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 FOR THE MOTION PICTURE ASSOCIATION OF AMERICA, INC. AND THE RECORDING INDUSTRY ASSOCIATION OF AMERICA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

The Motion Picture Association of America, Inc. (MPAA) is a not-for-profit trade association founded in 1922 to address issues of concern to the U.S. motion picture industry. Its members include Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLLP, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc. MPAA's members and their affiliates are the leading producers and distributors of filmed entertainment in the theatrical, television, and home entertainment markets.

The Recording Industry Association of America (RIAA) is a nonprofit trade association founded in 1952 representing the American recording industry. RIAA's record company members include Universal Music Group, Sony Music Entertainment, Warner Music Group, and EMI Music North America. RIAA's members create, manufacture, and/or distribute approximately eighty-five percent of all legitimate sound recordings produced and sold in the United States.

Copyright protection is essential to the health of the motion picture and music industries and the U.S. economy as a whole. Were this Court to reverse thirty years of settled law and accept Costco's interpretation of the first sale doctrine, MPAA's and RIAA's members and their affiliates could face a significant threat of harm from unauthorized importation into the United

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[1] Letters consenting to the filing of amicus briefs have been filed by the parties with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amici, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

States of copies of protected works that are manufactured abroad for distribution in foreign markets. Such unauthorized importation could deprive U.S. copyright holders of substantial value of their intellectual property. If accepted, Costco's view could, thus, upset the balance of rewards and incentives Congress struck in enacting the Copyright Act. Although this case arises in the context of importation of ordinary commercial goods, the Court's holding will apply equally in cases involving all sorts of creative works, including motion pictures and sound recordings. Viewed in that context, Costco's proposed interpretation of the first sale doctrine could significantly undermine protection of the types of creative works that lie at the core of what copyright law is meant to protect.

SUMMARY OF ARGUMENT

Pursuant to its constitutional authority to "promote the Progress of Science and useful Arts," U.S. Const. art. I, §8, cl. 8, Congress enacted (and has periodically amended) the Copyright Act for the purpose of stimulating creativity for the public benefit. Of particular relevance, Congress has granted copyright holders an exclusive right to control the first sale of tangible copies of protected works, including the right to obtain whatever economic benefits flow from that first sale. In the run-of-the-mill case, once that first sale of a particular tangible copy is made and the copyright holder has realized the economic benefit afforded under the Copyright Act, it has exhausted its exclusive rights and may no longer control further sales of that copy of the protected work.

Consistent with this rationale, §109(a) of the Copyright Act limits the availability of the first sale defense to cases involving tangible copies of protected works

that were "lawfully made under" the Act. Given its natural meaning and the presumption that U.S. law does not apply extraterritorially, that language is properly read to refer to copies made in the United States. The contrary reading advanced by Costco is inconsistent with the text and purposes of the Copyright Act and the rationale underlying the first sale doctrine. If a copyright owner makes copies of a protected work outside the United States for distribution outside the United States, the copyright owner has not exercised or benefited from—much less exhausted—its rights under U.S. copyright law, and it has not reaped the full economic benefit that Congress intended to serve as an incentive for creative activity. Accordingly, nearly all courts to have addressed the issue have applied §109(a) only to copies made in the United States, and Congress has ratified that interpretation by amending the Copyright Act on numerous occasions without disturbing that construction.

If accepted, Costco's interpretation of §109(a) could thwart the purposes of the Copyright Act and deprive copyright owners of the value of protection under U.S. law. In the motion picture industry, for example, a studio will frequently treat national markets separately for purposes of theatrical and home video releases. The studio's ability to do so can be critical to a film's commercial success. In the music industry, recordings are often released at different times in different countries, depending on the strategic considerations of the local territory. Unauthorized importation could undercut these important practices and reduce the value of U.S. movie and music copyrights. Far from achieving the economic benefits that Costco hypothesizes, extending the first sale defense to copies that were made abroad for distribution in a foreign market would thus prevent

U.S. copyright holders from obtaining the economic reward Congress intended to provide under U.S. law.

ARGUMENT

I. THE FIRST SALE DOCTRINE DOES NOT APPLY TO INFRINGING IMPORTS MANUFACTURED ABROAD

A. The Text, History, And Purposes Of The Copyright Act Support The Judgment Below

In *Quality King Distributors, Inc.* v. *L'anza Research International, Inc.*, 523 U.S. 135 (1998), after considering the text and structure of the Copyright Act and the history and purposes of the first sale doctrine, this Court held that the first sale defense is available in cases of "round trip" reimportation of copies of protected works that are manufactured in the United States and sold or distributed abroad. This case presents the distinct question whether the first sale defense applies also to copies of protected works that are manufactured and distributed abroad and imported into the United States without the copyright owner's authorization. While the issue is different, the same factors should guide the Court's analysis: Here, the text, history, and purpose of the Copyright Act and the rationale underlying the first sale doctrine confirm that the first sale defense does not apply to copies manufactured and sold outside the United States.

1. The text of §109(a) limits the first sale defense to copies made in the United States

The starting point in interpreting any statute is its text. *Lamie* v. *United States Tr.*, 540 U.S. 526, 534 (2004); *see also Quality King*, 523 U.S. at 143. "[W]hen the statute's language is plain, the sole function of the

courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotation marks omitted). Here, the relevant language is clear.

The first sale doctrine, as codified at 17 U.S.C. §109(a), provides that notwithstanding the copyright owner's exclusive right to distribute copies of a protected work under 17 U.S.C. §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.

(Emphasis added.) By its plain terms, this affirmative defense applies only to copies "lawfully made under" Title 17 of the United States Code. When given its natural reading, that language limits the first sale defense to those tangible copies that are made in a manner that is authorized by the U.S. Copyright Act. A copy that is not *subject to* the U.S. Copyright Act cannot be *lawfully made under* that Act.

The making of a copy outside the United States, however, is not subject to U.S. law and, thus, a copy made abroad cannot be "lawfully made under" the Copyright Act.[2] "It is a 'longstanding principle of

[2] *Cf. American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 356 (1909) ("[T]he character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."), *overruled on other grounds by Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 704-705 (1962).

American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Morrison* v. *National Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (quoting *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (*Aramco*)). Accordingly, unless Congress has "'clearly expressed'" an "'affirmative intention …' to give a statute extraterritorial effect," courts "'presume [the statute] is primarily concerned with domestic conditions.'" *Id.*; *see also Restatement (Second) of Foreign Relations Law of the United States* §38 (1965).

As the Court of Appeals observed, this presumption carries particular weight in the intellectual property context, where the need to avoid international conflicts of law is especially acute. Pet. App. 12a. Thus, the Supreme Court recognized in 1908 that the Copyright Act does not govern "personal action beyond the sphere of its control," *United Dictionary Co.* v. *G. & C. Merriam Co.*, 208 U.S. 260, 264 (1908), and since then, "[*e*]*very* court to have examined the issue has held that Congress did not intend the Copyright Act to be applied extraterritorially," 7 *Patry on Copyright* §25:86 (2010). *Cf. Microsoft Corp.* v. *AT&T Corp.*, 550 U.S. 437, 454-455 (2007) (explaining that the "presumption that United States law governs domestically but does not rule the world applies with particular force in patent law," in part because "foreign law 'may embody different policy judgments about the relative rights of inventors, competitors, and the public'" in intellectual property).

Here, nothing in §109(a) clearly expresses any intent to extend the protections or prohibitions of U.S. copyright law to the international manufacture or distribution of copies of creative works. When Congress

has intended a law to apply extraterritorially—including the Copyright Act—it has said so expressly. *See, e.g.*, 17 U.S.C. §§104(b)(2), 602(b); *Aramco*, 499 U.S. at 258-259 (citing statutes). Accordingly, because the Copyright Act generally does not apply abroad, and because nothing in §109(a) overcomes this presumption, the phrase "lawfully made under this title" must be read to apply only to those tangible copies that were made domestically. Leading copyright treatises thus agree that the phrase "lawfully made under this title" must mean "lawfully made in the United States." Patry & Martin, *Copyright Law and Practice* 182-183 (2000 Supp.); *see also id.* at 183 n.84, 210-213.[3]

2. Construing §109(a) to apply only to copies made in the United States is consistent with the purposes of the Copyright Act and the first sale doctrine

Consistent with its constitutional underpinnings, *see* U.S. Const. art. I, §8, cl. 8, the Copyright Act was designed to "stimulate artistic creativity for the general public good" by "secur[ing] a fair return for an author's

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[3] *See also* 2 *Nimmer on Copyright* §8.12[B][6][c] (rev. ed. 2009) (concluding after *Quality King* that the Copyright Act "should still be interpreted to bar the importation of gray market goods that have been manufactured abroad" (footnote omitted)); 4 *Patry on Copyright* §13:44 (Copyright Act "bars only the importation of copies that were acquired outside the United States and that were not 'lawfully made under this title,' i.e., were not made in the United States"); 2 *Goldstein on Copyright* §7.6.1.2(a) (3d ed. Supp. 2010) (under *Quality King*, "the first sale defense is unavailable to importers who acquire ownership of gray market goods made abroad and to resellers who acquire ownership in the United States of copies lawfully made abroad but unlawfully imported into the United States").

creative labor." *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151, 156 (1975). The Copyright Act "must be construed in light of this basic purpose." *Id.*

To fulfill this purpose, the Copyright Act grants to the author of a creative work an exclusive right to control the first sale or distribution of any tangible copies of the protected work. 17 U.S.C. §106(3). That exclusive right serves "'to motivate the creative activity of authors and inventors by the provision of a special reward,'" while also "'allow[ing] the public access to the products of their genius after the limited period of exclusive control has expired.'" *Harper & Row, Publishers, Inc.* v. *Nation Enters.*, 471 U.S. 539, 546 (1985); *see also Campbell* v. *Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10 (1994) (goal of copyright law is "'to stimulate the creation and publication of edifying matter'"). The "special reward" that the Copyright Act provides to a copyright owner is the right to obtain a royalty for his or her work and the increased market return made possible during the period of exclusivity.

The first sale doctrine limits a copyright owner's ability to control future sales of copies of a protected work, but only after the copyright owner has obtained the benefit (or royalty) to which it is entitled *under U.S. law*. Once the copyright owner has placed a particular copy into the stream of commerce *and obtained the economic reward made possible by the copyright*, the copyright owner has "exhausted his exclusive statutory right to control its distribution," and the copy may be freely sold and resold by subsequent purchasers. *Quality King*, 523 U.S. at 152; *see also Bobbs-Merrill Co.* v. *Straus*, 210 U.S. 339, 349-351 (1908). The doctrine thus enables copyright owners to realize the economic reward Congress intended to provide as incentive for creative activity, while limiting any restraints

on alienation and trade of a particular copy to its first sale.

This rationale does not apply where copies are manufactured and distributed abroad. A copyright owner who makes and distributes copies of a protected work exclusively in foreign markets does not benefit from U.S. copyright protection at the first sale and thus cannot be said to have "exhausted" his exclusive rights. *Quality King*, 523 U.S. at 152. While the copyright owner who sells copies in a foreign country will presumably realize some economic benefit under the laws of that country, that benefit is distinct from the benefit Congress intended to make available in the United States as an incentive to promote creative activity. *See Harper & Row*, 471 U.S. at 546. Yet under Costco's view, that copyright owner would be deemed to have exhausted its rights under U.S. law before it has ever exercised or benefited from them.

Construing the phrase "lawfully made under this title" in §109(a) to encompass copies made and sold abroad, outside the protection of U.S. copyright law, would thus thwart the Copyright Act's purpose by depriving copyright owners of the economic benefit made possible by the exclusive right conferred by U.S. law. *See Burke & Van Heusen, Inc.* v. *Arrow Drug, Inc.*, 233 F. Supp. 881, 884 (E.D. Pa. 1964) ("[T]he ultimate question under the 'first sale' doctrine is whether or not there has been such a disposition of the copyrighted article that it may fairly be said that the copyright proprietor has received his reward for its use."). When copies are made and sold abroad, the creator cannot be said to have exercised, much less exhausted, its rights under the U.S. Copyright Act. *See* 7 *Patry on Copyright* §25:18 ("For purposes of the first sale doctrine … copyright is quite 'territorial' since an authorized sale

or other distribution of a copy ends the copyright owner's control in that territory (*but not others*) over further distribution or public display of the copy." (emphasis added)). The Court of Appeals' interpretation of §109(a) thus best reflects the purposes of the Copyright Act and the rationale underlying the first sale doctrine.

3. Courts have long held that the first sale doctrine does not apply to copies made and sold abroad, and Congress has acquiesced in that interpretation

In holding that the first sale doctrine does not apply to copies manufactured and distributed outside the United States, the Court of Appeals followed settled precedent. Pet. App. 7a-10a. This interpretation of the 1976 Copyright Act was first adopted in 1983, and nearly all subsequent decisions have adhered to that view. Although Congress has amended the Copyright Act numerous times, it has refrained from revising §109(a) to overturn or modify that established construction. In light of this history, the long-standing construction of §109(a)—reaffirmed by the Court of Appeals below—is entitled to particular respect.

The first case to consider the relationship between the prohibition on unauthorized importation in 17 U.S.C. §602(a) and the first sale defense of §109(a) was *Columbia Broadcasting System, Inc.* v. *Scorpio Music Distributors, Inc.*, decided in 1983. 569 F. Supp. 47 (E.D. Pa. 1983). The district court there held that the phrase "lawfully made under this title" in §109(a) limits the first sale defense to copies manufactured and sold within the United States. *Id.* at 49. In so holding, the court relied on the text of §109(a) and the presumption against extraterritorial application of U.S. law. *Id.* The court further reasoned that a contrary interpretation

"would undermine the purpose of the statute" by precluding the copyright owner from "exercis[ing] control over copies of the work which entered the American market in competition with copies lawfully manufactured and distributed under this title." *Id.*

The Court of Appeals for the Third Circuit affirmed the district court's holding in *Scorpio* without comment, and courts in that circuit have continued to follow that rule in cases involving copies manufactured and distributed abroad. *Scorpio Music Distribs., Inc.* v. *CBS, Inc.*, 738 F.2d 424 (3d Cir. 1984); *see also, e.g.*, *T.B. Harms Co.* v. *Jem Records, Inc.*, 655 F. Supp. 1575, 1582-1583 (D.N.J. 1987) (following *Scorpio*); *cf. Sebastian Int'l, Inc.* v. *Consumer Contacts (PTY) Ltd.*, 847 F.2d 1093, 1098 (3d Cir. 1988) (distinguishing *Scorpio*). Other courts have similarly declined to apply §109(a) where copies are manufactured and sold overseas and then imported into the United States without the authorization of the copyright owner. *See, e.g.*, *BMG Music* v. *Perez*, 952 F.2d 318, 319 (9th Cir. 1991); *Parfums Givenchy, Inc.* v. *Drug Emporium, Inc.*, 38 F.3d 477, 481-482 (9th Cir. 1994); *Summit Tech., Inc.* v. *High-Line Med. Instruments Co.*, 922 F. Supp. 299, 312 (C.D. Cal. 1996); *Microsoft Corp.* v. *Big Boy Distrib. LLC*, 589 F. Supp. 2d 1308, 1317 (S.D. Fla. 2008); *Swatch S.A.* v. *New City Inc.*, 454 F. Supp. 2d 1245, 1254 (S.D. Fla. 2006); *see also* Resp. Br. 23 n.8.

Against the backdrop of this precedent, Congress has amended the Copyright Act on numerous occasions, yet it has never overturned or modified courts' construction of the phrase "lawfully made under this title" or otherwise expanded the scope of the first sale defense.

Congress has amended the Copyright Act of 1976 sixty-four times since the statute's enactment.[4] Many of those amendments were adopted in direct response to judicial interpretations of the Act. *See, e.g.*, 1 *Patry on Copyright* §1:92 (describing 1992 amendments to fair use doctrine responding to two Second Circuit decisions); *id.* §1:96 (describing 1997 amendment overturning *La Cienega Music Co.* v. *ZZ Top*, 53 F.3d 950 (9th Cir. 1995)); *id.* §1:101 (describing narrowly tailored 1998 legislative response to *MAI Systems Corp.* v. *Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993)). Similarly, Congress has frequently amended the Act in response to changes in technology, developments in international law, or emerging policy concerns.[5]

Indeed, Congress has amended both the first sale doctrine in §109(a) and the prohibition on unauthorized importation in §602 in response to judicial decisions or other developments without revising courts' interpretation of "lawfully made under this title." For example, prompted by the advent of the compact disc, Congress added subsection (b) to §109 in 1984 to create an exception to the first sale doctrine in the context of rental, lease, or lending of sound recordings. *See*

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[4] *See* U.S. Copyright Office, *Statutory Enactments Contained in Title 17 of the* United States Code, http://www.copyright.gov/title17/92preface.html (listing amendments); 1 *Patry on Copyright* §§1:71-115 (discussing Act's statutory history).

[5] *See, e.g.*, North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057, 2114-2115 (1993) (amending 17 U.S.C. §109 and enacting 17 U.S.C. §104A); Semiconductor Chip Protection Act of 1984, Pub. L. No. 98-620, tit. 3, 98 Stat. 3347-3356 (adding Title 17, chapter 9); Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, tit. 2, 102 Stat. 3949-3960 (amending Title 17 in light of changing satellite dish technology).

Record Rental Amendment of 1984, Pub. L. No. 98-450, §2, 98 Stat. 1727; *see also* 1 *Patry on Copyright* §1:86. Congress adopted a similar amendment in 1990 to revise the first sale doctrine in the context of the commercial rental of software. *See* Computer Software Rental Amendments Act of 1990, Pub. L. No. 101-650, tit. 8, 104 Stat. 5134-5137 (amending §109(b) and adding §119(e)). Among other things, that amendment overturned a Fourth Circuit decision concerning the operation of the first sale doctrine in the context of coin-operated arcade games. 1 *Patry on Copyright* §1:91. In 1994, Congress amended §109(a) to accommodate new provisions on copyright restoration adopted pursuant to multilateral agreements. *See* Uruguay Round Agreements Act, Pub. L. No. 103-465, §514(b), 108 Stat. 4809, 4981 (1994). And, more recently, Congress amended §602 to boost copyright owners' protection from unauthorized importation. *See* Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, §105, 122 Stat. 4256, 4259-4260.

Courts presume that Congress is "aware of … earlier judicial interpretations and, in effect, adopt[s] them" when it revises statutory language without reversing the judicial construction. *Keene Corp.* v. *United States*, 508 U.S. 200, 212 (1993) (citing *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978)); *see also Shepard* v. *United States*, 544 U.S. 13, 23 (2005). Here, Congress has shown its willingness to amend the Copyright Act in response to judicial decisions construing the Act. Because it has not done so with respect to the applicability of the first sale doctrine to copies manufactured and sold abroad, the governing presumption is that Congress is aware of courts' interpretation of §109(a) and has seen no reason to reverse it. *Keene*, 408 U.S. at 212.

B. Costco's Arguments Lack Merit

1. *Quality King* does not support Costco's interpretation of §109(a)

Costco relies heavily (Br. 27-40) on this Court's decision in *Quality King* to contend that the first sale doctrine applies to copies made outside the United States. The decision holds no such thing.

The copies at issue in *Quality King* were manufactured in the United States, then distributed abroad before being reimported into the United States without the copyright owner's authorization. 523 U.S. at 138-139; *see also id.* at 154 (Ginsburg, J., concurring). Whether and how the first sale doctrine would apply to copies manufactured abroad, where the copyright owner had never made or authorized any sale in the U.S. market, was not before the Court. As Justice Ginsburg's concurrence made explicit, the Court's decision did not "resolve cases in which the allegedly infringing imports were manufactured abroad." *Id.* at 154; *see also Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821) (rulings of this Court do not extend beyond the facts presented); *United States* v. *Stanley*, 483 U.S. 669, 680 (1987) ("no holding can be broader than the facts before the court"). The opinion for the Court did not contest this conclusion. To the contrary, the Court emphasized that §109(a) "does not apply to 'any copy'; it applies only to a copy that was 'lawfully made under this title,'" 523 U.S. at 143 n.9, and that "the owner of goods lawfully made *under the Act* is entitled to the protection of the first sale doctrine in an action in a United States court," *id.* at 145 n.14 (emphasis added). Significantly, the Court distinguished between copies "lawfully made under this title" and copies "'lawfully made' not under the United States Copyright Act,

but instead, under the laws of some other country." *Id.* at 147. As Omega has demonstrated (Br. 18-22), the Court's reasoning in *Quality King* thus supports the Court of Appeals' decision below, not Costco's interpretation of §109(a).

Nor does the Court's limited reference to the presumption against extraterritorial application in *Quality King* support Costco's argument (Br. 28). In *Quality King*, the Court observed that applying §109(a) to copies manufactured in the United States but initially sold abroad would not constitute an extraterritorial application of the Copyright Act. 523 U.S. at 145 n.14. In doing so, the Court assumed that the copies at issue were "lawfully made under the Act" and *subsequently* sold abroad. *Id.* The Court's interpretation thus did not extend U.S. copyright law to govern the making of copies abroad (as Costco's interpretation would in this case).

2. Costco's position is inconsistent with the language of §109(a) and finds no support in other sections of the Copyright Act

Unlike this Court's opinion in *Quality King*, which treated the plain text of the Copyright Act as dispositive, Costco fails to reconcile its position with the text of §109(a). Costco's principal textual argument (Br. 15-16) is that because Title 17 permits any U.S. copyright owner to make and distribute copies of its own work, any copies made (or authorized to be made) by the copyright owner must be "lawfully made under" Title 17.

This interpretation is untenable. Costco's argument equates the phrase "lawfully made under this title" with a requirement that the making of the copy *would have been lawful if the U.S. Copyright Act had applied.* But that is not what Congress said, and

Costco provides no reason to replace the words Congress used with words that have a very different meaning and invite very different consequences. Any doubt on that score is removed by reference to two subsections in 17 U.S.C. §602. In §602(a), regulating unauthorized importation, Congress distinguished between "infringement of copyright" under U.S. law, and acts "which would have constituted an infringement of copyright *if this title had been applicable*." (Emphasis added.) Similarly, §602(b) refers to circumstances "where the making of the copies … would have constituted an infringement of copyright *if this title had been applicable*." (Emphasis added.) Congress's use of this language demonstrates that when Congress intends to regulate the making of copies "according to, or as defined by" the U.S. Copyright Act even where that Act does not apply (*cf.* Pet. Br. 11), it knows precisely how to say so. It did not do so in §109(a), and this Court should reject Costco's invitation to rewrite the law.

Moreover, the use of this language in §602 shows that, despite Costco's contentions to the contrary, Congress did not assume that *all* copies made by a U.S. copyright owner were necessarily "lawfully made under" the Copyright Act. To the contrary, as Omega has shown (Br. 25-29), Congress intended §602 to prohibit importation not only of pirated copies, but also of legitimate foreign-made copies intended for foreign distribution. Costco's interpretation of §109(a) would defeat this purpose. *Id.* 24-30.

Costco's position also finds no support in other provisions of the Copyright Act that employ the phrase "lawfully made under this title" or refer explicitly to the place of manufacturing. Costco contends that absurd results would follow if the Court of Appeals' interpretation of §109(a) were imported into those other

provisions, but Costco's arguments gloss over important distinctions in the statute's text.

For example, Costco cites (Br. 19-20) the now-expired "manufacturing provision," which provides that "the importation into or public distribution in the United States of copies of a work consisting preponderantly of nondramatic literary material that is in the English language and is protected *under this title* is prohibited unless the portions consisting of such material have been *manufactured in the United States or Canada*." 17 U.S.C. §601(a) (emphasis added). In Costco's view (Br. 20), this provision demonstrates that a copy can be manufactured outside the United States and also "protected 'under [Title 17].'" But unlike §109(a), §601 does not turn on whether the *copies* at issue are "lawfully made under" the U.S. Copyright Act, but on whether the copies are of an original "*work* consisting … of … *literary material* that … is *protected under*" the U.S. Act. 17 U.S.C. §601(a) (emphasis added). Section 601 does not characterize copies made outside the United States as "lawfully made under" U.S. law. Moreover, Congress's use of specific language to clearly express its intent to apply §601 to copies manufactured outside the United States contrasts sharply with §109(a), where Congress indicated no similar intent to apply the law extraterritorially.

Costco similarly contends (Br. 17-18) that absurd results would follow if the Court of Appeals' interpretation of "lawfully made under this title" were applied to provisions of the Audio Home Recording Act. That Act provides for payment of royalties to certain parties whose musical works have been "embodied in a digital musical recording or an analog musical recording lawfully made under this title that has been distributed." 17 U.S.C. §1006(a)(1)(A). Costco argues that if "lawfully made under this title" required that the recording

be manufactured within the United States, no royalties would be payable for recordings made abroad, contrary to §1004(b). But there is no tension between these two provisions. Section 1004(b) governs payments into a royalty fund by importers of digital audio recording media; §1006 governs the distribution of royalties from that fund to certain authors of musical works. Moreover, unlike §109(a), §1004(b) expressly applies both to recording media "manufactured and distributed in the United States," and to recording media "imported into and distributed in the United States," and thus provides a clear expression of congressional intent to reach goods manufactured abroad.

Finally, Costco cites (Br. 17) the educational use defense in 17 U.S.C. §110(1). That provision creates an exception to infringement liability for educational institutions that display copyrighted works publicly in the course of teaching activities. The defense is not available, however, for performances of motion pictures or audiovisual works if the copy being displayed was "not lawfully made under this title" and the person responsible for the performance knew or had reason to believe the copy was "not lawfully made." 17 U.S.C. §110(1). Costco predicts (Br. 17) that under the Court of Appeals' interpretation of "lawfully made under this title," teachers who display movies for educational purposes could be held liable for copyright infringement. But even if the Court of Appeals' interpretation of §109(a) were imported into §110(1), Costco's concern that educators who display foreign films would suddenly face a grave threat of liability if this Court affirms the Court of Appeals' judgment in this case is baseless. As discussed above, *supra* Part I.A.3, courts have construed the phrase "lawfully made under this title" in §109(a) as the Court of Appeals construed it here for nearly thirty

years, yet Costco points to no evidence that this interpretation has resulted in the nonsensical and unintended consequences Costco predicts. Were those consequences to materialize, Congress could address them by amending the Act, as it has done on numerous occasions. *See supra* pp. 12-13.[6]

Costco's contentions thus cannot overcome what the text of §109(a), the presumption against extraterritoriality, settled judicial precedent, and the purposes of the Copyright Act make clear: The first sale doctrine does not apply to copies that are manufactured and distributed outside the United States.[7]

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[6] It is also far from clear that Costco's reading of §110(1) necessarily follows from the Court of Appeals' interpretation of §109(a). While §109(a) provides a defense to infringement with respect to copies that are "lawfully made under this title," §110(1) creates an exception to an infringement defense with respect to copies that are "*not* lawfully made under this title." If the hypothetical case Costco describes ever actually arose, a court would have to consider whether to construe the phrase "not lawfully made under this title" to mean "unlawfully made" under—*i.e.*, made in violation of—the U.S. Copyright Act.

[7] As Omega notes (Br. 10), this case does not present, and the Court need not resolve, the question whether the first sale doctrine applies where a copy is manufactured abroad but sold in the United States with the authorization of the copyright owner. In dicta, the Court of Appeals repeated its previous determination that the first sale defense would apply on those facts. Pet. App. 8a-9a, 16a-17a. While that determination is consistent with the rationale of the first sale doctrine, the text of §109(a) limits the first sale defense to copies "*lawfully made under*" U.S. law, and the making of copies outside the United States is not governed by U.S. law. As the Solicitor General has argued, should any "anomaly" ever result from that plain meaning, it should be resolved by Congress, not by "construe[ing]" §109(a) to "effectively nullify

II. EXTENDING THE FIRST SALE DEFENSE TO INFRINGING IMPORTS MANUFACTURED ABROAD COULD PRODUCE HARMFUL CONSEQUENCES CONTRARY TO THE PURPOSES OF THE COPYRIGHT ACT

Costco and its amici argue that the Court of Appeals' interpretation of §109(a), if adopted by this Court, would permit manufacturers to exploit the copyright laws to impair secondary markets, restrict competition, and harm consumers without any countervailing advancement of the purposes of the Copyright Act. *See* Pet. Br. 46-52; Retail Industry Leaders Association Br. 19-20, 34-35; Public Knowledge Br. 13-20, 25-27; Public Citizen Br. 7-10; eBay Br. 15-22.

In advancing these arguments, Costco and its amici ignore completely the consequences their preferred interpretation of §109(a) would have for artistic fields like the motion picture and music industries that lie at the core of the Copyright Act's intended protection and that depend on copyright protection for their economic viability. Although, like *Quality King*, this particular case arises in the context of labels on commercial goods that bear "only a limited creative component," the Court's interpretation of §109(a) will "apply equally to a case involving more familiar copyrighted materials." 523 U.S. at 140. Thus, when construing the Copyright Act, courts "must remember that its principal purpose was to promote the progress of the 'useful Arts' by rewarding creativity" and that its "principal function is the protection of original works, rather than ordinary commercial products that use copyrighted material as a marketing aid." *Id.* at 151 (citation omitted). As in

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Congress's clear policy choice … that market segmentation be permitted." U.S. Cert. Br. 19.

Quality King, it is therefore appropriate to "take into account the impact" on original creative works. *Id.*

Here, Costco's interpretation of §109(a), if accepted, would undermine important copyright protection on which the motion picture and music industries depend. These industries rely on the ability to plan for and control the timing and manner of the release of their works in different markets around the world. Unauthorized importation of home video discs and CDs[8] into the U.S. market would undercut that control and would deprive authors of creative works of the economic benefits Congress intended to make available *under U.S. copyright law* as an incentive to creative activity.[9]

A. Undermining Copyright Owners' Control Over Entry Into Different Markets Threatens The Value Of Their Copyright

Unauthorized importation into the United States of copies made outside the United States for foreign

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[8] As used in this brief, the phrase "video discs" includes both DVDs and Blu-Ray discs, and any other optical discs used for viewing movies at home. "CDs" refers to compact discs used for listening to sound recordings.

[9] While for technical reasons some video discs manufactured for sale in other markets cannot be played back satisfactorily or at all on U.S. televisions and disc players, a substantial proportion of such discs will play perfectly well in the United States. Indeed, with the shift to high-definition technologies such as Blu-Ray, one of the main technical impediments to using video discs manufactured abroad for home entertainment in the U.S. is becoming increasingly obsolete. Accordingly, the adverse consequences for the motion picture industry that arise from unauthorized importation will pose an even more serious concern as more markets move to high-definition home entertainment technology.

markets diminishes the value of the U.S. copyright. When copyright owners distribute tangible copies of creative works in a foreign market, they recoup the economic benefit made possible by the copyright law of that country—which may be substantially less generous or well enforced than U.S. copyright law—but do not realize the separate benefit Congress intended them to derive from their U.S. copyright. To avoid loss of valuable rights under U.S. copyright law, copyright owners must be able to maintain control over their entry into different markets and to enter one market without jeopardizing their success in another. Applying the first sale defense to copies that are manufactured abroad for distribution in other markets but introduced into the U.S. market without the copyright owner's authorization would undermine these important rights.

Under Costco's view, a U.S. copyright owner will be deemed to have exhausted its rights under the U.S. Copyright Act even before it has realized the economic benefit Congress intended to make available through control over the first sale. For example, when unauthorized importers purchase CDs, DVDs, or Blu-Ray discs in other markets and resell them in the United States, the importer effectively undercuts the economic benefit Congress intended to provide to the copyright owner to stimulate artistic activity. Similarly, when the U.S. copyright is held by a company that has no distribution rights in other markets, unauthorized importation of copies of a movie or sound recording made abroad for a foreign market prevents the U.S. copyright holder from realizing the benefit of its rights under U.S. law, even if it has yet to sell a single theater ticket, CD, or home video disc.

Extension of the first sale doctrine to copies made abroad could thus have harmful consequences for artistic industries that depend on copyright protection and thwart the purposes of the Copyright Act. Those harms, in turn, could have deleterious consequences for the U.S. economy as a whole. As of 2008, the motion picture and television industry supported 2.4 million jobs across all fifty States and over $140 billion in total wages. MPAA, *The Motion Picture & Television Industry Contribution to the U.S. Economy* 2 (Apr. 2010). In addition to the major motion picture studios, the industry supports and relies on a nationwide network of other businesses—over 95,000 businesses as of 2009. *Id.* at 4. The music industry generated revenue of $18.7 billion in 2005 and employed over 25,000 paid employees as of 2004. Siwek, *The True Cost of Sound Recording Piracy to the U.S. Economy*, Institute for Policy Innovation, Report No. 188, at 2 (2007). The industry supports many smaller businesses such as retail stores, distribution companies, recording studios, and music professionals. The retail trade alone generates over $7 billion from the sale of sound recordings. *Id.* Maintaining copyright protection thus is crucial not only to the health of these industries themselves, but also to preserve their substantial contributions to the national economy.

B. The Ability To Treat National Markets Separately Is Important To The Success Of The Motion Picture And Music Industries

As Omega has demonstrated (Br. 27-30), the prohibition on unauthorized importation in §602 was intended to protect domestic distribution rights and copyright holders' ability to treat national markets separately. Ignoring these purposes, Costco recognizes

no difference between the foreign and domestic markets. Yet these markets are distinct. Cultural and other differences across markets in different parts of the world make it necessary for motion picture companies to tailor theatrical releases and disc sales to the particulars of each market. Producers, accordingly, adapt the timing, content, advertising, and other aspects of theater and home video releases to each market to maximize the prospect of commercial success. Record companies similarly time their domestic and foreign releases to maximize overall sales. If companies' ability to do so is undercut by unauthorized importation and the U.S. market is saturated with DVDs, Blu-Ray discs, and CDs that were not intended for U.S. distribution, movies and sound recordings would be less likely to achieve commercial success. *See, e.g.*, Craig et al., *Culture Matters: Consumer Acceptance of U.S. Films in Foreign Markets*, 13 J. Int'l Marketing 80, 97 (2005). Unauthorized importation may disrupt exclusive licenses or interfere with the copyright holder's flexibility to respond to market changes. Moreover, a copyright owner's loss of control over the first sale into particular markets may increase the risk that entering different markets will diminish valuable rights under U.S. copyright law.

1. *Timing releases differently in different markets.* For numerous reasons, it is common practice in the motion picture industry for a studio to release new movies in theaters and on DVD or Blu-Ray at different times in different markets. Sometimes these decisions are driven by the content of the movie: A movie marketed as a summer blockbuster is unlikely to be released at the same time in Australia and New Zealand as in Europe and North America. Control over the timing of entry into a particular market is also vital to

advertising and promotional strategies. Promotional "hype" surrounding a movie's release or publication can contribute greatly to its commercial success, but creating hype depends on close control over the timing of entry into the market. For example, timing a release to coincide with a promotional tour by actors or artists associated with the work helps maintain excitement and demand around the work's release. Similarly, filmmakers may delay a movie's release in large markets like the United States until a movie has enjoyed success in smaller markets or international film festivals. Record companies likewise time the release of recordings in different markets to capitalize on promotional opportunities such as when an artist will be on tour or available to promote the album. Ensuring the copyright holder's control over the timing of entry into different markets enables it to build a "crescendo of demand" that facilitates the widest possible dissemination of its creative works. Barfield & Groombridge, *The Economic Case for Copyright Owner Control over Parallel Imports*, 1 J. World Intell. Prop. 903, 929 (1998). Under Costco's view, moreover, a studio that had reason to release a movie on disc in one market while the movie was still in theaters in the United States could not do so without heightened risk that unauthorized importation of foreign video discs into the United States would detract from the success of the U.S. theatrical release. *See id.* at 930 (unauthorized imports "can destroy the profitability of the sequencing chain—in both the theatrical and video markets").[10]

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[10] The practice of "windowing," or releasing movies at different times around the world, is longstanding and common. For example, an affiliate of MPAA member Twentieth Century Fox Films Corporation released the suspense film *Taken* on DVD in

2. *Combating piracy and unauthorized importation.* The timing of releases into different markets is often staggered due to concerns that piracy in some markets will hinder sales in other regions. For example, in countries where "camcording" is prevalent (*i.e.*, surreptitious use of handheld video recorders to record copies of movies during theater performances), a copyright owner might release the DVD and Blu-Ray versions of the film early to compete with and deter camcording activity. If those early-release video discs could lawfully be imported into the United States while the film is still showing in U.S. theaters, they could undercut the success of the theatrical release. Record companies also stagger their releases around the world in an effort to combat rampant music piracy. A copyright owner that needs to adapt its marketing strategy to conditions in certain other countries where copyright protection is less stringently enforced should not risk losing the economic benefit of its rights under U.S. copyright law in doing so.

3. *Varying content by market.* Unlike wristwatches or other ordinary commercial goods, original creative works are often tailored in content to better respond to regional conditions and tastes. In the motion picture context, for example, a studio will frequently release different versions of the same movie in different markets to adapt to local language, taste, and

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Mexico in November 2008, but did not release the film in U.S. theaters until January 2009. The Mexican DVD, which was manufactured in Mexico, was compatible with U.S. televisions and DVD players. Given the staggered release windows, unauthorized importation of copies of the Mexican DVD could have significantly diminished the success of the U.S. theatrical release and undercut the value of Fox's U.S. distribution rights.

humor, to comply with different decency and ratings standards, or simply to make different artistic statements.[11] Treating international markets differently for these purposes is perfectly legitimate. Yet under Costco's view, a studio would face the threat that foreign versions of movies, which could be less well received by U.S. audiences than a version specifically tailored to U.S. tastes, could become widely available in the United States, yielding negative reactions and depressing sales. Sound recordings tend to be less heavily tailored to particular tastes than movies, but even they are edited to comport with local views of language and decency. Record companies should not be deprived of the right to control how their works are received in the United States.

4. *Fostering local distribution networks.* The motion picture and television industry supports over 2.4 million jobs and over $140 billion in total wages in the United States. Over 453,000 of these jobs and over 45,000 businesses are involved in local distribution of motion pictures to consumers. MPAA, *Motion Picture Contribution* 2, 4. The recorded music industry

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[11] *See, e.g.*, Alternate Versions for *Austin Powers: International Man of Mystery* (1997), http://www.imdb.com/title/tt0118655/alternateversions (describing different jokes, editing, and content in U.S. and United Kingdom versions); Alternate Versions for *Schindler's List* (1993), http://www.imdb.com/title/tt0108052/alternateversions (comparing Israeli and other versions); Alternate Versions for *E.T.: The Extra-Terrestrial* (1982), http://www.imdb.com/title/tt0083866/alternateversions (describing alteration in Japanese version to accommodate cultural differences); Alternate Versions for *The Shining* (1980), http://www.imdb.com/title/tt0081505/alternateversions (describing changes in content and editing made by director Stanley Kubrick for U.S. and European theatrical and home video releases).

supports a similar array of "downstream" businesses including retail stores, which generate over $7 billion annually. Siwek 2. Treating markets separately permits copyright owners to develop stable networks of distributors who are focused on a particular national market. The distributor's familiarity with the national market helps ensure that new theatrical, home video, and music releases are packaged and advertised in the optimal manner for that market. Local distributors can "customize the products to meet local market demands, including dubbing/sub-titling, duplication of the customized product, special packaging and advertising." Barfield & Groombridge 930. Local distribution networks also aid the copyright owner in policing against piracy and copyright infringement by monitoring sales and distribution and keeping track of the provenance of different batches of copies.

5. *Dividing rights across markets.* It is common in the movie industry for distribution rights to a particular film to be held by different companies in different countries. As Omega has shown (Br. 24-30), Congress enacted §602(a) largely to protect such arrangements and prohibit importation of both piratical and legitimate foreign copies. Often, copyright owners license the exclusive distribution rights in particular markets as a means of raising capital to finance new films. For example, to obtain the necessary financing to produce and market a new film, a studio might sell or license distribution rights to the film in smaller, strategic markets to raise money, while retaining the rights—and the prospect of a sound market return—in larger markets like the United States. *See* Barfield & Groombridge 930. Likewise, record companies often license the distribution of their sound recordings in foreign territories as a way of utilizing the licensee's

superior distribution capability in a particular region, enhancing revenue for both the record company and its licensee. When rights are held separately in this way, the U.S. copyright holder has no right to make or distribute copies in foreign markets. Yet when copies made abroad by a foreign copyright holder or a licensee with distribution rights in the foreign market are imported without authorization into the United States, they undercut revenue for the company holding the exclusive distribution rights in the United States. Indeed, under Costco's view, there would effectively be no such thing as exclusive distribution rights for the U.S. copyright holder if copies made abroad by a licensee with foreign distribution rights could be freely imported and shielded by the first sale defense.

C. Costco's Policy Arguments Are Unrealistic And Cannot Overcome The Statute's Text And Purpose

While ignoring the harmful consequences their interpretation of the first sale doctrine could have for creative industries, Costco and its amici predict a parade of horribles they say will result if this Court affirms the decision below. These predictions are unfounded and unrealistic. And even if Costco's policy concerns were well taken, the proper forum in which to resolve them would be Congress, not this Court.

As an initial matter, Costco's improbable concern (Br. 17, 51-52) that limiting the first sale doctrine to copies made in the United States will result in unintended liability for unwary teachers, librarians, or travelers trivializes the serious threat to copyright protection that could result from adoption of Costco's interpretation of §109(a). The threat at issue is the prospect of unauthorized importation of tens or hundreds of

thousands of copies of movies, sound recordings, or other protected works that will undercut the market for the copies intended for sale in the United States and prevent copyright holders from realizing the benefit that Congress intended to make available under U.S. copyright law. Costco points to no evidence to suggest that the existing rule has deterred legitimate activity by teachers or librarians or has invited reckless or unwarranted enforcement actions.

Costco's dire predictions about the gray market are likewise one-sided and overstated. Costco fails even to acknowledge the active debate surrounding the value of parallel imports (or lack thereof), and it ignores the numerous legitimate reasons for treating national markets separately. The very articles Costco cites (Br. 46-47) for the proposition that the U.S. economy will be harmed, in fact, take a much more ambivalent view than Costco acknowledges of the value of and threat to the gray market. For example, one cited article reports that academic "reactions to gray market encroachments are mixed," due in part to evidence that "billion[s] [of dollars] in cannibalized sales" may "stifle the incentive to innovate." Autrey & Bova, *Gray Markets and Multinational Transfer Pricing*, Harv. Bus. School Accounting & Management Unit Working Paper No. 09-098, at 1 (2009). Another source Costco cites reports that gray markets cause companies to "suffer from price erosion, brand damage, and … inadequate customer service." KPMG LLP, *Effective Channel Management Is Critical in Combating the Gray Market and Increasing Technology Companies' Bottom Line* 3 (2008).

Costco and its amici next contend that adopting the Court of Appeals' interpretation of §109(a) would harm the U.S. economy by creating an incentive for copyright owners to "outsource" manufacturing to other

countries to avoid application of the first sale doctrine. As discussed, however, a producer of creative works must take numerous considerations into account when making manufacturing and marketing decisions across different markets. Costco ignores this context.

It is thus far from clear that any of the negative policy consequences Costco predicts will ever materialize. Indeed, as discussed above, courts have held for nearly thirty years that the first sale doctrine does not apply when copies manufactured abroad are imported into the United States without the copyright owner's authorization. *Supra* Part I.A.3. Yet Costco points to no evidence that any of the harms it predicts has come about despite this settled judicial construction. A similar rule of Community-wide exhaustion of the distribution right was codified in the European Union in 2001.[12] If Costco and its amici were correct in their warnings, one would expect some evidence of the harmful consequences they describe to have emerged in the United States or Europe, but Costco points to none.

Moreover, many of the policy arguments advanced by Costco and its amici in support of an unfettered secondary market in copyrighted goods reduce to the contention that copyright owners should not be permitted to control the first sale of any protected work in the United States or realize any economic benefit from

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[12] *See* Council Directive 2001/29, ¶28 & art. 4, 2001 O.J. (L167) 10, 12, 16 (EC) ("right to control resale" "should not be exhausted in respect of … copies … sold by the rightholder or with his consent outside the Community"); *see also* Case C-479/04, *Laserdisken ApS* v. *Kulturministeriet*, 2007 C.M.L.R. 6, 209 (exhaustion of exclusive distribution right requires first sale by or with the consent of the rightholder "on the market in the Community").

their U.S. copyright. But Congress has concluded otherwise, and it has determined that providing that benefit is the best way to spur creation of new artistic works for the public good. *See Twentieth Century Music Corp.*, 422 U.S. at 156; *Harper & Row*, 471 U.S. at 546.

Finally, even if Costco's policy concerns were to materialize, the proper response would be for Costco or its amici to direct those concerns to Congress, not to ask this Court to distort the language of §109(a) of the Copyright Act. In crafting and fine-tuning the Copyright Act, Congress has sought to achieve a "difficult balance between the interests of authors and inventors in the control and exploitation of their writing and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand." *Sony Corp. of Am.* v. *Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). As this Court has repeatedly recognized, "it is generally for Congress, not the courts, to decide how best to pursue [those] objectives." *Eldred* v. *Ashcroft*, 537 U.S. 186, 212 (2003). And as discussed above, Congress has shown itself to be willing and able to amend the Copyright Act to readjust that balance in response to emerging policy concerns. *Supra* pp. 12-13.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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