, Inc.*, 523 U.S. 135, 118 S.Ct. 1125, 140 L.Ed.2d 254 (1998), constricts the scope of § 602(a)(1)’s ban on unauthorized importation. I write to suggest that any problems associated with that limitation come not from our reading of § 109(a) here, but from *Quality King*’s holding that § 109(a) limits § 602(a)(1).

* * * *

Here, after all, we merely construe § 109(a); *Quality King* is the decision holding that § 109(a) limits § 602(a)(1). Had we come out the opposite way in that case, § 602(a)(1) would allow a copyright owner to restrict the importation of copies irrespective of the first-sale doctrine. That result would enable the copyright owner to divide international markets in the way John Wiley claims Congress intended when enacting § 602(a)(1). But it would do so without imposing downstream liability on those who purchase and resell in the United States copies that happen to have been manufactured abroad. In other words, that outcome would target unauthorized importers alone, and not the “libraries, used-book dealers, technology companies, consumer-goods retailers, and museums” with whom the Court today is rightly concerned. Ante, at ----. Assuming Congress adopted § 602(a)(1) to permit market segmentation, I suspect that is how Congress thought the provision would work—not by removing first-sale protection from every copy manufactured abroad (as John Wiley urges us to do here), but by enabling the copyright holder to control imports even when the first-sale doctrine applies (as *Quality King* now pre-

vents).²

At bottom, John Wiley (together with the dissent) asks us to misconstrue § 109(a) in order to restore § 602(a)(1) to its purportedly rightful function of enabling copyright holders to segment international markets. I think John Wiley may have a point about what § 602(a)(1) was designed to do; that gives me pause about Quality King's holding that the first-sale doctrine limits the importation ban's scope. But the Court today correctly declines the invitation to save § 602(a)(1) from Quality King by destroying the first-sale protection that § 109(a) gives to every owner of a copy manufactured abroad. That would swap one (possible) mistake for a much worse one, and make our reading of the statute only less reflective of Congressional intent. If Congress thinks copyright owners need greater power to restrict importation and thus divide markets, a ready solution is at hand—not the one John Wiley offers in this case, but the one the Court rejected in *Quality King*.

Justice GINSBURG, with whom Justice KENNEDY joins, and with whom Justice SCALIA joins except as to Parts III and V-B-1, dissenting.

... 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.

To justify a holding that shrinks to insignificance copyright protection against the unauthorized importation of foreign-made copies, the Court identifies several "practical problems." Ante, at ----. 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

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

² Indeed, allowing the copyright owner to restrict imports irrespective of the first-sale doctrine—i.e., reversing *Quality King*—would yield a far more sensible scheme of market segmentation than would adopting John Wiley's argument here. That is because only the former approach turns on the intended market for copies; the latter rests instead on their place of manufacture. To see the difference, imagine that John Wiley prints all its textbooks in New York, but wants to distribute certain versions only in Thailand. Without *Quality King*, John Wiley could do so—i.e., produce books in New York, ship them to Thailand, and prevent anyone from importing them back into the United States. But with *Quality King*, that course is not open to John Wiley even under its reading of § 109(a): To prevent someone like Kirtsaeng from re-importing the books—and so to segment the Thai market—John Wiley would have to move its printing facilities abroad. I can see no reason why Congress would have conditioned a copyright owner's power to divide markets on outsourcing its manufacturing to a foreign country.

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.

* * * *

II

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. See *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 52–53, 128 S.Ct. 2326, 171 L.Ed.2d 203 (2008) (“under” in 11 U.S.C. § 1146(a), a Bankruptcy Code provision exempting certain asset transfers from stamp taxes, means “pursuant to”); *Ardestani v. INS*, 502 U.S. 129, 135, 112 S.Ct. 515, 116 L.Ed.2d 496 (1991) (the phrase “under section 554” in the Equal Access to Justice Act means “subject to” or “governed by” 5 U.S.C. § 554 (internal quotation marks omitted)). 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”).

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. See *United Dictionary Co. v. G. & C. Merriam Co.*, 208 U.S. 260, 264, 28 S.Ct. 290, 52 L.Ed. 478 (1908) (copyright statute requiring that U.S. copyright notices be placed in all copies of a work did not apply to copies published abroad because U.S. copyright laws have no “force” beyond the United States’ borders) 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).

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.” Ante, at ----. 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.⁴

⁴ The Court asserts that my position gives the word “lawfully” in § 109(a) “little, if any, lin-

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).

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). See *ante*, at ---- ("§ 109(a)'s 'first sale' doctrine would apply to copyrighted works as long as their manufacture met the requirements of American copyright law."). 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 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. . . .

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. See 17 U.S.C. § 109(a) (§ 109(a) applies to any "owner of a particular copy or phonorecord lawfully made under this title" (emphasis added)) 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 would have used language tailored to that narrow purpose.

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. 17 U.S.C. § 602(a)(3). Copies imported under

guistic work to do." *Ante*, at ----. That is not so. My reading gives meaning to each word in the phrase "lawfully made under this title." The word "made" signifies that the conduct at issue is the creation or manufacture of a copy. See Webster's Third New International Dictionary 1356 (1961) (defining "made" as "artificially produced by a manufacturing process"). The word "lawfully" indicates that for § 109(a) to apply, the copy's creation must have complied with some body of law. Finally, the prepositional phrase "under this title" clarifies what that body of law is—namely, the copyright prescriptions contained in Title 17 of the U.S. Code.

these exceptions “will often be lawfully made gray market goods purchased through normal market channels abroad.” 2 [P. Goldstein, *Copyright*] § 7.6.1.2(a), at 7:141 [(3rd ed. 2012)]. 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”?

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.¹⁰

* * * *

IV

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, see *supra*, at ----, which means that creators of intellectual property “may hold a set of parallel” intellectual property rights under the laws of different nations. There is no international consensus 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), Apr. 15, 1994, 33 I.L.M. 1197, 1200, that “nothing in this Agreement shall be used to address the issue of ... exhaustion.”

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 in-

¹⁰ The Court asserts that its reading of § 109(a) is bolstered by § 104, which extends the copyright “protection[s]” of Title 17 to a wide variety of foreign works. See *ante*, at ----. The “protection under this title” afforded by § 104, however, is merely protection against infringing conduct within the United States, the only place where Title 17 applies. See 4 W. Patry, *Copyright* § 13:44.10, pp. 13–128 to 13–129 (2012) (hereinafter Patry). Thus, my reading of the phrase “under this title” in § 109(a) is consistent with Congress' use of that phrase in § 104.

ternational-exhaustion camp.

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.

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. See Brief for United States as Amicus Curiae in *Quality King*, O.T.1997, No. 96-1470, pp. 22-26 (hereinafter *Quality King Brief*). 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.” *Id.*, at 22. The United States has “advanced this position in multilateral trade negotiations,” including the negotiations on the TRIPS Agreement. *Id.*, at 24.. It has also taken a dim view of our trading partners' adoption of legislation incorporating elements of international exhaustion. See Clapperton & Corones, *Locking in Customers, Locking Out Competitors: Anti-Circumvention Laws in Australia and Their Potential Effect on Competition in High Technology Markets*, 30 *Melbourne U.L.Rev.* 657, 664 (2006) (United States expressed concern regarding international-exhaustion legislation in Australia); Montén, Comment, *The Inconsistency Between Section 301 and TRIPS: Counterproductive With Respect to the Future of International Protection of Intellectual Property Rights?* 9 *Marq. Intellectual Property L.Rev.* 387, 417-418 (2005) (same with respect to New Zealand and Taiwan).

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, see Parts II-III, *supra*—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. See 523 U.S., at 153-154, 118 S.Ct. 1125. See also *Quality King Brief* 22-24 (listing the agreements). That decision, however, dealt only with copyright-protected products made in the United States. See 523 U.S., at 154, 118 S.Ct. 1125 (GINSBURG, J., concurring). *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, see *ante*, at ---- (arguing that *Quality King* “significantly eroded” the national-exhaustion principle that, in my view, § 602(a)(1) embraces). 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.” *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539, 115 S.Ct. 2322, 132 L.Ed.2d 462 (1995).

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

A

The Court asserts that its holding “is consistent with antitrust laws that ordinarily forbid market divisions.” Ante, at ----. See also ante, at ---- (again referring to antitrust principles). Section 602(a)(1), however, read as I do and as the Government does, simply facilitates copyright owners' efforts to impose “vertical restraints” on distributors of copies of their works. See *Forsyth & Rothnie* 435 (“Parallel importation restrictions enable manufacturers and distributors to erect ‘vertical restraints’ in the market through exclusive distribution agreements.”). See generally *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007) (discussing vertical restraints). We have held that vertical restraints are not per se illegal under § 1 of the Sherman Act, 15 U.S.C. § 1, because such “restraints can have procompetitive effects.” 551 U.S., at 881–882, 127 S.Ct. 2705.¹⁷

B

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 horribles.

1

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. Copyright Act of 1891, § 1, 26 Stat. 1107.

In *Bobbs–Merrill*, the Court addressed the scope of the statutory right to “ven[d].”

¹⁷ Despite the Court's suggestion to the contrary, this case in no way implicates the per se antitrust prohibition against horizontal “[a]greements between competitors to allocate territories to minimize competition.” Ante, at ---- (quoting *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49, 111 S.Ct. 401, 112 L.Ed.2d 349 (1990) (per curiam)). Wiley is not requesting authority to enter into collusive agreements with other textbook publishers that would, for example, make Wiley the exclusive supplier of textbooks on particular subjects within particular geographic regions. Instead, Wiley asserts no more than the prerogative to impose vertical restraints on the distribution of its own textbooks. See Hovenkamp, *Post-Sale Restraints and Competitive Harm: The First Sale Doctrine in Perspective*, 66 N.Y.U. Ann. Survey Am. L. 487, 488 (2011) (“vertical restraints” include “limits [on] the way a seller's own product can be distributed”).

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.” 210 U.S., at 349–350, 28 S.Ct. 722. “[O]ne who has sold a copyrighted article ... without restriction,” the Court explained, “has parted with all right to control the sale of it.” *Id.*, at 350, 28 S.Ct. 722. 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.” *Ibid.*

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*. See *ibid.* (emphasizing that the question before the Court was “purely [one] of statutory construction”). 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.

* * * *

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. Congress first codified the first sale doctrine in § 41 of the Copyright Act of 1909, 35 Stat. 1084. It did so, the House Committee Report on the 1909 Act explains, “in order to make ... clear that [Congress had] no intention [of] enlarg[ing] in any way the construction to be given to the word ‘vend.’ ” H.R.Rep. No. 2222, 60th Cong., 2d Sess., 19 (1909). According to the Committee Report, § 41 was “not intended to change [existing law] in any way.” *Ibid.* The position I have stated and explained accords with this expression of congressional intent. In enacting § 41 and its successors, I would hold, Congress did not “change ... existing law,” *ibid.*, by stripping the word “vend” (and thus its substitute “distribute”) of the limiting construction imposed in *Bobbs–Merrill*.

* * * *

2

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.” But cf. *ante*, at ----- (suggesting that affirming the Second Circuit’s decision might prevent libraries from lending foreign-made books).

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. Ante, at ---- (citing Brief for Association of Art Museum Directors et al.). These amici observe that a museum's right to display works of art often depends on 17 U.S.C. § 109(c). See Brief for Association of Art Museum Directors et al. 11–13. 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. *Id.*, at 11–13.

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. See 2 Patry § 5:131, at 5–280 (“[C]ourts have noted the potential availability of an implied non-exclusive licens[e] when the circumstances ... demonstrate that the parties intended that the work would be used for a specific purpose.”). Displaying a work of art as part of a museum exhibition might also qualify as a “fair use” under 17 U.S.C. § 107. *Cf. Bouchat v. Baltimore Ravens Ltd. Partnership*, 619 F.3d 301, 313–316 (C.A.4 2010) (display of copyrighted logo in museum-like exhibition constituted “fair use”).

The Court worries about the resale of foreign-made consumer goods “contain [ing] copyrightable software programs or packaging.” Ante, at ----. . . . 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 [such goods as cars] to be resold without the copyright owners' authorization.

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. See *Columbia Broadcasting System, Inc. v. Scorpio Music Distributors, Inc.*, 569 F.Supp. 47, 49 (E.D.Pa.1983), summarily aff'd, 738 F.2d 424 (C.A.3 1984) (table). 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.

The Court provides a different explanation for the absence of the untoward consequences predicted in its opinion—namely, that lower court decisions regarding the scope of § 109(a)'s first sale prescription have not been uniform. Uncertainty generated by these conflicting decisions, the Court notes, may have deterred some copyright owners from pressing infringement claims. But if, as the Court suggests, there are a multitude of copyright owners champing at the bit to bring lawsuits against libraries, art museums, and consumers in an effort to exercise perpetual control over the downstream distribution and public display of foreign-made copies, might one not expect that at least a handful of such lawsuits would have been filed over the past 30 years? The absence of such suits indicates that the “practical problems” hypothesized by the Court are greatly exag-

gerated.²⁷

VI

To recapitulate, the objective of statutory interpretation is “to give effect to the intent of Congress.” *American Trucking Assns.*, 310 U.S., at 542, 60 S.Ct. 1059. 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. . . .

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.

²⁷ It should not be overlooked that the ability to prevent importation of foreign-made copies encourages copyright owners such as Wiley to offer copies of their works at reduced prices to consumers in less developed countries who might otherwise be unable to afford them. The Court’s holding, however, prevents copyright owners from barring the importation of such low-priced copies into the United States, where they will compete with the higher priced editions copyright owners make available for sale in this country. To protect their profit margins in the U.S. market, copyright owners may raise prices in less developed countries or may withdraw from such markets altogether. . . . Such an outcome would disserve consumers—and especially students—in developing nations and would hardly advance the “American foreign policy goals” of supporting education and economic development in such countries.