

AN INFORMATION COSTS APPROACH TO THE FIRST SALE DOCTRINE

*Guy A. Rub**

ABSTRACT

In *Kirtsaeng v. John Wiley & Sons* the Supreme Court wrote another chapter in the ongoing story of the first sale doctrine and the limitation it places on the copyright owner's ability to control the distribution of copies of her work. This Article provides an in depth analysis of the economics of the first sale doctrine in order to develop a framework for analyzing the desirability of its scope.

In particular the Article suggests that one of the strongest justifications for the first sale doctrine is its ability to reduce the transaction costs in the market for copyright protected goods. The doctrine sets the bundle of rights that the buyers of copyright protected goods receive and it therefore can minimize the information costs of buyers. The Article also suggests that some of the other traditional justifications for the first sale doctrine, such as the need to incentivize creation, limit the owner's market power, or to increase access to copyrighted goods are less convincing and their desirability might be limited to specific and possibly uncommon situations. In many other cases the market can provide those benefits and offer a robust market for reselling copyrighted goods even without the first sale doctrine.

Focusing on the information costs aspect of the first sale doctrine sheds light on several important inquiries regarding the desirable scope of that doctrine, including: should the doctrine equally apply to importation and domestic resale, should the doctrine be triggered by digital distribution, should it apply to leasing including commercial for-profit leasing, can the parties contract around the doctrine or when should distribution be considered a license that thus not trigger exhaustion. In addition the Article analyses the differences between enforcing distribution rights on laypersons and professionals and the role of actual and constructive knowledge as well as strict liability in the enforcement of distribution rights.

* Assistant Professor of Law, The Ohio State University Moritz College of Law. This is a draft. Please do not cite without the author's consent.