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No. 08-1423

IN THE

Supreme Court of the United States

COSTCO WHOLESALE CORPORATION,

Petitioner,

v.

OMEGA, S.A.,

Respondent.

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

BRIEF *AMICI CURIAE* OF RETAIL INDUSTRY LEADERS ASSOCIATION, NATIONAL ASSOCIATION OF CHAIN DRUG STORES, AMAZON.COM, INC., GAMESTOP CORP., QUALITY KING DISTRIBUTORS, INC., SAM'S WEST, INC., AND TARGET CORPORATION, IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Under the Copyright Act's "first sale" doctrine, codified at 17 U.S.C. § 109(a), the owner of any particular copy "lawfully made under this title" may resell that good without authorization from or further obligation to the copyright holder. In *Quality King Distribs., Inc.* v. *L'anza Research Int'l, Inc.*, this Court addressed "whether the 'first sale' doctrine endorsed in § 109(a) is applicable to imported copies," and answered it in the affirmative. *Id.*, 523 U.S. 135, 138 (1998). In the decision below, the Ninth Circuit limited *Quality King* to its facts, and held that the first sale doctrine would not apply with respect to copies manufactured abroad and sold in the United States. The question presented here is:

Whether the Ninth Circuit correctly held that the requirement of Section 109(a) that the copy be "lawfully made under this title" excludes all copies made outside the United States, even if those copies were made by or with the authorization of the United States copyright owner?

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STATEMENT OF INTEREST[1]

Retail Industry Leaders Association ("RILA"), established in 1969 as the Mass Retailing Institute, represents the interests of retailers, product manufacturers, and service suppliers. Its 600 member companies include the largest and fastest growing companies in the retail industry, and account for more than $1.5 trillion in annual sales. RILA members provide millions of jobs and operate more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

The National Association of Chain Drug Stores ("NACDS") represents 154 traditional drug stores, supermarkets, and mass merchants with pharmacies – from regional chains with four stores to national companies. NACDS members also include more than 900 pharmacy and front-end suppliers, and over 70 international members from 24 countries. Chains operate 37,000 pharmacies, and employ more than 2.5 million employees. The total economic impact of all retail stores with pharmacies transcends their $815 billion in annual sales. Every $1 spent in these stores creates a ripple effect of $3.82 in other industries, for a total economic impact of $3.11 trillion, equal to 26 percent of GDP.

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1. The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their respective members, or their counsel made a monetary contribution to its preparation or submission.

Amazon.com, Inc. was incorporated in 1994, with its principal corporate offices located in Seattle, Washington. Amazon.com started selling books online in 1995, out of the belief that only the Internet could offer the convenience of browsing millions of book titles in a single sitting. Amazon.com also offers for sale via its websites in the United States and foreign countries a broad array of entertainment, electronic, and household products. Since 1999, when Amazon.com offered its e-commerce platform to other retailers and to individual sellers, hundreds of thousands of world-class retail brands and individuals have sold goods to tens of millions of customers through the Amazon.com e-commerce platform.

GameStop Corp. is the world's largest video game retailer, selling new and used video game software, hardware and accessories. The company operates over 6,200 stores in the United States and throughout the world. GameStop owns two successful e-commerce retail sites and the largest multi-platform video game publication in the United States. Headquartered in Grapevine, Texas, GameStop is a Delaware company traded on the New York Stock Exchange with over 45,000 employees.

Quality King Distributors, Inc. is a family-owned wholesale distributor of health, beauty and cosmetics products, located in Bellport, N.Y. Founded in 1961 in a storefront in Queens, New York, Quality King has become one of the country's largest wholesalers operating in the secondary market and one of the largest privately-held businesses in the tri-state area surrounding New York City. Quality King's customer

base includes most of the mass retail chains including drug store chains, mass discount chains, grocery chains and independent stores. Quality King ships to customers in all 48 of the contiguous states as well as the District of Columbia. Notably, Quality King was the petitioner in *Quality King Distribs., Inc.* v. *L'anza Research Int'l, Inc.*, 523 U.S. 135 (1998), in which the Court last had occasion to address the application of the first sale doctrine of the Copyright Act to imported goods incorporating ancillary copyrighted works.

Sam's West, Inc., doing business as Sam's Club, has its principal place of business in Bentonville, Arkansas, and is a division of Wal-Mart Stores, Inc. Sam's Club offers savings to its members (including small businesses and consumers) on products and services in categories including health, home, jewelry, outdoor, pharmacy, photo, toys and video in its Clubs and SamsClub.com. The first Sam's Club opened its doors in Midwest City, Oklahoma in 1983. Today, Sam's Club serves more than 47 million U.S. members with locations nationwide, and internationally in Brazil, China, Mexico and Puerto Rico. Sam's Club employs more than 100,000 people worldwide.

Target Corporation, headquartered in Minneapolis, Minnesota, is a leader in discount retailing, offering stylish merchandise at affordable prices. The first Target store opened in Roseville, Minnesota, in 1962, as the first mass market discount retail store opened by The Dayton Company – a company that traces its heritage back more than 115 years to the first stores opened in downtown Minneapolis by its founder, George Dayton. Today, Target operates approximately 1,700

stores in 49 states, and employs approximately 350,000 people nationwide. Through its website, Target.com, Target offers for sale and home delivery a wide variety of books, music, videos, household and health and beauty products.

The *amici* and their members exemplify wholesale and retail commerce in the 21st century. They include suppliers, importers, purchasers, and retailers that produce, buy, and resell domestic and imported consumable and durable goods to businesses and the public. They encompass the largest retailers in the United States and the world. These companies also include many of America's largest retailers of copies of copyrighted works such as books, DVDs, video games, and compact discs. They reach consumers through brick and mortar stores located in urban, suburban, and rural communities; and through the largest retail presence in cyberspace, they enable anyone to buy and sell goods online around the country and the world. In short, the *amici* and their members bring goods to consumers physically in every community, and virtually on any home computer.

Thus, the *amici* have an interest, directly as to themselves and indirectly on behalf of consumers, in maintaining robust interstate and international commerce guaranteed under the first sale doctrine of U.S. copyright law.

ARGUMENT

Commerce in copies of copyrighted works constitutes a substantial part of the United States economy and culture. Copyright protection has a far broader effect on commerce, in that copyright registrations also can cover mundane elements of designs or packaging ancillary to ordinary household goods. Robust commerce in copies of copyrighted works and such general merchandise depends on the confidence that retailers and consumers will be free from downstream restraints imposed by a copyright owner. That right is secured by the first sale doctrine.

The application of the first sale doctrine to imported goods and copies has taken on increasing importance over the last decades as the value of imported products sold in the United States continues to grow. The Court's decision in *Quality King Distribs., Inc. v. L'anza Research Int'l Inc.*, 523 U.S. 135 (1998) ("*Quality King*"), provided importers, distributors, and retailers welcome certainty that lawfully produced, non-piratical goods could be imported and resold in the United States under the correct interpretation of the first sale doctrine. And consumers benefited from lower prices and greater competition from sales of these lawfully-made imported goods.

The first sale doctrine thus ensures to businesses and individuals the right to acquire and resell goods produced by the copyright owner. The principles underlying the first sale doctrine are of vital interest to suppliers, retailers, and their customers. Those principles should apply regardless of whether the goods first were produced in the United States or imported from abroad.

The Ninth Circuit decision, *Omega S.A. v. Costco Wholesale Corp.*, 541 F.3d 982 (9th Cir. 2008) ("*Omega*"), renews troubling concerns as to the scope of first sale exemption from claims of copyright infringement against authentic goods — even goods produced by or under the authority of the United States copyright owner. It rewrites the first sale statute so as to limit its scope only to domestically-produced goods. Such an interpretation is neither required by nor consistent with the plain language of 17 U.S.C. § 109 or the principles of the first sale doctrine as articulated in *Quality King*. Moreover, it conflicts with sound copyright policy, to the detriment of American businesses and consumers that benefit from discount pricing of genuine parallel imported goods.

In support of the proper interpretation of the first sale doctrine by the Petitioner Costco, the *amici* submit this brief to inform the Court of the potentially destructive impact of *Omega* upon modern commerce by excluding foreign-made goods from the first sale doctrine, and to urge the Court to reverse the judgment of the appellate court.

I. Robust Commerce, Including Commerce In Imported Goods And Copies Of Copyrighted Works, Depends Upon The First Sale Doctrine.

In *Quality King*, this Court analyzed the interaction of Sections 106, 109, and 602 of the Copyright Act, and held the importation prohibitions of Section 602(a) are "simply inapplicable" to both domestic and foreign owners of lawfully-made copies imported for resale in the United States. *Id.*, 523 U.S. at 145. Upon the first

sale, even unauthorized resales do not infringe the copyright owner's exclusive right to distribute. *Id.* at 143. "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." *Id.* at 152.[2]

Quality King gave full force to the first sale doctrine, by placing lawful goods purchased by retailers and consumers beyond the reach of the copyright owner:

> After the first sale of a copyrighted item "lawfully made under this title," any subsequent purchaser, whether from a domestic or from a foreign reseller, is obviously an "owner" of that item. Read literally, § 109(a) unambiguously states that such an owner "is entitled, without the authority of a copyright owner, to sell" that item.

Id., 523 U.S. at 145.

Quality King, like *Omega*, analyzed first sale in the context of a "parallel importation" of goods. Generally, "parallel importation" is defined as the purchase in a foreign country of authentic consumer products for importation into and resale on the domestic market

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2. *Cf. Quanta Computer, Inc. v. LG Elecs., Inc.*, 128 S. Ct. 2109, 2115 (2008) ("[t]he longstanding doctrine of patent exhaustion provides that the initial authorized sale of a patented item terminates all patent rights to that item").

without the authorization of the brand owner.[3] More simply, parallel importation refers to "goods diverted from a brand owner's authorized sales channel."[4] Sometimes referred to as the "gray market," parallel importation is distinct from trafficking in counterfeit or stolen goods (*i.e.*, the "black market"). This common arbitrage practice enables retailers to sell genuine products at a discount, giving American consumers the benefit of advantageous pricing. Parallel importation also prevents manufacturers from maintaining price-driven market segmentation by propping up prices domestically and depressing prices in foreign markets, in favor of global equilibrium pricing. Moreover, the difference in pricing may have no relationship to the value of a reasonable royalty, such that effectuating price discrimination under Section 602 serves no policies properly cognizable under the Copyright Act.

By affirming the primacy of the first sale doctrine over the importation ban, the Court granted a crucial victory to commercial businesses and consumers alike. As shown below, narrowing the scope of the first sale doctrine, as *Omega* threatens to do, will create

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3. *Cf. K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 285 (1988) ("A gray-market good is a foreign-manufactured good, bearing a valid United States trademark, that is imported without the consent of the United States trademark holder"). In *Quality King*, the Court effectively revised that definition, within the context of copyright, to also include goods manufactured domestically but exported by the domestic copyright owner.

4. David R. Sugden, *Gray Markets: Prevention, Detection and Litigation* 4 (Oxford University Press 2009), *quoting* David M. Hopkins *et al.*, *Counterfeiting Exposed* 10 (2003).

impossible burdens upon retail commerce that potentially will cost businesses and consumers tens of billions of dollars annually.

A. The *Omega* Decision Potentially Affects Billions of Dollars of Domestic and International Commerce in Copyrighted Works and Non-copyrightable Goods.

Mass retailers attract customers by offering high quality goods at reasonable and discount prices. A substantial percentage of the products retailers offer for sale in the United States are produced and first sold abroad and imported. Many retailers purchase goods for resale from wholesale importers and distributors, who arbitrage goods to take advantage of lower foreign pricing. Retailers need confidence that genuine foreign-produced goods can be purchased and resold in U.S. commerce free from claims of copyright infringement.

To retailers and consumers, the first sale doctrine is the Magna Carta of property rights and open commerce in copies of copyrighted works.[5] The first sale doctrine enables distributors and retailers to purchase and resell genuine products acquired domestically or abroad without fear of copyright liability. A major part of the value proposition retailers offer the public is

5. The first sale doctrine plays an equally fundamental role in American cultural life. It permits the lending of copyrighted books, music, and video by public libraries, and the public display of works of art. *See* 17 U.S.C. § 109(a), (c). Bequests to museums or resale of fine art such as paintings, prints, sculpture, and photographs, also are protected by the first sale doctrine. *Id.*

secured by the first sale doctrine, namely, the right to lend, give away, or resell goods they purchase. The ready availability of previously-owned books, CDs, vinyl records, DVDs and video games offered for resale by companies such as Amazon.com and GameStop, demonstrates the vitality of economic aftermarkets for copies of copyrighted works.

As shown below, the court of appeals' constriction of the first sale doctrine could have an immense impact on retail sales of new copyrighted copies, on lawful retail aftermarkets for copyrighted works, and on imported goods generally.

1. Copyrighted works sold annually at retail in the United States – new and aftermarkets.

The first sale doctrine applies to goods readily identifiable as copyrighted works, such as copies of motion pictures and books, and phonorecords of copyrighted sound recordings. According to government and industry estimates, in 2009:

- Retail commerce in copyrighted works sold in the United States (such as books, recorded music, motion pictures, and magazines) reached $881 billion[6]

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6. U.S. Bureau of Economic Analysis, U.S. Dep't of Commerce, National Economic Accounts, Table 2.4.5U. Personal Consumption Expenditures by Type of Product , *http://www.bea.gov/national/nipaweb/nipa_underlying/TableView.asp?SelectedTable=17&FirstYear=2009&LastYear=2010&Freq=Qtr&ViewSeries=Yes* (last visited July 7, 1010).

- Consumers spent $16.4 billion to purchase and rent movies on DVD[7]
- Sales of recorded music in physical format exceeded $4.56 billion[8]
- Book sales reached $16.7 billion[9]
- The electronic game industry was estimated to constitute a $20 billion market segment in the United States[10]

The first sale doctrine also gives rise to aftermarkets for many of these copyrighted works. Aftermarkets for rental and purchase enable more consumers to enjoy a greater number of copyrighted works, and spread

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7. Digital Entertainment Group, "DEG Year-End 2009 Home Entertainment Report," *http://www.degonline.org* (follow the "Data & Resources" hyperlink) (last visited July 6, 2010).

8. Recording Industry Association of America, "2009 Year-End Shipment Statistics," *http://76.74.24.142/A200B8A7-6BBF-EF15-3038-582014919F78.pdf* (last visited July 6, 2010). That figure does not include more than $2 billion in sales of recorded music in digital formats.

9. U.S. Census Bureau, U.S. Dep't of Commerce, Estimates of Monthly Retail and Food Services Sales by Kind of Business: 2009, at tab 2009, *http://www.census.gov/retail/mrts/www/data/excel/mrtssales92-present.xls* (last visited July 6, 2010).

10. Press Release, NPD Group, Inc., 2009 U.S. Video Game Industry and PC Game Software Retail Sales Reach $20.2 Billion (Jan. 14, 2010), http://www.npd.com/press/releases/press_100114.html.

access to cultural works to persons with lower incomes. Video rental – a commercial activity made possible by the first sale doctrine[11] – achieved $9.5 billion in revenues in 2008.[12] According to the Book Industry Study Group, the used book market segment in 2004 constituted $2.2 billion in overall sales, with some $1.6 billion in sales of used textbooks.[13] *Amicus* GameStop, believed to be the largest domestic seller of used video games, reported

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11. *See infra at* 22-23.

12. U.S. Census Bureau, U.S. Dep't of Commerce, Annual Services Report, Table 5.1. Rental and Leasing Services (NAICS 532) – Estimated Revenue for Employer Firms: 2000 Through 2008 (rel. Dec. 2009 - Jan. 2010), http://www2.census.gov/services/sas/data/53/2008_NAICS53.pdf. In 2009, that number dropped to $6.5 billion, largely because of the rapid closing of major chains such as Blockbuster and Movie Gallery. *See* Digital Entertainment Group, Industry Data, "DEG Year-End 2009 Home Entertainment Report," *http://www.degonline.org*; Ben Fritz, "DVD rental revenue falls, delivering another blow to home entertainment business (Apr. 15, 2010)," *http://latimesblogs.latimes.com/entertainmentnewsbuzz/2010/04/dvd-rental-revenue-falls-delivering-another-blow-to-home-entertainment-business.html*. Under Section 109(b)(1), copyright owners retain an exclusive right with respect to rental of phonorecords and certain computer software.

13. Edward Wyatt, "Internet Grows as Factor in Used Book Business," The New York Times, Sept. 29, 2005, http://query.nytimes.com/gst/fullpage.html?res=9D05E2DA1230F93AA1575AC0A9639C8B63 (citing Book Industry Study Group, Inc., *Used-Book Sales: A Study of the Behavior, Structure, Size and Growth of the U.S. Used-Book Market* (Sept. 2005)).

nearly $2.4 billion in revenue in 2009 from sales of used games.[14]

Under *Omega*, any copyright owner could disrupt these currently-lawful aftermarkets by moving production overseas. Eliminating first sale privileges for imports reduces the value proposition from the purchase of copyrighted works. Consumers know that the books, CDs, DVDs, and video games they purchase can be traded, given away, or sold. Many younger or less affluent consumers resell or trade in their used copies to fuel purchases of other copyrighted copies. Thus, the loss of first sale resale rights likely will reduce purchasing in primary market sectors, both by reducing the initial incentive to purchase, and by denying consumers the proceeds from sales of used goods.

2. The Value of Retail and Sales of Imported Goods in the United States

Total retail trade in the United States in 2007 exceeded $3.9 trillion. Retailers employed 15.6 million people, and paid nearly $365 billion to employees in the retail sector.[15] Setting aside retail relating to motor

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14. GameStop, Inc., Annual Report (Form 10-K), at F-30 (Mar. 30, 2010). The total revenue of stores that sell used goods in the United States is estimated as $11.6 billion. U.S. Census Bureau, U.S. Dep't of Commerce, Estimates of Monthly Retail and Food Services Sales by Kind of Business: 2009, at tab "2009", *http://www.census.gov/retail/mrts/www/data/excel/mrtssales92-present.xls* (last visited July 6, 2010).

15. U.S. Census Bureau, U.S. Dep't of Commerce, 2007 Economic Census, Selected Statistics by Economic Sector: 2007,
(Cont'd)

vehicles, retail sales contributed approximately $2.6 trillion in 2007, and more than 12.9 million jobs, to the American economy.[16]

In 2009, businesses in the United States imported $1.6 trillion in foreign-made goods.[17] Approximately $497 billion of those imports were consumer goods offered for sale by retailers.[18] Prior to 2009, the value of imported goods for consumption in the United States had steadily increased from more than $1.2 trillion in 2000 to more than $2.09 trillion in 2008.[19] Thus, imported goods,

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(Cont'd)

http://factfinder.census.gov/servlet/SAFFEconFacts?_event=&geo_id=01000US&_geoContext=01000US&_street=&_county=&_cityTown=&_state=&_zip=&_lang=en&_sse=on&ActiveGeoDiv=&_useEV=&pctxt=bg&pgsl=010&_submenuId=business_2&ds_name=&_ci_nbr=&qr_name=®=null%3Anull&_keyword=&_industry=44-45 (last visited July 6, 2010).

16. Even the automotive sector could be affected by the *Omega* decision. Every modern automobile runs on software that controls functions from engine timing to dashboard lighting. While Congress exempted automobile software from its restrictions on software *rental* in 17 U.S.C. § 109(b)(1)(B)(i), the *Omega* decision read literally would allow any imported automotive software developer to prevent used car *sales*.

17. U.S. Bureau of Economic Analysis, U.S. Census Bureau, U.S. Dep't of Commerce, U.S. International Trade in Goods and Services (FT900) Exh 5s – Exports, Imports, and Trade Balance of Goods (Apr. 2010), http://www.census.gov/foreign-trade/Press-Release/current_press_release/exh5s.pdf.

18. *See* data available from U.S. International Trade Commission Interactive Tariff and Trade Dataweb, *http://dataweb.usitc.gov/scripts/user_set.asp*.

19. *Id.*

including consumer goods sold at retail, constitute a huge segment of the domestic economy.

3. Goods Protected by Copyright Include a Broad Spectrum of Ordinary Consumable Goods.

While copies of copyrighted books, videos, games, and music comprise only a subset of sales of imported goods, copyright protection adheres to more than these obvious types of works. The U.S. Copyright Office routinely grants copyright registrations for packaging, logos, labels, and product inserts for myriad everyday products from floor cleaners and health and beauty aids to breakfast cereals. Given the low threshold for copyright protection, elements of any consumer product offered at retail could be subject to copyright protection. Consequently, claims of copyright infringement potentially can be asserted with respect to virtually every item in retail stores.

These fears are not merely theoretical. Copyright owners have sought to exploit such "thin" copyrights as a means to stop otherwise lawful parallel importation. In *Quality King*, the plaintiff used a copyright on a label of hair care products to attack discount-priced competition from lawfully-made re-imported products. Other product manufacturers similarly have registered copyrights covering disposable elements of functional items as a means to thwart low-priced competition from sales of authentic parallel-imported goods. *See*, *e.g.*, *Denbicare U.S.A.*, *Inc. v. Toys "R" Us*, *Inc.*, 84 F.3d 1143 (9th Cir. 1996) (packaging for reusable diapers); *Parfums Givenchy*, *Inc. v. Drug Emporium*, *Inc.*, 38

F.3d 477 (9th Cir. 1994) (box for perfume); *Sebastian Int'l Inc. v. Consumer Contacts (PTY) Ltd.*, 847 F.2d 1093 (3d Cir. 1988) (labels for beauty supplies).[20] In *Omega*, the copyrighted work pertains not to the design of the watch itself but, rather, to a minuscule logo engraved on the back of the watch.

The *Omega* decision already, regrettably, has given new life to such attempts to stifle lawful importation based on ancillary, even trivial, copyright claims. Thus, this Court's decision has the potential to affect hundreds of billions of dollars annually in commerce.

B. The Importance of the First Sale Doctrine, and the Threat Posed by *Omega*, to Markets for Authentic Imported Goods

The *amici* and their members typically offer thousands of products (known as stock keeping units or "SKUs") at any given time. Retailers cannot reasonably know the full provenance of each of the thousands of lawfully-produced goods they sell. Goods may be bought and resold several times before reaching retail shelves. Commonly, retailers acquire products not directly from the manufacturers, but through exporters, importers, and trading companies who, in turn, also may not deal directly with the manufacturers. Often these sources find genuine goods abroad for lower prices, and

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20. *See also*, *Cosmair v. Dynamite Enterprises, Inc.*, 226 U.S.P.Q. 344, 1985 WL 2209 (S.D. Fla. 1988) (package label for Ralph Lauren cosmetics and fragrances); *Neutrogena Corp. v. Sec. of Treasury*, 7 U.S.P.Q. 2d 1900, 1988 WL 166236 (D.S.C. 1988) (packaging for cosmetic products).

arbitrage them to discount retailers in the United States. As a result, consumers can buy the same quality goods at lower prices.

As an example, *amicus* Quality King distributes products to the wholesale and retail trade. It purchases product both domestically and in foreign markets for distribution to U.S. customers. To provide its customers with the lowest available prices, Quality King sources products in both domestic and foreign markets. Quality King often sells these goods to consumers at discount prices in competition with manufacturers or "authorized" distributors that would prefer to price discriminate and charge higher prices by separating the U.S. market from foreign markets and charging U.S. consumers more than foreign consumers simply because U.S. consumers can afford to pay more. Those were the facts of *Quality King* – the case which *amicus* Quality King brought before this Court to vindicate its right to sell, under the first sale doctrine, lawfully-produced goods it had purchased abroad and imported for resale.

Retailers rely on the first sale doctrine for relief from unknown and unknowable infringement risks that jeopardize their businesses. This Court, in the analogous context of patent exhaustion, has acknowledged how the uncertainty of infringement liability threatens free commerce, and how the exhaustion doctrine plays a vital role in securing commerce and personal property rights:

> one who buys patented articles of manufacture from one authorized to sell them becomes possessed of an absolute property in such articles, unrestricted in time or place.

> *. . . The inconvenience and annoyance to the public that an opposite conclusion would occasion are too obvious to require illustration.*

Keeler v. Standard Folding Bed Co., 157 U.S. 659, 666-667 (1895) (emphasis added). That "inconvenience and annoyance" is no different with respect to goods protected by copyright than those protected by patents.

Moreover, as Justice Black observed nearly 50 years ago, businesses need bright line rules to avoid the "disastrous or even lethal consequences" of infringement suits:

> businessmen are certainly entitled to know when they are committing an infringement. . . . But to what avail these congressional precautions if this Court, by its opinions, would subject small businessmen to the devastating uncertainties of nebulous and permissive standards of infringement under which courts could impose treble damages upon them. . . .[21]

Omega brings these risks into sharp focus for the retail community. Every retailer and consumer would face potential copyright infringement liability for transferring possession or title to *any* foreign-manufactured goods – even genuine goods manufactured and authorized for unrestricted sale by the U.S. copyright owner. The threat of liability under

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21. *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U.S. 336, 358 (1961) (Black, J., concurring).

the Copyright Act, including the potential for injunctive relief, seizure and loss of inventory, statutory damages (ranging from $750 to $150,000 per work),[22] and payment of both plaintiff's and its own litigation costs and attorney fees, could prove devastating to small businesses, and highly disruptive to commerce generally.[23] The threat to a small retailer far outweighs the potential profit to be gained by offering relatively small discounts on imported goods.[24] Thus, the potential infringement liability inevitably would deter otherwise lawful importation of authentic products, and compel rational, risk-averse businesses to forego opportunities to offer discounted goods to their customers.

The value of parallel imported goods sold annually in the United States represents a multibillion-dollar

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22. 17 U.S.C. § 504(c).

23. *See Parfums Givenchy, Inc. v. Drug Emporium, Inc.*, 38 F.3d at 482 ("the purchaser of illegally imported copies has no more authority to distribute copies than does the original importer"); *Am. Int'l Pictures, Inc. v. Foreman*, 576 F.2d 661, 664 (5th Cir. 1978) ("even an unwitting purchaser who buys a copy in the secondary market can be held liable for infringement if the copy was not the subject of a first sale by the copyright holder").

24. Where parallel import cases have been litigated and lost, the impact on defendants is as unpredictable as it is significant. *See, e.g.*, *Tesco falls as Levi's court case is lost*, Brand Republic, Nov. 20, 2001, http://www.brandrepublic.com/news/15134/tesco-falls-levis-court-case-lost (reporting the 1.1% fall in Tesco shares immediately following a loss in a parallel import case against Levi's in the European Court of Justice, Case T-415/99 *Levi Strauss v. Tesco Stores*).

benefit to American consumers.[25] *Omega* would certainly choke off such parallel importations, but in fact it goes much further. It applies to *any* copies or phonorecords of copyrighted works, and *any* goods incorporating a copy of a copyrighted work, if manufactured outside the United States. On its face, the Ninth Circuit decision negates the first sale doctrine for all items made outside the United States, *even if manufactured, imported, and sold in the United States by or with authority of the copyright owner.* Thus, the Ninth Circuit's decision (in addition to disrupting entire secondary market segments) would provide a lawful mechanism for manufacturers to discriminate in price between geographic markets at the expense of the American consumer.

In past cases involving importation of goods covered by copyright, the Ninth Circuit acknowledged that an overbroad interpretation of Section 602(a) would impose undue burdens and financial risks against lawful commerce:

> [E]very little gift shop in America would be subject to copyright penalties for genuine goods purchased in good faith from American

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25. For example, a 2008 white paper prepared for an association opposed to parallel importation estimated $58 billion annually in parallel importation activity. KPMG LLP, KPMG Gray Market Study Update, "Effective Channel Management is Critical in Combating the Gray Market and Increasing Technology Companies' Bottom Line," at 30, *http://www.agmaglobal.org/press_events/press_docs/KPMG%20AGMAGrayMarketStudyWebFinal071008.pdf* (last visited July 7, 2010).

> 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). Similarly, the Ninth Circuit decision in *BMG Music v. Perez*, 952 F.2d 318 (9th Cir. 1991), holding that "lawfully made under this title" requires manufacture in the United States, received almost-immediate criticism, even from the Ninth Circuit itself. As that court wrote just three years later, *BMG Music* literally would give "foreign manufactured goods . . . greater copyright protection than goods manufactured in the United States" – a result it characterized as "absurd and unintended." *Parfums Givenchy, Inc.*, 38 F.3d at 482 n.8. Two years later, the court acknowledged that *BMG Music* was the target of "widespread criticism" from courts and legal scholars. *Denbicare U.S.A., Inc. v. Toys "R" Us, Inc.*, 84 F.3d at 1149-50.

In the case leading to the Supreme Court decision in *Quality King*, the Ninth Circuit again conceded that legal commentators considered *BMG Music* a "flawed" decision. *L'anza Research Int'l, Inc. v. Quality King Distribs., Inc.*, 98 F.3d 1109, 1115 (9th Cir. 1996), *rev'd on other grounds*, 523 U.S. 135 (1998). And, presaging the need to resolve these issues, the Ninth Circuit reflected in *Disenos*: "The impracticality of the burden [plaintiff] would have us impose on the retailers gives us pause about whether its reading of *Parfums Givenchy* and *BMG Music* is correct." 97 F.3d at 380.

Quality King resolved these questions in favor of exhaustion. But in *Omega*, the Ninth Circuit reached the opposite conclusion. Because it believed its prior decisions were not "clearly irreconcilable" with this Court's decision in *Quality King*, the Ninth Circuit effectively narrowed *Quality King* to its facts. *Omega*, 541 F.3d at 987-990. As a result, the decision creates substantial uncertainty among retailers and distributors, who must now weigh the consequences of selling any imported product that could have a copyrightable label, logo, or product insert – *i.e.*, virtually every product in their stores.

C. Narrowing the First Sale Doctrine Harms Business and Consumer Welfare.

Omega also ignores how, as a matter of policy, a domestic manufacturing requirement burdens commerce and consumer welfare. As noted above, the "made in the U.S.A." rule absurdly applies to all copies of copyrighted works manufactured outside the United States – regardless if the copyright owner manufactured, imported into the United States, and sold the goods to a reseller or ultimate consumer.

Suppose a copyright owner duplicates its DVD movie discs in Mexico, and imports and sells them in the United States. Despite that the lawful copy was imported and sold by the copyright owner itself, under the Ninth Circuit interpretation, the first sale doctrine could not apply simply because the copy was not "lawfully made" *in* the United States. Consequently:

- Video stores that today purchase multiple copies of a movie during its initial release would no

longer be able to engage in the common practice of reselling most of the copies as "previously viewed" disks for a much lower price.

- An individual consumer could watch the movie, but could not lend it to a friend, resell it online, or give it away as a present.

Thus, *Omega* would impose on businesses and consumers the very restraints against free disposition of personal property that the first sale doctrine was intended to prohibit.[26]

If courts interpret Section 602 so as to prevent importation of goods lawfully made by the copyright owner, the retail industry can have little confidence to sell nonpiratical goods acquired from an independent exporter or importer. Indeed, despite *Quality King*, retailers even would be at risk to re-import goods produced in the United States given the practical difficulties in assuring the lineage of imported goods. Where, as here, the copyright owner places no copyright notice on the goods, retailers have no reasonable way

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26. To ameliorate the anomalies created by its rule, the Ninth Circuit proffered an exception permitting exhaustion in cases of authorized importations. 541 F.3d at 989-990. Yet, this exception also finds no basis in the statutory language or policy. Section 109(a) refers to lawful manufacture, not authorized importation. Had Congress found such an exception necessary, it explicitly would have provided it. Moreover, an "authorized importation" exception runs contrary to the express statutory affirmation that the entitlements of Section 109(a) apply "without the authority of the copyright owner" – hence, even over the copyright owner's objection.

to ascertain whether goods are protected by copyright. And the risks are all the more egregious where, as in *Omega*, the copyrighted work is ancillary to the goods and irrelevant to the reasons for the purchase.

The harm to consumers is equally obvious. Where retailer competition is subjugated to copyright owner price controls, the results are fewer imported goods offered at retail, in fewer retail outlets, and artificially inflated prices to consumers. And *Omega* likewise stifles the burgeoning aftermarket sectors for used books, CDs, DVDs, video games, works of fine art, and other works subject to copyright protection.

Narrowing the first sale doctrine can lead to unforeseen consequences detrimental to commerce and culture. A past example illustrates these potential chilling effects. Amidst the controversy leading to this Court's decision in *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), motion picture producers sought unsuccessfully to amend Section 109 to prevent commercial rental of videotapes by independent rental businesses.[27] Because the motion picture industry failed to narrow the first sale doctrine, entrepreneurs created an entire new industry segment for video rental. As a result, millions of consumers have been able to enjoy more movies than they could otherwise afford to purchase. Over the last decade alone,

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27. H.R. 5707, 97th Cong. (1982). *See* Peter S. Menell, *The Property Rights Movement's Embrace of Intellectual Property: True Love or Doomed Relationship?*, Paper 36 (2007), eScholarship Repository, Berkeley Center for Law and Technology, *http://repositories.cdlib.org/bclt/lts/36*.

the video rental market sector in the United States has grown from some $14 billion annually to more than $20 billion annually.[28]

The cumulative impact of price discrimination to consumers and the economy is enormous. Unless the *Omega* decision is reversed, the drain on consumers and the American economy could reach billions of dollars in higher prices for goods that could have been purchased more cheaply through parallel importation. That impact will become more pervasive, and more costly, given the rapid growth of commerce in new parallel imports and used imported goods via online retail and resale. According to figures in the U.S. Department of Commerce 2009 Statistical Abstract, online retail sales in 2007 totaled approximately $126.7 billion, and constituted approximately 3.2 % of all retail sales in the United States.[29] By 2012, the Abstract projects online retail sales to reach more than $334.7 billion.[30] The *amici* thus are concerned the erroneous holding of the Ninth Circuit could short-circuit the growth of online commerce, disrupting the myriad daily online transactions of corporate retailers and individual online sellers.

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28. Digital Entertainment Group, Industry Data, "DEG Year-End 2009 Home Entertainment Report," *http://www.degonline.org* (last visited July 6, 2010).

29. U.S. Census Bureau, U.S. Dep't of Commerce 2009 Statistical Abstract http://www.census.gov/compendia/statab/tables/09s1013.pdf (last visited July 7, 2010).

30. *Id.* Statistics from eBay, Inc. further illustrate the growth, velocity and significance of online commerce. *See* eBay, Inc., *eBay Marketplaces Fast Facts at a Glance*, June 30, 2009, http://files.shareholder.com/downloads/EBAYPRESS/661446397x0x223370/C99E1580-C708-46FA-A1B5-3FB94A64ABB2/eBayMarketplacesFastFacts.pdf.

II. The Ninth Circuit's Injection Of A Domestic Manufacturing Requirement Into Section 109 Is Erroneous As A Matter Of Law.

This case concerns the proper interpretation of five words – "lawfully made under this title" – in Section 109 of the Copyright Act.[31] The phrase, in its most natural reading, requires nothing more than that the copy be lawfully made under the authority granted to the copyright owner, or to the maker of the copy, by title 17. That was the conclusion reached in the thoughtful statutory analysis in *Pearson Educ. Inc. v. Liu*:

> Stated differently, § 109(a) teaches that for first-sale purposes, the lawfulness of a particular copy or phonorecord should be judged by U.S. copyright law no matter where the copy or phonorecord was manufactured. In the normal run of cases, this condition will be satisfied if the copy was manufactured by the U.S. rightsholder, *see* § 106(1); if the U.S. rightsholder authorized the copy to be manufactured; or if the manufacturer's

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31. Section 109, entitled "Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord," provides in pertinent part:

> (a) 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.

> activities would be privileged under U.S. concepts of fair use, *see* § 107.

Id., 656 F. Supp. 2d 407, 412 (S.D.N.Y. 2009) (citations omitted).

In *Omega*, the Ninth Circuit read into Section 109 an additional requirement of domestic production. That interpolation of extra-statutory conditions into the first sale doctrine is clearly erroneous. First, it is contrary to the plain language of the statute. Congress could have explicitly limited the first sale statute to the owner of a copy lawfully made under this title "in the United States," but did not.[32]

Second, that Congress elsewhere in title 17 did specify production in the United States suggests that its choice here was deliberate. Congress enacted a domestic production limitation in the Audio Home Recording Act of 1992, which defines the term "manufacture" to mean "to produce or assemble a product in the United States." 17 U.S.C. § 1001(8).

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32. This interpretation also comports with international copyright-related treaty provisions, which permit exhaustion of the right to distribute copies of copyrighted works "after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the owner." WIPO Copyright Treaty, art. 6(2) (1996), http://www.wipo.int/export/sites/www/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf; *see also* WIPO Performances and Phonograms Treaty, art. 12(2) (1996), http://www.wipo.int/export/sites/www/treaties/en/ip/wppt/pdf/trtdocs_wo034.pdf. Thus, under the WIPO treaty, a sale or transfer authorized by the copyright owner triggers exhaustion, without limitation as to the place of manufacture.

Section 601(a) prohibited importation or public distribution of certain copies of works protected under title 17 unless "manufactured in the United States or Canada." 17 U.S.C. § 601(a). In the PRO-IP Act of 2008, Congress singled out manufacture in the United States by requiring the Government Accountability Office to study how to improve protection for intellectual property of "domestic manufacturers in the United States."[33] Thus, Congress knew how, and under what circumstances, to limit obligations or rights relating to copyright based on domestic manufacture, but did not do so in Section 109(a).

Third, interpreting "lawfully made under this title" to mean only domestic production leads to anomalous results in other sections of title 17 employing that phrase. In Section 109(c), a domestic production requirement would impose infringement liability on any American museum that displays foreign art works. Similarly, as used in Section 109(e), no arcade, bar, or diner could offer coin-operated foreign-made video games. Educators could be liable for infringement, rather than exempt under Section 110(1), for showing foreign films or television programs in classrooms. Copyright owners of phonorecords manufactured outside the United States would not be entitled to royalty payments under the Audio Home Recording Act of 1992, even if those copyright owners had authorized distribution of the recordings in the United States. *See* §§ 1001(7), 1006(a)(1)(B). These anomalies suggest that

33. Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, § 501(b)(2), 122 Stat. 4256, 4277-78 (2008).

the phrase "lawfully made under this title" be given its natural reading, without specifying a place of manufacture.

Similarly, Section 106(3), which governs whether a copy has been "lawfully made," does not condition the exclusive right of reproduction on the place of manufacture.[34] In *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908), in which the Court first articulated the first sale doctrine, the Court observed that granting an exclusive reproduction right was the central purpose of copyright law, and the right to control sales of copies existed to give effect to the reproduction right:

> [O]ne 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, ...
>
> In our view the copyright statutes, while protecting the owner of the copyright in his right to multiply and sell his production, do not create the right to impose . . . a limitation at which the book shall be sold at retail by future purchasers, with whom there is no

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34. 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 work in copies or phonorecords; . . . .

> privity of contract. This conclusion is reached in view of the language of the statute, read in the light of its main purpose to secure the right of multiplying copies of the work.

Id. at 350-351. Regardless of the place of manufacture, where the reproduction right has been exercised by or under authority of the copyright owner, the copyright owner's exclusive right has been protected.

Thus, under Sections 106(3) and 109(a), the place of manufacture does not matter. A copy necessarily is "lawfully made under this title" if, as here, it is made by, or under the authorization of, the U.S. copyright owner.

The Ninth Circuit ignored these principles and instead restricted *Quality King* to its facts. The Panel viewed *Quality King* as affirming the scope of the first sale statute only in context of a "round trip" importation of goods first manufactured in the United States. *Omega*, 541 F.3d at 987. However, in even its most narrow recitation of the question presented, this Court indicated its intention in *Quality King* to articulate a principle of law, not just a determination on the facts: "More narrowly, the question is whether the 'first sale' doctrine endorsed in §109(a) is applicable to imported copies." *Quality King*, 523 U.S. at 138. The Court therefore characterized its own decision as resolving a general legal principle: that the first sale doctrine does apply to imported lawfully-made copies of a copyrighted work.

Similarly, the appellate court attributed too great weight to the brief concurrence in *Quality King*, agreeing with the outcome based on the "round-trip" facts of the case. With utmost respect, we note that the concurrence was neither incorporated into the opinion, nor was joined by any other Justice, so should not have been presumed to represent the views of an otherwise unanimous Court. That is particularly true where the Court gave its own articulation of the question decided in *Quality King* a broader scope.

The *Omega* court's concern that a plain meaning interpretation would result in extraterritorial application of U.S. copyright law also has no basis. Contrary to the Panel's view, copyright law would not be applied extraterritorially in this case, which calls upon the Court to determine the rights of a domestic copyright owner vis-à-vis domestic importers, resellers, and consumers. The pertinent questions under Section 109(a) are, first, whether the entity that made the copies possessed the right to reproduce under Section 106(3) (such that copy is "lawfully made under this title"); and, second, whether the first sales of the copies by that entity were authorized. These questions do not implicate infringement of U.S. copyright laws by acts occurring solely overseas. Rather, they concern whether the owner of the U.S. copyright authorized the making of the copies without any reservation of rights under title 17. Because the owner of the U.S. copyright made the watches, and did not limit or reserve any of its exclusive rights under Section 106 of the Copyright Act, the copies should be deemed "lawfully made" under Section 109 and the first sale doctrine should apply.

The facts here contrast with the extraterritorial concerns discussed by this Court in *Quality King*. In *dicta*, the Court considered a scenario in which a domestic copyright owner separately assigned book publication rights to British and U.S. publishers under their countries' respective laws. 523 U.S. at 148. Under those facts, the Court posited that the first sale of a book made under British copyright law would not exhaust the importation right in the United States.[35] Here, however, the domestic copyright owner itself produced the watches with the copyrighted logo. Because that manufacture was lawful under the

35. *Cf. Boesch v. Graff*, 133 U. S. 697 (1890) (importation of foreign lamps lawfully made in Germany infringed rights of United States patent assignee). Several courts have misread this passage in *Quality King* as if confirming the importance of the *place* of manufacture rather than the *right* to manufacture under title 17. *See Pearson Educ. Inc. v. Arora*, 2010 WL 2300535 at *3 (S.D.N.Y. 2010) ("[t]his Court has—albeit unenthusiastically—followed the Supreme Court's suggestion that the 'first sale' rule does not apply to works copyrighted in the United States, manufactured abroad, and subsequently imported and sold in the United States"); *Pearson Educ. Inc. v. Kumar*, 2010 WL 1609024 at *6 (S.D.N.Y. 2010) ("the first sale doctrine does not apply to copies of a copyrighted work manufactured abroad"); *John Wiley & Sons, Inc. v. Kirtsaeng*, 2009 WL 3364037 at *9 (S.D.N.Y. 2009) ("The Court indicated that only books manufactured and published in the United States are 'lawfully made' under U.S. law"); *Pearson Educ. Inc. v. Liu*, 656 F. Supp. 2d at 416 ("[t]his Court therefore holds, *dubitante*, that the first-sale doctrine does not apply to copies of a copyrighted work manufactured abroad"). To the contrary, the Court's hypothetical assumes that the British publisher had no rights to make in the United States and, therefore, that the books produced by that publisher could not be lawfully made under title 17. 523 U.S. at 148.

Copyright Act, these lawfully-made copies also could lawfully be imported.[36]

In sum, the Ninth Circuit decision finds no support in the language of Section 109(a) or the Copyright Act, and runs contrary to the principles enunciated by this Court in *Quality King*. The Court should re-affirm that the first sale doctrine under copyright law does not apply only to domestically manufactured copies and phonorecords, and reverse the judgment of the court of appeals.

III. Sound Copyright Policy Supports The Application Of The First Sale Doctrine To Goods Lawfully Made Abroad.

Amici and their members collectively sell annually hundreds of millions of copyrighted books, compact discs, DVDs, and video games. For copies of copyrighted works manufactured and sold at retail in the United States, it is a relatively simple matter to ensure that the copies offered for sale are authentic and not infringing. Less obvious is where the goods were manufactured, and how they were first acquired and resold (often more than once) before reaching the retailer's shelves or webpages.

But thousands of other products sold by the *amici* members include material ancillary to the purchased

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36. This does not address whether a copyright owner that manufactures a copyrighted work overseas may contractually restrict its sale in the United States. *See Quanta Computer, Inc. v. LG Elecs., Inc.*, 128 S. Ct. at 2122 n.7.

goods, such as product labels or package inserts. As is the case with the watches at issue here, the goods themselves are not purchased for their copyrighted content, and the copyrighted elements of the label packaging are not intrinsically identifiable as copies of copyrighted works. Nor are they relevant to the consumer's purchasing decision. The consumer's interest is in purchasing the goods, not whether the writing or a picture on its disposable packaging qualifies as an expressive copyrightable work.

The concern of the *amici* is not that these registrations are issued, but rather how these registrations can be and, as in this case, have been improperly leveraged. Copyright is being used in many cases to achieve commercial aims unrelated to any intrinsic value of copyrighted expression that purportedly is the object of protection.[37] It is simply too easy to obtain a copyright registration on the content of a product label or package design; and the aspect that is copyrightable is usually far removed from anything that motivates the consumer's purchasing decision.

Omega sought to leverage the power of copyright law to prevent otherwise lawful parallel importation and to price discriminate between foreign and domestic

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37. *See* Michael J. Meurer, *Copyright Law and Price Discrimination*, 23 Cardozo L. Rev. 55, 140-146 (2001). As the Court observed in *Quality King*, the real motivation is to maintain higher domestic product prices, not to protect the copyrighted work itself: "L'anza is primarily interested in protecting the integrity of its method of marketing the products to which the labels are affixed." 523 U.S. at 140.

retail sales — not to obtain a return on the copyrighted work itself. Omega admits it engraved the globe symbol on its watches to serve a policing function against parallel importation, not for ornamentation or aesthetic expression. Thus, Omega is not using the globe logo for any purpose protected by copyright law. In this context the logo is palpably no different than a non-copyrightable, functional forensic tool. Copyright law should not be strained to protect high pricing for brand merchandise, as an end run around the limits of trademark law defined by this Court in *K Mart v. Cartier.*

As explained above, the first sale doctrine plays a fundamental role to secure the rights to sell at retail in the United States, and to dispose of thereafter, lawfully-made goods legally acquired abroad. In today's global and online economy, it is impossible to overstate the potential disruptive impact on commerce if companies cannot import and sell goods lawfully made abroad consistent with U.S. copyright law, and consumers cannot transfer ownership of their property.

Moreover, a domestic manufacturing requirement creates perverse incentives for U.S. copyright owners to produce all copies of their copyrighted works outside the United States. The impact of such a holding could be particularly far-reaching in cases, such as this, where a copyrighted symbol, label, or package design can be applied to virtually any goods offered for sale in the United States. The language of Sections 109(a) and 602 demonstrate no clear Congressional intent to create incentives for manufacturers to move their plants across the border into Canada or Mexico, to a location that might only be a few miles outside the U.S. border, simply

to take advantage of the inapplicability of the first sale doctrine. And no copyright or public policy would be served by the potential losses of jobs and tax revenue, or the manifest disadvantages to consumer and commercial interests.

Applying the first sale doctrine only to domestically-produced goods also unfairly advantages foreign owners of U.S. copyrights over U.S. copyright holders. In *Parfums Givenchy*, the Ninth Circuit considered commentators' justifiable critiques of the "absurd and unintended" and "undesirable" results from *BMG Music*, which would have accorded first sale protection "only to copies legally made and sold in the United States." 38 F.3d at 482 n.8, *citing BMG Music*, 952 F.2d at 319. The Ninth Circuit concluded that denying first sale rights to foreign made goods would contravene both the language of the statute and public policy:

> This would mean that foreign manufactured goods would receive greater copyright protection than goods manufactured in the United States because the copyright holder would retain control over the distribution of the foreign manufactured copies even after the copies have been lawfully sold in the United States. We agree that such a result would be untenable, and that nothing in the legislative history or text of § 602 supports such an interpretation.

Id. Yet, the Ninth Circuit now has taken a step beyond that "untenable" result. Under *Omega*, any purchaser of a foreign-produced copyrighted work – even if made

with the express authority of the copyright owner – could lose the right to dispose of the property in any manner by resale, gift, or lending, without being branded an infringer.

No copyright policy is served by preventing importation and resale of goods that have been lawfully produced by or with the copyright owner's authorization. While a copyright owner is entitled to a payment for its creative expression, it receives that royalty incentive from the first sale of a copy of its copyrighted work. Omega, as holder of the U.S. copyright, made the goods and authorized the sale to the first purchaser. Under Section 109 it exhausted fully its copyright interest in further disposition of those goods.

Finally, in that regard there can be no contention that parallel importation deprived Omega of the full reward for its copyright. The copy of the copyrighted work at issue in this case is a half-centimeter engraving on the underside of the watch, visible only when one is not wearing it. Such is hardly the stuff of which "bling" is made. The $700 surcharge by Omega over the Costco price represents the social cost of price discrimination, not a royalty for the intrinsic value of a copyright. No copyright policy is served by leveraging a copyright solely to maintain price discrimination on non-copyrightable goods.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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