No. 11-697

IN THE
Supreme Court of the United States

SUPAP KIRTSAENG
d/b/a Bluechristine99,

Petitioner,

v.

JOHN WILEY & SONS, INC.,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Second Circuit

BRIEF OF eBAY INC., NETCOALITION, THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, THE INTERNET COMMERCE COALITION, TECHNET, NETCHOICE, AND TECHAMERICA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

This case presents the issue that recently divided this Court, 4-4, in *Costco Wholesale Corp. v. Omega, S.A.*, 131 S. Ct. 565 (2010). Under § 602(a)(1) of the Copyright Act, it is impermissible to import a work "without the authority of the owner" of the copyright. But the first-sale doctrine, codified at § 109(a), allows the owner of a copy "lawfully made under this title" to sell or otherwise dispose of the copy without the copyright owner's permission.

The question presented is how these provisions apply to a copy that was made and legally acquired abroad and then imported into the United States. Can such a foreign-made product never be resold within the United States without the copyright owner's permission, as the Second Circuit held in this case? Can such a foreign-made product sometimes be resold within the United States without permission, but only after the owner approves an earlier sale in this country, as the Ninth Circuit held in *Costco*? Or can such a product always be resold without permission within the United States, so long as the copyright owner authorized the first sale abroad, as the Third Circuit has indicated?

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INTEREST OF THE AMICI[1]

eBay, Inc. operates the world's largest online marketplace. Founded in 1995, eBay created an online market to bring together buyers and sellers to trade in local, national, and global markets. eBay serves individual buyers and sellers, as well as businesses ranging in size from part-time proprietorships to household brand names. eBay's online platform permits secondary marketplace trade in a wide range of goods. Accordingly, eBay has an interest in ensuring the alienability of authentic goods in the secondary market.

NetCoalition serves as the public policy voice for some of the world's most innovative Internet companies on the key legislative and administrative proposals affecting the online world. NetCoalition provides legal and policy solutions to critical legal and technological issues facing Internet companies, the courts, and policymakers. It helps insure the integrity, usefulness, and continued expansion of this dynamic new medium. Its members include Amazon.com, Bloomberg LP, eBay, Google, IAC, Yahoo! and Wikipedia.

The Computer & Communications Industry Association (CCIA) is a non-profit trade association

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[1] Pursuant to Supreme Court Rule 37.6, counsel for the amici curiae represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than the amici, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

that for 40 years has been dedicated to "open markets, open systems and open networks." CCIA members participate in many sectors of the computer, information technology and telecommunications industries and range in size from small entrepreneurial firms to the largest in the industry. CCIA members employ more than 600,000 workers and generate annual revenues in excess of $200 billion.

The Internet Commerce Coalition (ICC) is a coalition of leading U.S. Internet Service Providers (ISPs), e-commerce companies, and technology trade associations. The ICC's mission is to achieve a legal environment that allows service providers, ecommerce companies, their customers, and other users to do business on the global Internet under reasonable rules governing liability and use of technology.

Technology Network (TechNet) is a network of Chief Executive Officers and senior partners of some 100 companies in the information technology, biotechnology, venture capital, clean energy and e-commerce industries. The association is organized to promote the growth of the technology industry and to advance America's global leadership in innovation by building long-term relationships among technology leaders and policy makers. The majority of TechNet's members lead companies capitalized through publicly traded shares on the Nation's major stock exchanges. TechNet's members represent the leading edge of developing, manufacturing, and marketing emerging technologies.

NetChoice is a coalition of businesses, individuals, and trade associations who seek to promote con-

venience, choice, and commerce on the Internet. Its members range from some of the most prominent online businesses in the world to individual users of e-commerce services, and include eBay and other companies whose online platforms bring together buyers and sellers from around the globe. NetChoice has an interest in expanding the range of goods that can be sold safely and legally on secondary markets, particularly where the Internet enables these markets to reach across national borders.

TechAmerica represents approximately 1,000 member companies of all sizes from the public and commercial sectors of the economy and is the technology industry's largest advocacy organization. Its members include suppliers of broadband networks and equipment, consumer electronics companies, software and application providers, Internet and e-commerce companies, and Internet service providers, among others, many of which are involved in ensuring a robust e-commerce marketplace.

SUMMARY OF THE ARGUMENT

The first sale doctrine has long been recognized as a defense to copyright infringement, striking a balance between the property rights of consumers and the promotion of progress in the sciences and useful arts by ensuring that copyright owners are compensated for the initial sale of the copyrighted good. As this Court held over a century ago, "one who has sold a copyrighted article, without restriction, has parted with all right to control the sale of it. The purchaser of a book, once sold by authority of the owner of the copyright, may sell it again, although he could not publish a new edition of it." *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350 (1908).

Section 109(a) of the Copyright Act codifies the first sale doctrine, providing that "the owner of a particular copy . . . lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy." 17 U.S.C. § 109(a). In *Quality King Distrib. v. L'anza Research Int'l*, 523 U.S. 135, 138, 154 (1998), this Court confirmed that the first sale doctrine is not limited by place of first sale and held that the first sale doctrine endorsed in § 109(a) may be applied to imported copies.

The Second Circuit nevertheless held below that the first sale doctrine applies "only to copies manufactured domestically." *John Wiley & Sons, Inc. v. Kirtsaeng*, 654 F.3d 210, 221 (2d Cir. 2011). In so holding, the Second Circuit imposed a place of manufacturing requirement on the first sale doctrine that lacks support in the text, structure, history or pur-

poses of the Copyright Act. The Second Circuit's rule also dangerously expands beyond the Ninth Circuit's requirement, as considered by this Court in *Costco Wholesale Corp. v. Omega, S.A.*, 131 S. Ct. 565 (2010). In stark tension with the policy against restraints on alienation, the Second Circuit's rule affords copyright owners the ability to control the downstream sales of goods for which they have already been paid. The Second Circuit's rule not only is inconsistent with the terms, structure, history and purpose of the copyright act, but it also allows for significant adverse consequences for trade, e-commerce, secondary markets, small businesses, consumers, and jobs in the United States. Accordingly, this Court should grant the petition for certiorari.

ARGUMENT

I. THE SECOND CIRCUIT'S EXTREME CONCLUSION THAT A FOREIGN-MADE PRODUCT MAY NEVER BE RESOLD IN THE UNITED STATES WARRANTS REVIEW

When the Ninth Circuit concluded that the Copyright Act's first sale doctrine, 17 U.S.C. § 109(a), includes a place of manufacturing requirement, this Court determined the Ninth Circuit's holding warranted review. However, this Court split evenly, and affirmed the Ninth Circuit without discussion of the relevant rule. *Costco Wholesale Corp. v. Omega, S.A.*, 131 S. Ct. 565 (2010).

Now, with its opinion in *John Wiley & Sons, Inc. v. Kirtsaeng*, 654 F.3d 210 (2d Cir. 2011), the Second Circuit has presented this Court a critical new opportunity to resolve the uncertainty surrounding the first sale doctrine. Whereas the Ninth Circuit held

that a first sale in the United States would terminate a copyright owner's rights, the Second Circuit has held that the first sale doctrine applies "only to copies manufactured domestically." *Id.* at 221. The Second Circuit's holding thus implies that a foreign-manufactured copy will never be subject to the first-sale doctrine — even if that copy is imported into the United States and sold here with the copyright owner's permission. The Ninth Circuit's place of manufacturing rule portended significant negative policy consequences. *Omega S.A. v. Costco Wholesale Corp.*, 541 F.3d 982 (9th Cir. 2008). The Second Circuit's even more extreme rule, which strips away downstream resale rights, necessitates this Court's review.

II. A PLACE OF MANUFACTURING REQUIREMENT IS INCONSISTENT WITH THE TERMS, STRUCTURE, HISTORY, AND PURPOSES OF THE COPYRIGHT ACT

This Court's guidance is required to rectify the Second Circuit's conclusion that the first sale doctrine embodied in section 109(a) of the Copyright Act includes a place of manufacturing requirement that limits the first sale doctrine's application to goods manufactured in the United States. *John Wiley & Sons, Inc.*, 654 F.3d at 222. Section 109(a) provides in pertinent part:

> Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

17 U.S.C. § 109(a).

The Second Circuit reasoned that Congress's reference to copies "lawfully made under this title" can only be read to mean those copies "that are made in territories in which the Copyright Act is law, and not to foreign-manufactured works." *John Wiley & Sons, Inc.*, 654 F.3d at 222. But that reasoning is fundamentally flawed and would inject both significant textual anomalies and absurd consequences into the Act that Congress could not possibly have intended. This Court should grant the petition for certiorari and clarify the law as to Section 109(a) to resolve the division in the federal courts and prevent the drastic policy consequences that will result from the Second Circuit's rule.

A. "Lawfully Made Under This Title" Means Made According To Or In Conformance With The Copyright Act, Not Made In The United States

The Second Circuit's opinion calls out for this Court's review. The Second Circuit has unduly confined Section 109(a) by assigning the language "lawfully made under this title" the restrictive interpretation made in the United States. But that interpretation of the language cannot be correct.

The phrase "lawfully made under this title" is not expressly defined in the Copyright Act. Both by common usage and context, its most natural meaning is made according to, or in conformance with, the Copyright Act. *See* WEBSTER'S THIRD INT'L DICTIONARY 2487 (2002) (defining "under" as "in accordance with"). As the United States explained in its amicus brief in the *Quality King* case, "[t]he correct and more natural reading of the phrase 'lawfully made under this title' refers simply to any copy made with

the authorization of the copyright owner as required by Title 17, or otherwise authorized by specific provisions of Title 17." Br. of United States as *Amicus Curiae*, filed in *Quality King*, at 30 n.18 (No. 96-1470).

In other words, copies are subject to the first sale doctrine if they were made consistent with the terms of the Copyright Act, which includes copies made by or with the consent of the United States copyright holder or otherwise authorized by the Act.

B. The Copyright Act Is Structured Without Regard To Place Of Manufacturing

Reading Section 109(a) unlimited by place of manufacturing best accords with other provisions of the Copyright Act. As this Court has long recognized, "[s]tatutory construction . . . is a holistic endeavor." *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (internal citations omitted).

Section 106 of the Copyright Act, which defines the rights afforded a copyright holder under United States law without regard to the place of manufacturing, counsels strongly against importing a place of manufacturing requirement into the first sale doctrine of Section 109(a). Section 106 provides in pertinent part:

> Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted works in copies or phonorecords; . . . (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or

> other transfer of ownership, or by rental, lease, or lending . . . .

17 U.S.C. § 106(1) & (3). Reading section 109(a) with section 106, "made under this title" means made in conformance with the Copyright Act.

Tellingly, Congress has used the exact phrase "lawfully made under this title" in two additional provisions of Title 17. Only a straightforward reading of the phrase, unrestricted by place of manufacturing, permits a consistent, coherent construction of the title.

The Audio Home Recording Act ("AHRA") provides that royalty payments "shall . . . be distributed" to certain "interested copyright part[ies]," including, *inter alia*, "the owner of the exclusive rights under section 106(1) of this title to reproduce a sound recording of a musical work that has been embodied in a digital musical recording or analog musical recording *lawfully made under this title* that has been *distributed*." 17 U.S.C. § 1001(7) (emphasis added). The term "distribute" is limited specifically to distribution "in the United States." 17 U.S.C. § 1001(6). Thus, Congress used the concept of "in the United States" and "lawfully made under this title" distinctly — and did so in the same sentence. Additionally, if the phrase "lawfully made under this title" were given the Second Circuit's meaning, royalties would never be distributed for recordings manufactured abroad.

Similarly, Section 110 provides that the "performance or display" of a copy for educational use is not an infringement of copyright unless the copy "was not lawfully made under this title." 17 U.S.C. § 110(1). The only logical interpretation of this provision is that Congress intended to dissuade teachers

from displaying infringing works or works otherwise not made in accordance with the Copyright Act. *See* H.R. Rep. No. 94-1476 (stating that the exception to the exemption for copies "not lawfully made under this title" "deals with the special problem of performances from *unlawfully-made copies*") (emphasis added). Congress could not have intended to limit social studies, music and art teachers' curricula only to works created in the United States. Surely teachers are not responsible for determining where works were created in order to prepare their courses. Congress could not have intended to expose our nation's teachers to liability for copyright infringement for introducing their students to genuine copyrighted works for artistic and educational purposes simply because works selected by the teacher were manufactured abroad.

Moreover, Congress was quite willing to structure protection under United States copyright law in explicit geographic terms. The Copyright Act devotes an entire section to "National Origin," discussing the nationality of authors, among other geographic considerations. 17 U.S.C. § 104. In section 104, the Copyright Act affords protection in expressly geographic terms by providing that a work may be "subject to protection under [Title 17]" based on the place of the work's first publication. However, section 104 does not provide for protection on the basis of place of manufacturing, nor does the section limit its protections on that ground. The absence of any reference to place of manufacturing in Congress's focused consideration of the relevance of the origin of a work weighs against reading a place of manufacturing limitation into the law.

As these other provisions of the Copyright Act make clear, the first sale doctrine of Section 109(a) is

applicable to goods embodying copyrighted works that are imported into and sold in the United States, regardless of their place of manufacture. As this Court concluded in *Quality King*, neither section 109(a) nor earlier codifications of the first sale doctrine were intended by Congress to "limit [the first sale doctrine's] broad scope." *Quality King*, 523 U.S. at 152. This Court should grant the petition for certiorari and prevent the Second Circuit from reading such a place of manufacturing requirement into section 109(a).

C. At The Time Congress Adopted Section 109(a) It Removed A Longstanding Place Of Manufacturing Provision From The Copyright Act

The petition for certiorari warrants this Court's review because the Second Circuit's interpretation of Section 109(a) is at odds with evident congressional intent. Had Congress intended to limit application of the first sale doctrine to copies made "within the United States," Congress would have said so. Indeed, at the same time it adopted Section 109(a), Congress began phasing out a longstanding place of manufacturing requirement from the Copyright Act.

Section 601(a) of the Act, the so-called "manufacturing clause," provided: "Prior to July 1, 1986,[2] . . . the importation into or public distribution in the United States of copies of a work consisting preponderantly of nondramatic literary material that is in the English language and is protected *under this title* is prohibited *unless the portions consisting of such material have been manufactured in the United*

[2] See Public Law 97-215, 96 Stat. 178 (1982) (substituting "1986" or "1982").

States or Canada." 17 U.S.C. § 601(a) (emphasis added). Thus, not only was Congress generally capable of specifying the relevance of an activity's occurrence "in the United States," Congress expressly specified the relevance of manufacturing in the United States in the Copyright Act. *See Sebastian Int'l Inc. v. Consumer Contacts (PTY) Ltd.*, 847 F.2d 1093, 1098 n.1 (3d Cir. 1988) ("When Congress considered the place of manufacture to be important, as it did in the manufacturing requirement of section 601(a), the statutory language clearly expresses that concern.").

In stark contrast, Congress did not include such a place of manufacturing requirement in section 109(a). When Congress includes language in one section of an Act and excludes that language from another, "Congress' silence" in the latter section "speaks volumes." *United States v. Shabani*, 513 U.S. 10, 14 (1994).

Moreover, Congress's handling of Section 601(a)'s express manufacturing requirement demonstrates the absurdity of the Second Circuit's construction of Section 109(a). That express manufacturing requirement *protected* U.S. publishers from foreign competition. It first "came into the copyright law as a compromise in 1891." H.R. Rep. No. 94-1476. As codified in the 1909 Act, the "manufacturing clause" required "[t]hat in the case of the book the copies so deposited shall be accompanied by an affidavit . . . duly made by the person claiming copyright . . . setting forth that the copies deposited have been printed from type set within the limits of the United States or from plates made within the limits of the United States from type set therein . . . ." Act of Mar. 4, 1909 § 16, 35 Stat. 1080-1081 (1909). This place of manufacturing requirement was intended to

protect "American typographers and bookbinders against foreign competition." 2 NIMMER ON COPYRIGHT § 7.22.

However, "the manufacturing clause exemplifie[d] short-sighted and parochial tendencies that [proved] destructive of the best interests of both copyright creators and users." *Id.* Accordingly, in the 1976 Copyright Act, Congress chose to phase out the place of manufacturing requirement. *See* 17 U.S.C. § 601 (stating that the manufacturing clause would remain in effect until July 1, 1986).

The legislative history of the Copyright Act demonstrates that Congress carefully considered place of manufacturing requirements and found such requirements wanting. Congress concluded that "[t]he manufacturing clause *violates the basic principle that an author's rights should not be dependent on the circumstances of manufacture*." H.R. Rep. No. 94-1476 (emphasis added). Congress was concerned that authors were held "hostage" by the manufacturing requirement, which "unfairly discriminate[d] between American authors and other authors." *Id.* Additionally, Congress emphasized the need to "eliminate the tangle of procedural requirements . . . burdening . . . the United States Customs Service." *Id.*; *see also* Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 877 (1987) ("The Copyright Office, the Justice Department, the State Department, and the Commerce Department all opposed the manufacturing clause.").

Congress concluded that "there is no justification on principle for a manufacturing requirement in the copyright statute, and although there may have been some economic justification for it at one time, that

justification no longer exists." H.R. Rep. 94-1476. That is not to say that Congress considered the economic concerns of the U.S. printing industry irrelevant. Quite the opposite. Because Congress "recognize[d] that immediate repeal of the manufacturing requirement might have damaging effects in some segment of the U.S. printing industry," Congress chose to phase out the manufacturing requirement through the use of a sunset provision. *Id.*

The abrogation of the manufacturing clause makes clear that Congress in 1976 intended to remove place of manufacture as a relevant factor in the determination of whether the distribution of goods embodying copyrighted works within the United States violates the Copyright Act. It defies reason that Congress would at the same time, in the same Act, insert by mere implication and without comment a "reverse manufacturing clause" that greatly re-tilts the playing field, this time to the benefit of *foreign* publishers and manufacturers at the expense of their domestic counterparts, by creating a strong incentive to manufacture copies abroad. Rather, by phasing out the pro-domestic publishing manufacturing clause, Congress meant to eliminate the discriminatory impact that previously flowed from copyright's focus on place of manufacture.

"Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987). It is therefore incongruous, to say the least, for the Second Circuit to impose a place of manufacturing limitation on Section 109, when, at the time Congress drafted and enacted Section 109, it simultaneously excised a longstanding place of manufacturing re-

quirement from our copyright law. Thus, this Court should grant the petition for certiorari to clarify that no such place of manufacturing requirement operates to limit the first sale doctrine.

III. EXEMPTING GOODS MANUFACTURED ABROAD FROM THE FIRST SALE DOCTRINE WOULD BE DETRIMENTAL TO THE UNITED STATES ECONOMY

Reading section 109(a) to impose a place of manufacturing requirement on the first sale doctrine would negatively impact commerce in the United States. A place of manufacturing requirement will create incentives for off-shore manufacturing, stifle secondary markets, stifle e-commerce, and harm small businesses, further depressing the job market in the United States. Copyright protection is enshrined in our Constitution "[t]o promote the progress of science and useful arts," not to permit manufacturers to price discriminate and manipulate markets to the detriment of consumers. U.S. CONST. art. 1 § 8. These public policy concerns weigh strongly in favor of this Court's review of the Second Circuit's reading of section 109(a).

A. Imposing A Place Of Manufacturing Requirement On The First Sale Doctrine Infringes Consumers' Rights to Redistribute Goods

Producers of consumer goods have "waged a full-scale battle in legislative, executive, and administrative fora" for regulations that would grant them power to control the downstream importation of secondary market goods into the United States. *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 295-96 (1988) (Brennan, J., concurring in part and dissenting in part). "Having lost in other fields of law, manufac-

turers are now realizing that copyright may furnish a supplemental vehicle for protection." 2 NIMMER ON COPYRIGHT § 8.11[B][4] (2009). As a result, copyright owners who have already been compensated for these goods are now attempting to use copyright law to hamper the ability of consumers and resellers to re-distribute goods and comparison shop from different vendors.

The Second Circuit's opinion will encourage producers to use copyright to control downstream sales of goods in the United States. In so doing, the Second Circuit permits companies to use copyright law like a "weapon against gray market goods." Donna K. Hintz, *Battling Gray Market Goods with Copyright Law*, 57 ALB. L. REV. 1187, 1191 (1994). Reducing consumer rights in this dramatic way is inconsistent with the purposes of copyright law. Thus, the Second Circuit's rule warrants this Court's review.

B. The Second Circuit's Rule Will Stifle Secondary Markets

Exempting foreign consumer goods from the first sale doctrine could unsustainably burden secondary markets. "The essential trade in the Copyright Act is monopoly and policing: the grant of exclusivity comes with the duty to protect it. The Act does not grant the holder the windfall of both monopoly and reimbursement for its maintenance." *Sony Discos Inc. v. E.J.C. Family P'ship*, No. 4:02-cv-03729, 2010 WL 1270342, at *5 (S.D. Tex. Mar. 31, 2010). It is impossible for secondary market participants to identify each alleged copyrighted work and make a determination regarding its legal status. Moreover, secondary market participants lack means to determine where the goods were manufactured.

Imposition of such a substantial and unmanageable burden is likely to stifle commerce in the secondary market. This burden would translate into higher costs for consumers, increased unemployment, and risk for small businesses. Such a result in the current difficult economic environment would be particularly troubling. *See, e.g.*, U.S. Dept. of Labor, Bureau of Labor Statistics, News Release (Dec. 2, 2011) (stating that the unemployment rate was "8.6 percent in November"), *available at* http://www.bls.gov/news.release/pdf/empsit.pdf.

The Second Circuit's rule also could stifle commerce in the international secondary markets. Such a result would significantly impact the economy. The volume of commerce in the international secondary markets is substantial. In 2010 alone, the United States imported $6,401,858,000 of used or secondhand goods.[3] U.S. Census Bureau, U.S. Int'l Trade Statistics, Value of Exports, General Imports, and Imports by Country by 3-digit NAICS, *available at* http://censtats.census.gov/cgi-bin/naic3_6/naicMonth.pl. By October 2011, the United States had already imported an additional $5,637,301,000 worth of used or second-hand goods. *Id.* This market is of significant value to our economy and should be allowed to thrive. By granting the petition for certiorari, this Court will take a significant step toward protecting this valuable market.

C. The Second Circuit's Rule Will Stifle e-Commerce

E-commerce companies are exemplars of American innovation and ingenuity and make significant

[3] This statistic represents the customs value basis for general imports.

contributions to the United States' economy and job market. The Second Circuit's rule substantially threatens the increasingly important e-commerce sector of the economy, particularly secondary market e-commerce. International e-commerce is growing rapidly. In the third quarter of 2011, there were approximately $48.2 billion in retail e-commerce sales in the United States. U.S. Census Bureau, News, Quarterly Retail E-Commerce Sales 3rd Quarter 2011 (Nov. 17, 2011), *available at* http://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf. These third quarter sales represent a 13.7 percent increase from the third quarter of 2010, while total retail sales increased only 8.2 percent in the same period. *Id.* E-commerce also "benefit[s] consumers by helping them enjoy lower prices and more choices." Yannis Bakos, *The Emerging Landscape for Retail E-commerce*, 15 J. ECON. PERSPECTIVES 69, 78-79 (2001). No misinterpretation of copyright law should be allowed to hinder the growth of this market. This Court's grant of the petition for certiorari would be a significant step in the right direction.

D. The Second Circuit's Rule Will Harm Small Businesses

Likewise, small businesses would be particularly burdened by increased transaction costs. As the Ninth Circuit has recognized, without the first sale doctrine, "every little gift shop in America would be subject to copyright penalties for genuine goods purchased in good faith from American distributors, where unbeknownst to the gift shop proprietor, the copyright owner had attempted to arrange some different means of distribution several transactions back." *Disenos Artisticos E Industriales S.A. v. Costco Wholesale Corp.*, 97 F.3d 377, 380 (9th Cir.

1996). Imposing a place of manufacturing requirement on section 109(a) may well impose unsustainable costs on small businesses, which may translate into the loss of additional jobs. Small businesses that have weathered the economic downturn should not now be subjected to such risk.

E. The Second Circuit's Rule Will Further Depress The Job Market In The United States

If section 109(a) is interpreted to exempt foreign consumer goods from the first sale doctrine, goods stamped with copyrighted material and manufactured overseas will be afforded greater protection under the Copyright Act than goods manufactured domestically. This Court should not permit the Second Circuit's graft of a place of manufacturing requirement onto section 109(a) to stand without review because such a requirement creates incentives for off-shore manufacturing, striking yet another blow to the American worker.

When repealing the manufacturing requirement, Congress was sensitive to creating incentives for overseas manufacturing and creating a trade imbalance. Congress concluded that, "although there may have been some economic justification [for the manufacturing requirement] at some time, that justification no longer exists." H.R. Rep. 94-1476. Far from concluding that the economic consequences of its rule were irrelevant, Congress simply concluded that the economic justification no longer existed in the context of book publishing. Given Congress's sensitivity to trade imbalances and economic concerns, Congress could not have intended an interpretation of section 109(a) that would exacerbate trade imbalances and motivate overseas manufacturing.

"The loss of well-paying manufacturing jobs has harmed the U.S. economy. Declines in manufacturing employment reduce over-all consumer demand in the United States and limit the economy's potential for expansion." Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Buyers' Competitive Conduct*, 56 HASTINGS L.J. 1121, 1123-24 n.10 (2005) (citations omitted). Manufacturing employment in the United States is under stress and has "changed little over the month [of November 2011] and has remained essentially unchanged since July." U.S. Dept. of Labor, Bureau of Labor Statistics, Econ. News Release, *Employment Situation Summary*, (Dec. 2, 2011), *available at* http://www.bls.gov/news.release/empsit.nr0.htm. The manufacturing sector should not be hindered by a strained interpretation of section 109(a) that motivates additional offshore manufacturing.

The imposition of a place of manufacturing requirement on section 109(a) would also likely lead to job losses in the secondary market. As increased transaction costs may curtail trade, importers and resellers may face a diminishing market and concomitant job loss.

The United States already faces an overall trade deficit in goods and services. In October 2011, the United States trade deficit for goods and services was $43.5 billion. U.S. Census Bureau, U.S. Bureau of Econ. Analysis News, *U.S. Int'l Trade in Goods and Services October 2011* (Dec. 9, 2011), *available at* http://www.bea.gov/newsreleases/international/trade/tradnewsrelease.htm. The United States' trade deficit for goods was $58.8 billion. *Id*. If this Court declines to review the Second Circuit's interpretation of section 109(a), which will afford greater protections to foreign goods, an even greater per-

centage of such goods will likely be produced overseas.

F. The United States Agrees That A Place Of Manufacturing Requirement Will Have "Adverse Policy Consequences"

The United States agrees that "the court of appeals' reasoning could result in adverse policy consequences, particularly if carried to its logical extreme." United States Br. on Pet. for Certiorari, filed in *Costco Wholesale Corp. v. Omega*, 131 S. Ct. 565 (2010), at 5. The United States recognizes that "[t]he potential implications of excluding foreign-made copies of a copyrighted work from Section 109(a)'s coverage are indeed troubling." *Id.* at 18. In fact, the United States identified "higher unemployment," "encourag[ing] companies to move manufacturing overseas," and the hesitation of downstream retailers "to sell a variety of products for fear that the sale could be deemed infringing" as "legitimate concerns." *Id.* at 17-18.

Yet, in its amicus brief on petition for certiorari in *Costco*, the United States argued that this Court should not concern itself with these "legitimate concerns" because "some of the potential adverse policy effects . . . are a direct . . . consequence of Congress's decision in 1976 to expand Section 602's ban on unauthorized importation beyond piratical copies [which] segment[ed] domestic and foreign markets." *Id*. at 18. This argument missed the mark. That Congress allowed for the segmentation of domestic and foreign markets to some degree is hardly evidence that Congress intended the exacerbated market segmentation that would follow from exempting foreign manufactured items from the first sale doctrine.

"The whole point of the first sale doctrine is that once the copyright owner places a copyrighted item in the stream of commerce by selling it, he has exhausted his exclusive statutory right to control its distribution." *Quality King*, 523 U.S. at 152. The Second Circuit's interpretation of the first sale doctrine, which discriminates between domestic and foreign copies, warrants this Court's review. Regardless of the place of manufacturing, once a copyright owner had sold his property, he has exhausted his exclusive statutory right to control its distribution. The Second Circuit's holding is to the contrary, does not conform with the copyright act, and will precipitate a host of adverse policy results.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari and reverse the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted.

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