



Meeting The COSTCO Case “First Sale” Challenge:

Eliminating Restrictions on the Downstream Sale of Genuine Goods

The American Free Trade Association (AFTA) supports the First Sale Coalition (the “FSC”) and invites you to join this important effort. The FSC was formed to clarify that the First Sale Doctrine under U.S. Copyright Law:

- (i) provides no greater control of distribution of genuine, copyrighted goods to foreign producers than to US producers; and
- (ii) protects the right of US consumers to freely acquire and dispose of genuine, copyrighted merchandise, books and other works of authorship, regardless of place of manufacture.

Why You Should Support FSC

1. Is selling or reselling genuine consumer goods an important part of your business?

Distribution and sale of foreign-made, brand-name consumer products, books or other works of authorship now poses increasing risk of litigation for importers, retailers and resellers.

2. If you do sell, distribute, resell or import consumer goods manufactured outside of the United States with printed labels, instructions, texts or images your business may be illegal.

Recent Court decisions hold that U.S. copyright owners can control distribution and stop imports of foreign-made, genuine merchandise no matter how many times those goods have been sold and resold since being manufactured. As a result, your sales or resales of these products could be illegal – damages and penalties can be assessed, and your goods seized and forfeited. This legal authority has been approved by a Federal Appellate Court, and the US Supreme Court allowed that decision to stand (*Omega v. Costco*). Previously copyright owners could only control the “First Sale” of their goods; thus, the recent court decisions appear to allow copyright owners of foreign-made goods to control all downstream sales rather than limit their control to the First Sale as held by the Supreme Court on US-manufactured goods.

3. Under existing U.S. law, any copyrighted article manufactured outside the United States could be held illegal should the US Copyright holder object.

Today, many products manufactured overseas are copyrighted or include copyrighted material (e.g., labels, instruction booklets or other text/images). As a result, importers, distributors, sellers and resellers of copyrighted goods (such as books and paintings), goods bearing copyrighted materials (such as cosmetics and jewelry) are increasingly vulnerable to copyright infringement litigation.

4. FSC – The First Sale Coalition – is committed to uniform application of the First Sale

Doctrine: Join AFTA as a member of the First Sale Coalition and participate in the Coalition’s efforts to assure the legality of your business, and to eliminate your risk of unnecessary and expensive litigation. Without clarification of the law – by the Administration, the Congress or the Courts - your transactions are at risk.

Background

Recent Court decisions under US Copyright law allow the unrestricted sale and distribution of US-made goods but not of foreign-made goods. Thus, foreign manufacturers have a greater ability than US manufacturers to control price and distribution of their products in the US marketplace -- and US copyright owners seeking to control prices and distribution of their products in the US can do so if they move their manufacturing operations out of the US. Why is this so?

- US-made goods are subject to the First Sale Doctrine. In 1998, the US Supreme Court in *Quality King v. L'Anza*, determined that the First Sale Doctrine, codified at [17 U.S.C. § 109\(a\)](#), prevents manufacturers from relying upon US Copyright Law to prohibit reimportation of domestically manufactured, copyrighted articles
- Certain courts have held that foreign-made goods are *not* subject to the First Sale Doctrine. In 2010, the U.S. Supreme Court in *Omega v. Costco* was unable to decide whether that same [17 U.S.C. § 109\(a\)](#) also prevents manufacturers from relying upon US Copyright Law to prohibit importation of foreign-made, copyrighted articles, and accordingly has yet to ultimately determine the issue. As result, Copyright owners may restrict sales under the 2008 Appellate Court decision which the Supreme Court allowed to stand.

The deadlock in *Omega v. Costco*, empowers brand owners to discriminate *against* US producers and *against* U.S. consumers. Manufacturers remain able to control importation and distribution of genuine products --- so long as they were made *outside* the U.S. Non-U.S. Manufacturers are able under US Copyright Law to dictate the terms and conditions under which US consumers can purchase and dispose of lawful, genuine branded merchandise. The U.S. Copyright Law has become a non-tariff trade barrier discriminating against US interests.

The FSC Action Plan

The First Sale Coalition (FSC) believes that the cloud over US Copyright law which inhibits or prohibits the right to purchase, sell and import foreign-made products and materials needs to be removed as soon as possible. Opportunities to achieve this goal administratively, legislatively or judicially are underway, but will not succeed unless a well-coordinated, targeted coalition of US consumers and businesses aggressively and systematically work to preserve competitive pricing and distribution in the US marketplace.

The First Sale Coalition will lead a collective effort to pursue a favorable clarification of the First Sale Doctrine. To learn more about FSC and confirm your interest in participating in its work, please contact the American Free Trade Association directly at afta@aftaus.com or 1-888-600-4179. A conference call will be scheduled to discuss strategies and immediate next steps immediately upon confirmation of your interest.