

## QUALITY KING DISTRIBUTORS, INC. V. L'ANZA RESEARCH INTERNATIONAL

By Christopher Morris

In *Quality King Distributors, Inc v. L'anza Research International, Inc.*,<sup>1</sup> shampoo, conditioner, and hair gel took center stage as the Court ruled on whether the 'first sale' doctrine of 17 U.S.C. § 109 provided a defense to the unauthorized importation of copyrighted goods.<sup>2</sup> Specifically at issue was whether section 109<sup>3</sup> of the Copyright Act limits section 602(a),<sup>4</sup> or whether the rights granted by section 602(a) are independent of

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1. \_\_ U.S. \_\_, 118 S. Ct. 1125 (1998).
  2. The first sale doctrine of 17 U.S.C. § 109(a) provides:
    - (a) Notwithstanding 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) (1995).
3. See *supra* note 2.
  4. The relevant portion of 17 U.S.C. § 602(a) provides that
    - (a) Importation 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 is an infringement of the exclusive right to distribute copies or phonorecords under section 106, actionable under section 501. This subsection does not apply to--
      - (1) importation of copies or phonorecords under the authority or for the use of the Government of the United States or of any State or political subdivision of a State, but not including copies or phonorecords for use in schools, or copies of any audiovisual work imported for purposes other than archival use; (2) importation, for the private use of the importer and not for distribution, by any person with respect to no more than one copy or phonorecord of any one work at any one time, or by any person arriving from outside the United States with respect to copies or phonorecords forming part of such person's personal baggage; or (3) importation by or for an organization operated for scholarly, educational, or religious purposes and not for private gain, with respect to no more than one copy of an audiovisual work solely for its archival purposes, and no more than five copies or phonorecords of any other work for its library lending or archival purposes, unless the importation of such copies or phonorecords is part of an activity consisting of systematic reproduction or distribution, engaged in by such organization in violation of the provisions of section 108(g)(2).
- 17 U.S.C. § 602(a) (1995).

section 106.<sup>5</sup> Section 106 provides that the owner of a copyright shall enjoy certain rights, one of which is power over distribution. While generally these rights are exclusive, the Copyright Act does subject them to limitations. One of the most important is the 'first sale' doctrine. First sale means that once an initial sale has taken place, the copyright owner loses the ability to control subsequent transfers of ownership. Another portion of the Copyright Act, section 602, deals with importation of copyrighted items. This section makes it illegal to import works without the copyright owner's permission. Prior to *Quality King*, it was unclear whether section 602 applied after a first sale had taken place.

In a unanimous decision, the Court ruled that the first sale doctrine does provide a defense to a claim of infringement arising in connection with unauthorized importation of goods.<sup>6</sup> In so holding, the Court resolved a split between the Ninth and Second Circuits on this issue. The Court also answered the important question of whether gray market imports of copyrighted material was permissible.<sup>7</sup> In finding that such imports were legal,

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5. The relevant portion of 17 U.S.C. § 106 provides that Subject to sections 107 through 120, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106 (1995).

6. See *Quality King*, 118 S. Ct. at 1134.

7. The gray market has been described in several different ways and has generally come to refer to the situation in which goods, bearing an authorized trademark or embodying an authorized copy of copyrighted material, and intended for sale outside the United States, have instead entered the country without the consent of the trademark or copyright owner. See, e.g., Donna Hintz, *Battling Gray Market Goods with Copyright Law*, 57 ALB. L. REV. 1187 (1994); Christopher Mohr, *Gray Market Goods and Copyright Law: An End Run Around K Mart v. Cartier*, 45 CATH. U. L. REV. 561, 561 (1996).

Gray market goods are not counterfeits, but rather are genuine products, distinguishable from the U.S version only in the sense that that they were intended for sale abroad. The reintroduction generally comes about when third parties purchase the products from an authorized or unauthorized foreign distributor. Upon re-entry into the United

the Court dealt a serious blow to gray market opponents. As a result of the *Quality King* decision, there is now no legal remedy by which the copyright owner can prevent the unauthorized U.S. importation of her products once the initial sale has occurred.<sup>8</sup>

## I. CASE HISTORY

### A. Background Facts

The respondent in *Quality King*, L'anza Research International ("L'anza"), is a California based corporation engaged in the business of manufacturing and selling hair care items.<sup>9</sup> The labels affixed to these products were copyrighted. In the United States, L'anza sold exclusively through a network of authorized distributors, consisting entirely of professional beauty and barber salons and colleges.<sup>10</sup> As a condition of the right to sell L'anza products, these distributors agreed to market the wares only within a certain limited geographical area and only through "authorized channels." L'anza claimed that it "ha[d] advertised extensively in the United States market to create and maintain a reputation for selling exclusive high quality products which [were] only available through the authorized channels of distribution."<sup>11</sup>

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States, the imported items compete directly in the market with the trademark holder's authorized goods. *See, e.g.*, Mohr, at 561; Hintz, at 1188.

There is a substantial body of literature on the subject. *See generally* Daniel De Vito & Benjamin Marks, *Preventing Gray Market Imports After Quality King Distributors, Inc. v. L'anza Research International Inc.*, 10 N.O. 5 J. PROPRIETY RTS. 2 (1998); Shashank Upadhye, *Rewriting the Lanham Act to Prohibit the Importation of All Gray Market Goods*, 20 SETON HALL LEGIS. J. 59 (1996); Paul Lansing & Joseph Gabriella, *Clarifying Gray Market Gray Areas*, 31 AM. BUS. L.J. 313, 314 (1993); Gilbert Lee Sandler, *Gray Market Goods: The Controversy Will Continue*, 13 BROOK. J. INT'L L. 267 (1987).

8. *See* Johnson & Johnson Products Inc. v. DAL Int'l Trading Co., 798 F.2d 633 (1st Cir. 1992) (holding that the U.C.C. does not require the purchaser of goods to investigate the title of the seller); K Mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988) (upholding Customs Service interpretation of the Tariff Act which allows the importation of trademark goods so long as they were manufactured by the trademark owner or affiliate); Olympus Corp. v. United States, 792 F.2d 315 (2d Cir. 1986) (holding that Section 42 of Lanham Act does not bar importation of trademarked items as long as goods are genuine).

9. *See* *Quality King Distributors, Inc. v. L'anza Research International*, \_\_\_ U.S. \_\_\_, 118 S. Ct. 1125, 1127 (1998).

10. *See id.*

11. *See* Brief for Respondent at 5, *Quality King Distrib., Inc. v. L'anza Research Int'l, Inc.*, 118 S. Ct. 1125 (1998) (No. 96-1470).

L'anza also maintained a distribution system to market its products abroad. Sales outside of the United States were discounted in price and were also made through distributors limited to certain geographical territories.<sup>12</sup> The goods at the center of the *Quality King* dispute were originally intended for foreign sale under this type of arrangement. After the initial export, they passed through several intermediaries and eventually ended up with a British company, L. Intertrade, for distribution in Malta.<sup>13</sup> Somehow a portion of the L'anza shipment was acquired from L. Intertrade by Priva Corporation, a United States company located in California. Priva then sold those goods to the Petitioner, Quality King Distributors ("Quality King"), Inc., a discount wholesaler based in Ronkonkoma, New York.

After acquiring the L'anza products, Quality King sold them to various discount retail drug stores. In January 1994, L'anza copyrighted the labels on at least some of those products.<sup>14</sup> According to L'anza, it was one month later, in February of 1994, that they discovered the unauthorized sales.<sup>15</sup>

## B. Procedural History

On February 7, 1994, L'anza filed a complaint against Quality King in the Central District of California. The suit charged that Quality King had violated its "exclusive rights under 17 U.S.C. §§ 106, 501, and 602(a) [of the Copyright Act] to reproduce and distribute copyrighted material in the United States."<sup>16</sup> Quality King filed a response in which it asserted that its

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12. See *Quality King*, 118 S. Ct. at 1127. The goods in question were manufactured by L'anza itself in the United States. L'anza maintains that the discount is "a reflection of the fact that the company's advertising focuses on the United States, and that through its advertising and promotional activities in the United States, L'anza has already established a high quality distribution network in the United States." See Brief for Respondent at 6, *Quality King Distrib., Inc. v. L'anza Research Int'l, Inc.*, 118 S. Ct. 1125 (1998) (No. 96-1470).

13. It is not clear whether or not the goods actually arrived in Malta. The most that can be said is that somehow, the L'anza products made their way back into the United States. According to L'anza, the transaction with L. Intertrade included a contract to limit sales to Malta. However, subsequent sales of the goods did not contain copies of this agreement. The upshot of this is that the petitioner was not put on notice that the goods were not to be re-imported into the United States. See Brief for Petitioner at 4, *Quality King Distrib., Inc. v. L'anza Research Int'l, Inc.*, 118 S. Ct. 1125 (1998) (No. 96-1470).

14. See *L'anza Research Int'l, Inc. v. Quality King Distrib., Inc.*, 1995 WL 908331 (C.D.Cal. 1995) (District Court Order).

15. See Brief for Respondent at 6, *Quality King Distrib., Inc. v. L'anza Research Int'l, Inc.*, 118 S. Ct. 1125 (1998) (No. 96-1470).

16. See *id.* at 32(a). (Respondent's First Amended Complaint).

actions were protected by 17 U.S.C. § 109(a), the “first sale” doctrine, which allows the buyer of a product to “sell or otherwise dispose of” the item(s) purchased.<sup>17</sup> L’anza moved for summary judgment on the issue of whether the first sale principle provided a defense to Quality King’s actions.<sup>18</sup> The court granted the motion, reasoning that section 602 of the Copyright Act was intended to protect not only pirated items, but legally produced products imported into the United States without the permission of the manufacturer.<sup>19</sup> Based on this logic, the court found that the first sale doctrine did not extinguish the copyright owner’s right to prohibit unauthorized importation of copies.<sup>20</sup>

The decision was subsequently appealed by Quality King. The Ninth Circuit affirmed the ruling and held that “section 602(a) would be rendered meaningless if section 109(a) were found to supersede the prohibition on importation.”<sup>21</sup> In doing so, the court specifically rejected a contrary decision of the Third Circuit, *Sebastian Int’l Inc. v. Consumer Contacts Ltd.*<sup>22</sup>

## II. A SPLIT BETWEEN CIRCUITS

### A. Ninth Circuit Rule

Section 106(3) of the Copyright Act grants to the owner of a copyright the exclusive right to distribute that work or product.<sup>23</sup> This right, however, is subject to certain limitations, among them 17 U.S.C. § 109(a), which holds that: “(a) Notwithstanding 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.”<sup>24</sup> This ‘first sale’ provision allows

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17. See Brief for Petitioner at 44a, *Quality King Distrib., Inc. v. L’anza Research Int’l, Inc.*, 118 S. Ct. 1125 (1998) (No. 96-1470) (Petitioner’s Answer to First Amended Complaint).

18. See *L’anza Research Int’l, Inc. v. Quality King Distrib., Inc.*, 1995 WL 908331 (C.D.Cal. 1995) (District Court Order).

19. See *id.* at \*3.

20. The court also entered a permanent injunction which prevented Quality King from ever importing or selling specified L’anza products. See *id.* at \*2.

21. See *L’anza Research Int’l, Inc. v. Quality King Distrib.*, 98 F.3d 1109, 1114 (9th Cir. 1996).

22. 847 F.2d 1093 (3d Cir. 1988).

23. See 17 U.S.C. § 106 (1995).

24. 17 U.S.C. § 109(a) (1995).

that once a copyrighted item has been lawfully purchased, the buyer may sell or dispose of the product as he or she desires.

The Ninth Circuit, in *L'anza Research International, Inc. v. Quality King Distributors, Inc.*,<sup>25</sup> was faced with whether section 109 limits section 602(a), or whether the rights granted by section 602(a) are independent of section 106. The Ninth Circuit came to the conclusion that the latter was the more correct interpretation and that the first sale doctrine was inapplicable to situations in which goods were imported into the United States without the copyright holder's permission.<sup>26</sup> In doing so, the court explicitly rejected the district court's finding that the L'anza sale had occurred outside the United States and thus not under the 'title' of section 106.<sup>27</sup> Instead, the appeals court affirmed the lower court decision based upon the belief that, "section 602(a) would be rendered meaningless if section 109(a) were found to supersede the prohibition on importation in this case."<sup>28</sup> The court reasoned that:

[j]ust as in the example offered by [*Parfums Givenchy, Inc. v. C & C Beauty Sales, Inc.*],<sup>29</sup> the unauthorized importation of these goods undercuts L'anza's ability to receive the full value for L'anza products sold in the United States through authorized channels, notwithstanding the fact that the imported products were manufactured in the United States and sold by L'anza. As a result, it would contradict the congressional intent underlying §§ 106(3), 109(a) and 602(a) if we were to hold that § 109(a) barred liability under § 602(a) in this case.<sup>30</sup>

In support of this, the court found the legislative history to suggest that section 602 was not intended to be limited in scope by section 109(a)<sup>31</sup> The court was also persuaded by the argument that absent a right to control importation, L'anza would not receive the "full value" of its product.<sup>32</sup> Because imports affect the price and quantity of goods available for sale,

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25. 98 F.3d 1109 (9th Cir. 1996).

26. *See id.* at 1116-17.

27. *See id.* at 1109.

28. *See id.* at 1114.

29. 832 F.Supp. 1378 (C.D. Cal.1993).

30. *See L'anza Research Int'l, Inc. v. Quality King Distrib.*, 98 F.3d 1109, 1114 (9th Cir. 1996).

31. *See id.* at 1115.

32. *See id.*

the Ninth Circuit found that Quality King's actions prevented L'anza from fully realizing the rights granted to a copyright owner under section 106.<sup>33</sup>

### B. Third Circuit Rule

The Ninth Circuit's decision was in direct conflict with the conclusion drawn by the Third Circuit in *Sebastian Int'l, Inc. v. Consumer Contacts*.<sup>34</sup> Sebastian was a manufacturer of hair care items sold exclusively in professional salons. In 1987, Sebastian entered into an oral agreement with the defendant, Consumer Contacts, to distribute their wares to hair care salons in South Africa. The agreement specifically limited the scope of the defendant's marketing to that country. Consumer Contacts received a shipment from Sebastian and, in direct violation of the their understanding, immediately returned the goods to the United States for resale. Sebastian discovered this and brought an action alleging copyright infringement.<sup>35</sup>

The district court held for Sebastian, finding that the copyright holder had a right to control importation of copies regardless of where those copies were made and in spite of the occurrence of a "first sale."<sup>36</sup> The Third Circuit overturned the lower court ruling, finding instead that although, "at first glance, section 602(a)--the importation clause--appears to clash with the first sale doctrine. We conclude, nonetheless, that the two provisions were intended to function interdependently and may be read in harmony with each other."<sup>37</sup> The Third Circuit reasoned that

[n]othing in the wording of section 109(a), its history or philosophy, suggests that the owner of copies who sells them abroad does not receive a 'reward for his work.' Nor does the language of section 602(a) intimate that a copyright owner who elects to sell copies abroad should receive 'a more adequate award' than those who sell domestically. That result would occur if the holder were to receive not only the purchase price, but a right to limit importation as well.<sup>38</sup>

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33. *See id.* at 1116.

34. 847 F.2d 1093 (3d Cir. 1988).

35. *See id.* at 1094.

36. *See Sebastian Int'l. Inc. v. Consumer Contacts Ltd.*, 664 F. Supp. 909, 920 (D.N.J. 1987).

37. *See Sebastian Int'l. Inc. v. Consumer Contacts Ltd.*, 847 F.2d 1093, 1097 (3d Cir. 1988).

38. *See id.* at 1099.

More importantly the court determined that, as a matter of statutory interpretation, the first sale defense applied to goods exported and subsequently re-imported. The court reasoned that, “[s]ection 602(a) does not purport to create a right in addition to those conferred by section 106(3), but states that unauthorized importation is an infringement of “the exclusive [section 106(3)] right to distribute copies.”<sup>39</sup> Because that exclusive right is specifically limited by the first sale provisions of section 109(a), “it necessarily follows that once transfer of ownership has cancelled the distribution right to a copy, the right does not survive so as to be infringed by importation.”<sup>40</sup> In so ruling, the court acknowledged that the real issue was not the Copyright Act, but rather the legal viability of the gray market.<sup>41</sup> The resolution of such a controversy was, in the court’s view, a matter better resolved on its merits by Congress than “by judicial extension of the Copyright Act’s limited monopoly.”<sup>42</sup>

### III. SUPREME COURT DECISION

The Court began its treatment of the legal issues implicated in the dispute by noting that it was confronted with an unusual case in that L’anza was attempting to use copyright law to protect the integrity of its marketing efforts.<sup>43</sup> According to the Court however, this fact had no bearing on the proper interpretation of the relevant statutory provisions.<sup>44</sup> The Court then turned to the text of section 602(a).

The Court noted that the relevant portion of section 602(a) provides that unauthorized importation under that section was an infringement of the exclusive right to distribute copies granted by section 106.<sup>45</sup> The Court further observed that the introductory language of section 106 stated explicitly that the exclusive rights of that section are limited by sections 107 through 120.<sup>46</sup> This includes the first sale doctrine embodied in section 109(a). The Court, consistent with the reasoning offered by the Third Cir-

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39. *See id.*

40. *See id.*

41. *See id.* (“This twist has created the anomalous situation in which the dispute at hand superficially targets a product’s label, but in reality rages over the product itself.”).

42. *See id.*

43. *See Quality King Distrib., Inc. v. L’anza Research Int’l, Inc.*, \_\_ U.S. \_\_, 118 S. Ct. 1125, 1128 (1998). The real significance of the dispute is illustrated by the amicus briefs filed with the Court: Recording Industry of America, Motion Picture Association, Business Software Alliance, Wal-Mart Stores, Target Stores, and National Consumers League, among others.

44. *See id.* at 1134.

45. *See id.* at 1130.

46. *See id.*

cuit, concluded that the literal text of section 602(a) is, "simply inapplicable to both domestic and foreign owners of L'anza's products who decide to import them and resell them in the United States."<sup>47</sup>

L'anza advanced a contrary interpretation and argued that the language of the Copyright Act should be construed to disallow sales of the nature made by Quality King.<sup>48</sup> According to the Court L'anza's brief centered around two main contentions; "(1) that section 602(a), and particularly its three exceptions, are superfluous if limited by the first sale doctrine; and (2) that the text of section 501 defining an "infringer" refers separately to violations of section 106, on the one hand, and to imports in violation of section 602."<sup>49</sup> However, the Court found both of these arguments thoroughly unpersuasive, stating that "neither adequately explained why the words 'under section 106' appear in section 602(a)."<sup>50</sup>

With respect to L'anza's first contention, the Court located several flaws. L'anza's interpretation was based upon the fact that prior to the enactment of section 602(a), other portions of the Copyright Act already prohibited importation of piratical or unauthorized copies.<sup>51</sup> According to this argument, if section 602(a) only prohibited piratical copies, it would be a redundant addition to the Act.<sup>52</sup> The Court found that because "importation" almost always implies that a first sale has taken place, there is no need for section 602(a) in the face of section 602(b).<sup>53</sup> The Court however stated that it is not accurate to characterize the two sections as overlapping completely. Instead, they held that the language of section 602(a) is broader in its scope than other portions of the Copyright Act, and thus a necessary supplement to the coverage afforded by the present laws.

According to the Court, there are three main differences between the two statutes. The first is that section 602(a) is more comprehensive than section 602(b) in that at the very least, it provide a private remedy against

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47. *See id.*

48. *See generally* Brief for Respondent, Quality King Distrib., Inc. v. L'anza Research Int'l, Inc., 118 S. Ct. 1125 (1998) (No. 96-1470).

49. *See* Quality King Distrib., Inc. v. L'anza Research Int'l, Inc., \_\_ U.S. \_\_, 118 S. Ct. 1125, 1131 (1998).

50. *See id.*

51. *See* 17 U.S.C. § 106 (1995); 17 U.S.C. § 107 (1995).

52. *See* Brief for the United States as Amicus Curiae Supporting Respondent, at 16, Quality King Distrib., Inc. v. L'anza Research Int'l, Inc., 118 S. Ct. 1125 (1998) (No. 96-1470); *See* Brief for Respondent at 19-27, Quality King Distrib., Inc. v. L'anza Research Int'l, Inc., 118 S. Ct. 1125 (1998) (No.96-1470). *See also* 17 U.S.C. § 602(b) (1995); 17 U.S.C. § 106 (1995) (prohibiting importation of piratical copies).

53. *See* Quality King Distrib., Inc. v. L'anza Research Int'l, Inc., \_\_ U.S. \_\_, 118 S. Ct. 1125, 1131 (1998).

piratical copies.<sup>54</sup> Second, the Court found that section 109 grants an affirmative right only to the “owner” of a lawfully made copy. Thus it does not provide a defense to a potential section 602(a) action brought against a non-owner “bailee, licensee, consignee, or one whose possession of the copy was lawful.”<sup>55</sup> Finally, the Court states that section 602(a) differs from section 106 because it applies the Copyright Act to copies that are neither piratical nor “lawfully made under this title,” but rather manufactured under the laws of another country.<sup>56</sup> In sum, although the Court found that the first sale doctrine of section 109(a) and the exceptions of section 602(a) are coextensive in certain situations, they also found that there is independent meaning that broadens the scope of section 602(a) beyond that of section 109(a).

In addressing L’anza’s second argument the Court focused on the interrelationship between the language of sections 106, 602 and section 501.<sup>57</sup> The Court found that the language of section 501 is consistent with the interpretation of section 602 as distinct from section 106.<sup>58</sup> The Court reasons that since section 501 contains the words “or who imports ... in violation of section 602” after phrasing that addresses violations of section 106A(a), it suggests that the two were distinct.<sup>59</sup> According to this theory, if Congress had viewed section 602 as dependent upon section 106, a more appropriate phrasing would have been “including one who imports.”<sup>60</sup> Ultimately, the Court rejected this argument stating that other

54. *See id.* See 17 U.S.C. § 602(b) (1995) (vests enforcement of its prohibitions in the Customs Service).

55. *See Quality King*, 118 S. Ct. at 1131.

56. *See id.*

57. *See* 17 U.S.C. § 501 (1995) (providing remedies for infringement of copyright).

58. *See Quality King Distrib., Inc. v. L’anza Research Int’l, Inc.*, \_\_ U.S. \_\_, 118 S. Ct. 1125, 1131 (1998). The relevant section reads:

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a).

17 U.S.C. § 501(a) (1995).

59. *See* Brief for the United States as Amicus Curiae Supporting Respondent at p. 8-9, *Quality King Distrib., Inc. v. L’anza Research Int’l, Inc.*, 118 S. Ct. 1125 (1998) (No. 96-1470) (17 U.S.C. § 106(A) deals with the rights of authors to attribution and integrity. section 106(A) differs in substance from section 106 and was intended to grant to certain authors rights to attribution and integrity).

60. *See Quality King Distrib., Inc. v. L’anza Research Int’l, Inc.*, \_\_ U.S. \_\_, 118 S. Ct. 1125, 1132 (1998).

sections of the Act provide much stronger evidence of congressional intent. Foremost among this was the fact that "section 602(a) unambiguously states that the prohibited importation is an infringement of the exclusive distribution right 'under section 106, actionable under section 502.'"<sup>61</sup> Further, in contrast to the ambiguous reference to section 602, another section of the Copyright Act, section 106(A) explicitly states that it is independent of the "exclusive rights provided in section 106."<sup>62</sup> The Court found that the contrast in the language between section 106(A) and section 602 strongly indicates that only section 106(A), and not section 602, describes a right independent of section 106.<sup>63</sup>

Of even greater importance, in the eyes of the Court, is the fact that the "exclusive rights" provision contained in section 109 are subject to a variety of exceptions besides the first sale doctrine.<sup>64</sup> If section 602 existed independent from section 106, all the defenses available in a copyright action are foreclosed to importers.

Finally, the Court addresses the contention made by the Solicitor General that the act of importation is not a "sale or disposal" of the copy as required by section 109(a).<sup>65</sup> The Court found this argument "unpersuasive."<sup>66</sup> In a typical commercial transaction, the shipper transfers "possession, custody, control and title" to the products. The Court found that an ordinary interpretation of the right to "sell or dispose of the possession" of the item "surely includes the right to ship it to another person in another country."<sup>67</sup> In addition, the Court found the Solicitor General's reading at odds with the general philosophy underlying the first sale doctrine, that being once a copyright owner places a product in the stream of commerce, she exhausts her statutory right to control the distribution.<sup>68</sup>

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61. *See id.*

62. 17 U.S.C. § 106(A) (1995).

63. *See Quality King*, 118 S. Ct. at 1132.

64. *See* 17 U.S.C. §§ 107-120 (1995) (providing affirmative defenses of fair use, performance, academic research, etc.).

65. *See* Brief for the United States as Amicus Curiae Supporting Respondent at 8-15, *Quality King Distrib., Inc. v. L'anza Research Int'l, Inc.*, 118 S. Ct. 1125 (1998) (No. 96-1470).

66. *See Quality King Distrib., Inc. v. L'anza Research Int'l, Inc.*, \_\_ U.S. \_\_, 118 S. Ct. 1125, 1133 (1998).

67. *See id.* at 1134.

68. *See id.*

## IV. DISCUSSION

### A. Statutory Analysis

The Court concluded its statutory analysis of the Copyright Act with the terse observation that “[i]n sum, we are not persuaded by either L’anza’s or the Solicitor General’s textual argument.”<sup>69</sup> This conclusion is, as a matter of statutory interpretation, almost certainly the correct one. In support of the position that section 602(a) provided a remedy against Quality King’s actions, L’anza made arguments under three separate theories: (1) statutory interpretation; (2) legislative history; and (3) public policy.<sup>70</sup> Although L’anza appeared to have attached equal importance to all three, the Court seemed concerned with really only one, that of statutory interpretation.<sup>71</sup> The reason for this is obvious. The language of section 602(a) states clearly that unauthorized importation of copyrighted material is an infringement upon the “exclusive right to distribute copies or phonorecords under section 106.”<sup>72</sup> Any contrary statutory construction must present strong evidence to rebut the presumption that the section should be interpreted on its face.<sup>73</sup> L’anza sought to do this by providing several possible interpretations of the language. L’anza’s contentions, however, really centered on one basic argument.

Sections 602(a)(1), (2) and (3), exempt from violation of the law unauthorized importations of copyrighted materials for use in certain limited situations (such as scholarly, religious or educational pursuits).<sup>74</sup> If, according to L’anza, Congress had really intended for the fair use defense to apply in the context of section 602, then such exceptions would be superfluous.<sup>75</sup> The Court noted three ways in which section 602(a) could be interpreted as being broader than existing statutory provisions. One section 602(a) provides a private remedy to copyright holders not granted in sec-

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69. *See id.*

70. *See generally*, Brief for Respondent at 20-27, *Quality King Distrib., Inc. v. L’anza Research Int’l, Inc.*, 118 S. Ct. 1125 (1998) (No. 96-1470) (explaining the statutory interpretation, legislative history and public policy with regards to section 602(a)).

71. *See Quality King Distrib., Inc. v. L’anza Research Int’l, Inc.*, 118 S. Ct. 1125, 1134 (1998).

72. 17 U.S.C. § 106(a) (1995).

73. *See Sony Corp. of Am. v. Universal City Studios Inc.* 464 U.S. 417, 431 (1984) (“The judiciary’s reluctance to expand the protections afforded by the copyright without explicit legislative guidance is a recurring theme.”)

74. *See supra* note 4. (17 U.S.C. § 602(a) (1995) provides exceptions to the importation prohibition).

75. *See* Brief for Respondent at 20, *Quality King Distrib., Inc. v. L’anza Research Int’l, Inc.*, 118 S. Ct. 1125 (1998) (No. 96-1470).

tion 602(b); two first sale provides no defense to a section 602(a) against a bailee, licensee, consignee, or one whose possession was unlawful; and three section 602 can be applied to copies lawfully made under a foreign title.<sup>76</sup>

Although a case can be made that these extensions are at best, somewhat limited, the possibility of such an interpretation casts sufficient doubt to rebut the argument that section 602(a) is clearly redundant. However, it appears that the defenses available under section 602(a)(1)-(3) are in some ways *less* broad than those traditionally available to alleged infringers. Thus the interpretation urged by L'anza leads to several unusual conclusions. L'anza's interpretation would mean that because sections 107-120 do not apply to section 602, section 602 was the only portion of the copyright law for which there is not a fair use defense. L'anza attempted to defuse this argument by claiming that section 602(a)(1)-(3) provides a defense very similar to the 'fair use' found in section 107.<sup>77</sup> The problem with this claim is that the respective code sections do not exactly track one another, with the effect being that certain activities protected by section 107 are not permitted under section 602(a). Quality King's counsel in oral argument demonstrated this fact when he pointed out that section 602, as interpreted by L'anza, would not permit the importation of a *London Times* book review containing copyrighted excerpts.<sup>78</sup>

The incongruity between section 107 and section 602(a)(1)-(3) did not go unnoticed by L'anza's counsel.<sup>79</sup> However, the lack of a fair use defense is an inevitable conclusion to be drawn from that contention. In fact, other elements of L'anza's argument lead to the inference that this absence is deliberate. The text of section 602(a)(3) contains a specific reference to section 108(g)(2).<sup>80</sup> L'anza claimed that this is an indication that Congress

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76. See text accompanying *supra* notes 51 through 53.

77. See Brief for Respondent at 24-25, *Quality King Distrib., Inc. v. L'anza Research Int'l, Inc.*, 118 S. Ct. 1125 (1998) (No. 96-1470).

78. See United States Supreme Court Official Transcript at \*48, *Quality King Distrib., Inc. v. L'anza Research Int'l, Inc.*, 118 S. Ct. 1125 (1998) (No. 96-1470).

79. See *id.* at \*22.

80. Section 108(g)(2) provides:

(g) The rights of reproduction and distribution under this section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions, but do not extend to cases where the library or archives, or its employee—

(2) engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of material described in subsection (d): Provided, That nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or

did not intend for the provisions of section 602 to be limited by sections 107-120.<sup>81</sup> L'anza reasoned that the inclusion of a reference to section 108(g)(2) demonstrated that if Congress had meant for section 109 to apply to section 602, such an intent would have been explicitly stated.<sup>82</sup> This, according to the brief filed with the Court, suggests that Congress selectively preserved the elements of sections 107-120 that it wished to see embodied in section 602.

L'anza's argument requires the conclusion that Congress wished to base the fair use defense upon where the copyrighted material was acquired. In fact, L'anza's position means that by the explicit reference to section 108(g), Congress did not fail to reference section 107 by oversight, but rather by specific rejection. This theory seems fundamentally at odds with the purpose of limited monopoly granted by the Copyright Act.<sup>83</sup> Although the public has received no benefit, the fact that the material was intended for foreign distribution will give the copyright holder a greater array of legal rights than what is available to the owner of material distributed domestically. Such a conclusion is contrary to the idea that the ultimate aim of copyright law is to "stimulate artistic creativity for the general public good."<sup>84</sup>

In addition, there appears to be a plausible alternative interpretation to the section 108(g) reference. Section 108(g) states that:

importation by or for an organization operated for scholarly, educational, or religious purposes and not for private gain, with respect to no more than one copy of an audiovisual work solely for its archival purposes, and no more than five copies or phonorecords of any other work for its library lending or archival purposes, unless the importation of such copies or phonorecords is part of an activity consisting of systematic reproduction or distribution, engaged in by such organization in violation of the provisions of section 108(g)(2).

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phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.

17 U.S.C. § 108(g)(2) (1995).

81. See Brief for Respondent at 23, *Quality King Distrib., Inc. v. L'anza Research Int'l, Inc.*, 118 S. Ct. 1125 (1998) (No. 96-1470).

82. See *id.*

83. The Court noted this, stating that such an interpretation would create a result counter to the goals of copyright law by inhibiting access to ideas without a corresponding benefit. See *Quality King Distrib., Inc. v. L'anza Research Int'l, Inc.*, \_\_\_ U.S. \_\_\_, 118 S. Ct. 1125, 1133 n.24 (1998).

84. See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). (holding that public playing of radio broadcast was not performance).

Based on this language, it could be argued that the citation to section 108(g) serves the purpose of providing a ready definition of a specific violation, not a substantive limit on the provisions of section 106. Further, it seems that if Congress had really intended section 602(a) as a right distinct from section 106, it would have done more than indicate so by use of a negative inference drawn from a single reference to section 108. To suggest that this reference indicates a congressional intent to abrogate sections 107 through 120 places too much weight on controvertible evidence in derogation of the plain language of the statute.

Moreover, in other portions of the Copyright Act, Congress has been explicit when it has intended a code section to operate independently of section 106. Section 106A states that, “[s]ubject to section 107 and *independent of the exclusive rights provided in section 106*, the author of a work of visual art....”<sup>85</sup> Two points should be noted about this excerpt. First, L’anza’s argument asked the Court to assume that although Congress was able to specifically exempt section 106A from section 106, it was only able to do so by negative inference in section 602. Second, in exempting section 106A from section 106, Congress specifically preserved the fair use defense of section 107. L’anza’s argument suggests that while Congress thought enough of fair use to preserve it in this context, it did not intend to do so if copyrighted material was imported into the United States without authorization.

Several other statutory arguments put forth by the Solicitor General and L’anza are worth addressing briefly. L’anza contended that distribution of the goods outside of the United States did not meet the requirement of section 106, that sale or distribution be “lawfully made under this title.”<sup>86</sup> Plaintiffs in several cases have successfully adopted this argument.<sup>87</sup> However, this position was rejected by the Ninth Circuit and has been criticized by numerous commentators.<sup>88</sup> Possibly for this reason, the Court did not address the issue. Both the Solicitor General and the Respondent’s argued at length that the “sell or otherwise dispose of” lan-

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85. 17 U.S.C. § 106A (1995).

86. See Brief for Petitioner at 27, *Quality King Distrib., Inc. v. L’anza Research Int’l, Inc.*, 118 S. Ct. 1125 (1998) (No. 96-1470).

87. See *e.g.*, *BMG Music v. Perez*, 952 F.2d 318 (9th Cir. 1991); *T.B. Harms Co. v. Jem Records, Inc.*, 655 F.Supp. 1575, 1583 (D.N.J. 1987); *Columbia Broad. Sys., Inc. v. Scorpio Music Distrib., Inc.*, 569 F.Supp. 47, 49 (E.D.Pa. 1983), *aff’d*, 738 F.2d 421 (3d Cir. 1984).

88. See *L’anza Research Int’l, Inc. v. Quality King Distrib., Inc.*, 98 F.3d 1109, 1115 (9th Cir. 1996); See also MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT*, § 8.12(B)(6) at 8-166 (1997); PAUL GOLDSTEIN, 1, *COPYRIGHT* § 5.6.1, at 604 (1989).

guage of section 109(a) did not include the act of importation.<sup>89</sup> The government's theory was that acts of importation and to "sell or dispose" are not coextensive. Because of this importation is not an act covered under section 109 and thus no first sale defense was available to Quality King. The Court held otherwise, finding that absent evidence to the contrary, there was not a basis on which to deduce a desire of Congress to give a narrow scope to the 'first sale' defense.

## B. Legislative History

In addition to its statutory argument, L'anza raised numerous points regarding the legislative history of section 602. Close examination, however, reveals this history to be ambiguous. As the Ninth Circuit noted, the legislative record of the Copyright Act says nothing explicit as to the interaction between sections 602(a) and 109(a).<sup>90</sup> The Ninth Circuit was able to locate evidence Congress intended the two sections to operate independent of one another.<sup>91</sup> However, the evidence relied upon by the Ninth Circuit came from panel discussion statements made by record company executives testifying in favor of section 602.<sup>92</sup> These statements carry little weight in adducing Congressional intent, and in fact, were left out of the official House and Senate reports.

While there is no direct evidence in the legislative history of Congressional intent, there are some possible inferences to be drawn from other portions of the Copyright Act. L'anza made a very promising argument regarding the legislative history of section 501.<sup>93</sup> Specifically, section

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89. See Brief for the United States as Amicus Curiae Supporting Respondent at 8-15, *Quality King Distrib., Inc. v. L'anza Research Int'l, Inc.*, 118 S. Ct. 1125 (1998) (No. 96-1470).

90. See Brief for Respondent at 29, *Quality King Distrib., Inc. v. L'anza Research Int'l, Inc.*, 118 S. Ct. 1125 (1998) (No. 96-1470) (citing *L'anza Research Int'l, Inc. v. Quality King Distrib., Inc.*, 98 F.3d 1109, 1116 (9th Cir. 1996)). See generally H.R. Rep. No. 94-1476 (1976); S. Rep. No. 94-473 (1976). Respondent and petitioner devoted considerable energy to debating the implications of various House and Senate committee reports. None of these reports dealt directly with sections 602 and 109 and thus are of limited persuasive value. See generally Brief for Respondent, *Quality King Distrib., Inc. v. L'anza Research Int'l, Inc.*, 118 S. Ct. 1125 (1998) (No. 96-1470); Brief for Petitioner, *Quality King Distrib., Inc. v. L'anza Research Int'l, Inc.*, 118 S. Ct. 1125 (1998) (No. 96-1470).

91. See *L'anza Research Int'l, Inc. v. Quality King Distrib., Inc.*, 98 F.3d 1109, 1116 (9th Cir. 1996).

92. See *id.*

93. See Brief for Respondent at 19-27, *Quality King Distrib., Inc. v. L'anza Research Int'l, Inc.*, 118 S. Ct. 1125 (1998) (No. 96-1470).

501(a) enumerates what constitutes an infringement of copyright under the code:

“Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author as the case may be.”<sup>94</sup>

L'anza argued that section 501(a) supported the conclusion that sections 602 and 106 should be read independently of one another. Further evidence of this is provided in a quotation from the House Report on the bill, which states that, “Under the latter section an unauthorized importation of copies or phonorecords acquired abroad is an infringement of the exclusive right of distribution under certain circumstances.”<sup>95</sup> L'anza's argument was that section 501 treats sections 602 and 106 as being distinct, thereby evincing a Congressional intent to do the same. Had Congress not intended to do so, the more logical construction would be to include both sections 106 and 602 in the same definition.

The problem with this, as the Supreme Court noted, is that section 106(A), refers to “the exclusive rights provided in section 106.”<sup>96</sup> Thus even though section 501 seems to treat section 106(A) as distinct from section 106, the language of section 106(A) does not treat it as being such. Without supporting evidence in either the legislative history or the statutory language, the language of section 501 cannot by itself be taken to indicate a specific Congressional intent to distinguish sections 106 and 602. This is especially true when considered in conjunction with the fact that other portions of the Copyright Act suggest an opposite conclusion. In particular, the legislative history that accompanies section 109 indicates a Congressional desire to maintain a strong form of the first sale principle: “as section 109 makes clear, the copyright owner's rights under section 106(3) cease with respect to a particular copy or phonorecord once he has parted with ownership of it.”<sup>97</sup> This means, for example, that “the outright sale of an authorized copy of a book frees it from the copyright control over the resale price or other conditions of its future disposition.”<sup>98</sup>

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94. 17 U.S.C. § 501 (1995).

95. See H.R. Rep. No. 94-1476 at 271 (1976).

96. See *Quality King Distrib., Inc. v. L'anza Research Int'l, Inc.*, \_\_\_ U.S. \_\_\_, 118 S. Ct. 1125, 1130 (1998); 17 U.S.C. § 106(A)(a) (1995).

97. See H.R. Rep. No. 94-1476 at 271 (1976); S.Rep. 94-473 at 58-59 (1976).

98. See H.R. Rep. No. 94-1476 at 79 (1976); S.Rep. 94-473 at 71 (1976).

### C. Policy Implications

Although not addressed specifically by the Court, the policy issues implicated by *Quality King* are key in analyzing the decision.<sup>99</sup> A review of the basic purpose of copyright law demonstrates that the Court was correct on this front as well. Regardless of the supposed negatives of the gray market, copyright law is not the proper means with which to address them. The Ninth Circuit came to a different conclusion because the court failed to place enough emphasis on the idea that the fundamental purpose of copyright law is to “promote the useful arts.”<sup>100</sup> In order to achieve this result, the law grants to the owner of a copyright a limited monopoly.<sup>101</sup> However, this is done only to achieve the ultimate purpose of enhancing the public good.<sup>102</sup> The interplay between these two concepts was summarized very well in *Sebastian*. As the court explained:

“The copyright statutes have been amended repeatedly in an attempt to balance the authors' interest in the control and exploitation of their writings with society's competing stake in the free flow of ideas, information and commerce. Ultimately, the copyright law regards financial reward to the owner as a secondary consideration.”<sup>103</sup>

The interpretation of section 602 adopted by the Ninth Circuit and urged by L'anza does little to further the goal of consumer benefit. On a practical level, the labels themselves import very little of the creative ex-

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99. The Court deliberately ignored all issues except for statutory construction. *See Quality King Distrib., Inc. v. L'anza Research Int'l, Inc.*, 118 S. Ct. 1125, 1134 (1998). (“...whether or not we think it would be wise policy to provide statutory protection for such price discrimination is not a matter that is relevant to our duty to interpret the text of the Copyright Act.”)

100. U.S. CONST. art I, § 8, cl. 8.

101. *See Quality King* at 1135; *See also Sony Corp. of Am. v. Universal City Studios Inc.*, 464 U.S. 417, 429 (1984) (“[Copyright law] is intended to motivate the creative activity of authors and inventors by the provision of a special award, and to allow the public access to the products of this genius after the limited period of exclusive controls has expired.”).

102. *See Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834) (“But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”). *See also Fox Film Corp. v. Doyal*, 286 U.S. 123, 127, (1932) (“The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.”).

103. *Sebastian Int'l. Inc. v. Consumer Contacts Ltd.*, 847 F.2d. 1093, 1094 (3d Cir. 1998).

pression that the law is intended to foster.<sup>104</sup> This is not to say that copyright law should not protect items of minimal creativity. However, when determining the proper interpretation of section 602, it is relevant to ask to what end the law is being used. In this case the protection sought is not actually for the copyrighted item, but rather for the L'anza products. In this way copyright law is really being used to protect marketing strategy. So the question becomes whether this justifies the extension of a limited monopoly to the copyright owner. If the copyrighted elements are of only ancillary concern, the public benefit in creative expression is minimal.

The counter argument is that the public benefits from the Ninth Circuit decision because manufacturers can command higher prices and thus have greater incentives to advertise, perform product support, and create brands.<sup>105</sup> While this may be true, this is not a public benefit relevant to copyright law. For instance, the underlying assumption of the first sale doctrine is the idea that the copyright owner will receive full value at the time of initial purchase.<sup>106</sup> Once this has occurred, the owner protection model gives way to the general legal disapproval of restraints upon the alienation of property.<sup>107</sup> In this manner the incentive doctrine and public benefit goals are both satisfied. With gray market situations, the initial sale has taken place and the owner has been compensated. The fact that the owner cannot receive additional profit does not in any way alter the incentive to create. The position argued by L'anza would, as the Supreme Court noted, merely extend L'anza's monopoly without providing a corresponding benefit to the public.<sup>108</sup> As the *Sebastian* court noted, the copyright owner who sells abroad should not receive "a more adequate reward' than those who sell domestically."<sup>109</sup>

However, there seems to be a clear detriment to the public in this type of system. A close reading of the Ninth Circuit opinion seems to imply that price discrimination is permissible. While this may be true under trademark, it is a premise that runs contrary to copyright law's societal

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104. The labels do fit the technical definition of the statute in that they are an "original work of authorship fixed in a tangible medium of express." 17 U.S.C. § 102 (1995).

105. In short, all the goals of trademark law. See 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2.01[2], at 2-3 to 2-10 (1996).

106. See GOLDSTEIN, *supra* note 88, COPYRIGHT § 5.5, at 5:100-5:101 (1998).

107. See *Parfums Givenchy, Inc. v. Drug Emporium, Inc.*, 832 F. Supp. 1378, 1388 (C.D. Cal. 1993). See generally GOLDSTEIN, *supra* note 88, at 5:106-5:107.

108. See *Quality King Distrib., Inc. v. L'anza Research Int'l, Inc.*, \_\_\_ U.S. \_\_\_, 118 S. Ct. 1125, 1133 (1998) (citing *Sony Corp. of America v. Universal City Studios Inc.*, 464 U.S. 417 (1984)).

109. See *Sebastian Int'l. Inc. v. Consumer Contacts Ltd*, 847 F.2d 1093,1099 (3d Cir. 1988).

benefit ideal.<sup>110</sup> The Ninth Circuit decision was premised on the idea that a copyright holder is prevented from realizing the full value of its products intended for domestic sale.<sup>111</sup> There are several problems with this, the most obvious being that the Copyright Act says nothing at all about "full value." However, even if full value is a concern of copyright law, it appears difficult for the court to determine what exactly that is. Since it is not normally the role of the court to address the adequacy of consideration, there appears little basis for the Ninth Circuit's position.

## V. CONCLUSION

What then does the future hold for gray market goods in the wake of the *Quality King* decision? Barring some sort of congressional action, there are now no legal remedies available to prevent the unauthorized reimportation of domestically manufactured goods.<sup>112</sup> Efforts to forestall such imports through the use of tariff, contract, trademark, and now copyright law have failed. At present, the only area of legal uncertainty with respect to gray goods is the status of products manufactured abroad and imported into the United States without the authorization of the copyright holder.<sup>113</sup> Several lower courts have held that a "first sale" defense does not apply in that context and it is possible that the Supreme Court might do the same.<sup>114</sup> In her concurrence, Justice Ginsberg cited several sources,

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110. See *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) ("The sole interest of the United States and the primary objective in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.")

111. See *Sebastian Int'l. Inc. v. Consumer Contacts Ltd.*, 847 F.2d 1093, 1116-17 (3d Cir. 1988). Low cost imports suppress the price capable of being charged on identical domestic versions of the product. See Shubha Ghosh, *An Economic Analysis of the Common Control Market Exception to Gray Market Exclusion*, 15 U. PA. J. INT'L BUS. L. 373 (1994).

112. This, however, assumes that there are no 'material' differences between the products intended for the export market and those intended for the domestic market. Goods that are not similar can possibly be excluded under either the Tariff Act or the Lanham Act. See *Olympus Corp. v. United States*, 792 F.2d 315 (2d Cir. 1986).

113. See *L'anza Research Int. v. Quality King Dist., Inc.*, 118 S. Ct. 1125, 1135 (1998) (Ginsberg, J., concurring).

114. See generally *BMG Music v. Perez*, 952 F.2d 318 (9th Cir. 1991) (finding that first sale does not provide a defense to goods manufactured abroad); *Columbia Broadcasting System, Inc. v. Scorpio Music Distributors, Inc.* 569 F. Supp. 47, 49 (E.D. Pa. 1983), *aff'd* without opinion, 738 F.2d 424 (3d Cir. 1984) (holding that "lawfully made under this title" does not extend first sale defense to goods manufactured abroad). See also *Parfums Givenchy, Inc. v. Drug Emporium, Inc.*, 38 F.3d 477, 479, 481 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1315 (1995) (holding that section 602 bars products manufactured abroad).

which argued that the Copyright Act does not apply to goods, manufactured abroad, indicating perhaps her feelings on the subject.<sup>115</sup> This question, however, involves issues of extra-territoriality and international law upon which the *Quality King* holding has somewhat limited bearing.

More generally, there is a question of whether there will be some sort of congressional response to the *Quality King* decision. Shortly after *Quality King* was announced, an amendment was introduced to H.R. 2281 ("Digital Millennium Copyright Act") which would have limited the first sale defense to products distributed in the United States.<sup>116</sup> This however was dropped from the final version of the bill amidst complaints from industry that the amendment was taken up without sufficient public debate. Absent, however, a change at the congressional level, there seems little that can be done to stop *Quality King* type imports.<sup>117</sup>

Regardless of the future legal status of the gray market, *Quality King* was a correctly decided case. Although certain other interpretations do exist, the statutory construction found by the Court was the most logical and the one that aligned most closely with the intent of the statute. The decision arrived at by the Court corrected a Ninth Circuit opinion that erred in both statutory construction and policy analysis. In doing so the Court properly interpreted the law in a manner that sets section 602 consistent with the rest of the Copyright Act.

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115. See *Quality King Distrib., Inc. v. L'anza Research Int'l, Inc.*, 118 S. Ct. 1125, 1135 (1998). See generally GOLDSTEIN, *supra* note 88, at 16:1-16:2 (1998) ("Copyright protection is territorial. The rights granted by the United States Copyright Act extend no farther than the nation's borders.")

116. The proposed amendment to section 109 read in relevant part:

Notwithstanding the provisions of section 106(3), the owner of a particular lawfully made copy or phonorecord that has been *distributed in the United States* by the authority of the copyright owner, or any person authorized by the owner of that copy or phonorecord, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

(visited Dec. 5, 1998) <<http://thomas.loc.gov/cgi-bin/query>>.

117. Some have suggested that limited remedies may be found in state consumer protection laws. However, these laws are generally quite narrow in their scope and operate to protect consumers rather than manufactures. See *De Vito and Marks*, *supra* note 4, at 6. There has also been precedent, albeit quite limited, for barring gray market imports through an action before the International Trade Commission (ITC). See *In re Certain Alkaline Batteries*, 225 U.S.P.Q. (BNA) 823 (1984) (the court, relying on a variety of theoretical basis, held that Duracell could enjoin the sale of batteries manufactured by its foreign subsidiary on the grounds that consumers might be confused about the place of manufacture). However, President Reagan overturned this decision. See 19 U.S.C. § 1337(j) (1994) (all ITC decisions are subject to Presidential veto).

