

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: QUALITY KING DISTRIBUTORS, INC., Petitioner v.

L'ANZA RESEARCH INTERNATIONAL, INC.

CASE NO: 96-1470 c.j.

PLACE: Washington, D.C.

DATE: Monday, December 8, 1997

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IN THE SUPREME COURT OF THE UNITED STATES

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QUALITY KING DISTRIBUTORS, :

INC., :

Petitioner :

v. : No. 96-1470

L'ANZA RESEARCH INTERNATIONAL, :

INC. :

- - - - -X

Washington, D.C.

Monday, December 8, 1997

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:02 a.m.

APPEARANCES:

ALLEN R. SNYDER, ESQ., Washington, D.C.; on behalf of
the Petitioner.

RAYMOND H. GOETTSCH, ESQ., Long Beach, California; on
behalf of the Respondent.

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; on behalf of
the United States, as amicus curiae, supporting the
Respondent.

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1 PROCEEDINGS

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in Number 96-1470, Quality King
5 Distributors v. L'anza Research International.

6 Mr. Snyder.

7 ORAL ARGUMENT OF ALLEN R. SNYDER

8 ON BEHALF OF THE PETITIONER

9 MR. SNYDER: Mr. Chief Justice, and may it
10 please the Court:

11 The Members of Congress in 1976 who enacted the
12 copyright law of 1976 would be quite surprised to learn
13 from the Ninth Circuit's decision below that Congress
14 allegedly intended section 602 of that law to override the
15 longstanding and fundamental principle in copyright law
16 known as the first sale doctrine and thus to allow a
17 manufacturer to control the import and the subsequent
18 resale of particular copies of goods that the manufacturer
19 itself had already sold.

20 This Ninth Circuit decision is inconsistent not
21 only with the statutory language but also with the
22 legislative history and, indeed, Congress simply has not
23 addressed either in the copyright law or elsewhere
24 respondent's efforts to curtail parallel imports --

25 QUESTION: Well, Mr. Snyder, the Government has

1 come in and urged us to rely on the section that -- 602,
2 dealing with infringing importation of goods, and they
3 tell us that the United States has entered into treaties
4 on the assumption that that provision governs. What do we
5 do with that argument made by the Government?

6 MR. SNYDER: Justice O'Connor, I believe the
7 issue before the Court is what did Congress say and what
8 did Congress intend in a statute.

9 QUESTION: Yes, I think so, but I would be very
10 interested to know how you evaluate the extent to which
11 this country has relied on some other interpretation, as
12 the Government argues.

13 MR. SNYDER: I believe that the Government has
14 shown that in several bilateral trade agreements that were
15 never submitted to Congress either for consideration or
16 for action, the Government has asserted the position in
17 dealing with the Governments of Cambodia, Trinidad and
18 Tobago, and several other countries, that it is the
19 executive branch's position that parallel imports of the
20 kind at issue here should be curtailed.

21 We believe that, to the extent the Government is
22 relying on copyright law for that position, that it is up
23 to Congress to pass the law and set the policy, and it is
24 up to this Court to interpret that position of Congress
25 and what Congress said and meant.

1 QUESTION: Do we owe deference to any Government
2 agency in interpreting these laws before us?

3 MR. SNYDER: I believe not, Justice O'Connor.
4 This is not a case where the Government has even alleged
5 Chevron deference. This is not a case where the
6 Government has been assigned by Congress any duty under
7 602(a). There are no regulations. There is no role for
8 the Copyright Office or any other agency of the executive
9 branch to administer 602(a).

10 It is solely a private right of action, and
11 under those circumstances we think there is no deference
12 to be accorded. The executive branch is free to take
13 whatever position it wishes in bilateral negotiations, but
14 if their positions conflict with the position of Congress,
15 we submit they should go to Congress for a change in the
16 law.

17 QUESTION: Let me ask you one more question,
18 since I have you interrupted, and then I'll leave it
19 alone.

20 Section 501, dealing with infringement of
21 copyright, says anyone who violates any of the exclusive
22 rights of the copyright owner covered by sections 106
23 through 118, or who imports copies into the United States
24 in violation of section 602, is an infringer.

25 Under your theory, that section wouldn't be

1 needed, I suppose, insofar as it refers to section 602.

2 MR. SNYDER: I think it's correct that that
3 particular language could have been omitted. However, it
4 would have raised questions where, in -- for courts to
5 interpret the language, since section 106 obviously deals
6 with distribution to the extent we're discussing it here,
7 and we all agree that importation is not literally the
8 same thing as distribution, Congress chose to make
9 importation part of the distribution right.

10 Had section 501 not specifically referred to
11 importation, someone could have argued that the reference
12 there to distribution or to section 106 didn't necessarily
13 cover things that were actually dealt with in 602 but not
14 literally in 106. I think it was a situation where
15 Congress appropriately tried to be sure that their
16 intention was crystal clear.

17 QUESTION: Mr. Snyder, I --

18 QUESTION: Of course, one of the things they --
19 just on this point.

20 One of the things they wanted to make sure of,
21 perhaps, is that 602 was kept intact as an independent
22 provision, because 602 says, under their reading, that it
23 is an independent act of infringement to import without
24 the consent.

25 MR. SNYDER: Well, it is an act of infringement.

1 However, I think it's not totally independent in the sense
2 that the language of 602 specifically made importation a
3 violation of the distribution right under 106, so as we
4 interpret the language, Congress was saying that we wish
5 to make importation a separate type of violation of the
6 distribution right.

7 QUESTION: But Mr. Snyder, if you're right about
8 that, wouldn't it have been more logical to say, in the
9 first part of 501(a), exclusive rights, section 106
10 through, including the right, the 602 right, instead of
11 making it conjunctive, as -- instead of making it
12 separate?

13 Your argument would fit very well if Congress
14 had said 602 belongs with 106A, but it makes it separate,
15 and in that light, going back to Justice O'Connor's point
16 about the representations this Nation has made, the
17 Government isn't making them in the air. It does point to
18 this 501(a), and if that's a plausible reading, even if we
19 don't owe Chevron deference, don't we owe some -- don't we
20 give some weight to the representations our Government has
21 made to other Governments?

22 MR. SNYDER: Well, first of all, Justice
23 Ginsburg, 501 obviously is not the section that
24 specifically was dealing with either the distribution
25 right or the importation issue, and I think to determine

1 Congress' intent, the first place that I would urge the
2 Court to look would be the statutes directly on point,
3 including 109, but I take your point that it could have
4 been phrased in a different way.

5 However, I would suggest respectfully to the
6 Court that by referring in 602 to the rights under 106,
7 Congress was doing something that really made quite a bit
8 of sense, and that is that all of the panoply of
9 conditions and exceptions to distribution rights that are
10 contained within 106 and its cross-referenced sections
11 thereby were applied here.

12 Section 106 begins by saying, subject to
13 sections 107 through 120, quote-unquote, there will be
14 certain exclusive rights, including the distribution
15 right. Those exceptions include such things as the fair
16 use doctrine, which is a quite fundamental element of
17 American copyright law.

18 By making 602 a part of the 106 right and cross-
19 referencing it the way Congress did, it included the fair
20 use doctrine, the first sale doctrine, the other
21 exceptions, into the importation rules just as they're in
22 all the other parts of the copyright law.

23 Section 501 simply provides for the enforcement
24 mechanism for all of the rights, and I would respectfully
25 suggest that, because it lists importation as an

1 additional word in 501, it really doesn't negate, I don't
2 believe, the intent of Congress in the operative sections.

3 And obviously one of the key operative sections
4 here is section 109, and 109, which is the current
5 codification of the first sale doctrine, which is a
6 doctrine that goes back well over 100 years in copyright
7 law, section 109 says that if someone is the owner of a
8 particular copy that was lawfully made under this title,
9 that that owner can sell or otherwise dispose of that
10 copy.

11 And we believe that that is about as broad
12 language as Congress could use and in fact follows a --
13 quite a lengthy history of broad language in the statutes,
14 the predecessor statutes, and in the legislative history,
15 all of which have made clear that Congress intended to say
16 that once a particular copy that's lawfully made under the
17 U.S. copyright law has been sold, the copyright owner's
18 rights cease, and that's the actual language in the
19 legislative history of the '76 act. The rights cease, of
20 the U.S. copyright owner, as to that particular copy.

21 We think that the first sale doctrine, there is
22 nothing in the language of the statute that suggests that
23 the first sale doctrine was being overridden, or that
24 Congress intended to change it, there's nothing in the
25 legislative history where Congress was talking about

1 changing the first sale doctrine, and we think the more
2 natural reading of all of these sections together,
3 including section 501, the more natural reading, to try to
4 follow the congressional intent, not the policy arguments
5 that each side can make, not the positions that the
6 executive branch might wish to take as a matter of policy
7 or as a matter of bilateral negotiations, we think that
8 the fairer way to read the actual language of Congress is
9 the way we've set forth.

10 The treaties -- excuse me. They're not
11 treaties, actually. They're bilateral agreements that the
12 Government has cited. They represent positions that the
13 executive branch has taken. I might add that they've
14 taken that position in multilateral negotiations and the
15 international community has so far rejected them, but
16 Trinidad and Tobago and several other countries, and you
17 have the lodgings in front of you, have agreed to the U.S.
18 position.

19 However, there is no liability on the part of
20 the United States if the U.S. position is wrong. If
21 there's a violation of those agreements, there is an
22 obligation for consultation. There is no arbitration,
23 there is no financial liability, and we would respectfully
24 suggest that if the executive branch wishes to curtail
25 parallel imports beyond the language of existing statutes,

1 then if they wish to rely on copyright law or any other
2 congressional enactment, they should go to Congress.

3 QUESTION: Mr. Snyder, can I ask you another
4 question. I haven't quite figured out the answer. If
5 your position is correct, what is the function of the
6 three exceptions to the statute?

7 MR. SNYDER: The 602 exceptions, Justice
8 Stevens, we believe apply on their terms to very limited
9 situations where people are importing or bringing property
10 in for personal use or for noncommercial use. Each of the
11 exceptions, library use, Government use, do not apply to
12 commercial distributions, and they apply generally to very
13 limited numbers. In other words, you can bring in one
14 copy or bring in a copy in your baggage. We think those
15 are very different situations from the first sale doctrine
16 that deals with sales.

17 QUESTION: Why wouldn't those exceptions already
18 be protected by the first sale doctrine if it applied?
19 That's what I'm not quite clear.

20 MR. SNYDER: Justice Stevens, they are not
21 because the language of the 602 exceptions is not limited
22 to copies that are lawfully made under this title.

23 In other words, one of the paradigm situations
24 that the copyright considerations were looking at was
25 where property is copyrighted under a foreign copyright,

1 and this happens very frequently. This is a quite common
2 situation, and it was discussed at length in the
3 deliberations leading up to the statute.

4 If an author gives the British copyright to his
5 or her book to a British company, and the U.S. copyright
6 to his or her book to a U.S. copyright holder, the U.S.
7 copyright holder obviously wishes to avoid having the
8 unrelated British copyright holder ship 1,000 copies of
9 the book here because the U.S. copyright holder has no
10 control over the independent entity, has not been paid
11 anything for those copies, et cetera.

12 That was discussed in the deliberations leading
13 up to the statute, and the phrase in 109, lawfully made
14 under this title, we submit means copies that are made
15 under the U.S. copyright law or made with the
16 authorization of the U.S. copyright holder, whereas,
17 Justice Stevens, under 602, if I'm traveling in Britain,
18 and I pick up a copy of a British book that's been
19 British-copyrighted and I put it in my baggage, I can come
20 home with it.

21 QUESTION: Or, if you're traveling in some other
22 country and you pick up a totally unauthorized copy of a
23 phonograph, a CD or some -- or a book, totally
24 unauthorized, you'd be protected as a traveler if you
25 bought it and brought it back in --

1 MR. SNYDER: Yes, Justice O'Connor.

2 QUESTION: -- under the 602 exceptions.

3 MR. SNYDER: That's correct.

4 QUESTION: But it would not be protected under
5 106, presumably.

6 MR. SNYDER: We agree with that, and we think
7 that is a very significant distinction between the two
8 statutes.

9 QUESTION: Maybe I'll reveal my ignorance about
10 that. I just want to be sure I understand. In other
11 words, if the author gave the British copyrights to a
12 separate company from the publisher, the American
13 publisher, the British company then sells to some person
14 in Britain, abroad, a bunch of copies, those are not
15 protected by the first sale doctrine?

16 MR. SNYDER: As -- not as we interpret the
17 statute, although this has not been addressed in any of
18 the decisions that I'm aware of precisely. But the
19 lawfully-made-under-this-title language of the first sale
20 doctrine in 109, the Government agrees with us on this
21 point that that means it's made with the authorization of
22 the U.S. copyright holder, in other words, made under U.S.
23 copyright law.

24 QUESTION: Yes, but if the U.S. copyright -- oh,
25 I see. The U.S. copyright holder could be a licensee of

1 the author, and you have a different copyright holder
2 who's also a licensee in Britain.

3 MR. SNYDER: That's correct. It's quite common
4 for property --

5 QUESTION: So British copies would not be
6 lawfully made under this title, within the meaning of 109,
7 in your view.

8 MR. SNYDER: That is our understanding, and that
9 is exactly the parallel or analogue to what this Court
10 held in the K Mart case, which obviously arose under
11 customs laws and trademark law, but in K Mart the
12 Solicitor General then argued that the first sale doctrine
13 in the trademark law should protect a U.S. mark holder
14 from competition from a totally unrelated entity, such as
15 the kind we're talking about now, but should not protect
16 the U.S. mark holder if the U.S. mark holder is a parent
17 or a subsidiary of the foreign mark holder.

18 That was the position the Government took then,
19 and this Court was unanimous -- while it -- the Court
20 split on several other of the various alternative cases
21 dealt with in K Mart, the case 1 and the case 2A
22 situations that I've just referred to, the Court was
23 unanimous on that.

24 The position we are taking is exactly the same
25 under copyright law as this Court found Congress had

1 authorized under the trademark law, and we think it makes
2 good sense in terms of the interests that are at stake
3 and, most importantly, it follows the language of the
4 statute.

5 QUESTION: Does the U.S. copyright holder have
6 to have specific authorization from the author to
7 manufacture abroad in order to avoid a violation of 602?

8 MR. SNYDER: Well, we do not believe that 602
9 limits the question of where you manufacture, and there's
10 a BMG decision from the Ninth Circuit that we cite in our
11 brief that seems to say the opposite, but that decision's
12 been criticized by a number of other courts, including the
13 Ninth Circuit in a later case. We don't think the
14 language of Congress makes anything turn specifically on
15 where you manufacture.

16 Now, to fully answer your question, Justice
17 Souter, there could well be contractual limitations. If
18 the author divided up the worldwide rights in a certain
19 way, where it's manufactured --

20 QUESTION: But if the contract is silent, your
21 answer is the geography of manufacture is irrelevant.

22 MR. SNYDER: I think that's correct, but I --
23 I'm not certain.

24 QUESTION: Am I right in my understanding of
25 your answer to Justice Stevens that (1), (2), and (3) are

1 exceptions from 602?

2 They all deal with, let's imagine a human being
3 who comes to the border. That human being who comes to
4 the border got his book, for example, some way or other.
5 If the way he got that book was subject to the first sale
6 doctrine, then under your theory you wouldn't need (1),
7 (2), or (3), but if it was not, you do need (1), (2), or
8 (3), and whether that category, not, is big or little or
9 medium-sized is beside the point. It's not the null set.

10 MR. SNYDER: I think that's correct, Justice
11 Breyer.

12 QUESTION: Is that right?

13 MR. SNYDER: There could -- there are cases I
14 think where there could be some overlap between the 109
15 protection and 602, but there are a great number of cases
16 where there's not overlap.

17 QUESTION: I mean, there might be a lot of
18 people who have those books coming to the border who
19 didn't buy them.

20 MR. SNYDER: Correct.

21 QUESTION: In which case there's no first sale
22 doctrine under anybody's theory.

23 MR. SNYDER: Well, if they don't own them --

24 QUESTION: There was no sale.

25 MR. SNYDER: If they don't own them, there might

1 not -- there wouldn't be a first sale doctrine. You
2 actually -- you don't have to have bought them, I believe.
3 It could have been a gift or other situation.

4 QUESTION: Where there are other -- yes.

5 MR. SNYDER: There also could be situations
6 where the property wasn't -- was made under U.S. law or
7 wasn't made under U.S. law. There could be cases where
8 the traveler took it with him or her when they went abroad
9 and then brought it back.

10 So there are a variety of hypotheticals. I
11 agree with you they're not totally separate. The two
12 statutes have some overlapping situations, I agree.

13 QUESTION: There's one other language point that
14 the Government makes in addition to its 501 argument. It
15 refers to the later provision, the one in the -- what is
16 it, the chip, the 905 and 906, and that 906 includes --
17 906(b) refers not simply to otherwise dispose, but
18 includes the word, import, and the argument is, and when
19 Congress -- Congress knows there's a difference between
20 importing and otherwise disposing.

21 MR. SNYDER: Well, Justice Ginsburg, I think
22 it's fair to say that this statute, as many other
23 congressional enactments, probably could have been phrased
24 in different ways, some of which would have made our job
25 easier.

1 But, for example, 106A, which we cite, is a
2 statute that specifically says that that provision is an
3 exception, is -- that the first sale doctrine, the other
4 exceptions don't apply to that one.

5 In other words, in 106A Congress made it very
6 clear they were enacting a provision that wasn't going to
7 include the exceptions in 106 that we've relied on, so you
8 know, we've made the assertion that if -- that Congress
9 knows how to make it clear that something is not subject
10 to the exceptions. They did it in 106A.

11 I think you're correct, the Government is
12 correct that there are other ways that Congress could have
13 phrased several of these provisions that probably would
14 have made them a little bit clearer, but I don't think
15 there's anything in the sections that you just cited,
16 Justice Ginsburg, that's inconsistent with our position.
17 They simply made that section a little clearer than they
18 made 602 and 106.

19 I think it's undisputed by everyone that there
20 is no specific reference in the legislative history to the
21 interplay between 106 -- I'm sorry, between 602 and 109.
22 In other words, no Congress Member ever addressed how
23 these two should go together.

24 We believe that the best way to deal with that,
25 given the language that's in the statutes at issue here,

1 the most relevant statutes, 602 and 109, is to say
2 Congress just hasn't addressed the matter.

3 Congress obviously is free to address it, and
4 the Government can either submit the bilateral agreements
5 that it's negotiated to Congress for review, or it can go
6 in with a statute on parallel imports. There actually
7 have been quite a number of proposed bills to curtail
8 parallel imports.

9 QUESTION: What is your response to the
10 argument -- I recall it was part of the Ninth Circuit's
11 opinion -- that the predecessor of 602 was worded in a way
12 which would cover many of the examples you gave, and yet
13 they added the terms, acquired outside the United States,
14 so it seems that your arguments give very little weight or
15 significance to the changes between the two -- between the
16 predecessor statute and 602 as now written.

17 MR. SNYDER: I think the predecessor statute
18 only applied to pirated goods, Justice Kennedy, and the
19 Government and the respondent have both made the -- have
20 both referred to the fact that the new statute in '76 was
21 clearly intended to cover more than just pirated goods,
22 but so-called lawfully made goods as well.

23 We agree with that, and that's exactly the case
24 that I referred to that's analogous to the K Mart
25 situation. In other words, goods that are lawfully made

1 under foreign copyright laws but not under the U.S. law we
2 think are covered by 602, and the fact that 109 is limited
3 to lawfully made goods under this title we think draws the
4 line between goods made under U.S. copyright law and goods
5 made under foreign copyright law, and we've laid out in
6 our brief quite a number of situations where the new 602
7 does have meaning, because it applies, for example, in the
8 case where an unrelated foreign copyright holder has
9 produced the good, it applies to many other cases.

10 Basically, our position is that 109 applies in
11 the importation situation just as it applies to all other
12 aspects of the distribution right, and 109 limits the
13 distribution right to some extent, and we think the
14 importation rules in 602 have become part of the
15 distribution right, and 109 applies to those as well.

16 QUESTION: Well, to prevail, do we have to think
17 that importation is a form of distribution?

18 MR. SNYDER: No. I do not believe it is
19 literally a form of distribution. If it were, there would
20 be no need for the 602 statute.

21 But Congress, we believe, intended to subsume
22 602 within the distribution right. We think that's what
23 it meant by saying that an unauthorized importation is a
24 violation of the right under 106, that Congress was simply
25 declaring it to be a -- for legal purposes a form of

1 distribution, even though linguistically it may not be
2 precisely that.

3 If I may, Mr. Chief Justice, I would like to
4 reserve the balance of my time for rebuttal.

5 QUESTION: Very well, Mr. Snyder.

6 Mr. Goettsch, we'll hear from you.

7 ORAL ARGUMENT OF RAYMOND H. GOETTSCH

8 ON BEHALF OF THE RESPONDENTS

9 MR. GOETTSCH: Mr. Chief Justice, and may it
10 please the Court:

11 I think it's important at the outset to note
12 that we believe that the K Mart v. Cartier case is not
13 apposite to this case at all. In that case, the Court
14 addressed section 526 of the Tariff Act of 1930, and under
15 section 526, a U.S. entity can record its U.S. trademark
16 with the Customs Service to prevent unauthorized
17 importation of goods, even those with a genuine trademark.

18 The protection, however, extends only to goods
19 of foreign manufacture, and the issue before the Court was
20 whether the Customs Service's regulations were based upon
21 a reasonable interpretation of that statute, and a
22 majority of the Court found the phrase, foreign
23 manufacture, to be ambiguous and then as a result found
24 that some of the regulations of the Customs Service were
25 reasonable.

1 But to the extent that the K Mart case dealt
2 with trademark law, it's important to remember that, as
3 this Court recognized in the Sony v. Universal Studios
4 case, the -- there's a difference between the scope and
5 scheme and purpose of the trademark law as opposed to the
6 copyright law, and the courts are not to take principles
7 or doctrines from trademark law and extend them to
8 copyright law.

9 QUESTION: May I ask, since you've cited the
10 Sony case, which dealt in part with fair use, how, under
11 your reading of the statute, does the fair use doctrine
12 protect the importation of foreign-made goods?

13 MR. GOETTSCH: Well, I think that in enacting
14 section 602(a) Congress made a decision that the
15 limitations under Chapter 1 of the Copyright Act, which
16 would include the fair use under section 107 as well as
17 the first sale defense under section 109(a), did not apply
18 to section 602(a).

19 QUESTION: Oh, so your view is there is no fair
20 use defense in this -- for imported goods.

21 MR. GOETTSCH: Yes, except to the extent that we
22 think that the three exceptions that Congress did set out
23 expressly to section 602(a) do have a fair use element to
24 them.

25 The question, of course, before this Court is

1 whether section 109(a) of the Copyright Act is a defense
2 to copyright infringement under section 602(a) for
3 unauthorized importation of copies acquired outside the
4 United States. The answer to this question should be
5 purely a product of statutory interpretation. Prior to
6 the enactment --

7 QUESTION: Mr. Goettsch, you don't question the
8 contention of petitioners that there is no need to give
9 any deference to the negotiation -- negotiating position
10 of the United States in trade agreements?

11 MR. GOETTSCH: Well, I don't -- no, we do not
12 agree with that. First of all, I think it's important to
13 recognize that --

14 QUESTION: Well, then you say that there is
15 some -- I thought you just said that we just pay attention
16 to the language used by Congress, but you're saying,
17 though, that that language should be interpreted through
18 the prism of the executive branch deference?

19 MR. GOETTSCH: No, I'm not saying that. What
20 I'm saying is that -- first of all, I don't think that the
21 Court needs to reach that issue to interpret this statute.
22 I think the statute is unambiguous on its face.

23 However, if the Court were to consider
24 legislative intent, since the Copyright Office was very
25 much involved in the writing of the 1976 Copyright Act,

1 then I would simply say that its interpretation of that
2 act corroborates --

3 QUESTION: It has no duties under this section,
4 does it? I mean, it doesn't administer this act.

5 MR. GOETTSCH: No. Unlike 602(b), where Customs
6 is required to prohibit or bar the import of piratical
7 copies, under section 602(a) it's up to the copyright
8 holder to enforce the bar to entry of unauthorized
9 importation.

10 QUESTION: Well, on your interpretation of the
11 statute, actually, that it's sort of an import violation
12 rather than a distribution violation, it really ought to
13 be the Customs Service to whom we might defer rather than
14 the Copyright Office.

15 MR. GOETTSCH: Well, that could be. The --

16 QUESTION: But I don't understand your argument
17 that just because the Copyright Office had much to do with
18 the drafting of this provision we give them deference. I
19 mean, we certainly don't give General Motors deference if
20 they have had substantial participation in the drafting of
21 a particular provision.

22 MR. GOETTSCH: Well, I think what I meant by
23 deference, and probably my choice of words was not
24 particularly apt, what I meant was that if the Court is
25 going to look at legislative intent, which I don't think

1 the Court needs to do, that the Copyright Office's role in
2 the writing of the statute is corroborated -- is evidence
3 of intent, and its current interpretation corroborates the
4 legislative intent.

5 QUESTION: Okay. You don't -- you do not
6 contend that we owe them deference.

7 MR. GOETTSCH: Not in that sense, just in the
8 sense that this is corroborative evidence of legislative
9 intent if the Court needs to reach that.

10 QUESTION: Will you -- just concentrating on the
11 language for a minute, will you explain how you get out of
12 the box that the right that's been infringed is the
13 exclusive right to distribute copies under section 106, a
14 right which is otherwise qualified as a first sale
15 doctrine, fair use doctrine and others.

16 Why, if it's the right granted by 106, why isn't
17 that right qualified by the other provisions between 107
18 and 119? I don't quite understand your answer to that.

19 MR. GOETTSCH: Well, there are several reasons.
20 First of all, if section 109(a), the first sale defense,
21 applied to section 602(a), then the three exceptions that
22 Congress expressly identified --

23 QUESTION: Well, I understand. As -- you're
24 saying -- I understand that argument, but initially, if
25 it's just the 106 right, which has already been curtailed

1 by the first sale doctrine, how can you say it's more -- I
2 don't understand. You say the 106 right has two different
3 scopes, one for most infringement cases, and then a
4 broader right under 602(a), is that right?

5 MR. GOETTSCH: Well, section 106, subparagraph
6 (3), which provides for the copyright holder --

7 QUESTION: Subject to 107 through 120, yes.

8 MR. GOETTSCH: Right, but that gives the
9 copyright holder the right to control the exclusive
10 distribution of a copy, is not exhausted unless there is a
11 sale, and importation does not denote a sale, so the
12 distribution right under section 106 is complementary but
13 separate from the importation right under section 602(a).

14 QUESTION: Well, but the importation right is
15 treated as though it were an infringing sale, and to be an
16 infringing sale, it has to get by all the things like the
17 fair use doctrine, the first sale doctrine, and so forth.

18 Maybe I just don't quite --

19 MR. GOETTSCH: No, I don't think it is Justice
20 Stevens, I don't think it is treated as an infringing
21 sale. The importation, the act of unauthorized
22 importation of copies acquired outside of the United
23 States itself is copyright infringement, as recognized
24 separately in section 501(a) of the act.

25 QUESTION: But, of course, the argument on the

1 other side is, there's no infringement, obviously, if
2 there's been a first sale, because 109 applies. I mean,
3 that's the argument, and I don't -- it's kind of odd that
4 you're here arguing, all you have to do is look at the
5 statute, it's so clear. The other side is saying the same
6 thing.

7 Frankly, I think the other side has the better
8 argument on looking at the statute and seeing what it
9 means, so I'm concerned about what, if any, deference is
10 owed to anybody here. What about the Government's
11 position on these bilateral trade agreements? How much
12 does that concern us? Is this something Congress can fix,
13 if they're worried about it?

14 Is it not odd that we would find in the middle
15 of the copyright statute some effort to control
16 importation of some kind of goods? I mean, it just
17 doesn't fit comfortably under the copyright law, does it?

18 MR. GOETTSCH: Well, I don't agree, Justice
19 O'Connor, because prior to the enactment of the 1976
20 Copyright Act section 602 prohibited the importation of
21 piratical goods, meaning unauthorized copies, and
22 Congress -- by enacting section 602(a), Congress intended
23 to extend that protection to the copyright holder beyond
24 piratical goods to the unauthorized importation of
25 authentic copies.

1 QUESTION: Well, of course, that gets us to the
2 issue.

3 QUESTION: May I ask this, do you agree that
4 there was a distinction which -- and again, I don't know
5 the answer to this by any means, but is there a
6 distinction between piratical goods on the one hand and
7 goods lawfully manufactured pursuant to a British licensee
8 of an American author? Isn't it -- he relies heavily on
9 that distinction. Is there such a distinction?

10 MR. GOETTSCH: I don't think so.

11 QUESTION: You would say that the piratical
12 goods encompass lawfully made goods pursuant to a license
13 from the original author --

14 MR. GOETTSCH: Well --

15 QUESTION: -- in the other -- the British
16 copyright.

17 MR. GOETTSCH: Justice Stevens, if you're
18 asking, prior to the enactment of section 602(a) was the
19 provision with respect to piratical goods applicable to
20 that situation, then I think it was.

21 QUESTION: You think it was?

22 QUESTION: It was.

23 QUESTION: Well, what were all those experts who
24 testified saying they needed 602 for, including Ms.
25 Harriet Spilpellan, Horace Man --

1 MR. GOETTSCH: Well, it wasn't -- there was no
2 case law that expressly said that, and I think that
3 Congress, by enacting section 602(a), wanted to make it
4 very clear that the unauthorized importation of authentic
5 copies was copyright infringement.

6 QUESTION: That makes sense, but I don't see how
7 it helps you. I mean, they wanted to say, suppose that I
8 bring in some books from England, and really they are
9 perfectly legitimate, but if I were to distribute them in
10 the shop it would violate the distribution right of the
11 copyright holder. Well, 602 says, stop them at the
12 border. I mean, nothing in that theory tells you whether
13 they are or are not subject to the first sale doctrine.
14 It wouldn't hurt if they were, wouldn't hurt if they
15 weren't.

16 MR. GOETTSCH: Well --

17 QUESTION: If there's been a first sale, no more
18 reason to -- no more reason, if there's been a first sale,
19 to stop them than if there's been a first sale in the
20 United States. It's the same problem.

21 MR. GOETTSCH: Well, of course --

22 QUESTION: Do you want to apply a first sale
23 doctrine to copyrighted books or not? If the answer is
24 yes, why distinguish them where the first sale was abroad?
25 If the answer's no, treat them all alike.

1 MR. GOETTSCH: Well, because the first sale is
2 intended to reflect the fact that the copyright holder has
3 exhausted its exclusive distribution right and has
4 received the full value of its copyright, and a sale
5 abroad, a sale outside the United States, since the
6 Copyright Act operates territorially, the sale outside of
7 the United States does not exhaust --

8 QUESTION: No, but he's been paid for it, hasn't
9 he? I mean, if they're legitimate and not pirated, he's
10 been paid for that.

11 MR. GOETTSCH: Well, under the facts of this
12 case, which is true in many situations where copyright
13 holders sell the copyright goods abroad, they're sold at a
14 discount, a significant discount. If those copies are
15 allowed to come back into the United States and compete
16 with the copies --

17 QUESTION: They would like -- the copyright
18 holder, I take it, would like to have a vertically imposed
19 territorial division, as would many manufacturers.
20 Normally we control that through the antitrust laws.
21 Sometimes you can do it, sometimes you can't.

22 Why, to repeat Justice O'Connor's question,
23 would this antitrust issue of vertically imposed
24 territorial restrictions suddenly be brought into the
25 copyright law when it isn't brought into the trademark law

1 or most other laws?

2 I mean, wouldn't you have to have a fairly clear
3 expression of congressional intent to find it, rather than
4 the other way around?

5 I mean, that's basically my underlying question
6 in this case.

7 MR. GOETTSCH: Well, the concern is that if the
8 copies acquired outside the United States at a discount
9 come back into this country, then they compete with the
10 copyright holders --

11 QUESTION: Yes. That's also true when you sell
12 to California. It's also true when you sell to Maine.

13 MR. GOETTSCH: No --

14 QUESTION: If you decide to sell at a discount,
15 it would be nice to do that often, and many manufacturers
16 feel that way.

17 MR. GOETTSCH: Well --

18 QUESTION: You can't sell at a discount to
19 Maine, and you won't be able to to France.

20 MR. GOETTSCH: Well, if the sale were in the
21 United States, then the copyright holder would have
22 exhausted the right under 106(3) to control the exclusive
23 distribution, and then section 109(a) would apply, but if
24 the sale is outside of the United States, then the right
25 to control distribution has not been exhausted.

1 QUESTION: May I ask -- just to comment very
2 briefly on one aspect of the case that I just can't quite
3 get out of my head, it's easy to follow the arguments when
4 you're talking about books and records and so forth, but
5 when you're talking about the label on a product that is
6 not itself patented or copyrighted, the label is
7 controlling the distribution of the product, is that
8 relevant at all in the case?

9 MR. GOETTSCH: No, because the Copyright Act
10 does not recognize classes of copyrights. There's no
11 first class copyright for a book or play and a second
12 class copyright for --

13 QUESTION: For a label.

14 MR. GOETTSCH: -- a product label or a product
15 design. If --

16 QUESTION: Thank you, Mr. Goettsch. I think
17 you've answered the question.

18 MR. GOETTSCH: Thank you.

19 QUESTION: Mr. Wallace, we'll hear from you.

20 ORAL ARGUMENT OF LAWRENCE G. WALLACE

21 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

22 SUPPORTING THE RESPONDENTS

23 MR. WALLACE: Thank you, Mr. Chief Justice, and
24 may it please the Court:

25 One very important component of the text of the

1 statute which I believe has been overlooked in the
2 discussion thus far is 602 itself. What is set forth in
3 the appendix to the petition for certiorari on the very
4 last page, E-3, is not all of section 602. It is section
5 602(a), which is in substance the new part of section 602.
6 Section 602 also contains a subsection (b).

7 QUESTION: Where do you want us to be reading?
8 What brief, and what page?

9 MR. WALLACE: Well, subsection -- the 602(a) --

10 QUESTION: Yes.

11 MR. WALLACE: -- is set forth in the appendix to
12 the petition for certiorari.

13 QUESTION: Yes, but you're referring us to
14 something else. Where do we find the something else?

15 MR. WALLACE: It's not set forth in any of the
16 briefs, the text of it. It's the very --

17 QUESTION: And yet it's the most important part
18 of the case.

19 MR. WALLACE: Well, I --

20 QUESTION: What is actually --

21 (Laughter.)

22 MR. WALLACE: I say that it's been overlooked.

23 QUESTION: It's on page 2 of the appendix in the
24 amicus brief that Mr. Olson filed.

25 QUESTION: Well, isn't it on page 2 of the red

1 brief?

2 MR. GOETTSCH: Yes.

3 MR. WALLACE: All right. It's on page 2 of the
4 red brief, then. I'm sorry.

5 In any event, the very first sentence carries
6 forward what had been in existence in somewhat different
7 words in the 1909 Copyright Act, that importation of
8 piratical copies is prohibited, and the Customs Service is
9 given authority to stop those at the border. That was
10 always true.

11 What is added in 602(a) --

12 QUESTION: May I ask right there, Mr. Wallace --
13 it's quite important to me -- did that section cover
14 copies made pursuant to the -- an authorized British
15 copyright?

16 MR. WALLACE: Piratical copies are copies that
17 are not legitimate in the country where acquired, and
18 not --

19 QUESTION: So your answer is no.

20 MR. WALLACE: My answer is no.

21 QUESTION: And so his response to the argument
22 you're developing as well, this -- the big change in this
23 statute was, it covers that universe.

24 MR. WALLACE: The authority that has been given
25 in 602(a), the new authority, allows the owner of the

1 copyright to prevent without -- if it doesn't have his
2 permission, to prevent importation of legitimate copies as
3 well as piratical copies, but the piratical copies are
4 prohibited from entry separately as well, under 602(b).

5 Therefore, the exceptions listed in 602(a)
6 cannot be exceptions to allow the entry of piratical
7 copies because their importation is already prohibited by
8 the companion provision. It can -- they can only be
9 exceptions to allow the importation of copies that were
10 legitimate copies authorized by the copyright holder where
11 acquired.

12 QUESTION: Or by the British copyright, right?

13 MR. WALLACE: However -- but it --

14 QUESTION: It would have permitted those.

15 MR. WALLACE: Right.

16 QUESTION: I want to be sure we understand what
17 it does apply to. There are three categories of goods,
18 piratical goods, stuff made pursuant to the British
19 copyright, and stuff made pursuant to the American
20 copyright. It picks up the middle category.

21 MR. WALLACE: Of course, we have --

22 QUESTION: Do you agree with that?

23 MR. WALLACE: Yes, but we have agreements with
24 these countries so that there's reciprocal recognition of
25 copyright rights, and the British copyright is very apt to

1 derive from the American copyright, or vice versa,
2 depending on where the original copyright is, so that
3 we're not really separating out very much.

4 QUESTION: Is there a substantial reduction of
5 copyrighted goods, pursuant to copyrights in Trinidad and
6 these other countries, that these agreements are made
7 with?

8 QUESTION: Tobago -- yes.

9 MR. WALLACE: There -- the goods are marketed in
10 these countries, and our concern in negotiating these
11 agreements has been in protecting the distributors from
12 gray market imports that would undermine the distribution
13 of the American made works in these other countries.

14 QUESTION: Briefly, you want to assure that the
15 Americans can sell cheaper in that country than they do at
16 home, right?

17 MR. WALLACE: Well --

18 QUESTION: Briefly put.

19 MR. WALLACE: -- there -- that is part of the
20 reason why we have been --

21 QUESTION: We don't even do that at home. We --
22 you know, we generally don't -- don't make sure that
23 people can sell in Maine cheaper than they can sell in
24 California. Why do we want to do it for Tobago?

25 MR. WALLACE: There are reasons why we've been

1 espousing this, because in order to market copyrighted
2 works, and the whole point of copyright is to give
3 incentives to created copyrighted works and to protect
4 their -- the ability of the authors to market them --

5 QUESTION: We're talking about shampoo here,
6 aren't we? I mean, these people don't care about the
7 labels. They're trying to piece out the market for
8 shampoo.

9 MR. WALLACE: The statutory issue is going to
10 apply to motion pictures, sound recordings --

11 QUESTION: But it's also going to apply to
12 shampoo.

13 MR. WALLACE: When the label that is affixed to
14 it qualifies for copyrighting. This is a venerable part
15 of the copyright law, but I think it would be a mistake to
16 let that drive this case, because --

17 QUESTION: Well, is it your position that in
18 construing the statutory language we should give some sort
19 of deference to the position that our Government has taken
20 in negotiating with Trinidad and Tobago?

21 MR. WALLACE: We have not asked for deference,
22 nor do we think deference is the right approach to this.
23 We do believe that the Court was entitled to be informed
24 about this. We --

25 QUESTION: Well, if there's no deference, why --

1 I'm sure we're entitled to be informed about it, but why
2 do you take up your time informing us about it?

3 (Laughter.)

4 MR. WALLACE: Well, because of the very reason
5 that the Court gave. We -- just 2 years ago in the case
6 of Vimar Seguros -- we quoted on page 25 of our brief one
7 sentence from the opinion. The very next sentence is what
8 we think is pertinent here, and the very next sentence
9 starts out --

10 QUESTION: The sentence that you didn't quote?

11 MR. WALLACE: That we didn't quote, and the very
12 next sentence starts off, that concern counsels against
13 construing the act differently. That's all it does. It
14 is a factor to take into consideration --

15 QUESTION: Well, should we look, for example --

16 MR. WALLACE: -- as the Court said.

17 QUESTION: Is it the case -- I'm not certain at
18 all about this. I've a recollection, though, that the
19 European Court of Justices found a first sale right, a
20 similar kind of thing, through imports from one country to
21 another. Are those relevant, too? Am I supposed to look
22 at those cases to see which way they come out?

23 MR. WALLACE: Well, they have not been brought
24 to my attention, and we're talking here about construing
25 an act of Congress, and --

1 QUESTION: So why is the Government -- normally
2 the Government takes the position, with what I consider
3 here -- you can see the analogy to territorial
4 restrictions imposed by a manufacturer. Normally the
5 Government wants those viewed under a rule of reason and
6 is often hostile. Why, in this case, is the Government
7 willing to forego the rule of reason and just saying,
8 well, they're okay across the board?

9 MR. WALLACE: Well, there are trade restraints
10 in copyrighted and patented materials that are not
11 permitted elsewhere, and they're permitted under statutes
12 that Congress has enacted.

13 We really think the answer to this case is in
14 the statutes that Congress has enacted --

15 QUESTION: Mr. Wallace, since it's obvious that
16 there is some ambiguity here, room for different views,
17 since the Government was taking this position in its
18 representations to other nations, why didn't it ask
19 Congress for a clarifying amendment so that there would be
20 no doubt about how the statute should be read?

21 MR. WALLACE: Well, I'm not privy to reasons
22 that -- why it did not. It took 15 years to do the
23 revision in 1976. It started off at the very beginning of
24 the 1960's with a series of studies by Congress and the
25 committee and they heard from a great many people.

1 QUESTION: I'm talking about once this problem
2 surfaced. Now, we have the Ninth Circuit with one
3 opinion, the Third Circuit with a different one, so that
4 this particular problem has been known for a while, and as
5 far as I know there hasn't been any effort to get Congress
6 to spare the judiciary this kind of decision.

7 MR. WALLACE: Well, this is not a problem that
8 arises in Government litigation. It's not just the
9 Government that might have come forward. In fact, we're
10 talking now about the rights between two non-Government
11 parties.

12 We looked in connection with another case
13 pending before this Court and didn't find a single pending
14 case in which the United States has -- a single reported
15 case in which the United States has sued anyone for
16 copyright infringement. We're not usually involved in
17 this litigation, so we're not necessarily the ones who
18 would come forward with requests for an amendment that
19 might clarify something. We are faced --

20 QUESTION: Then you're saying this is not a very
21 important issue for the Government, however important it
22 is for private --

23 MR. WALLACE: Well, it --

24 QUESTION: -- participants.

25 MR. WALLACE: We do think it's important because

1 it bears on positions we've been taking in international
2 negotiations. It's important to the Government in that
3 way.

4 QUESTION: Mr. Wallace, I've been reading
5 subsection (b) and I'm curious, could you just help me
6 with the second sentence? The first sentence, the one you
7 pointed to, repeats the prohibition against pirated --
8 piratical works.

9 The second sentence says, in a case where copies
10 were lawfully made the Customs Service has no authority to
11 prevent their importation unless the provisions of 601 are
12 applicable, and 601 has to do with English literary works
13 or something. What do I do with --

14 MR. WALLACE: Well --

15 QUESTION: Why doesn't the second sentence
16 describe this case?

17 MR. WALLACE: It's -- it does describe this case
18 for purposes of what the Customs Service is authorized to
19 do. Congress in section 602 did not expand the authority
20 of the Customs Service to prevent importations. That is
21 still limited to piratical copies.

22 It added 602(a) to give the copyright owner
23 ability to move against copies that were legitimate in the
24 country in which they were acquired, but that would be too
25 difficult for the Customs Service to try to distinguish

1 between goods that may or may not be violating contractual
2 restrictions on their distribution, so the Customs Service
3 still has the same authority in substance that it had
4 before.

5 QUESTION: That just emphasizes, it seems to me,
6 the statement in (a) that importation is not a violation
7 of any importation restriction. Importation is only a
8 violation of the right to distribute. That sentence
9 just --

10 MR. WALLACE: The right --

11 QUESTION: -- doubles up on that statement.

12 MR. WALLACE: The right to distribute is covered
13 in section 106B, a separate section in a separate chapter
14 of this provision, and something was added here to stand
15 alone in a different chapter, and there are a series of
16 exceptions listed which the petitioner in substance is
17 saying can be explained because they would allow piratical
18 copies in, but they would not allow piratical copies in.

19 QUESTION: No, not piratical copies, legitimate
20 copies made under a different copyright, under a different
21 licensee. That's -- he says that takes care of the
22 British copyright situation. I don't think you've
23 responded to that.

24 MR. WALLACE: But that --

25 QUESTION: You keep referring to piratical.

1 MR. WALLACE: But that limits very -- most of
2 these importations that are listed here as exceptions
3 would have been ones where a first sale of a legitimate
4 copy occurred. It would not be -- would not --

5 QUESTION: Well, what about the personal right
6 of a traveler in their baggage. You can bring in
7 anything, piratical or otherwise, if it's in your luggage.

8 MR. WALLACE: There's nothing in the copyright
9 law that allows a piratical copy to be brought in.

10 QUESTION: Well, 602(a) now has a specific
11 little provision for somebody arriving at Customs with an
12 illicit book --

13 MR. WALLACE: But the point I've been --

14 QUESTION: -- in their baggage.

15 MR. WALLACE: The point I've been trying to
16 make, and perhaps I haven't explained it, is that 602(b)
17 separately prohibits that.

18 QUESTION: Is 602 -- can you --

19 MR. WALLACE: It prohibits the import of any
20 piratical copy.

21 QUESTION: Can you correct this, which I'm about
22 to say: 602(a) says, the act of importing is an act of
23 distribution. 602(b) says, if what you're importing is a
24 pirated copy, i.e., one that would have been unlawful had
25 the laws of the United States applied there, you can seize

1 it, Customs person. If it's not a piratical copy, you
2 can't seize it. You just notify. So (b) is explicating
3 (a).

4 Now, what's wrong with what I just said, if
5 anything?

6 MR. WALLACE: Because (a), (a) has --

7 QUESTION: (a) is covering both. (b) says, if
8 at the border it's a pirate, you can seize it. If not,
9 you can't. You notify.

10 MR. WALLACE: It doesn't -- what is wrong for a
11 starter is that 602(a) says that importation is an
12 infringement of the exclusive right to distribute.

13 QUESTION: Right.

14 MR. WALLACE: It doesn't say it's a
15 distribution.

16 QUESTION: No, no --

17 MR. WALLACE: What is a distribution is in
18 106(3), and importation is treated separately from
19 distribution in provision after provision of the act, as
20 we've set out in our brief.

21 QUESTION: Thank you, Mr. Wallace.

22 Mr. Wallace, our records reflect that this is
23 your 141st appearance before the Court. You have now
24 eclipsed the 20th Century record of 140 arguments
25 accumulated by John W. Davis, who was a former Solicitor

1 General, so on behalf of the Court I extend to you our
2 appreciation for your many years of advocacy and dedicated
3 service during your 30 years in the Solicitor General's
4 Office. Thank you.

5 MR. WALLACE: Thank you very much, Mr. Chief
6 Justice. It's been a great privilege.

7 QUESTION: Mr. Snyder, you have 5 minutes
8 remaining.

9 REBUTTAL ARGUMENT OF ALLEN R. SNYDER

10 ON BEHALF OF THE PETITIONERS

11 MR. SNYDER: Thank you, Mr. Chief Justice.

12 Mr. Wallace said at one point that we are
13 "talking here about interpreting an act of Congress." We
14 agree with that, and we think that's the key issue before
15 the Court, and in our view the position of the U.S.
16 Government in bilateral negotiations or bilateral
17 agreements doesn't by itself change what Congress
18 intended.

19 And I would point out to the Court that in one
20 of the lodgings that the Solicitor General has provided
21 the Court is a 1990 telegram that includes the
22 Government's legal position and argument before most of
23 these bilateral agreements were negotiated. In that
24 memorandum the Government lawyer cites the Sebastian
25 decision from the Third Circuit, which was at the time the

1 only court of appeals decision on this issue anywhere.

2 The Government was aware that the law, as set
3 forth by the court of appeals, was contrary to their
4 position. We believe they could have come to Congress for
5 a clarifying change. They still can. There is no reason
6 why the Government can't ask Congress to change the law,
7 but we believe there has been nothing cited today or
8 otherwise that suggests that Congress in the copyright
9 statute was making the kind of broad, antiparallel imports
10 rule that the Congress -- that the respondents and their
11 amici are now suggesting.

12 All of the amici for respondents, including the
13 Solicitor General, have been really quite candid in saying
14 that a big part of what's at issue here is that many
15 manufacturers do charge more for U.S.-made goods in the
16 United States than those U.S. manufacturers charge for the
17 same U.S.-made goods in foreign countries.

18 The Solicitor General has argued that somehow
19 that's good for our economy. That's a policy argument we
20 don't agree with, but we do not think that that is an
21 issue for this Court to decide or for us to opine on. If
22 the Congress wishes for U.S. consumers to pay more for
23 U.S. goods than foreign consumers, that is a legitimate
24 issue for Congress to deal with as a matter of policy,
25 parallel import --

1 QUESTION: You could put it more kindly. You
2 could say they want foreigners to pay less. That seems
3 more generous.

4 (Laughter.)

5 MR. SNYDER: I will accept that, Justice Scalia,
6 although I don't agree with the ultimate decision.

7 QUESTION: Well, they do say that the foreigners
8 have to advertise it on their own, they have to service
9 it, it doesn't come with a warranty, so there is --

10 MR. SNYDER: Well --

11 QUESTION: There's a justification for the
12 differential.

13 MR. SNYDER: They do say that, Justice Ginsburg.
14 I would point out that, in the recording industry amicus
15 brief that they filed here, they pointed out that
16 videotapes cost as much as six times more in the United
17 States than the same U.S. videotape is sold for in certain
18 foreign countries. I don't think anyone contends that the
19 marketing cost is 600 percent of the price.

20 The Government has been quite candid in saying
21 that they believe there are certain foreign policy values
22 in promoting underdeveloped countries, some other economic
23 issues. There may be antitrust issues at stake.

24 Whatever those considerations are, we don't
25 think in the copyright law Congress addressed them, and

1 while I agree, Justice Stevens, that copyrights can apply
2 to labels sometimes, I think the tail is wagging the dog
3 here, and that Congress certainly didn't intend the result
4 that's at issue here.

5 We would also point out that the respondent --

6 QUESTION: But you wouldn't have any problem if
7 you just changed the label, right? I mean, you could --
8 you could do everything and not have any problem about
9 importing if you just made a different label.

10 MR. SNYDER: There might be some issues of
11 tampering with goods if we were to take off the label of
12 someone else's product, but I'm not prepared to say what
13 the State law issues there are.

14 Certainly, the copyright law itself wouldn't, I
15 think, address that, I agree, but there may be some other
16 tort issues that might come into play.

17 The respondent has acknowledged that under his
18 theory the fair use doctrine of section 107 doesn't apply
19 to imported goods. We think that is an extremely
20 important point, because the logic of their position is
21 that none of these exceptions apply, including fair use.

22 When the owner of the London Times gives
23 authority to import multiple copies of the London Times to
24 sell in the United States, under the respondent's theory
25 the owner of the London Times copyright cannot bring in

1 his own newspaper if there is a book review in the London
2 Times that quotes from someone else's book in what
3 normally would be considered fair use, because the fair
4 use doctrine that allows scholarly books, treatises, book
5 reviews to quote someone else's work, it only allows that
6 under 107. Under their theory, 107 is simply inapplicable
7 to imports. It would be a quite major change in the law
8 of this United States.

9 We think their entire argument, getting rid of
10 the first sale doctrine, also is a major change. We have
11 in our country --

12 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Snyder.

13 MR. SNYDER: Thank you, Mr. Chief Justice.

14 CHIEF JUSTICE REHNQUIST: The case is submitted.

15 (Whereupon, at 10:02 a.m., the case in the
16 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of:

QUALITY KING DISTRIBUTORS, INC., Petitioner v. L'ANZA RESEARCH INTERNATIONAL, INC.
CASE NO: 96-1470

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Donna Maria Fedirko-----

(REPORTER)