No. 08-1423

In the Supreme Court of the United States

COSTCO WHOLESALE CORPORATION, PETITIONER

v.

OMEGA, S.A.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Section 602(a)(1) of Title 17 generally prohibits the "[i]mportation 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." Under 17 U.S.C. 109(a), however, "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." In *Quality King Distributors, Inc.* v. *L'anza Research International, Inc.*, 523 U.S. 135 (1998), this Court held that, where Section 109(a) applies, it provides an exception to the general ban on the unauthorized importation into the United States of copies of copyrighted works. The question presented in this case is as follows:

Whether a copy made outside the United States by the owner of the United States copyright is "lawfully made under this title [*i.e.*, Title 17]" and is therefore covered by Section 109(a)'s exception to the general ban on unauthorized importation.

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INTEREST OF THE UNITED STATES

The question presented in this case concerns the circumstances under which copies of a copyrighted work may be imported into this country and subsequently distributed in the United States without the authorization of the United States copyright owner. The United States Copyright Office, which administers the Copyright Act, see 17 U.S.C. 701, and which contributed significantly to Congress's drafting of the relevant provisions of the Copyright Act of 1976, 17 U.S.C. 101 *et seq.*, has a substantial interest in the resolution of that question. This case also implicates questions of concern to other federal agencies charged with administering federal laws governing intellectual property and importation of goods. At the invitation of the Court, the United

States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. Section 106 of Title 17 provides that, "[s]ubject to sections 107 through 122," a copyright owner "has the exclusive rights to do and to authorize" various enumerated activities, including "to distribute copies or phonorecords of the copyrighted work to the public," 17 U.S.C. 106(3). Section 602(a)(1) provides that "[i]mportation into the United States, without the authority of the owner of copyright under this title, of copies * * * of a work that have been acquired outside the United States is an infringement of the [owner's] exclusive right to distribute copies" granted by Section 106(3). 17 U.S.C. 602(a)(1).[1] And Section 109(a) states that, "[n]otwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord." 17 U.S.C. 109(a).

Section 109(a) is the current codification of the "first sale doctrine" initially recognized by this Court in *Bobbs-Merrill Co.* v. *Straus*, 210 U.S. 339 (1908). The

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[1] In October 2008, shortly after the court of appeals issued the decision below, Congress amended Section 602 of the Copyright Act and added a separate private cause of action against importers and exporters of piratical copies. See Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, § 105(b), 122 Stat. 4259. The legislation also reorganized the existing provisions of Section 602. The ban on unauthorized importation specifically at issue in this case, which was formerly codified at 17 U.S.C. 602(a), was redesignated as Section 602(a)(1). All citations in this brief are to the amended version of the statute. See Sup. Ct. R. 34.5.

Court in *Bobbs-Merrill* held that the copyright owner's exclusive right to "vend" a copyrighted book did not encompass the right to place restrictions on the resale of the book after ownership had been transferred. *Id.* at 349-351; see *Quality King Distribs., Inc.* v. *L'anza Research Int'l, Inc.*, 523 U.S. 135, 140-141 (1998) (*Quality King*) (discussing *Bobbs-Merrill*).

In *Quality King*, this Court held that Section 109(a) establishes an exception to Section 602(a)(1)'s general ban on unauthorized importation. See 523 U.S. at 143-152. Because the imported copies at issue in *Quality King* were manufactured in the United States by the copyright owner, see *id.* at 138-139, the case did not present the question whether copies produced outside this country could be "lawfully made under this title" within the meaning of Section 109(a). See *id.* at 154 (Ginsburg, J., concurring).

2. Respondent Omega, S.A., a Swiss corporation, manufactures wristwatches in Switzerland and sells them internationally, including in the United States, through a network of authorized distributors and retailers. Pet. App. 3a. On the back of each watch, respondent engraves a small logo, which it calls the "Omega Globe Design," that is registered as a copyrighted work with the United States Copyright Office. *Ibid.*

Respondent first sold some of the watches at issue here to an authorized distributor overseas under an agreement limiting resale to specific territories outside the United States. J.A. 27; see Resp. Br. 3-4. Unidentified parties subsequently purchased the watches and imported them into the United States. After importation, petitioner Costco Wholesale Corporation purchased the watches from a supplier in New York and resold them to consumers in California. Pet. App. 3a-4a; J.A.

54-58. Although respondent authorized the initial foreign sale of the watches, it did not authorize their importation into the United States or the subsequent domestic resales. Pet. App. 4a; see *id.* at 17a.

Respondent brought this suit for copyright infringement under 17 U.S.C. 106(3) and 602(a)(1) and moved for summary judgment. Pet. App. 4a. Petitioner filed a cross-motion for summary judgment, arguing that, under Section 109(a), respondent's voluntary first sale of the watches exhausted its right to control their subsequent distribution or importation. *Ibid.* The district court granted summary judgment for petitioner without explanation. *Id.* at 18a-19a.

3. The court of appeals reversed and remanded for further proceedings. Pet. App. 1a-17a. The court explained that this Court in *Quality King* had distinguished between copies lawfully made under Title 17 and copies lawfully made under foreign law. *Id.* at 13a-15a. Relying on that distinction, the court concluded that "copies covered by the phrase 'lawfully made under [Title 17]' in [Section] 109(a)" are those made "*within the United States*, where the Copyright Act applies." *Id.* at 14a (first set of brackets in original).

The court of appeals acknowledged that, taken to its logical extreme, the court's construction of Section 109(a) could allow a copyright owner to "exercise distribution rights after even the tenth sale in the United States of a watch lawfully made in Switzerland." Pet. App. 16a. Earlier Ninth Circuit cases had "resolved this problem," the court explained, by holding that any domestic sale authorized by the copyright owner would trigger the application of Section 109(a), even when the copy in question was lawfully made overseas. *Ibid.* Because respondent had not authorized any of the domestic

sales in this case, the court of appeals found it unnecessary to decide whether those holdings survived *Quality King*. *Id.* at 17a.

SUMMARY OF ARGUMENT

1. In the Copyright Act of 1976, Congress enacted Section 602(a)(1), which broadened protections against unauthorized importation of copyrighted works to encompass copies that are lawfully made. In *Quality King*, this Court held that Section 109(a) provides an exception to Section 602(a)(1)'s general ban on the unauthorized importation of copyrighted works. 523 U.S. at 145-154. The Court emphasized, however, that Section 602(a)(1) would retain significant operative effect because Section 109(a) applies only to copies "lawfully made under this title," not to copies lawfully made under foreign law.

Consistent with that analysis, and to ensure that Section 602(a)(1) retains meaningful operative force, the phrase "lawfully made under this title" in Section 109(a) should be construed to mean lawfully made "pursuant" or "subject" to Title 17, *i.e.*, where Title 17 applies. Because Title 17 does not apply extraterritorially, a copy manufactured abroad and imported into the United States without the copyright owner's authorization is not covered by Section 109(a).

2. Petitioner argues that Section 109(a) encompasses any copy "made in accordance with standards enumerated in the Copyright Act," Br. 35, even if the copy's creation is not subject to United States law, see *id.* at 35 n.16. Read in isolation, the phrase "lawfully made under this title" could bear that meaning. That proposed construction of Section 109(a), however, is inconsistent with the larger statutory context because it

would render Section 602(a)(1) largely superfluous, and it ignores the *Quality King* Court's careful distinction between copies lawfully made under Title 17 and copies lawfully made under foreign law.

3. Petitioner argues that the application of Section 109(a) cannot turn on the place of manufacture because the phrase "lawfully made under this title" is used in other Title 17 provisions where it cannot reasonably be read to exclude foreign-made copies. But the principle that the same words should ordinarily be given the same meaning in different provisions of a given statute is simply an interpretive guide, not an inflexible rule. In any event, petitioner is wrong in arguing that the other Title 17 provisions would be rendered absurd if they were read as limited to copies made in the United States.

4. Petitioner's policy arguments provide no sound basis for adopting its reading of Section 109(a). Some of the impacts that petitioner identifies are an unavoidable consequence of Congress's decision in 1976 to expand Section 602's ban on unauthorized importation beyond piratical copies. And some of the adverse consequences would result even under petitioner's interpretation of Section 109(a). Petitioner contends that the court of appeals' decision would allow copyright owners to restrict the downstream distribution of foreign-made goods even after the copyright owner has authorized the importation or first domestic sale of the relevant copies. The Copyright Act can reasonably be read to prevent that result, however, and petitioner identifies no instance in which a copyright owner has attempted to exercise that sort of continuing control over foreign-made copyrighted goods.

ARGUMENT

A COPY THAT IS MADE OUTSIDE THE UNITED STATES IS NOT "LAWFULLY MADE UNDER THIS TITLE" WITHIN THE MEANING OF 17 U.S.C. 109(a)

The question presented in this case concerns the proper construction of the phrase "lawfully made under this title" in 17 U.S.C. 109(a). Petitioner argues that the phrase means "made in accordance with standards enumerated in the Copyright Act," Br. 35, even if the creation of the copy was not subject to United States law, see *id.* at 35 n.16. Respondent contends (Br. 13) that the phrase means that "the making of the copy is both *governed by* and *consistent with* the Copyright Act."

Read in isolation, the phrase "lawfully made under this title" could reasonably bear either of those meanings. But "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000) (quoting *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)). Because petitioner's expansive reading of Section 109(a) would render largely ineffectual Congress's effort to protect United States copyright owners against unauthorized importation of copyrighted works, see 17 U.S.C. 602(a)(1), the larger statutory context indicates that Section 109(a) does not encompass copies created abroad. That narrower construction of Section 109(a) is strongly supported by *Quality King*, in which this Court emphasized that Section 602(a)(1) will have significant practical effect *because* Section 109(a) does not cover copies "lawfully made" under the law of another country.

A. To Effectuate Congress's Purpose In Enacting Section 602(a)(1), The Phrase "Lawfully Made Under This Title" In Section 109(a) Is Best Understood To Mean "Lawfully Made" Where Title 17 Is Applicable

In *Quality King*, this Court held that Section 109(a) provides an exception to Section 602(a)(1)'s general ban on the unauthorized importation of copyrighted works. *Quality King Distribs., Inc.* v. *L'anza Research Int'l*, 523 U.S. 135, 145-154 (1998). In so holding, the Court emphasized that Section 602(a)(1) would retain significant practical effect because, *inter alia*, it would prohibit unauthorized importation of copies "'lawfully made' not under the United States Copyright Act, but instead, under the law of some other country." *Id.* at 147. To effectuate Congress's intent in enacting Section 602(a)(1), and in light of this Court's decision in *Quality King*, the phrase "lawfully made under this title" should be interpreted to mean lawfully made "pursuant" or "subject" to Title 17, *i.e.*, where Title 17 is applicable.

1. Section 602(a)(1) represented a significant departure from the treatment of imported works under prior law. The Copyright Act of 1909, as codified in 1947, directed the Customs Service to block the importation only of "piratical copies of any work copyrighted in the United States." 17 U.S.C. 106 (1976); see also 17 U.S.C. 107 (1976). This "earlier prohibition is retained in [Section] 602(b) of the present Act." *Quality King*, 523 U.S. at 146; see 17 U.S.C. 602(b) (prohibiting the importation of copies whose creation "would have constituted an infringement of copyright if this title had been applicable"). Until the Copyright Act of 1976, copyright owners lacked the ability under the copyright laws to control "gray-market" imports—lawfully made copies intended

for distribution in foreign countries but imported into the United States without the authorization of the copyright owner. Cf. *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 285 (1988) (discussing gray-market trademarked goods).

When the copyright revision process commenced in 1961, the Register of Copyrights received an industry proposal to expand the Copyright Act's importation restrictions. See House Comm. on the Judiciary, 87th Cong., 1st Sess., *Copyright Law Revision: Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* 125-126 (Comm. Print 1961). The proposal focused on agreements "to divide international markets," whereby a "foreign publisher agrees not to sell his [foreign] edition in the United States, and the U.S. publisher agrees not to sell his [United States] edition in certain foreign countries." See *id.* at 125. Although the Register initially suggested that "the prohibition against imports of piratical copies" should not be expanded "to authorized copies covered by an agreement of this sort," *id.* at 126, industry representatives continued to advocate their "proposal to enforce private agreements to divide international markets by means of a statutory prohibition against importation," House Comm. on the Judiciary, 88th Cong., 1st Sess., *Copyright Law Revision Pt. 2: Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* 193 (Comm. Print 1963) (*Copyright Law Revision Pt. 2*); see, *e.g.*, *id.* at 212-214, 232, 275, 327. The general concern expressed was that foreign publishers bound by market allocation agreements were lawfully reproducing and selling copies abroad, but that third party wholesalers and jobbers, not bound by the agreements, were then importing the

foreign-made copies into the United States. *Id.* at 213, 232; House Comm. on the Judiciary, 88th Cong., 2d Sess., *Copyright Law Revision Pt. 3: Preliminary Draft for Revised U.S. Copyright Law & Discussions and Comments on the Draft* 209, 260 (Comm. Print 1964).

The Copyright Office ultimately endorsed legislation that would expand the importation restrictions to encompass "foreign copies that were made under proper authority." See House Comm. on the Judiciary, 88th Cong., 2d Sess., *Copyright Law Revision Pt. 4: Further Discussions and Comments on Preliminary Draft for Revised U.S. Copyright Law* 203 (Comm. Print 1964) (*Copyright Law Revision Pt. 4*). The Register explained that the provision would bar importation if, "for example, * * * the copyright owner had authorized the making of copies in a foreign country for distribution only in that country." House Comm. on the Judiciary, 89th Cong., 1st Sess., *Copyright Law Revision Pt. 6: Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* 150 (Comm. Print 1965) (*Copyright Law Revision Pt. 6*). The House and Senate reports accompanying the Copyright Act of 1976 discuss the expanded importation restrictions in the same terms. See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 169 (1976) (*1976 House Report*) ("Section 602 * * * deals with * * * unauthorized importation of copies * * * that w[er]e lawfully made."); *id.* at 170 (Section 602 covers a situation "where the copies or phonorecords were lawfully made but their distribution in the United States would infringe the U.S. copyright owner's exclusive rights."); S. Rep. No. 473, 94th Cong., 2d Sess. 151-152 (1976) (*1976 Senate Report*) ("unauthorized importation is an

infringement merely if the copies or phonorecords 'have been acquired abroad'").

2. In *Bobbs-Merrill Co.* v. *Straus*, 210 U.S. 339 (1908), this Court held that a copyright owner's exclusive right to "vend" a copyrighted book did not encompass the right to restrict the terms on which lawful purchasers could resell the items. *Id.* at 349-351; see *Quality King*, 523 U.S. at 140-141 & n.5. In the Copyright Acts of 1909 and 1947, Congress confirmed that principle (which came to be known as the "first sale doctrine") by providing that "nothing 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, ch. 320, § 41, 35 Stat. 1084; Copyright Act of 1947, ch. 391, § 27, 61 Stat. 660 (same). This provision was added to "make it clear that there is no intention to enlarge in any way the construction to be given to the word 'vend' in the first section of the bill." H.R. Rep. No. 2222, 60th Cong., 2d Sess. (1909). As the Court explained in *Quality King*, the "point of the first sale doctrine is that once the copyright owner places a copyrighted item in the stream of commerce by selling it, he has exhausted his exclusive statutory right to control its distribution." 523 U.S. at 152.

In 1976, at the same time Congress adopted the expanded importation restrictions in Section 602(a)(1), it enacted Section 109(a) in its current form, which provides that

> [n]otwithstanding the provisions of section 106(3) [establishing a copyright owner's right of exclusive distribution], 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.

17 U.S.C. 109(a). The legislative reports confirm in general terms Congress's intent to retain the first sales principle recognized in *Bobbs-Merrill.* See, *e.g.1976 Senate Report* 71; *1976 House Report* 79; see also, *Quality King,* 523 U.S. at 152 ("There is no reason to assume that Congress intended either [Section] 109(a) or the earlier codifications of the doctrine to limit its broad scope.").

3. The Court in *Quality King* addressed the "narrow[]" question "whether the 'first sale' doctrine endorsed in [Section] 109(a) is applicable to imported copies." 523 U.S. at 138. The labels at issue in *Quality King* were manufactured in the United States, see *id.* at 139; *id.* at 154 (Ginsburg, J., concurring), and the copyright owner (L'anza) did not dispute that the labels were "lawfully made under this title" within the meaning of Section 109(a), see *id.* at 143. Rather, L'anza argued that Section 602(a)(1)'s ban on unauthorized importation of copyrighted materials is not subject to Section 109(a). See *id.* at 143, 145. The Court rejected that contention. See *id.* at 144-145. Because the relevant copies were made within the United States, the Court had no occasion squarely to decide the issue presented here—*i.e.*, whether Section 109(a) encompasses copies made outside this country by the United States copyright owner.

The Court's opinion in *Quality King* does, however, provide significant guidance as to the proper resolution of that issue. L'anza (supported by the United States as amicus curiae) argued that applying Section 109(a) to unauthorized imports would thwart Congress's intent in enacting Section 602(a)(1) to expand the importation right beyond piratical copies. See *Quality King*, 523

U.S. at 145, 146 & n.17. In rejecting that contention, the Court explained that Section 602(a)(1) sweeps more broadly than Section 109(a) because, *inter alia*, Section 602(a)(1) "applies to a category of copies that are neither piratical nor 'lawfully made under this title.' That category encompasses copies that were 'lawfully made' not under the United States Copyright Act, but instead, under the law of some other country." *Id.* at 147; see *id.* at 148.

In elaborating on that point, the Court discussed "one example" that was noted in the deliberations leading up to the 1976 Act. See *Quality King*, 523 U.S. at 147. The Court explained that "[e]ven in the absence of a market allocation agreement between, for example, a publisher of the United States edition and a publisher of the British edition of the same work, each such publisher could make lawful copies." *Id.* at 148. The Court observed that "[i]f the author of the work gave the exclusive United States distribution rights * * * to the publisher of the United States edition and the exclusive British distribution rights to the publisher of the British edition, * * * presumably only those made by the publisher of the United States edition would be 'lawfully made under this title' within the meaning of [Section] 109(a)." *Ibid.*

The Court did not further explain its conclusion that copies made with the author's consent by the "publisher of the British edition" would not be "lawfully made under this title" for purposes of Section 109(a). *Quality King*, 523 U.S. at 148. It is well established, however, that the Copyright Act does not apply outside the United States. See *United Dictionary Co.* v. *G. & C. Merriam Co.*, 208 U.S. 260, 264-265 (1908); 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*

§ 17.02, at 17-19 (Matthew Bender rev. ed. 2009) (*Nimmer on Copyright*); Pet. Br. 41 (not contesting that Copyright Act does not apply abroad). In light of that settled background understanding, the most natural explanation of this Court's discussion is that copies made by the "publisher of the British edition" would not be "lawfully made under" Title 17 because they would be produced in a place where Title 17 does not apply.[2]

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[2] Aside from Section 602(a)(1)'s application to copies lawfully made under foreign law, the Court in *Quality King* identified two additional functions that Section 602(a)(1) could serve notwithstanding Section 109(a). First, the Court observed that "even if [Section] 602(a) did apply only to piratical copies, it at least would provide the copyright holder with a private remedy against the importer, whereas the enforcement of [Section] 602(b) is vested in the Customs Service." 523 U.S. at 146. In 2008, however, Congress enacted 17 U.S.C. 602(a)(2), which establishes a private civil action against unauthorized 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." If Section 602(a)(1) were limited to the same class of copies described in Section 602(a)(2), as petitioner advocates, Congress's conferral of a private right of action would no longer add anything of substance to the protections afforded copyright owners by neighboring Copyright Act provisions. Second, the Court noted that Section 109(a) would not bar a suit under Section 602(a)(1) "against any nonowner such as a bailee, a licensee, a consignee, or one whose possession of the copy was unlawful." *Quality King*, 523 U.S. at 146-147 & n.19. Petitioner suggests that "the historical rationale for Section 602(a) was to solve just that problem," Br. 33 n.15, but the broad statutory text and a fair reading of the legislative history make clear this was not Congress's principal concern. Rather, as discussed, Congress's unambiguous intent in enacting Section 602(a)(1) was to afford copyright owners an effective means of segmenting international markets for copyrighted works. That purpose can be adequately achieved only if Section 602(a)(1)'s operative effect extends to persons who have acquired ownership of the relevant copies. See 2 *Nimmer on Copyright* § 8.12[B][6][c] at 8-178.4(6) n.111.61 (suggesting that the number of

That inference is strongly supported by the *Quality King* Court's evident assumption that a particular copy may be made *either* "under" Title 17 *or* "under" the law of another country, but not "under" both. The Court observed, for example, that Section 602(a)(1) "encompasses copies that were 'lawfully made' not under the United States Copyright Act, but instead, under the law of some other country." 523 U.S. at 147; see *id.* at 148 (explaining that Section 602(a)(1) "encompasses copies that are not subject to the first sale doctrine—*e.g.*, copies that are lawfully made under the law of another country"). If the phrase "made under" means "made pursuant or subject to" a particular body of law, that assumption makes perfect sense: the legality of a copy's creation depends only on the law of the place where the copy is made. But if (as petitioner contends) the phrase "made under" means "made in a manner consistent with the substantive requirements" of the relevant law, the Court's "either-or" approach would be unfounded, since the creation of a particular copy could easily comply with the substantive requirements imposed by many different countries. In this case, for example, petitioner could not reasonably dispute that the watches were "lawfully made under" the law of Switzerland, where their creation occurred. Petitioner's contention that the copies at issue here were "lawfully made under" both Title 17 and Swiss law is inconsistent with the *Quality King* Court's statement that Section 109(a) does not en-

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importation cases involving bailees, consignees, and the like is likely to be extremely small).

compass "copies that are lawfully made under the law of another country." *Id.* at 148.[3]

If, as *Quality King* indicates, the phrase "lawfully made under this title" in Section 109(a) means "lawfully made pursuant or subject to Title 17," the copies at issue here clearly fall outside Section 109(a)'s coverage. United States law simply has no bearing on the legality of respondent's conduct in Switzerland. See Pet. Br. 35 n.16 (conceding that the law of the place of manufacture "governs production").

B. Petitioner's Alternative Construction Of Section 109(a) Is Not Persuasive

1. Petitioner argues that Section 109(a) encompasses any copy "made in accordance with standards enumerated in the Copyright Act," Br. 35, even if United States law does not govern the making of the copy, see *id.* at 35 n.16. On this view, a copy made by or with the authorization of the United States copyright holder anywhere in the world is "lawfully made under [Title 17]" within the meaning of Section 109(a). Read in isolation,

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[3] The leading commentators on copyright law have understood *Quality King* in the manner described in the text. See 2 *Nimmer on Copyright* § 8.12[B][6][c] at 8-178.4(10) (discussing *Quality King* and concluding that the Copyright Act "should still be interpreted to bar the importation of gray market goods that have been manufactured abroad"); 4 William F. Patry, *Patry on Copyright* § 13:44, at 13-96 (2010) (The Copyright Act "bars only the importation of copies that were acquired outside the United States and that were not 'lawfully made under this title,' i.e., were not made in the United States."); 2 Paul Goldstein, *Goldstein on Copyright* § 7.6.1, at 7:144 (3d ed. Supp. 2007) (concluding that, under *Quality King*, "the first sale defense is unavailable to importers who acquire ownership of gray market goods made abroad and to resellers who acquire ownership in the United States of copies lawfully made abroad but unlawfully imported into the United States").

Section 109(a) could reasonably be construed in the manner that petitioner advocates. Indeed, in *Quality King*, the United States as amicus curiae advocated essentially that reading, arguing that the application of Section 109(a) does not turn on the place of manufacture, see Gov't Br. at 29-30, *Quality King, supra* (No. 96-1470), but that Section 109(a) instead encompasses "any copy made with the authorization of the copyright owner as required by Title 17, or otherwise authorized by specific provisions of Title 17," *id.* at 30 n.18 (citation omitted).

In light of this Court's decision in *Quality King*, however, the construction of Section 109(a) that the United States advanced in that case, and that petitioner advocates here, is no longer tenable. As explained above, the Court in *Quality King* drew a sharp distinction between copies "made under" Title 17 and copies "made under" foreign law, and it assumed that any particular copy would be "made under" only one legal regime. That analysis makes sense only if the phrase "made under this title" refers to copies to which Title 17 is *applicable—i.e.*, copies created in the United States.

In addition, because the construction of an ambiguous statutory provision may depend in part upon the larger statutory context, the *Quality King* Court's holding that Section 109(a) limits Section 602(a)(1) bears directly on the proper reading of Section 109(a) itself. If the Court in *Quality King* had agreed with L'anza and the United States, and had held that Section 109(a) does not limit a copyright owner's authority to restrict importation of copyrighted goods (see p. 12, *supra*), petitioner's expansive reading of Section 109(a) could be adopted without rendering inefficacious Section 602(a)(1)'s ban on unauthorized importation. But given

the Court's holding that Section 109(a) (where it applies) provides an exception to Section 602(a)(1), see 523 U.S. at 145-152, construing Section 109(a) in the manner petitioner advocates would largely negate Congress's decision to extend the importation ban beyond piratical copies. Settled principles of statutory construction counsel that such a reading should be rejected, and that the Copyright Act should instead be construed to give effect to all of its provisions. See, *e.g.*, *United States ex rel. Eisenstein* v. *City of New York*, 129 S. Ct. 2230, 2234 (2009).

2. Petitioner purports to accept the *Quality King* Court's conclusion that Section 109(a) does not encompass copies made under the law of a foreign country. Petitioner also appears to recognize that, unless *some* meaningful category of lawfully made copies falls outside Section 109(a), that provision will effectively negate Congress's decision to extend Section 602's ban on unauthorized importation beyond piratical copies. Petitioner's efforts to identify that category, however, have been both inconsistent and unpersuasive.

At the petition stage of this case, petitioner appeared to draw a sharp distinction between copies produced abroad by the United States copyright owner itself and copies made abroad by another entity with the copyright owner's authorization. See Pet. 13-14; Reply Br. 2. As the United States explained (see Gov't Pet. Stage Amicus Br. 16), that distinction is inconsistent with basic principles of copyright law. "[T]he owner of copyright under [Title 17] has the exclusive rights to do *and to authorize*" the prerogatives that attend copyright ownership, including the reproduction of the copyrighted work. 17 U.S.C. 106 (emphasis added); 17 U.S.C. 106(1). In determining whether copies were "lawfully made un-

der this title," there is consequently no sound reason to distinguish between copies made by the copyright owner and copies made in like circumstances by another entity with the copyright owner's authorization.

In its brief on the merits, by contrast, petitioner contends that all copies made by *or* with the authorization of the United States copyright owner are "lawfully made under this title" within the meaning of Section 109(a). Petitioner now posits a different distinction—between a copy produced abroad by the United States copyright owner itself or another entity with that copyright owner's authorization, and a copy produced abroad by an "*unrelated foreign copyright holder.*" Br. 12, 34-40. Although the meaning of the italicized phrase is not entirely clear, petitioner appears to contemplate situations in which an American author assigns his United States copyright to one publisher and his foreign copyright to another. Under petitioner's view, copies produced abroad by the second publisher would not be "lawfully made under this title" because they would be made without the authorization of the current United States copyright owner (*i.e.*, the author's domestic assignee).

If petitioner's theory were accepted, the application of Section 109(a) to unauthorized imports would depend on fine details of the relationships between various domestic and foreign actors. In the situation described above, for example, if the United States author retained his copyrights, while licensing United States and foreign publishers to reproduce the work in their respective countries, the copies created abroad would be "lawfully made under [Title 17]" as petitioner construes that phrase because they would be made with the authorization of the United States copyright owner. Nothing in *Quality King* supports petitioner's view that the line

between copies "lawfully made under [Title 17]" and copies "lawfully made under the law of another country" (523 U.S. at 148) turns on the United States copyright owner's choice between assignment and licensing as his means of authorizing copies to be made abroad.

The legislative history appears to be similarly devoid of any suggestion that such nuances would determine the legality of unauthorized importation. Industry representatives spoke in more general terms of a United States publisher "enter[ing] into a contract with a British publisher to acquire exclusive U.S. rights for a particular book," *Copyright Law Revision Pt. 2* 212; a "foreign publisher agree[ing] with a U.S. publisher not to sell his edition of a particular book in the United States," *id.* at 232; a "foreign publisher agree[ing] not to sell his edition in the United States, and the U.S. publisher agree[ing] not to sell his edition in certain foreign countries," *id.* at 327; and a "British publisher contract-[ing] with an American publisher to give him exclusive American rights to a work," *Copyright Law Revision Pt. 4* 260. And the Register of Copyrights explained that the provision would bar importation if, "for example, * * * the copyright owner had authorized the making of copies in a foreign country for distribution only in that country." *Copyright Law Revision Pt. 6* 150.

There is consequently no basis for petitioner's contention (Br. 38, 39) that, in expanding Section 602's restrictions on unauthorized importation to encompass lawfully made copies, Congress was concerned with who was *making* the copies, or about "competition from unrelated foreign copyright holders." To the contrary, the proposals that ultimately produced Section 602(a)(1) were driven by concerns about competition from copies imported by downstream wholesalers and jobbers,

against whom contractual remedies were inadequate because privity of contract was lacking, not about unauthorized importation by the "foreign copyright holders" themselves. See pp. 9-10, *supra*. As even petitioner's examples indicate, the "foreign copyright holder" was not the problem. See Br. 39 (noting ineffective means of redress against "a third party, *e.g.*, a British wholesaler") (quoting *Copyright Law Revision Pt. 4* 260); *id.* at 39-40 (noting that problem was because of "German jobber," not "German publisher") (quoting *Copyright Law Revision Pt. 4* 210).

C. Other Copyright Act Provisions Are Consistent With The Conclusion That Section 109(a) Does Not Cover Foreign-Made Copies

Although petitioner acknowledges that "a legislator perhaps *could* use the phrase 'where this title is applicable' and 'under this title' synonymously," Br. 44, it argues that other provisions of the Copyright Act preclude that reading here, *id.* at 15-20. That is incorrect.

1. The phrase "lawfully made under this title" can quite naturally be read to refer to copies "lawfully made" pursuant or subject to Title 17. See *Ardestani* v. *I.N.S.*, 502 U.S. 129, 135 (1991) (holding that "the most natural reading" of the word "under" in the Equal Access to Justice Act was "subject to" or "governed by"); *Webster's New Ninth Collegiate Dictionary* 1285 (1985) (defining "under" as "subject to the authority * * * of"). To be sure, because "[t]he word 'under' is a chameleon" with "many dictionary definitions," it "must draw its meaning from its context.'" *Kucana* v. *Holder*, 130 S. Ct. 827, 835 (2010) (internal quotation marks and citation omitted). For the reasons set forth above, Section 109(a)'s role within the overall statutory scheme, and (in

particular) its relationship to Section 602(a)(1), dictate that "lawfully made under this title" should be read as "lawfully made" pursuant to Title 17.

Section 602(b), which was enacted contemporaneously with Section 109(a), grants Customs the authority to stop the importation of copies that "would have constituted an infringement of copyright if this title had been applicable." 17 U.S.C. 602(b). The counterfactual structure of that provision demonstrates Congress's recognition that Title 17 does not apply beyond the territorial jurisdiction of the United States. And in 2008, Congress amended Section 602(a) to provide a distinct private right of action against piratical imports and exports, see notes 1 and 2, *supra*, employing the same counterfactual formulation. 17 U.S.C. 602(a)(2). Congress could have used similar language in Section 109(a) if it had intended the application of that provision to turn on a comparable inquiry into whether particular extraterritorial conduct would have been legal if it had occurred in the United States.

Petitioner argues at length (Br. 29-33) that applying Section 109(a) to copies imported into the United States would not involve an extraterritorial application of domestic law. That argument, while correct, is essentially irrelevant to the proper disposition of this case. If (as we explain above) the phrase "lawfully made under this title" in Section 109(a) means "lawfully made" pursuant or subject to Title 17, then Section 109(a)'s application to particular cases turns on whether the specific acts of copying involved were subject to the Copyright Act. Because the Copyright Act does not apply abroad (see pp. 13-14, *supra*) and the copies in this case were made in Switzerland, those copies were not "lawfully made under this title" within the meaning of Section 109(a).

The established understanding that the Copyright Act does not apply extraterritorially thus informs Section 109(a)'s proper application to the facts of this case, even though the conduct that is alleged to have been unlawful (the importation and subsequent resale of respondent's watches) occurred within the United States.

2. As petitioner observes (Br. 16-19), the words "lawfully made under this title" also appear in other Copyright Act provisions—the Audio Home Recording Act of 1992 (AHRA), 17 U.S.C. 1001 *et seq.*, and 17 U.S.C. 110. Petitioner contends that the phrase must be given the same meaning in every Title 17 provision where it appears, and that reading the AHRA and Section 110 to exclude foreign-made copies would produce absurd results. Those arguments lack merit.

a. Contrary to petitioner's contention, the phrase "lawfully made under this title" need not have the same meaning throughout Title 17. Although "there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning, * * * the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932) (citation omitted); see *Barber* v. *Thomas*, 130 S. Ct. 2499, 2506 (2010) (interpreting "term of imprisonment" to mean different things in same statute). Section 109(a)'s place within the overall statutory scheme—and, in particular, its relationship to Section 602(a)(1)—strongly indicates that Section 109(a) does not cover foreign-made copies. If (as petitioner contends) analogous contextual clues made it apparent that

the AHRA and Section 110 *do* cover such copies, the phrase "lawfully made under this title" could appropriately be given different meanings in different Title 17 provisions.

b. In any event, there would be nothing irrational about interpreting the cited provisions to apply only to copies made where Title 17 applies. Under the AHRA, persons who distribute blank digital audio recording media within the United States must pay royalties into a fund managed by the Register of Copyrights. See 17 U.S.C. 1003, 1004(b). The proceeds are then paid to recording artists and composers whose works were embodied in musical recordings that were "lawfully made under this title" and distributed within the United States during the relevant period. 17 U.S.C. 1006(a)(1)(A). The rationale for the royalty program is that, because blank recording media are often used by consumers to record copyrighted music, persons whose works may be copied should receive compensation from those who distribute the recording media. See S. Rep. No. 294, 102d Cong., 2d Sess. 30 (1992).

Petitioner argues (Br. 17-18) that, if the phrase "lawfully made under this title" in Section 1006(a)(1)(A) is limited to recordings made within the United States, the provision will conflict with Section 1004(b), which encompasses recording media manufactured abroad and imported into the United States. That is a non sequitur. Section 1004(b) deals with blank audio recording *media* (*e.g.*, a blank cassette), see 17 U.S.C. 1001(4) (definition of "digital audio recording medium"), and defines the obligations of persons who must pay royalties *into* the fund; Section 1006 deals with finished musical *recordings* and identifies the persons who may *receive* payments. There would be nothing absurd or illogical in

requiring royalties to be paid into the fund on all blank recording media distributed within the United States, including media manufactured abroad, while paying benefits only to artists and composers whose works were embodied in recordings made in the United States.

Section 110 exempts certain educational activities from copyright infringement liability but provides that, for motion pictures and other audiovisual works and phonorecords, no exemption shall apply to a copy "not lawfully made under this title" if the instructor "knew or had reason to believe [it] was not lawfully made." 17 U.S.C. 110(1). Petitioner argues (Br. 17) that, if the phrase "made under this title" is limited to copies created in the United States, "teachers would be liable for copyright infringement simply for exposing their students to genuine musical performances or instructional videos that happened to be made abroad." But it would not be irrational to limit the safe harbor to copies made in the United States, and Section 110(1)'s scienter requirement reduces the danger of over-expansive liability. In addition, Section 110(1)'s reference to copies "not lawfully made under this title" could plausibly be read as limited to copies "unlawfully made subject to Title 17"—*i.e.*, copies made in the United States in violation of Title 17. So construed, Section 110(1) would not impose any potential liability for the educational use of copies produced abroad.

3. Petitioner also contends (Br. 18-20) that, if Congress had intended the application of Section 109(a) to depend in part on the location of manufacture, it would have expressed that intent directly, as it did in other provisions of Title 17. But it is equally true that, if Congress had intended Section 109(a)'s coverage to turn on whether a copy's creation would have complied with Ti-

tle 17 *if* Title 17 applied, it could have used the same counterfactual formulation that it used in Section 602(a)(2) and (b). See p. 22, *supra*. A recognition that Congress could more clearly have indicated which of the two competing constructions it intended is the beginning rather than the end of the interpretive process.

D. Petitioner's Policy Arguments Do Not Support Its Reading Of Section 109(a)

Petitioner and its amici contend that the court of appeals' decision will mark the end of secondary markets, lead to higher unemployment, and encourage companies to move manufacturing overseas. Those concerns provide no sound reason to adopt the construction of Section 109(a) advocated by petitioner.[4]

1. Some of the potential adverse policy effects that petitioner identifies are a direct and inherent consequence of Congress's decision in 1976 to expand Section 602 's ban on unauthorized importation beyond piratical copies. Petitioner and its amici argue that the court of appeals' interpretation will impede secondary markets, and that such markets benefit consumers by increasing competition and lowering consumer costs. See, *e.g.*, Pet.

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[4] As petitioner observes (Br. 8-9), the watches at issue in this case are quite different from the typical copyrighted work. In order to exploit the importation protections of the copyright laws, respondent has affixed a tiny copyrighted logo—less than one half-centimeter in diameter, *id.* at 8—to its luxury wristwatches. Petitioner does not contend, however, that the atypical character of the copyrighted works at issue here is relevant to the proper application of Section 109(a). Cf. *Quality King*, 523 U.S. at 140 (explaining that, "[a]lthough the labels" at issue in that case "ha[d] only a limited creative component, [the Court's] interpretation of the relevant statutory provisions would apply equally to a case involving more familiar copyrighted materials such as sound recordings or books").

Br. 46-47, 51. Section 602(a)(1), however, reflects a clear congressional determination that the benefits of allowing international market segmentation in copyrighted goods outweigh those disadvantages. See pp. 8-11, *supra*.[5] And while the Court in *Quality King* construed Section 109(a) as a limitation on Section 602(a)(1), the Court also held that Section 109(a) does not encompass copies lawfully made under the law of another country. Any impediment to the formation of secondary markets in foreign-made copies is simply a corollary to that holding.

In addition, some of the policy concerns raised by petitioner and its amici are equally implicated by petitioner's own construction of Section 109(a). For example, petitioner argues (Br. 12, 50-51) that "retailers and consumers will be hesitant to buy or sell" imported products "for fear of unintended liability for infringement," because they cannot "always know the provenance of lawfully made goods first sold abroad and imported for sale in the United States." As explained above, however, petitioner's own theory, which distinguishes between copies made abroad with the United States copyright owner's authorization and those made abroad by an "unrelated foreign copyright holder," would cause Section 109(a)'s coverage to turn on fine details of the relationships between the copyright owner and his delegees. See pp. 19-20, *supra*. There is no rea-

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[5] For example, book publishers have sometimes offered cheaper editions of their works in other (particularly undeveloped) countries, but their willingness to continue that practice might be reduced if the foreign editions could be imported into this country to compete with the higher-priced United States edition. Cf. *John Wiley & Sons, Inc.* v. *Kirtsaeng*, No. 08-CV-7834 (DCP), 2009 WL 3364037, at *8 & n.23 (S.D.N.Y. Oct. 19, 2009).

son to suppose that a downstream retailer or consumer will be more able to ascertain those details than to determine where the relevant copies were manufactured.

2. Taken together, the decision below and this Court's ruling in *Quality King* create the anomalous result that a copyright holder can produce copies for distribution abroad, while exercising its statutory right to bar unauthorized importation of the copies into the United States, *only* by producing the relevant copies in a foreign country. That differential treatment of domestic-and foreign-manufactured goods has no evident policy justification, and it could at least in theory provide an artificial incentive for outsourcing. That anomaly, however, is not a sufficient reason to construe Section 109(a) as effectively nullifying Congress's clear policy choice (see 17 U.S.C. 602(a)(1)) that market segmentation be permitted. Congress of course remains free to amend the Copyright Act in order to adjust the balance between protection of copyright holders' prerogatives and advancement of other policy objectives.

3. Petitioner argues that, if Section 109(a) does not apply to copies made outside the United States, a copyright owner who authorized the importation of such copies and sold them within this country could continue to exercise control over the manner in which the goods are resold. See Br. 12, 46-54; Pet. App. 15a-16a (court of appeals suggests that "[a] U.S. copyright owner * * * could seemingly exercise distribution rights after even the tenth sale in the United States of a watch lawfully made in Switzerland"). That speculation, which has nothing to do with the facts of this case, provides no sound basis for construing Section 109(a) to encompass foreign-made copies.

a. As petitioner recognizes (Br. 52), prior Ninth Circuit decisions have held that, even when copies are manufactured abroad, a copyright owner who authorizes their sale within the United States has no authority to control their further distribution. Although petitioner contends (*ibid.*) that this approach "has no textual basis," the relevant Copyright Act provisions taken together may reasonably be read to support that result, even if Section 109(a) is limited to copies made in the United States.

The Court in *Bobbs-Merrill* held that a copyright owner's exclusive right to "vend" the copyrighted work did not include a right to dictate the terms on which the goods would be resold. 210 U.S. at 349-351; see *Quality King*, 523 U.S. at 140-141 & n.5 (discussing *Bobbs-Merrill*). The corresponding right under the current Copyright Act is the exclusive right to "distribute" copies of the copyrighted work. 17 U.S.C. 106(3); see *Quality King*, 523 U.S. at 142. And under Section 602(a)(1), unauthorized importation is "an infringement of the exclusive right to distribute copies or phonorecords under section 106."

If Congress had never enacted Section 109(a) or its statutory predecessors, a straightforward application of *Bobbs-Merrill* would indicate that a copyright owner who authorized the importation of foreign-made copies into the United States, and/or authorized a first sale of the goods within this country, had "exhausted his exclusive statutory right to control [the goods'] distribution." *Quality King*, 523 U.S. at 152. To hold that a copyright owner who authorizes the importation or first domestic sale of foreign-made copyrighted goods continues to possess exclusive distribution rights under Section 106(3), it would not be sufficient for a court simply to

conclude that Section 109(a) is limited to copies made in the United States. Rather, the court would be required to conclude in addition that, by codifying the first sale doctrine in a way that does not encompass foreign-made copies, Congress implicitly *expanded* the copyright owner's exclusive right to "vend" or "distribute" those copies. There is no evident reason to draw that inference. See *ibid.* ("There is no reason to assume that Congress intended either [Section] 109(a) or the earlier codifications of the doctrine to limit its broad scope.").

Thus, in the hypothetical circumstances that petitioner describes, application of the first sale doctrine as a limiting construction of the term "distribute" in Section 106(3) would be consistent with the current text of the Copyright Act and faithful to the doctrine's historical underpinnings. In the actual circumstances of this case, by contrast, acceptance of petitioner's position would represent a significant expansion of the first sale doctrine. With respect to the copies at issue here, respondent has never exercised *any* of the exclusive rights conferred by the Copyright Act, since the Act does not apply outside the United States and both the manufacture and the authorized first sale of the watches occurred abroad. Treating the sale in Switzerland as exhausting respondent's Copyright Act rights would also disserve Congress's intent to address unauthorized importation by downstream wholesalers and jobbers (see pp. 9-10, *supra*)—entities that would ordinarily acquire ownership of copyrighted works only after an authorized first sale had taken place.[6]

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[6] To be sure, the Court in *Quality King* construed Section 109(a) to encompass at least some copyrighted goods whose first sale occurred aborad. See 523 U.S. at 145 n.14. In *Quality King*, however, Section 109(a) unambiguously covered the relevant copies, which were made in

b. Petitioner and its amici cite no case in which a copyright owner has sought to extract royalties for foreign-made copies of a copyrighted work at multiple stages of an otherwise lawful distribution chain within the United States. The apparent absence of such real-world examples is particularly significant because Section 109(a) has for the past 25 years been understood not to encompass foreign-made copies. See Resp. Br. 45-46. Even if the Copyright Act were read to confer on the copyright owner a continuing right to control distribution of copies made abroad, there are a number of reasons, both legal and practical, why the downstream effects petitioner hypothesizes are unlikely to materialize.

If, for example, a foreign-made copy is imported into the United States with the copyright owner's permission, the copyright owner presumably will be deemed to have granted downstream retailers an implied, nonexclusive license to distribute. Cf. *Disenos Artisticos E Industriales, S.A.* v. *Costco Wholesale Corp.*, 97 F.3d 377, 382 (9th Cir. 1996) (explaining that "sales without restriction on export into the United States" give rise to implied license to import and preclude liability under Section 602(a)(1), which requires importation "without the authority of the owner"); 17 U.S.C. 106(3) ("owner of

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the United States; L'anza had exercised its exclusive right to "reproduce the copyrighted work," 17 U.S.C. 106(1), since the labels at issue were manufactured in this country; and the Court's decision allowed Section 602(a)(1) to have practical effect in a substantial range of cases (*i.e.*, those involving copies lawfully made under the laws of other countries). Here, by contrast, respondent has exercised none of its exclusive Copyright Act rights with respect to the relevant copies; Section 109(a) read in isolation is ambiguous as applied to copies made in Switzerland by the United States copyright owner; and acceptance of petitioner's theory would essentially negate Congress's decision to expand Section 602 beyond piratical copies.

copyright under this title has the exclusive rights to do and to *authorize* * * * distribut[ion of] copies or phonorecords of the copyrighted work to the public") (emphasis added). And downstream domestic distributors are often the copyright owner's own customers, making it unlikely that the copyright owner will sue for infringement. Additionally, default rules of commercial law may provide protection in the form of indemnification against defective title and third-party copyright infringement claims in the sale of goods. See, *e.g.*, U.C.C. § 2-312 (2005) (implied warranty of title and implied warranty against infringement). Thus, even apart from the first sale doctrine, downstream retailers have a variety of means to avoid infringement actions based on foreign-made copies that copyright owners have allowed to be introduced into the United States.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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