

**Supreme Court First Sale Doctrine case**

All eyes are on the U.S. Supreme Court this fall with arguments scheduled to begin October 29, 2012, in the case of *Kirtsaeng v. John Wiley & Sons*. At the heart of the case is the first sale doctrine, which is also at the heart of what allows libraries to do what they do—lend books and other materials to the public.

The issue before the court is so critical to libraries that the Library Copyright Alliance (LCA)—comprised of ACRL, ALA, and the Association of Research Libraries—filed an *amicus curiae*, or friend of the court brief, with the Supreme Court in support of the petitioner Supap Kirtsaeng (available at [www.librarycopyrightalliance.org/bm~doc/lca-kirtsaeng-brief-3july2012.pdf](http://www.librarycopyrightalliance.org/bm~doc/lca-kirtsaeng-brief-3july2012.pdf)).

To summarize the case, the publisher Wiley claims that Kirtsaeng infringed their copyrights by reselling foreign editions of Wiley textbooks at a cheaper price in the United States, even though Kirtsaeng's family lawfully purchased the textbooks abroad. At issue is the first sale doctrine, which is the provision of U.S. Copyright Act that allows any purchaser of a legal copy of a book or other copyrighted work to sell or lend that copy.

However, the U.S. Court of Appeals for the Second Circuit ruled that the first sale doctrine applies only to copies manufactured in the United States. This arguably odd interpretation effectively strips libraries of their first sale rights to lend copies of books and materials manufactured abroad.

As the LCA's brief explains, this case concerns the meaning of the phrase "lawfully made under this title" in Section 109(a). The

Second Circuit ruled that "lawfully made under this title" means lawfully manufactured in the United States. In other words, how this Court interprets the phrase "lawfully made under this title" could determine the extent to which libraries can continue to perform their historic function of lending books and materials to the public.

LCA believes that an adverse decision in this case by the Supreme Court (i.e., upholding the Second Circuit Court of Appeals decision) could affect libraries' right to lend books and other materials manufactured abroad.

Also, this is not the first time the Supreme Court has taken up the issue of the first sale doctrine. LCA filed a brief in 2010 with the Supreme Court in *Costco v. Omega*, a case involving the importation of luxury watches with copyrighted logos (available at [www.librarycopyrightalliance.org/bm~doc/lca-costco-amicus.pdf](http://www.librarycopyrightalliance.org/bm~doc/lca-costco-amicus.pdf)).

Ultimately, the Court was deadlocked 4-4, leaving the issue unresolved. Justice Elena Kagan recused herself from the case due to her participation in the lower court when she was Solicitor General. However, Kagan will participate in the Kirtsaeng case.

In conclusion, a Supreme Court decision in the case of *Wiley v. Kirtsaeng* is not anticipated until sometime in the New Year—likely not long after the 113th Congress convenes in January 2013.

While the outcome of the case is unknown, it is becoming increasingly clear that the potential for legislative activity addressing the first sale doctrine is likely. With libraries' ability to lend in the balance, LCA members will continue to monitor the potential for legislation and work to uphold and protect our libraries' ability to lend materials no matter where they were manufactured. *rw*

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