

KIRTSAENG v. JOHN WILEY & SONS, INC.

Supreme Court of the United States, 2013
133 S. Ct. 1351

JUSTICE BREYER delivered the opinion of the Court.

Section 106 of the Copyright Act grants “the owner of copyright under this title” certain “exclusive rights,” including the right “to distribute copies ... of the copyrighted work to the public by sale or other transfer of ownership.” 17 U.S.C. §106(3). These rights are qualified, however, by the application of various limitations set forth in the next several sections of the Act, §§107 through 122. Those sections, typically entitled “Limitations on exclusive rights,” include, for example, the principle of “fair use” (§107), permission for limited library archival reproduction, (§108), and the doctrine at issue here, the “first sale” doctrine (§109). ...

Thus, even though §106(3) forbids distribution of a copy of, say, the copyrighted novel Herzog without the copyright owner's permission, §109(a) adds that, once a copy of Herzog has been lawfully sold (or its ownership otherwise lawfully transferred), the buyer of that *copy* and subsequent owners are free to dispose of it as they wish. In copyright jargon, the “first sale” has “exhausted” the copyright owner's §106(3) exclusive distribution right.

What, however, if the copy of Herzog was printed abroad and then initially sold with the copyright owner's permission? Does the “first sale” doctrine still apply? Is the buyer, like the buyer of a domestically manufactured copy, free to bring the copy into the United States and dispose of it as he or she wishes?

To put the matter technically, an “importation” provision, §602(a)(1), says that

“[i]mportation into the United States, without the authority of the owner of copyright under this title, of copies ... of a work that have been acquired outside the United States is an infringement of the exclusive right to distribute copies ... *under section 106....*” 17 U.S.C. §602(a)(1) (2006 ed., Supp. V) (emphasis added).

Thus §602(a)(1) makes clear that importing a copy without permission violates the owner's exclusive distribution right. But in doing so, §602(a)(1) refers explicitly to the §106(3) exclusive distribution right. As we have just said, §106 is by its terms “[s]ubject to” the various doctrines and principles contained in §§107 through 122, including §109(a)'s “first sale” limitation. Do those same modifica-

tions apply—in particular, does the “first sale” modification apply—when considering whether §602(a)(1) prohibits importing a copy?

In *Quality King Distributors, Inc. v. L'anza Research Int'l, Inc.*, 523 U.S. 135, 145 (1998), we held that §602(a)(1)'s reference to §106(3)'s exclusive distribution right incorporates the later subsections' limitations, including, in particular, the “first sale” doctrine of §109. Thus, it might seem that, §602(a)(1) notwithstanding, one who buys a copy abroad can freely import that copy into the United States and dispose of it, just as he could had he bought the copy in the United States.

But *Quality King* considered an instance in which the copy, though purchased abroad, was initially manufactured in the United States (and then sent abroad and sold). This case is like *Quality King* but for one important fact. The copies at issue here were manufactured abroad. That fact is important because §109(a) says that the “first sale” doctrine applies to “a particular copy or phonorecord *lawfully made under this title.*” And we must decide here whether the five words, “lawfully made under this title,” make a critical legal difference.

Putting section numbers to the side, we ask whether the “first sale” doctrine applies to protect a buyer or other lawful owner of a copy (of a copyrighted work) lawfully manufactured abroad. Can that buyer bring that copy into the United States (and sell it or give it away) without obtaining permission to do so from the copyright owner? Can, for example, someone who purchases, say at a used bookstore, a book printed abroad subsequently resell it without the copyright owner's permission?

In our view, the answers to these questions are, yes. We hold that the “first sale” doctrine applies to copies of a copyrighted work lawfully made abroad.

I

A

Respondent, John Wiley & Sons, Inc., publishes academic textbooks. Wiley obtains from its authors various foreign and domestic copyright assignments, licenses and permissions—to the point that we can, for present purposes, refer to Wiley as the relevant American copyright owner. Wiley often assigns to its wholly owned foreign subsidiary, John Wiley & Sons (Asia) Pte Ltd., rights to publish, print, and sell Wiley's English language textbooks abroad. Each copy of a Wiley Asia foreign edition will likely contain language making clear that the copy is to be sold only in a particular country or geographical region outside the United States.

For example, a copy of Wiley's American edition says, “Copyright © 2008 John Wiley & Sons, Inc. All rights reserved.... Printed in the United States of America.” J. Walker, *Fundamentals of Physics*, p. vi (8th ed. 2008). A copy of Wiley Asia's Asian edition of that book says:

“Copyright © 2008 John Wiley & Sons (Asia) Pte Ltd[.] All rights reserved. This book is authorized for sale in Europe, Asia, Africa, and the Middle East only and may be not exported out of these territories. Exportation from or importation of this book to another region without the Publisher's authorization is illegal and is a violation of the Publisher's rights. The Publisher may take legal action to enforce its rights.... Printed in Asia.” J. Walker, *Fundamentals of Physics*, p.vi (8th ed. 2008 Wiley Int'l Student ed.).

Both the foreign and the American copies say:

“No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means ... except as permitted under Sections 107 or 108 of the 1976 United States Copyright Act.” Compare, *e.g.*, *ibid.* (Int'l ed.), with Walker, *supra*, at vi (American ed.).

The upshot is that there are two essentially equivalent versions of a Wiley textbook, each version manufactured and sold with Wiley's permission: (1) an American version printed and sold in the United States, and (2) a foreign version manufactured and sold abroad. And Wiley makes certain that copies of the second version state that they are not to be taken (without permission) into the United States.

Petitioner, Supap Kirtsaeng, a citizen of Thailand, moved to the United States in 1997 to study mathematics at Cornell University. He paid for his education with the help of a Thai Government scholarship which required him to teach in Thailand for 10 years on his return. Kirtsaeng successfully completed his undergraduate courses at Cornell, successfully completed a Ph.D. program in mathematics at the University of Southern California, and then, as promised, returned to Thailand to teach. While he was studying in the United States, Kirtsaeng asked his friends and family in Thailand to buy copies of foreign edition English-language textbooks at Thai book shops, where they sold at low prices, and mail them to him in the United States. Kirtsaeng would then sell them, reimburse his family and friends, and keep the profit.

B

In 2008 Wiley brought this federal lawsuit against Kirtsaeng for copyright infringement. Wiley claimed that Kirtsaeng's unauthorized importation of its books and his later resale of those books amounted to an infringement of Wiley's §106(3) exclusive right to distribute as well as §602's related import prohibition. 17 U.S.C. §§106(3) (2006 ed.), 602(a) (2006 ed., Supp. V). Kirtsaeng replied that the books he had acquired were “lawfully made” and that he had acquired them

legitimately. Thus, in his view, §109(a)'s “first sale” doctrine permitted him to resell or otherwise dispose of the books without the copyright owner's further permission.

The District Court held that Kirtsaeng could not assert the “first sale” defense because, in its view, that doctrine does not apply to “foreign-manufactured goods” (even if made abroad with the copyright owner's permission).

On appeal, a split panel of the Second Circuit agreed with the District Court. It pointed out that §109(a)'s “first sale” doctrine applies only to “the owner of a particular copy ... *lawfully made under this title.*” *Id.*, at 218–219 (emphasis added). And, in the majority's view, this language means that the “first sale” doctrine does not apply to copies of American copyrighted works manufactured abroad. *Id.*, at 221. A dissenting judge thought that the words “lawfully made under this title” do not refer “to a place of manufacture” but rather “focu[s] on whether a particular copy was manufactured lawfully under” America's copyright statute, and that “the lawfulness of the manufacture of a particular copy should be judged by U.S. copyright law.” *Id.*, at 226 (opinion of Murtha, J.). ...

II

We must decide whether the words “lawfully made under this title” restrict the scope of §109(a)'s “first sale” doctrine geographically. The Second Circuit, the Ninth Circuit, Wiley, and the Solicitor General (as *amicus*) all read those words as imposing a form of *geographical* limitation. The Second Circuit held that they limit the “first sale” doctrine to particular copies “made in territories *in which the Copyright Act is law,*” which (the Circuit says) are copies “manufactured domestically,” not “outside of the United States.” (emphasis added). Wiley agrees that those five words limit the “first sale” doctrine “to copies made in conformance with the [United States] Copyright Act *where the Copyright Act is applicable,*” which (Wiley says) means it does not apply to copies made “outside the United States” and at least not to “foreign production of a copy for distribution exclusively abroad.”

Kirtsaeng, however, reads the words “lawfully made under this title” as imposing a *non-geographical* limitation. He says that they mean made “in accordance with” or “in compliance with” the Copyright Act. In that case, §109(a)'s “first sale” doctrine would apply to copyrighted works as long as their manufacture met the requirements of American copyright law. In particular, the doctrine would apply where, as here, copies are manufactured abroad with the permission of the copyright owner.

In our view, §109(a)'s language, its context, and the common-law history of the “first sale” doctrine, taken together, favor a *non-geographical* interpretation. We also doubt that Congress would have intended to create the practical copyright-related harms with which a geographical interpretation would threaten ordinary

scholarly, artistic, commercial, and consumer activities. We consequently conclude that Kirtsaeng's nongeographical reading is the better reading of the Act.

A

The language of §109(a) read literally favors Kirtsaeng's nongeographical interpretation, namely, that “lawfully made under this title” means made “in accordance with” or “in compliance with” the Copyright Act. The language of §109(a) says nothing about geography. The word “under” can mean “[i]n accordance with.” 18 Oxford English Dictionary 950 (2d ed.1989). See also Black's Law Dictionary 1525 (6th ed. 1990) (“according to”). And a nongeographical interpretation provides each word of the five-word phrase with a distinct purpose. The first two words of the phrase, “lawfully made,” suggest an effort to distinguish those copies that were made lawfully from those that were not, and the last three words, “under this title,” set forth the standard of “lawful[ness].” Thus, the nongeographical reading is simple, it promotes a traditional copyright objective (combatting piracy), and it makes word-by-word linguistic sense.

The geographical interpretation, however, bristles with linguistic difficulties. It gives the word “lawfully” little, if any, linguistic work to do. (How could a book be *un* lawfully “made under this title”?) It imports geography into a statutory provision that says nothing explicitly about it. And it is far more complex than may at first appear.

To read the clause geographically, Wiley, like the Second Circuit and the Solicitor General, must first emphasize the word “under.” Indeed, Wiley reads “under this title” to mean “in conformance with the Copyright Act *where the Copyright Act is applicable*.” Wiley must then take a second step, arguing that the Act “is applicable” only in the United States. And the Solicitor General must do the same.

One difficulty is that neither “under” nor any other word in the phrase means “where.” See, *e.g.*, 18 Oxford English Dictionary, *supra*, at 947–952 (definition of “under”). It might mean “subject to,” as this Court has repeatedly acknowledged, the word evades a uniform, consistent meaning. See *Kucana v. Holder*, 558 U.S. 233, 245 (2010) (“‘under’ is chameleon”); *Ardestani v. INS*, 502 U.S. 129, 135 (1991) (“under” has “many dictionary definitions” and “must draw its meaning from its context”).

A far more serious difficulty arises out of the uncertainty and complexity surrounding the second step's effort to read the necessary geographical limitation into the word “applicable” (or the equivalent). Where, precisely, is the Copyright Act “applicable”? The Act does not instantly *protect* an American copyright holder from unauthorized piracy taking place abroad. But that fact does not mean the Act is *inapplicable* to copies made abroad. As a matter of ordinary English, one can say that a statute imposing, say, a tariff upon “any rhododendron grown in Nepal” applies to *all* Nepalese rhododendrons. And, similarly, one can say that the American

Copyright Act is *applicable* to *all* pirated copies, including those printed overseas. Indeed, the Act itself makes clear that (in the Solicitor General's language) foreign-printed pirated copies are “subject to” the Act. §602(a)(2) (referring to importation of copies “the making of which either constituted an infringement of copyright, or which would have constituted an infringement of copyright if this title had been applicable”).

The appropriateness of this linguistic usage is underscored by the fact that §104 of the Act itself says that works “*subject to protection under this title*” include unpublished works “without regard to the nationality or domicile of the author,” and works “first published” in any one of the nearly 180 nations that have signed a copyright treaty with the United States. §§104(a), (b) (2006 ed.) (emphasis added); §101 (2006 ed., Supp. V) (defining “treaty party”); U.S. Copyright Office, Circular No. 38A, International Copyright Relations of the United States (2010). Thus, ordinary English permits us to say that the Act “applies” to an Irish manuscript lying in its author's Dublin desk drawer as well as to an original recording of a ballet performance first made in Japan and now on display in a Kyoto art gallery. Cf. 4 M. Nimmer & D. Nimmer, Copyright §17.02, pp. 17–18, 17–19 (2012) (noting that the principle that “copyright laws do not have any extraterritorial operation” “requires some qualification”).

The Ninth Circuit's geographical interpretation produces still greater linguistic difficulty. As we said, that Circuit interprets the “first sale” doctrine to cover both (1) copies manufactured in the United States and (2) copies manufactured abroad but first sold in the United States with the American copyright owner's permission. [*Denbicare U.S.A. Inc. v. Toys “R” Us, Inc.*, 84 F.3d 1143, 1149–1150 (9th Cir. 1996).]

We can understand why the Ninth Circuit may have thought it necessary to add the second part of its definition. As we shall later describe, without some such qualification a copyright holder could prevent a buyer from domestically reselling or even giving away copies of a video game made in Japan, a film made in Germany, or a dress (with a design copyright) made in China, *even* if the copyright holder has granted permission for the foreign manufacture, importation, and an initial domestic sale of the copy. A publisher such as Wiley would be free to print its books abroad, allow their importation and sale within the United States, but prohibit students from later selling their used texts at a campus bookstore. We see no way, however, to reconcile this half-geographical/half-nongeographical interpretation with the language of the phrase, “lawfully made under this title.” As a matter of English, it would seem that those five words either do cover copies lawfully made abroad or they do not.

In sum, we believe that geographical interpretations create more linguistic problems than they resolve. And considerations of simplicity and coherence tip the purely linguistic balance in Kirtsaeng's, nongeographical, favor.

B

Both historical and contemporary statutory context indicate that Congress, when writing the present version of §109(a), did not have geography in mind. In respect to history, we compare §109(a)'s present language with the language of its immediate predecessor. That predecessor said:

“[N]othing in this Act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work *the possession of which has been lawfully obtained.*” Copyright Act of 1909, §41, 35 Stat. 1084 (emphasis added).

The predecessor says nothing about geography (and Wiley does not argue that it does). So we ask whether Congress, in changing its language implicitly *introduced* a geographical limitation that previously was lacking.

A comparison of language indicates that it did not. The predecessor says that the “first sale” doctrine protects “the transfer of any copy *the possession of which has been lawfully obtained.*” The present version says that “*the owner* of a particular copy or phonorecord lawfully made under this title is entitled to sell or otherwise dispose of the possession of that copy or phonorecord.” What does this change in language accomplish?

The language of the former version referred to those *who are not owners* of a copy, but mere possessors who “lawfully obtained” a copy. The present version covers only those who are *owners* of a “lawfully made” copy. Whom does the change leave out? Who might have lawfully *obtained* a copy of a copyrighted work but not *owned* that copy? One answer is owners of movie theaters, who during the 1970's (and before) often *leased* films from movie distributors or filmmakers. Because the theater owners had “lawfully obtained” their copies, the earlier version could be read as allowing them to sell that copy, *i.e.*, it might have given them “first sale” protection. Because the theater owners were lessees, not owners, of their copies, the change in language makes clear that they (like bailees and other lessees) cannot take advantage of the “first sale” doctrine. (Those who find legislative history useful will find confirmation in, *e.g.*, House Committee on the Judiciary, Copyright Law Revision, Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, 89th Cong., 1st Sess., pt. 6, p. 30 (Comm. Print 1965) (hereinafter Copyright Law Revision) (“[W]here a person has rented a print of a motion picture from the copyright owner, he would have no right to lend, rent, sell, or otherwise dispose of the print without first obtaining the copyright owner's permission”).

This objective perfectly well explains the new language of the present version, including the five words here at issue. Section 109(a) now makes clear that a lessee of a copy will *not* receive “first sale” protection but one who *owns* a copy *will* receive “first sale” protection, *provided*, of course, that the copy was “*lawfully*

made” and not pirated. The new language also takes into account that a copy may be “lawfully made under this title” when the copy, say of a phonorecord, comes into its owner's possession through use of a compulsory license, which “this title” provides for elsewhere, namely, in §115. Again, for those who find legislative history useful, the relevant legislative report makes this clear. H.R.Rep. No. 94–1476, p. 79 (1976), 1976 U.S.C.C.A.N. 5659, 5693 (“For example, any resale of an illegally ‘pirated’ phonorecord would be an infringement, but the disposition of a phonorecord legally made under the compulsory licensing provisions of section 115 would not”).

Other provisions of the present statute also support a nongeographical interpretation. For one thing, the statute phases out the “manufacturing clause,” a clause that appeared in earlier statutes and had limited importation of many copies (of copyrighted works) printed outside the United States. §601, 90 Stat. 2588 (“Prior to July 1, 1982 ... the importation into or public distribution in the United States of copies of a work consisting preponderantly of nondramatic literary material ... is prohibited unless the portions consisting of such material have been manufactured in the United States or Canada”). The phasing out of this clause sought to equalize treatment of copies manufactured in America and copies manufactured abroad..

The “equal treatment” principle, however, is difficult to square with a geographical interpretation of the “first sale” clause that would grant the holder of an American copyright (perhaps a foreign national, see *supra*, at 1359) permanent control over the American distribution chain (sales, resales, gifts, and other distribution) in respect to copies printed abroad but not in respect to copies printed in America. And it is particularly difficult to believe that Congress would have sought this unequal treatment while saying nothing about it and while, in a related clause (the manufacturing phase-out), seeking the opposite kind of policy goal. Cf. *Golan v. Holder*, 565 U.S. ___, ___, 132 S.Ct. 873, 893 (2012) (Congress has moved from a copyright regime that, prior to 1891, entirely excluded foreign works from U.S. copyright protection to a regime that now “ensure[s] that most works, whether foreign or domestic, would be *governed by the same legal regime*” (emphasis added)). ...

C

A relevant canon of statutory interpretation favors a nongeographical reading. “[W]hen a statute covers an issue previously governed by the common law,” we must presume that “Congress intended to retain the substance of the common law.” *Samantar v. Yousuf*, 560 U.S. ___, ___ n. 13 (2010). See also *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952) (“Statutes which invade the common law ... are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident”).

The “first sale” doctrine is a common-law doctrine with an impeccable historic pedigree. In the early 17th century Lord Coke explained the common law’s refusal to permit restraints on the alienation of chattels. Referring to Littleton, who wrote in the 15th century, Lord Coke wrote:

“[If] a man be possessed of ... a horse, or of any other chattell ... and give or sell his whole interest ... therein upon condition that the Donee or Vendee shall not alien[ate] the same, the [condition] is void, because his whole interest ... is out of him, so as he hath no possibilit[y] of a Reverter, and it is against Trade and Traffi[c], and bargaining and contracting betwee[n] man and man: and it is within the reason of our Author that it should ouster him of all power given to him.” 1 E. Coke, *Institutes of the Laws of England* §360, p. 223 (1628).

A law that permits a copyright holder to control the resale or other disposition of a chattel once sold is similarly “against Trade and Traffi[c], and bargaining and contracting.” *Ibid.*

With these last few words, Coke emphasizes the importance of leaving buyers of goods free to compete with each other when reselling or otherwise disposing of those goods. American law too has generally thought that competition, including freedom to resell, can work to the advantage of the consumer. See, e.g., *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (restraints with “manifestly anticompetitive effects” are *per se* illegal; others are subject to the rule of reason (internal quotation marks omitted)); 1 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 100, p. 4 (3d ed. 2006) (“[T]he principal objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively”).

The “first sale” doctrine also frees courts from the administrative burden of trying to enforce restrictions upon difficult-to-trace, readily movable goods. And it avoids the selective enforcement inherent in any such effort. Thus, it is not surprising that for at least a century the “first sale” doctrine has played an important role in American copyright law. See *Bobbs–Merrill Co. v. Straus*, 210 U.S. 339 (1908); Copyright Act of 1909, §41, 35 Stat. 1084. See also Copyright Law Revision, *Further Discussions and Comments on Preliminary Draft for Revised U.S. Copyright Law*, 88th Cong., 2d Sess., pt. 4, p. 212 (Comm. Print 1964) (Irwin Karp of Authors’ League of America expressing concern for “the very basic concept of copyright law that, once you’ve sold a copy legally, you can’t restrict its resale”).

The common-law doctrine makes no geographical distinctions; nor can we find any in *Bobbs–Merrill* (where this Court first applied the “first sale” doctrine) or in §109(a)’s predecessor provision, which Congress enacted a year later. Rather, as the Solicitor General acknowledges, “a straightforward application of *Bobbs–Merrill*” would not preclude the “first sale” defense from applying to authorized

copies made overseas. And we can find no language, context, purpose, or history that would rebut a “straightforward application” of that doctrine here.

* * *

D

Associations of libraries, used-book dealers, technology companies, consumer-goods retailers, and museums point to various ways in which a geographical interpretation would fail to further basic constitutional copyright objectives, in particular “promot[ing] the Progress of Science and useful Arts.” U.S. Const., Art. I, §8, cl. 8.

The American Library Association tells us that library collections contain at least 200 million books published abroad (presumably, many were first published in one of the nearly 180 copyright-treaty nations and enjoy American copyright protection under 17 U.S.C. §104); that many others were first published in the United States but printed abroad because of lower costs; and that a geographical interpretation will likely require the libraries to obtain permission (or at least create significant uncertainty) before circulating or otherwise distributing these books.

How, the American Library Association asks, are the libraries to obtain permission to distribute these millions of books? How can they find, say, the copyright owner of a foreign book, perhaps written decades ago? They may not know the copyright holder's present address. And, even where addresses can be found, the costs of finding them, contacting owners, and negotiating may be high indeed. Are the libraries to stop circulating or distributing or displaying the millions of books in their collections that were printed abroad?

Used-book dealers tell us that, from the time when Benjamin Franklin and Thomas Jefferson built commercial and personal libraries of foreign books, American readers have bought used books published and printed abroad. The dealers say that they have “operat[ed] ... for centuries” under the assumption that the “first sale” doctrine applies. But under a geographical interpretation a contemporary tourist who buys, say, at Shakespeare and Co. (in Paris), a dozen copies of a foreign book for American friends might find that she had violated the copyright law. The used-book dealers cannot easily predict what the foreign copyright holder may think about a reader's effort to sell a used copy of a novel. And they believe that a geographical interpretation will injure a large portion of the used-book business.

Technology companies tell us that “automobiles, microwaves, calculators, mobile phones, tablets, and personal computers” contain copyrightable software programs or packaging. Many of these items are made abroad with the American copyright holder's permission and then sold and imported (with that permission) to the United States. A geographical interpretation would prevent the resale of, say,

a car, without the permission of the holder of each copyright on each piece of copyrighted automobile software. Yet there is no reason to believe that foreign auto manufacturers regularly obtain this kind of permission from their software component suppliers, and Wiley did not indicate to the contrary when asked. Without that permission a foreign car owner could not sell his or her used car.

Retailers tell us that over \$2.3 trillion worth of foreign goods were imported in 2011. American retailers buy many of these goods after a first sale abroad. And, many of these items bear, carry, or contain copyrighted “packaging, logos, labels, and product inserts and instructions for [the use of] everyday packaged goods from floor cleaners and health and beauty products to breakfast cereals.” The retailers add that American sales of more traditional copyrighted works, “such as books, recorded music, motion pictures, and magazines” likely amount to over \$220 billion. ... A geographical interpretation would subject many, if not all, of them to the disruptive impact of the threat of infringement suits.

Art museum directors ask us to consider their efforts to display foreign-produced works by, say, Cy Twombly, Rene Magritte, Henri Matisse, Pablo Picasso, and others. A geographical interpretation, they say, would require the museums to obtain permission from the copyright owners before they could display the work—even if the copyright owner has already sold or donated the work to a foreign museum. What are the museums to do, they ask, if the artist retained the copyright, if the artist cannot be found, or if a group of heirs is arguing about who owns which copyright?

These examples, and others previously mentioned, help explain *why* Lord Coke considered the “first sale” doctrine necessary to protect “Trade and Traffi[c], and bargaining and contracting,” and they help explain *why* American copyright law has long applied that doctrine.

Neither Wiley nor any of its many *amici* deny that a geographical interpretation could bring about these “horribles”—at least in principle. Rather, Wiley essentially says that the list is artificially invented. It points out that a federal court first adopted a geographical interpretation more than 30 years ago. *CBS, Inc. v. Scorpio Music Distributors, Inc.*, 569 F.Supp. 47, 49 (E.D. Pa.1983), summarily aff’d, 738 F.2d 424 (3d Cir. 1984) (table). Yet, it adds, these problems have not occurred. Why not? Because, says Wiley, the problems and threats are purely theoretical; they are unlikely to reflect reality.

We are less sanguine. For one thing, the law has not been settled for long in Wiley's favor. The Second Circuit, in its decision below, is the first Court of Appeals to adopt a purely geographical interpretation. ... And other courts have hesitated to adopt, and have cast doubt upon, the validity of the geographical interpretation. *Pearson Educ., Inc. v. Liu*, 656 F. Supp. 2d 407 (S.D.N.Y. 2009); *Red-Baron Franklin Park, Inc. v. Taito Corp.*, No. 88–0156–A, 1988 WL 167344, *3 (E.D. Va.1988), rev'd on other grounds, 883 F.2d 275 (4th Cir. 1989).

For another thing, reliance upon the “first sale” doctrine is deeply embedded in the practices of those, such as booksellers, libraries, museums, and retailers, who have long relied upon its protection. Museums, for example, are not in the habit of asking their foreign counterparts to check with the heirs of copyright owners before sending, *e.g.*, a Picasso on tour. That inertia means a dramatic change is likely necessary before these institutions, instructed by their counsel, would begin to engage in the complex permission-verifying process that a geographical interpretation would demand. And this Court’s adoption of the geographical interpretation could provide that dramatic change. ...

Finally, the fact that harm has proved limited so far may simply reflect the reluctance of copyright holders so far to assert geographically based resale rights. They may decide differently if the law is clarified in their favor. Regardless, a copyright law that can work in practice only if unenforced is not a sound copyright law. It is a law that would create uncertainty, would bring about selective enforcement, and, if widely unenforced, would breed disrespect for copyright law itself.

Thus, we believe that the practical problems that petitioner and his *amici* have described are too serious, too extensive, and too likely to come about for us to dismiss them as insignificant—particularly in light of the ever-growing importance of foreign trade to America. See The World Bank, Imports of goods and services (% of GDP) (imports in 2011 18% of U.S. gross domestic product compared to 11% in 1980), online at [http:// data. worldbank. org/ indicator/ NE. IMP. GNFS. ZS?](http://data.worldbank.org/indicator/NE.IMP.GNFS.ZS?) (as visited Mar. 15, 2013, and available in Clerk of Court’s case file). The upshot is that copyright-related consequences along with language, context, and interpretive canons argue strongly against a geographical interpretation of §109(a).

III

* * *

Wiley and the dissent claim that a nongeographical interpretation will make it difficult, perhaps impossible, for publishers (and other copyright holders) to divide foreign and domestic markets. We concede that is so. A publisher may find it more difficult to charge different prices for the same book in different geographic markets. But we do not see how these facts help Wiley, for we can find no basic principle of copyright law that suggests that publishers are especially entitled to such rights.

The Constitution describes the nature of American copyright law by providing Congress with the power to “secur[e]” to “[a]uthors” “for limited [t]imes” the “*exclusive [r]ight to their ... [w]ritings.*” Art. I, §8, cl. 8. The Founders, too, discussed the need to grant an author a limited right to exclude competition. Compare Letter from Thomas Jefferson to James Madison (July 31, 1788), in 13 Papers of

Thomas Jefferson 440, 442–443 (J. Boyd ed. 1956) (arguing against any monopoly) with Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 14 *id.*, at 16, 21 (J. Boyd ed. 1958) (arguing for a limited monopoly to secure production). But the Constitution's language nowhere suggests that its limited exclusive right should include a right to divide markets or a concomitant right to charge different purchasers different prices for the same book, say to increase or to maximize gain. Neither, to our knowledge, did any Founder make any such suggestion. We have found no precedent suggesting a legal preference for interpretations of copyright statutes that would provide for market divisions.

To the contrary, Congress enacted a copyright law that (through the “first sale” doctrine) limits copyright holders' ability to divide domestic markets. And that limitation is consistent with antitrust laws that ordinarily forbid market divisions. Whether copyright owners should, or should not, have more than ordinary commercial power to divide international markets is a matter for Congress to decide. We do no more here than try to determine what decision Congress has taken.

* * *

IV

For these reasons we conclude that the considerations supporting Kirtsaeng's nongeographical interpretation of the words “lawfully made under this title” are the more persuasive. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

(Concurring opinion of Kagan, J., joined by Alito, J., and Dissenting opinion of Ginsburg, J., joined by Kennedy, J., and Scalia, J., in part, omitted)