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Session 401: Did My Copyright Get Lost in the Cloud?

Most of today's copyrighted content, such as music, movies, television, and even books, are being digitized. Users seek seamless access to content wherever they are, causing the legal copyright framework to struggle to catch-up with these technological realities. The copyright landscape is rapidly changing and impacted by content streaming and transmittal through the cloud. This panel will explore some of the most significant recent issues in copyright law, including: (i) the Transmit Clause of the Copyright Act and performance rights, as discussed in *ABC, Inc., et al., v. Aereo, Inc.* and *Fox TV Stations, Inc., et al., v. FilmOn X LLC*; (ii) the First-Sale Doctrine as applied to digitized copyrighted material, as discussed in *Capitol Records, LLC v. ReDigi Inc.*; (iii) the Safe Harbor protection for ISPs under the DMCA, as raised in *Viacom v. YouTube*; and (iv) the "transformative" nature of digitization and its relationship to the fair use doctrine, as raised in *Authors Guild v. Google Books.*

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AMERICAN BROADCASTING COMPANIES, INC., ET AL., PETITIONERS v. AEREO, INC., FKA BAMBOOM LABS, INC.

No. 13-461.

SUPREME COURT OF THE UNITED STATES

134 S. Ct. 2498*; *189 L. Ed. 2d 476*; *2014 U.S. LEXIS 4496*; *82 U.S.L.W. 4568*; *Copy. L. Rep. (CCH) P30,620*; *42 Media L. Rep. 1885*; *110 U.S.P.Q.2D (BNA) 1961*; *24 Fla. L. Weekly Fed. S 913*; *60 Comm. Reg. (P & F) 1156

April 22, 2014, Argued
June 25, 2014, Decided

NOTICE:

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: [***1]
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
WNET v. Aereo, Inc., 712 F.3d 676, 2013 U.S. App. LEXIS 6578 (2013)

DISPOSITION: Reversed and remanded.

SYLLABUS

[*2499] [**481] The Copyright Act of 1976 gives a copyright owner the "exclusive righ[t]" to "perform the copyrighted work publicly." *17 U. S. C. §106(4)*. The Act's *Transmit Clause* defines that exclusive right to include the right to "transmit or otherwise communicate a performance . . . of the [copyrighted] work . . . to the public, by means of any device or process, whether [*2500] the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times." *§101*.

Respondent Aereo, Inc., sells a service that allows its subscribers to watch television programs over the Internet at about the same time as the programs are broadcast over the air. When a subscriber wants to watch a show that is currently airing, he selects the show from a menu on Aereo's website. Aereo's system, which consists of thousands of small antennas and other equipment housed in a centralized warehouse, responds roughly as follows: A server tunes an antenna, which is dedicated to the use of one subscriber alone, to the broadcast carrying [***2] the selected show. A transcoder translates the signals received by the antenna into data that can be transmitted over the Internet. A server saves the data in a subscriber-specific folder on Aereo's hard drive and begins streaming the show to the subscriber's screen once several seconds of programming have been saved. The streaming continues, a few seconds behind the over-the-air broadcast, until the subscriber has received the entire show.

Petitioners, who are television producers, marketers, distributors, and broadcasters that own the copyrights in many of the programs that Aereo streams, sued Aereo for copyright infringement. They sought a preliminary injunction, arguing that Aereo was infringing their right to "perform" their copyrighted works "publicly." The District Court denied the preliminary injunction, and the Second Circuit affirmed.

Held: Aereo performs petitioners' works publicly within the meaning of the *Transmit Clause*. Pp. 4-18.

(a) Aereo "perform[s]." It does not merely supply equipment that allows others to do so. Pp. 4-10.

(1) One of Congress' primary purposes in amending the Copyright Act in 1976 was to overturn this Court's holdings that the activities of community [***3] antenna television (CATV) providers fell outside the Act's scope. In *Fortnightly Corp. v. United Artists Television, Inc., 392 U. S. 390, 88 S. Ct. 2084, 20 L. Ed. 2d 1176*, the Court determined that a CATV provider was more like a viewer than a broadcaster, because its system "no more

than enhances the viewer's capacity to receive the broadcaster's signals [by] provid[ing] a well-located antenna with an efficient connection to the viewer's television set." *Id., at 399, 88 S. Ct. 2084, 20 L. Ed. 2d 1176*. Therefore, the Court concluded, a CATV provider did not perform publicly. The Court reached the same determination in respect to a CATV provider that retransmitted signals from hundreds of miles away in *Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U. S. 394, 94 S. Ct. 1129, 39 L. Ed. 2d 415*. "The reception and rechanneling of [broadcast television signals] for simultaneous viewing is [**482] essentially a viewer function, irrespective of the distance between the broadcasting station and the ultimate viewer," the Court said. *Id., at 408, 94 S. Ct. 1129, 39 L. Ed. 2d 415*. Pp. 4-7.

(2) In 1976, Congress amended the Copyright Act in large part to reject the *Fortnightly* and *Teleprompter* holdings. The Act now clarifies that to "perform" an audiovisual work means "to show its images in any sequence or to make the sounds [***4] accompanying it audible." *§101*. Thus, *both* the broadcaster *and* the viewer "perform," because they both show a television program's images and make audible the program's sounds. Congress also enacted the *Transmit Clause*, which specifies that an entity performs when it "transmit[s] . . . a performance . . . to the public." [*2501] *Ibid. The Clause* makes clear that an entity that acts like a CATV system itself performs, even when it simply enhances viewers' ability to receive broadcast television signals. Congress further created a complex licensing scheme that sets out the conditions, including the payment of compulsory fees, under which cable systems may retransmit broadcasts to the public. *§111*. Congress made all three of these changes to bring cable system activities within the Copyright Act's scope. Pp. 7-8.

(3) Because Aereo's activities are substantially similar to those of the CATV companies that Congress amended the Act to reach, Aereo is not simply an equipment provider. Aereo sells a service that allows subscribers to watch television programs, many of which are copyrighted, virtually as they are being broadcast. Aereo uses its own equipment, housed in a centralized warehouse, outside [***5] of its users' homes. By means of its technology, Aereo's system "receive[s] programs that have been released to the public and carr[ies] them by private channels to additional viewers." *Fortnightly, supra, at 400, 88 S. Ct. 2084, 20 L. Ed. 2d 1176*.

This Court recognizes one particular difference between Aereo's system and the cable systems at issue in *Fortnightly* and *Teleprompter*: The systems in those cases transmitted constantly, whereas Aereo's system remains inert until a subscriber indicates that she wants to watch a program. In other cases involving different kinds of service or technology providers, a user's involvement in the operation of the provider's equipment and selection of the content transmitted may well bear on whether the provider performs within the meaning of the Act. But given Aereo's overwhelming likeness to the cable companies targeted by the 1976 amendments, this sole technological difference between Aereo and traditional cable companies does not make a critical difference here. Pp. 8-10.

(b) Aereo also performs petitioners' works "publicly." Under the Clause, an entity performs a work publicly when it "transmit[s] . . . a performance . . . of the work . . . to the public." *§101*. What performance, [***6] if any, does Aereo transmit? Petitioners say Aereo transmits a *prior* performance of their works, whereas Aereo says the performance it transmits is the *new* performance created by its act of transmitting. This Court assumes *arguendo* that Aereo is correct and thus assumes, for present purposes, that to transmit a performance of an audiovisual work means to communicate [**483] contemporaneously visible images and contemporaneously audible sounds of the work. Under the Court's assumed definition, Aereo transmits a performance whenever its subscribers watch a program.

What about the Clause's further requirement that Aereo transmit a performance "to the public"? Aereo claims that because it transmits from user-specific copies, using individually-assigned antennas, and because each transmission is available to only one subscriber, it does not transmit a performance "to the public." Viewed in terms of Congress' regulatory objectives, these behind-the-scenes technological differences do not distinguish Aereo's [***7] system from cable systems, which do perform publicly. Congress would as much have intended to protect a copyright holder from the unlicensed activities of Aereo as from those of cable companies.

The text of the Clause effectuates Congress' intent. Under the Clause, an entity may transmit a performance through multiple transmissions, where the performance is of the same work. Thus when an entity communicates the same contemporaneously perceptible images and sounds to multiple people, it "transmit[s] . . . a [*2502] performance" to them, irrespective of the number of discrete communications it makes and irrespective of whether it transmits using a single copy of the work or, as Aereo does, using an individual personal copy for each viewer.

Moreover, the subscribers to whom Aereo transmits constitute "the public" under the Act. This is because Aereo communicates the same contemporaneously perceptible images and sounds to a large number of people who are unrelated and unknown to each other. In addition, neither the record nor Aereo suggests that Aereo's subscribers receive performances in their capacities as owners or possessors of the underlying works. This is relevant because when an entity performs [***8] to a set of people, whether they constitute "the public" often depends upon their relationship to the underlying work. Finally, the statute makes clear that the fact that Aereo's subscribers may receive the same programs at different times and locations is of no consequence. Aereo transmits a performance of petitioners' works "to the public." Pp. 11-15.

(c) Given the limited nature of this holding, the Court does not believe its decision will discourage the emergence or use of different kinds of technologies. Pp. 15-17.

712 F. 3d 676, reversed and remanded.

COUNSEL: Paul D. Clement argued the cause for petitioner.

Malcolm L. Stewart argued the cause for the United States, as amicus curiae, by special leave of court.

David C. Frederick argued the cause for respondent.

JUDGES: BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined.

OPINION BY: BREYER

OPINION

JUSTICE BREYER delivered the opinion of the Court.

The Copyright Act of 1976 gives a copyright owner the "exclusive [**484] righ[t]" to "perform the copyrighted work publicly." *17 U. S. C. §106(4)*. The Act's *Transmit Clause* defines that exclusive right as including the right to

> "transmit or otherwise communicate a performance . . . of the [copyrighted] work . . . to the public, by means of any device or process, whether the members [***9] of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times." *§101*.

[*2503] We must decide whether respondent Aereo, Inc., infringes this exclusive right by selling its subscribers a technologically complex service that allows them to watch television programs over the Internet at about the same time as the programs are broadcast over the air. We conclude that it does.

I

A

For a monthly fee, Aereo offers subscribers broadcast television programming over the Internet, virtually as the programming is being broadcast. Much of this programming is made up of copyrighted works. Aereo neither owns the copyright in those works nor holds a license from the copyright owners to perform those works publicly.

Aereo's system is made up of servers, transcoders, and thousands of dime-sized antennas housed in a central warehouse. It works roughly as follows: First, when a subscriber wants to watch a show that is currently being broadcast, he visits Aereo's website and selects, from a list of the local programming, the show he wishes to see.

Second, one of Aereo's servers selects an antenna, which it dedicates to the use of [***10] that subscriber (and that subscriber alone) for the duration of the selected show. A server then tunes the antenna to the over-the-air broadcast carrying the show. The antenna begins to receive the broadcast, and an Aereo transcoder translates the signals received into data that can be transmitted over the Internet.

Third, rather than directly send the data to the subscriber, a server saves the data in a subscriber-specific folder on Aereo's hard drive. In other words, Aereo's system creates a subscriber-specific copy--that is, a "personal" copy--of the subscriber's program of choice.

Fourth, once several seconds of programming have been saved, Aereo's server begins to stream the saved copy of the show to the subscriber over the Internet. (The subscriber may instead direct Aereo to stream the program at a later time, but that aspect of Aereo's service is not before us.) The subscriber can watch the streamed program on the screen of his personal computer, tablet, smart phone, Internet-connected television, or other Internet-connected device. The streaming continues, a mere few seconds behind the over-the-air broadcast, until the subscriber has received the entire show. See A Dictionary [***11] of Computing 494 (6th ed. 2008) (defining "streaming" as "[t]he process of providing a steady flow of audio or video data so that an Internet user is able to access it as it is transmitted").

Aereo emphasizes that the data that its system streams to each subscriber are the data from his own personal copy, made from the broadcast signals received by the particular [**485] antenna allotted to him. Its system does not transmit data saved in one subscriber's folder to any other subscriber. When two subscribers wish to watch the same program, Aereo's system activates two separate antennas and saves two separate copies of the program in two separate folders. It then streams the show to the subscribers through two separate transmissions--each from the subscriber's personal copy.

B

Petitioners are television producers, marketers, distributors, and broadcasters who own the copyrights in many of the programs that Aereo's system streams to its subscribers. They brought suit against Aereo for copyright infringement in Federal District Court. They sought a preliminary [*2504] injunction, arguing that Aereo was infringing their right to "perform" their works "publicly," as the *Transmit Clause* defines those terms.

The [***12] District Court denied the preliminary injunction. *874 F. Supp. 2d 373 (SDNY 2012)*. Relying on prior Circuit precedent, a divided panel of the Second Circuit affirmed. *WNET, Thirteen v. Aereo, Inc., 712 F. 3d 676 (2013)* (citing *Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F. 3d 121 (2008))*. In the Second Circuit's view, Aereo does not perform publicly within the meaning of the *Transmit Clause* because it does not transmit "to the public." Rather, each time Aereo streams a program to a subscriber, it sends a *private* transmission that is avail-able only to that subscriber. The Second Circuit denied rehearing en banc, over the dissent of two judges. *WNET, Thirteen v. Aereo, Inc., 722 F. 3d 500 (2013)*. We granted certiorari.

II

This case requires us to answer two questions: First, in operating in the manner described above, does Aereo "perform" at all? And second, if so, does Aereo do so "publicly"? We address these distinct questions in turn.

Does Aereo "perform"? See *§106(4)* ("[T]he owner of [a] copyright . . . has the exclusive righ[t] . . . to *perform* the copyrighted work publicly" (emphasis added)); *§101* ("To *perform* . . . a work 'publicly' means [among other things] to transmit [***13] . . . a performance . . . of the work . . . to the public . . . " (emphasis added)). Phrased another way, does Aereo "transmit . . . a performance" when a subscriber watches a show using Aereo's system, or is it only the subscriber who transmits? In Aereo's view, it does not perform. It does no more than supply equipment that "emulate[s] the operation of a home antenna and [digital video recorder (DVR)]." Brief for Respondent 41. Like a home antenna and DVR, Aereo's equipment simply responds to its subscribers' directives. So it is only the subscribers who "perform" when they use Aereo's equipment to stream television programs to themselves.

Considered alone, the language of the Act does not clearly indicate when an entity "perform[s]" (or "transmit[s]") and when it merely supplies equipment that allows others to do so. But when read in light of its purpose, the Act is unmistakable: An entity that engages in activities like Aereo's performs.

A

History makes plain that one of Congress' primary purposes in amending the Copyright Act in 1976 was to overturn this Court's determination [**486] that community antenna television (CATV) systems (the precursors of modern cable systems) fell outside the [***14] Act's scope. In *Fortnightly Corp. v. United Artists Television, Inc., 392 U. S. 390, 88 S. Ct. 2084, 20 L. Ed. 2d 1176 (1968)*, the Court considered a CATV system that carried local television broadcasting, much of which was copyrighted, to its subscribers in two cities. The CATV provider placed antennas on hills above the cities and used coaxial cables to carry the signals received by the antennas to the home television sets of its subscribers. The system amplified and modulated the signals in order to improve their strength and efficiently transmit them to subscribers. A subscriber "could choose any of the . . . programs he wished to view by simply turning the knob on his own television set." *Id., at 392, 88 S. Ct. 2084, 20 L. Ed. 2d 1176*. The CATV provider "neither edited the programs received nor originated any programs of its own." *Ibid.*

Asked to decide whether the CATV provider infringed copyright holders' exclusive [*2505] right to perform their works publicly, the Court held that the provider did not "perform" at all. See *17 U. S. C. §1(c) (1964 ed.)* (granting copyright holder the exclusive right to "perform . . . in public for profit" a nondramatic literary work), *§1(d)* (granting copyright holder the exclusive right to "perform . . . publicly" a dramatic [***15] work). The Court drew a line: "Broadcasters perform. Viewers do not perform." *392 U. S., at 398, 88 S. Ct. 2084, 20 L. Ed. 2d 1176* (footnote omitted). And a CATV provider "falls on the viewer's side of the line." *Id., at 399, 88 S. Ct. 2084, 20 L. Ed. 2d 1176*.

The Court reasoned that CATV providers were unlike broadcasters:

> "Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been

> released to the public and carry them by private channels to additional viewers." *Id., at 400, 88 S. Ct. 2084, 20 L. Ed. 2d 1176*.

Instead, CATV providers were more like viewers, for "the basic function [their] equipment serves is little different from that served by the equipment generally furnished by" viewers. *Id., at 399, 88 S. Ct. 2084, 20 L. Ed. 2d 1176*. "Essentially," the Court said, "a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals [by] provid[ing] a well-located antenna with an efficient connection to the viewer's television set." *Ibid.* Viewers do not become performers by using "amplifying equipment," and a CATV provider should not be treated differently for providing viewers the same equipment. *Id., at 398-400, 88 S. Ct. 2084, 20 L. Ed. 2d 1176*.

In *Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U. S. 394, 94 S. Ct. 1129, 39 L. Ed. 2d 415 (1974)*, [***16] the Court considered the copyright liability of a CATV provider that carried broadcast television programming into subscribers' homes from hundreds of miles away. Although the Court recognized that a viewer might not be able to afford amplifying equipment that would provide access to those distant signals, it nonetheless found that the CATV provider was more like a viewer than a broadcaster. *Id., at 408-409, 94 S. Ct. 1129, 39 L. Ed. 2d 415*. It explained: "The reception and rechanneling of [broadcast television signals] for simultaneous [**487] viewing is essentially a viewer function, irrespective of the distance between the broadcasting station and the ultimate viewer." *Id., at 408, 94 S. Ct. 1129, 39 L. Ed. 2d 415*.

The Court also recognized that the CATV system exercised some measure of choice over what to transmit. But that fact did not transform the CATV system into a broadcaster. A broadcaster exercises significant creativity in choosing what to air, the Court reasoned. *Id., at 410, 94 S. Ct. 1129, 39 L. Ed. 2d 415*. In contrast, the CATV provider makes an initial choice about which broadcast stations to retransmit, but then "'simply carr[ies], without editing, whatever programs [it] receive[s].'" *Ibid.* (quoting *Fortnightly, supra, at 400, 88 S. Ct. 2084, 20 L. Ed. 2d 1176* (alterations in original)).

B

In 1976 Congress amended [***17] the Copyright Act in large part to reject the Court's holdings in *Fortnightly* and *Teleprompter*. See H. R. Rep. No. 94-1476, pp. 86-87 (1976) (hereinafter H. R. Rep.) (The 1976 amendments "completely overturned" this Court's narrow construction of the Act in *Fortnightly* and *Teleprompter*). Congress enacted new language that erased the Court's line between broadcaster and viewer, in respect to "perform[ing]" a work. The amended statute clarifies that to "perform" an audiovisual work means "to show its images in any sequence or to [*2506] make the sounds accompanying it audible." *§101*; see *ibid.* (defining "[a]udiovisual works" as "works that consist of a series of related images which are intrinsically intended to be shown by the use of machines . . ., together with accompanying sounds"). Under this new language, *both* the broadcaster *and* the viewer of a television program "perform," because they both show the program's images and make audible the program's sounds. See H. R. Rep., at 63 ("[A] broadcasting network is performing when it transmits [a singer's performance of a song] . . . and any individual is performing whenever he or she . . . communicates the performance by turning on a receiving [***18] set").

Congress also enacted the *Transmit Clause*, which specifies that an entity performs publicly when it "transmit[s] . . . a performance . . . to the public." *§101*; see *ibid.* (defining "[t]o 'transmit' a performance" as "to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent"). Cable system activities, like those of the CATV systems in *Fortnightly* and *Teleprompter*, lie at the heart of the activities that Congress intended this language to cover. See H. R. Rep., at 63 ("[A] cable television system is performing when it retransmits [a network] broadcast to its subscribers"); see also *ibid.* ("[T]he concep[t] of public performance . . . cover[s] not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public"). *The Clause* thus makes clear that an entity that acts like a CATV system itself performs, even if when doing so, it simply enhances viewers' ability to receive broadcast television signals.

Congress further created a new section of the Act to regulate cable companies' public performances of copyrighted works. See *§111*. *Section 111* [***19] creates a complex, highly detailed compulsory licensing scheme that sets out the conditions, including the payment of compulsory fees, under [**488] which cable systems may retransmit broadcasts. H. R. Rep., at 88 (*Section 111* is primarily "directed at the operation of cable television systems and the terms and conditions of their liability for the retransmission of copyrighted works").

Congress made these three changes to achieve a similar end: to bring the activities of cable systems within the scope of the Copyright Act.

C

This history makes clear that Aereo is not simply an equipment provider. Rather, Aereo, and not just its subscribers, "perform[s]" (or "transmit[s]"). Aereo's activities are substantially similar to those of the CATV companies that Congress amended the Act to reach. See *id.*, at 89 ("[C]able systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material"). Aereo sells a service that allows subscribers to watch television programs, many of which are copyrighted, almost as they are being broadcast. In providing this service, Aereo uses its own equipment, housed in a centralized warehouse, outside of its users' [***20] homes. By means of its technology (antennas, transcoders, and servers), Aereo's system "receive[s] programs that have been released to the public and carr[ies] them by private channels to additional viewers." *Fortnightly, 392 U. S., at 400, 88 S. Ct. 2084, 20 L. Ed. 2d 1176*. It "carr[ies] . . . whatever programs [it] receive[s]," and it offers "all the programming" of each over-the-air station it carries. *Id., at 392, 400, 88 S. Ct. 2084, 20 L. Ed. 2d 1176*.

Aereo's equipment may serve a "viewer function"; it may enhance the viewer's ability to receive a broadcaster's programs. [*2507] It may even emulate equipment a viewer could use at home. But the same was true of the equipment that was before the Court, and ultimately before Congress, in *Fortnightly* and *Teleprompter*.

We recognize, and Aereo and the dissent emphasize, one particular difference between Aereo's system and the cable systems at issue in *Fortnightly* and *Teleprompter*. The systems in those cases transmitted constantly; they sent continuous programming to each subscriber's television set. In contrast, Aereo's system remains inert until a subscriber indicates that she wants to watch a program. Only at that moment, in automatic response to the subscriber's request, does Aereo's system activate an antenna [***21] and begin to transmit the requested program.

This is a critical difference, says the dissent. It means that Aereo's subscribers, not Aereo, "selec[t] the copyrighted content" that is "perform[ed]," *post*, at 4 (opinion of SCALIA, J.), and for that reason they, not Aereo, "transmit" the performance. Aereo is thus like "a copy shop that provides its patrons with a library card." *Post*, at 5. A copy shop is not directly liable whenever a patron uses the shop's machines to "reproduce" copyrighted materials found in that library. See *§106(1)* ("exclusive righ[t] . . . to reproduce the copyrighted work"). And by the same token, Aereo should not be directly liable whenever its patrons use its equipment to "transmit" copyrighted television programs to their screens.

In our view, however, the dissent's copy shop argument, in whatever form, makes too much out of too little. [**489] Given Aereo's overwhelming likeness to the cable companies targeted by the 1976 amendments, this sole technological difference between Aereo and traditional cable companies does not make a critical difference here. The subscribers of the *Fortnightly* and *Teleprompter* cable systems also selected what programs to display on their [***22] receiving sets. Indeed, as we explained in *Fortnightly*, such a subscriber "could choose any of the . . . programs he wished to view by simply turning the knob on his own television set." *392 U. S., at 392, 88 S. Ct. 2084, 20 L. Ed. 2d 1176*. The same is true of an Aereo subscriber. Of course, in *Fortnightly* the television signals, in a sense, lurked behind the screen, ready to emerge when the subscriber turned the knob. Here the signals pursue their ordinary course of travel through the universe until today's "turn of the knob"--a click on a website--activates machinery that intercepts and reroutes them to Aereo's subscribers over the Internet. But this difference means nothing to the subscriber. It means nothing to the broadcaster. We do not see how this single difference, invisible to subscriber and broadcaster alike, could transform a system that is for all practical purposes a traditional cable system into "a copy shop that provides its patrons with a library card."

In other cases involving different kinds of service or technology providers, a user's involvement in the operation of the provider's equipment and selection of the content transmitted may well bear on whether the provider performs within the meaning of the [***23] Act. But the many similarities between Aereo and cable companies, considered in light of Congress' basic purposes in amending the Copyright Act, convince us that this difference is not critical here. We conclude that Aereo is not just an equipment supplier and that Aereo "perform[s]."

III

Next, we must consider whether Aereo performs petitioners' works "publicly," within the meaning of the *Transmit Clause*. Under the Clause, an entity performs [*2508] a work publicly when it "transmit[s] . . . a performance . . . of the work . . . to the public." *§101*. Aereo denies that it satisfies this definition. It reasons as follows: First, the "performance" it "transmit[s]" is the performance created by its act of transmitting. And second, because each of these performances is capable of being received by one and only one subscriber, Aereo transmits privately, not publicly. Even assuming Aereo's first argument is correct, its second does not follow.

We begin with Aereo's first argument. What performance does Aereo transmit? Under the Act, "[t]o 'transmit' a performance . . . is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent." *Ibid.* [***24] And "[t]o 'perform'" an audiovisual work means "to show its images in any sequence or to make the sounds accompanying it audible." *Ibid*.

Petitioners say Aereo transmits a *prior* performance of their works. Thus when Aereo retransmits a network's prior broadcast, the underlying broadcast (itself a performance) is the performance that Aereo transmits. Aereo, as discussed above, says the performance it transmits is the *new* performance created by its act of transmitting. That performance comes into existence when Aereo [**490] streams the sounds and images of a broadcast program to a subscriber's screen.

We assume *arguendo* that Aereo's first argument is correct. Thus, for present purposes, to transmit a performance of (at least) an audiovisual work means to communicate contemporaneously visible images and contemporaneously audible sounds of the work. Cf. *United States v. American Soc. of Composers, Authors and Publishers, 627 F. 3d 64, 73 (CA2 2010)* (holding that a download of a work is not a performance because the data transmitted are not "contemporaneously perceptible"). When an Aereo subscriber selects a program to watch, Aereo streams the program over the Internet to that subscriber. Aereo thereby [***25] "communicate[s]" to the subscriber, by means of a "device or process," the work's images and sounds. *§101*. And those images and sounds are contemporaneously visible and audible on the subscriber's computer (or other Internet-connected device). So under our assumed definition, Aereo transmits a performance whenever its subscribers watch a program.

But what about the Clause's further requirement that Aereo transmit a performance "to the public"? As we have said, an Aereo subscriber receives broadcast television signals with an antenna dedicated to him alone. Aereo's system makes from those signals a personal copy of the selected program. It streams the content of the copy to the same subscriber and to no one else. One and only one subscriber has the ability to see and hear each Aereo transmission. The fact that each transmission is to only one subscriber, in Aereo's view, means that it does not transmit a performance "to the public."

In terms of the Act's purposes, these differences do not distinguish Aereo's system from cable systems, which do perform "publicly." Viewed in terms of Congress' regulatory objectives, why should any of these technological differences matter? They concern [***26] the behind-the-scenes way in which Aereo delivers television programming to its viewers' screens. They do not render Aereo's commercial objective any different from that of cable companies. Nor do they significantly alter the viewing experience of Aereo's subscribers. Why would a subscriber who wishes to watch a television show care much whether images and sounds are delivered to his screen via a large multisubscriber antenna or one [*2509] small dedicated antenna, whether they arrive instantaneously or after a few seconds' delay, or whether they are transmitted directly or after a personal copy is made? And why, if Aereo is right, could not modern CATV systems simply continue the same commercial and consumer-oriented activities, free of copyright restrictions, provided they substitute such new technologies for old? Congress would as much have intended to protect a copyright holder from the unlicensed activities of Aereo as from those of cable companies.

The text of the Clause effectuates Congress' intent. Aereo's argument to the contrary relies on the premise that "to transmit . . . a performance" means to make a single transmission. But *the Clause* suggests that an entity may transmit a performance [***27] through multiple, discrete transmissions. That is because one can "transmit" or "communicate" something through a *set* of actions. Thus one can transmit a message to one's friends, irrespective of whether one sends separate identical e-mails to each [**491] friend or a single e-mail to all at once. So can an elected official communicate an idea, slogan, or speech to her constituents, regardless of whether she communicates that idea, slogan, or speech during individual phone calls to each constituent or in a public square.

The fact that a singular noun ("a performance") follows the words "to transmit" does not suggest the contrary. One can sing a song to his family, whether he sings the same song one-on-one or in front of all together. Similarly, one's colleagues may watch a performance of a particular play--say, this season's modern-dress version of "Measure for Measure"--whether they do so at separate or at the same showings. By the same principle, an entity may transmit a performance through one or several transmissions, where the performance is of the same work.

The Transmit Clause must permit this interpretation, for it provides that one may transmit a performance to the public "whether the [***28] members of the public capable of receiving the performance . . . receive it . . . at the same time or at different times." *§101*. Were the words "to transmit . . . a performance" limited to a single act of communication, members of the public could not receive the performance communicated "at different times." Therefore, in light of the purpose and text of the Clause, we conclude that when an entity communicates the same contemporaneously perceptible images and sounds to multiple people, it transmits a performance to them regardless of the number of discrete communications it makes.

We do not see how the fact that Aereo transmits via personal copies of programs could make a difference.

The Act applies to transmissions "by means of any device or process." *Ibid.* And retransmitting a television program using user-specific copies is a "process" of transmitting a performance. A "cop[y]" of a work is simply a "material objec[t] . . . in which a work is fixed . . . and from which the work can be perceived, reproduced, or otherwise communicated." *Ibid.* So whether Aereo transmits from the same or separate copies, it performs the same work; it shows the same images and makes audible the same sounds. [***29] Therefore, when Aereo streams the same television program to multiple subscribers, it "transmit[s] . . . a performance" to all of them.

Moreover, the subscribers to whom Aereo transmits television programs constitute "the public." Aereo communicates the same contemporaneously perceptible images and sounds to a large number of people who are unrelated and unknown to each other. This matters because, although [*2510] the Act does not define "the public," it specifies that an entity performs publicly when it performs at "any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered." *Ibid.* The Act thereby suggests that "the public" consists of a large group of people outside of a family and friends.

Neither the record nor Aereo suggests that Aereo's subscribers receive performances in their capacities as owners or possessors of the underlying works. This is relevant because when an entity performs to a set of people, whether they constitute "the public" often depends upon their relationship to the underlying work. When, for example, a valet parking [**492] attendant returns cars to their drivers, we would not say that the parking service [***30] provides cars "to the public." We would say that it provides the cars to their owners. We would say that a car dealership, on the other hand, does provide cars to the public, for it sells cars to individuals who lack a preexisting relationship to the cars. Similarly, an entity that transmits a performance to individuals in their capacities as owners or possessors does not perform to "the public," whereas an entity like Aereo that transmits to large numbers of paying subscribers who lack any prior relationship to the works does so perform.

Finally, we note that Aereo's subscribers may receive the same programs at different times and locations. This fact does not help Aereo, however, for the *Transmit Clause* expressly provides that an entity may perform publicly "whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times." *Ibid.* In other words, "the public" need not be situated together, spatially or temporally. For these reasons, we conclude that Aereo transmits a performance of petitioners' copyrighted works to the public, within the meaning of the *Transmit Clause*.

IV

Aereo [***31] and many of its supporting *amici* argue that to apply the *Transmit Clause* to Aereo's conduct will impose copyright liability on other technologies, including new technologies, that Congress could not possibly have wanted to reach. We agree that Congress, while intending the *Transmit Clause* to apply broadly to cable companies and their equivalents, did not intend to discourage or to control the emergence or use of different kinds of technologies. But we do not believe that our limited holding today will have that effect.

For one thing, the history of cable broadcast transmissions that led to the enactment of the *Transmit Clause* informs our conclusion that Aereo "perform[s]," but it does not determine whether different kinds of providers in different contexts also "perform." For another, an entity only transmits a performance when it communicates contemporaneously perceptible images and sounds of a work. See Brief for Respondent 31 ("[I]f a distributor . . . sells [multiple copies of a digital video disc] by mail to consumers, . . . [its] distribution of the DVDs merely makes it possible for the recipients to perform the work themselves--it is not a 'device or process' by which the *distributor* [***32] publicly performs the work" (emphasis in original)).

Further, we have interpreted the term "the public" to apply to a group of individuals acting as ordinary members of the public who pay primarily to watch broadcast television programs, many of which are copyrighted. We have said that it does not extend to those who act as owners or possessors of the relevant product. [*2511] And we have not considered whether the public performance right is infringed when the user of a service pays primarily for something other than the transmission of copyrighted works, such as the remote storage of content. See Brief for United States as *Amicus Curiae* 31 (distinguishing cloud-based storage services because they "offer consumers more numerous and convenient means of playing back copies that the consumers have *already* lawfully acquired" (emphasis in [**493] original)). In addition, an entity does not transmit to the public if it does not transmit to a substantial number of people outside of a family and its social circle.

We also note that courts often apply a statute's highly general language in light of the statute's basic purposes. Finally, the doctrine of "fair use" can help to prevent inappropriate or inequitable [***33] applications of the Clause. See *Sony Corp. of America v. Universal City Studios, Inc., 464 U. S. 417, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984).*

We cannot now answer more precisely how the *Transmit Clause* or other provisions of the Copyright Act will apply to technologies not before us. We agree with the Solicitor General that "[q]uestions involving cloud computing, [remote storage] DVRs, and other novel issues not before the Court, as to which 'Congress has not plainly marked [the] course,' should await a case in which they are squarely presented." Brief for United States as *Amicus Curiae* 34 (quoting *Sony, supra, at 431, 104 S. Ct. 774, 78 L. Ed. 2d 574* (alteration in original)). And we note that, to the extent commercial actors or other interested entities may be concerned with the relationship between the development and use of such technologies and the Copyright Act, they are of course free to seek action from Congress. Cf. Digital Millennium Copyright Act, *17 U. S. C. §512*.

* * *

In sum, having considered the details of Aereo's practices, we find them highly similar to those of the CATV systems in *Fortnightly* and *Teleprompter.* And those are activities that the 1976 amendments sought to bring within the scope of the Copyright Act. Insofar as there are [***34] differences, those differences concern not the nature of the service that Aereo provides so much as the technological manner in which it provides the service. We conclude that those differences are not adequate to place Aereo's activities outside the scope of the Act.

For these reasons, we conclude that Aereo "perform[s]" petitioners' copyrighted works "publicly," as those terms are defined by the *Transmit Clause.* We therefore reverse the contrary judgment of the Court of Appeals, and we remand the case for further proceedings consistent with this opinion.

It is so ordered.

DISSENT BY: SCALIA

DISSENT

JUSTICE SCALIA, with whom JUSTICE THOMAS and JUSTICE ALITO join, dissenting.

This case is the latest skirmish in the long-running copyright battle over the delivery of television programming. Petitioners, a collection of television networks and affiliates (Networks), broadcast copyrighted programs on the public airwaves for all to see. Aereo, respondent, operates an automated system that allows subscribers to receive, on Internet-connected devices, programs that they select, including the Networks' copyrighted programs. The Networks sued Aereo for several forms of copyright infringement, but we are here concerned [***35] with a single claim: that Aereo violates the Networks' "exclusive righ[t]" to "perform" their programs [*2512] "publicly." *17 U. S. C. §106(4)*. That claim fails at the very outset because Aereo does not "perform" at [**494] all. The Court manages to reach the opposite conclusion only by disregarding widely accepted rules for service-provider liability and adopting in their place an improvised standard ("looks-like-cable-TV") that will sow confusion for years to come.

I. Legal Standard

There are two types of liability for copyright infringement: direct and secondary. As its name suggests, the former applies when an actor personally engages in infringing conduct. See *Sony Corp. of America v. Universal City Studios, Inc., 464 U. S. 417, 433, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984)*. Secondary liability, by contrast, is a means of holding defendants responsible for infringement by third parties, even when the defendants "have not themselves engaged in the infringing activity." *Id., at 435, 104 S. Ct. 774, 78 L. Ed. 2d 574*. It applies when a defendant "intentionally induc[es] or encourag[es]" infringing acts by others or profits from such acts "while declining to exercise a right to stop or limit [them]." *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U. S. 913, 930, 125 S. Ct. 2764, 162 L. Ed. 2d 781 (2005)*.

Most [***36] suits against equipment manufacturers and service providers involve secondary-liability claims. For example, when movie studios sued to block the sale of Sony's Betamax videocassette recorder (VCR), they argued that Sony was liable because *its customers* were making unauthorized copies. See *Sony, supra, at 434-435, 104 S. Ct. 774, 78 L. Ed. 2d 574*. Record labels and movie studios relied on a similar theory when they sued Grokster and StreamCast, two providers of peer-to-peer file-sharing software. See *Grokster, supra, at 920-921, 927, 125 S. Ct. 2764, 162 L. Ed. 2d 781*.

This suit, or rather the portion of it before us here, is fundamentally different. The Networks claim that Aereo *directly* infringes their public-performance right. Accordingly, the Networks must prove that Aereo "perform[s]" copyrighted works, *§106(4)*, when its subscribers log in, select a channel, and push the "watch" button. That process undoubtedly results in a performance; the question is *who* does the performing. See *Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F. 3d 121, 130 (CA2 2008)*. If Aereo's subscribers perform but Aereo does not, the claim necessarily fails.

The Networks' claim is governed by a simple but profoundly important rule: A defendant may be held directly liable [***37] only if it has engaged in volitional conduct that violates the Act. See 3 W. Patry, Copyright §9:5.50 (2013). This requirement is firmly grounded in the Act's text, which defines "perform" in active, affirmative terms: One "perform[s]" a copyrighted "audiovisual work," such as a movie or news broadcast, by "show[ing] its images in any sequence" or "mak[ing] the sounds accompanying it audible." *§101*. And since the Act makes it unlawful to copy or perform copyrighted works, not to copy or perform in general, see *§501(a)*, the volitional-act requirement demands conduct directed to the plaintiff's copyrighted material, see *Sony, supra, at 434, 104 S. Ct. 774, 78 L. Ed. 2d 574*. Every Court of Appeals to have considered an automated-service provider's direct liability for copyright infringement has adopted that rule. See *Fox Broadcasting Co. v. Dish Network LLC, 747 F. 3d 1060, 1066-1068 (CA9 2014)*; *Cartoon Network, supra, at* [**495] *130-131 (CA2 2008)*; *CoStar Group, Inc. v. LoopNet, Inc., 373 F. 3d 544, 549-550 (CA4 2004)*. [1] [*2513] Although we have not opined on the issue, our cases are fully consistent with a volitional-conduct requirement. For example, we gave several examples of direct infringement in *Sony*, each of which involved a [***38] volitional act directed to the plaintiff's copyrighted material. See *464 U. S., at 437, n. 18, 104 S. Ct. 774, 78 L. Ed. 2d 574*.

1 An unpublished decision of the Third Circuit is to the same effect. *Parker v. Google, Inc., 242 Fed. Appx. 833, 836-837 (2007)* (*per curiam*).

The Networks muster only one case they say stands for a different approach, *New York Times Co. v. Tasini, 533 U. S. 483, 121 S. Ct. 2381, 150 L. Ed. 2d 500 (2001)*. Reply Brief 18. But *Tasini* is clearly inapposite; it dealt with the question whether the defendants' copying was permissible, not whether the defendants were the ones who made the copies. See *533 U. S., at 487-488, 492, 504-506*.

The volitional-conduct requirement is not at issue in most direct-infringement cases; the usual point of dispute is whether the defendant's conduct is infringing (*e.g.,* Does the defendant's design copy the plaintiff's?), rather than whether the defendant has acted at all (*e.g.,* Did this defendant create the infringing design?). But it comes right to the fore when a direct-infringement claim is lodged against a defendant who does nothing more than operate an automated, user-controlled system. See, *e.g., Fox Broadcasting, supra, at 1067*; *Cartoon Network, supra, at 131*. Internet-service providers are a prime [***39] example. When one user sends data to another, the provider's equipment facilitates the transfer automatically. Does that mean that the provider is directly liable when the transmission happens to result in the "reproduc[tion]," *§106(1)*, of a copyrighted work? It does not. The provider's system is "totally indifferent to the material's content," whereas courts require "some aspect of volition" directed at the copyrighted material before direct liability may be imposed. *CoStar, 373 F. 3d, at 550-551*. [2] The defendant may be held directly liable only if the defendant *itself* "trespassed on the exclusive domain of the copyright owner." *Id., at 550*. Most of the time that issue will come down to who selects the copyrighted content: the defendant or its customers. See *Cartoon Network, supra, at 131-132*.

2 Congress has enacted several safe-harbor provisions applicable to automated network processes, see, *e.g., 17 U. S. C. §512(a)-(b)*, but those provisions do not foreclose "any other defense," *§512*(*l*), including a volitional-conduct defense.

A comparison between copy shops and video-on-demand services illustrates the point. A copy shop rents out photocopiers on a per-use basis. One customer might [***40] copy his 10-year-old's drawings--a perfectly lawful thing to do--while another might duplicate a famous artist's copyrighted photographs--a use clearly prohibited by *§106(1)*. Either way, *the customer* chooses the content and activates the copying function; the photocopier does nothing except in response to the customer's commands. Because the shop plays no role in selecting the content, it cannot be held directly liable when a customer makes an infringing copy. See *CoStar, supra, at 550*.

Video-on-demand services, like photocopiers, respond automatically to user input, but they differ in one crucial respect: *They choose the content*. When a user signs in to Netflix, for example, "thousands of . . . movies [and] TV episodes" carefully curated by Netflix are "available to watch instantly." [**496] See How [D]oes Netflix [W]ork?, online at http://help.netflix.com/en/node/412 (as visited June 20, 2014, and available in Clerk of Court's case file). That selection and arrangement by the service provider constitutes a volitional act directed to specific copyrighted works and thus serves as a basis for direct liability.

[*2514] The distinction between direct and secondary liability would collapse if there were not [***41] a clear rule for determining whether *the defendant* committed the infringing act. See *Cartoon Network, 536 F. 3d, at 132-133*. The volitional-conduct requirement supplies that rule; its purpose is not to excuse defendants from accountability, but to channel the claims against them into the correct analytical track. See Brief for 36 Intellectual Property and Copyright Law Professors as *Amici Curiae* 7. Thus, in the example given above, the fact that the copy shop does not choose the content simply means that its culpability will be assessed using secondary-liability rules rather than direct-liability rules. See *Sony, supra, at 434-442, 104 S. Ct. 774, 78 L. Ed. 2d 574*; *Cartoon Network, supra, at 132-133*.

II. Application to Aereo

So which is Aereo: the copy shop or the video-on-demand service? In truth, it is neither. Rather, it is akin to a copy shop that provides its patrons with a library card. Aereo offers access to an automated system consisting of routers, servers, transcoders, and dime-sized antennae. Like a photocopier or VCR, that system lies dormant until a subscriber activates it. When a subscriber selects a program, Aereo's system picks up the relevant broadcast signal, translates its audio and video components [***42] into digital data, stores the data in a user-specific file, and transmits that file's contents to the subscriber via the Internet--at which point the subscriber's laptop, tablet, or other device displays the broadcast just as an ordinary television would. The result of that process fits the statutory definition of a performance to a tee: The subscriber's device "show[s]" the broadcast's "images" and "make[s] the sounds accompanying" the broadcast "audible." *§101*. The only question is whether those performances are the product of Aereo's volitional conduct.

They are not. Unlike video-on-demand services, Aereo does not provide a prearranged assortment of movies and television shows. Rather, it assigns each subscriber an antenna that--like a library card--can be used to obtain whatever broadcasts are freely available. Some of those broadcasts are copyrighted; others are in the public domain. The key point is that subscribers call all the shots: Aereo's automated system does not relay any program, copyrighted or not, until a subscriber selects the program and tells Aereo to relay it. Aereo's operation of that system is a volitional act and a but-for cause of the resulting performances, but, [***43] as in the case of the copy shop, that degree of involvement is not enough for direct liability. See *Grokster, 545 U. S., at 960, 125 S. Ct. 2764, 162 L. Ed. 2d 781* (BREYER, J., concurring) ("[T]he producer of a technology which *permits* unlawful copying does not himself *engage* in unlawful copying").

In sum, Aereo does not "perform" for the sole and simple reason that it does not make the choice of content. And because Aereo does not perform, [**497] it cannot be held directly liable for infringing the Networks' public-performance right. [3] That conclusion does not necessarily mean that Aereo's service complies with the Copyright Act. Quite the contrary. The Networks' complaint alleges that Aereo is directly *and* secondarily liable for infringing their public-performance rights (*§106(4)*) *and also* their reproduction rights (*§106(1)*). Their request for a preliminary injunction--the only issue before this Court--is based exclusively on the direct-liability portion of the public-performance claim [*2515] (and further limited to Aereo's "watch" function, as opposed to its "record" function). See App. to Pet. for Cert. 60a-61a. Affirming the judgment below would merely return this case to the lower courts for consideration of the Networks' remaining [***44] claims.

3 Because I conclude that Aereo does not perform at all, I do not reach the question whether the performances in this case are to the public. See *ante*, at 10-15.

III. Guilt By Resemblance

The Court's conclusion that Aereo performs boils down to the following syllogism: (1) Congress amended the Act to overrule our decisions holding that cable systems do not perform when they retransmit over-the-air broadcasts; [4] (2) Aereo looks a lot like a cable system; therefore (3) Aereo performs. *Ante*, at 4-10. That reasoning suffers from a trio of defects.

4 See *Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U. S. 394, 94 S. Ct. 1129, 39 L. Ed. 2d 415 (1974)*; *Fortnightly Corp. v. United Artists Television, Inc., 392 U. S. 390, 88 S. Ct. 2084, 20 L. Ed. 2d 1176 (1968)*.

First, it is built on the shakiest of foundations. Perceiving the text to be ambiguous, *ante*, at 4, the Court reaches out to decide the case based on a few isolated snippets of legislative history, *ante*, at 7-8 (citing H. R. Rep. No. 94-1476 (1976)). The Court treats those snippets as authoritative evidence of congressional intent even though they come from a single report issued by a committee whose members make up a small fraction of one of the two Houses of Congress. Little else [***45] need be said here about the severe shortcomings of that interpretative methodology. See *Lawson v. FMR LLC, 571 U. S. ___, ___, 134 S. Ct. 1158, 188 L. Ed. 2d 158, 186 (2014)* (SCALIA, J., concurring in principal part and concurring in judgment).

Second, the Court's reasoning fails on its own terms because there are material differences between the cable systems at issue in *Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U. S. 394, 94 S. Ct. 1129, 39 L. Ed. 2d 415 (1974)*, and *Fortnightly Corp. v. United Artists Television, Inc., 392 U. S. 390, 88 S. Ct. 2084, 20 L. Ed. 2d 1176 (1968)*, on the one hand and Aereo on the other. The former (which were then known as community-antenna television systems) captured the full range of broadcast signals and forwarded them to all subscribers at all times, whereas Aereo transmits only specific programs selected by the user, at specific times selected by the user. The Court acknowledges this distinction but blithely concludes that it "does not make a critical difference." *Ante*, at 10. Even if that were true, the Court fails to [**498] account for other salient differences between the two technologies. [5] Though cable systems started out essentially as dumb pipes that routed signals from point

A to point B, see *ante*, at 5, by the 1970's, [***46] that kind of service "'no longer exist[ed],'" Brief for Petitioners in *Columbia Broadcasting System, Inc.* v. *Teleprompter Corp.*, O. T. 1973, No. 72-1633, p. 22. At the time of our *Teleprompter* decision, cable companies "perform[ed] the same functions as 'broadcasters' by deliberately selecting and importing distant signals, originating programs, [and] selling commercials," [*2516] *id.*, at 20, thus making them curators of content--more akin to video-on-demand services than copy shops. So far as the record reveals, Aereo does none of those things.

5 The Court observes that "[t]he subscribers of the *Fortnightly* and *Teleprompter* cable systems . . . selected what programs to display on their receiving sets," but acknowledges that those choices were possible only because "the television signals, in a sense, lurked behind the screen, ready to emerge when the subscriber turned the knob." *Ante*, at 10. The latter point is dispositive: The signals were "ready to emerge" because the cable system--much like a video-on-demand provider--took affirmative, volitional steps to *put* them there. As discussed above, the same cannot be said of the programs available through Aereo's automated system.

Third, and most importantly, [***47] even accepting that the 1976 amendments had as their purpose the overruling of our cable-TV cases, what they were meant to do and how they did it are two different questions--and it is the latter that governs the case before us here. The injury claimed is not violation of a law that says operations similar to cable TV are subject to copyright liability, but violation of *§106(4)* of the Copyright Act. And whatever soothing reasoning the Court uses to reach its result ("this looks like cable TV"), the consequence of its holding is that someone who implements this technology *"perform[s]" under that provision*. That greatly disrupts settled jurisprudence which, before today, applied the straightforward, bright-line test of volitional conduct directed at the copyrighted work. If that test is not outcome determinative in this case, presumably it is not outcome determinative elsewhere as well. And it is not clear what the Court proposes to replace it. Perhaps the Court means to adopt (invent, really) a two-tier version of the Copyright Act, one part of which applies to "cable companies and their equivalents" while the other governs everyone else. *Ante*, at 9-10, 16.

The rationale for the Court's [***48] ad hoc rule for cable-system lookalikes is so broad that it renders nearly a third of the Court's opinion superfluous. Part II of the opinion concludes that Aereo performs because it resembles a cable company, and Congress amended the Act in 1976 "to bring the activities of cable systems within [its] scope." *Ante*, at 8. Part III of the opinion purports to address separately the question whether Aereo performs "publicly." *Ante*, at 10-15. Trouble is, that question cannot remain open if Congress's supposed intent to regulate whatever looks like a cable company must be given legal effect (as the Court says in Part II). The Act reaches only public performances, see *§106(4)*, so Congress could not have regulated "the activities of cable systems" without deeming their retransmissions public performances. The upshot is this: If [**499] Aereo's similarity to a cable company means that it performs, then by necessity that same characteristic means that it does so publicly, and Part III of the Court's opinion discusses an issue that is no longer relevant--though discussing it certainly gives the opinion the "feel" of real textual analysis.

Making matters worse, the Court provides no criteria for determining [***49] when its cable-TV-lookalike rule applies. Must a defendant offer access to live television to qualify? If similarity to cable-television service is the measure, then the answer must be yes. But consider the implications of that answer: Aereo would be free to do exactly what it is doing right now so long as it built mandatory time shifting into its "watch" function. [6] Aereo would not be providing *live* television if it made subscribers wait to tune in until after a show's live broadcast ended. A subscriber could watch the 7 p.m. airing of a 1-hour program any time after 8 p.m. Assuming the Court does not intend to adopt such a do-nothing rule (though it very well may), there must be some other means of identifying [*2517] who is and is not subject to its guilt-by-resemblance regime.

6 Broadcasts accessible through the "watch" function are technically not live because Aereo's servers take anywhere from a few seconds to a few minutes to begin transmitting data to a subscriber's device. But the resulting delay is so brief that it cannot reasonably be classified as time shifting.

Two other criteria come to mind. One would cover any automated service that captures and stores live television broadcasts [***50] at a user's direction. That can't be right, since it is exactly what remote storage digital video recorders (RS-DVRs) do, see *Cartoon Network*, *536 F. 3d, at 124-125*, and the Court insists that its "limited holding" does not decide the fate of those devices, *ante*, at 16-17. The other potential benchmark is the one offered by the Government: The cable-TV-lookalike rule embraces any entity that "operates an integrated system, substantially dependent on physical equipment that is used in common by [its] subscribers." Brief for United States as *Amicus Curiae* 20. The Court sensibly avoids that approach because it would sweep in Internet service providers and a host of other entities that quite obviously do not perform.

That leaves as the criterion of cable-TV-resemblance nothing but th'ol' totality-of-the-circumstances test (which is not a test at all but merely assertion of an intent to perform test-free, ad hoc, case-by-case evaluation). It will take years, perhaps decades, to determine which automated systems now in existence are governed by the traditional volitional-conduct test and which get the Aereo treatment. (And automated systems now in contemplation will have to take their chances.) [***51] The Court vows that its ruling will not affect cloud-storage providers and cable-television systems, see *ante*, at 16-17, but it cannot deliver on that promise given the imprecision of its result-driven rule. Indeed, the difficulties inherent in the Court's makeshift approach will become apparent in this very case. Today's decision addresses the legality of Aereo's "watch" function, which provides nearly contemporaneous access to live broadcasts. On remand, one of the first questions the lower courts will face is whether Aereo's "record" function, which allows subscribers [**500] to save a program while it is airing and watch it later, infringes the Networks' public-performance right. The volitional-conduct rule provides a clear answer to that question: Because Aereo does not select the programs viewed by its users, it does not perform. But it is impossible to say how the issue will come out under the Court's analysis, since cable companies did not offer remote recording and playback services when Congress amended the Copyright Act in 1976.

* * *

I share the Court's evident feeling that what Aereo is doing (or enabling to be done) to the Networks' copyrighted programming ought not to be allowed. [***52] But perhaps we need not distort the Copyright Act to forbid it. As discussed at the outset, Aereo's secondary liability for performance infringement is yet to be determined, as is its primary and secondary liability for reproduction infringement. If that does not suffice, then (assuming one shares the majority's estimation of right and wrong) what we have before us must be considered a "loophole" in the law. It is not the role of this Court to identify and plug loopholes. It is the role of good lawyers to identify and exploit them, and the role of Congress to eliminate them if it wishes. Congress can do that, I may add, in a much more targeted, better informed, and less disruptive fashion than the crude "looks-like-cable-TV" solution the Court invents today.

We came within one vote of declaring the VCR contraband 30 years ago in *Sony*. See *464 U. S., at 441, n. 21, 104 S. Ct. 774, 78 L. Ed. 2d 574*. The dissent in that case was driven in part by the plaintiffs' prediction that VCR technology would wreak all manner of havoc in the television and movie industries. See *id., at 483, 104 S. Ct. 774, 78 L. Ed. 2d 574* (opinion of Blackmun, J.); [*2518] see also Brief for CBS, Inc., as *Amicus Curiae*, O. T. 1982, No. 81-1687, p. 2 (arguing that VCRs "directly threatened" [***53] the bottom line of "[e]very broadcaster").

The Networks make similarly dire predictions about Aereo. We are told that nothing less than "the very existence of broadcast television as we know it" is at stake. Brief for Petitioners 39. Aereo and its *amici* dispute those forecasts and make a few of their own, suggesting that a decision in the Networks' favor will stifle technological innovation and imperil billions of dollars of investments in cloud-storage services. See Brief for Respondents 48-51; Brief for BSA, The Software Alliance as *Amicus Curiae* 5-13. We are in no position to judge the validity of those self-interested claims or to foresee the path of future technological development. See *Sony, supra, at 430-431, 104 S. Ct. 774, 78 L. Ed. 2d 574*; see also *Grokster, 545 U. S., at 958, 125 S. Ct. 2764, 162 L. Ed. 2d 781* (BREYER, J., concurring). Hence, the proper course is not to bend and twist the Act's terms in an effort to produce a just outcome, but to apply the law as it stands and leave to Congress the task of deciding whether the Copyright Act needs an upgrade. I conclude, as the Court concluded in *Sony*: "It may well be that Congress will take a fresh look at this new technology, just as it so often has examined other innovations in the past. [***54] But it is not our job to apply laws that have not yet been written. Applying the copyright statute, as it now reads, to the [**501] facts as they have been developed in this case, the judgment of the Court of Appeals must be [affirmed]." *464 U. S., at 456, 104 S. Ct. 774, 78 L. Ed. 2d 574*.

I respectfully dissent.

THE AUTHORS GUILD, INC., Associational Plaintiff, BETTY MILES, JOSEPH GOULDEN, and JIM BOUTON, individually and on behalf of all others similarly situated, Plaintiffs-Appellees, v. GOOGLE INC., Defendant-Appellant.

Docket No. 12-3200-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

721 F.3d 132*; *2013 U.S. App. LEXIS 13389*; *107 U.S.P.Q.2D (BNA) 1361*; *Copy. L. Rep. (CCH) P30,447*; *41 Media L. Rep. 2158

May 8, 2013, Argued
July 1, 2013, Decided

SUBSEQUENT HISTORY: On remand at, Partial summary judgment denied by, Summary judgment granted by, Judgment entered by *Authors Guild, Inc. v. Google Inc., 954 F. Supp. 2d 282, 2013 U.S. Dist. LEXIS 162198 (S.D.N.Y., 2013)*

PRIOR HISTORY: *Authors Guild v. Google, Inc., 282 F.R.D. 384, 2012 U.S. Dist. LEXIS 76080 (S.D.N.Y., 2012)*

DISPOSITION: [**1] We consider in this appeal whether the United States District Court for the Southern District of New York (Denny Chin, Circuit Judge, sitting by designation) erred in certifying the plaintiff class--authors claiming that defendant-appellant Google Inc. committed copyright infringement by copying and displaying "snippets" of millions of books in the Library Project of its Google Books search tool. On the particular facts of this case, we conclude that class certification was premature in the absence of a determination by the District Court of the merits of Google's "fair use" defense. Accordingly, we vacate the June 11, 2012 order certifying the class and remand the cause to the District Court, for consideration of the fair use issues, without prejudice to any future motion for class certification.

COUNSEL: SETH P. WAXMAN (Louis R. Cohen, Randolph D. Moss, Daniel P. Kearney, Jr., Ari Holtzblatt, on the brief) Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC, for Appellant Google Inc.

Daralyn J. Durie, Joseph C. Gratz, Durie Tangri LLP, San Francisco, CA, for Appellant Google Inc.

ROBERT J. LAROCCA, Kohn, Swift & Graf, P.C., Philadelphia, PA, for Appellees The Authors Guild Inc., et al.

Michael J. Boni, [**2] Joshua D. Snyder, John E. Sindoni, Boni & Zack LLC, Bala Cynwyd, PA, for Appellees The Authors Guild Inc., et al.

Sanford P. Dumain, Milberg LLP, New York, NY, for Appellees The Authors Guild Inc., et al.

JUDGES: Before: LEVAL, CABRANES, and B.D. PARKER, Circuit Judges.

OPINION

[*133] PER CURIAM:

Plaintiff-appellee The Authors Guild, an association of authors, as well as several individual authors (jointly, "plaintiffs"), began this suit in 2005, alleging that defendant-appellant Google Inc. ("Google") committed copyright infringement through the Library Project of its "Google Books" search tool by scanning and indexing more than 20 million books and making available for public display "snippets" of most books upon a user's search.[1] Following a course of discovery and settlement discussions, the parties moved for final approval of an amended proposed class settlement agreement ("ASA") before the District Court. In a thorough opinion, Judge Chin refused to approve the ASA on March 22, 2011.

See Authors Guild Inc. v. Google Inc., 770 F. Supp. 2d 666, 686 (S.D.N.Y. 2011).

1 Plaintiffs sought injunctive and declaratory relief as well as statutory damages. *See Authors Guild v. Google, Inc., 282 F.R.D. 384, 387 (S.D.N.Y. 2012)*.

Following [**3] the District Court's denial of the motion to approve the ASA, plaintiffs moved to certify a proposed class of "[a]ll persons residing in the United States who [*134] hold a United States copyright interest in one or more Books reproduced by Google as part of its Library Project, who are either (a) natural persons who are authors of such Books or (b) natural persons, family trusts or sole proprietorships who are heirs, successors in interest or assigns of such authors." *Authors Guild v. Google, Inc., 282 F.R.D. 384, 393 (S.D.N.Y. 2012)* (alteration in original).[2] The District Court granted plaintiffs' motion to certify the proposed class of authors pursuant to *Federal Rule of Civil Procedure 23*. *Id. at 395*.

2 The motion for class certification also specified that a "book" was defined as each "full-length book published in the United States in the English language and registered with the United States Copyright Office within three months after its first publication. Google's directors, officers, and employees [were] excluded from the class, as well as United States Government and Court personnel." *Id. at 393 n.7* (internal citations omitted).

Google opposed the motion for class certification before [**4] the District Court and now appeals the District Court's grant of class certification to us. Google argues, *inter alia*, that it intends to assert a "fair use" defense,[3] which might moot the litigation. Google also claims that plaintiffs are unable to "fairly and adequately protect the interests of the class," *Fed. R. Civ. P. 23(a)(4)*, because many members of the class, perhaps even a majority, benefit from the Library Project and oppose plaintiffs' efforts. *See* Appellant's Br. 25 (arguing that class certification has "potentially tied many [authors] in the class to a suit that is contrary to their interests"); *see also* Joint App'x 244 (summarizing the findings of a controverted survey of authors).

3 As we have explained, "[f]air use is a judicially created doctrine dating back nearly to the birth of copyright in the eighteenth century, but first explicitly recognized in statute in the Copyright Act of 1976." *On Davis v. The Gap, Inc., 246 F.3d 152, 173 (2d Cir. 2001)* (internal citations omitted). Under that statute, to determine whether the use of a work is a fair use, courts consider four factors, including:

> (1) the purpose and character of the use, including whether such use is of a [**5] commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107.

Putting aside the merits of Google's claim that plaintiffs are not representative of the certified class--an argument which, in our view, may carry some force--we believe that the resolution of Google's fair use defense in the first instance will necessarily inform and perhaps moot our analysis of many class certification issues, including those regarding the commonality of plaintiffs' injuries, the typicality of their claims, and the predominance of common questions of law or fact, *see Fed. R. Civ. P. 23(a)(2), (3), (b)(3)*. *See, e.g., FPX, LLC v. Google, Inc., 276 F.R.D. 543, 551 (E.D. Tex. 2011)* (denying plaintiffs' request for class certification "because of the fact-specific inquiries the court would have to evaluate to address [defendants'] affirmative defenses [including fair use of trademarks]"); *Vulcan Golf, LLC v. Google Inc., 254 F.R.D. 521, 531 (N.D. Ill. 2008)* ("The existence [**6] of affirmative defenses [such as fair use of trademarks] which require individual resolution can be considered as part of the court's analysis to determine whether individual issues predominate under *Rule 23(b)(3)*."); *see also Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 n.12, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978)* ("Evaluation of many of the questions entering into determination of class action questions is [*135] intimately involved with the merits of the claims. The typicality of the representative's claims or defenses . . . and the presence of common questions of law or fact are obvious examples." (quotation marks omitted)); *Castano v. Am. Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996)* ("[A] court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues."); *cf. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct.*

2541, 2561, 180 L. Ed. 2d 374 (2011) (holding that "a class cannot be certified on the premise that [a defendant] will not be entitled to litigate its statutory defenses to individual claims"). Moreover, we are persuaded that holding the issue of class certification in abeyance until Google's fair use defense has been resolved will not [**7] prejudice the interests of either party during the projected proceedings before the District Court following remand. Accordingly, we vacate the District Court's order of June 11, 2012 certifying plaintiffs' proposed class, and we remand the cause to the District Court, for consideration of the fair use issues.

CONCLUSION

For the reasons stated above, we **VACATE** the June 11, 2012 order of the District Court certifying plaintiffs' proposed class and **REMAND** the cause to the District Court for consideration of the fair use issues, without prejudice to any renewal of the motion for class certification before the District Court following its decision on the fair use defense. In the interest of judicial economy, any further appeal from the decisions of the District Court shall be assigned to this panel.

The mandate shall issue forthwith.

CAPITOL RECORDS, LLC, Plaintiff, VERSUS REDIGI INC., Defendant.

No. 12 Civ. 95 (RJS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

934 F. Supp. 2d 640*; *2013 U.S. Dist. LEXIS 48043*; *Copy. L. Rep. (CCH) P30,405*; *106 U.S.P.Q.2D (BNA) 1449

March 30, 2013, Decided
March 30, 2013, Filed

SUBSEQUENT HISTORY: Motion denied by *Capitol Records LLC v. ReDigi Inc., 2014 U.S. Dist. LEXIS 122711 (S.D.N.Y., Sept. 2, 2014)*

DISPOSITION: Court held that Defendant's conduct in reselling "used" digital music files infringed on Plaintiff's rights to reproduce and distribute such music under the Copyright Act.

COUNSEL: [**1] For Plaintiff: Richard Stephen Mandel, Jonathan Zachary King, and Robert William Clarida of Cowan, Liebowitz & Latman, P.C., New York, New York.

For Defendant: Gary Philip Adelman of Davis Shapiro Lewit & Hayes LLP, New York, New York.

JUDGES: RICHARD J. SULLIVAN, United States District Judge.

OPINION BY: RICHARD J. SULLIVAN

OPINION

[*644] MEMORANDUM AND ORDER

RICHARD J. SULLIVAN, District Judge:

Capitol Records, LLC ("Capitol"), the recording label for such classic vinyls as [*645] Frank Sinatra's "Come Fly With Me" and The Beatles' "Yellow Submarine," brings this action against ReDigi Inc. ("ReDigi"), a twenty-first century technology company that touts itself as a "virtual" marketplace for "pre-owned" digital music. What has ensued in a fundamental clash over culture, policy, and copyright law, with Capitol alleging that ReDigi's web-based service amounts to copyright infringement in violation of the Copyright Act of 1976 (the "Copyright Act"), *17 U.S.C. § 101, et seq.* Now before the Court are Capitol's motion for partial summary judgment and ReDigi's motion for summary judgment, both filed pursuant to *Federal Rule of Civil Procedure 56*. Because this is a court of law and not a congressional subcommittee or technology blog, the [**2] issues are narrow, technical, and purely legal. Thus, for the reasons that follow, Capitol's motion is granted and ReDigi's motion is denied.

I. BACKGROUND

A. Facts

ReDigi markets itself as "the world's first and only online marketplace for digital used music."[1] (Capitol 56.1 Stmt., Doc. No. 50 ("Cap. 56.1"), ¶ 6.) Launched on October 13, 2011, ReDigi's website invites users to "sell their legally acquired digital music files, and buy used digital music from others at a fraction of the price currently available on iTunes." (*Id*. ¶¶ 6, 9.) Thus, much like used record stores, ReDigi permits its users to recoup value on their unwanted music. Unlike used record stores, however, ReDigi's sales take place entirely in the digital domain. (*See* ReDigi Reply 56.1 Stmt., Doc. No. 83 ("RD Rep. 56.1"), 4 ¶ 16.)

1 The facts are taken from the pleadings, the parties' Local Civil Rule 56.1 Statements, the affidavits submitted in connection with the instant motions, and the exhibits attached thereto. The

facts are undisputed unless otherwise noted. Where one party's 56.1 Statement is cited, the other party does not dispute the fact asserted, has offered no admissible evidence to refute that fact, or merely [**3] objects to inferences drawn from that fact.

To sell music on ReDigi's website, a user must first download ReDigi's "Media Manager" to his computer. (ReDigi 56.1 Stmt., Doc. No. 56 ("RD 56.1"), ¶ 8.) Once installed, Media Manager analyzes the user's computer to build a list of digital music files eligible for sale. (*Id*.) A file is eligible only if it was purchased on iTunes or from another ReDigi user; music downloaded from a CD or other file-sharing website is ineligible for sale. (*Id*.) After this validation process, Media Manager continually runs on the user's computer and attached devices to ensure that the user has not retained music that has been sold or uploaded for sale. (*Id*. ¶ 10.) However, Media Manager cannot detect copies stored in other locations. (Cap. 56.1 ¶¶ 59-61, 63; *see* Capitol Reply 56.1 Stmt., Doc. No. 78 ("Cap. Rep. 56.1"), ¶ 10.) If a copy is detected, Media Manager prompts the user to delete the file. (Cap. 56.1 ¶ 64.) The file is not deleted automatically or involuntarily, though ReDigi's policy is to suspend the accounts of users who refuse to comply. (*Id*.)

After the list is built, a user may upload any of his eligible files to ReDigi's "Cloud Locker," an ethereal [**4] moniker for what is, in fact, merely a remote server in Arizona. (RD 56.1 ¶¶ 9, 11; Cap. 56.1 ¶ 22.) ReDigi's upload process is a source of contention between the parties. (*See* RD 56.1 ¶¶ 14-23; Cap. Rep. 56.1 ¶¶ 14-23.) ReDigi asserts that the process involves "migrating" a user's file, packet by packet -- "analogous to a train" -- from the user's computer to the Cloud Locker so that data does not exist in two places at any one time.[2] (RD 56.1 ¶¶ 14, 36.) Capitol asserts [*646] that, semantics aside, ReDigi's upload process "necessarily involves copying" a file from the user's computer to the Cloud Locker. (Cap. Rep. 56.1 ¶ 14.) Regardless, at the end of the process, the digital music file is located in the Cloud Locker and not on the user's computer. (RD 56.1 ¶ 21.) Moreover, Media Manager deletes any additional copies of the file on the user's computer and connected devices. (*Id*. ¶ 38.)

2 A train was only one of many analogies used to describe ReDigi's service. At oral argument, the device was likened to the Star Trek transporter -- "Beam me up, Scotty" -- and Willy Wonka's teleportation device, Wonkavision. (Tr., dated Oct. 5, 2012 ("Tr."), 10:2-12; 28:15-20.)

Once uploaded, a digital music [**5] file undergoes a second analysis to verify eligibility. (Cap. 56.1 ¶¶ 31-32.) If ReDigi determines that the file has not been tampered with or offered for sale by another user, the file is stored in the Cloud Locker, and the user is given the option of simply storing and streaming the file for personal use or offering it for sale in ReDigi's marketplace. (*Id*. ¶¶ 33-37.) If a user chooses to sell his digital music file, his access to the file is terminated and transferred to the new owner at the time of purchase. (*Id*. ¶ 49.) Thereafter, the new owner can store the file in the Cloud Locker, stream it, sell it, or download it to her computer and other devices. (*Id*. ¶ 50.) No money changes hands in these transactions. (RD Rep. 56.1 5 ¶ 18.) Instead, users buy music with credits they either purchased from ReDigi or acquired from other sales. (*Id*.) ReDigi credits, once acquired, cannot be exchanged for money. (*Id*.) Instead, they can only be used to purchase additional music. (*Id*.)

To encourage activity in its marketplace, ReDigi initially permitted users to preview thirty-second clips and view album cover art of songs posted for sale pursuant to a licensing agreement with a third party. (*See* [**6] RD 56.1 ¶¶ 73-78.) However, shortly after its launch, ReDigi lost the licenses. (*Id*.) Accordingly, ReDigi now sends users to either YouTube or iTunes to listen to and view this promotional material. (*Id*. ¶¶ 77, 79.) ReDigi also offers its users a number of incentives. (Cap. 56.1 ¶ 39.) For instance, ReDigi gives twenty-cent credits to users who post files for sale and enters active sellers into contests for prizes. (*Id*. ¶¶ 39, 42.) ReDigi also encourages sales by advising new users via email that they can "[c]ash in" their music on the website, tracking and posting the titles of sought after songs on its website and in its newsletter, notifying users when they are low on credits and advising them to either purchase more credits or sell songs, and connecting users who are seeking unavailable songs with potential sellers. (*Id*. ¶¶ 39-48.)

Finally, ReDigi earns a fee for every transaction. (*Id*. ¶ 54.) ReDigi's website prices digital music files at fifty-nine to seventy-nine cents each. (*Id*. ¶ 55.) When users purchase a file, with credits, 20% of the sale price is allocated to the seller, 20% goes to an "escrow" fund for the artist, and 60% is retained by ReDigi.[3] (*Id*.)

3 On June 11, 2012, [**7] ReDigi launched ReDigi 2.0, new software that, when installed on a user's computer, purportedly directs the user's new iTunes purchases to upload from iTunes directly to the Cloud Locker. (RD 56.1 ¶¶ 40-41.) Accordingly, while access may transfer from user to user upon resale, the file is never moved from its initial location in the Cloud Locker. (*Id*. ¶¶ 44-52.) However, because ReDigi 2.0 launched after Capitol filed the Complaint and mere days before the close of discovery, the Court will not consider it in this action. (*See* Tr. 19:2-20:3.)

B. Procedural History

Capitol, which owns a number of the recordings sold on ReDigi's website, commenced [*647] this action by filing the Complaint on January 6, 2012. (*See* Complaint, dated Jan. 5, 2012, Doc. No. 1 ("Compl."); Cap. 56.1 ¶¶ 68-73.) In its Complaint, Capitol alleges multiple violations of the Copyright Act, *17 U.S.C. § 101, et seq.*, including direct copyright infringement, inducement of copyright infringement, contributory and vicarious copyright infringement, and common law copyright infringement. (Compl. ¶¶ 44-88.) Capitol seeks preliminary and permanent injunctions of ReDigi's services, as well as damages, attorney's fees and costs, interest, [**8] and any other appropriate relief. (*Id*. at 17-18.) On February 6, 2012, the Court denied Capitol's motion for a preliminary injunction, finding that Capitol had failed to establish irreparable harm. (Doc. No. 26.)

On July 20, 2012, Capitol filed its motion for partial summary judgment on the claims that ReDigi directly and secondarily infringed Capitol's reproduction and distribution rights. (Doc. No. 48.) ReDigi filed its cross-motion the same day, seeking summary judgment on all grounds of liability, including ReDigi's alleged infringement of Capitol's performance and display rights.[4] (Doc. No. 54.) Both parties responded on August 14, 2012 and replied on August 24, 2012. (Doc. Nos. 76, 79, 87, 90.) The Court heard oral argument on October 5, 2012.

4 ReDigi's arguments in this round of briefing differ markedly from those it asserted in opposition to Capitol's motion for a preliminary injunction. (*See* ReDigi Opp'n to Prelim. Inj., dated Jan. 27, 2012, Doc. No. 14 ("ReDigi Opp'n to PI").) For instance, ReDigi no longer asserts an "essential step defense," nor does it argue that "copying" to the Cloud Locker for storage is protected by the fair use defense. (*Id*. at 9-14.) ReDigi has also [**9] abandoned its argument that the Digital Millenium Copyright Act, *17 U.S.C. § 512*, bars Capitol's claim. (*Id*. at 22.) As such, the Court will consider only those arguments made in the instant motions.

II. LEGAL STANDARD

Pursuant to *Federal Rule of Civil Procedure 56(a)*, a court may not grant a motion for summary judgment unless "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*; *see Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. The moving party bears the burden of showing that it is entitled to summary judgment. *See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. The court "is not to weigh evidence but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments." *Amnesty Am. v. Town of W. Hartford, 361 F.3d 113, 122 (2d Cir. 2004)* (internal quotation marks omitted); *accord Anderson, 477 U.S. at 249*. As such, "if there is any evidence in the record from any source from which a reasonable inference in the [nonmoving party's] [**10] favor may be drawn, the moving party simply cannot obtain a summary judgment." *Binder & Binder PC v. Barnhart, 481 F.3d 141, 148 (2d Cir. 2007)* (internal quotation marks omitted).

Inferences and burdens of proof on cross-motions for summary judgment are the same as those for a unilateral motion. *See Straube v. Fla. Union Free Sch. Dist., 801 F. Supp. 1164, 1174 (S.D.N.Y. 1992)*. "That is, each cross-movant must present sufficient evidence to satisfy its burden of proof on all material facts." *U.S. Underwriters Ins. Co. v. Roka LLC, No. 99 Civ. 10136 (AGS), 2000 U.S. Dist. LEXIS 14401, 2000 WL 1473607, at *3 (S.D.N.Y. Sept. 29, 2000)*; *see Barhold v. Rodriguez, 863 F.2d 233, 236 (2d Cir. 1988)*.

[*648] III. DISCUSSION

Section 106 of the Copyright Act grants "the owner of copyright under this title" certain "exclusive rights," including the right "to reproduce the copyrighted work in copies or phonorecords," "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership," and to publicly perform and display certain copyrighted works. *17 U.S.C. §§ 106(1), (3)-(5)*. However, these exclusive rights are limited by several subsequent sections of the statute. Pertinently, *Section 109* [**11] sets forth the "first sale" doctrine, which provides that "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." *Id. § 109(a)*. The novel question presented in this action is whether a digital music file, lawfully made and purchased, may be resold by its owner through ReDigi under the first sale doctrine. The Court determines that it cannot.

A. Infringement of Capitol's Copyrights

To state a claim for copyright infringement, a plaintiff must establish that it owns a valid copyright in the work at issue and that the defendant violated one of the exclusive rights the plaintiff holds in the work. *Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd., 996 F.2d 1366, 1372 (2d Cir. 1993)* (citing *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (1991))*. It is undisputed that Capitol owns copyrights in a number of the recordings sold on ReDigi's website. (*See* Cap. 56.1 ¶¶ 68-73; RD Rep. 56.1 18-19, ¶¶ 68-73; Decl. of Richard S. Mandel, dated July 19, 2012, Doc. No. 52 ("Mandel Decl."), ¶ 16, [**12] Ex. M; Decl. of Alasdair J. McMullan, dated July 19, 2012, Doc. No. 51 ("McMullan Decl."), ¶¶ 3-5, Ex. 1.) It is also undisputed that Capitol did not approve the reproduction or distribution of its copyrighted recordings on ReDigi's website. Thus, if digital music files are "reproduce[d]" and "distribute[d]" on ReDigi's website within the meaning of the Copyright Act, Capitol's copyrights have been infringed.

1. Reproduction Rights

Courts have consistently held that the unauthorized duplication of digital music files over the Internet infringes a copyright owner's exclusive right to reproduce. *See, e.g., A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014 (9th Cir. 2001)*. However, courts have not previously addressed whether the unauthorized transfer of a digital music file over the Internet -- where only one file exists before and after the transfer -- constitutes reproduction within the meaning of the Copyright Act. The Court holds that it does.

The Copyright Act provides that a copyright owner has the exclusive right "to reproduce the copyrighted work *in . . . phonorecords*." *17 U.S.C. § 106(1)* (emphasis added). Copyrighted works are defined to include, *inter alia*, "sound recordings," [**13] which are "works that result from the fixation of a series of musical, spoken, or other sounds." *Id. § 101*. Such works are distinguished from their material embodiments. These include phonorecords, which are the "*material objects* in which sounds . . . are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." *Id. § 101* (emphasis added). Thus, the plain text of the Copyright Act makes clear that reproduction occurs when a copyrighted work is fixed in a new *material object.* [*649] *See Matthew Bender & Co., Inc. v. W. Pub. Co., 158 F.3d 693, 703 (2d Cir. 1998)*.

The legislative history of the Copyright Act bolsters this reading. The House Report on the Copyright Act distinguished between sound recordings and phonorecords, stating that "[t]he copyrightable work comprises the aggregation of sounds and not the tangible medium of fixation. Thus, 'sound recordings' as copyrightable subject matter are distinguished from 'phonorecords[,]' the latter being physical objects in which sounds are fixed." H.R. Rep. No. 94-1476, at 56 (1976). Similarly, the House and Senate [**14] Reports on the Act both explained:

> Read together with the relevant definitions in [S]ection 101, the right "to reproduce the copyrighted work in copies or phonorecords" means the right to produce a material object in which the work is duplicated, transcribed, imitated, or simulated in a fixed form from which it can be "perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."

Id. at 61; S. Rep. No. 94-473, at 58 (1975). Put differently, the reproduction right is the exclusive right to embody, and to prevent others from embodying, the copyrighted work (or sound recording) in a new material object (or phonorecord). *See Nimmer on Copyright § 8.02* (stating that "in order to infringe the reproduction right, the defendant must embody the plaintiff's work in a 'material object'").

Courts that have dealt with infringement on peer-to-peer ("P2P") file-sharing systems provide valuable guidance on the application of this right in the digital domain. For instance, in *London-Sire Records, Inc. v. John Doe 1*, the court addressed whether users of P2P software violated copyright owners' distribution rights. *542 F. Supp. 2d 153, 166 & n.16 (D. Mass. 2008)*. [**15] Citing the "material object" requirement, the court expressly differentiated between the copyrighted work -- or digital music file -- and the phonorecord -- or "appropriate segment of the hard disk" that the file would be embodied in following its transfer. *Id. at 171*. Specifically,

> [w]hen a user on a [P2P] network downloads a song from another user, he receives into his computer a digital sequence representing the sound recording. That sequence is magnetically encoded on a segment of his hard disk (or likewise written on other media). With the right hardware and software, the downloader can use the magnetic sequence to *reproduce* the sound recording. The electronic file (or, perhaps more accurately, the appropriate segment of the hard disk) is therefore a "phonorecord" within the meaning of the statute.

Id. (emphasis added). Accordingly, when a user downloads a digital music file or "digital sequence" to his "hard disk," the file is "reproduce[d]" on a new phonorecord within the meaning of the Copyright Act. *Id*.

This understanding is, of course, confirmed by the laws of physics. It is simply impossible that the same "material object" can be transferred over the Internet. Thus, logically, [**16] the court in *London-Sire* noted that the Internet transfer of a file results in a material object being "created elsewhere at its finish." *Id. at 173*. Because the reproduction right is necessarily implicated when a copyrighted work is embodied in a new material object, and because digital music files must be embodied in a new material object following their transfer over the Internet, the Court determines that the embodiment of a digital music file on a new hard disk is a reproduction [*650] within the meaning of the Copyright Act.

This finding holds regardless of whether one or multiple copies of the file exist. *London-Sire*, like all of the P2P cases, obviously concerned multiple copies of one digital music file. But that distinction is immaterial under the plain language of the Copyright Act. Simply put, it is the creation of a *new* material object and not an *additional* material object that defines the reproduction right. The dictionary defines "reproduction" to mean, *inter alia*, "to produce again" or "to cause to exist again or anew." *See Merriam-Webster Collegiate Edition* 994 (10th ed. 1998) (emphasis added). Significantly, it is not defined as "to produce again while the original exists." [**17] Thus, the right "to reproduce the copyrighted work in . . . phonorecords" is implicated whenever a sound recording is fixed in a new material object, regardless of whether the sound recording remains fixed in the original material object.

Given this finding, the Court concludes that ReDigi's service infringes Capitol's reproduction rights under any description of the technology. ReDigi stresses that it "migrates" a file from a user's computer to its Cloud Locker, so that the same file is transferred to the ReDigi server and no copying occurs.[5] However, even if that were the case, the fact that a file has moved from one material object -- the user's computer -- to another -- the ReDigi server -- means that a reproduction has occurred. Similarly, when a ReDigi user downloads a new purchase from the ReDigi website to her computer, yet another reproduction is created. It is beside the point that the original phonorecord no longer exists. It matters only that a new phonorecord has been created.

5 It bears noting that ReDigi made numerous admissions to the contrary at the preliminary injunction stage. For instance, in its opposition to Capitol's motion, ReDigi stated that, "The only *copying* which [**18] takes place in the ReDigi service occurs when a user uploads music files to the ReDigi Cloud, . . . or downloads music files from the user's Cloud Locker." (*See* ReDigi Opp'n to PI at 9 (emphasis added).) ReDigi also stated that, after a digital music file was uploaded to the Cloud Locker, "the copy from which it was made was actually *deleted* from the user's machine." (*Id*. at 14 (emphasis added).) ReDigi's officers made similar statements in their depositions, and ReDigi's patent application for its upload technology states that "to be offered for sale, [a music file] is first *copied* to the remote server and stored on the disc." (*See* Capitol Mem. of Law, dated July 20, 2012, Doc. No. 49 ("Cap. Mem."), at 8-9, n.6 (emphasis added).) But, as earlier stated, these semantic distinctions are immaterial as even ReDigi's most recent description of its service runs afoul of the Copyright Act.

ReDigi struggles to avoid this conclusion by pointing to *C.M. Paula Co. v. Logan*, a 1973 case from the Northern District of Texas where the defendant used chemicals to lift images off of greeting cards and place them on plaques for resale. *355 F. Supp. 189, 190 (N.D. Tex. 1973)*; (*see* ReDigi Mem. of Law, [**19] dated July 20, 2012, Doc. No. 55 ("ReDigi Mem."), at 13). The court determined that infringement did not occur because "should defendant desire to make one hundred ceramic plaques . . . , defendant would be required to purchase one hundred separate . . . prints." *C.M. Paula, 355 F. Supp. at 191*. ReDigi argues that, like the defendant in *C.M. Paula*, its users must purchase a song on iTunes in order to sell a song on ReDigi. (ReDigi Mem. 13.) Therefore, no "duplication" occurs. *See C.M. Paula, 355 F. Supp. at 191* (internal quotation marks omitted). ReDigi's argument is unavailing. Ignoring the questionable merits of the court's holding in *C.M. Paula*, ReDigi's service is distinguishable from the process in that case. There, the copyrighted print, or material object, was lifted from the greeting card [*651] and transferred in toto to the ceramic tile; no new material object was created. By contrast, ReDigi's service by necessity creates a new material object when a digital music file is either uploaded to or downloaded from the Cloud Locker.

ReDigi also argues that the Court's conclusion would lead to "irrational" outcomes, as it would render illegal any movement of copyrighted files on a hard [**20] drive, including relocating files between directories and defragmenting. (ReDigi Opp'n, dated Aug. 14, 2012, Doc. No. 79 ("ReDigi Opp'n"), at 8.) However, this argument is nothing more than a red herring. As Capitol has conceded, such reproduction is almost certainly protected under other doctrines or defenses, and is not relevant to the instant motion. (Cap. Reply, dated Aug. 24, 2012, Doc. No. 87 ("Cap. Reply"), at 5 n.1.)

Accordingly, the Court finds that, absent the existence of an affirmative defense, the sale of digital music files on ReDigi's website infringes Capitol's exclusive right of reproduction.

2. Distribution Rights

In addition to the reproduction right, a copyright owner also has the exclusive right "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership." *17 U.S.C. § 106(3)*. Like the court in *London-Sire*, the Court agrees that "[a]n electronic file transfer is plainly within the sort of transaction that *§ 106(3)* was intended to reach [and] . . . fit[s] within the definition of 'distribution' of a phonorecord." *London-Sire, 542 F. Supp. 2d at 173-74*. For that reason, "courts have not hesitated to find copyright [**21] infringement by distribution in cases of file-sharing or electronic transmission of copyrighted works." *Arista Records LLC v. Greubel, 453 F. Supp. 2d 961, 968 (N.D. Tex. 2006)* (collecting cases); *see, e.g., Napster, 239 F.3d at 1014*. Indeed, in *New York Times Co., Inc. v. Tasini*, the Supreme Court stated it was "clear" that an online news database violated authors' distribution rights by selling electronic copies of their articles for download. *533 U.S. 483, 498, 121 S. Ct. 2381, 150 L. Ed. 2d 500 (2001)*.

There is no dispute that sales occurred on ReDigi's website. Capitol has established that it was able to buy more than one-hundred of its own recordings on ReDigi's webite, and ReDigi itself compiled a list of its completed sales of Capitol's recordings. (Cap. 56.1 ¶¶ 68-73; RD Rep. 56.1 ¶¶ 68-73.) ReDigi, in fact, does not contest that distribution occurs on its website -- it only asserts that the distribution is protected by the fair use and first sale defenses. (*See, e.g.*, ReDigi Opp'n 15 (noting that "any distributions . . . which occur on the ReDigi marketplace are protected").)

Accordingly, the Court concludes that, absent the existence of an affirmative defense, the sale of digital music files on ReDigi's website [**22] infringes Capitol's exclusive right of distribution.[6]

6 Capitol argues that ReDigi also violated its distribution rights simply by making Capitol's recordings available for sale to the public, regardless of whether a sale occurred. (*See* Cap. Mem. 11 n.8 (citing *Hotaling v. Church of Jesus Christ of Latter-Day Saints, 118 F.3d 199, 201 (4th Cir. 1997))*. However, a number of courts, including one in this district, have cast significant doubt on this "make available" theory of distribution. *See, e.g., Elektra Entm't Grp., Inc. v. Barker, 551 F. Supp. 2d 234, 243 (S.D.N.Y. 2008)* ("[T]he support in the case law for the "make available" theory of liability is quite limited."); *London-Sire, 542 F. Supp. 2d at 169* ("[T]he defendants cannot be liable for violating the plaintiffs' distribution right unless a 'distribution' actually occurred."). In any event, because the Court concludes that actual sales on ReDigi's website infringed Capitol's distribution right, it does not reach this additional theory of liability.

[*652] 3. Performance and Display Rights

Finally, a copyright owner has the exclusive right, "in the case of . . . musical . . . works, to perform the copyrighted work publicly." *17 U.S.C. § 106(4)*. [**23] Public performance includes transmission to the public regardless of "whether the members of the public . . . receive it in the same place or in separate places and at the same time or at different times." *Id. § 101*. Accordingly, audio streams are performances because a "stream is an electronic transmission that renders the musical work audible as it is received by the client-computer's temporary memory. This transmission, like a television or radio broadcast, is a performance because there is a playing of the song that is perceived simultaneously with the transmission." *United States v. Am. Soc. Of Composers, Authors, & Publishers, 627 F.3d 64, 74 (2d Cir. 2010)*. To state a claim for infringement of the performance right, a plaintiff must establish that (1) the public performance or display of the copyrighted work was for profit, and (2) the defendant lacked authorization from the plaintiff or the plaintiff's representative. *See Broad. Music, Inc. v. 315 W. 44th St. Rest. Corp., No. 93 Civ. 8182 (MBM), 1995 U.S. Dist. LEXIS 9575, 1995 WL 408399, at *2 (S.D.N.Y. July 11, 1995)*.

The copyright owner also has the exclusive right, "in the case of . . . pictorial [and] graphic . . . works[,] . . . to display the copyrighted [**24] work publicly." *17 U.S.C. § 106(5)*. Public display includes "show[ing] a copy of [a work], either directly or by means of a film, slide, television image, or any other device or process." *Id. § 101*. The Ninth Circuit has held that the display of a photographic image on a computer may implicate the display right, though infringement hinges, in part, on where the image was hosted. *Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1160 (9th Cir. 2007)*.

Capitol alleges that ReDigi infringed its copyrights by streaming thirty-second song clips and exhibiting album cover art to potential buyers. (Compl. ¶¶ 25-26.) ReDigi counters that it only posted such content pursuant to a licensing agreement and within the terms of that agreement. (ReDigi Mem. 24-25.) ReDigi also asserts that it promptly removed the content when its licenses were terminated, and instead sent users to YouTube or iTunes for previews. (*Id.*) Capitol, in response, claims that ReDigi's use violated the terms of those licenses and did not cease at the time the licenses were terminated. (*Compare* RD 56.1 ¶¶ 73-79, *with* Cap. Rep. 56.1 ¶¶ 73-79.) As such, there are material disputes as to the source of the content, whether ReDigi [**25] was authorized to transmit the content, when authorization was or was not revoked, and when ReDigi ceased providing the content. Because the Court cannot determine whether ReDigi infringed Capitol's display and performance rights on the present record, ReDigi's motion for summary judgment on its alleged infringement of these exclusive rights is denied.

B. Affirmative Defenses

Having concluded that sales on ReDigi's website infringe Capitol's exclusive rights of reproduction and distribution, the Court turns to whether the fair use or first sale defenses excuse that infringement. For the reasons set forth below, the Court determines that they do not.

1. Fair Use

"The ultimate test of fair use . . . is whether the copyright law's goal of 'promot[ing] the Progress of Science and useful Arts' would be better served by allowing [*653] the use than by preventing it." *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 141 (2d Cir. 1998)* (quoting *U.S. Const., art. I, § 8, cl. 8*). Accordingly, fair use permits reproduction of copyrighted work without the copyright owner's consent "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom [**26] use), scholarship, or research." *17 U.S.C. § 107*. The list is not exhaustive but merely illustrates the types of copying typically embraced by fair use. *Castle Rock Entm't, Inc., 150 F.3d at 141*. In addition, four statutory factors guide courts' application of the doctrine. Specifically, courts look to:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107. Because fair use is an "equitable rule of reason," courts are "free to adapt the doctrine to particular situations on a case-by-case basis." *Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448 n.31, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984)* (quoting H. Rep. No. 94-1476, at 65-66); *see Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos., 621 F.2d 57, 60 (2d Cir. 1980)*.

On the record before it, the Court has little difficulty concluding that ReDigi's reproduction and distribution of Capitol's copyrighted works falls well [**27] outside the fair use defense. ReDigi obliquely argues that uploading to and downloading from the Cloud Locker for storage and personal use are protected fair use.[7] (*See* ReDigi Mem. 15.) Significantly, Capitol does not contest that claim. (*See* Tr. 12:8-23.) Instead, Capitol asserts only that uploading to and downloading from the Cloud Locker *incident to sale* fall outside the ambit of fair use. The Court agrees. *See Arista Records, LLC v. Doe 3, 604 F.3d 110, 124 (2d Cir. 2010)* (rejecting application of fair use to user uploads and downloads on P2P file-sharing network).

> 7 ReDigi's argument is, perhaps, a relic of the argument it previously levied that "copying" to the Cloud Locker is protected as "space shifting" under the fair use doctrine. (*See* ReDigi Opp'n to PI at 10.)

Each of the statutory factors counsels against a finding of fair use. The first factor requires the Court to determine whether ReDigi's use "transforms" the copyrighted work and whether it is commercial. *Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578-79, 114 S. Ct. 1164, 127 L. Ed. 2d 500 (1994)*. Both inquiries disfavor ReDigi's claim. Plainly, the upload, sale, and download of digital music files on ReDigi's website does nothing to "add[] something [**28] new, with a further purpose or different character" to the copyrighted works. *Id.; see, e.g., Napster, 239 F.3d at 1015* (endorsing district court finding that "downloading MP3 files does not transform the copyrighted work"). ReDigi's use is also undoubtedly commercial. ReDigi and the uploading user directly profit from the sale of a digital music file, and the downloading user saves significantly on the price of the song in the primary market. *See Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562, 105 S. Ct. 2218, 85 L. Ed. 2d 588 (1985)* ("The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying [*654] the customary price."). ReDigi asserts that downloads for personal, and not public or commercial, use "must be characterized as . . . noncommercial, nonprofit activity." (ReDigi Mem. 16 (quoting *Sony, 464 U.S. at 449*).) However, ReDigi twists the law to fit its facts. When a user downloads purchased files from the Cloud Locker, the resultant reproduction is an essential component of ReDigi's commercial enterprise. Thus, ReDigi's argument is unavailing.

The second factor [**29] -- the nature of the copyrighted work -- also weighs against application of the fair use defense, as creative works like sound recordings are "close to the core of the intended copyright protection" and "far removed from the . . . factual or descriptive work more amenable to fair use." *UMG Recordings, Inc. v. MP3.Com, Inc., 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000)* (alteration and internal quotation marks omitted) (citing *Campbell, 510 U.S. at 586*). The third factor -- the portion of the work copied -- suggests a similar outcome because ReDigi transmits the works in their entirety, "negating any claim of fair use." *Id. at 352*. Finally, ReDigi's sales are likely to undercut the "market for or value of the copyrighted work" and, accordingly, the fourth factor cuts against a finding of fair use. *Cf. Arista Records, LLC v. Doe 3, 604 F.3d at 124* (rejecting application of fair use to P2P file sharing, in part, because "the likely detrimental effect of file-sharing on the value of copyrighted compositions is well documented." (citing *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 923, 125 S. Ct. 2764, 162 L. Ed. 2d 781 (2005))*. The product sold in ReDigi's secondary market is indistinguishable from that sold in [**30] the legitimate primary market save for its lower price. The clear inference is that ReDigi will divert buyers away from that primary market. ReDigi incredibly argues that Capitol is preempted from making a market-based argument because Capitol itself condones downloading of its works on iTunes. (ReDigi Mem. 18.) Of course, Capitol, as copyright owner, does not forfeit its right to claim copyright infringement merely because it permits certain uses of its works. This argument, too, is therefore unavailing.

In sum, ReDigi facilitates and profits from the sale of copyrighted commercial recordings, transferred in their entirety, with a likely detrimental impact on the primary market for these goods. Accordingly, the Court concludes that the fair use defense does not permit ReDigi's users to upload and download files to and from the Cloud Locker incident to sale.

2. First Sale

The first sale defense, a common law principle recognized in *Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 350, 28 S. Ct. 722, 52 L. Ed. 1086, 6 Ohio L. Rep. 323 (1908)* and now codified at *Section 109(a)* of the Copyright Act, provides that:

> Notwithstanding the provisions of *section 106(3)*, the owner of a particular copy or phonorecord lawfully made under this title, or any [**31] person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

17 U.S.C. § 109. Under the first sale defense, "once the copyright owner places a copyrighted item [here, a phonorecord] in the stream of commerce by selling it, he has exhausted his exclusive statutory right to control its distribution." *Quality King Distribs., Inc. v. L'anza Research Int'l, Inc., 523 U.S. 135, 152, 118 S. Ct. 1125, 140 L. Ed. 2d 254 (1998)*; *see Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351, 185 L. Ed. 2d 392, 2013 WL 1104736, at *4 (U.S. 2013)*.

[*655] ReDigi asserts that its service, which involves the resale of digital music files lawfully purchased on iTunes, is protected by the first sale defense. (ReDigi Mem. 19.) The Court disagrees.

As an initial matter, it should be noted that the fair use defense is, by its own terms, limited to assertions of the *distribution right*. *17 U.S.C. § 109* (referencing *Section 106(3)*); *see Nimmer on Copyright § 8.12*. Because the Court has concluded that ReDigi's service violates Capitol's reproduction right, the first sale defense does not apply to ReDigi's infringement of those rights. *See Design Options v. BellePointe, Inc., 940 F. Supp. 86, 91 (S.D.N.Y. 1996)*.

In [**32] addition, the first sale doctrine does not protect ReDigi's distribution of Capitol's copyrighted works. This is because, as an unlawful reproduction, a digital music file sold on ReDigi is not "lawfully made under this title." *17 U.S.C. § 109(a)*. Moreover, the statute protects only distribution by "the owner of a *particular* copy or phonorecord . . . of *that* copy or phonorecord." *Id.* Here, a ReDigi user owns the phonorecord that was created when she purchased and downloaded a song from iTunes to her hard disk. But to sell that song on ReDigi, she must produce a new phonorecord on the ReDigi server. Because it is therefore impossible for the user to sell her "particular" phonorecord on ReDigi, the first sale statute cannot provide a defense. Put another way, the first sale defense is limited to material items, like records, that the copyright owner put into the stream of commerce. Here, ReDigi is not distributing such material items; rather, it is distributing *reproductions* of the copyrighted code embedded in new material objects, namely, the ReDigi server in Arizona and its users' hard drives. The first sale defense does not cover this any more than it covered the sale of cassette [**33] recordings of vinyl records in a bygone era.

Rejecting such a conclusion, ReDigi argues that, because "'technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of [its] basic purpose,'" namely, to incentivize creative work for the "ultimate[] . . . cause of promoting broad public availability of literature, music, and the other arts." *Sony, 464 U.S. at 432* (quoting *Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156, 95 S. Ct. 2040, 45 L. Ed. 2d 84 (1975))*. Thus, ReDigi asserts that refusal to apply the first sale doctrine to its service would grant Capitol "a Court sanctioned extension of rights under the [C]opyright [A]ct . . . which is against policy, and should not be endorsed by this Court." (ReDigi Mem. 24.)

The Court disagrees. ReDigi effectively requests that the Court amend the statute to achieve ReDigi's broader policy goals -- goals that happen to advance ReDigi's economic interests. However, ReDigi's argument fails for two reasons. First, while technological change may have rendered *Section 109(a)* unsatisfactory to many contemporary observers and consumers, it has not rendered it ambiguous. The statute plainly applies to the lawful owner's "particular" [**34] phonorecord, a phonorecord that by definition cannot be uploaded and sold on ReDigi's website. *Second*, *amendment* of the Copyright Act in line with ReDigi's proposal is a legislative prerogative that courts are unauthorized and ill suited to attempt.

Nor are the policy arguments as straightforward or uncontested as ReDigi suggests. Indeed, when confronting this precise subject in its report on the Digital Millenium Copyright Act, *17 U.S.C. § 512*, the United States Copyright Office (the "USCO") rejected extension of the first [*656] sale doctrine to the distribution of digital works, noting that the justifications for the first sale doctrine in the physical world could not be imported into the digital domain. *See* USCO, Library of Cong., DMCA Section 104 Report (2001) ("DMCA Report"); *see also Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 129 (2d Cir. 2008)* (finding that the DMCA report is entitled to deference under *Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944))*. For instance, the USCO stated that "the impact of the [first sale] doctrine on copyright owners [is] limited in the off-line world by a number of factors, including geography and the gradual degradation of books and analog [**35] works." DMCA Report at xi. Specifically,

> [p]hysical copies of works degrade with time and use, making used copies less desirable than new ones. Digital information does not degrade, and can be reproduced perfectly on a recipient's computer. The "used" copy is just as desirable as (in fact, is indistinguishable from) a new copy of the same work. Time, space, effort and cost no longer act as barriers to the movement of copies, since digital copies can be transmitted nearly instantaneously anywhere in the world with minimal effort and negligible cost. The need to transport physical copies of works, which acts as a natural brake on the effect of resales on the copyright owner's market, no longer exists in the realm of digital transmissions. The ability of such "used" copies to compete for market share with new copies is thus far greater in the digital world.

Id. at 82-83 (footnotes omitted). Thus, while ReDigi mounts attractive policy arguments, they are not as one-sided as it contends.

Finally, ReDigi feebly argues that the Court's reading of *Section 109(a)* would in effect exclude digital works from the meaning of the statute. (ReDigi Mem. 21.) That is not the case. *Section 109(a)* still [**36] protects a lawful owner's sale of her "particular" phonorecord, be it a computer hard disk, iPod, or other memory device onto which the file was originally downloaded. While this limitation clearly presents obstacles to resale that are different from, and perhaps even more onerous than, those involved in the resale of CDs and cassettes, the limitation is hardly absurd -- the first sale doctrine was enacted in a world where the ease and speed of data transfer could not have been imagined. There are many reasons, some discussed herein, for why such physical limitations may be desirable. It is left to Congress, and not this Court, to deem them outmoded.

Accordingly, the Court concludes that the first sale defense does not permit sales of digital music files on ReDigi's website.

C. Liability

Having determined that sales on ReDigi's website infringe Capitol's copyrights, the Court turns to whether ReDigi is directly and/or secondarily liable for that infringement. Direct liability requires "volitional conduct" that "causes" the reproduction or distribution to be made. *See Cartoon Network, 536 F.3d at 131*. Secondary infringement occurs when a defendant contributed to or benefitted from a third [**37] party's infringement such that it is "just" to hold the defendant accountable for the infringing activity. *Sony, 464 U.S. at 435*. For the reasons stated below, the Court finds that ReDigi directly and secondarily infringed Capitol's copyrights.

1. Direct Infringement

To be liable for direct infringement, a defendant must have "engaged in [*657] some volitional conduct sufficient to show that [it] actively" violated one of the plaintiff's exclusive rights. *Arista Records LLC v. Use-*

net.com, Inc., 633 F. Supp. 2d 124, 148 (S.D.N.Y. 2009). In other words, "'to establish direct liability under . . . the Act, something more must be shown than mere ownership of a machine used by others to make illegal copies. There must be actual infringing conduct with a nexus sufficiently close and causal to the illegal copying that one could conclude that the machine owner himself trespassed on the exclusive domain of the copyright owner.'" *Cartoon Network, 536 F.3d at 130* (quoting *CoStar Group, Inc. v. LoopNet, Inc., 373 F.3d 544, 550 (4th Cir. 2004))* (citing *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc., 907 F. Supp. 1361, 1370 (N.D. Cal. 1995))*.

In *Cartoon Network*, the Second Circuit addressed whether [**38] the cable television provider Cablevision had directly infringed the plaintiff's copyrights by providing digital video recording devices to its customers. *536 F.3d 121*. The court determined that it had not. Though Cablevision had "design[ed], hous[ed], and maintain[ed]" the recording devices, it was Cablevision's customers who "made" the copies and therefore directly infringed the plaintiff's reproduction rights. *Id. at 131-32*. The court reasoned that, "[i]n determining who actually 'makes' a copy, a significant difference exists between making a request to a human employee, who then volitionally operates the copying system to make the copy, and issuing a command directly to a system, which automatically obeys commands and engages in no volitional conduct." *Id. at 131*. However, the court allowed that a case may exist where "one's contribution to the creation of an infringing copy [is] so great that it warrants holding that party directly liable for the infringement, even though another party has actually made the copy." *Cartoon Network, 536 F.3d at 133*.

On the record before it, the Court concludes that, if such a case could ever occur, it has occurred with ReDigi. ReDigi's founders [**39] built a service where *only* copyrighted work could be sold. Unlike Cablevision's programming, which offered a mix of protected and public television, ReDigi's Media Manager scans a user's computer to build a list of eligible files that consists *solely* of protected music purchased on iTunes. While that process is itself automated, absolving ReDigi of direct liability on that ground alone would be a distinction without a difference. The fact that ReDigi's founders programmed their software to choose copyrighted content satisfies the volitional conduct requirement and renders ReDigi's case indistinguishable from those where human review of content gave rise to direct liability. *See Usenet.com, 633 F. Supp. 2d at 148*; *Playboy Enters., Inc. v. Russ Hardenburgh, Inc., 982 F. Supp. 503, 512-13 (N.D. Ohio 1997)*. Moreover, unlike Cablevision, ReDigi infringed both Capitol's reproduction and distribution rights. ReDigi provided the infrastructure for its users' infringing sales and affirmatively brokered sales by connecting users who are seeking unavailable songs with potential sellers. Given this fundamental and deliberate role, the Court concludes that ReDigi's conduct "transform[ed] [it] from [**40] [a] passive provider[] of a space in which infringing activities happened to occur to [an] active participant[] in the process of copyright infringement." *Usenet.com, 633 F. Supp. 2d at 148*. Accordingly, the Court grants Capitol's motion for summary judgment on its claims for ReDigi's direct infringement of its distribution and reproduction [*658] rights.[8]

8 Capitol also asserts a claim for common law copyright infringement arising from sales of its pre-1972 recordings on ReDigi's website. (Compl. ¶¶ 82-88.) Capitol correctly argues in its memorandum that the elements for a direct infringement claim under federal law mirror those for infringement of common law copyright under state law. *See Capitol Records, Inc. v. Naxos of Am., Inc., 4 N.Y.3d 540, 563, 830 N.E.2d 250, 797 N.Y.S.2d 352 (2005)*; (Cap. Mem. 4.) Accordingly, the Court also Court grants Capitol's motion for summary judgment with respect to ReDigi's direct infringement of Capitol's distribution and reproduction rights in its pre-1972 recordings. However, because neither Capitol nor ReDigi addressed the question of secondary infringement of common law copyrights, the Court does not reach that claim.

2. Secondary Infringement

"The Copyright Act does not expressly render [**41] anyone liable for infringement committed by another." *Sony, 464 U.S. at 434*. However, common law doctrines permit a court to impose secondary liability where "just" and appropriate. *Id. at 435*. Capitol asserts that ReDigi is secondarily liable for its users' direct infringement under three such doctrines: contributory infringement, inducement of infringement, and vicarious infringement. (Cap. Mem. 13-16.) The Court agrees with respect to contributory and vicarious infringement, and therefore does not reach the inducement claim.

a. Contributory Infringement

Contributory infringement occurs where "one . . . with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another." *Arista Records, LLC v. Doe 3, 604 F.3d at 118* (quoting *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971))*; *see, e.g., Grokster, 545 U.S. at 930*. The knowledge requirement is "objective" and satisfied where the defendant knew or had reason to know of the infringing activity.

See Arista Records, LLC v. Doe 3, 604 F.3d at 118. Further, the support must be "more than a mere quantitative contribution to the primary infringement [**42] . . . [, it] must be substantial." *Usenet.com, 633 F. Supp. 2d 124, 155 (S.D.N.Y. 2009)*. However, even where a defendant's contribution is material, it may evade liability if its product is "capable of substantial noninfringing uses." *Sony, 464 U.S. at 442* (the "*Sony-Betamax* rule").

In weighing the knowledge requirement, courts consider evidence of actual and constructive knowledge, including cease-and-desist letters, officer and employee statements, promotional materials, and industry experience. *See, e.g., Napster, 239 F.3d at 1020-21, 1027*; *Arista Records LLC v. Lime Grp. LLC, 784 F. Supp. 2d at 432*; *Usenet.com 633 F. Supp. 2d at 155*. In addition, courts have consistently found that material support existed where file-sharing systems provided "the site and facilities" for their users' infringement. *Napster, 239 F.3d at 1022*; *see, e.g., Usenet.com, 633 F. Supp. 2d at 155*.

The Court has little difficulty concluding that ReDigi knew or should have known that its service would encourage infringement. Despite the fact that ReDigi boasted on its website that it was "The Legal Alternative" and insisted "YES, ReDigi is LEGAL," ReDigi warned investors in its subscription agreements that "the [**43] law cannot be said to be well-settled" in this area and that it could not guarantee ReDigi would prevail on its copyright defenses. (Cap. 56.1 ¶¶ 65-66.) The Recording Industry Association of America ("RIAA") sent ReDigi a cease-and-desist [*659] letter in November 2011, advising ReDigi that its website violated Capitol's and other RIAA members' copyrights. (Compl. ¶ 41.) Further, ReDigi was ensnared in a licensing dispute over song clips and cover art shortly after its launch, plainly indicating that infringement could be afoot. (RD 56.1 ¶¶ 74-75, 77.) ReDigi was also, of course, aware that copyright protected content was being sold on its website -- a fact central to its business model and promotional campaigns. (Cap. 56.1 ¶¶ 70-73). Finally, ReDigi's officers claim to have "researched copyright law [and] consulted with attorneys" concerning their service, and also to have met with record companies "to get input, get marketing support[,] and enter into deals with the labels." (RD Rep. 56.1 2 ¶ 5, 5 ¶ 20.) By educating themselves, the officers presumably understood the likelihood that use of ReDigi's service would result in infringement. Indeed, though ReDigi attempts to use its consultations [**44] with counsel as a shield, it is telling that ReDigi declined to reveal any of the advice it received on the subject. (*See* Cap. Reply 9). ReDigi's lone rebuttal to this surfeit of evidence could only be that it "sincerely" believed in the legality of its service. However, the Court has not found and will not create a subjective, good faith defense to contributory liability's objective knowledge requirement, and therefore concludes that, based on the objective facts, ReDigi was aware of its users' infringement.

The Court also finds that ReDigi materially contributed to its users' infringement. As ReDigi has admitted, "more than any other website that permits the sale of music, ReDigi is intimately involved in examining the content that will be sold and supervising the steps involved in making the music available for sale and selling it." (Cap. 56.1 ¶ 35; RD Rep. 56.1 15 ¶ 35.) ReDigi thus provided the "site and facilities" for the direct infringement. *See, e.g., Napster, 239 F.3d at 1022*; *Usenet.com, 633 F. Supp. 2d at 155*; *Lime Grp., 784 F. Supp. 2d at 434*. Without ReDigi's Cloud Locker, no infringement could have occurred. Indeed, Media Manager ensured that *only* infringement occurred [**45] by limiting eligible files to iTunes tracks. Contrary to any conception of remote conduct, ReDigi's service was the hub and heart of its users' infringing activity.

The Court finally concludes that ReDigi's service is not capable of substantial noninfringing uses. The *Sony-Betamax* rule requires a court to determine whether a product or service is *capable* of substantial noninfringing uses, not whether it is currently used in a non-infringing manner. *Napster, 239 F.3d at 1021* (discussing *Sony, 464 U.S. at 442-43*). But, put simply, ReDigi, by virtue of its design, is incapable of compliance with the law. ReDigi's business is built on the erroneous notion that the first sale defense permits the electronic resale of digital music. As such, ReDigi is built to trade only in copyright protected iTunes files. However, as determined above, ReDigi's legal argument -- and therefore business model -- is fundamentally flawed. Accordingly, to comply with the law, either the law or ReDigi must change. While ReDigi 2.0, 3.0, or 4.0 may ultimately be deemed to comply with copyright law -- a finding the Court need not and does not now make -- it is clear that ReDigi 1.0 does not. Given the fundamental disconnect [**46] between ReDigi and the Copyright Act, and ReDigi's failure to provide any evidence of present or potential noninfringing uses, the Court concludes that the *Sony-Betamax* rule cannot save ReDigi from contributory liability.

Accordingly, the Court grants Capitol's motion for summary judgment on its claim [*660] for ReDigi's contributory infringement of its distribution and reproduction rights.[9]

9 As noted above, Capitol has alleged a separate cause of action for inducement of infringement. (Compl. ¶¶ 51-60.) Disagreement exists over whether "inducement of infringement" is a separate theory of liability for copyright infringement or merely a subset of contributory liability. *Compare Flava Works, Inc. v. Gunter, 689 F.3d 754, 758 (7th Cir. 2012)* (describing inducement as "a

form of contributory infringement"), *with Lime Grp., 784 F. Supp. 2d at 424* ("In *Grokster*, the Supreme Court confirmed that inducement of copyright infringement constitutes a distinct cause of action."). Regardless, because the Court concludes that ReDigi is liable for contributing to its users' direct infringement of Capitol's copyrights, it does not reach Capitol's inducement claim.

b. Vicarious Infringement

Vicarious liability [**47] for copyright infringement exists where the defendant "'has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.'" *Napster, 239 F.3d at 1022* (quoting *Gershwin Pub. Corp., 443 F.2d at 1162*); *see Grokster, 545 U.S. at 930*. Unlike contributory infringement, knowledge is not an element of vicarious liability. *Gershwin, 443 F.2d at 1162*; *see Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 262-63 (9th Cir. 1996)*.

Clearly, ReDigi vicariously infringed Capitol's copyrights. As discussed, ReDigi exercised complete control over its website's content, user access, and sales. Indeed, ReDigi admits that it "is intimately involved in . . . supervising the steps involved in making the music available for sale and selling it" on the website. (Cap. 56.1 ¶ 35; RD Rep. 56.1 ¶ 35); *see, e.g., Lime Grp., 784 F. Supp. 2d at 435* (finding right to supervise where P2P file sharing system could filter content and regulate users). In addition, ReDigi financially benefitted from every infringing sale when it collected 60% of each transaction fee. *See, e.g., Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F.2d 304, 308 (2d Cir. 1963)* (finding [**48] a direct financial benefit where the defendant received a share of the gross receipts on every infringing sale). Notably, ReDigi failed to address any of these arguments in its opposition brief, instead insisting that it was not vicariously liable for infringement that occurred *outside* the ReDigi service, for instance, when a user impermissibly retained files on his computer. (*See* ReDigi Opp'n 22-23.) However, this argument is inapposite to the instant motions. Accordingly, the Court grants Capitol's motion for summary judgment on its claim for ReDigi's vicarious infringement of its distribution and reproduction rights.

IV. CONCLUSION

At base, ReDigi seeks judicial amendment of the Copyright Act to reach its desired policy outcome. However, "[s]ound policy, as well as history, supports [the Court's] consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology." *Sony, 464 U.S. at 431*. Such deference often counsels for a limited interpretation [**49] of copyright protection. However, here, the Court cannot of its own accord condone the wholesale application of the first sale defense to the digital sphere, particularly when Congress itself has declined to take that step. Accordingly, and for the reasons stated above, the Court GRANTS Capitol's motion for summary judgment on its claims for ReDigi's direct, [*661] contributory, and vicarious infringement of its distribution and reproduction rights. The Court also DENIES ReDigi's motion in its entirety.

Because issues remain with respect to Capitol's performance and display rights, and ReDigi's secondary infringement of Capitol's common law copyrights, as well as damages, injunctive relief, and attorney's fees. IT IS HEREBY ORDERED THAT the parties shall submit a joint letter to the Court no later than April 12, 2013 concerning the next contemplated steps in this case.

The Clerk of Court is respectfully directed to terminate the motions pending at Doc. Nos. 48 and 54.

SO ORDERED

/s/ Richard J. Sullivan

RICHARD J. SULLIVAN

United States District Judge

Dated: March 30, 2013

New York, New York

SUPAP KIRTSAENG, dba BLUECHRISTINE99, Petitioner v. JOHN WILEY & SONS, INC.

No. 11-697

SUPREME COURT OF THE UNITED STATES

133 S. Ct. 1351*; *185 L. Ed. 2d 392*; *2013 U.S. LEXIS 2371*; *81 U.S.L.W. 4167*; *106 U.S.P.Q.2D (BNA) 1001*; *Copy. L. Rep. (CCH) P30,396*; *35 Int'l Trade Rep. (BNA) 1049*; *75 A.L.R. Fed. 2d 767*; *41 Media L. Rep. 1441*; *24 Fla. L. Weekly Fed. S 87

October 29, 2012, Argued
March 19, 2013, Decided

NOTICE:

The LEXIS pagination of this document is subject to change pending release of the final published version.

SUBSEQUENT HISTORY: As Amended April 4, 2013.

PRIOR HISTORY: [***1]
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
John Wiley & Sons, Inc. v. Kirtsaeng, 654 F.3d 210, 2011 U.S. App. LEXIS 16830 (2d Cir. N.Y., 2011)

DISPOSITION: *654 F.3d 210*, reversed and remanded.

DECISION:

[**392] "First sale" doctrine of *17 U.S.C.S. § 109(a)*, allowing owner of copy "lawfully made under this title" to sell or otherwise dispose of copy without copyright owner's permission, held applicable to copies lawfully made abroad.

SUMMARY:

Procedural posture: Respondent publisher sued petitioner student/importer claiming unauthorized importation and resale of its books in violation of *17 U.S.C.S. §§106(3), 602*. The district court held *17 U.S.C.S. § 109(a)*'s first sale doctrine did not apply to copies of American copyrighted works manufactured abroad, and a jury found willful infringement. The U.S. Court of Appeals for the Second Circuit affirmed. The importer's petition for certiorari was granted.

Overview: The copies were, as authorized, manufactured abroad. When the importer moved from Thailand to the U.S. to study, he asked friends and family to buy foreign edition English-language textbooks in Thai book shops, where they sold at low prices, and mail them to him in the U.S. He then sold the books, reimbursed his family and friends, and kept the profit. The language of *§ 109(a)* read literally favored a nongeographical interpretation, that "lawfully made under this title" meant made "in accordance with" or "in compliance with" the Copyright Act. *Section 109(a)* said nothing about geography. *17 U.S.C.S. § 104* said that works "subject to protection under this title" included unpublished works "without regard to the nationality or domicile of the author," and works "first published" in any nation that had signed a copyright treaty with the U.S. Copyright-related consequences, along with language, context, and interpretive canons argued strongly against a geographical interpretation of *§ 109(a)*. History reiterated the importance of the "first sale" doctrine. The "first sale" doctrine applied to copies of a copyrighted work lawfully made abroad.

Outcome: The Second Circuit's judgment finding that the first sale doctrine did not apply was reversed, and the case was remanded for further proceedings. 6-3 Decision; 1 opinion; 1 concurrence; 1 dissent.

LAWYERS' EDITION HEADNOTES: [**393]

COPYRIGHT AND LITERARY PROPERTY §20.5 ;COPYRIGHT AND LITERARY PROPERTY §21;

INFRINGEMENT -- FAIR USE -- FIRST SALE ;

Headnote:[1]

Section 106 of the Copyright Act grants the owner of copyright under the Copyright Act 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.S. § 106(3)*. These rights are qualified, however, by the application of various limitations set forth in the next several sections of the Act, *17 U.S.C.S. §§107-122*. Those sections, typically entitled "Limitations on exclusive rights," include, for example, the principle of "fair use" (*§ 107*), permission for limited library archival reproduction, (*17 U.S.C.S. § 108*), and the "first sale" doctrine (*17 U.S.C.S. § 109*). (Breyer, J., joined by Roberts, Ch. J., and Thomas, Alito, Sotomayor, and Kagan, JJ.)

COPYRIGHT AND LITERARY PROPERTY §21;

INFRINGEMENT -- FIRST SALE ;

Headnote:[2]

See *17 U.S.C.S. § 109(a)*, which provides in part: "Notwithstanding the provisions of *section 106(3)*, the owner of a particular copy or phonorecord lawfully made under this title . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."

COPYRIGHT AND LITERARY PROPERTY §20;

INFRINGEMENT -- IMPORTATION ;

Headnote:[3]

See *17 U.S.C.S. § 602(a)(1)*, which provides in part: "Importation 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* . . . ."

COPYRIGHT AND LITERARY PROPERTY §21;

INFRINGEMENT -- FIRST SALE ;

Headnote:[4]

17 U.S.C.S. § 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 *17 U.S.C.S. § 106(3)* exclusive distribution right. *Section 106* is by its terms "subject to" the various doctrines and principles contained in *17 U.S.C.S. §§107-122*, including *17 U.S.C.S. § 109(a)*'s "first sale" limitation. (Breyer, J., joined by Roberts, Ch. J., and Thomas, Alito, Sotomayor, and Kagan, JJ.)

COPYRIGHT AND LITERARY PROPERTY §21;

INFRINGEMENT -- FIRST SALE ;

Headnote:[5]

17 U.S.C.S. § 109(a)'s language, its context, and the common-law history of the "first sale" doctrine, taken together, favor a non-geographical interpretation. The language of *§ 109(a)* read literally favors a 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. (Breyer, J., joined by Roberts, Ch. J., and Thomas, Alito, Sotomayor, and Kagan, JJ.)

[**394]

COPYRIGHT AND LITERARY PROPERTY §3;

WORKS PROTECTED -- LOCATION OF PRODUCTION ;

Headnote:[6]

17 U.S.C.S. § 104 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. *17 U.S.C.S. §§101, 104(a), (b)*. (Breyer, J., joined by Roberts, Ch. J., and Thomas, Alito, Sotomayor, and Kagan, JJ.)

COPYRIGHT AND LITERARY PROPERTY §21;

INFRINGEMENT -- FIRST SALE -- OWNER -- LESSEE ;

Headnote:[7]

17 U.S.C.S. § 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 comes into its owner's possession through use of a compulsory license, which "this title" provides for elsewhere, namely, in *17 U.S.C.S. § 115*. (Breyer, J., joined by Roberts, Ch. J., and Thomas, Alito, Sotomayor, and Kagan, JJ.)

STATUTES §170;

RELATED SECTIONS ;

Headnote:[8]

Courts normally presume that words in a statute carry the same meaning when they appear in different but related sections. (Breyer, J., joined by Roberts, Ch. J., and Thomas, Alito, Sotomayor, and Kagan, JJ.)

COPYRIGHT AND LITERARY PROPERTY §21;

INFRINGEMENT -- FIRST SALE -- DISPLAY OF WORK ;

Headnote:[9]

17 U.S.C.S. § 109(c) says that, despite the copyright owner's exclusive right "to display" a copyrighted work (provided in *17 U.S.C.S. § 106(5)*), the owner of a particular copy "lawfully made under this title" may publicly display it without further authorization.

COPYRIGHT AND LITERARY PROPERTY §21;

INFRINGEMENT BY OWNER -- VIDEO GAME ;

Headnote:[10]

17 U.S.C.S. § 109(e) specifically provides that the owner of a particular copy of a copyrighted video arcade game "lawfully made under this title" may publicly perform or display that game in coin-operated equipment without the authorization of the copyright owner.

COPYRIGHT AND LITERARY PROPERTY §21;

INFRINGEMENT BY TEACHER -- AUTHORIZATION ;

Headnote:[11]

17 U.S.C.S. § 110(1) says that a teacher, without the copyright owner's authorization, is allowed to perform or display a copyrighted work "in the course of face-to-face teaching activities" --unless the teacher knowingly used "a copy that was not lawfully made under this title."

COPYRIGHT AND LITERARY PROPERTY §10;

RIGHTS OF OWNER ;

Headnote:[12]

In its introductory sentence, *17 U.S.C.S. § 106* provides the Copyright Act's basic exclusive rights to an "owner of a copyright under this title." (Breyer, J., joined by Roberts, Ch. J., and Thomas, Alito, Sotomayor, and Kagan, JJ.)

[**395]

EVIDENCE §253;

PRESUMPTION -- STATUTE -- COMMON LAW ;

Headnote:[13]

When a statute covers an issue previously governed by the common law, courts must presume that Congress intended to retain the substance of the common law. (Breyer, J., joined by Roberts, Ch. J., and Thomas, Alito, Sotomayor, and Kagan, JJ.)

COURTS §768;

DICTA ;

Headnote:[14]

The United States Supreme Court is not necessarily bound by its prior dicta should more complete argument demonstrate that the dicta is not correct. (Breyer, J., joined by Roberts, Ch. J., and Thomas, Alito, Sotomayor, and Kagan, JJ.)

COPYRIGHT AND LITERARY PROPERTY §1;

CONSTITUTIONAL PROTECTION ;

Headnote:[15]

The United States Constitution describes the nature of American copyright law by providing Congress with the power to secure to authors for limited times the exclusive right to their writings. *U.S. Const. art. I, § 8, cl. 8*. (Breyer, J., joined by Roberts, Ch. J., and Thomas, Alito, Sotomayor, and Kagan, JJ.)

SYLLABUS

[**396] [*1352] The "exclusive rights" that a copyright owner has "to distribute copies . . . of [a] copyrighted work," *17 U.S.C. §106(3)*, are qualified by the application of several limitations set out in *§§107 through 122*, including the "first sale" doctrine, which provides that "the owner of a particular copy or phonorecord lawfully made under this title . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord," *§109(a)*. Importing a copy made abroad without the copyright owner's permission is an infringement of *§106(3)*. See *§602(a)(1)*. In *Quality King Distribs. v. L'anza Research Int'l, 523 U.S. 135, 145, 118 S. Ct. 1125, 140 L. Ed. 2d 254*, this Court held that *§602(a)(1)*s reference to *§106(3)* incorporates the *§§107 through 122* limitations, including *§109*s "first sale" doc-

trine. However, the copy in *Quality King* was initially manufactured in the United States and then sent abroad and sold.

Respondent, John Wiley & Sons, Inc., an academic textbook publisher, often assigns to its wholly owned foreign subsidiary (Wiley [***2] Asia) rights to publish, print, and sell foreign editions of Wiley's English language textbooks abroad. Wiley Asia's books state that they are not to be taken (without permission) into the United States. When petitioner Kirtsaeng moved from Thailand to the United States to study mathematics, he asked friends and family to buy foreign edition English-language textbooks in Thai book shops, where they sold at low prices, and to mail them to him in the United States. He then sold the books, reimbursed his family and friends, and kept the profit.

Wiley filed suit, claiming that Kirtsaeng's unauthorized importation and resale of its books was an infringement of Wiley's *§106(3)* exclusive right to distribute and *§602*s import prohibition. Kirtsaeng replied that because his books were "lawfully made" and acquired legitimately, *§109(a)*s "first sale" doctrine permitted importation and resale without Wiley's further permission. The District Court held that Kirtsaeng could not assert this defense because the doctrine does not apply to goods manufactured abroad. The jury then found that Kirtsaeng had willfully infringed Wiley's American copyrights and assessed damages. The Second Circuit affirmed, [***3] concluding that *§109(a)*s "lawfully made under this title" language indicated that the "first sale" doctrine does not apply to copies of American copyrighted works manufactured abroad.

Held: The "first sale" doctrine applies to copies of a copyrighted work lawfully made abroad. *Pp. ___ - ___, 185 L. Ed. 2d, at 402-417*.

(a) Wiley reads "lawfully made under this title" to impose a *geographical* limitation that prevents *§109(a)*s doctrine from applying to Wiley Asia's books. Kirtsaeng, however, reads the phrase as imposing the *non*-geographical limitation made "in accordance with" or "in compliance with" the Copyright Act, which would permit the doctrine to apply to copies manufactured abroad with the copyright owner's permission. *Pp. ___ - ___, 185 L. Ed. 2d, at 402-403*.

(b) *Section 109(a)*s language, its context, and the "first sale" doctrine's common-law history favor Kirtsaeng's reading. *Pp. ___ - ___, 185 L. Ed. 2d, at 403-412*.

[**397] (1) *Section 109(a)* says nothing about geography. "Under" can logically mean "in accordance with." And a nongeographical [*1353] interpretation provides each word in the phrase "lawfully made under this title" with a distinct purpose: "lawfully made" suggests an effort to distinguish copies that were made lawfully from those that were not, and "under this title" sets [***4] forth the standard of "lawful[ness]" (*i.e.*, the U.S. Copyright Act). This simple reading promotes the traditional copyright objective of combatting piracy and makes word-by-word linguistic sense.

In contrast, the geographical interpretation bristles with linguistic difficulties. Wiley first reads "under" to mean "in conformance with the Copyright Act *where the Copyright Act is applicable*." Wiley then argues that the Act "is applicable" only in the United States. However, neither "under" nor any other word in "lawfully made under this title" means "where." Nor can a geographical limitation be read into the word "applicable." The fact that the Act does not instantly protect an American copyright holder from unauthorized piracy taking place abroad does not mean the Act is inapplicable to copies made abroad. Indeed, *§602(a)(2)* makes foreign-printed pirated copies subject to the Copyright Act. And *§104* says that works "subject to protection" include unpublished works "without regard to the [author's] nationality or domicile," and works "first published" in any of the nearly 180 nations that have signed a copyright treaty with the United States. *Pp. ___ - ___, 185 L. Ed. 2d, at 403-405*.

(2) Both historical and contemporary [***5] statutory context indicate that Congress did not have geography in mind when writing the present version of *§109(a)*. A comparison of the language in *§109(a)*s predecessor and the present provision supports this conclusion. The former version referred to those who are not owners of a copy, but mere possessors who "lawfully obtained" a copy, while the present version covers only owners of a "lawfully made" copy. This new language, including the five words at issue, makes clear that a lessee of a copy will not receive "first sale" protection but one who owns a copy will be protected, provided that the copy was "lawfully made." A nongeographical interpretation is also supported by other provisions of the present statute. For example, the "manufacturing clause," which limited importation of many copies printed outside the United States, was phased out in an effort to equalize treatment of copies made in America and copies made abroad. But that "equal treatment" principle is difficult to square with a geographical interpretation that would grant an American copyright holder permanent control over the American distribution chain in respect to copies printed abroad but not those printed in [***6] America. Finally, the Court normally presumes that the words "lawfully made under this title" carry the same meaning when they appear in different but related sections, and it is unlikely that Congress would have intended the consequences

produced by a geographical interpretation. *Pp. ___ - ___, 185 L. Ed. 2d, at 405-407*.

(3) A nongeographical reading is also supported by the canon of statutory interpretation that "when a statute covers an issue previously governed by the common law," it is presumed that "Congress intended to retain the substance of the common law." *Samantar v. Yousuf, 560 U.S. 305, ___,* [**398] *130 S. Ct. 2278, 2290, 176 L. Ed. 2d 1047, 1064*. The common-law "first sale" doctrine, which has an impeccable historic pedigree, makes no geographical distinctions. Nor can such distinctions be found in *Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 28 S. Ct. 722, 52 L. Ed. 1086, 6 Ohio L. Rep. 323*, where this Court first applied the "first sale" doctrine, or in *§109(a)*s predecessor provision, which Congress enacted a year later. *Pp. ___ - ___, 185 L. Ed. 2d, at 407-409*.

[*1354] (4) Library associations, 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 [***7] and useful Arts," *Art. I, §8, cl. 8*. For example, a geographical interpretation of the first-sale doctrine would likely require libraries to obtain permission before circulating the many books in their collections that were printed overseas. Wiley counters that such problems have not occurred in the 30 years since a federal court first adopted a geographical interpretation. But the law has not been settled for so long in Wiley's favor. The Second Circuit in this case was the first Court of Appeals to adopt a purely geographical interpretation. Reliance on the "first sale" doctrine is also deeply embedded in the practices of booksellers, libraries, museums, and retailers, who have long relied on its protection. And the fact that harm has proved limited so far may simply reflect the reluctance of copyright holders to assert geographically based resale rights. Thus, the practical problems described by petitioner and his *amici* are too serious, extensive, and likely to come about to be dismissed as insignificant--particularly in light of the ever-growing importance of foreign trade to America. *Pp. ___ - ___, 185 L. Ed. 2d, at 409-412*.

(c) Several additional arguments that Wiley and the dissent make in support of a geographical [***8] interpretation are unpersuasive. *Pp. ___ - ___, 185 L. Ed. 2d, at 412-417*.

654 F.3d 210, reversed and remanded.

COUNSEL: E. Joshua Rosenkranz argued the cause for petitioner.

Theodore B. Olson argued the cause for respondent.

Malcolm L. Stewart argued the cause for the United States, as amicus curiae.

JUDGES: Breyer, J., delivered the opinion of the Court, in which Roberts, C. J., and Thomas, Alito, Sotomayor, and Kagan, JJ., joined. Kagan, J., filed a concurring opinion, in which Alito, J., joined. Ginsburg, J., filed a dissenting opinion, in which Kennedy, J., joined, and in which Scalia, J., joined except as to Parts III and V-B-1.

OPINION BY: BREYER

OPINION

Justice **Breyer** delivered the opinion of the Court.

[**LEdHR1] [1] *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*).

[**399] *Section 109(a)* sets forth the "first sale" doctrine as follows:

> [**LEdHR2] [2] "Notwithstanding [***9] the provisions of *section 106(3)* [the section that grants the owner exclusive distribution rights], the [*1355] owner of a particular copy or phonorecord lawfully made under this title . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord." (Emphasis added.)

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

> [**LEdHR3] [3] "[i]mportation into the [***10] 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 [**LEdHR4] [4] *§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 modifications apply--in particular, does the "first sale" modification apply--when considering whether *§602(a)(1)* prohibits importing a copy?

In *Quality King Distribs. v. L'anza Research Int'l, 523 U.S. 135, 145, 118 S. Ct. 1125, 140 L. Ed. 2d 254 (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 [***11] 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.

[**400] 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 [***12] to these questions are, yes. We hold that the "first [*1356] 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. See *654 F.3d 210, 213, n. 6 (CA2 2011)*. 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. App. to Pet. for Cert. 47a-48a. 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. *654 F.3d, at 213*.

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[.] [***13] 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, *654 F.3d, at 213*, 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) [***14] into the United States. *Ibid.*

Petitioner, Supap Kirtsaeng, a citizen of Thailand, moved to the United States in 1997 to study mathematics [**401] at Cornell University. *Ibid.* 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. Brief for Petitioner 7. 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. *Ibid.* 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. *Id.* at 7-8. Kirtsaeng would then sell them, reimburse his family and friends, and keep the profit. App. to Pet. for Cert. 48a-49a.

[*1357] B

In 2008 Wiley brought this federal lawsuit against Kirtsaeng for copyright infringement. *654 F.3d, at 213*. 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)* [***15] 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)*. See also *§501* (2006 ed.) (authorizing infringement action). App. 204-211. Kirtsaeng replied that the books he had acquired were " 'lawfully made' " and that he had acquired them legitimately. Record in No. 1:08-CV-7834-DCP (SDNY), Doc. 14, p. 3. 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. *Id.*, at 2-3.

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). App. to Pet. for Cert. 72a. The jury then found that Kirtsaeng had willfully infringed Wiley's American copyrights by selling and importing without authorization copies of eight of Wiley's copyrighted titles. And it assessed statutory damages of $600,000 ($75,000 per work). *654 F.3d, at 215*.

On appeal, a split panel of the Second Circuit agreed with the District Court. *Id., at 222*. It pointed out that *§109(a)*'s "first sale" [***16] 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.).

We granted Kirtsaeng's petition for certiorari to consider this question in light of different views among the Circuits. Compare *id., at 221* (case below) ("first sale" doctrine does not apply to copies manufactured outside the United States), with *Omega S. A. v. Costco Wholesale Corp., 541 F.3d 982, 986 (CA9 2008)* ("first sale" doctrine applies to copies manufactured [**402] outside the United States only if an authorized first sale occurs within the United States), aff'd by an equally divided court, *562 U.S. ___, 131 S. Ct. 565, 178 L. Ed. 2d 470 (2010)*, and [***17] *Sebastian Int'l, Inc. v. Consumer Contacts (PTY) Ltd., 847 F.2d 1093, 1098, n. 1 (CA3 1988)* (limitation of the first sale doctrine to copies made within the United States "does not fit comfortably within the scheme of the Copyright Act").

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." *654 F.3d, at 221-222* (emphasis added). Wiley agrees that those five words limit [*1358] 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." Brief for Respondent 15-16. Similarly, the Solicitor [***18] General says that those five words limit the "first sale" doctrine's applicability to copies " '*made subject to* and in compliance with [the Copyright Act],' " which (the Solicitor General says) are copies "made in the United States." Brief for United States as *Amicus Curiae* 5 (hereinafter Brief for United States) (emphasis added). And the Ninth Circuit has held that those words limit the "first sale" doctrine's applicability (1) to copies lawfully made in the United States, and (2) to copies lawfully made outside the United States but initially sold in the United States with the copyright owner's permission. *Denbicare U.S. A. Inc. v. Toys "R" Us, Inc., 84 F.3d 1143, 1149-1150 (1996)*.

Under any of these geographical interpretations, *§109(a)*'s "first sale" doctrine would not apply to the Wiley Asia books at issue here. And, despite an American copyright owner's permission to *make* copies abroad, one who *buys* a copy of any such book or other copyrighted work--whether at a retail store, over the Internet, or at a library sale--could not resell (or otherwise dispose of) that particular copy without further permission.

Kirtsaeng, however, reads the words "lawfully made under this title" as imposing [***19] a *non*-geographical limitation. He says that they mean made "in accordance with" or "in compliance with" the Copyright Act. Brief for Petitioner 26. 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. See *§106* (referring to the owner's right to authorize).

In our view, [**LEdHR5] [5] *§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 [**403] would threaten ordinary scholarly, artistic, commercial, and consumer activities. See Part II-D, *infra*. 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. [***20] 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 [*1359] 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, [***21] Wiley reads "under this title" to mean "in conformance with the Copyright Act *where the Copyright Act is applicable*." Brief for Respondent 15. Wiley must then take a second step, arguing that the Act "is applicable" only in the United States. *Ibid.* And the Solicitor General must do the same. See Brief for United States 6 ("A copy is '*lawfully* made under this title' if Title 17 governs the copy's creation *and* the copy is made in compliance with Title 17's requirements"). See also *post, at ___, 185 L. Ed. 2d, at 423* (Ginsburg, J., dissenting) ("under" describes something "governed or regulated by another").

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," see *post, at ___, 185 L. Ed. 2d, at 422*, but as this Court has repeatedly acknowledged, the word evades a uniform, consistent meaning. See *Kucana v. Holder, 558 U.S. 233, 245, 130 S. Ct. 827, 175 L. Ed. 2d 694 (2010)* (" 'under' is chameleon"); *Ardestani v. INS, 502 U.S. 129, 135, 112 S. Ct. 515, 116 L. Ed. 2d 496 (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 [***22] 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 [**404] 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)* (2006 ed., Supp. V) (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"); Brief for United States 5. See also *post, at ___, 185 L. Ed. 2d, at 422* (suggesting that "made under" may be read as "subject to").

The appropriateness of this linguistic usage is underscored by the fact that [**LEdHR6] [6] *§ 104* of [***23] 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) (hereinafter Nimmer [*1360] on Copyright) (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 [***24] abroad but first sold in the United States with the American copyright owner's permission. *Denbicare U.S. A., 84 F.3d, at 1149-1150*. See also Brief for Respondent 16 (suggesting that the clause *at least* excludes "the foreign production of a copy for distribution exclusively abroad"); *id.*, at 51 (the Court need "not decide whether the copyright owner would be able to restrict further distribution" in the case of "a downstream domestic purchaser of *authorized* imports"); Brief for Petitioner in *Costco Wholesale Corp.* v. *Omega, S. A.*, O. T. 2010, No. 08-1423, p. 12 (excepting imported copies "made by unrelated foreign copyright holders" (emphasis deleted)).

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, see Part II-D, *infra*, 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 [***25] 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, [**405] 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 [***26] added).

See also Copyright Act of 1947, §27, 61 Stat. 660. 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. See also Part II-C, *infra* (discussing 1909 codification of common-law principle).

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 [*1361] 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 [***27] *leased* films from movie distributors or filmmakers. See S. Donahue, American Film Distribution 134, 177 (1987) (describing producer-distributer and distributer-exhibitor agreements); Note, The Relationship Between Motion Picture Distribution and Exhibition: An Analysis of the Effects of Anti-Blind Bidding Legislation, 9 Comm/Ent. L. J. 131, 135 (1986). 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 [**406] 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 [***28] to lend, rent, sell, or otherwise dispose of the print without first obtaining the copyright owner's permission"). See also *Platt & Munk Co. v. Republic Graphics, Inc., 315 F.2d 847, 851 (CA2 1963)* (Friendly, J.) (pointing out predecessor statute's leasing problem)).

This objective perfectly well explains the new language of the present version, including the five words here at issue. [**LEdHR7] [7] *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) ("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 [***29] 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. See H. R. Rep. No. 94-1476, at 165-166.

[*1362] 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 ___, 185 L. Ed. 2d, at 404*) 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 [***30] 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, 181 L. Ed. 2d 835, 859 (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)).

Finally, [**LEdHR8] [8] we normally presume that the words "lawfully made under this title" carry the same meaning when they appear in different but related sections. *Department of Revenue of Ore. v. ACF Industries, Inc.*, [**407] *510 U.S. 332, 342, 114 S. Ct. 843, 127 L. Ed. 2d 165 (1994)*. But doing so here produces surprising consequences. Consider:

> (1) [**LEdHR9] [9] *Section 109(c)* says that, despite the copyright owner's exclusive right "to display" a copyrighted work (provided in *§106(5)*), the owner of a particular copy "lawfully made under this title" may publicly display it without further authorization. To interpret these words geographically would mean that one who buys [***31] a copyrighted work of art, a poster, or even a bumper sticker, in Canada, in Europe, in Asia, could not display it in America without

the copyright owner's further authorization.

(2) [**LEdHR10] [10] *Section 109(e)* specifically provides that the owner of a particular copy of a copyrighted video arcade game "lawfully made under this title" may "publicly perform or display that game in coin-operated equipment" without the authorization of the copyright owner. To interpret these words geographically means that an arcade owner could not ("without the authority of the copyright owner") perform or display arcade games (whether new or used) originally made in Japan. Cf. *Red Baron-Franklin Park, Inc. v. Taito Corp., 883 F.2d 275 (CA4 1989)*.

(3) [**LEdHR11] [11] *Section 110(1)* says that a teacher, without the copyright owner's authorization, is allowed to perform or display a copyrighted work (say, an audiovisual work) "in the course of face-to-face teaching activities" --unless the teacher knowingly used "a copy that was not lawfully made under this title." To interpret these words geographically would mean that the teacher could not (without further authorization) use a copy of a film during class if the copy was lawfully made [***32] in Canada, Mexico, Europe, Africa, or Asia.

(4) [**LEdHR12] [12] In its introductory sentence, *§106* provides the Act's basic exclusive rights to an "owner of a copyright under this title." The last three words cannot support a geographic interpretation.

Wiley basically accepts the first three readings, but argues that Congress intended the restrictive consequences. And it argues that context simply requires that the words of the fourth example receive a different interpretation. Leaving the fourth example to the side, we shall explain in Part II-D, *infra*, why we find it unlikely that Congress would have intended these, and other related consequences.

[*1363] C

A relevant canon of statutory interpretation favors a nongeographical reading. [**LEdHR13] [13] "[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. 305, ___, n. 13, 130 S. Ct. 2278, 2290, 176 L. Ed. 2d 1047, 1064 (2010)*). See also *Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783, 72 S. Ct. 1011, 96 L. Ed. 1294 (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 [***33] 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 [**408] restraints on the alienation of chattels. Referring to Littleton, who wrote in the 15th century, Gray, Two Contributions to Coke Studies, *72 U. Chi. L. Rev. 1127, 1135 (2005)*, 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 voi[d], 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 [***34] 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, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (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 P100, 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, 28 S. Ct. 722, 52 L. Ed. 1086, 6 Ohio L. Rep. 323 (1908)*; Copyright Act of 1909, §41, 35 Stat. 1084. See also Copyright Law Revision, Further Discussions and Comments [***35] 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. See *supra,* [*1364] *at ___, 185 L. Ed. 2d, at 405*. 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. Brief for United States 27. And we can find no language, context, purpose, or history that would rebut a "straightforward application" of that doctrine here.

The dissent argues that another principle of statutory interpretation works against our reading, and points [**409] out that elsewhere in the statute Congress used different words to express something like the non-geographical reading we adopt. *Post, at ___ - ___, 185 L. Ed. 2d, at 423-424* (quoting *§602(a)(2)* (prohibiting the importation of copies "the making [***36] of which either constituted an infringement of copyright, or which would have constituted an infringement of copyright if this title had been applicable" (emphasis deleted))). Hence, Congress, the dissent believes, must have meant *§109(a)*s different language to mean something different (such as the dissent's own geographical interpretation of *§109(a)*). We are not aware, however, of any canon of interpretation that forbids interpreting different words used in different parts of the same statute to mean roughly the same thing. Regardless, were there such a canon, the dissent's interpretation of *§109(a)* would also violate it. That is because Congress elsewhere in the 1976 Act included the words "manufactured in the United States or Canada," 90 Stat. 2588, which express just about the same geographical thought that the dissent reads into *§109(a)*s very different language.

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 [***37] 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*, see *supra, at ___, 185 L. Ed. 2d, at 403*); 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. Brief for American Library Association et al. as *Amici Curiae* 4, 15-20. Cf. *id.*, at 16-20, 28 (discussing limitations of potential defenses, including the fair use and archival exceptions, *§§107-108*). See also Library and Book Trade Almanac 511 (D. Bogart ed., 55th ed. 2010) (during 2000-2009 "a significant amount of book printing moved to foreign nations").

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 [***38] present address. Brief for American Library Association 15 (many books lack indication of place of manufacture; "no practical way to learn where [a] book was printed"). 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 [*1365] Jefferson built commercial and personal libraries of foreign books, American readers have bought used books published and printed abroad. Brief for Powell's Books Inc. [**410] et al. as *Amici Curiae* 7 (citing M. Stern, Antiquarian Bookselling in the United States (1985)). The dealers say that they have "operat[ed] . . . for centuries" under the assumption that the "first sale" doctrine applies. Brief for Powell's Books 7. 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 [***39] 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. Brief for Public Knowledge et al. as *Amici Curiae* 10. See also Brief for Association of Service and Computer Dealers International, Inc., et al. as *Amici Curiae* 2. 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. Brief for Retail Litigation Center, Inc., et al. as *Amici Curiae* 4. 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. See Tr. of Oral Arg. 29-30. Without that permission a foreign car owner [***40] could not sell his or her used car.

Retailers tell us that over $2.3 trillion worth of foreign goods were imported in 2011. Brief for Retail Litigation Center 8. American retailers buy many of these goods after a first sale abroad. *Id.*, at 12. 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." *Id.*, at 10-11. 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. *Id.*, at 9. See also *id.*, at 10 (electronic game industry is $16 billion). A geographical interpretation would subject many, if not all, of them to the disruptive impact of the threat of infringement suits. *Id.*, at 12.

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. See *supra, at ___, 185 L. Ed. 2d, at 404* (describing how *§104* often makes such works "subject to" American copyright protection). A geographical interpretation, [***41] they say, would require the museums to obtain permission from the copyright owners before they could display the work, see *supra, at ___, 185 L. Ed. 2d, at 407*--even if the copyright owner has already sold or donated the work to a foreign museum. Brief for Association of Art Museum Directors et al. as *Amici Curiae* 10-11. 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 [**411] is arguing about who owns which copyright? *Id.*, at 14.

These examples, and others previously mentioned, help explain *why* Lord Coke considered the "first sale" doctrine necessary [*1366] to protect "Trade and Traffi[c], and bargaining and contracting," and they help explain *why* American copyright law has long applied that doctrine. Cf. *supra, at ___ - ___, 185 L. Ed. 2d, at 408.*

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. Brief for Respondent 51-52. 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 (ED Pa. 1983)*, summarily [***42] aff'd, *738 F.2d 424 (CA3 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. See also *post, at ___ - ___, 185 L. Ed. 2d, at 436-437.*

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. The Third Circuit has favored a nongeographical interpretation. *Sebastian Int'l, 847 F.2d 1093*. The Ninth Circuit has favored a modified geographical interpretation with a nongeographical (but textually unsustainable) corollary designed to diminish the problem. *Denbicare U.S. A., 84 F.3d 1143*. See *supra, at ___ - ___, 185 L. Ed. 2d, at 404-405*. 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 (SDNY 2009)*; *Red-Baron Franklin Park, Inc. v. Taito Corp., No. 88-0156-A, 1988 U.S. Dist. LEXIS 15735, 1988 WL 167344, *3 (ED Va. 1988)*, rev'd on other grounds, *883 F.2d 275 (CA4 1989)*.

For another thing, reliance upon the "first sale" doctrine is deeply embedded in the practices of those, such as booksellers, [***43] 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. Brief for Association of Art Museum Directors 11-12. 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. These intolerable consequences (along with the absurd result that the copyright owner can exercise downstream control even when it authorized the import or first sale) have understandably led the Ninth Circuit, the Solicitor General as *amicus*, and the dissent to adopt textual readings of the statute that attempt to mitigate these harms. Brief for United States 27-28; *post, at ___ - ___, 185 L. Ed. 2d, at 432-435*. But those readings are not defensible, for they require too many unprecedented jumps over linguistic and other hurdles that in our view are insurmountable. See, *e.g., post, at ___, 185 L. Ed. 2d, at 434* [**412] (acknowledging [***44] that its reading of *§106(3)* "significantly curtails the independent effect of *§109(a)*").

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.

[*1367] 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? (as visited Mar. 15, 2013, and available in Clerk of Court's case file). The upshot is that copyright-related consequences along with language, [***45] context, and interpretive canons argue strongly against a geographical interpretation of *§109(a)*.

III

Wiley and the dissent make several additional important arguments in favor of the geographical interpretation. *First*, they say that our *Quality King* decision strongly supports its geographical interpretation. In that case we asked whether the Act's "importation provision," now *§602(a)(1)* (then *§602(a)*), barred importation (without permission) of a copyrighted item (labels affixed to hair care products) where an American copyright owner authorized the first sale and export of hair care products with copyrighted labels made in the United States, and where a buyer sought to import them back into the United States without the copyright owner's permission. *523 U.S., at 138-139, 118 S. Ct. 1125, 140 L. Ed. 2d 254*.

We held that the importation provision did *not* prohibit sending the products back into the United States (without the copyright owner's permission). That section says:

> "Importation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work that have been acquired outside the United States is an infringement of the exclusive right to distribute copies [***46] or phonorecords under *section 106*." *17 U.S.C. §602(a)(1) (2006 ed., Supp. V)* (emphasis added). See also *§602(a)* (1994 ed.).

We pointed out that this section makes importation an infringement of the "exclusive right to distribute . . . *under 106*." We noted that *§109(a)*s "first sale" doctrine limits the scope of the *§106* exclusive distribution right. We took as given the fact that the products at issue had at least once been sold. And we held that consequently, importation of the copyrighted labels does not violate *§602(a)(1). 523 U.S., at 145, 118 S. Ct. 1125, 140 L. Ed. 2d 254*.

In reaching this conclusion we endorsed *Bobbs-Merrill* and its statement that the copyright laws were not "intended to create a right which would permit the holder of the [**413] copyright to fasten, by notice in a book . . . a restriction upon the subsequent alienation of the subject-matter of copyright after the owner had parted with the title to one who had acquired full dominion over it." *210 U.S., at 349-350, 28 S. Ct. 722, 52 L. Ed. 2d 1086*.

We also explained why we rejected the claim that our interpretation would make *§602(a)(1)* pointless. Those advancing that claim had pointed out that the 1976 Copyright Act amendments retained a prior anti-piracy provision, prohibiting the importation [***47] of *pirated* copies. *Quality King, supra, at 146, 118 S. Ct. 1125, 140 L. Ed. 2d 254*. Thus, they said, *§602(a)(1)* must prohibit the importation of lawfully made copies, for to allow the importation of those lawfully made copies *after a first sale,* as *Quality King*'s holding would do, would leave *§602(a)(1)* without much to prohibit. It would become superfluous, without any real work to do.

[*1368] We do not believe that this argument is a strong one. Under *Quality King*'s interpretation, *§602(a)(1)* would still forbid importing (without permission, and subject to the exceptions in *§602(a)(3)*) copies lawfully made abroad, for example, where (1) a foreign publisher operating as the licensee of an American publisher prints copies of a book overseas but, prior to any authorized sale, seeks to send them to the United States; (2) a foreign printer or other manufacturer (if not the "owner" for purposes of *§109(a)*, *e.g.,* before an authorized sale) sought to send copyrighted goods to the United States; (3) "a book publisher transports copies to a

wholesaler" and the wholesaler (not yet the owner) sends them to the United States, see Copyright Law Revision, pt. 4, at 211 (giving this example); or (4) a foreign film distributor, having leased [***48] films for distribution, or any other licensee, consignee, or bailee sought to send them to the United States. See, *e.g.*, 2 *Nimmer on Copyright §8.12[B][1][a]*, at 8-159 ("*Section 109(a)* provides that the distribution right may be exercised solely with respect to the initial disposition of copies of a work, not to prevent or restrict the resale or other further transfer of possession of such copies"). These examples show that *§602(a)(1)* retains significance. We concede it has less significance than the dissent believes appropriate, but the dissent also adopts a construction of *§106(3)* that "significantly curtails" *§109(a)*s effect, *post, at ___, 185 L. Ed. 2d, at 434*, and so limits the scope of that provision to a similar, or even greater, degree.

In *Quality King* we rejected the "superfluous" argument for similar reasons. But, when rejecting it, we said that, where an author gives exclusive American distribution rights to an American publisher and exclusive British distribution rights to a British publisher, "presumably *only those [copies] made by the publisher of the United States edition would be 'lawfully made under this title'* within the meaning of *§109(a)*." *523 U.S., at 148, 118 S. Ct. 1125, 140 L. Ed. 2d 254* (emphasis added). Wiley now [***49] argues that this phrase in the *Quality King* opinion means that books published abroad (under license) must fall outside the words "lawfully made under this title" and that we have consequently already given those words the geographical interpretation that it favors.

We cannot, however, give the *Quality King*statement the legal weight for which Wiley argues. The language "lawfully made under this title" was [**414] not at issue in *Quality King*; the point before us now was not then fully argued; we did not canvas the considerations we have here set forth; we there said nothing to suggest that the example assumes a "first sale"; and we there hedged our statement with the word "presumably." Most importantly, the statement is pure dictum. It is dictum contained in a rebuttal to a counterargument. And it is *unnecessary* dictum even in that respect. Is the Court having once written dicta calling a tomato a vegetable bound to deny that it is a fruit forever after?

To the contrary, we have written that [**LEdHR14] [14] we are not necessarily bound by dicta should more complete argument demonstrate that the dicta is not correct. *Central Va. Community College v. Katz, 546 U.S. 356, 363, 126 S. Ct. 990, 163 L. Ed. 2d 945 (2006)* ("[W]e are not bound to follow [***50] our dicta in a prior case in which the point now at issue was not fully debated"); *Humphrey's Ex'r v. United States, 295 U.S. 602, 627-628, 55 S. Ct. 869, 79 L. Ed. 1611 (1935)* (rejecting, under *stare decisis*, dicta, "which may be followed if sufficiently persuasive but which are not controlling"). And, given the bit part that our *Quality King* statement played in our [*1369] *Quality King* decision, we believe the view of *stare decisis* set forth in these opinions applies to the matter now before us.

Second, Wiley and the dissent argue (to those who consider legislative history) that the Act's legislative history supports their interpretation. But the historical events to which it points took place more than a decade before the enactment of the Act and, at best, are inconclusive.

During the 1960's, representatives of book, record, and film industries, meeting with the Register of Copyrights to discuss copyright revision, complained about the difficulty of dividing international markets. Copyright Law Revision Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 88th Cong., 1st Sess., pt. 2, p. 212 (Comm. Print 1963) (English editions of "particular" books "fin[d]" [***51] their "way into this country"); *id.*, at 213 (works "publi[shed] in a country where there is no copyright protection of any sort" are put into "the free stream of commerce" and "shipped to the United States"); *ibid.* (similar concern in respect to films).

The then-Register of Copyrights, Abraham Kaminstein, found these examples "very troubl[ing]." *Ibid.* And the Copyright Office released a draft provision that it said "deals with the matter of the importation for distribution in the United States of foreign copies that were made under proper authority but that, if sold in the United States, would be sold in contravention of the rights of the copyright owner who holds the exclusive right to sell copies in the United States." *Id.*, pt. 4, at 203. That draft version, without reference to *§106*, simply forbids unauthorized imports. It said:

> "Importation into the United States of copies or records of a work for the purpose of distribution to the public shall, if such articles are imported without the authority of the owner of the exclusive right to distribute copies or records under this title, constitute an infringement of copyright actionable under section 35 [*17 U.S.C. §501*]." *Id.*, Preliminary [***52] Draft for Revised U.S. Copyright Law and Discussions and Comments, 88th Cong., 2d Sess., pt. 3, pp. 32-33 (Comm. Print 1964).

[**415] In discussing the draft, some of those present expressed concern about its effect on the "first sale"

doctrine. For example, Irwin Karp, representing the Authors League of America asked, "If a German jobber lawfully buys copies from a German publisher, are we not running into the problem of restricting his transfer of his lawfully obtained copies?" *Id.*, pt. 4, at 211. The Copyright Office representative replied, "This could vary from one situation to another, I guess. I should guess, for example, that if a book publisher transports [*i.e.*, does not sell] copies to a wholesaler [*i.e.*, a *nonowner*], this is not *yet* the kind of transaction that exhausts the right to control disposition." *Ibid.* (emphasis added).

The Office later withdrew the draft, replacing it with a draft, which, by explicitly referring to *§106*, was similar to the provision that became law, now *§602(a)(1)*. The Office noted in a report that, under the new draft, importation of a copy (without permission) "would violate the exclusive rights of the U.S. copyright owner . . . where the copyright owner [***53] had authorized the making of copies in a foreign country for distribution only in that country." *Id.*, pt. 6, at 150.

Still, that part of the report says nothing about the "first sale" doctrine, about *§109(a)*, or about the five words, "lawfully made under this title." And neither the report nor its accompanying 1960's draft answers the question before us here. Cf. *Quality King, 523 U.S., at 145, 118 S. Ct. 1125,* [*1370] *140 L. Ed. 2d 254* (without those five words, the import clause, via its reference to *§106*, imports the "first sale" doctrine).

But to ascertain the best reading of *§109(a)*, rather than dissecting the remarks of industry representatives concerning *§602* at congressional meetings held 10 years before the statute was enacted, see *post, at* ___ - ___, *185 L. Ed. 2d, at 426-428*, we would give greater weight to the congressional report accompanying *§109(a)*, written a decade later when Congress passed the new law. That report says:

> "*Section 109(a)* restates and confirms the principle that, where the copyright owner has transferred ownership of a particular copy or phonorecord of a work, the person to whom the copy or phonorecord is transferred is entitled to dispose of it by sale, rental, or any other means. Under this principle, which has been established [***54] by the court decisions and . . . the present law, the copyright owner's exclusive right of public distribution would have no effect upon anyone who owns 'a particular copy or phonorecord lawfully made under this title' and who wishes to transfer it to someone else or to destroy it.
>
> . . . . .
>
> "To come within the scope of *section 109(a)*, a copy or phonorecord must have been 'lawfully made under this title,' though not necessarily with the copyright owner's authorization. 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." H. R. Rep. No. 94-1476, at 79 (emphasis added).

Accord, S. Rep. No. 94-473, pp. 71-72 (1975).

This history reiterates the importance of the "first sale" doctrine. See, [**416] *e.g.*, Copyright Law Revision, 1964 Revision Bill with Discussions and Comments, 89th Cong., 1st Sess., pt. 5, p. 66 (Comm. Print 1965) ("[F]ull ownership of a lawfully-made copy authorizes its owner to dispose of it freely"). It explains, as we have explained, the nongeographical purposes of the words "lawfully made under this title." Part II-B, *supra*. And [***55] it says nothing about geography. Nor, importantly, did *§109(a)*s predecessor provision. See *supra, at* ___, *185 L. Ed. 2d, at 405*. This means that, contrary to the dissent's suggestion, any lack of legislative history pertaining to the "first sale" doctrine only tends to bolster our position that Congress' 1976 revision did not intend to create a drastic geographical change in its revision to that provision. See *post, at* ___, *n. 13, 185 L. Ed. 2d, at 429*. We consequently believe that the legislative history, on balance, supports the nongeographical interpretation.

Third, 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.

[**LEdHR15] [15] 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* [***56] *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 [*1371] 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. Cf. Copyright Law Revision, pt. 2, at 194 (statement of Barbara Ringer, Copyright Office) (division of territorial markets was "primarily a matter of private contract").

To the contrary, Congress enacted a copyright law that (through the "first sale" doctrine) limits [***57] copyright holders' ability to divide domestic markets. And that limitation is consistent with antitrust laws that ordinarily forbid market divisions. Cf. *Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49-50, 111 S. Ct. 401, 112 L. Ed. 2d 349 (1990)* (*per curiam*) ("[A]greements between competitors to allocate territories to minimize competition are illegal"). 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.

Fourth, the dissent and Wiley contend that our decision launches [**417] United States copyright law into an unprecedented regime of "international exhaustion." *Post, at* ___ - ___, *185 L. Ed. 2d, at 429-431*; Brief for Respondent 45-46. But they point to nothing indicative of congressional intent in 1976. The dissent also claims that it is clear that the United States now opposes adopting such a regime, but the Solicitor General as *amicus* has taken no such position in this case. In fact, when pressed at oral argument, the Solicitor General stated that the consequences of Wiley's reading of the statute (perpetual downstream control) were "worse" than those of Kirtsaeng's reading (restriction [***58] of market segmentation). Tr. of Oral Arg. 51. And the dissent's reliance on the Solicitor General's position in *Quality King* is undermined by his agreement in that case with our reading of *§109(a)*. Brief for United States as *Amicus Curiae* in *Quality King*, O. T. 1996, No. 1470, p. 30 ("When . . . Congress wishes to make the location of manufacture relevant to Copyright Act protection, it does so expressly"); *ibid.* (calling it "distinctly unlikely" that Congress would have provided an incentive for overseas manufacturing).

Moreover, the exhaustion regime the dissent apparently favors would provide that "the sale in one country of a good" does not "exhaus[t] the intellectual-property owner's right to control the distribution of that good elsewhere." *Post, at* ___ - ___, *185 L. Ed. 2d, at 429*. But our holding in *Quality King* that *§109(a)* is a defense in U.S. courts even when "the first sale occurred abroad," *523 U.S., at 145, n. 14, 118 S. Ct. 1125, 140 L. Ed. 2d 254*, has already significantly eroded such a principle.

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 [***59] the case is remanded for further proceedings consistent with this opinion.fa law t

It is so ordered.

CONCUR BY: KAGAN

CONCUR

[*1372] Justice **Kagan**, with whom Justice **Alito** joins, concurring.

I concur fully in the Court's opinion. Neither the text nor the history of *17 U.S.C. §109(a)* supports removing first-sale protection from every copy of a protected work manufactured abroad. See *ante, at* ___ - ___, ___ - ___, *185 L. Ed. 2d, at 402-407, 414-416*. I recognize, however, that the combination of today's decision and *Quality King Distribs. v. L'anza Research Int'l, 523 U.S. 135, 118 S. Ct. 1125, 140 L. Ed. 2d 254 (1998)*, constricts the scope of *§602(a)(1)*s ban on unauthorized importation. I write to suggest that any problems associated with that limitation come not from our reading of *§109(a)* here, but from *Quality King*'s holding that *§109(a)* limits *§602(a)(1)*.

As the Court explains, the first-sale doctrine has played an integral part in American copyright law for over a century. See *ante, at* ___ - ___, *185 L. Ed. 2d, at 407-409*; *Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 28 S. Ct. 722, 52 L. Ed. 1086, 6 Ohio L. Rep. 323 (1908)*. No codification of the doctrine prior to 1976 even arguably limited its application to copies made in the United States. See *ante, at* ___, *185 L. Ed. 2d, at* [**418] *405*. And nothing in the text or history of *§109(a)*-the Copyright Act of 1976's first-sale provision--suggests [***60] that Congress meant to enact the new, geographical restriction John Wiley proposes, which at once would deprive American consumers of important rights and encourage copyright holders to manufacture abroad. See *ante, at* ___ - ___, ___ - ___, *185 L. Ed. 2d, at 402-407, 414-416*.

That said, John Wiley is right that the Court's decision, when combined with *Quality King*, substantially narrows *§602(a)(1)*s ban on unauthorized importation. *Quality King* held that the importation ban does not reach any copies receiving first-sale protection under *§109(a)*.

See *523 U.S., at 151-152, 118 S. Ct. 1125, 140 L. Ed. 2d 254*. So notwithstanding *§602(a)(1)*, an "owner of a particular copy . . . lawfully made under this title" can import that copy without the copyright owner's permission. *§109(a)*. In now holding that copies "lawfully made under this title" include copies manufactured abroad, we unavoidably diminish *§602(a)(1)*s scope--indeed, limit it to a fairly esoteric set of applications. See *ante, at ___ - ___, 185 L. Ed. 2d, at 413*.

But if Congress views the shrinking of *§602(a)(1)* as a problem, it should recognize *Quality King*--not our decision today--as the culprit. Here, after all, we merely construe *§109(a)*; *Quality King* is the decision holding that *§109(a)* limits *§602(a)(1)*. Had we come out the opposite [***61] way in that case, *§602(a)(1)* would allow a copyright owner to restrict the importation of copies irrespective of the first-sale doctrine.[1] That result would enable the copyright owner to divide international markets in the way John Wiley claims Congress intended when enacting *§602(a)(1)*. But it would do so without imposing downstream liability on those who purchase and resell in the United States copies that happen to have been manufactured abroad. In other words, [*1373] that outcome would target unauthorized importers alone, and not the "libraries, used-book dealers, technology companies, consumer-goods retailers, and museums" with whom the Court today is rightly concerned. *Ante, at ___, 185 L. Ed. 2d, at 409*. Assuming Congress adopted *§602(a)(1)* to permit market segmentation, I suspect that is how Congress thought the provision would work--not by removing first-sale protection from every copy manufactured abroad (as John Wiley urges us to do here), but by enabling the copyright holder to control imports even when the first-sale doctrine applies (as *Quality King* now prevents).[2]

1 Although *Quality King* concluded that the statute's text foreclosed that outcome, see *523 U.S., at 151-152, 118 S. Ct. 1125, 140 L. Ed. 2d 254*, the Solicitor General offered [***62] a cogent argument to the contrary. He reasoned that *§109(a)* does not limit *§602(a)(1)* because the former authorizes owners only to "sell" or "dispose" of copies--not to import them: The Act's first-sale provision and its importation ban thus regulate separate, non-overlapping spheres of conduct. See Brief for United States as *Amicus Curiae* in *Quality King*, O. T. 1996, No. 96-1470, pp. 5, 8-10. That reading remains the Government's preferred way of construing the statute. See Tr. of Oral Arg. 44 ("[W]e think that we still would adhere to our view that *section 109(a)* should not be read as a limitation on *section 602(a)(1)*"); see also *ante, at ___ - ___, 185 L. Ed. 2d, at 416-417*; *post, at ___, n. 15, 185 L. Ed. 2d, at 430* (Ginsburg, J., dissenting).

2 Indeed, allowing the copyright owner to restrict imports irrespective of the first-sale doctrine--*i.e.*, reversing *Quality King*--would yield a far more sensible scheme of market segmentation than would adopting John Wiley's argument here. That is because only the former approach turns on the *intended market* for copies; the latter rests instead on their *place of manufacture*. To see the difference, imagine that John Wiley prints all its textbooks in New York, but wants to distribute certain versions [***63] only in Thailand. Without *Quality King*, John Wiley could do so--*i.e.*, produce books in New York, ship them to Thailand, and prevent anyone from importing them back into the United States. But with *Quality King*, that course is not open to John Wiley even under its reading of *§109(a)*: To prevent someone like Kirtsaeng from reimporting the books--and so to segment the Thai market--John Wiley would have to move its printing facilities abroad. I can see no reason why Congress would have conditioned a copyright owner's power to divide markets on outsourcing its manufacturing to a foreign country.

[**419] At bottom, John Wiley (together with the dissent) asks us to misconstrue *§109(a)* in order to restore *§602(a)(1)* to its purportedly rightful function of enabling copyright holders to segment international markets. I think John Wiley may have a point about what *§602(a)(1)* was designed to do; that gives me pause about *Quality King*'s holding that the first-sale doctrine limits the importation ban's scope. But the Court today correctly declines the invitation to save *§602(a)(1)* from *Quality King* by destroying the first-sale protection that *§109(a)* gives to every owner of a copy manufactured abroad. That [***64] would swap one (possible) mistake for a much worse one, and make our reading of the statute only less reflective of Congressional intent. If Congress thinks copyright owners need greater power to restrict importation and thus divide markets, a ready solution is at hand--not the one John Wiley offers in this case, but the one the Court rejected in *Quality King*.

DISSENT BY: GINSBURG

DISSENT

Justice **Ginsburg**, with whom Justice **Kennedy** joins, and with whom Justice **Scalia** joins except as to Parts III and V-B-1, dissenting.

"In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress." *United States v.*

American Trucking Assns., Inc., 310 U.S. 534, 542, 60 S. Ct. 1059, 84 L. Ed. 1345 (1940). Instead of adhering to the Legislature's design, the Court today adopts an interpretation of the Copyright Act at odds with Congress' aim to protect copyright owners against the unauthorized importation of low-priced, foreign-made copies of their copyrighted works. The Court's bold departure from Congress' design is all the more stunning, for it places the United States at the vanguard of the movement for "international exhaustion" of copyrights--a movement the [***65] United States has steadfastly resisted on the world stage.

To justify a holding that shrinks to insignificance copyright protection against the unauthorized importation of foreign-made copies, the Court identifies several "practical problems." *Ante, at ___, 185 L. Ed. 2d, at 412*. The Court's parade of horribles, however, is largely imaginary. Congress' objective in [*1374] enacting *17 U.S.C. §602(a)(1)*s importation prohibition can be honored without generating the absurd consequences hypothesized in the Court's opinion. I dissent from the Court's embrace of "international exhaustion," and would affirm the sound judgment of the Court of Appeals.

I

Because economic conditions and demand for particular goods vary across the globe, copyright owners have a financial incentive to charge different prices for copies of their works in different geographic regions. Their ability to engage in such price discrimination, however, is undermined if arbitrageurs are permitted [**420] to import copies from low-price regions and sell them in high-price regions. The question in this case is whether the unauthorized importation of foreign-made copies constitutes copyright infringement under U.S. law.

To answer this question, one must examine [***66] three provisions of Title *17 of the U.S. Code: §§106(3), 109(a)*, and *602(a)(1)*. *Section 106* sets forth the "exclusive rights" of a copyright owner, including the right "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." *§106(3)*. This distribution right is limited by *§109(a)*, which provides: "Notwithstanding the provisions of *section 106(3)*, the owner of a particular copy or phonorecord lawfully made under this title . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord." *Section 109(a)* codifies the "first sale doctrine," a doctrine articulated in *Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 349-351, 28 S. Ct. 722, 52 L. Ed. 1086, 6 Ohio L. Rep. 323 (1908)*, which held that a copyright owner could not control the price at which retailers sold lawfully purchased copies of its work. The first sale doctrine recognizes that a copyright owner should not be permitted to exercise perpetual control over the distribution of copies of a copyrighted work. At some point--ordinarily the time of the first commercial sale--the copyright owner's exclusive right under *§106(3)* [***67] to control the distribution of a particular copy is exhausted, and from that point forward, the copy can be resold or otherwise redistributed without the copyright owner's authorization.

Section 602(a)(1) (2006 ed., Supp. V)[1] --last, but most critical, of the three copyright provisions bearing on this case--is an importation ban. It reads:

> "Importation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work that have been acquired outside the United States is an infringement of the exclusive right to distribute copies or phonorecords under *section 106*, actionable under *section 501*."

1 In 2008, Congress renumbered what was previously *§602(a)* as *§602(a)(1)*. See Prioritizing Resources and Organization for Intellectual Property Act of 2008 (PROIPA), §105(b)(2), 122 Stat. 4259. Like the Court, I refer to the provision by its current numbering.

In *Quality King Distribs. v. L'anza Research Int'l, 523 U.S. 135, 143-154, 118 S. Ct. 1125, 140 L. Ed. 2d 254 (1998)*, the Court held that a copyright owner's right to control importation under *§602(a)(1)* is a component of the distribution right set forth in *§106(3)* and is therefore subject to *§109(a)*s codification [***68] of the first sale doctrine. *Quality King* thus held that the importation of copies *made in the United States* but sold abroad did not rank as copyright infringement [*1375] under *§602(a)(1)*. *Id., at 143-154, 118 S. Ct. 1125, 140 L. Ed. 2d 254*. See also *id., at 154, 118 S. Ct. 1125, 140 L. Ed. 2d 254* (Ginsburg, J., concurring) (*Quality King* "involve[d] a 'round trip' journey, travel of the copies in question from the United States to places abroad, then back again").[2] Important to the Court's holding, the copies at issue in *Quality King* had been " [**421] 'lawfully made under [Title 17]' "--a prerequisite for application of *§109(a)*. *Id., at 143, n. 9, 118 S. Ct. 1125, 140 L. Ed. 2d 254* (quoting *§109(a)*). *Section 602(a)(1)*, the Court noted, would apply to "copies that were 'lawfully made' not under the United States Copyright Act, but instead, under the law of some other country." *Id., at 147, 118 S. Ct. 1125, 140 L. Ed. 2d 254*. Drawing on an example discussed during a 1964 public meeting on proposed revisions to the U.S. copyright laws,[3] the Court stated: [***69]

> "If the author of [a] work gave the exclusive United States distribution rights--enforceable under the Act--to the publisher of the United States edition and the exclusive British distribution rights to the publisher of the British edition, . . . presumably only those [copies] made by the publisher of the United States edition would be 'lawfully made under this title' within the meaning of *§ 109(a)*. The first sale doctrine would not provide the publisher of the British edition who decided to sell in the American market with a defense to an action under *§ 602(a)* (or, for that matter, to an action under *§ 106(3)*, if there was a distribution of the copies)." *Id., at 148, 118 S. Ct. 1125, 140 L. Ed. 2d 254*.

2 Although Justice Kagan's concurrence suggests that *Quality King* erred in "holding that *§109(a)* limits *§602(a)(1)*," *ante, at ___, 185 L. Ed. 2d, at 418*, that recent, unanimous holding must be taken as a given. See *John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 139, 128 S. Ct. 750, 169 L. Ed. 2d 591 (2008)* ("*[S]tare decisis* in respect to statutory interpretation has 'special force,' for 'Congress remains free to alter what we have done.' " (quoting *Patterson v. McLean Credit Union, 491 U.S. 164, 172-173, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989)))*. The Court's objective in this case should be to avoid unduly "constrict[ing] the scope of *§602(a)(1)*s ban on unauthorized importation," *ante, at ___, 185 L. Ed. 2d, at 418* (opinion of Kagan, J.), while at the same time remaining faithful to *Quality King*'s holding and to the text and history of other Copyright Act provisions. This aim is not difficult to achieve. See Parts II-V, *infra*. [***70] Justice Kagan and I appear to agree to this extent: Congress meant the ban on unauthorized importation to have real force. See *ante, at ___, 185 L. Ed. 2d, at 418* (acknowledging that "Wiley may have a point about what *§602(a)(1)* was designed to do").

3 See *Quality King Distribs. v. L'anza Research Int'l, 523 U.S. 135, 148, n. 20, 118 S. Ct. 1125, 140 L. Ed. 2d 254 (1998)* (quoting Copyright Law Revision Part 4: Further Discussions and Comments on Preliminary Draft for Revised U.S. Copyright Law, 88th Cong., 2d Sess., 119 (H. R. Judiciary Comm. Print 1964) (hereinafter Copyright Law Revision Part 4) (statement of Harriet Pilpel)).

As the District Court and the Court of Appeals concluded, see *654 F.3d 210, 221-222 (CA2 2011)*; App. to Pet. for Cert. 70a-73a, application of the *Quality King* analysis to the facts of this case would preclude any invocation of *§109(a)*. Petitioner Supap Kirtsaeng imported and then sold at a profit over 600 copies of copyrighted textbooks printed outside the United States by the Asian subsidiary of respondent John Wiley & Sons, Inc. (Wiley). App. 29-34. See also *ante, at ___ - ___, 185 L. Ed. 2d, at 400-401* (opinion of the Court). In the words the Court used in *Quality King*, these copies "were 'lawfully made' not under the United States [***71] Copyright Act, but instead, under the law of some other country." *523 U.S., at 147, 118 S. Ct. 1125, 140 L. Ed. 2d 254*. *Section 109(a)* therefore does not apply, and Kirtsaeng's unauthorized importation constitutes copyright infringement under *§602(a)(1)*.

The Court does not deny that under the language I have quoted from *Quality* [*1376] *King*, Wiley would prevail. *Ante, at ___, 185 L. Ed. 2d, at 413.* [**422] Nevertheless, the Court dismisses this language, to which all Members of the *Quality King* Court subscribed, as ill-considered dictum. *Ante, at ___ - ___, 185 L. Ed. 2d, at 413-414*. I agree that the discussion was dictum in the sense that it was not essential to the Court's judgment. See *Quality King, 523 U.S., at 154, 118 S. Ct. 1125, 140 L. Ed. 2d 254* (Ginsburg, J., concurring) ("[W]e do not today resolve cases in which the allegedly infringing imports were manufactured abroad."). But I disagree with the Court's conclusion that this dictum was ill considered. Instead, for the reasons explained below, I would hold, consistently with *Quality King*'s dictum, that *§602(a)(1)* authorizes a copyright owner to bar the importation of a copy manufactured abroad for sale abroad.

II

The text of the Copyright Act demonstrates that Congress intended to provide copyright owners with a potent remedy against the importation of foreign-made [***72] copies of their copyrighted works. As the Court recognizes, *ante, at ___, 185 L. Ed. 2d, at 399*, this case turns on the meaning of the phrase "lawfully made under this title" in *§109(a)*. In my view, that phrase is most sensibly read as referring to instances in which a copy's creation is governed by, and conducted in compliance with, Title 17 of the U.S. Code. This reading is consistent with the Court's interpretation of similar language in other statutes. See *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 52-53, 128 S. Ct. 2326, 171 L. Ed. 2d 203 (2008)* ("under" in *11 U.S.C. §1146(a)*, a Bankruptcy Code provision exempting certain asset transfers from stamp taxes, means "pursuant to"); *Ardestani v. INS, 502 U.S. 129, 135, 112 S. Ct. 515, 116 L. Ed. 2d 496 (1991)* (the phrase "under *section 554* in the Equal Access to Justice Act means "subject to" or "governed by" *5 U.S.C. §554* (internal quotation marks omitted)). It also accords with dictionary definitions of the word "under." See, *e.g.*, American Heritage Dictionary 1887 (5th ed. 2011) ("under" means, among other things, "[s]ubject to the authority, rule, or control of").

Section 109(a), properly read, affords Kirtsaeng no defense against Wiley's claim of copyright infringement. The Copyright Act, [***73] it has been observed time and again, does not apply extraterritorially. See *United Dictionary Co. v. G. & C. Merriam Co., 208 U.S. 260, 264, 28 S. Ct. 290, 52 L. Ed. 478, 1908 Dec. Comm'r Pat. 559 (1908)* (copyright statute requiring that U.S. copyright notices be placed in all copies of a work did not apply to copies published abroad because U.S. copyright laws have no "force" beyond the United States' borders); 4 M. Nimmer & D. *Nimmer, Copyright §17.02*, p. 17-18 (2012) (hereinafter Nimmer) ("[C]opyright laws do not have any extraterritorial operation."); 4 W. Patry, Copyright § 13:22, p. 13-66 (2012) (hereinafter Patry) ("Copyright laws are rigorously territorial."). The printing of Wiley's foreign-manufactured textbooks therefore was not governed by Title 17. The textbooks thus were not "lawfully made under [Title 17]," the crucial precondition for application of *§109(a)*. And if *§109(a)* does not apply, there is no dispute that Kirtsaeng's conduct constituted copyright infringement under *§602(a)(1)*.

The Court's point of departure is similar to mine. According to the Court, the phrase " 'lawfully made under this title' means made 'in accordance with' or 'in compliance with' the Copyright Act." *Ante, at ___, 185 L.* [**423] *Ed. 2d, at 403*. But the Court overlooks that, according [***74] to the very dictionaries it cites, *ante, at ___, 185 L. Ed. 2d, at 403*, the word "under" commonly signals a relationship of subjection, where one thing is governed or regulated by another. See Black's Law Dictionary 1525 (6th ed. 1990) ("under" [*1377] "frequently" means "inferior" or "subordinate" (internal quotation marks omitted)); 18 Oxford English Dictionary 950 (2d ed. 1989) ("under" means, among other things, "[i]n accordance with (*some regulative power or principle*)" (emphasis added)). See also Webster's Third New International Dictionary 2487 (1961) ("under" means, among other things, "in . . . a condition of subjection, regulation, or subordination" and "suffering restriction, restraint, or control by"). Only by disregarding this established meaning of "under" can the Court arrive at the conclusion that Wiley's foreign-manufactured textbooks were "lawfully made under" U.S. copyright law, even though that law did not govern their creation. It is anomalous, however, to speak of particular conduct as "lawful" under an inapplicable law. For example, one might say that driving on the right side of the road in England is "lawful" under U.S. law, but that would be so only because U.S. law has nothing to say [***75] about the subject. The governing law is English law, and English law demands that driving be done on the left side of the road.[4]

4 The Court asserts that my position gives the word "lawfully" in *§109(a)* "little, if any, linguistic work to do." *Ante, at ___, 185 L. Ed. 2d, at 403*. That is not so. My reading gives meaning to each word in the phrase "lawfully made under this title." The word "made" signifies that the conduct at issue is the creation or manufacture of a copy. See Webster's Third New International Dictionary 1356 (1961) (defining "made" as "artificially produced by a manufacturing process"). The word "lawfully" indicates that for *§109(a)* to apply, the copy's creation must have complied with some body of law. Finally, the prepositional phrase "under this title" clarifies what that body of law is--namely, the copyright prescriptions contained in Title 17 of the U.S. Code.

The logical implication of the Court's definition of the word "under" is that *any* copy manufactured abroad--even a piratical one made without the copyright owner's authorization and in violation of the law of the country where it was created--would fall within the scope of *§109(a)*. Any such copy would have been made "in [***76] accordance with" or "in compliance with" the U.S. Copyright Act, in the sense that manufacturing the copy did not violate the Act (because the Act does not apply extraterritorially).

The Court rightly refuses to accept such an absurd conclusion. Instead, it interprets *§109(a)* as applying only to copies whose making actually complied with Title 17, or would have complied with Title 17 had Title 17 been applicable (*i.e.*, had the copies been made in the United States). See *ante, at ___, 185 L. Ed. 2d, at 402* ("*§109(a)*s 'first sale' doctrine would apply to copyrighted works as long as their manufacture met the requirements of American copyright law."). Congress, however, used express language when it called for such a counterfactual inquiry in *17 U.S.C. §§602(a)(2)* and *(b)*. See *§602(a)(2)* ("Importation into the United States or exportation from the United States, without the authority of the owner of copyright under this title, of copies or phonorecords, 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*, is an infringement of the exclusive right to distribute copies or phonorecords under *section 106*." [***77] [**424] (emphasis added)); *§602(b)* ("In a case where the making of the copies or phonorecords *would have constituted an infringement of copyright if this title had been applicable*, their importation is prohibited." (emphasis added)). Had Congress intended courts to engage in a similarly hypothetical inquiry under *§109(a)*, Congress would presumably have included similar language in that section. See *Russello v. United States, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983)* (" '[W]here Congress includes [*1378] particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " (quoting *United States v. Wong Kim Bo, 472 F.2d 720, 722 (CA5 1972)* (*per curiam*); brackets in original)).[5]

5 Attempting to show that my reading of *§109(a)* is susceptible to the same criticism, the Court points to the now-repealed "manufacturing clause," which required "copies of a work consisting preponderantly of nondramatic literary material . . . in the English language" to be "manufactured in the United States or Canada." Copyright Act of 1976, §601(a), 90 Stat. 2588. Because Congress expressly referred to [***78] manufacturing in this provision, the Court contends, the phrase "lawfully made under this title" in *§109(a)* cannot mean "manufactured in the United States." *Ante, at ___, 185 L. Ed. 2d, at 409*. This argument is a non sequitur. I do *not* contend that the phrases "lawfully made under this title" and "manufactured in the United States" are interchangeable. To repeat, I read the phrase "lawfully made under this title" as referring to instances in which a copy's creation is governed by, and conducted in compliance with, Title 17 of the U.S. Code. See *supra, at ___, 185 L. Ed. 2d, at 422*. Not all copies "manufactured in the United States" will satisfy this standard. For example, piratical copies manufactured in the United States without the copyright owner's authorization are not "lawfully made under [Title 17]." Nor would the phrase "lawfully manufactured in the United States" be an exact substitute for "lawfully made under this title." The making of a copy may be lawful under Title 17 yet still violate some other provision of law. Consider, for example, a copy made with the copyright owner's authorization by workers who are paid less than minimum wage. The copy would be "lawfully made under [Title 17]" in the sense that its creation [***79] would not violate any provision of that title, but the copy's manufacturing would nonetheless be unlawful due to the violation of the minimum-wage laws.

Not only does the Court adopt an unnatural construction of the *§109(a)* phrase "lawfully made under this title." Concomitantly, the Court reduces *§602(a)(1)* to insignificance. As the Court appears to acknowledge, see *ante, at ___, 185 L. Ed. 2d, at 413*, the only independent effect *§602(a)(1)* has under today's decision is to prohibit unauthorized importations carried out by persons who merely have possession of, but do not own, the imported copies. See *17 U.S.C. §109(a)* (*§109(a)* applies to any "*owner* of a particular copy or phonorecord lawfully made under this title" (emphasis added)).[6] If this is enough to avoid rendering *§602(a)(1)* entirely "superfluous," *ante, at ___, 185 L. Ed. 2d, at 413*, it hardly suffices to give the owner's importation right the scope Congress intended it to have. Congress used broad language in *§602(a)(1)*; it did so to achieve a broad objective. Had Congress [**425] intended simply to provide a copyright remedy against larcenous lessees, licensees, consignees, and bailees of films and other copyright-protected goods, see *ante, at ___ - ___, ___, 185 L. Ed. 2d, at 405-406, 413*, it likely would have [***80] used language tailored to that narrow purpose. See 2 *Nimmer §8.12[B][6][c]*, at 8-184.31, n. 432 ("It may be wondered whether . . . potential causes of action [against licensees and the like] are more than theoretical."). See also *ante, at ___, 185 L. Ed. 2d, at 418* (Kagan, J., concurring) (the Court's decision limits *§602(a)(1)* "to a fairly esoteric set of applications").[7]

6 When *§602(a)(1)* was originally enacted in 1976, it played an additional role--providing a private cause of action against importers of piratical goods. See *Quality King, 523 U.S., at 146, 118 S. Ct. 1125, 140 L. Ed. 2d 254*. In 2008, however, Congress amended *§602* to provide for such a cause of action in *§602(a)(2)*, which prohibits the unauthorized "[i]mportation into the United States . . . of copies or phonorecords, the making of which either constituted an infringement of copyright, or which would have constituted an infringement of copyright if [Title 17] had been applicable." See PROIPA, §105(b)(3), 122 Stat. 4259-4260. Thus, under the Court's interpretation, the only conduct reached by *§602(a)(1)* but not *§602(a)(2)* is a nonowner's unauthorized importation of a nonpiratical copy.

7 Notably, the Court ignores the history of *§602(a)(1)*, which reveals that the primary pur-

pose [***81] of the prescription was not to provide a remedy against rogue licensees, consignees, and bailees, against whom copyright owners could frequently assert breach-of-contract claims even in the absence of *§602(a)(1)*. Instead, the primary purpose of *§602(a)(1)* was to reach third-party importers, enterprising actors like Kirtsaeng, against whom copyright owners could not assert contract claims due to lack of privity. See Part III, *infra*.

[*1379] The Court's decision also overwhelms *17 U.S.C. §602(a)(3)*s exceptions to *§602(a)(1)*s importation prohibition. 2 P. Goldstein, Copyright § 7.6.1.2(a), p. 7:141 (3d ed. 2012) (hereinafter Goldstein).[8] Those exceptions permit the importation of copies without the copyright owner's authorization for certain governmental, personal, scholarly, educational, and religious purposes. *17 U.S.C. §602(a)(3)*. Copies imported under these exceptions "will often be lawfully made gray market goods purchased through normal market channels abroad." 2 Goldstein § 7.6.1.2(a), at 7:141.[9] But if, as the Court holds, such copies can in any event be imported by virtue of *§109(a)*, *§602(a)(3)*s work has already been done. For example, had Congress conceived of *§109(a)*s sweep [***82] as the Court does, what earthly reason would there be to provide, as Congress did in *§602(a)(3)(C)*, that a library may import "no more than five copies" of a non-audiovisual work for its "lending or archival purposes"?

8 *Section 602(a)(3)* provides: "This subsection [i.e., *§602(a)*] does not apply to--"(A) importation or exportation of copies or phonorecords under the authority or for the use of the Government of the United States or of any State or political subdivision of a State, but not including copies or phonorecords for use in schools, or copies of any audiovisual work imported for purposes other than archival use;"(B) importation or exportation, for the private use of the importer or exporter and not for distribution, by any person with respect to no more than one copy or phonorecord of any one work at any one time, or by any person arriving from outside the United States or departing from the United States with respect to copies or phonorecords forming part of such person's personal baggage; or"(C) importation by or for an organization operated for scholarly, educational, or religious purposes and not for private gain, with respect to no more than one copy of an audiovisual work [***83] solely for its archival purposes, and no more than five copies or phonorecords of any other work for its library lending or archival purposes, unless the importation of such copies or phonorecords is part of an activity consisting of systematic reproduction or distribution, engaged in by such organization in violation of the provisions of *section 108(g)(2)*."

9 The term "gray market good" refers to a good that is "imported outside the distribution channels that have been contractually negotiated by the intellectual property owner." Forsyth & Rothnie, Parallel Imports, in The Interface Between Intellectual Property Rights and Competition Policy 429 (S. Anderman ed. 2007). Such goods are also commonly called "parallel imports." *Ibid.*

The far more plausible reading of *§§109(a)* and *602(a)*, then, is that Congress intended *§109(a)* to apply to copies made in the United States, not to copies manufactured and sold [**426] abroad. That reading of the first sale and importation provisions leaves *§602(a)(3)*s exceptions with real, meaningful work to do. See *TRW Inc. v. Andrews, 534 U.S. 19, 31, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001)* ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed [***84] that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (internal quotation marks omitted)). In the range of circumstances covered by the exceptions, *§602(a)(3)* frees individuals and entities [*1380] who purchase foreign-made copies abroad from the requirement they would otherwise face under *§602(a)(1)* of obtaining the copyright owner's permission to import the copies into the United States.[10]

10 The Court asserts that its reading of *§109(a)* is bolstered by *§104*, which extends the copyright "protection[s]" of Title 17 to a wide variety of foreign works. See *ante, at ___ - ___, 185 L. Ed. 2d, at 404*. The "protection under this title" afforded by *§104*, however, is merely protection against infringing conduct within the United States, the only place where Title 17 applies. See 4 W. Patry, Copyright § 13:44.10, pp. 13-128 to 13-129 (2012) (hereinafter Patry). Thus, my reading of the phrase "under this title" in *§109(a)* is consistent with Congress' use of that phrase in *§104*. Furthermore, *§104* describes which *works* are entitled to copyright protection under U.S. law. But no one disputes that Wiley's copyrights in the works at issue in this case are valid. The only question [***85] is whether Kirtsaeng's importation of *copies* of those works infringed Wiley's copyrights. It is basic to copyright law that "[o]wnership of a copyright . . . is distinct from ownership of any material object in which the work is embodied." *17 U.S.C. §202*. See also *§101* (" 'Copies' are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from

which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."). Given the distinction copyright law draws between works and copies, *§104* is inapposite to the question here presented. 4 Patry § 13:44.10, at 13-129 ("There is no connection, linguistically or substantively, between Section[s] 104 and 109: *Section 104* deals with national eligibility for the *intangible* work of authorship; *Section 109(a)* deals with the *tangible*, physical embodiment of the work, the 'copy.' ").

III

The history of *§602(a)(1)* reinforces the conclusion I draw from the text of the relevant provisions: *§109(a)* does not apply to copies manufactured abroad. *Section 602(a)(1)* was enacted as part of the Copyright Act of 1976, 90 Stat. 2589-2590. That Act [***86] was the product of a lengthy revision effort overseen by the U.S. Copyright Office. See *Mills Music, Inc. v. Snyder, 469 U.S. 153, 159-160, 105 S. Ct. 638, 83 L. Ed. 2d 556 (1985)*. In its initial 1961 report on recommended revisions, the Copyright Office noted that publishers had "suggested that the [then-existing] import ban on piratical copies should be extended to bar the importation of . . . foreign edition[s]" in violation of "agreements to divide international markets for copyrighted works." Copyright Law Revision: Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Cong., 1st Sess., 126 (H. R. Judiciary Comm. Print 1961) (hereinafter Copyright Law Revision). See Copyright Act of 1947, §106, 61 Stat. 663 ("The importation into the United States . . . of any piratical copies of any work copyrighted in the United States . . . is prohibited."). The Copyright Office originally recommended against such an extension of the importation ban, reasoning that enforcement of territorial restrictions was best left to contract law. Copyright Law Revision 126.

Publishing-industry representatives argued strenuously against the position initially taken by the Copyright Office. At a 1962 [***87] panel [**427] discussion on the Copyright Office's report, for example, Horace Manges of the American Book Publishers Council stated:

> "When a U.S. book publisher enters into a contract with a British publisher to acquire exclusive U.S. rights for a particular book, he often finds that the English edition . . . of that particular book finds its way into this country. Now it's all right to say, 'Commence a lawsuit for breach of contract.' But this is expensive, burdensome, and, for the most part, ineffective." Copyright Law Revision Part 2: Discussion and Comments on Report of the Register of Copyrights [*1381] on the General Revision of the U.S. Copyright Law, 88th Cong., 1st Sess., 212 (H. R. Judiciary Comm. Print 1963).

Sidney Diamond, representing London Records, elaborated on Manges' statement. "There are many situations," he explained, "in which it is not necessarily a question of the inadequacy of a contract remedy--in the sense that it may be difficult or not quick enough to solve the particular problem." *Id.*, at 213. "Very frequently," Diamond stated, publishers "run into a situation where . . . copies of [a] work . . . produced in a foreign country . . . may be shipped [to the United States] [***88] without violating any contract of the U.S. copyright proprietor." *Ibid.* To illustrate, Diamond noted, if a "British publisher [sells a copy] to an individual who in turn ship[s] it over" to the United States, the individual's conduct would not "violate [any] contract between the British and the American publisher." *Ibid.* In such a case, "no possibility of any contract remedy" would exist. *Ibid.* The facts of Kirtsaeng's case fit Diamond's example, save that the copies at issue here were printed and initially sold in Asia rather than Great Britain.

After considering comments on its 1961 report, the Copyright Office "prepared a preliminary draft of provisions for a new copyright statute." Copyright Law Revision Part 3: Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft, 88th Cong., 2d Sess., V (H. R. Judiciary Comm. Print 1964). Section 44 of the draft statute addressed the concerns raised by publishing-industry representatives. In particular, § 44(a) provided:

> "Importation into the United States of copies or records of a work for the purpose of distribution to the public shall, if such articles are imported without the authority of the owner of [***89] the exclusive right to distribute copies or records under this title, constitute an infringement of copyright actionable under section 35 [i.e., the section providing for a private cause of action for copyright infringement]." *Id.*, at 32-33.

In a 1964 panel discussion regarding the draft statute, Abe Goldman, the Copyright Office's General Counsel, left no doubt about the meaning of § 44(a). It represented, he explained, a "shif[t]" from the Copyright Office's 1961 report, which had recommended against using copyright law to facilitate publishers' efforts to segment international markets. Copyright Law Revision Part 4: Further Discussions and Comments on Preliminary Draft for Revised U.S. Copyright Law, 88th Cong., 2d Sess., 203 (H. R. Judiciary Comm. Print 1964). Section 44(a), Goldman stated, would allow copyright owners to bring infringement actions against importers of "foreign copies that were made under proper [**428] authority." *Ibid.* See also *id.*, at 205-206 (Goldman agreed with a speaker's comment that § 44(a) "enlarge[d]" U.S. copyright law by extending import prohibitions "to works legally produced in Europe" and other foreign countries).[11]

11 As the Court observes, *ante, at ___, 185 L. Ed. 2d, at 415*, Irwin [***90] Karp of the Authors League of America stated at the 1964 panel discussion that § 44(a) ran counter to "the very basic concept of copyright law that, once you've sold a copy legally, you can't restrict its resale." Copyright Law Revision Part 4, at 212. When asked if he was "presenting . . . an argument against" § 44(a), however, Karp responded that he was "neutral on th[e] provision." *Id.*, at 211. There is thus little reason to believe that any changes to the wording of § 44(a) before its codification in *§602(a)* were made in response to Karp's discussion of "the problem of restricting [the] transfer of . . . lawfully obtained [foreign] copies." *Ibid.*

The next step in the copyright revision process was the introduction in Congress [*1382] of a draft bill on July 20, 1964. See Copyright Law Revision Part 5: 1964 Revision Bill with Discussions and Comments, 89th Cong., 1st Sess., III (H. R. Judiciary Comm. Print 1965). After another round of public comments, a revised bill was introduced on February 4, 1965. See Copyright Law Revision Part 6: Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, 89th Cong., 1st Sess., V (H. R. Judiciary [***91] Comm. Print 1965) (hereinafter Copyright Law Revision Part 6). In language closely resembling the statutory text later enacted by Congress, *§602(a)* of the 1965 bill provided:

> "Importation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work for the purpose of distribution to the public is an infringement of the exclusive right to distribute copies or phonorecords under *section 106*, actionable under *section 501*." *Id.*, at 292.[12]

12 There is but one difference between this language from the 1965 bill and the corresponding language in the current version of *§602(a)(1)*: In the current version, the phrase "for the purpose of distribution to the public" is omitted and the phrase "that have been acquired outside the United States" appears in its stead. There are no material differences between the quoted language from the 1965 bill and the corresponding language contained in the 1964 bill. See Copyright Law Revision Part 6: Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, 89th Cong., 1st Sess., 292-293 (H. R. Judiciary Comm. Print 1965).

The Court [***92] implies that the 1965 bill's "explici[t] refer[ence] to *§106*" showed a marked departure from § 44(a) of the Copyright Office's prior draft. *Ante, at ___, 185 L. Ed. 2d, at 415*. The Copyright Office, however, did not see it that way. In its summary of the 1965 bill's provisions, the Copyright Office observed that *§602(a)* of the 1965 bill, like § 44(a) of the Copyright Office's prior draft, see *supra, at ___ - ___, 185 L. Ed. 2d, at 427-428*, permitted copyright owners to bring infringement actions against unauthorized importers in cases "where the copyright owner had authorized the making of [the imported] copies in a foreign country for distribution only in that country." Copyright Law Revision Part 6, at 149-150. See also *id.*, at XXVI (Under *§602(a)* of the 1965 bill, "[a]n unauthorized importer could be enjoined and sued for damages both where the copies or phonorecords he was importing were 'piratical' (that is, where their making would have constituted an infringement if the U.S. copyright law could [**429] have been applied), and where their making was 'lawful.' ").

The current text of *§602(a)(1)* was finally enacted into law in 1976. See Copyright Act of 1976, §602(a), 90 Stat. 2589-2590. The House and Senate Committee Reports on the 1976 Act [***93] demonstrate that Congress understood, as did the Copyright Office, just what that text meant. Both Reports state:

> "*Section 602* [deals] with two separate situations: importation of 'piratical' articles (that is, copies or phonorecords made without any authorization of the copyright owner), and unauthorized importation of copies or phonorecords that were lawfully made. The general approach of *section 602* is to make unauthorized importation an act of infringement in both cases, but

to permit the Bureau of Customs to prohibit importation only of 'piratical' articles." S. Rep. No. 94-473, p. 151 (1975) (emphasis added). See also H. R. Rep. No. 94-1476, p. 169 (1976) (same).

In sum, the legislative history of the Copyright Act of 1976 is hardly "inconclusive." *Ante, at ___, 185 L. Ed. 2d, at 414*. To the contrary, it confirms what the plain text of the Act [*1383] conveys: Congress intended *§602(a)(1)* to provide copyright owners with a remedy against the unauthorized importation of foreign-made copies of their works, even if those copies were made and sold abroad with the copyright owner's authorization.[13]

13 The Court purports to find support for its position in the House and Senate Committee Reports on the 1976 Copyright [***94] Act. *Ante, at ___ - ___, 185 L. Ed. 2d, at 415-416*. It fails to come up with anything in the Act's legislative history, however, showing that Congress understood the words "lawfully made under this title" in *§109(a)* to encompass foreign-made copies.

IV

Unlike the Court's holding, my position is consistent with the stance the United States has taken in international-trade negotiations. This case bears on the highly contentious trade issue of interterritorial exhaustion. The issue arises because intellectual property law is territorial in nature, see *supra, at ___, 185 L. Ed. 2d, at 422*, which means that creators of intellectual property "may hold a set of parallel" intellectual property rights under the laws of different nations. Chiappetta, The Desirability of Agreeing to Disagree: The WTO, TRIPS, International IPR Exhaustion and a Few Other Things, *21 Mich. J. Int'l L. 333, 340-341* (2000) (hereinafter Chiappetta). There is no international consensus on whether the sale in one country of a good incorporating protected intellectual property exhausts the intellectual property owner's right to control the distribution of that good elsewhere. Indeed, the members of the World Trade Organization, "agreeing to disagree,"[14] provided in Article 6 [***95] of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Apr. 15, 1994, *33 I. L. M. 1197, 1200*, that "nothing in this Agreement shall be used to address the issue of . . . exhaustion." See Chiappetta 346 (observing that exhaustion of intellectual property rights was "hotly [**430] debated" during the TRIPS negotiations and that Article 6 "reflects [the negotiators'] ultimate inability to agree" on a single international standard). Similar language appears in other treaties to which the United States is a party. See World Intellectual Property Organization (WIPO) Copyright Treaty, Art. 6(2), Dec. 20, 1996, S. Treaty Doc. No. 105-17, p. 7 ("Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right [to control distribution of copies of a copyrighted work] applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author."); WIPO Performances and Phonograms Treaty, Art. 8(2), Dec. 20, 1996, S. Treaty Doc. No. 105-17, p. 28 (containing language nearly identical to Article 6(2) of the WIPO Copyright Treaty).

14 Chiappetta, [***96] The Desirability of Agreeing to Disagree: The WTO, TRIPS, International IPR Exhaustion and a Few Other Things, *21 Mich. J. Int'l L. 333, 340* (2000) (hereinafter Chiappetta) (internal quotation marks omitted).

In the absence of agreement at the international level, each country has been left to choose for itself the exhaustion framework it will follow. One option is a national-exhaustion regime, under which a copyright owner's right to control distribution of a particular copy is exhausted only within the country in which the copy is sold. See Forsyth & Rothnie, Parallel Imports, in The Interface Between Intellectual Property Rights and Competition Policy 429, 430 (S. Anderman ed. 2007) (hereinafter Forsyth & Rothnie). Another option is a rule of international exhaustion, under which the authorized distribution of a particular copy anywhere in the world exhausts the copyright owner's distribution [*1384] right everywhere with respect to that copy. See *ibid.* The European Union has adopted the intermediate approach of regional exhaustion, under which the sale of a copy anywhere within the European Economic Area exhausts the copyright owner's distribution right throughout that region. See *id.*, at 430, 445. [***97] *Section 602(a)(1)*, in my view, ties the United States to a national-exhaustion framework. The Court's decision, in contrast, places the United States solidly in the international-exhaustion camp.

Strong arguments have been made both in favor of, and in opposition to, international exhaustion. See Chiappetta 360 ("[r]easonable people making valid points can, and do, reach conflicting conclusions" regarding the desirability of international exhaustion). International exhaustion subjects copyright-protected goods to competition from lower priced imports and, to that extent, benefits consumers. Correspondingly, copyright owners profit from a national-exhaustion regime, which also enlarges the monetary incentive to create new copyrightable works. See Forsyth & Rothnie 432-437 (surveying arguments for and against international exhaustion).

Weighing the competing policy concerns, our Government reached the conclusion that widespread adoption of the international-exhaustion framework would be inconsistent with the long-term economic interests of the United States. See Brief for United States as *Amicus Curiae* in *Quality King*, O. T. 1997, No. 96-1470, pp. 22-26 (hereinafter *Quality King* Brief). [***98] [15] Accordingly, the United States has steadfastly "taken the position in international trade [**431] negotiations that domestic copyright owners should . . . have the right to prevent the unauthorized importation of copies of their work sold abroad." *Id.*, at 22. The United States has "advanced this position in multilateral trade negotiations," including the negotiations on the TRIPS Agreement. *Id.*, at 24. See also D. Gervais, The TRIPS Agreement: Drafting History and Analysis § 2.63, p. 199 (3d ed. 2008). It has also taken a dim view of our trading partners' adoption of legislation incorporating elements of international exhaustion. See Clapperton & Corones, Locking in Customers, Locking Out Competitors: Anti-Circumvention Laws in Australia and Their Potential Effect on Competition in High Technology Markets, *30 Melbourne U. L. Rev. 657, 664 (2006)* (United States expressed concern regarding international-exhaustion legislation in Australia); Monten, Comment, The Inconsistency Between Section 301 and TRIPS: Counterproductive With Respect to the Future of International Protection of Intellectual Property Rights? *9 Marq. Intellectual Property L. Rev. 387, 417-418 (2005)* (same with respect to [***99] New Zealand and Taiwan).

15 The Court states that my "reliance on the Solicitor General's position in *Quality King* is undermined by his agreement in that case with [the] reading of *§109(a)*" that the Court today adopts. *Ante, at ___, 185 L. Ed. 2d, at 417*. The United States' principal concern in both *Quality King* and this case, however, has been to protect copyright owners' "right to prevent parallel imports." Brief for United States as *Amicus Curiae* in *Quality King*, O. T. 1997, No. 96-1470, p. 6 (hereinafter *Quality King* Brief). See also Brief for United States as *Amicus Curiae* 14 (arguing that Kirtsaeng's interpretation of *§109(a)*, which the Court adopts, would "subver[t]*Section 602(a)(1)*s ban on unauthorized importation"). In *Quality King*, the Solicitor General urged this Court to hold that *§109(a)*s codification of the first sale doctrine does not limit the right to control importation set forth in *§602(a)*. *Quality King* Brief 7-30. After *Quality King* rejected that contention, the United States reconsidered its position, and it now endorses the interpretation of the *§109(a)* phrase "lawfully made under this title" I would adopt. Brief for United States as *Amicus Curiae* 6-7, 13-14.

[*1385] Even if the text and history [***100] of the Copyright Act were ambiguous on the answer to the question this case presents--which they are not, see Parts II-III, *supra*[16] --I would resist a holding out of accord with the firm position the United States has taken on exhaustion in international negotiations. *Quality King*, I acknowledge, discounted the Government's concerns about potential inconsistency with United States obligations under certain bilateral trade agreements. See *523 U.S., at 153-154, 118 S. Ct. 1125, 140 L. Ed. 2d 254*. See also *Quality King* Brief 22-24 (listing the agreements). That decision, however, dealt only with copyright-protected products made in the United States. See *523 U.S., at 154, 118 S. Ct. 1125, 140 L. Ed. 2d 254* (Ginsburg, J., concurring). *Quality King* left open the question whether owners of U.S. copyrights could retain control over the importation of copies manufactured and sold abroad--a point the Court obscures, see *ante, at ___, 185 L. Ed. 2d, at 417* (arguing that *Quality King* "significantly eroded" the national-exhaustion principle that, in my view, *§602(a)(1)* embraces). The Court today answers that question with a resounding "no," and in doing so, it risks undermining the United States' credibility on the world stage. While the Government has urged our trading [**432] partners to refrain [***101] from adopting international-exhaustion regimes that could benefit consumers within their borders but would impact adversely on intellectual-property producers in the United States, the Court embraces an international-exhaustion rule that could benefit U.S. consumers but would likely disadvantage foreign holders of U.S. copyrights. This dissonance scarcely enhances the United States' "role as a trusted partner in multilateral endeavors." *Vimar Seguros y Reaseguros, S. A. v. M/V Sky Reefer, 515 U.S. 528, 539, 115 S. Ct. 2322, 132 L. Ed. 2d 462 (1995)*.

16 Congress hardly lacks capacity to provide for international exhaustion when that is its intent. Indeed, Congress has expressly provided for international exhaustion in the narrow context of semiconductor chips embodying protected "mask works." See *17 U.S.C. §§905(2), 906(b)*. See also 2 M. Nimmer & D. *Nimmer*, *Copyright §8A.06[E]*, p. 8A-37 (2012) (hereinafter Nimmer) ("[T]he first sale doctrine under *[§906(b)]* expressly immunizes unauthorized importation.").

V

I turn now to the Court's justifications for a decision difficult to reconcile with the Copyright Act's text and history.

A

The Court asserts that its holding "is consistent with antitrust laws that ordinarily forbid [***102] market divisions." *Ante, at ___, 185 L. Ed. 2d, at 416*. See also *ante, at ___, 185 L. Ed. 2d, at 408* (again referring to antitrust principles). *Section 602(a)(1)*, however, read as I do and as the Government does, simply facilitates copyright owners' efforts to impose "vertical restraints" on distributors of copies of their works. See Forsyth & Rothnie 435 ("Parallel importation restrictions enable manufacturers and distributors to erect 'vertical restraints' in the market through exclusive distribution agreements."). See generally *Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)* (discussing vertical restraints). We have held that vertical restraints are not *per se* illegal under § 1 of the Sherman Act, *15 U.S.C. §1*, because such "restraints can have procompetitive effects." *551 U.S., at 881-882, 127 S. Ct. 2705, 168 L. Ed. 2d 623*.[17]

17 Despite the Court's suggestion to the contrary, this case in no way implicates the *per se* antitrust prohibition against *horizontal* " '[a]greements between competitors to allocate territories to minimize competition.' " *Ante, at ___, 185 L. Ed. 2d, at 416* (quoting *Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49, 111 S. Ct. 401, 112 L. Ed. 2d 349 (1990)* (*per curiam*)). Wiley is not requesting authority to enter into collusive agreements with other textbook publishers that [***103] would, for example, make Wiley the exclusive supplier of textbooks on particular subjects within particular geographic regions. Instead, Wiley asserts no more than the prerogative to impose *vertical* restraints on the distribution of its own textbooks. See Hovenkamp, Post-Sale Restraints and Competitive Harm: The First Sale Doctrine in Perspective, 66 N. Y. U. Ann. Survey Am. L. 487, 488 (2011) ("vertical restraints" include "limits [on] the way a seller's own product can be distributed").

[*1386] B

The Court sees many "horribles" following from a holding that the *§109(a)* phrase "lawfully made under this title" does not encompass foreign-made copies. *Ante, at ___, 185 L. Ed. 2d, at 410* (internal quotation marks omitted). If *§109(a)* excluded foreign-made copies, the Court fears, then copyright owners could exercise perpetual control over the downstream distribution or public display of such copies. A ruling in Wiley's favor, the Court asserts, would shutter libraries, put used-book dealers out of business, cripple art museums, and prevent the resale of a wide range of consumer goods, from cars to calculators. *Ante, at ___ - ___, 185 L. Ed. 2d, at 409-411*. See also *ante, at ___ - ___, 185 L. Ed. 2d, at 418-420* (Kagan, J., concurring) (expressing concern about "imposing downstream [***104] liability on those who purchase and resell in the United States copies that happen to have been manufactured [**433] abroad"). Copyright law and precedent, however, erect barriers to the anticipated horribles.[18]

18 As the Court observes, *ante, at ___ - ___, 185 L. Ed. 2d, at 437-438*, the United States stated at oral argument that the types of "horribles" predicted in the Court's opinion would, if they came to pass, be "worse than the frustration of market segmentation" that will result from the Court's interpretation of *§109(a)*. Tr. of Oral Arg. 51. The United States, however, recognized that this purported dilemma is a false one. As the United States explained, the Court's horribles can be avoided while still giving meaningful effect to *§602(a)(1)*s ban on unauthorized importation. *Ibid.*

1

Recognizing that foreign-made copies fall outside the ambit of *§109(a)* would not mean they are forever free of the first sale doctrine. As earlier observed, see *supra, at ___, 185 L. Ed. 2d, at 420*, the Court stated that doctrine initially in its 1908 *Bobbs-Merrill* decision. At that time, no statutory provision expressly codified the first sale doctrine. Instead, copyright law merely provided that copyright owners had "the sole liberty of printing, reprinting, [***105] publishing, completing, copying, executing, finishing, and vending" their works. Copyright Act of 1891, §1, 26 Stat. 1107.

In *Bobbs-Merrill*, the Court addressed the scope of the statutory right to "ven[d]." In granting that right, the Court held, Congress did not intend to permit copyright owners "to fasten . . . a restriction upon the subsequent alienation of the subject-matter of copyright after the owner had parted with the title to one who had acquired full dominion over it and had given a satisfactory price for it." *210 U.S., at 349-350, 28 S. Ct. 722, 52 L. Ed. 2d 1086*. "[O]ne who has sold a copyrighted article . . . without restriction," the Court explained, "has parted with all right to control the sale of it." *Id., at 350, 28 S. Ct. 722, 52 L. Ed. 2d 1086*. Thus, "[t]he purchaser of a book, once sold by authority of the owner of the copyright, may sell it again, although he could not publish a new edition of it." *Ibid.*

Under the logic of *Bobbs-Merrill*, the sale of a foreign-manufactured copy in the United States carried out with the copyright owner's authorization would exhaust the copyright owner's right to "vend" that copy. The copy could thenceforth be resold, lent out, or otherwise redistributed [*1387] without further authorization from the copyright [***106] owner. Although *§106(3)* uses the word "distribute" rather than "vend," there is no reason to think Congress intended the word "distribute" to bear a meaning different from the construction the Court gave to the word "vend" in *Bobbs-Merrill*. See *ibid.* (emphasizing that the question before the Court was "purely [one] of statutory construction").[19] Thus, in accord with *Bobbs-Merrill*, the first authorized distribution of a foreign-made copy in the United States exhausts the copyright owner's distribution right under *§106(3)*. After such an authorized distribution, a library may lend, or a used-book dealer may resell, the foreign-made copy without seeking the copyright owner's permission. Cf. *ante, at* ___ - ___, *185 L. Ed. 2d, at 409-410*.

19 It appears that the Copyright Act of 1976 omitted the word "vend" and introduced the word "distribute" to avoid the "redundan[cy]" present in pre-1976 law. Copyright Law Revision: Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Cong., 1st Sess., 21 (H. R. Judiciary Comm. Print 1961) (noting that the exclusive rights to "publish" and "vend" works under the Copyright Act of 1947, §1(a), 61 Stat. 652-653, were "redundant").

For example, if [***107] Wiley, rather than Kirtsaeng, had imported into the United States and then sold the [**434] foreign-made textbooks at issue in this case, Wiley's *§106(3)* distribution right would have been exhausted under the rationale of *Bobbs-Merrill*. Purchasers of the textbooks would thus be free to dispose of the books as they wished without first gaining a license from Wiley.

This line of reasoning, it must be acknowledged, significantly curtails the independent effect of *§109(a)*. If, as I maintain, the term "distribute" in *§106(3)* incorporates the first sale doctrine by virtue of *Bobbs-Merrill*, then *§109(a)*s codification of that doctrine adds little to the regulatory regime.[20] *Section 109(a)*, however, does serve as a statutory bulwark against courts deviating from *Bobbs-Merrill* in a way that increases copyright owners' control over downstream distribution, and legislative history indicates that is precisely the role Congress intended *§109(a)* to play. Congress first codified the first sale doctrine in §41 of the Copyright Act of 1909, 35 Stat. 1084.[21] It [*1388] did so, the House Committee Report on the 1909 Act explains, "in order to make . . . clear that [Congress had] no intention [of] enlarg[ing] in any [***108] way the construction to be given to the word 'vend.' " H. R. Rep. No. 2222, 60th Cong., 2d Sess., 19 (1909). According to the Committee Report, §41 was "not intended to change [existing law] in any way." *Ibid.* The position I have stated and explained accords with this expression of congressional intent. In enacting §41 and its successors, I would hold, Congress did not "change . . . existing law," *ibid.*, by stripping the word "vend" (and thus its substitute "distribute") of the limiting construction imposed in *Bobbs-Merrill*.

20 My position that *Bobbs-Merrill* lives on as a limiting construction of the *§106(3)* distribution right does not leave *§109(a)* with no work to do. There can be little doubt that the books at issue in *Bobbs-Merrill* were published and first sold in the United States. See *Bobbs-Merrill Co. v. Straus, 139 F. 155, 157 (CC SDNY 1905)* (the publisher claiming copyright infringement in *Bobbs-Merrill* was incorporated and had its principal office in Indiana). See also Copyright Act of 1891, §3, 26 Stat. 1107-1108 (generally prohibiting importation, even by the copyright owner, of foreign-manufactured copies of copyrighted books); 4 Patry § 13:40, at 13-111 (under the Copyright [***109] Act of 1891, "copies of books by both foreign *and* U.S. authors had to be printed in the United States"). But cf. *ante, at* ___, *185 L. Ed. 2d, at 409* (asserting, without acknowledging the 1891 Copyright Act's general prohibition against the importation of foreign-made copies of copyrighted books, that the Court is unable to find any "geographical distinctions . . . in *Bobbs-Merrill*"). Thus, exhaustion occurs under *Bobbs-Merrill* only when a copy is distributed within the United States with the copyright owner's permission, not when it is distributed abroad. But under *§109(a)*, as interpreted in *Quality King*, any authorized distribution of a U.S.-made copy, even a distribution occurring in a foreign country, exhausts the copyright owner's distribution right under *§106(3)*. See *523 U.S., at 145, n. 14, 118 S. Ct. 1125, 140 L. Ed. 2d 254*. *Section 109(a)* therefore provides for exhaustion in a circumstance not reached by *Bobbs-Merrill*.

21 Section 41 of the 1909 Act provided: "[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." 35 Stat. 1084. This language was repeated without material change in §27 of the Copyright Act of 1947, 61 Stat. 660. [***110] As noted above, see *supra*, at ___, 185 L. Ed. 2d, at 420, *17 U.S.C. §109(a)* sets out the current codification of the first sale doctrine.

In any event, the reading of the Copyright Act to which I subscribe honors Congress' aim in enacting *§109(a)* while the Court's reading of the Act severely diminishes *§602(a)(1)*'s role. See *supra, at* ___ - ___, *185 L. Ed. 2d, at 424-426*. My position in no way tugs against the principle underlying *§109(a)-i.e.*, that certain conduct by the copyright owner exhausts the owner's *§106(3)* distribution right. The Court, [**435] in contrast, fails to give meaningful effect to Congress' manifest intent in *§602(a)(1)* to grant copyright owners the right to control the importation of foreign-made copies of their works.

2

Other statutory prescriptions provide further protection against the absurd consequences imagined by the Court. For example, *§602(a)(3)(C)* permits "an organization operated for scholarly, educational, or religious purposes" to import, without the copyright owner's authorization, up to five foreign-made copies of a non-audiovisual work--notably, a book--for "library lending or archival purposes." But cf. *ante, at ___ - ___, 185 L. Ed. 2d, at 409-410* (suggesting that affirming the Second Circuit's decision might prevent libraries from lending [***111] foreign-made books).[22]

22 A group of *amici* representing libraries expresses the concern that lower courts might interpret *§602(a)(3)(C)* as authorizing only the importing, but not the lending, of foreign-made copies of non-audiovisual works. See Brief for American Library Association et al. 20. The United States maintains, and I agree, however, that *§602(a)(3)(C)* "is fairly (and best) read as implicitly authorizing lending, in addition to importation, of all works other than audiovisual works." Brief for United States as *Amicus Curiae* 30, n. 6.

The Court also notes that *amici* representing art museums fear that a ruling in Wiley's favor would prevent museums from displaying works of art created abroad. *Ante, at ___, 185 L. Ed. 2d, at 410* (citing Brief for Association of Art Museum Directors et al.). These *amici* observe that a museum's right to display works of art often depends on *17 U.S.C. §109(c)*. See Brief for Association of Art Museum Directors et al. 11-13.[23] That provision addresses exhaustion of a copyright owner's exclusive right under *§106(5)* to publicly display the owner's work. Because *§109(c)*, like *§109(a)*, applies only to copies "lawfully made under this title," *amici* contend that a ruling in [***112] Wiley's favor would prevent museums from invoking *§109(c)* with respect to foreign-made works of art. *Id.*, at 11-13.[24]

23 Title *17 U.S.C. §109(c)* provides: "Notwithstanding the provisions of *section 106(5)*, the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located."

24 The word "copy," as it appears in *§109(c)*, applies to the original of a work of art because the Copyright Act defines the term "copies" to "includ[e] the material object . . . in which the work is first fixed." *§101*.

[*1389] Limiting *§109(c)* to U.S.-made works, however, does not bar art museums from lawfully displaying works made in other countries. Museums can, of course, seek the copyright owner's permission to display a work. Furthermore, the sale of a work of art to a U.S. museum may carry with it an implied license to publicly display the work. See 2 Patry § 5:131, at 5-280 ("[C]ourts have noted the potential availability of an implied nonexclusive licens[e] when [***113] the circumstances . . . demonstrate that the parties intended that the work would be used for a specific purpose."). Displaying a work of art as part of a museum exhibition might also qualify as a "fair use" under *17 U.S.C. §107*. Cf. *Bouchat v. Baltimore Ravens Ltd. Partnership, 619 F.3d 301, 313-316 (CA4 2010)* (display of copyrighted logo in museum-like exhibition constituted "fair use").

[**436] The Court worries about the resale of foreign-made consumer goods "contain[ing] copyrightable software programs or packaging." *Ante, at ___, 185 L. Ed. 2d, at 410*. For example, the Court observes that a car might be programmed with diverse forms of software, the copyrights to which might be owned by individuals or entities other than the manufacturer of the car. *Ibid.* Must a car owner, the Court asks, obtain permission from all of these various copyright owners before reselling her car? *Ibid.* Although this question strays far from the one presented in this case and briefed by the parties, principles of fair use and implied license (to the extent that express licenses do not exist) would likely permit the car to be resold without the copyright owners' authorization.[25]

25 Principles of fair use and implied license may also [***114] allow a U.S. tourist "who buys a copyrighted work of art, a poster, or . . . a bumper sticker" abroad to publicly "display it in America without the copyright owner's further authorization." *Ante, at ___, 185 L. Ed. 2d, at 407*. (The tourist could lawfully bring the work of art, poster, or bumper sticker into the United States under *17 U.S.C. §602(a)(3)(B)*, which provides that *§602(a)(1)*s importation ban does not apply to "importation . . . by any person arriving from outside the United States . . . with respect to copies . . . forming part of such person's personal baggage."). Furthermore, an individual clearly

would not incur liability for infringement merely by displaying a foreign-made poster or other artwork in her home. See *§106(5)* (granting the owners of copyrights in "literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works" the exclusive right "to display the copyrighted work *publicly*" (emphasis added)). See also *§101* (a work is displayed "publicly" if it is displayed "at a place open to the public or at any place where a substantial number of persons *outside of a normal circle of a family and its social acquaintances* is gathered" (emphasis [***115] added)). Cf. 2 *Nimmer §8.14[C][1]*, at 8-192.2(1) ("[A] performance limited to members of the family and invited guests is not a public performance." (footnote omitted)).

Most telling in this regard, no court, it appears, has been called upon to answer any of the Court's "horribles" in an actual case. Three decades have passed since a federal court first published an opinion reading *§109(a)* as applicable exclusively to copies made in the United States. See *Columbia Broadcasting System, Inc. v. Scorpio Music Distributors, Inc., 569 F. Supp. 47, 49 (ED Pa. 1983)*, summarily aff'd, *738 F.2d 424 (CA3 1984)* (table). Yet Kirtsaeng and his supporting *amici* cite not a single case in which the owner of a consumer good authorized for sale in the United States has been sued for copyright infringement after reselling the item or giving it away as a gift or to charity. The [*1390] absence of such lawsuits is unsurprising. Routinely suing one's customers is hardly a best business practice.[26] Manufacturers, moreover, may be hesitant to do business with software programmers taken to suing consumers. Manufacturers may also insist that software programmers agree to contract terms barring such lawsuits.

26 Exerting [***116] extensive control over secondary markets may not always be in a manufacturer's best interest. Carmakers, for example, often trumpet the resale value of their vehicles. See, *e.g.*, Nolan, UD grad leads Cadillac marketing, Dayton Daily News, Apr. 2, 2009, p. A8 ("Cadillac plays up its warranty coverage and reliable resale value to prospective customers."). If the transaction costs of reselling vehicles were to rise, consumers' perception of a new car's value, and thus the price they are willing to pay for such a car, might fall--an outcome hardly favorable to automobile manufacturers.

The Court provides a different explanation for the absence of the untoward consequences predicted in its opinion--namely, that lower court decisions regarding the scope of *§109(a)*s first sale prescription have not been uniform. *Ante, at ___, 185* [**437] *L. Ed. 2d, at 411*. Uncertainty generated by these conflicting decisions, the Court notes, may have deterred some copyright owners from pressing infringement claims. *Ante, at ___ - ___, 185 L. Ed. 2d, at 411-412*. But if, as the Court suggests, there are a multitude of copyright owners champing at the bit to bring lawsuits against libraries, art museums, and consumers in an effort to exercise perpetual control over the downstream [***117] distribution and public display of foreign-made copies, might one not expect that at least a handful of such lawsuits would have been filed over the past 30 years? The absence of such suits indicates that the "practical problems" hypothesized by the Court are greatly exaggerated. *Ante, at ___, 185 L. Ed. 2d, at 412*.[27] They surely do not warrant disregarding Congress' intent, expressed in *§602(a)(1)*, to grant copyright owners the authority to bar the importation of foreign-made copies of their works. Cf. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A., 530 U.S. 1, 6, 120 S. Ct. 1942, 147 L. Ed. 2d 1 (2000)* ("[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." (internal quotation marks omitted)).

27 It should not be overlooked that the ability to prevent importation of foreign-made copies encourages copyright owners such as Wiley to offer copies of their works at reduced prices to consumers in less developed countries who might otherwise be unable to afford them. The Court's holding, however, prevents copyright owners from barring the importation of such low-priced copies into the United States, where [***118] they will compete with the higher priced editions copyright owners make available for sale in this country. To protect their profit margins in the U.S. market, copyright owners may raise prices in less developed countries or may withdraw from such markets altogether. See Brief for United States as *Amicus Curiae* 26; Brief for Text and Academic Authors Association as *Amicus Curiae* 12; Brief for Association of American Publishers as *Amicus Curiae* 37. See also Chiappetta 357-358 (a rule of national exhaustion "encourages entry and participation in developing markets at lower, locally more affordable prices by eliminating them as risky sources of cheaper parallel imports back into premium markets"). Such an outcome would disserve consumers--and especially students--in developing nations and would hardly advance the "American foreign policy goals" of supporting education and economic development in such countries. *Quality King* Brief 25-26.

VI

To recapitulate, the objective of statutory interpretation is "to give effect to the intent of Congress." *American Trucking Assns., 310 U.S., at 542, 60 S. Ct. 1059, 84 L. Ed. 2d 1345*. Here, two congressional aims are evident. First, in enacting *§602(a)(1)*, Congress intended to grant copyright [***119] owners permission [*1391] to segment international markets by barring the importation of foreign-made copies into the United States. Second, as codification of the first sale doctrine underscores, Congress did not want the exclusive distribution right conferred in *§106(3)* to be boundless. Instead of harmonizing these objectives, the Court subordinates the first entirely to the second. It is unsurprising that none of the three major treatises on U.S. copyright law embrace the Court's construction of *§109(a)*. See 2 *Nimmer §8.12[B][6][c]*, at 8-184.34 to 8-184.35; 2 Goldstein § 7.6.1.2(a), at 7:141; 4 Patry §§ 13:22, 13:44, 13:44.10.

Rather than adopting the very international-exhaustion rule the United States has consistently resisted in international-trade negotiations, I would adhere to the national-exhaustion framework set by the Copyright Act's text and history. [**438] Under that regime, codified in *§602(a)(1)*, Kirtsaeng's unauthorized importation of the foreign-made textbooks involved in this case infringed Wiley's copyrights. I would therefore affirm the Second Circuit's judgment.

REFERENCES

17 U.S.C.S. § 109(a)

2 *Nimmer on Copyright § 8.12* (Matthew Bender)

L Ed Digest, Copyright and Literary Property § 21

L Ed Index, Copyright and Literary Property

Supreme Court's construction and application of limited-times provision in *Federal Constitution's Art. I, § 8, cl. 8*, authorizing Congress to provide "for limited Times" copyright and patent protection. *154 L. Ed. 2d 1185*.

Supreme Court's views as to when books or other written or printed materials are copyrightable under federal law. *113 L. Ed. 2d 771*.

Supreme Court's views as to what constitutes copyright infringement. *78 L. Ed. 2d 957*.

NAPABA

National Asian Pacific American Bar Association

Did My Copyright Get Lost In The Cloud?

November 7, 2014

KEKER & VAN NEST LLP

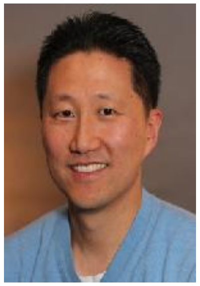
BAKER BOTTS

Stradling
Attorneys at Law

Panel Introduction

- **Salil Bali** (*Moderator*):
  - Senior Associate - SYCR

- **Michael S. Kwun**:
  - Of Counsel – Keker & Van Nest



- **Joe Lee**:
  - Assistant GC – Microsoft Corp.

- **Samir A. Bhavsar** :
  - Partner – Baker Botts

How Are We Taking Old World Copyright Doctrines And Applying Them In Today's Digital World?

Copyright Basics

- **17 U.S.C § 102** – A copyright protects a literary, musical, dramatic, choreographic, pictoral or graphic, audiovisual, or architectural work, or a sound recording, from being reproduced without the permission of the copyright owner.

- **17 U.S.C § 201** – The copyright in a work vests originally in the author(s) of the work. The author(s) may transfer the copyright to any other party if she(they) choose(s) to do so.

- **17 U.S.C. § 106** - Subject to certain limitations, the owner of a copyright has the sole right to authorize reproduction of the work, creation of a work derived from the work, distribution of copies of the work, or public performance or display of the work.

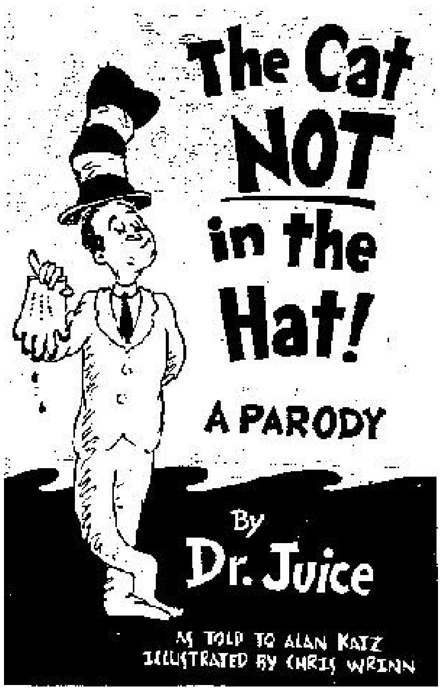
Subjects of Particular Interest in Digital

- Fair Use Doctrine
- First Sale Doctrine
- Transmit Clause

Fair Use Doctrine

- **17 USC § 107** - The fair use of a copyrighted work, … for purposes such as criticism, comment, news, reporting, teaching, scholarship, research, or parody is not an infringement of copyright.

Fair Use Doctrine



Fair Use in the Digital World

***Authors Guild, Inc. v. Google Inc.*,**
721 F.3d 132 (2d Cir. 2013)

The Authors Guild

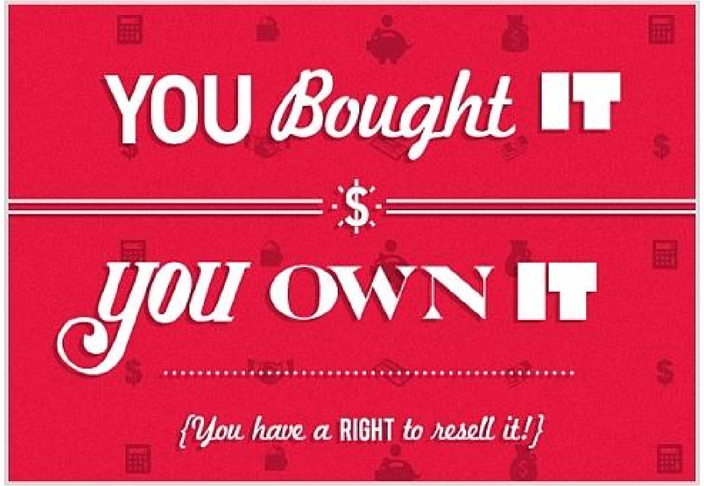
Vs.

Google

Fair Use in the Digital World

Questions Or Issues Raised By Authors' Guild.

First Sale Doctrine



- **17 USC § 109** – Once the work is lawfully sold or even transferred gratuitously, the copyright owner's interest in the material object in which the copyrighted work is embodied is exhausted. The owner of the material object can then dispose of it as he sees fit.

NAPABA

First Sale Doctrine

First Sale in the Digital World

***Capitol Records, LLC v. ReDigi Inc*.,**
934 F. Supp. 2d 640 (S.D.N.Y. 2013)

Capitol
REG. U.S. PAT. OFF.
RECORDS

Vs.

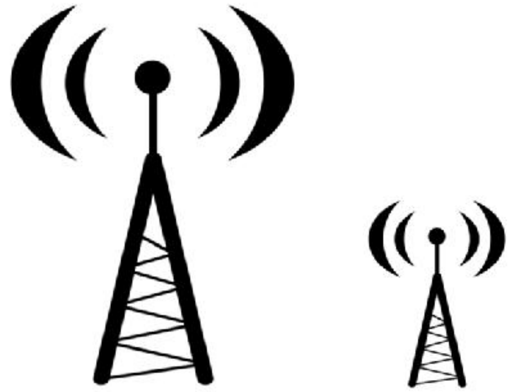
ReDigi

NAPABA

First Sale in the Digital World

Questions Or Issues Raised By ReDigi.

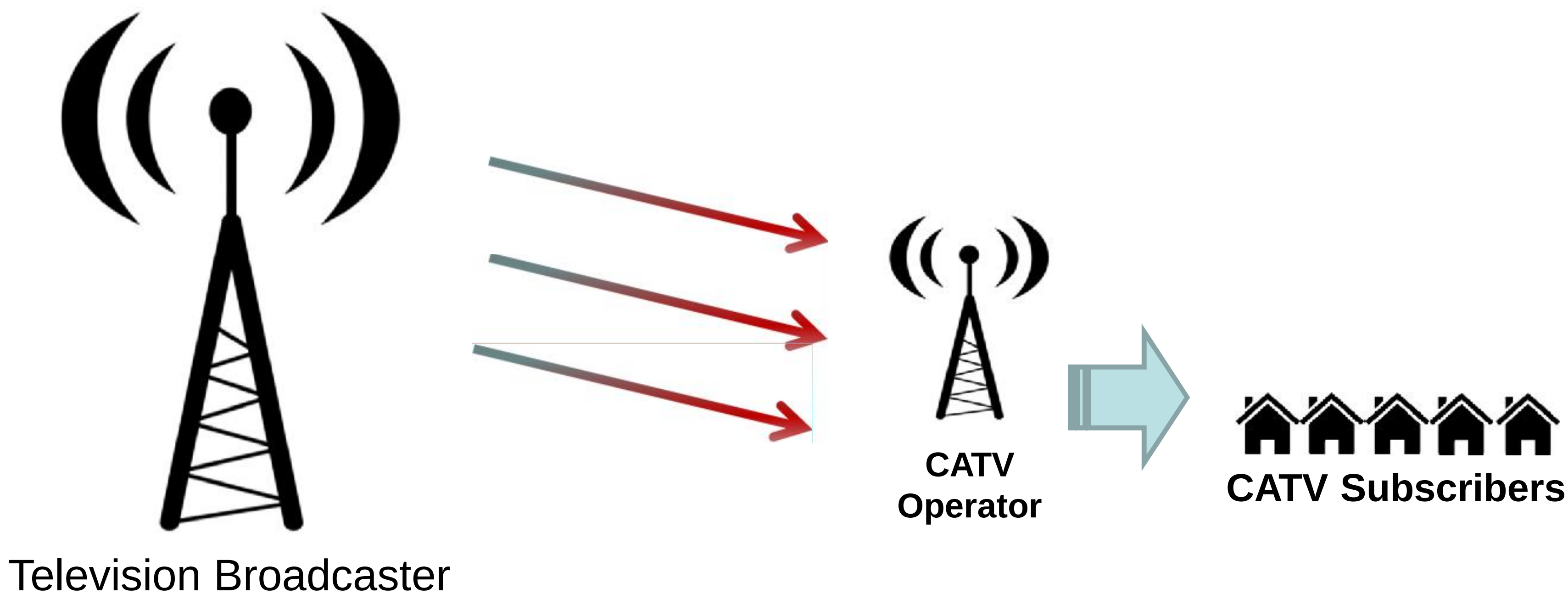
Transmit Clause



- **17 USC § 101** – to transmit or otherwise communicate a performance or display of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

Evolution of the Transmit Clause

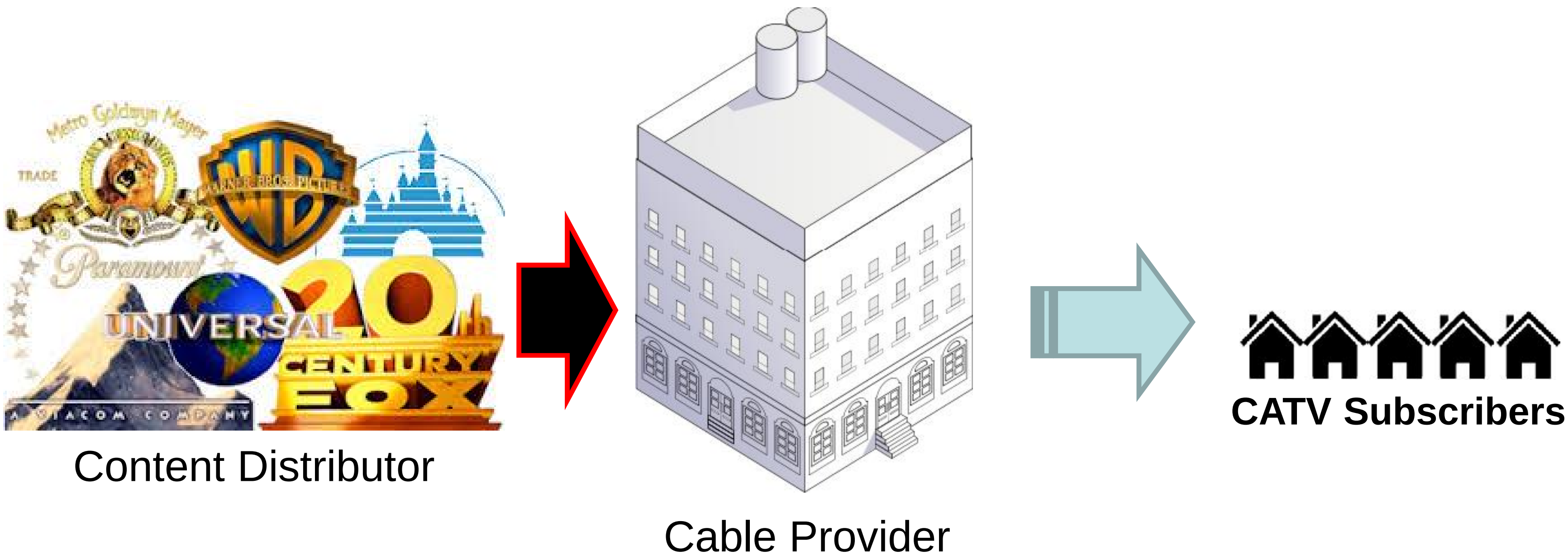
Fortnightly Corp. v. United Artists Television, Inc., **392 U.S. 390 (1968).**



Teleprompter Corp. v. CBS, Inc., **415 U.S. 394 (1974).**

Evolution of the Transmit Clause

Modern Cable Systems



Evolution of the Transmit Clause

Sony Corp. of Am. v. Universal City Studios, **464 U.S. 417 (1984)**
(the "Betamax" case).

Content

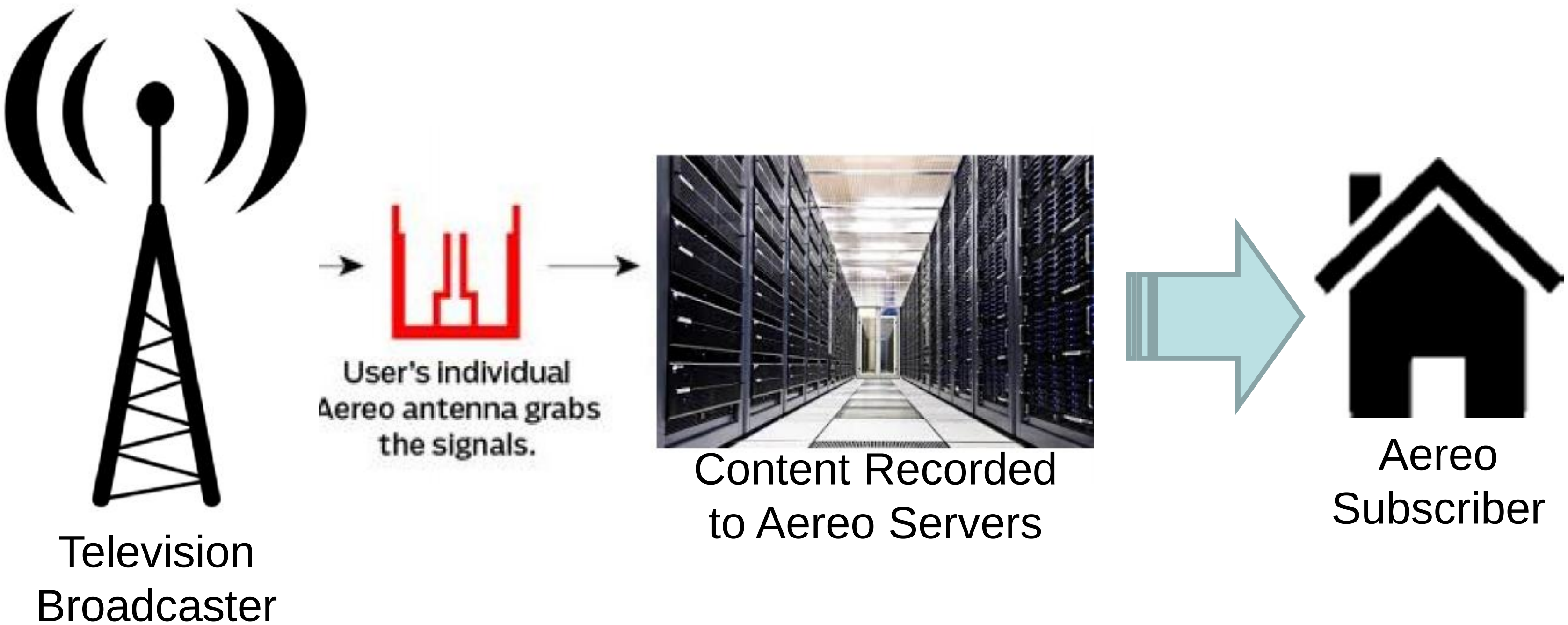
Viewer

Transmit Clause in the Digital World

***American Broad. Cos. v. Aereo, Inc.*,**
134 S. Ct. 2498 (2014)

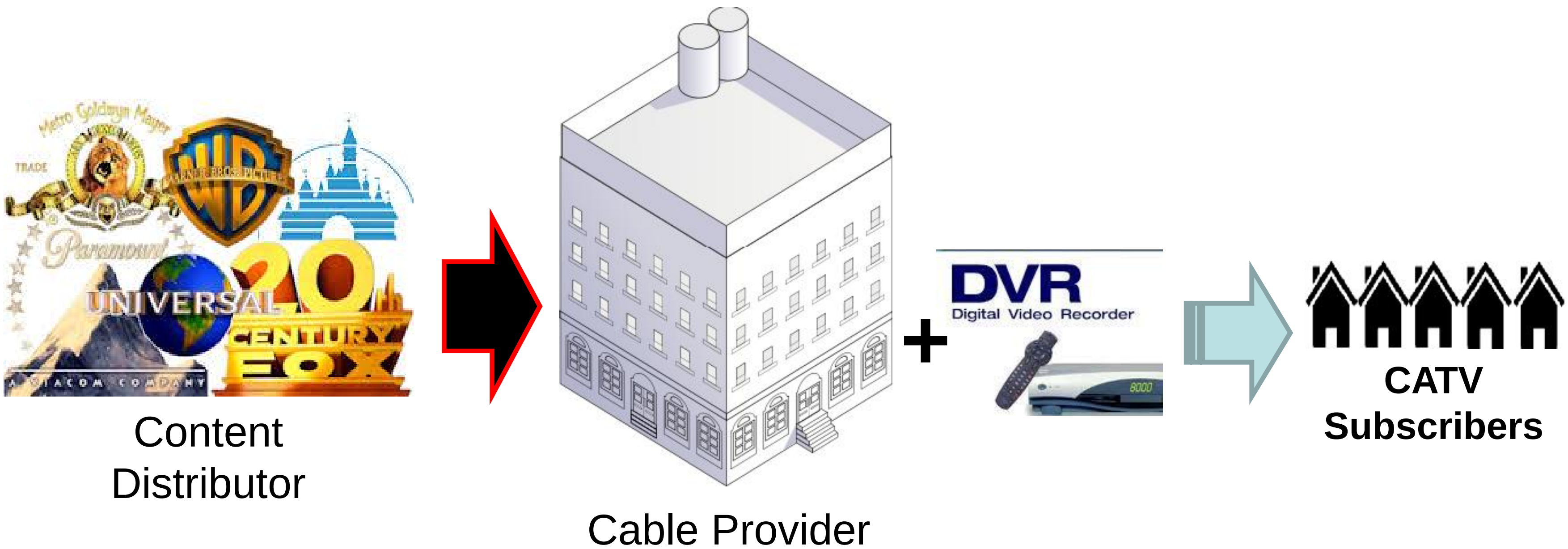
Vs.

How Aereo Functions



Contrast With:

Cartoon Network LP, LLLP v. CSC Holdings, Inc., **536 F.3d 121 (2d Cir. 2008)**
(the “Cablevision” case)



Transmit Clause in the Digital World

Questions Or Issues Raised By Aereo.

Key Issues Content Owners Need to Be Aware of