

University of Massachusetts Amherst

From the Selected Works of Laura Quilter

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Handicapping Kirtsaeng

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Available at: https://works.bepress.com/laura_quilter/24/



Handicapping *Kirtsaeng*

Laura Quilter
January 26, 2013
ALA Midwinter 2013 :
Washington Office Breakout Session

Supap Kirtsaeng wins -- Yaay!

- LCA intervened on Kirtsaeng's side -- so we're happy if he gets a straight-up win.
- I give it 30% chance
 - plausible statutory interpretation, + no clear Congressional intent otherwise, + awful policy consequences. Breyer.

What happens?

- First sale is protected--*status quo*.
- Publishers/MPAA/RIAA run to Congress
 - I am optimistic we can hold them off from hurting first sale, generally, although they may be able to get some sort of expanded import rules.

Plausible statutory interpretation:

(1) multiple uses of "lawfully made" throughout statute, so it makes sense to have one meaning for all -- and in other places it pretty clearly means "lawfully made" as in not piratical.

(2) Section 104 when implemented

(3) Good argument that 602 is subordinate to 109 -- not independent of or better than 106 "exclusive rights", and therefore subordinate to all the same exclusions that 106 is subject to (such as 109 and 107).

Wiley wins -- Uh-Oh

- Sinking feeling on part of libraries, consumers, non-content businesses.
- I give it 10% chance
 - Ginsburg: Concerned about implementing principle of "universal exhaustion" that no other countries have established.

What happens?

- First sale is significantly damaged -- litigation ensues, new licensing regimes.
- Libraries, consumers, resellers => Congress.

Mixed result -- Uh-Oh

- Sinking feeling on part of libraries, consumers, non-content businesses.
- I give it 60% chance
 - Solicitor General's proposed *Bobbs-Merrill* save
 - something good but w/ ambiguous threats
 - something bad w/ ambiguous positive hints
 - some new rule

What happens?

- First sale is significantly damaged -- litigation ensues, new licensing regimes.
- Libraries, consumers, resellers => Congress.

Mixed result -- *Ambiguity*

- Supreme Court often likes to find against one party but craft a new rule that is ultimately a win for the other party -- splitting the baby.
- Carve-outs create new litigation.

Mixed result -- *Bobbs-Merrill*

- Solicitor General proposing *B-M*, the common law case on "first sale": Wiley should win because s.109 is subordinate to s.602, BUT s.109 is not all of first sale
- No chance.
 - When pushed: Solicitor General's admitted that parade of horrors if Wiley wins is worse than if Kirtsaeng wins.

outcomes : legislation

- running to Congress
 - Owners Right Initiative (ORI)
 - libraries (ALA, AALL, ARL)
 - *ALA First Sale Resolution being drafted now*
 - retailers (Costco, Overstock.com)
 - user 2d hand (Goodwill, eBay, Etsy, Powell's)
 - lenders (Redbox, Chegg (textbooks))
 - tech (CCIA)
 - proposing a simple fix : "lawfully made UNDER THIS TITLE" => "lawfully made"
 - Content industries: publishers, MPAA, RIAA
- outlook? *hard & time-consuming.*

outcomes : litigation

- while legislation is pending ... litigation

Yes, it will really happen, notwithstanding:

- they won't sue! (hollow laughter)
- "implied license" theory
- copyright misuse to cover "incidental" copyright (watch faces, shampoo bottles)
- library-specific carve-outs
- fair use? (Breyer: "oh, fair use")

"They won't sue" - Yes, they will. Exhibit A Georgia State University; Exhibit B UCLA; Exhibit C HathiTrust. Exhibits D ad infinitum on suing for incidental or minor copyrights: Garage door openers, printer cartridges, watch faces, shampoo bottles.

Implied license theory - Only applicable to library-oriented businesses or library-aware sellers, and still doesn't fix downstream transfers (donations).

Copyright misuse. A very promising doctrine and we wish it would be stronger, but it's just not there yet.

Library-specific carve-outs. Hard to see how we could get something big enough that would actually solve real problems; and hard to see how it would be justified beyond what we already have.

fair use. Maybe, but this is a new direction, and a pretty big build-out for fair use.

outcomes : litigation

- while legislation is pending ... litigation
- who will be targeted (or chilled)?
 - museum & art gallery displays
 - libraries - foreign works; ambiguous works
 - second-hand markets: Goodwill, garage sales, library booksales
- licensing solutions
 - library lending rights from foreign rightsholders - the "alien reigme"
- incidental & mixed copyright works
- unintended effects : outsourcing