

No. 11-697

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IN THE  
**Supreme Court of the United States**

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SUPAP KIRTSANG, D/B/A BLUECHRISTINE99,

*Petitioner,*

*v.*

JOHN WILEY & SONS, INC.,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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**BRIEF OF *AMICUS CURIAE*  
PROFESSOR HUGH C. HANSEN  
IN SUPPORT OF RESPONDENT**

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## INTEREST OF AMICUS CURIAE<sup>1</sup>

*Amicus* is a professor of law who has been teaching, researching and writing on intellectual property law subjects at the Fordham University School of Law for over thirty years. He is the founder and director of the Fordham Intellectual Property Law Institute and the Fordham Annual Conference on Intellectual Property Law and Policy, now in its twenty-first year. *Amicus* has an interest in assisting the Court by discussing the policy and historical contexts of the case.<sup>2</sup>

## SUMMARY OF ARGUMENT

I. The first sale doctrine does not apply to first sales outside of the United States. From its statutory-construction origin in this Court until the Copyright Act of 1976, there has been no indication in legislative history, case law or contemporaneous legal literature that the doctrine was or should be applied to foreign first sales. The term “international exhaustion” was coined because of the need to name a doctrine that did apply to foreign first sales. It would be superfluous if the first sale

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<sup>1</sup> The parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus* or his counsel, made a monetary contribution to the preparation or submission of this brief.

<sup>2</sup> *Amicus* files this brief in his individual capacity, and not as a representative of the Fordham University School of Law.

doctrine also applied to such sales. The doctrine originated from this Court's construction of a copyright owner's U.S. right to "vend." This origin dictated that it would not apply to foreign sales where there was no right to vend, but a common-law approach would produce the same result. The doctrine was not meant to deprive the copyright owner of the initial proceeds of a sale in the U.S. It was meant to allow for the free alienation of property after that first sale.

II. *Amici Curiae* in support of Petitioner are rightly concerned about possible adverse effects of the Court's ruling on Section 602(a). But their fears are unwarranted. For instance, the possibility of having goods in their possession which violate an import prohibition has existed continuously since 1790. Sometimes they were as many as three in place at the same time. Moreover, the same fears that these prohibitions trigger can be equally or more greatly triggered by other laws such as money laundering, counterfeiting or even just criminal laws. In fact, even copyright law or property laws could trigger them. The fact that these other laws do not trigger them should reassure *Amici* that they need not worry about § 602(a). In any case, § 602(a) has been in effect and enforced consistently as an import restriction by the courts for over 30 years. Fears based upon hypothetical problems with regard to it should not cause concern when they have not come to

pass for 30 years, let alone for the last hundred years of U.S. import restrictions.

**III.** The intent behind Congress' passage of 17 U.S.C. § 602(a) was to prevent unauthorized importation of copies of copyrighted works first sold or licensed abroad. Section 109(a) was not intended to negate that protection. The rules of statutory interpretation are important and useful and lead to the above conclusion. But sometimes they make it difficult to see the forest for the trees. It might be helpful to look at other aspects of the picture. Congress in enacting the Copyright Act of 1976 was proactive in expanding copyright protection. The legislative history shows no conflict about the purpose of § 602(a). The subsequent years show that the courts easily adopted the rule that § 602(a) prohibits imports of copies first sold abroad and that § 109(a) does not apply to sales outside the United States. Finally, Congress, which amended the Act over 50 times, never considered amending § 602(a) on the basis that the courts had gotten Congress' intent wrong.

**IV.** Petitioner's position in this matter is anticompetitive and at odds with antitrust policy. In antitrust terminology, an import ban such as that found in 17 U.S.C. § 602(a) is a vertical restraint – a territorial vertical restraint. It restricts buyers of the copyrighted products abroad from selling inside the U.S. without the copyright owner's permission.

Such restrictions favor interbrand competition but may limit intrabrand competition.

At one time this Court treated such vertical territorial restrictions as per se illegal. Since 1977 the Court has applied the rule of reason largely because “[v]ertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products. These ‘redeeming virtues’ are implicit in every decision sustaining vertical restrictions under the rule of reason.”

Because of the benefits to competition, most of the rule-of-reason decisions have found nonprice vertical restraints legal under the Sherman Act. Whatever one thinks about some vertical restraints, such as resale price maintenance, there is little doubt that territorial vertical restraints are pro-competitive.

In effect, Petitioner is asking this Court to declare the territorial vertical restraint in § 602(a) per se illegal. This would adversely affect many U.S. businesses that sell overseas and limit interbrand competition.

## **ARGUMENT**

### **I. THE FIRST SALE DOCTRINE DOES NOT APPLY TO SALES OUTSIDE THE UNITED STATES.**

The first sale doctrine derived not from the common law, but from statutory construction by this

Court of the "the sole right of vending the [work]" under U.S. copyright law.<sup>3</sup> While the Court was not oblivious to the common law and mentioned common law copyright, the common law was not the basis for the Court's approach to "vend." It chose instead to apply traditional statutory interpretation. It stated:

To add to the right of exclusive sale the authority to control all future retail sales, by a notice that such sales must be made at a fixed sum, would give a right not included in the terms of the statute, and, in our view, extend its operation, by construction, beyond its meaning, when interpreted with a view to ascertaining the legislative intent in its enactment.<sup>4</sup>

The statutory origin of the first sale doctrine also helps to explain why it did not apply to sales outside the United States. A copyright owner had no right to vend outside of the U.S. *See* discussion of "territoriality" in § 2, *infra*. So a lawyer, judge or legislator would not naturally conclude that a construction of "vend" would apply to sales outside the United States.

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<sup>3</sup> *See* *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 349 (1908) ("What does the statute mean in granting 'the sole right of vending the same?'").

<sup>4</sup> *Id.* at 351.

Even a common-law created first sale doctrine would not apply to sales outside of the United States. As a doctrinal matter, copyright owners selling abroad under foreign law would not exhaust their right to vend under U.S. law.

As a matter of policy, excluding sales outside of the United States also makes sense. The doctrine was not meant to deprive the copyright owner of the initial proceeds of a sale in the U.S. It was meant to allow for the free alienation of property after that first sale.<sup>5</sup>

The term “international exhaustion”<sup>6</sup> was coined because of the need to name a doctrine that did apply

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<sup>5</sup> See R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577, 580 (2003) (“This first sale doctrine has generally been viewed as a recognition in copyright of the law’s historic disfavor of restraints on the alienation of personal property.”).

<sup>6</sup> Frederick M. Abbot, *Parallel Importation: Economic and Social Welfare Dimensions*, International Institute for Sustainable Development, p.5 (2007).

There are three distinct geographic concepts of exhaustion and parallel importation: national, regional and international. Under a “national” exhaustion policy, the IP holder’s right to exclude is only extinguished when the good or service is put onto the market in the national territory. There are no “parallel imports” permitted. Under a “regional” exhaustion policy, the IP holder’s right is extinguished when a good or service is put onto the market within any country of a defined region, such as the European Union. “Parallel imports” are permitted, but only with respect to goods first

to foreign first sales. It would be superfluous if the first sale doctrine also applied to such sales.

In the EU, “Community” exhaustion does not encompass sales outside the EU. The EU has Community exhaustion but not international exhaustion. See *Silhouette International Schmied GmbH & Co. KG v. Hartlauer Handelsgesellschaft mbH*, C-355/96, [1981] E.C.R. 1-4799, [1988] 2 C.M.L.R. 953.

At the time of the Copyright Act of 1976, no one thought that the first sale doctrine applied to sales outside of the U.S. This might explain why Petitioner and *Amici* in support do not cite any case, article or legislative history contemporaneous with or prior to the 1976 Copyright Act that states their view that the first sale doctrine applies to sales outside the U.S.

## **II. THERE HAVE BEEN CONTINUOUS STATUTORY AND NON-STATUTORY IMPORT PROHIBITIONS SINCE 1790 WITHOUT PRODUCING THE HARMS**

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placed on the market within the regional territory. Under an “international” exhaustion policy, the IPR holder’s right is extinguished when a good or service is put onto the market anywhere in the world. “Parallel imports” are permitted with respect to goods or services lawfully first placed on the market anywhere in the world.

**CLAIMED BY PETITIONER AND *AMICI CURIAE*.**

Petitioner and *Amici* in support set forth a plethora of possible harms that will result if the Court does not reverse the Second Circuit's decision. Yet ironically, the environment that they predict has been in place for many years, and it is one in which people and organizations like them have been living in without apparent negative consequences.

Section 602(a) of the Copyright Act of 1976 is not a departure from past law prohibiting importation of copies of copyrighted works. Rather, it represents what has been the normal environment for those who seek to import without authorization. Statutory restrictions and the principle of territoriality have long been in place to achieve at least the same results as § 602(a).

A. Statutory importation restrictions

There were statutory import restrictions in the Statute of Anne,<sup>7</sup> the U.S. Copyright Act of 1790,<sup>8</sup>

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<sup>7</sup> Statute of Anne (Act for the Encouragement of Learning), § 2, 8 Ann., c. 19, (1710) (Gr. Brit.):

That if any other bookseller, printer or other person whatsoever, from and after the tenth day of April, one thousand seven hundred and ten, within the times granted and limited by this act, as aforesaid, shall . . . import, or cause to be . . . imported, any such book or books, without the consent of the proprietor or

and the Copyright Act of 1909.<sup>9</sup> At every point since 1790 there has been some form of comparable statutory restriction in place and for a period of years around 1900 and 1976, two such restrictions overlapped.

The restrictions in the Statute of Anne and the Copyright Act of 1790 were strong and would have barred Petitioner and his business from operating in Great Britain and the U.S. The Copyright Act of 1909 did not have a “complete” prohibition against importing copies of a protected work. It prohibited “piratical” copies of books and periodicals but not others that were authorized to be sold abroad by the copyright owner.

However, there was a non-copyright prohibition against importation, the so-called “manufacturing

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proprietors thereof . . . then such offender or offenders shall forfeit such [and be subject to statutory damages].

<sup>8</sup> Copyright Act of 1790, § 2, 1 Stat. 24:

[I]f any other person or persons [than the copyright owner] . . . shall . . . import, or cause to be . . . imported from any foreign Kingdom or State, any copy or copies of such map, chart, book or books, without the consent of the author or proprietor thereof . . . or knowing the same to be so . . . imported, shall publish, sell, or expose to sale, or cause to be published, sold or exposed to sale . . . [shall forfeit and be liable for statutory damages].

<sup>9</sup> Copyright Act of 1909, §§ 30, 31, Pub. L. No. 60-349, 35 Stat. 1075 (repealed 1976).

clause,” that prohibited importation of books and periodicals in English that were not printed and manufactured in the United States. This was introduced in 1891,<sup>10</sup> when the U.S. first provided copyright protection for foreign works, and was carried over into the Copyright Act of 1909.<sup>11</sup>

The bar on the importation of works manufactured abroad was not enforced by copyright owners, but rather by the Customs Service at the behest of the U.S. printing industry. It thus was capable of being a much more “complete” bar to importation than “classic” import restrictions in the Statute of Anne and the Copyright Act of 1790. Yet, even though the manufacturing clause hindered U.S. authors’ ability to use foreign publishers for both domestic and foreign markets, the benefits to the printing industry carried the day in Congress and the clause survived until 1986. While the clause was somewhat watered down in 1954 and was

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<sup>10</sup> Act of Mar. 3, 1891, ch. 565, § 4956, 26 Stat. 1106, 1107. For further information on the history of the manufacturing clause, see Annette V. Tucker, *The Validity of the Manufacturing Clause of the United States Copyright Code As Challenged by Trade Partners and Copyright Owners*, 18 VAND. J. TRANSNAT’L L. 577, 580-82 (1985).

<sup>11</sup> Copyright Act of 1909, § 15, Pub. L. No. 60-349, 35 Stat. 1075 (repealed 1976).

significantly so by 1986, the negative effects on importation were still significant.<sup>12</sup>

Under the various manifestations of the manufacturing clause from 1891 through 1986, there was little or no opportunity to legally import books for normal industry distribution, let alone for arbitrage. In short, because the effective blocking mechanism of the printing industry and the Customs Service, the situation is significantly more favorable for importers under the Second Circuit's interpretation of § 602(a) and copyright owner enforcement than it had been for over 90 years.

B. Territoriality and infringement actions against importers.

Intellectual property law, including copyright law, is territorial in nature.<sup>13</sup> There are no international copyrights, patents or trademarks. A work is protected only to the extent that it is

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<sup>12</sup> *Amending the Requirements of the Manufacturing Clause of the Copyright Law: Hearing on S. 1822 Before the S. Comm. on Finance*, 99th Cong. 15-16 (1986) (description of S. 1822 by committee staff). Then the "European Communities (EC)" estimated its trade loss due to the manufacturing clause at between \$300-\$500 million. *Id.* at 19.

<sup>13</sup> See P. Goldstein, *Copyright* § 16.0, pp. 16:1-16-2 (2d ed.1998) ("Copyright protection is territorial. The rights granted by the United States Copyright Act extend no farther than the nation's borders.")

protected by the laws of the country in which protection is sought.<sup>14</sup>

Thus, a nation's intellectual property laws have no effect outside of that country. An IP owner may bring an infringement action against an importer whose importation has not been authorized for that country. If copies of a work are sold in Thailand, this does not mean that those copies can be imported into the United States.

This Court recognized this regime as early as 1890 with regard to patents.<sup>15</sup> *See Boesch v. Graff*, 133 U.S. 697, 703 (“The right which [the German seller] had to make and sell the burners in Germany was allowed him under the laws of that country, and purchasers from him could not be thereby authorized to sell the articles in the United States in defiance of the rights or patentees under a United States patent”). Justice Holmes applied the rule in *Boesch* to trademarks. *A Bourjois & Co. v. Katzel*, 260 U.S. 689, 692 (1923) (“Ownership of the goods does not . . . necessarily carry the right to sell them at all in a given place. If the goods were patented in the United

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<sup>14</sup> *See* Andreas P. Reindl, *Choosing Law in Cyberspace: Copyright Conflicts on Global Networks*, 19 MICH. J. INT'L L. 799, 804 (“[P]rotection of a copyrighted work exists independently in each country according to that country's grant of rights; protection under one country's copyright laws does not automatically result in the same protection outside that country's territory.”).

States a dealer who lawfully bought similar goods abroad from one who had a right to make and sell them there could not sell them in the United States.”).

This principle of territoriality is recognized worldwide. The Berne Convention provides that copyright protection “shall be governed exclusively by the laws of the country where protection is claimed.” Berne Convention for the Protection of Literary and Artistic Works, Art. 5(2) (1886).

Thus, even if § 602(a) did not exist, Respondent could still have sued the Petitioner for infringement.

C. The threat of hypothetical harms to *Amici Curiae* in support of Petitioner has always existed.

These *Amici* are leaders in our copyright, business and cultural communities and have made significant contributions to them. Their fears are sincere. Moreover, it is the duty of their lawyers to examine and advise on possible adverse consequences. But these fears are unnecessary. There have always been legal threats and uncertainties of the kind that concern *Amici* now and so far they apparently have not come to fruition.

There were at least two sources of hypothetical legal threats at all times in the copyright environment: (1) books (and later other copies of copyrighted works) could have slipped through an import prohibition (either copyright or

manufacturing clause); and (2) copies of copyrighted works brought into this country without authorization could have been the subject of an infringement action under the principles of territoriality. And willful infringement could be the subject of a criminal action. Sometimes there were three legal sources of concern when the copyright prohibition and the manufacturing clause overlapped around the 1890s and for eight years after the Copyright Act of 1976 took effect in 1978.

There are other laws that can produce the same anxiety: anti-counterfeiting, money laundering and criminal law, for instance. For that matter copyright law, itself, could produce similar uncertainties and even property law could do so.

Moreover, § 602(a) itself has been in effect and enforced in the manner the Second Circuit determined to be appropriate for over 30 years. Hypothetical problems should not cause concern when they have not come to pass for 30 years, let alone for the last hundred years of U.S. import restrictions.

### **III. CONGRESSIONAL INTENT WITH REGARD TO § 602(A) IS CLEAR.**

Rules of statutory interpretation are necessary and helpful. For reasons stated in Respondent's brief, pp. 14-35, these rules correctly lead to the conclusion that § 602(a) does prevent unauthorized importations of copies of works manufactured and

sold abroad by the copyright owner, and § 109(a) does not impede the copyright owners' ability to do so.

Sometimes, however, rules of statutory interpretation rules can lead to a situation where one gets so deeply involved with individual words and phrases that it is difficult to see the forest for the trees. To prevent this, it might be helpful to look at other aspects of the picture.

Congress. The Congress that enacted § 602 did not have doubts about the value of copyright nor was it seeking ways to cut back its protection. In the Copyright Act of 1976 it increased and expanded protection in subject matter and rights by adding pantomimes and choreographic works to the subject matter of copyright, 17 U.S.C. § 102(b), and “public display” to rights, 17 U.S.C. § 106. It created “divisibility of copyright ownership”, 17 U.S.C. § 201(d) (“transfer of ownership”), which greatly increased the value of copyrights and their efficient exploitation. It created the legal fiction of “fixation” for live broadcasts, giving them federal copyright protection for the first time. 17 U.S.C. § 101 (“fixation”). It increased the amount of statutory damages. 17 U.S.C. § 504. It also extended the term of copyright from 28 years plus a renewal for an additional 28 to a certain term of life plus 50 years. 17 U.S.C. § 304.

Also, as in the past these increases and additions did not just apply prospectively but rather they applied to all works currently under copyright protection. Moreover, Barbara Ringer, the Register of Copyrights, stated that in the end the law came “down on the authors' and creators' side in almost every instance.” *Righting Copyright*, TIME, Nov. 1, 1976, at 92.

Legislative history. The House Report, which is the authoritative congressional report,<sup>16</sup> states “Section 109(a) restates and confirms the principle[s] [of the first sale doctrine] . . . established by the court decisions and section 27 of the [1909 Act].” H. R. No. 94-1476, 79 (1976). Thus, there was no attempt to change the first sale doctrine as it existed, enlarge it or internationalize it. There is no mention of § 109(a) as relating to foreign sales or as having any effect on copies imported into the United States. There is no mention that § 109(a) was in any way connected to § 602(a).

The Report also indicates some congressional support for copyright owners with regard to § 109(a). It disagreed with a recent district court decision holding that a copyright owner had the burden of establishing that the allegedly infringing copies in the defendant’s possession were not derived from a first sale. *American International Pictures, Inc. v.*

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<sup>16</sup> The House took the laboring oar in the revision of the Copyright Act and its report is more complete. The Senate Report does not conflict with the House Report.

*Foreman*, 400 F. Supp. 928, 933-34 (S.D. Ala. 1975). It stated: the “Committee believes that the court’s decision, if followed, would place a virtually impossible burden on copyright owners.” It concluded:

It is the intent of the Committee, therefore, that in an action to determine whether a defendant is entitled to the privilege established by section 109 (a) and (b), the burden of proving whether a particular copy was lawfully made or acquired should rest on the defendant.

House Report at 80-81.

For Section 602, the House Report states:

[This section] deals with two separate situations: importation of “piratical” articles (that is, copies or phonorecords made without any authorization of the copyright owner), and unauthorized importation of copies or phonorecords that were lawfully made. The general approach of section 602 is to make unauthorized importation an act of infringement in both cases, but to permit the United States Customs Service to prohibit importation only of “piratical” articles.

*Id.* at 169.

Later it adds:

The second situation covered by section 602 is that where the copies or phonorecords were lawfully made but their distribution in the United States would infringe the U.S. copyright owner's exclusive rights. As already said, the mere act of importation in this situation would constitute an act of infringement and could be enjoined.

*Id.* at 170.

Thus, the intent of Congress is very straightforward. It does not appear that the Committee was aware of any problems with proving infringement, i.e., the minefield that Petitioner says exists for the copyright owners. This section on § 602 does not make any mention of § 109(a).

Subsequent events.

For the over 30 years of post-enactment litigation that involved § 602, courts have also been unaware of statutory interpretation difficulties on the issue of infringement. They have consistently found infringements and rejected defenses involving 109(a) when the copies of copyrighted works were manufactured and sold outside the United States. *See, e.g., Pearson Educ. Inc. v Liao*, 2008 WL2073491 \*3 (S.D.N.Y. 2008); *Swatch S.A. v. New City, Inc.*, 454 F. Supp.2d 1245, 1254-55 (S.D. Fla. 2006); *BMG*

*Music v. Perez*, 952 F.2d 318, 319 (9th Cir. 1991); *T.B. Harms Co. v. Jem Records, Inc.*, 655 F.Supp. 1575, 1583 (D.N.J. 1987); *Columbia Broad. Sys., Inc. v. Scorpio Music Distributions, Inc.*, 569 F.Supp. 47, 49 (D.Pa. 1983).

Not surprisingly, although Congress has amended the 1976 Act over 50 times, it has not sought to step in and change this consistent judicial interpretation.

#### **IV. PETITIONER'S POSITION ON § 602(A) IS ANTICOMPETITIVE AND AT ODDS WITH ANTITRUST POLICY.**

In antitrust terminology, an import ban such as that found in 17 U.S.C. § 602(a) is a vertical restraint – a territorial vertical restraint. It restricts buyers of the copyrighted products abroad from selling inside the U.S. without the copyright owner's permission. Such restrictions favor interbrand competition but may limit intrabrand competition.

Since *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), the Court has moved away from viewing vertical restraints as per se illegal and instead requires a rule of reason approach. Justice Powell in *GTE Sylvania*, writing for the Court, noted that “[v]ertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products.

These ‘redeeming virtues’ are implicit in every decision sustaining vertical restrictions under the rule of reason.”<sup>17</sup> Moreover, as Justice Ginsburg has stated, “[i]nterbrand competition, our opinions affirm, is the ‘primary concern of antitrust law.’” *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 180 (2006). Judge Posner has found that while there are theoretical reasons why vertical restraints have anticompetitive

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<sup>17</sup> Justice Powell went on to note:

Economists have identified a number of ways in which manufacturers can use such restrictions to compete more effectively. For example, new manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer. Established manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products. Service and repair are vital for many products, such as automobiles and major household appliances. The availability and quality of such services affect a manufacturer's goodwill and the competitiveness of his product. Because of market imperfections such as the so-called "free-rider" effect, these services might not be provided by retailers in a purely competitive situation, despite the fact that each retailer's benefit would be greater if all provided the services than if none did.

433 U.S. at 54-55.

consequences, they exist only in a small minority of cases. And even then, “there invariably are multiple possible economic reasons to justify a challenged practice.”<sup>18</sup>

Because of the benefits to competition, most of the rule-of-reason decisions have found nonprice vertical restraints legal under the Sherman Act.<sup>19</sup> Whatever one thinks about some vertical restraints, such as resale price maintenance, there is little doubt that territorial vertical restraints are pro-competitive.<sup>20</sup>

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<sup>18</sup> Richard A. Posner, “Vertical Restraints and Antitrust Policy,” 72 U. CHI. L. REV. 229, 241 (2005). Judge Posner adds: “Another reason to question the appropriateness of aggressive enforcement action against vertical restraints is that, as I have stressed, they are effective exclusionary practices only in situations of fragile monopoly. And in such situations market forces may work as fast as or faster than antitrust litigation to destroy monopoly.”

<sup>19</sup> See HERBERT HOVENKAMP, MARK D. JANIS, MARK A. LEMLEY, & CHRISTOPHER R. LESLIE, *IP & ANTITRUST* §24.2 (2010) (citations omitted) (“Since 1977, vertical nonprice restraints have been evaluated under the rule of reason, and nearly all of them have been approved. Such restraints are generally thought to be procompetitive because (1) they affect only the supplier’s own brand or product, and a supplier cannot generally profit by decreasing the competitiveness of its downstream resellers; and (2) the supplier has significant interests that can be addressed by such restraints.”).

<sup>20</sup> See Alan H. Silberman, *The Evolving Face of Vertical Restraints*, 1738 PLI/CORP 531 (2009).

While a reduction in intrabrand competition (and even total elimination of intrabrand competition) may result from a manufacturer's

Petitioner is, in effect, asking the court to declare the territorial, vertical restraint in § 602(a) per se illegal. This would adversely affect many businesses that sell overseas and limit interbrand competition.

### CONCLUSION

For the foregoing reasons, *amicus* respectfully urges the Court to affirm the decision of the Second Circuit.

**Respectfully submitted,**

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decision to employ a restricted distribution system -- as, for example, where each distributor has an exclusive area in which no other distributor is selected -- that result has not been characterized as an unreasonable restraint of trade.

*Id.* at 589.