

No. 11-697

IN THE
Supreme Court of the United States

——
SUPAP KIRTSAENG, DBA BLUECHRISTINE99,
Petitioner,

v.

JOHN WILEY & SONS, INC.,
Respondent.

—
*On a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit*

**BRIEF OF ASSOCIATION OF SERVICE
AND COMPUTER DEALERS
INTERNATIONAL, INC. AS
AMICUS CURIAE IN SUPPORT
OF PETITIONER**

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QUESTION PRESENTED

Does the Copyright Act's first sale doctrine apply to copyrighted works that were manufactured abroad?

INTEREST OF *AMICUS CURIAE*

In the case at bar the Court will be hearing from titans of commerce and copyright. This brief offers a different perspective: that of a not-for-profit trade association, founded in 1981, whose 380 members are primarily small businesses based in the U.S.A.¹ *Amicus curiae* Association of Service and Computer Dealers International, Inc. is the successor by merger, effective January 2, 2012, of the Association of Service and Computer Dealers International, Inc., and the North-American Association of Telecommunications Dealers, Inc, both Internal Revenue Code § 501(c)(6) trade associations (hereinafter "ASCDI/NATD"). The members of ASCDI/NATD provide technology hardware, software, maintenance services, leasing services and technical support to customers worldwide.² Among other things ASCDI/NATD's members routinely

¹ This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 37.3(a). Pursuant to Rule 37.6 the *amicus curiae* submitting this brief and its counsel represent that no party to this case or its counsel authored this brief in whole or in part and no person other than *amicus curiae* and its counsel paid for or made a monetary contribution toward the preparation and submission of this brief.

² See www.ascdi.com.

buy and sell technology products that contain copyrightable elements and were manufactured outside of the U.S.A.—indeed most technology products fit this description. Continued tradability of such products will be affected by the outcome of this case.³ Accordingly this brief offers the Court a philosophical and practical assessment of the case from a small-business perspective.

SUMMARY OF ARGUMENT

Look around—is there a computer, cell phone, television, DVD player, game console or microwave oven in view? Almost every such device contains copyrightable software.⁴ Now examine the device and try to determine its provenance. Was it made in the U.S.A. or abroad? If made in the U.S.A. does it contain copyrightable components that were

³ Commentators in the trade press have framed the issue as make-or-break for the secondary market. *See, e.g.*, Jay McDaniel, *Absence of First Sale Defense Is a Trap for Importers of Foreign-Manufactured Goods*, IP TRADER (2010), <http://theiptrader.com/absence-of-first-sale-defense-is-a-trap-for-importers-of-foreign-manufactured-goods/>.

⁴ John Catsoulis, *Designing Embedded Hardware* 1-2 (2d ed. 2005) (embedded microprocessors driven by software are found inside “TV’s, VCR’s, DVD players, remote controls, washing machines, cell phones, air conditioners, game consoles, ovens, toys and a host of other devices”). *See also Alcatel USA v. DGI Technologies, Inc.*, 166 F.3d 772, 778 (5th Cir. 1999) (explaining that microprocessors contain “software embedded in the memory chip on the card.”) All of the devices referenced as examples in this brief contain copyrightable software.

manufactured abroad? Here is the ultimate question: On pain of being held liable for statutory damages of up to \$150,000, under the rule espoused by the court below, can the owner of the device lawfully sell it on eBay?⁵ Most likely the response will be a shrugging “Who knows?”—underscoring the confusion that will result if the decision below is upheld.

This case is an opportunity to end the confusion by reaffirming a doctrine established by the Court more than a century ago in the landmark case of *Bobbs-Merrill Co. v. Straus*,⁶ subsequently codified by Congress,⁷ and embraced by merchants and consumers ever since:

[O]ne who has sold a copyrighted article, without restriction, has parted with all right to control the sale of it. The purchaser. . . may sell it again. . . .⁸

The first sale doctrine as so understood by Supap Kirtsaeng,⁹ *Costco Wholesale Corp.*¹⁰ and countless

⁵ eBay and Craigslist are two of the best-known venues in which computers and other goods are traded, but there are numerous specialty sites—an example being BrokerBin.com, a forum for worldwide trade in technology products.

⁶ 210 U.S. 339 (1908).

⁷ 17 U.S.C. § 109(a).

⁸ *Bobbs-Merrill*, 210 U.S. at 350.

⁹ *John Wiley & Sons, Inc. v. Kirtsaeng*, 654 F.3d 210, 213 (2d Cir. 2011).

¹⁰ *Omega S.A. v. Costco Wholesale Corp.*, 541 F.3d 982, 984 (9th Cir. 2008).

others is a bright-line rule that has facilitated billions of dollars in commerce.¹¹

Although the first sale doctrine originates from a 1908 opinion of this Court it manifests a concept articulated by Adam Smith 132 years earlier that engaging in trade is a “natural liberty.”¹² The first sale doctrine also reflects the common law disdain for restraints on alienation.¹³ Today the principle that if you buy something you own it and are free to “sell it again” is so deeply engrained in the American consciousness as to be intuitive. In venues ranging from pawn shops to internet trading networks the freedom of an owner to sell his or her goods is regarded as a natural right—whether the item in question is an automatic coffeemaker made in China, a book published in Thailand, a digital camera manufactured in Germany or a watch made in Switzerland.¹⁴

¹¹ See Steven Seidenberg, *Market Mayhem: Sale of Gray Market Goods Heads to the Supreme Court*, INSIDE COUNSEL (2010), <http://www.insidecounsel.com/2010/02/01/market-mayhem> (independent trade in technology products was estimated to be \$58 billion in 2007 in the United States alone).

¹² Adam Smith, *The Wealth of Nations* 265, 376, 426 (1776), <http://i-ahrens.de/schule/bvw/Wealth-Nations.pdf>. See also *id.* at 560 (positing that systems which “impose restraints upon manufactures and foreign trade, act contrary to the very end which they propose”).

¹³ See *Bobbs Merrill Co.*, 210 U.S. at 350; Richard E. Manning, *The Development of Restraints on Alienation Since Gray*, 48 HARV. L. REV. 373 (Jan. 1935).

¹⁴ Automatic coffeemakers and microwave ovens have digital displays that are driven by copyrightable software.

Two lower courts, however, have lost sight of the principle that if you own something you are free to “sell it again” and have turned a blind eye to the practical consequences. The view of the Second Circuit: Congress intended that Americans, prior to putting out the garage sale sign, must consider whether the items on the folding table contain any copyright-protected elements, and if so, were manufactured within or without the U.S.A.¹⁵ The view of the Ninth Circuit: A flea market vendor, prior to selling her collection of made-in-Japan talking toys, must determine the geographic location of the first sale.¹⁶

From the ground-level view of ASCDI/NATD these courts have been parsing the phrase “lawful-

See Catsoulis, *supra* n. 4. The example of a “book published in Thailand” is a reference to the textbooks at issue in the case at bar; the example of a “watch made in Switzerland” is a reference to the Omega Seamaster watches at issue in *Omega v. Costco*, 541 F.3d at 982.

¹⁵ Once the garage sale vendor determined that goods proposed to be sold contained copyrighted elements—itsself no easy task—then alienability of those goods without permission from the copyright holder would depend on where they were manufactured, as the first sale doctrine would only apply to “copies manufactured domestically.” *Kirtsaeng*, 654 F.3d at 221.

¹⁶ Talking toys contain copyrightable software, *see* Catsoulis, *supra* n. 4, and in this example the products were manufactured abroad. Under *Kirtsaeng* the toys could not be resold without permission from the copyright holder, *see* 654 F.3d at 221, but under the Ninth Circuit rule the toys could be resold if the first sale had occurred in the U.S.A. *Omega v. Costco*, 541 F.3d at 986.

ly made under this title” without regard to the sweeping implications. Meanwhile workaday merchants and consumers, in keeping with the bright-line first sale doctrine of *Bobbs-Merrill*, have been going about their business believing that if they own something they have the right to “sell it again” regardless of where it was manufactured or first sold—benefitting not only themselves but also the customers who depend on the products they supply. As for the answer to the question presented, as explained in the well-reasoned dissent of the Honorable J. Garvan Murtha, because “lawfully made under this title” refers simply to *lawfulness of manufacture* rather than *place of manufacture*, the first sale doctrine applies to copyrighted goods that were manufactured abroad.¹⁷

ARGUMENT

THE BRIGHT-LINE FIRST SALE DOCTRINE OF *BOBBS-MERRILL V.* *STRAUS* FACILITATES VITALLY- IMPORTANT COMMERCE

Copyrightable elements are ubiquitous in the goods that are bought and sold in today’s marketplace. Functional items ranging from dishwashers to automobiles contain embedded software; products or their packaging are often adorned with art-

¹⁷ *Kirtseng*, 654 F.3d at 226 (Murtha, J., dissenting).

work; and many items include copyrighted instruction manuals.¹⁸

Today's marketplace is also global in scope. Commerce that formerly required face-to-face contact or cumbersome long-distance communication now occurs seamlessly via uploads and mouse clicks. The logistics of transporting goods and dealing with customs & duties have been streamlined by shipping companies and freight forwarders.¹⁹ The result is that products may have components manufactured in several countries; assembly may take place in yet another; the "first sale" might be to a distributor at one of many global hubs; and the products could end up being bought and sold all over the world.²⁰

At stake in this case is the continued ability of merchants and consumers in the U.S.A. to trade goods freely in the global marketplace—and once the goods are in the U.S.A., to continue trading them in wholesale marts, retail stores, online venues, flea markets, garage sales and the like.²¹ Also

¹⁸ Copyrightable elements permeate functional goods in part because this Court has held that a work is eligible for copyright protection if it possesses "even a slight amount" of creativity. *Feist Publications, Inc, v. Rural Telephone Service, Inc*, 499 U.S. 340, 345 (1991).

¹⁹ Kent Gourdin, *Global Logistics Management: A Competitive Advantage for the 21st Century* 10-15 (2d ed. 2006) (describing trends in e-commerce and global logistics).

²⁰ See generally *id.*

²¹ See *Kirtsaeng*, 654 F.3d at 227 (Murtha, J, dissenting).

at stake is the continued flow of supply for customers who rely on the goods. Indeed, one of the ironies of this case is that while debate has been raging over the scope of the first sale doctrine, many of the players involved in the dispute have personally and directly benefitted from technology products that were manufactured abroad, contain copyrightable elements and were shipped to them by ASCDI/NATD's membership in reliance on the bright-line first sale doctrine of *Bobbs-Merrill*, including:

- John Wiley & Sons, Inc.—respondent in the case at bar;
- Gibson, Dunn & Crutcher LLP—counsel for respondent;
- Proskauer Rose LLP—counsel for American Publishers;
- The United States Supreme Court; and
- The United States Department of Justice.²²

Given the importance of this stream of commerce and the historical role of the U.S.A. as a pillar of

²² Each of the entities listed above has, during the past three years, received from ASCDI/NATD's membership at least one shipment of a foreign-manufactured technology product that contains copyrightable elements and was bought and sold in the secondary market without permission from the copyright holder: Wiley & Sons—a Lenovo laptop battery with copyrighted instruction manual; the Supreme Court—APC power units with copyrighted software; Gibson, Proskauer and the Justice Department—numerous computer products with copyrighted software and instruction manuals.

free enterprise, ASCDI/NATD finds it remarkable that the present dispute is occurring.²³ When the Framers met to craft the Constitution, one of their primary purposes was to facilitate trade without regard to state boundaries—hence the Commerce Clause.²⁴ More to the point in the case at bar, Congress and this Court have been vigilant in maintaining a balance between intellectual property rights on the one hand, and ownership rights on the other hand—including the right to own an item free-and-clear of restraints on alienation.²⁵ A key to maintaining this balance is the copyright law’s first sale doctrine, under which holders of copyrights in a particular work exhaust those rights once the work is alienated by authority of the copyright holder.²⁶ Subsequent to that first sale the owner of the work is free to turn around and “sell it again.”²⁷

This bright-line construction of the first sale doctrine reflects the view of Adam Smith in his 1776 treatise *WEALTH OF NATIONS* that the right to engage in trade is a “natural liberty”—a view that

²³ John Tyler, *Smugglers & Patriots: Boston Merchants and the Advent of the American Revolution* 238 (1986) (positing that the desire for free trade was a motivating factor for the American Revolution).

²⁴ U.S. Const., Art. I, § 8, cl. 3.

²⁵ See, e.g., *Quality King Distributors, Inc. v. Lanza Research Int’l, Inc.*, 523 U.S. 135 (1998).

²⁶ 17 U.S.C. § 109(a).

²⁷ *Bobbs-Merrill*, 210 U.S. at 350.

has imbued the values of America's merchants and consumers.²⁸ As a result, if a retailer finds an opportunity to acquire watches that Omega sold at a discount overseas, the retailer believes that it may buy those watches and resell them at a bargain price to American customers.²⁹ If an enterprising student spots an opportunity to buy medical textbooks in Thailand and resell them to budget-conscious students in the U.S.A., the student believes that in the land of liberty he is free to pursue the venture.³⁰ In the view of ASCDI/NATD, rather than being actionable events these are examples of transactions that the first sale doctrine was intended to protect.

The bright-line view of the first sale doctrine that if you own something you are free to "sell it again" also reflects the common law aversion to restraints on alienation. The classical doctrine against restraints on alienation helped free real property from onerous restrictions that could tie up title for generations; similar rationales have been applied to personal property.³¹ In *Bobbs-Merrill*, the concept that ownership includes the right of alienation was central to how the Court framed the question presented:

Was [the Copyright Act] intended to create. . . a restriction upon the subsequent

²⁸ *Supra* n. 12 at 560.

²⁹ *Omega*, 541 F.3d at 984.

³⁰ *Kirtsaeng*, 654 F.3d at 213.

³¹ See Manning, *supra* n. 13 at 373.

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?³²

In the case at bar the Second and Ninth Circuits would answer that question affirmatively, thereby burdening a huge class of goods with a restraint on alienation: Subject goods could not be imported to or resold in the U.S.A. without authorization from the copyright holder—even though the copyright holder previously authorized a sale to someone who “acquired full dominion” over the goods.

How would such a restraint play out in the commercial world? Presently merchants and consumers must be mindful that the goods they buy and sell are authentic—not counterfeit—and came to market lawfully and not, for example, because they were stolen. But merchants and consumers in the U.S.A. would face an additional burden: Ensuring that the goods, although authentic and placed into commerce lawfully, are of a provenance that permits them to be freely bought and sold in this country.³³ The result: A nation steeped in the principle of commerce as a natural liberty would be operating under a legal regime in which an owner wanting to sell, for example, a pocket calculator

³² 210 U.S. at 349-350.

³³ *Kirtsaeng*, 654 F.3d at 227 (Murtha, J., dissenting) (under the majority opinion “[a]n owner first would have to determine the origin of the copy—either domestic or foreign—before she could sell it).”

would need to discern whether it contains embedded software or an “Omega Globe” design or some other copyrighted element; if so the country where it was manufactured, which can be surprisingly difficult to determine;³⁴ and under the Ninth Circuit approach the location of the first sale.

Because most technology products are manufactured abroad³⁵ and contain copyrightable elements,³⁶ trade in these products would be severely restrained. Government agencies, schools, hospitals, consumers and businesses of every size and type would suffer supply shortages and increased costs for a wide range of mission-critical items—including computer servers, networking products, laptops, tablets and other technology goods. The members of ASCDI/NATD and many other merchants would be seriously harmed and jobs lost as a result. Here are specific examples of how this would occur:

³⁴ Determining provenance can be difficult because many technology products are comprised of components that were manufactured in various countries, and the rules applicable to country-of-origin labeling are complex. *See, e.g.*, FTC, *Complying with the Made in USA Standard*, <http://business.ftc.gov/documents/bus03-complying-made-usa-standard>

³⁵ Edward Moyer, *A Tale of Apple, the iPhone, and overseas manufacturing*, CNET NEWS (2012), http://news.cnet.com/8301-13579_3-57363434-37/a-tale-of-apple-the-iphone-and-overseas-manufacturing/ (noting that not only are labor costs cheaper in China, but the supply chain for components needed in computer manufacturing is located in China).

³⁶ *See* Catsoulis, *supra* n. 4.

• In the fall of 2011, monsoon rains caused extensive flooding in the industrial zone in Thailand where most of the world's computer hard drives are manufactured, resulting in a severe worldwide shortage.³⁷ ASCDI/NATD's members, wanting to protect their customers in the U.S.A. and seeing an opportunity to increase their business, responded to the crisis by buying up new and used hard drives from distributors, brokers and other vendors abroad and then importing the hard drives to the U.S.A. As the computer manufacturers and their authorized distributors in the U.S.A. ran short on hard drives, ASCDI/NATD's members and other independent dealers stepped in to fill the void with stock that had been gathered from around the world. Examples of the technology users who benefitted from these independently-marketed hard drives include:

Government

US Navy—
Washington, D.C.

VA Medical Center—
East Orange NJ

Education

Vassar College—
Poughkeepsie NY

Fowler Middle School—
Maynard MA

³⁷ Thomas Fuller, *Thailand Flooding Cripples Hard-Drive Suppliers*, NEW YORK TIMES (Nov. 6, 2011), <http://www.nytimes.com/2011/11/07/business/global/07iht-floods07.html?pagewanted=all> (the flooding had the effect of “leaving the world's largest computer manufacturers without a reliable forecast about when crucial parts will be available again.”)

Indiana Air Nat'l
Guard–Terre Haute IN

Carlisle Police Dept–
Carlisle PA

Healthcare

GE Healthcare–
Wauwatosa WI

Magellan Health–
Glen Allen VA

Texas Children's
Hospital–Houston TX

St. Jude Medical–
Hackettstown NJ

Legal

Sullivan & Cromwell–
New York, NY

Latham & Watkins–
Los Angeles CA

Weil, Gotshal–
Jersey City, NJ

Dechert LLP–
Philadelphia PA

Brookdale Comm.
College–Lincroft NJ

Yale Public Schools–
Yale MI

Corporate

Anschutz Company–
Denver CO

Ticketmaster–
Ashburn VA

Alcoa Inc.–
Cleveland OH

Nikon Inc.–
Melville NY

Finance

Wells Fargo Capital–
Dallas TX

Northwest Fed'l Credit
Union–Herndon VA

Farmers Nat'l Bank–
Twin Falls ID

Bayview Financial–
Miami FL

**Defense
Contractors**

General Dynamics IT–
Chesapeake VA

Bechtel Nat'l–
Richland WA

Northrop Grumman–
Charlottesville VA

Smith & Wesson Corp.–
Springfield MA

Nonprofit

Museum of Modern
Art–New York NY

Nature Conservancy–
Arlington VA

Underwriters Labs–
Northbrook IL

Directors Guild–
Los Angeles CA

**Communications
& Publishing**

AT&T Global–
Aurora CO

Army Times Publishing–
Springfield VA

Verizon–
Tampa FL

RR Donnelley & Sons–
DePere WI

Small Business

Tasty Tacos–
Des Moines IA

Marshalltown Tools–
Fayetteville AK

Coeur d' Alene Resort–
Coeur d' Alene ID

Promenade Smiles–
Casa Grande AZ

This is just a sampling—there were thousands of other technology users across all walks of American life that, in a time of shortage, needed the secondary market to supply them with hard drives.³⁸

³⁸ The names and cities above are from actual shipments of secondary-market hard drives made to these technology users by ASCDI/NATD's membership during the time period of the worldwide hard drive shortage.

However, if the Second or Ninth Circuit approach becomes the law of the land, technology users in the U.S.A. will be crippled in their ability to obtain mission-critical items such as hard drives when future shortages occur. Why? The answer is because most hard drives are manufactured abroad³⁹ and contain embedded, copyrightable “firmware” that controls their operation.⁴⁰ In other words, the tradability of hard drives in the U.S.A depends on the *Bobbs-Merrill* bright-line construction of the first sale doctrine.

- Many weapon systems continue to use older computer systems and defense contractors are sometimes “desperate to find the parts they need.”⁴¹ Over the past 22 years, ASCDI/NATD member XS International, Inc. in Alpharetta, Georgia, has supplied refurbished technology equipment to every branch of the military, many defense contractors and numerous federal agencies. The refurbished equipment can be anything from a decade-old processor for an F-15 flight simulator to

³⁹ See Fuller, *supra* n. 37.

⁴⁰ See *Alcatel*, 166 F.3d at 778 (explaining that a “micro-processor card contains *firmware*, which is software embedded in the memory chip on the card.”) See also Dataclinic, *Recovering data from hard disk drives with Firmware corruption/faults*, <http://www.dataclinic.co.uk/hard-drive-firmware-corruption.htm> (explaining how firmware controls the operation of hard drives).

⁴¹ Benj Edwards, *If It Ain't Broke, Don't Fix It: Ancient Computers in Use Today*, PCWORLD 2 (2012), [HTTP://WWW.PCWORLD.COM/ARTICLE/249951-2/IF_IT_AINT_BROKE_DONT_FIX_IT_ANCIENT_COMPUTERS_IN_USE_TODAY.HTML](http://www.peworld.com/article/249951-2/if-it-aint-broke-dont-fix-it-ancient-computers-in-use-today.html)

a discontinued networking switch for a federal office.

A similar business is Sotel Systems LLC, a 31-year-old distributor of refurbished technology equipment based in Maryland Heights, Missouri, that employs more than 100 people. Sotel has supplied refurbished equipment to almost every federal agency and major defense contractor in the U.S.A. The refurbished equipment has ranged from telephones provided to Verizon following the 9-11 attacks in New York City to technology gear sold to the U.S. Marine Corps training center in Parris Island, South Carolina.

The businesses of XSi and Sotel would be jeopardized by adoption of the Second or Ninth Circuit approaches, thereby harming both of those companies, increasing the burden to taxpayers and potentially posing a threat to national security. Again, the reason is that most technology products are manufactured abroad⁴² and contain copyrightable elements,⁴³ and therefore tradability of those products depends on the bright-line first sale doctrine.

• Especially during challenging economic times, governments, schools, hospitals and businesses in the U.S.A. are often trying to maintain older computer systems which are no longer supported by the manufacturer; not everyone can afford the “latest and greatest.” To meet this demand, ASCDI/NATD’s members reach out to sources around the

⁴² See Moyer, *supra* n. 35.

⁴³ See Catsoulis, *supra* n. 4.

globe to find the products needed to keep the computers running. One ASCDI/NATD member providing this service is Data Sales Company Inc., a 40-year-old technology dealer based in Burnsville, Minnesota, which employs more than 100 people. Another is Arbitech, LLC, a 12-year-old independent distributor based in Irvine, California, which employs more than 70 people. However, the ability to buy and sell discontinued computer products would be severely compromised by adoption of the Second or Ninth Circuit approaches, harming not only Data Sales Company and Arbitech but also those customers who depend on older products, no longer available from the manufacturers, to keep their computers running. Once again, because most technology products are manufactured outside of the U.S.A. and contain copyrightable elements, tradability of those products depends on the bright-line first sale doctrine.

- With 400 million units of electronic equipment being scrapped every year, electronic waste is a national problem.⁴⁴ The members of ASCDI/NATD and other merchants and consumers in the U.S.A. help promote reuse of electronic equipment by buying and selling such products in the global market. However, because most technology products are manufactured abroad and contain copyrightable

⁴⁴ John McCardle, *Hill, Agencies Forge Ahead on E-Waste Efforts*, NY TIMES (May 2, 2011), <http://www.nytimes.com/gwire/2011/05/02/02greenwire-hill-agencies-forge-ahead-on-e-waste-efforts-99832.html>. See also EPA, *Management of Electronic Waste in the United States* (July 2008 rev.), <http://www.epa.gov/osw/conservation/materials/ecycling/docs/fact7-08.pdf>

elements, viability of the reuse market depends on the bright-line first sale doctrine of *Bobbs-Merrill*. If copyrighted products that were manufactured abroad contain a restraint on alienation, those products will be far more likely to be dumped in a landfill.

Persons who traded in technology products or other goods subject to the restraint on alienation would find themselves at risk of being haled into federal court and threatened with the severe sanctions imposed under the Copyright Act.⁴⁵ Mr. Kirtsaeng's experience—\$37,000 in total sales resulting in a \$600,000 judgment—portends what lies ahead if the Second or Ninth Circuit approach becomes the law of the land.⁴⁶ Millions of transactions that have taken place on eBay, Craigslist, Amazon and in retail stores, flea markets, garage sales and other venues nationwide would be rendered illegal. Federal courts would be hit by a wave of copyright-infringement litigation—and make no mistake about it, the sharks are already circling.⁴⁷

Adoption of the Second or Ninth Circuit approaches would also damage the judicial branch's credibil-

⁴⁵ See 18 U.S.C. § 2319.

⁴⁶ See *Kirtsaeng*, Petition for a Writ of Certiorari, No. 11-697 at 3-4.

⁴⁷ See, e.g., Douglas R. Wolf & Anderson J. Duff, *IP: Copyrights used to stop grey market goods—the good and the bad*, INSIDE COUNSEL (2011), <http://www.wolfgreenfield.com/news-stand/460-copyrights-used-stop-grey-market-goodsthe-good-bad>.

ity. Imagine the reaction of the average American if told that the Supreme Court says her clock radio—an item she bought and paid for—cannot be sold at the church rummage sale because it was manufactured in China and the digital display is driven by copyrighted software; instead she needs to find out who owns the copyright and try to get permission.

Rationality cries for a credible alternative—and that alternative has been provided by Judge Murtha in his dissent. Judge Murtha opined that the phrase “lawfully made under this title” refers simply to *lawfulness of manufacture* rather than *place of manufacture*.⁴⁸ His interpretation is statutorily correct, accords with common sense and avoids the enormous disruption that will occur if either the Second or Ninth Circuit approaches becomes law of the land.

⁴⁸ *Kirtseng*, 654 F.3d at 226 (Murtha, J., dissenting).

CONCLUSION

Interpreting “lawfully made under this title” in a manner that imposes a restraint on alienation of goods that were lawfully manufactured and placed into commerce with authority of the copyright holder will severely disrupt the market for technology goods and many other vital products, causing harm to merchants, governments, schools, hospitals and consumers across the U.S.A. ASCDI/NATD respectfully submits that the Second Circuit’s decision should be reversed.

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Respectfully submitted,

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