

# CENTER FOR THE STUDY OF INNOVATIVE FREEDOM

## **Libraries: Prepare to burn foreign books, courtesy copyright law**

by Stephan Kinsella on August 17, 2011

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If you think this headline is hyperbole, read on. You tell me.

### **Erosion of the copyright first-sale doctrine: Omega watches**

In my post [Leveraging IP](#), I discussed a lawsuit from last year where Swiss watchmaker Omega used an arcane twist in copyright law to protect itself from competitive arbitrage. Omega sells its luxury watches at a higher cost in the US than in Paraguay. The difference in prices creates “a tempting arbitrage opportunity in importing Omega watches from Paraguay to the U.S. It is just such watches that Costco bought from a stateside importer, allowing the warehouse store to offer an Omega Seamaster for \$1,299 when the brand preferred them sold in the U.S. for \$1,999.”

Now Omega didn't like this, but couldn't argue that the watches were fakes. They were authentic. No fraud, no trademark infringement.

So Omega made a small globe logo, subject to copyright protection, and put it on the back of the watch. Then they sued Costco for copyright infringement. Now normally one would think this would be prohibited by the copyright law “[First Sale Doctrine](#).” Under that doctrine, when the owner of a copyright sells a copy to a buyer, the buyer is free to resell that particular copy. The seller is said to have “exhausted” his rights in the copyright in the first sale. The buyer cannot make extra copies, but he can re-sell his copy. This is why used book sales do not infringe the author or publisher's copyright.

However, in the Omega case, “[t]he appeals judges decided that, since the first sale of the Omega watches in question happened outside of the U.S., America's first-sale doctrine doesn't apply.” (For an update on that case, see [Supreme Court lets ban on “gray market” imports stand](#).)

As I noted in that post, a [WSJ article](#) commented that this arcane ruling:

could have large implications. ... Constrain the first-sale doctrine and you throw a wrench into the business of used-book stores, garage sales (including the electronic

garage sale that is eBay), and any and every sort of secondhand shop. And yes, even public libraries might find themselves facing the challenge of figuring out which books on the stacks were first sold in the U.S., and which were first sold abroad.

### **The first-sale doctrine and resale of books**

Another recent case gets a step closer to a rule that public libraries can't lend out books purchased overseas, that used books originally purchased overseas can't be re-sold on Amazon or eBay. The case, *John Wiley & Sons Inc. v. Supap Kirtsaeng d/b/a Bluechristine99*, discussed [here](#) and [here](#), was decided on Monday by the Court of Appeals for the Second Circuit. In this case, a foreign grad student, Supap Kirtsaeng, re-sold in the US textbooks printed abroad.

To subsidize his education, Kirtsaeng's family shipped him foreign editions of textbooks printed abroad by Wiley Asia, which he sold on eBay.com at a discount. The textbooks, mostly scientific, had soft covers, thinner paper and lower-quality printing than the more expensive U.S. editions.

Apparently Kirtsaeng made about \$1 million re-selling these books. Now these books were not pirated. *They were authorized copies.* But the publisher did not like this price arbitrage cutting into their geographic price discrimination. They maintained that the books were "intended only for overseas markets." So, they sued for copyright infringement. Of course, "Kirtsaeng argued that the first sale doctrine gave him the right to resell the textbooks," but, naturally, in view of the copyright statute, and recent precedent, the Court of Appeals disagreed, holding, as did the court in the Omega watch case, "that the first sale doctrine does not apply to goods manufactured outside the United States." Thus, the court "upheld a \$600,000 jury verdict against Supap Kirtsaeng for his unauthorized re-sale of books."

Wiley's lawyer "said the company was 'very pleased' with the 2nd Circuit's decision." I bet it was! How presh!

### **The first-sale doctrine and library lending and resale of used foreign books**

Now: as noted above: what about libraries, that own foreign-published books? What about sales of used books that were printed overseas? Is this now to be prohibited? It's hard to see how this is not a real possibility.

Yet another case of how copyright causes censorship (see various examples, e.g. that of the judicial banning of a sequel to J.D. Salinger's *Catcher in the Rye* or a judge ordering buyers of a Harry Potter book not to read it, in [The Patent, Copyright, Trademark, and Trade Secret Horror Files](#)).

For more on the first-sale doctrine, see [Do Libraries Need Permission To Lend Out Ebooks?](#); [Supreme Court lets ban on "gray market" imports stand](#); [Leveraging IP](#); [Why Netflix Won](#).

## **Patent law's exhaustion doctrine, drug reimportation, and free trade**

By the way, a patent law has a rule similar to copyright law's first-sale doctrine, the "exhaustion doctrine," which I discuss in [Leveraging IP](#), [Patent Exhaustion](#), and [Radical Patent Reform Is \*Not\* on the Way](#) esp. [n.5](#). Big pharma have also tried to stop price arbitrage from eroding their own geographical price differentials, as when drug is priced very high in the US (due to patents) but sold cheaper, say, in Canada (partly because of Canadian price controls). This gives rise to arbitrage opportunities, as in the Omega watch case—leading to drugs being imported into the US from Canada and sold at a cheaper price. Unlike in the Omega case and the recent text book copyright case, the patent exhaustion doctrine has not yet been watered down enough to allow the drug companies to claim the resale of the reimported drug infringes patents: the pills were sold legitimately in Canada, and so the patent is not infringed if they are re-sold in the US. However, the FDA still helps out Big Pharma by blocking the reimportation for various made-up reasons such as consumer safety, etc. The pharma companies have succeeded in blocking legislative attempts (e.g., H.R. 2427, in 2003) to force the FDA to allow such drug reimportation. And sadly, the support of patents even by some libertarians has led them to oppose reimportation—that is, to oppose free trade—e.g., Cato's Doug Bandow, Richard Epstein, and Michael Kraus. (See [Ideas Are Free: The Case Against Intellectual Property](#); [Pilon on Patents](#); [Drug Reimportation](#); [Cato on Drug Reimportation](#); and [Patents, Prescription Drugs, and Price Controls](#).)

Libertarians and free marketeers must support property rights in purchased items, whether it be drugs, books, or ebooks; we must support the right to resell, or even reimport, one's own property; and we must oppose patent and copyright.