1 IN THE SUPREME COURT OF THE UNITED STATES

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3 COSTCO WHOLESALE CORPORATION, :

4 Petitioner :

5 v. : No. 08-1423

6 OMEGA, S.A. :

7 - - - - - - - - - - - - - - - - - x

8 Washington, D.C.

9 Monday, November 8, 2010

10

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 10:02 a.m.

14 APPEARANCES:

15 ROY T. ENGLERT, JR., ESQ., Washington, D.C.; on behalf

16 of Petitioner.

17 AARON M. PANNER, ESQ., Washington, D.C.; on behalf of

18 Respondent.

19 MALCOLM L. STEWART, ESQ., Deputy Solicitor General,

20 Department of Justice, Washington, D.C.; on

21 behalf of the United States, as amicus curiae,

22 supporting Respondent.

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

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear

4 argument first this morning in Case 08-1423, Costco

5 Wholesale Corporation v. Omega.

6 Mr. Englert.

7 ORAL ARGUMENT OF ROY T. ENGLERT, JR.,

8 ON BEHALF OF THE PETITIONER

9 MR. ENGLERT: Mr. Chief Justice, and may it

10 please the Court:

11 This case is a repeat of Quality

12 King v. L'anza with only one pertinent difference. Both

13 cases involve goods not authorized for importation into

14 the United States. Both cases involve arguments that

15 the first sale doctrine must be narrowly construed, thus

16 the Copyright Act's importation ban, section 602(a), be

17 given less than its supposedly intended scope. The only

18 difference is place of manufacture of the goods.

19 Quality King involved U.S. manufactured goods; this case

20 involves goods made in Switzerland.

21 According to the Ninth Circuit in Omega,

22 Congress intended to treat foreign manufactured goods

23 better in this respect than goods made in the United

24 States. It is wildly implausible that Congress had any

25 such intent.

1 From 1790 to 1891, foreigners were
2 categorically ineligible to hold U.S. copyrights. From
3 1891 to 1986, the United States discriminated against
4 foreign manufacturing of copyrighted goods through a
5 series of so-called manufacturing clauses, including
6 section 601 of the 1976 Act. If Congress intended to
7 make the first sale doctrine discriminate in favor of
8 foreign manufacturing at the same time, one would expect
9 some note to be taken of that fact in the legislative
10 history, but none is. And yet the Ninth Circuit held
11 that Congress in 1976 altered the long-established first
12 sale doctrine to make it uniquely favorable to foreign
13 manufacturing of copyrighted goods and did so through
14 the obscure phrase, "lawfully made under this title," in
15 section 109.
16 No one in all the briefs in this case has
17 identified a single reason why Congress would have
18 wanted to do so. Moreover, the words "lawfully made
19 under this title" are used elsewhere in the Copyright
20 Act, and they never mean what the Ninth Circuit said
21 they mean in section 109.
22 Most instructive is the very next section
23 after section 109, section 110, which governs
24 educational use of copyrighted works and was enacted
25 contemporaneously with 109. In describing the kinds of

1 works teachers may show students in their classroom
2 without fear of copyright liability, Congress referred
3 to works lawfully made under this title. Our briefs
4 have pointed out the absurdity of construing the phrase
5 in section 110 to mean made in the United States, and
6 it's very revealing how Respondent and its amici have
7 tried to answer that point.
8 Omega says "lawfully made under this title"
9 means either made in the United States or authorized for
10 distribution in the United States. That argument gives
11 up any pretense --
12 JUSTICE SOTOMAYOR: Would you clarify for me
13 what your exact meaning is? There -- your blue brief
14 and your reply brief appear to give two different
15 meanings.
16 MR. ENGLERT: I hope not, Your Honor. I
17 believe our --
18 JUSTICE SOTOMAYOR: Your reply brief
19 suggests that if Omega grants foreign reproduction and
20 distribution rights but retains U.S. rights, that the
21 first sale doctrine would allow Omega to bar
22 importation.
23 MR. ENGLERT: If it grants exclusive foreign
24 distribution.
25 JUSTICE SOTOMAYOR: Why does it matter?

1 Because your blue brief says that "lawfully made" means
2 anything that was made with Omega's consent or
3 authority. So why the difference at all?
4 MR. ENGLERT: It matters, Your Honor,
5 because of the underlying rationale of the first sale
6 doctrine and the underlying rationale of the import ban
7 in section 602.
8 The purpose of the first sale doctrine is to
9 make sure that the copyright owner gets one and only one
10 recompense for each copy, for each lawfully made copy.
11 JUSTICE SOTOMAYOR: So if he sells his
12 rights to a foreign manufacturer and distributor, he
13 gets paid for those rights. Why should he now have any
14 additional rights to bar that authorized copy --
15 MR. ENGLERT: The reason, Your --
16 JUSTICE SOTOMAYOR: -- from being imported
17 into the United States?
18 MR. ENGLERT: Yes, Your Honor. The --
19 JUSTICE SOTOMAYOR: I -- I don't understand
20 what --
21 MR. ENGLERT: The reason is to give effect
22 to the examples given in the legislative history of
23 section 602.
24 JUSTICE SOTOMAYOR: Not -- you mean to the
25 examples in the legislative history or in the examples

1 in Quality King?

2 MR. ENGLERT: Oh. The Quality King has a

3 paragraph, much discussed in the briefs, which cites to

4 the legislative history of section 602 and in

5 particular, cites to witness statements that are in the

6 committee prints that are part of the legislative

7 history of section 602.

8 JUSTICE SOTOMAYOR: So do you think that

9 there is a difference between assigning a copyright to a

10 foreign entity or merely licensing a foreign entity?

11 One of the criticisms of your approach is that you would

12 draw a line between those two.

13 MR. ENGLERT: We don't draw a line between

14 those two, Your Honor.

15 The line is -- depends on whether the

16 copyright owner has given exclusive foreign rights to

17 someone else. And the reason the exclusivity of the

18 foreign rights matters is because that is the example

19 given in the legislative history of 602 and in the

20 paragraph in Quality King.

21 And to give meaning to section 602 and to be

22 completely consistent with the rationale of the first

23 sale doctrine, one must draw some line. Drawing a line

24 between the U.S. manufacturer and the foreign

25 manufacturer makes no sense. It's not consistent with

1 the purposes of anything.
2 Drawing a line between the exclusive grant
3 of rights, whether by license or assignment to a foreign
4 manufacturer -- or a foreign distributor, rather, and
5 not granting such exclusive rights is perfectly
6 consistent with the rationale --
7 JUSTICE BREYER: You are talking about the
8 first sale doctrine. The perfectly consistent rationale
9 would be whether there is a first sale. So -- so 109,
10 though it doesn't say it, but if you look at the history
11 and title, there has to be a transfer.
12 So in fact, if a British publisher with a
13 British right given by an American author or publisher
14 makes this, 109 doesn't apply -- I mean, 109 doesn't
15 apply until there's a sale.
16 Now, that makes -- you -- you haven't
17 adopted that. Nobody -- I guess maybe one of the amicus
18 briefs does, but I don't see why that isn't perfectly
19 sensible and I find no authority against it.
20 MR. ENGLERT: Well, Your Honor, since that's
21 a -- a broader position than ours, and we would --
22 JUSTICE BREYER: I know it is, but it -- the
23 trouble with your position is it gets everybody, I
24 think, going to be -- I mean, I don't know what all
25 these contracts say. There are hundreds of thousands of

1 them, if not millions. What I don't see is why you
2 don't just say: The first sale doctrine has always
3 meant there was a transfer or sale.
4 It meant that in 1792, when I took Phil
5 Arita's antitrust course, and he used to bring it up.
6 You go back to the 18th century. It's always meant
7 there has to be a sale or transfer. So why don't we
8 just read 109 that way, and there you give meaning to
9 everything, and there is just no problem?
10 Now, I raise that not because -- I raise it
11 because since there's only a few people really
12 supporting this, there must be some problem with what I
13 say. So what is it?
14 MR. ENGLERT: Well, the issue, Your Honor --
15 and you're putting me in a position of arguing against
16 myself a little bit, but the issue is a fair reading of
17 the legislative history of section 602 -- not the text,
18 but the legislative history -- is that Congress did
19 intend to allow certain blocking of imported goods when
20 there had been --
21 JUSTICE BREYER: Of course, if you say there
22 has to be a first sale, there is no problem. You block
23 that British manufacturer from sending his books to the
24 United States, but you don't block the person to whom he
25 sells it. Gives meaning to everything.

1 MR. ENGLERT: Okay, Your Honor.
2 JUSTICE BREYER: I mean, no, I'm putting
3 that to you, because since you haven't advocated it, I
4 must be missing something, and I'm not an expert in
5 copyright law. What am I missing?
6 MR. ENGLERT: Well, there is a dictum in
7 this Court's opinion in Quality King that suggests that
8 if a publisher and a -- an American publisher gives
9 exclusive rights to a British publisher, if an American
10 author or a British author gives exclusive territorial
11 rights to two different publishers, then 602 retains
12 meaning in that --
13 JUSTICE KENNEDY: Exactly, and that's what
14 it does under my theory, because there has been no first
15 sale.
16 MR. ENGLERT: No, but -- with respect, Your
17 Honor, it's my understanding of both the legislative
18 history and this Court's dictum that they refer to
19 second and subsequent sales.
20 JUSTICE BREYER: Oh, you mean you are
21 talking about jobbers? Somebody goes and buys, and so
22 they're -- and so then you lose, because if that's what
23 we are supposed to follow, those excerpts in the
24 legislative history, then it would mean that a person
25 who buys from the British publisher cannot import into

1 the United States because 109 doesn't apply.
2 MR. ENGLERT: No, that's not what the
3 example means. It doesn't say categorically all second
4 sales from British publishers are not subject to the
5 first sale doctrine. What it says is in a situation in
6 which rights have been divided and exclusive territorial
7 rights have been given in two different countries, or to
8 put it in copyright language, in the language you also
9 used in the legislative history, when the copyright
10 owner has divided its rights because an innovation of
11 the '76 act, the Copyright Act, the copyrights became
12 divisible.
13 JUSTICE SCALIA: Where do you get that in
14 the text? I mean, that's lovely, and you're saying that
15 what Justice Breyer suggests makes perfect sense except
16 for dictum and legislative history. Does your position
17 make any sense with regard to text?
18 MR. ENGLERT: Yes, absolutely, Your Honor.
19 JUSTICE SCALIA: Where? Where is that
20 limitation in the text?
21 MR. ENGLERT: The other side's effort to
22 read 602 broadly has no support in the text after
23 Quality King, but --
24 JUSTICE SCALIA: I'm talking about your --
25 MR. ENGLERT: I understand.

1 JUSTICE SCALIA: -- your limitation on
2 exclusive rights abroad versus nonexclusive rights
3 abroad. Where can you possibly find that in the text?
4 MR. ENGLERT: You cannot.
5 JUSTICE SCALIA: Oh. Well, that's the end
6 of it for me.
7 MR. ENGLERT: Let us --
8 JUSTICE BREYER: I have to say, I didn't
9 even see it in the legislative history. I didn't think
10 they made a big deal about jobbers. I like history
11 here. Go back to 1792.
12 JUSTICE GINSBURG: Mr. Englert, also talk
13 about what, if anything, 602(a)(1) does, then. It seems
14 602(a)(2) is dealing with infringing goods, with pirated
15 goods. So given the first sale doctrine as you construe
16 it, what does 602(a)(1) protect?
17 MR. ENGLERT: 602(a)(1) is limited to
18 imports and doesn't confer a private right of action.
19 602(a)(2), which was enacted after the Ninth Circuit
20 ruled in this case, adds a private right of action and
21 adds exports. But it is -- 602(a)(2) is a new statute.
22 It was not part of the 1976 Copyright Act. So it -- it
23 is a subsection in which Congress expanded on what was
24 already prohibited in 602(a)(1).
25 Now, with respect to text, the text that the

1 Court is construing is five words, "lawfully made under
2 this title." And those five words are used several
3 places in the Copyright Act, including section 110, "for
4 educational use." The government says "lawfully made
5 under this title" can mean two different things in
6 section 109 and section 110, provisions of the same
7 chapter of the Copyright Act enacted contemporaneously.
8 As a fallback position, the government says
9 there is nothing wrong with having copyright liability
10 for teachers who show foreign-made films in the
11 classroom as long as they know they weren't made in the
12 United States. So, for example, showing an Ingmar
13 Bergman film, The Seventh Seal, in class would be
14 copyright infringement according to the government.
15 Even the people who make movies don't agree
16 with that argument. The Motion Picture Association of
17 America has filed an amicus brief in this case, and on
18 page 19 of its brief, the MPAA says that the result the
19 government says is A-OK is, quote, "a nonsensical and
20 unintended consequence." The MPAA goes on to say there
21 is no evidence that such liability has ever been
22 imposed, but that argument misses the point. We are
23 trying to ascertain what Congress meant by using the
24 phrase "lawfully made under this title," not making a
25 policy argument about consequences, and section 110

1 remains a powerful argument that Congress didn't use the
2 phrase to mean "made in the United States."
3 There is nothing extraterritorial about
4 construing "lawfully made in this title" as a choice of
5 law clause, which means: Lawfully made according to
6 standards of the U.S. Copyright Act anywhere in the
7 world. In that respect, this case is no different from
8 Quality King, in which the court rejected an
9 extraterritoriality argument in a two-sentence footnote.
10 JUSTICE SCALIA: You don't really mean --
11 your position is that "lawfully made under this title"
12 means that -- means "would have been lawfully made under
13 this title if this title governed." Isn't that
14 basically what you are saying?
15 MR. ENGLERT: Yes.
16 JUSTICE SCALIA: Okay. But there is another
17 provision of the statute -- I forget where it is --
18 which says that in so many words.
19 MR. ENGLERT: Not quite, Your Honor. In
20 section 602(a)(2) and in section 602(b), Congress used
21 the phrase, "would have constituted an infringement if
22 this title had been applicable," and it says --
23 JUSTICE SCALIA: "If this title had been
24 applicable," right? We say "applicable." Much
25 prettier.

1 MR. ENGLERT: Okay, sir. Yes, that is the
2 phrase Congress used to express a certain disfavored
3 class of goods, goods that would have been infringing if
4 this title would have been applicable. 110 -- 109,
5 excuse me, and 110 are a different purpose. They are
6 the purpose of favoring goods, goods that have been
7 lawfully made under this title.
8 So, yes, Congress could have chosen to use a
9 variation of the phrase "if this title had been
10 applicable" under 109, but it didn't. And we are left
11 with the language Congress enacted, but it is language
12 that Congress uses at least four different places in the
13 Copyright Act, and we have a pretty good idea that it
14 doesn't mean "made in the United States" and it doesn't
15 mean what Omega says it means, which is "made in the
16 United States or authorized at any time for distribution
17 in the United States."
18 JUSTICE GINSBURG: May I ask you -- I see
19 that 602(a) is now broken into (1) and (2) and it's
20 602(b) that you put entirely in quotes. But what does
21 602(a) shelter? How does it coexist with the first sale
22 doctrine?
23 MR. ENGLERT: Well, Your Honor, as you know,
24 there is no reference in the legislative history to the
25 interaction between 602(a) and 109, and therefore, this

1 Court had to address that question for the first time in
2 Quality King, and the Court rejected the argument that
3 109 is inapplicable to imported goods altogether.
4 The Court did say in a dictum which has been
5 discussed already this morning that if a British and an
6 American publisher divide rights, then section 602(a)
7 does have a role to play. But the Court did not say
8 books manufactured in Britain are not subject to the
9 first sale doctrine.
10 JUSTICE GINSBURG: There was a concurring
11 opinion that says -- that said this case is about a
12 round trip and doesn't talk to goods that --
13 MR. ENGLERT: Correct, and the concurring
14 opinion cited two distinguished copyright treatises that
15 suggested there was some concern about
16 extraterritoriality in this case. Well, even the
17 government has conceded there is no concern about
18 extraterritoriality in this case, so the rationale of
19 those treatises, learned though they are, is undermined.
20 If one looks more closely at those
21 treatises, they argue the language is so plain that it
22 can only be construed one way. The government concedes
23 that's not true. They argue extraterritoriality, as
24 I've already said, and they argue that this court's
25 dictum in Quality King -- the later additions to those

1 treatises argue that this Court's dictum in Quality King
2 drew a distinction based on place of manufacture, but
3 it's only the concurring opinion, not the dictum in the
4 court's opinion that mentions place of manufacture. So
5 it's a vert thin reed to say that the case turned on
6 place of manufacture. And again, one can find nothing
7 in the Quality King dictum, nothing in the legislative
8 history of 602, nothing in the legislative history of
9 109 that talks about place of manufacture.
10 JUSTICE SCALIA: And nothing in the text
11 that supports your position.
12 MR. ENGLERT: No. What supports our
13 position, Your Honor, is the text of 109, the use of the
14 phrase "lawfully made under this title," and the use of
15 that phrase "elsewhere in the Copyright Act."
16 JUSTICE SCALIA: You pulled out of the sky
17 this distinction between having created exclusive rights
18 abroad and having created nonexclusive rights abroad.
19 Where does that come from?
20 MR. ENGLERT: That comes from the
21 legislative history, Your Honor. And for those who
22 prefer not to look at legislative history --
23 JUSTICE SCALIA: You use --
24 MR. ENGLERT: -- that distinction may not
25 hold up. But if that distinction doesn't hold up --

1 JUSTICE SCALIA: I don't know why using --
2 MR. ENGLERT: -- that strengthens my
3 position.
4 JUSTICE SCALIA: Did the legislative history
5 suggest what part of the text this -- this novel
6 suggestion was based upon?
7 MR. ENGLERT: It does not. The relevant
8 legislative history is witness statements.
9 JUSTICE BREYER: I do read legislative
10 history, but I didn't really find anything that said
11 that they were worried about an American and a British
12 publisher dividing rights, and they want them to do
13 that. There is no problem with that, because there has
14 never been a sale. So they divide the rights.
15 And there isn't even a problem with -- with
16 buyers from the British publisher, because a reasonable
17 vertically imposed territorial agreement or other
18 restriction on resale is lawful.
19 MR. ENGLERT: Well, if --
20 JUSTICE BREYER: And if it's reasonable,
21 they don't even need copyright.
22 MR. ENGLERT: That was not true at the time.
23 JUSTICE BREYER: If it isn't reasonable, why
24 should they have it?
25 MR. ENGLERT: Pardon me, Justice Breyer.

1 JUSTICE BREYER: That's all you -- yes, I
2 just want you to respond.
3 MR. ENGLERT: It was not lawful at the time
4 of the enactment of this statute. This Court had not
5 yet decided GTE Sylvania, and territorial restrictions
6 were per se unlawful at the time Congress enacted this
7 statute.
8 JUSTICE BREYER: Here. But in Europe, I
9 guess, they were lawful.
10 MR. ENGLERT: I don't know the state of the
11 law in Europe.
12 JUSTICE BREYER: I think -- I think it's
13 always been true.
14 MR. ENGLERT: But, again, what the Court has
15 asked me many questions about is whether I'm giving too
16 broad a scope to section 602 and too narrow a scope to
17 section 109.
18 Our position is that section 109 has a
19 necessarily broad reach, and we have tried to
20 accommodate the legislative history and the dictum in
21 Quality King to give some role for section 602 to play
22 in the case of nonpiratical goods. If the Court wants
23 to reject anything, if it wants to reconsider the dictum
24 in Quality King or not rely on legislative history, that
25 makes my position --

1 JUSTICE BREYER: My question really wasn't
2 to argue with you. My question was: Where in the
3 legislative history does it say that the point of 602 is
4 to prevent a foreign publisher from selling copies to a
5 distributor and then that distributor resells them to
6 the United States? I'm not saying it doesn't; it's just
7 that I didn't focus on those particular words directly.
8 MR. ENGLERT: And Justice Breyer, to be fair
9 about what the legislative history says, it is
10 statements by witnesses. It is not statements by
11 committee, so it's a little bit hard to tell where
12 they're drawing the line.
13 JUSTICE BREYER: Oh. In other words,
14 somebody wanted that. I understand the industry wanted
15 it. But -- but I -- is there anything in there that
16 suggests that this is what Congress wanted to do,
17 members of Congress? Even I draw the line somewhere.
18 (Laughter.)
19 MR. ENGLERT: Yes. Yes.
20 JUSTICE SCALIA: Let me write that down.
21 (Laughter.)
22 MR. ENGLERT: Justice Breyer, we do know
23 that section 602(a) has some role to play. And when
24 this Court was trying to figure out in Quality King what
25 role it had to play it did look to the statements of

1 Mrs. Harriet Pilpel, Mr. Horace Manges from the American
2 Book Publishers Council. And those are the statements
3 that the Court said in dicta presumably reflected
4 congressional intent, and so I am relying on those
5 statements for the limitation of section 109 to
6 accommodate section 602.
7 But again, if the Court disagrees with me
8 and wants to give less of a role to 602 and more of a
9 role to section 109, that is, of course, further
10 assistance to my position.
11 I would like to reserve the balance of my
12 time for rebuttal.
13 CHIEF JUSTICE ROBERTS: Thank you, Mr.
14 Englert.
15 Mr. Panner.
16 ORAL ARGUMENT OF AARON M. PANNER
17 ON BEHALF OF THE RESPONDENT
18 MR. PANNER: Mr. Chief Justice, and may it
19 please the Court:
20 Section -- section 602(a)(1) allows the
21 distribution of foreign-made copies abroad without the
22 U.S. copyright holder forfeiting the exclusive right to
23 distribute copies domestically, which is guaranteed by
24 section 106(3), and that provision applies in this case.
25 And unlike in Quality King, section 109(a) provides

1 Costco with no defense because the copies at issue were
2 not lawfully made under this title. That is, the making
3 of the copies was not subject to or governed by U.S.
4 copyright law.
5 The decision of the court of appeals should
6 not be affirmed for three basic reasons, and the first
7 depends on the plain language of section 109(a), which
8 applies only to copies that were lawfully made under
9 this title.
10 JUSTICE ALITO: What do you say "made"
11 means?
12 MR. PANNER: Well, "made" certainly includes
13 the creation of the physical copy. It also includes the
14 addition of any necessary intellectual property rights
15 that would permit distribution in the United States.
16 So that is to say that we understand section
17 109(a) should be read to reach a situation in which copy
18 has been subject to an authorized sale in the United
19 States.
20 JUSTICE ALITO: See, I'm with you, and I
21 think you -- the text supports you up to the point where
22 you add the qualification. But once you've added that
23 qualification, I think you're -- you're outside the
24 text, just as Costco is outside the text with the
25 qualification that they had.

1 MR. PANNER: I don't think so, Your Honor,
2 and let me try to explain why. Section 202 of the Act
3 draws a -- a distinction between the material object and
4 the intellectual property rights that are involved in
5 the copyright. And it makes sense. The word "made" is
6 not -- does not correspond to the word "reproduced" in
7 section 106(1). It's a broader term that can also refer
8 to the addition of these necessary intellectual property
9 rights.
10 And the -- what is, I think, important is
11 the decision whether the copy was lawfully made under
12 this title will, of course, be made at the time of the
13 sale. It is not -- the decision doesn't need to be made
14 at the time of -- of manufacture, because the question
15 is: How should section 109(a) or another provision
16 apply to that particular copy?
17 JUSTICE KENNEDY: Well, in their brief, the
18 brief for the National Library Association indicates at
19 the bottom -- the American Library Association indicates
20 at the bottom of page 38 that "made" might mean cause to
21 exist, cause to appear, and so that it applies the first
22 time that U.S. copyright law lawfully could apply; so
23 that if you lawfully import it into the United States,
24 it would then apply at that time.
25 MR. PANNER: Well, I think that that

1 probably gets us to pretty much the same place,
2 Justice Kennedy. I think the point is --
3 JUSTICE KENNEDY: And it makes the exemption
4 work, then, too.
5 MR. PANNER: That's correct, Your Honor.
6 And the -- that also gives effect to the language of
7 602(a)(1), because section 602(a)(1) is actually written
8 in a very broad term. It's written to apply to copies
9 that have been acquired outside of the United States. I
10 think -- that is, I think, an answer, Justice Breyer, to
11 your objection that any sort of sale ought to suffice.
12 Section 602(a)(1) is designed to permit a
13 U.S. copyright owner to exclude legitimate copies, and
14 if you ask where Congress said that, it's right in the
15 House Committee report, in the legislative history.
16 JUSTICE BREYER: And it can. It can exclude
17 legitimate copies before there's a first sale.
18 MR. PANNER: But the --
19 JUSTICE BREYER: And the -- the --
20 question is -- I mean, the text seems to say 602 expands
21 or falls within 106. All right?
22 So that's what it says. It says -- it says
23 it's an infringement of the exclusive right to
24 distribute copies. That's the 106 right.
25 MR. PANNER: That's correct.

1 JUSTICE BREYER: And then 109 is an
2 exception from 106. So it's automatically an exception
3 from 602.
4 MR. PANNER: And I think --
5 JUSTICE BREYER: Now, that's the text. And
6 therefore, you are back at what the meaning of 109 is,
7 if I understand your argument. And it seems to me
8 that's the choice. If you are going to take 109
9 literally, then everything that comes into the United
10 States can't, without the permission of the copyright
11 holder, but for the exception in (a)(3), and a library
12 that brings them in under (a)(3) cannot even lend out
13 the books. That's one choice.
14 And the other choice is to say that
15 "lawfully made" means it's made without contravening any
16 provision of the Act, if the Act were applicable.
17 MR. PANNER: Well, Your Honor --
18 JUSTICE BREYER: What's a third choice?
19 Maybe you want a third choice.
20 MR. PANNER: Well, a small qualification,
21 Your Honor. The exception in section 602(a)(3) does
22 allow libraries to lend copies that are imported
23 pursuant to that section. It's for archival or lending
24 purposes.
25 But in any event, I think that that's -- I

1 don't want to get caught up on the small point. The
2 more significant point is that section 602(a)(1) is
3 designed to permit a U.S. copyright owner -- as Costco
4 admits, it's designed to permit a U.S. copyright owner
5 to exclude legitimate copies that are made overseas.
6 If the only issue were one of contract,
7 there would be no need for section 602(a)(1) because
8 there would be no need to create a copyright remedy
9 where contractual remedies are sufficient; that is, in
10 circumstances where there is privity between the U.S.
11 copyright owner or the U.S. copyright owner's direct
12 party and the foreign copyright owner.
13 JUSTICE BREYER: That's why I started with
14 the first sale doctrine, because if you apply the first
15 sale doctrine as it traditionally has been applied and
16 if you believe that 109 incorporates that, there is
17 loads of room for 602(a)(1) to act. That's all the
18 instances where the British publisher published -- makes
19 the book. What they do is they have a license and they
20 try to send it to the United States and they can't
21 without permission because of 602(a)(1), and then 109
22 doesn't come into play because there's been no first
23 sale. That's the part of this case that I'm finding the
24 hardest, because, literally, 109(a) -- as you correctly
25 point out, 109 doesn't say that literally.

1 MR. PANNER: Well, Your Honor, section
2 602(a)(1) refers specifically to copies that have been
3 acquired outside of the United States. So it does not
4 make sense to say that it's limited to the publisher,
5 because the publisher hasn't acquired the copies. It
6 has produced the copies.
7 JUSTICE BREYER: That's all right.
8 MR. PANNER: So I think that the difficulty
9 with Costco's reading, by contrast -- and I think that
10 some of the Court's questions brought that out this
11 morning -- is that either they -- Costco's reading tends
12 to eliminate any practical effect for section 602(a)(1)
13 by making it not apply to legitimate copies or it makes
14 substantive rights turn on formalities of title, which
15 is quite inconsistent with the structure of the
16 Copyright Act, which actually goes out of its way to
17 make clear that the nature of the rights that are held
18 by the copyright owner, which is defined to mean the
19 owner of any of the many rights that comprise the
20 copyright, are the same regardless of whether there's
21 been a transfer.
22 And so when Costco says, for example, that
23 Omega would have the right to exclude foreign-made
24 copies that were produced by a transferee, but cannot do
25 so if it manufactures the copy abroad itself, it really

1 draws a distinction that has absolutely no basis in the
2 text of the Copyright Act and that would make
3 substantive rights, the value of the rights under
4 602(a)(1) and 106(3), turn on formalities and, again,
5 transfers that really should make no difference in terms
6 of the substantive rights that are available to the
7 copyright owner.
8 JUSTICE SCALIA: It seems to me -- why
9 didn't they say -- instead of "lawfully made under this
10 title," why didn't they just say "made in the United
11 States"?
12 MR. PANNER: Well, Your Honor --
13 JUSTICE SCALIA: I mean, that's what you say
14 it means. "Made under this title" means "made in the
15 United States."
16 MR. PANNER: That is not our position, Your
17 Honor. Our position is that "lawfully made under this
18 title" would include a copy that was manufactured in the
19 United States, but that it is not so limited, and that
20 if you look at section 1(e) of our brief, we discuss the
21 fact that an interpretation of "lawfully made under this
22 title" to include a copy that includes the necessary
23 licenses for distribution in the United States is a
24 consistent reading -- is consistent with the language of
25 that provision and gives -- and is consistent with the

1 traditional understanding that section 109(a) is
2 intended to reflect an exhaustion principle.
3 So where a U.S. copyright owner has
4 exhausted rights with respect to a particular copy by
5 having been compensated for a right that has been
6 invested into that copy, that can be included in the
7 making.
8 JUSTICE SCALIA: That's just not in the
9 text. I mean, like the other side, in order to make
10 your theory of the text appear reasonable, you have to
11 bring in a skyhook with a limitation that finds no basis
12 in the text.
13 MR. PANNER: I don't think so, Your Honor.
14 Again, there is -- because the textual evidence is that
15 there is a distinction between reproduction, which is
16 the narrow term used in section 106(1), and the broader
17 term that is used in section 109(a), which is "made" --
18 and again, that inquiry is always going to occur at the
19 time of the challenged sale in the United States.
20 And so the question is as to that topic.
21 JUSTICE SOTOMAYOR: Then you are trying to
22 rewrite Quality King. Now you are saying that the
23 entire premise of Quality King is wrong.
24 MR. PANNER: Not at all, Your Honor, because
25 in Quality King, what the Court held was that a copy

1 that is made in the United States is lawfully made under
2 this title.
3 JUSTICE SOTOMAYOR: Where in Quality King do
4 you see anything Quality King turning on where the goods
5 were made?
6 MR. PANNER: Well, Your Honor, the reason --
7 JUSTICE SOTOMAYOR: I read the decision and
8 it barely mentions that, if at all. Its whole premise
9 was on what the owner did: Did the owner sell this
10 copy?
11 MR. PANNER: I don't think so, Your Honor.
12 What -- there was no challenge in Quality King to the
13 idea that the copy was lawfully made under this title,
14 precisely because the copy was made in the United States
15 where the Copyright Act governs.
16 This Court said in our Descani case that the
17 natural reading under this title is subject to or
18 governed by this title, and therefore it is a perfectly
19 straightforward reading of the text.
20 JUSTICE SCALIA: But you don't say that. I
21 mean, you bring in this other qualification.
22 MR. PANNER: But Your Honor, again, the
23 distinction is between the question whether -- what the
24 conduct that is being addressed is simply the
25 manufacture. That's the case here.

1 There's -- all that happened here is that
2 the copies were manufactured in Switzerland and sold in
3 Switzerland for distribution abroad. That does not
4 implicate U.S. copyright law at all. U.S. copyright law
5 provides the copyright owner with certain rights to
6 exclude. It has no right to exclude the making of a
7 copy, whatever you want to say the making means, in
8 Switzerland. And it is for that reason that the Ninth
9 Circuit correctly determined that the copies at issue
10 here were not lawfully made under this title.
11 JUSTICE ALITO: How often does this
12 situation --
13 JUSTICE SCALIA: But it would be lawfully
14 made under this title, even though it was made -- you
15 know, made abroad, if what?
16 MR. PANNER: If it were made, for example,
17 pursuant to a license that allowed for distribution in
18 the United States, there would be an affirmative
19 exercise of the exclusive right that the copyright
20 holder has under section 106(3) with respect to that
21 particular copy. And so it makes perfect sense to say
22 that that copy is lawfully made under this title,
23 because you need to look to U.S. law to determine
24 whether the making of that copy -- even though it took
25 place overseas, for example -- was governed by -- was

1 lawful as determined by the rights that are granted --
2 JUSTICE SCALIA: Is isn't the making that is
3 rendered lawful. It's the importation into the United
4 States that is rendered lawful by the agreement that you
5 are relying upon.
6 MR. PANNER: Well, Your Honor, the -- the
7 making -- the question is whether it was lawfully made
8 under this title. If it was made for distribution in
9 the United States, it could only be lawfully made for
10 distribution in the United States if the appropriate
11 rights were granted by the owner of those rights. And
12 that is why it makes perfect sense to say --
13 CHIEF JUSTICE ROBERTS: So you are saying --
14 you are saying that whether or not it's lawfully made
15 depends on something that happens after it's made?
16 MR. PANNER: In a particular case, it might
17 be, Your Honor, but in the typical case -- let's say the
18 Heartland case -- if a manufacturer has a license under
19 U.S. copyright to distribute in the United States, it
20 could be lawfully made at that time.
21 But I think, Justice Alito, you were going
22 to ask a question about how often the situation arises,
23 and I think it's important to point out that there is no
24 case that Costco has pointed to, and we are not aware of
25 them, where a U.S. copyright owner has sought to

1 challenge the resale of a copy where there was an
2 acknowledged, authorized sale in the United States.
3 Obviously, this is a significant issue to
4 bringing --
5 CHIEF JUSTICE ROBERTS: Well, they still
6 have that right. You say there is no case. But under
7 what theory of yours do they not have that right?
8 MR. PANNER: Because if the sale is
9 authorized in the United States, then that copy would be
10 considered lawfully made because it includes the
11 license. That copy carries with it a license to be
12 distributed in the United States, which would include
13 then the right for a lawful owner to resell it. Again,
14 that's consistent with the language of "made" and it
15 gives proper effect both to section 602(a)(1), which is
16 clearly intended to allow the owner of the U.S.
17 distribution right to exclude legitimate copies that
18 were made overseas, and it also sensibly construes
19 section 109(a) to give affect to the exhaustion
20 principle that underlies it. Which is where a U.S.
21 copyright owner has exercised his U.S. distribution
22 rights with regard to a particular copy.
23 JUSTICE GINSBURG: Mr. Panner, can you
24 answer Mr. Englert's point what earthly sense would it
25 make to prefer goods that are manufactured abroad over

1 those manufactured in the United States?

2 MR. PANNER: Your Honor, it doesn't create

3 any sort of a preference, as Mr. Englert -- Mr. Englert

4 suggests that this is somehow -- prefers the -- the --

5 the copies that are made abroad. But in the same

6 breath, he suggests that this will actually promote the

7 sale of U.S. -- U.S.-manufactured goods because

8 foreign-manufactured goods may therefore be of suspect

9 legitimacy for purposes of resale in the United States.

10 But the key point is that in Quality King

11 this Court looked at the language of section 109(a), and

12 it says -- and -- and -- and it emphasized that to

13 determine the scope of the first sale doctrine that text

14 is what matters. And it says section 109(a) applies to

15 goods that are lawfully made under this title.

16 There was no dispute that goods that are

17 reproduced in the United States are lawfully made under

18 this title, because one must have a U.S. -- the U.S.

19 right in order to lawfully make a copy in the United

20 States.

21 JUSTICE BREYER: There's a whole brief filed

22 that traces the history of that language, and I think

23 comes to a somewhat different conclusion. Do you want

24 to say anything about that? It was on the other side.

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

1 the -- the tracing of the language is -- is helpful,
2 actually, to understand how section -- the current
3 section 60 -- excuse me current section 109(a) differs
4 from section 27, which is, in section 27, what happened
5 was is that Congress codified in 1909 the idea that the
6 material object is different from the copyright. And
7 when it did that, it added that language as a tag-on to
8 that principle to ensure that it did not end up
9 overruling legislatively Bobbs-Merrill.
10 And when the -- when the Congress recodified
11 the provision in 1976, it actually took section 202, put
12 it separately, and it -- it codified 109(a) in a way
13 that is significantly different and then it says
14 notwithstanding the rights under 106(3) the owner of a
15 copy lawfully made under this title is entitled to
16 resell it.
17 And that needs to then be read in harmony
18 with section 602(a)(1), which after all, was part of the
19 same act in 1976, it must be read in such a way as to
20 give section rule 602(a)(1) sufficient room to perform
21 the function that it was intended to perform, which is
22 to ensure that a U.S. copyright owner could protect
23 domestic distribution rights against competition from
24 legitimate foreign copies. And that's what it -- that's
25 precisely what's at issue here.

1 JUSTICE ALITO: How often do issues
2 involving 602(a)(1) come up with respect to things like
3 books, musical recordings, movies, as opposed to the
4 copyrighted -- the -- the -- the material that is
5 copyrighted here, a little -- a little insignia, a place
6 to a label -- put on a label or put on a -- on goods?
7 MR. PANNER: Thank you, Your Honor, that's a
8 very good question. There are a number of cases coming
9 up right now through the Second Circuit that involved
10 textbooks. This has been -- this has been applied to
11 all sorts of traditional copyrighted materials, and
12 indeed that's why the amici who have filed in this case
13 are not at all limited but include all of the
14 traditional copyright industries, software, publishing,
15 movies, music.
16 And, indeed, Costco does not argue that
17 there is any legal significance to the fact that -- to
18 the nature of the image or the fact that it -- that it
19 is placed on a watch, because I think that Costco is
20 quite aware that what is really at stake here is whether
21 section 602(a)(1) will continue to provide effective
22 protection for the exclusive --
23 JUSTICE BREYER: The other side, if you go
24 to -- you go to -- go to Home Depot and buy a desk, and
25 how do you know -- are you worried that maybe on this

1 desk it says there was a restriction somewhere, you
2 could only use it for homes and not for offices? Does
3 that kind of thing worry you?
4 MR. PANNER: No, Your Honor, it doesn't.
5 JUSTICE BREYER: And the reason it doesn't
6 is because there is a first sale doctrine. Now, aren't
7 you importing those very things that don't worry us
8 about Home Depot into the entire world of books,
9 everything you are talking about?
10 CHIEF JUSTICE ROBERTS: You may answer,
11 counsel.
12 MR. PANNER: Thank you, Mr. Chief Justice.
13 I don't think so. And the reason why is
14 because, first of all this doctrine has existed for
15 nearly 30 years. It's hornbook law that -- that the
16 first sale doctrine does not provide a defense in
17 circumstances where a -- a -- a copyrighted article is
18 manufactured or reproduced abroad. That has been
19 well --
20 CHIEF JUSTICE ROBERTS: That was first. Do
21 you have a second quickly?
22 MR. PANNER: Thank you, Your Honor.
23 And I forgotten what it was.
24 (Laughter.)
25 CHIEF JUSTICE ROBERTS: Thank you,

1 Mr. Panner.

2 MR. PANNER: Thank you.

3 CHIEF JUSTICE ROBERTS: Mr. Stewart?

4 ORAL ARGUMENT OF MALCOLM L. STEWART,

5 ON BEHALF OF THE UNITED STATES,

6 AS AMICUS CURIAE, SUPPORTING RESPONDENT

7 MR. STEWART: Mr. Chief Justice, and may it

8 please the Court:

9 If the government's interpretation of

10 section 109(a) is a little bit different from either of

11 the parties, since I want to make clear precisely what

12 it is, in our view, the words "lawfully made under this

13 title" mean made subject to and in accordance with Title

14 17. And because the Copyright Act doesn't apply abroad,

15 in order for a copy to be made subject to Title 17, it

16 would have to be created in the United States.

17 Now, I think our interpretation of the

18 statute still gives it a slightly different meaning from

19 the alternative "lawfully made in the United States,"

20 because at least in theory, it would be possible for the

21 creation of a copy to entail a violation of

22 environmental laws, workplace safety laws, minimum wage

23 laws, et cetera. And it wouldn't be accurate to

24 characterize a copy made in that way as lawfully made in

25 the United States, but it would be made -- it would be

1 lawfully made under this title, because it would be made
2 subject to and in a manner consistent with the
3 requirements of the Copyright Act.
4 Now, with respect to the types of copyright
5 materials at issue here, the watches are clearly very
6 different from what Congress had in mind when it enacted
7 section 602(a)(1). But in other respects, what Omega
8 was trying to do in this case was exactly what Congress
9 intended to allow when it expanded the importation
10 provisions beyond restrictions on importation of radical
11 copies. The ideal was to allow a copyright owner to
12 segment markets either to give -- either retain for
13 itself or to give to another entity exclusive rights
14 within the United States, but give other rights abroad
15 to other producers.
16 And consequently, we argued in Quality King
17 and we are arguing here that the Court should construe
18 section 109(a) in a way that doesn't prevent section
19 602(a) from performing that function.
20 And the Court in Quality King grappled with
21 the question of whether applying the -- section 109(a)
22 to the labels that were at issue in that case would have
23 the effect of negating 602(a)(1) and the Court said no
24 it wouldn't, because section 109(a) applies only to
25 copies that are lawfully made under this title. And the

1 Court specially said it wouldn't apply to copies that
2 were made -- lawfully made under the law of the foreign
3 country.
4 Now, the Court didn't refer specifically to
5 the place of manufacture. In giving the example of the
6 British publisher who would be creating copies under the
7 law of Great Britain, it didn't specifically say that's
8 because British law would apply when the copies are made
9 in England. But I think that's the necessary inference,
10 because the Court's analysis made quite clear that it
11 viewed a particular copy as being lawfully made under
12 the law of one and only one question --
13 JUSTICE ALITO: Well, what is your answer to
14 the argument that if "lawfully made under this title"
15 means basically made in the United States, that provides
16 a great incentive to manufacture goods abroad and that
17 can't possibly be what Congress intended?
18 MR. STEWART: Well, I think there are -- I
19 think we would say a couple of things. The question has
20 been raised whether this gives favored status to a
21 foreign manufactured goods. And in one sense our
22 reading -- from -- from the perspective of the copyright
23 owner, it's true, that this creates something of
24 potential incentive to manufacture abroad. Now, from
25 the perspective of the potential importer, you could say

1 this makes foreign manufactured goods disfavored because
2 they were harder to get into the country than would be
3 the case if they had been manufactured within the United
4 States and had then been sent abroad and -- and
5 reimported.
6 I guess the best we can say about the
7 treatment from the copyright owners' prospective, the
8 differential treatment of foreign and domestic
9 manufactured goods is that at least with respect to
10 goods that were made within the United States, the
11 copyright owner has exercised rights under United States
12 law. He has -- it has exercised its exclusive right to
13 produce the copies in the first instance, whereas the
14 manufacturer in Omega's position by creating and then
15 selling the watches abroad, never exercised any of its
16 Title 17 rights.
17 And the theory underlying the first sale
18 doctrine tracing it back to -- to Bobbs-Merrill, the
19 first articulation by this Court of the -- the doctrine
20 of the copyright context, the theory is that a copyright
21 owner who sells the goods, places them in the stream of
22 commerce, has exercised, as the Court put it in
23 Bobbs-Merrill, its exclusive right to vend, and
24 therefore it can claim no more rights under the
25 copyright laws.

1 Omega with respect to the
2 watches at issue here, never exercised any its rights
3 under title 17, not -- not when the watches were made
4 and not when they were sold.
5 I do also want to address the question of
6 what happens in the circumstance where Omega
7 manufactures watches abroad, but then voluntarily
8 imports them into the United States, sells them here;
9 can it place restrictions on resale because I think it's
10 an important policy question and here again we get to
11 the same point in the end as the Respondents do, but we
12 have a somewhat different textual route to get there.
13 Our view is that in that circumstance
14 section 109(a) still would not apply, because even
15 though the goods were imported into the United States,
16 they were made abroad, and that's what counts for
17 determining whether they were lawfully made under this
18 title. But section 109(a) is simply a safe harbor. It
19 doesn't prohibit anything. Section 109(a) says if your
20 conduct falls within these contours then what you are
21 doing is legal, whether or not it would otherwise
22 violate the copyright act.
23 But if there is a dispute as to whether
24 section 109(a) applies, and a court held that it
25 doesn't, the consequence is not necessarily that the

1 conduct is unlawful. The consequence is that you look
2 to other provisions of title 17 to see whether it is
3 lawful or not.
4 JUSTICE KENNEDY: Well, in your example, if
5 there is a lawful importation of the foreign-made good,
6 then if you interpret "made" as causing to exist of
7 appear or under these laws, as the library brief
8 suggests, the first sale doctrine would operate.
9 MR. STEWART: I think we would say the first
10 sale doctrine as articulated in Bobbs-Merrill would
11 operate, but we wouldn't place this within section
12 109(a).
13 CHIEF JUSTICE ROBERTS: Well, that's the
14 problem I have with your position. You are suddenly
15 saying a copyright -- these issues have to be resolved
16 not within the confines of the Copyright Act, but then
17 you have to look to -- to common law as well, which is a
18 very confused situation.
19 MR. STEWART: I think we would still be
20 looking to other provisions of the Copyright Act rather
21 than to common law. That is, in the hypothetical I
22 describe, clearly there could be no violation of
23 602(a)(1), because the copies would have been imported
24 by Omega itself. And so the question is if Omega sells
25 them within the United States and the buyer attempts to

1 resell them, would that be an infringement of Omega 17's
2 rights? And the only claim that Omega could -- I mean
3 that -- Omega could plausibly make in that circumstance
4 would be to say, that is a violation of my exclusive
5 right to distribute copies to the public protected by
6 section 106(3).
7 And I think the response would be under
8 Bobbs-Merrill, the Court already held that once the
9 copyright owner exercised its exclusive right to vend --
10 the word which appeared at the statute at the time --
11 once it had exercised its exclusive right to vend the
12 copies, it was done with them and had no more rights to
13 assert.
14 And there is no reason to give the right to
15 vend -- the right to distribute under the current law a
16 broader reading than the right to vend had at that time,
17 simply because Congress has enacted section 109.
18 And -- so I think that the -- it would still
19 be the case that in order to prevail in a copyright
20 suit, Omega would have to show that not only that
21 section 109 was inapplicable, but there was a violation
22 of the exclusive rights and I don't think it would be
23 able to do that here.
24 Now in Bobbs-Merrill, the Court was
25 certainly drawing on common law principles but it said

1 in the end, its words: "This is exclusively a question
2 of statutory interpretation." It -- it based its
3 holding on the language of the Copyright Act as it
4 existed at that time, specifically the exclusive right
5 to vend; and the exclusive right to distribute copies to
6 the public is no different for these purposes under the
7 current statute.
8 JUSTICE BREYER: I found the brief I was
9 looking for which is the American Intellectual Property
10 Law Association. And they trace this back to Professor
11 Nimmer's 1965 letter, and they say that the point there
12 was that they were reading Bobbs-Merrill as it was a
13 pre-emption question, that they thought that the
14 copyright law was not pre-empting State law of contract,
15 and State law of contract had the exception in it which
16 applied the first sale doctrine. Now if that's the
17 reasoning, that reasoning would seem to me to apply. We
18 could look up what the State law is, but my guess is
19 that the first sale doctrine applies just as much to
20 goods that come from abroad as to goods that are here at
21 home.
22 MR. STEWART: I -- I think with -- with
23 respect to the pre-emption question, what they had in
24 mind was a situation in which Omega sells the watch to a
25 reseller -- to a retailer on condition, for instance,

1 that the retailer only sell them in a particular way, or
2 do particular types of advertising, and the reseller
3 sells them in violation.
4 JUSTICE BREYER: What Nimmer said is, he
5 said we want to be sure in his -- in bill back in '64,
6 '65 -- not to invalidate any State law contractual
7 restriction on the right of the owner of the particular
8 copy to dispose, exhibit, et cetera the same.
9 MR. STEWART: Exactly. I think the language
10 was chosen in part at least to make clear that although
11 Omega under in that hypothetical circumstance would have
12 no remedy under the Copyright Act, it might potentially
13 have a breach of contract suit against the retailer if
14 the retailer had breached the agreement with Omega, and
15 that nothing was -- in the Federal law was intended to
16 preempt the State law contractual remedies that would
17 otherwise be available. And I think the language
18 adequately accomplishes that purpose.
19 JUSTICE SOTOMAYOR: So why don't we let --
20 MR. STEWART: I'm sorry?
21 JUSTICE SOTOMAYOR: Why don't we let
22 contract law control the violations of any agreements
23 with foreigners?
24 MR. STEWART: Well, I think --
25 JUSTICE SOTOMAYOR: With respect to

1 manufacturing and distribution?

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

3 CHIEF JUSTICE ROBERTS: Very briefly.

4 MR. STEWART: Because many of the people

5 with which Congress were concerned would not be in

6 privity of contract with the U.S. copyright owner.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 Mr. Englert, you have nine minutes

9 remaining.

10 REBUTTAL ARGUMENT OF ROY T. ENGLERT, JR.,

11 ON BEHALF OF THE PETITIONER

12 MR. ENGLERT: Thank you, Your Honor.

13 Justice Ginsberg asked Mr. Panner what

14 policy Congress could have had in mind to give this

15 different status to foreign-made goods than to U.S. made

16 goods, and Mr. Panner's answer, and Mr. Stewart said

17 something similar, was that in one respect Congress is

18 disfavoring foreign goods under their interpretation by

19 making them harder to import. That's not true.

20 Under both of their theories, as long as the

21 manufacturer chooses to authorize importation, which is

22 Omega's test, or as long as an authorized first sale

23 takes place in the United States, then the first sale

24 doctrine does apply. So the copyright holder has

25 control under their theory and it's not harder to import

1 the goods.

2 In the briefs in this case you will not find

3 anyone making any policy argument as to what Congress

4 could have had in mind to favor foreign-manufactured

5 goods.

6 The heart of Mr. Panner's argument was that

7 Costco's position either eliminates any significant role

8 for section 602(a)(1) or makes section 602(a)(1) turn on

9 formalities of transfer of title. Neither of those

10 propositions is true. This Court in Quality King

11 addressed the role that section 602(a)(1) has to play if

12 section 109 is applicable to imported goods, and the

13 answer was it still applies to nonowners. That was the

14 Court's first answer.

15 The dictum that has been much discussed this

16 morning was another answer but the Court's first answer

17 was that it still applies to nonowners, and because, for

18 example, software is licensed there is a very live issue

19 about whether the first sale doctrine applies to

20 lawfully acquired copies of -- of software. So

21 602(a)(1) has a role to play under anyone's

22 interpretation.

23 Now Mr. Panner asserts that our answers to

24 some of the questions that the Court has asked in our

25 efforts to harmonize our position with the dictum in

1 Quality King make 602(a)(1) turn on formalities of
2 transfer of title. Our position can perhaps be
3 criticized and has been criticized this morning not for
4 having a textual basis, but it cannot be criticized for
5 making anything turn on formalities.
6 Our position turns on the economic realities
7 of the situation. If the copyright owner gets its one
8 reward, the first sale doctrine applies; if the
9 copyright owner doesn't get its run reward, because for
10 example it has given the exclusive foreign manufacturing
11 rights to someone else, and retained or assigned or
12 licensed the exclusive U.S. manufacturing rights, then
13 602(a)(1) has a role to play. So neither of Mr.
14 Panner's criticisms of our position is correct.
15 Mr. Panner asserted that section 109(a)
16 differs from section 27, the predecessor statute in the
17 1947 Act, which in turn was Section 41 of the 1909 Act.
18 This Court said the exact opposite in Quality King.
19 It said there is no evidence of any attempt
20 to narrow the first sale doctrine through the language
21 of section 109(a). And if one looks at the House
22 report -- again, getting into legislative history, which
23 some members of the Court do not like to get into -- but
24 if one looks at the House report, the first sentence of
25 the relevant part of the House report is section 109(a)

1 restates and confirms the principle that where the
2 copyright owner has transferred ownership of a
3 particular copy or phonorecord of a work, the person to
4 whom the copy or phonorecord is transferred is entitled
5 to dispose of it by sale, rental or other means. No
6 hint that using "lawfully made" under this title to
7 narrow the doctrine.
8 The last sentence of the relevant part of
9 the House report: To come within the scope of section
10 109(a) a copy or phonorecord must have been lawfully
11 made under this title though not necessarily with the
12 copyright owner's authorization. For example, any
13 resale of an illegally pirated phonorecord would be an
14 infringement, but the disposition of a phonorecord
15 legally made under the compulsory licensing provisions
16 of section 115, would not.
17 So what does the House report on section 109
18 tell us? It tells us that lawfully made under this
19 title was intended to expand the category of covered
20 works beyond just those made by the copyright owner, or
21 with the authorization of the copyright owner. But
22 under Omega's and the government's position, that phrase
23 is used to contract the scope of the first sale doctrine
24 in derogation of the common law, imposing a restraint on
25 alienation for foreign-made goods that is not imposed on

1 U.S.-made goods.
2 With respect to the policy incentives that
3 it creates it's undeniable that it creates an incentive
4 for outsourcing of manufacture. The government admitted
5 that in its cert stage brief, and again, in its brief in
6 this Court. Obviously if Congress wants to create an
7 incentive for outsourcing, that's probably within its
8 power as long as it can be said somehow to advance
9 science and the useful arts; but there is simply not a
10 shred of evidence in text or legislative history that
11 Congress intended to encourage outsourcing; quite the
12 contrary.
13 The very controversial section 601, the
14 adjacent section to section 602, required that
15 nondramatic literary works in the English language be
16 manufactured in the United States or Canada or else they
17 would not be eligible for a U.S. copyright. So we know
18 that the 1976 Congress wanted to favor the domestic
19 printing industry, not to disfavor it; and yet their
20 interpretation of 602 and 109 would disfavor domestic
21 printing industry and any domestic manufacturing
22 industry. Thank you.
23 CHIEF JUSTICE ROBERTS: Thank you, counsel.
24 The case is submitted.
25 (Whereupon, at 11:00 a.m., the case in the

1 above-entitled matter was submitted.)

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