A HARD SELL: DISSECTING 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.

The limitations on the owner’s ability to exercise control over distribution of copies of her work has several economic effects, which include: impacting transaction costs in the initial sale and the resale markets as the doctrine determines the scope of the copyright bundle of rights, impacting competition policy as the doctrine affects certain restraints on trade, impacting access to information goods because the doctrine affects the owner’s ability to price discriminate, and impacting the long-term incentives to creation. Only when all these effects are considered does the desirability of the first sale doctrine can be fully appreciated.

The Article uses this analysis to suggest the right scope for the first sale doctrine. The article analyzes whether the first sale doctrine is desirable, whether it should be mandatory and thus not subject to contractual limitations, and whether the answers to these questions depend on the type of activity, and maybe the type of market in question. Thus, it will be suggested that giving the copyright owner a right to control the resale of copyrighted goods may involve quite a different cost-benefit analysis than giving her a right to control the commercial lending of these goods. Similarly, as implicitly suggested by Justice Kagan’s concurring opinion in Kirtsaeng, it might be desirable to have a different rule regarding the scope of the first sale doctrine with respect to importation of copyrighted goods and with respect to the domestic resale of these goods.

* 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 Please do not cite without the author’s consent.