

Right to Resell, Lend or Trade Foreign Made Goods Online at Risk

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Internet users by the millions have embraced the ability to use Craigslist, eBay, and similar tools to buy, sell, and "freecycle" all kinds of stuff. But the Supreme Court is considering a case that could greatly erode that ability and undermine the burgeoning secondary markets that the Internet has enabled.

This week, CDT joined a [legal brief](#) [1] with eBay, Google, NetCoalition and other Internet industry groups seeking to overturn a wrong-headed Second Circuit decision that would enable copyright owners to control downstream distribution of any copyrighted items manufactured overseas. In addition, a [citizens' petition](#) [2] urging the Administration to support ownership rights and secondary markets is collecting signatures from the public.

The case is [Kirtsaeng v. Wiley](#) [3], and it concerns the reach of the ["first sale" doctrine](#) [4] of U.S. [copyright law](#) [5].

The first sale doctrine is simply the principle that once you buy a copy of a copyrighted work, you own that copy. You can re-sell, lend, or give it away as you please. As the Supreme Court has put it (in *Bobbs-Merrill Co. v. Straus*), "[O]ne who has sold a copyrighted article, without restriction, has parted with all right to control the sale of it." Copyright owners have an exclusive right to distribute their copyrighted goods, but they only get one bite at the apple; that right is exhausted after the first sale of the work. They cannot control later "downstream" sales of goods, such as yard sales or online auctions.

Kirtsaeng v. Wiley centers on the actions of Kirtsaeng, a Thai graduate student attending the University of Southern California, who lawfully bought copyrighted textbooks in Thailand, brought them to the U.S. and resold them on websites such as eBay. Publisher John Wiley & Sons, Inc. owned the copyright on eight of those textbooks. Wiley sued, alleging violations of its exclusive rights of importation and distribution. Kirtsaeng raised the doctrine of first sale in defense, claiming that his lawful purchase barred copyright liability.

Wiley won the case with the Second Circuit ruling that the first sale doctrine only applies to goods manufactured in the United States. That decision, if it stands, would allow copyright owners to indefinitely control the distribution of foreign made goods. Your used records? Can't resell them if they were made in China. Old toys? Can't donate them if they were made in Malaysia. (Toys [often include copyrighted](#) [6] music or logos.) U.K. edition of Harry Potter? You get the idea. With so many goods manufactured overseas, the Second Circuit's decision puts a huge burden on everything from the local weekend flea market to websites like Craigslist or eBay.

Libraries could also be hit hard. Libraries rely heavily on the first sale doctrine to lend books to the public. Under the Second Circuit's ruling, books manufactured overseas could not be lent without the consent of the copyright holder. Such a result would disproportionately affect individuals who read or speak foreign languages, as foreign-language products are more likely to be manufactured overseas.

Charitable giving could also be curtailed. For example, each winter the Marine Toys for Tots Foundation collects and redistributes donated toys to disadvantaged children. Under the Second Circuit's ruling that time honored tradition of giving could lead to copyright liability if toys or toy packaging were made outside of the U.S. and contained copyrighted elements.

But the impact for Internet-based commerce could be particularly serious. The Internet has created unprecedented resale markets on global basis, giving millions the opportunity to build small businesses. Obscure curios and vintage swag, previously unmarketable, can now be bought and sold in thriving online markets. Without the first sale doctrine, large segments of those are markets are

dead.

Given how many goods today are manufactured overseas, a legal rule that excluded foreign-made goods from the first sale doctrine would deal a huge blow to the online secondary markets. The Second Circuit's decision should be overturned.

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- [first sale doctrine](#)
- [copyright](#)

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