

The First Sale Doctrine and Foreign Sales: The Economic Implications in the United States Textbook Market

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The First Sale Doctrine and Foreign Sales: The Economic Implications in the United States Textbook Market

Garry A. Gabison¹

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ABSTRACT

This Article investigates the impact of the *Kirtsaeng* decision. After discussing the first sale doctrine, this Article presents the issues around implementing a worldwide first sale doctrine. International treaties attempt to ensure that authors can benefit from their work by affording them similar protections in different jurisdictions. But a worldwide first sale exhaustion limits the ability of copyright holders to profit from their work because it allows the author to compete with its own work that had been priced differently in different jurisdictions. Finally, this Article tests whether, in the United States, the price of textbooks has been affected by the *Kirtsaeng* decision and finds that the price of textbooks increased between 2001 and 2018 but not more rapidly or slowly after the decision. In other words, the decision may not have had any effect (yet).

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I. INTRODUCTION

Like other property rights, copyright has been described as a bundle of rights.² The copyright first sale doctrine takes away one stick from the bundle of rights. The first sale doctrine states that: “the owner of a particular copy or phonorecord lawfully made under this title . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”³

What the rule against perpetuities does for real property,⁴ the first sale doctrine does for copyright. The first sale doctrine limits how a right holder controls a copyright-embodiment work once it enters the stream of commerce. Courts have used this doctrine to remove uncertainties for purchasers of copyrighted goods.⁵ This doctrine harmonizes the rights of purchasers by limiting the rights of copyright holders.

The first sale doctrine arose because right holders attempted to use copyrights to control how their copyright-embodiment goods were traded. For example, copyright holders have attempted to control how their work can be priced⁶ or where their work can be sold.⁷ These copyright holders raised copyright claims to avoid contract privity

² See *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 546–47 (1985) (“Section 106 of the Copyright Act confers a bundle of exclusive rights to the owner of the copyright. Under the Copyright Act, these rights—to publish, copy, and distribute the author’s work—vest in the author of an original work from the time of its creation.”).

³ 17 U.S.C. § 109(a) (2008).

⁴ See generally JOHN CHIPMAN GRAY, *THE RULE AGAINST PERPETUITIES* 1 (3d ed. 1915). John Chipman Gray describes the rule against perpetuities as one of the “transfers of rights in their nature alienable the law forbids” and as a limitation “beyond which future interests cannot be created.” *Id.*

⁵ See generally Anne Layne-Farrar, *An Economic Defense of Flexibility in IPR Licensing: Contracting Around “First Sale” in Multilevel Production Settings*, 51 SANTA CLARA L. REV. 1149, 1155–56 (2011) (“[T]he original rationale for the first sale doctrine [is]: an increased certainty over the ‘price’ of a good, arising when limits are placed on the parties that can be charged licensing fees. If an end purchaser of a good has no reasonable way of knowing whether the good comes with unseen obligations, such as licensing fees on the components that form the inputs of the good, then uncertainty will hinder the exchange of goods and the dissemination of the innovations underlying those goods.”).

⁶ *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 341 (1908).

⁷ *Kirtsaeng v. John Wiley & Sons*, 568 U.S. 519, 525–26 (2013).

requirements and antitrust liability.⁸ In response, the Supreme Court created the first sale doctrine to rein in the copyright holders' business methods.⁹

Copyright holders have tested the limits of the first sale doctrine. In *Kirtsaeng v. John Wiley & Sons*, a book publisher argued that copyright granted its holder the power to price differently based on the location where each copyright-embodied work was sold.¹⁰ The Supreme Court disagreed and instead expanded the reach of the U.S. first sale doctrine.

This Article first discusses the law and economics behind the first sale doctrine and the impact of the *Kirtsaeng* decision on the U.S. textbook market. Section II provides an overview of the origin of the first sale doctrine. It also discusses the overlay with international copyright treaties. Section III discusses the law and economics of the first sale doctrine and how copyright holders would geographically price discriminate without such a doctrine. Price discrimination has theoretical ambiguous effects on price and consumer welfare. Thus, welfare analysis cannot support or disprove the efficiency of the first sale doctrine. Section IV empirically measures the impact of the *Kirtsaeng* decision on the price of textbooks in the U.S. The first sale doctrine made price discrimination more difficult to implement. Publishers cannot prevent arbitrage¹¹ between low-price countries and the high-price U.S. anymore. Nonetheless, the decision has had no impact on the pricing behavior of textbooks in the U.S.

II. COPYRIGHT, FIRST SALE DOCTRINE, AND FOREIGN SALES

Even before it was adopted by Congress, the first sale doctrine had a long common law history.¹² This section discusses the Supreme

⁸ See Herbert Hovenkamp, *Post-Sale Restraints and Competitive Harm: The First Sale Doctrine in Perspective*, 66 N.Y.U. ANN. SURV. AM. L. 487, 487 (2011) (discussing the relationship between first sale doctrine and contractual relationship as well as antitrust scrutiny).

⁹ See *id.* Hovenkamp questions the necessity of the doctrine when antitrust laws can be used to limit copyright in the same way as the first sale doctrine does. *Id.* at 503–04.

¹⁰ 568 U.S. at 525.

¹¹ Arbitrage is “[t]he simultaneous purchase in one market and sale in another of a security or commodity in hope of making a profit on price differences in the different markets.” *Arbitrage*, BLACK’S LAW DICTIONARY (6th ed. 1990).

¹² *Kirtsaeng*, 568 U.S. at 538.

Court's jurisprudence of the doctrine. This section then addresses how international treaties affect the first sale doctrine. Finally, it examines the public policy implications of the first sale doctrine and of the *Kirtsaeng* ruling.

A. A Brief History of the First Sale Doctrine

The first sale doctrine has a long history. Justice Breyer traces it to 1628 England: "In the early 17th century Lord Coke explained the common law's refusal to permit restraints on the alienation of chattels A law that permits a copyright holder to control the resale or other disposition of a chattel once sold is similarly 'against Trade and Traffi[c], and bargaining and contracting.'"¹³

The U.S. version of the first sale doctrine is more recent. The doctrine was first discussed by the Supreme Court in 1908 in *Bobbs-Merrill Co. v. Straus*¹⁴ and arose out of common law.¹⁵

In *Bobbs-Merrill*, the copyright holder attempted to impose a resale price maintenance—which occurs when an upstream supplier agrees or requires that the supplied good be sold at a specific price to a downstream retailer.¹⁶ The defendant, Macy's department store, decided to undercut this price.¹⁷ The plaintiff argued that a copyright holder only grants a license to a retailer and under this license, the copyright holder is able to control the price at which the retailer could sell the product to consumers.¹⁸

At that time, the Court had not yet made resale price maintenance per se illegal,¹⁹ which made the *Bobbs-Merrill* ruling all the more important. In *Bobbs-Merrill*, the Court ruled that:

¹³ *Id.* at 538–39 (quoting EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND § 360 (1628)).

¹⁴ 210 U.S. 339, 343 (1908).

¹⁵ *Kirtsaeng*, 568 U.S. at 538.

¹⁶ 210 U.S. at 341.

¹⁷ *Id.* at 342.

¹⁸ *Id.* at 343.

¹⁹ In 1911, the Supreme Court made resale price maintenances per se illegal. *Dr. Miles Med. Co. v. John D. Park & Sons*, 220 U.S. 373, 408–09 (1911). It remained per se illegal until 2007 when the Supreme Court overruled *Dr. Miles Medical*. *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 900 (2007). In other words, it took three years for the Supreme Court to extend the bar on resale price maintenance, as articulated in *Bobbs-Merrill*, for copyright products to all products. Resale price maintenance aimed at decreasing the intra-brand competition and encouraging inter-brand competition. Contrary to what

In our view the copyright statutes, while protecting the owner of the copyright in his right to multiply and sell his production, do not create the right to impose, by notice, such as is disclosed in this case, a limitation at which the book shall be sold at retail by future purchasers, with whom there is no privity of contract.²⁰

The Court thus limited the control that copyright holders had over their copyrighted works once put into the stream of commerce. The Court feared that without such a rule the copyright holder would be able to dictate and limit what would happen to its copyright-embodiment products.²¹

The following year, Congress codified the doctrine in the Copyright Act of 1909.²² The Act specified that “the copyright is distinct from the property in the material object copyrighted”²³ and that “nothing in this Act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained.”²⁴

The current version was modified by the Copyright Act of 1976.²⁵ It specifies that “the owner of a particular copy . . . lawfully made . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy”²⁶

B. The First Sale Doctrine and International Trade

The first sale doctrine has so far dealt with nationally traded copyrighted works. However, these works are also traded across the globe. It was not until ninety years after creating the first sale doctrine

Hovenkamp advocates, the antitrust laws may not be a save-all panacea—even if the copyright holder implemented anticompetitive behaviors. *See* Hovenkamp, *supra* note 8, at 487.

²⁰ *Bobbs-Merrill Co.*, 210 U.S. at 350.

²¹ *Quality King Distrib. v. L’anza Research Int’l*, 523 U.S. 135, 152 (1998) (“The whole point of the first sale doctrine is that once the copyright owner places a copyrighted item in the stream of commerce by selling it, he has exhausted his exclusive statutory right to control its distribution.”).

²² Copyright Act of 1909, Pub. L. No. 60-349, ch. 320, 33 Stat. 1075, *amended by* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as 17 U.S.C. §§ 101–810 (1976)).

²³ *Id.* at § 41.

²⁴ *Id.*

²⁵ Copyright Act of 1976 § 109 (Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord).

²⁶ *Id.* at § 109(a).

that the Supreme Court addressed the issue of the international trade of copyrighted works. Until then, the question remained open whether copyright holders could control the distribution of copyrighted products imported to the U.S.

In 1998, the Supreme Court investigated this question in *Quality King Distributors v. L'anza Research International*, where the Court decided whether the first sale doctrine applied to imported copies.²⁷ In *Quality King*, the plaintiff, L'anza, was a manufacturer of hair care products.²⁸ The products had copyrighted labels attached to them and L'anza enforced a territorial restriction on the product.²⁹ One or multiple shipments aimed for the European market made their way into the U.S. stream of commerce.³⁰ L'anza argued that, as a copyright holder, it could bar the entry of such products into the U.S. because the "importation and subsequent distribution of those products bearing copyrighted labels violated L'anza's 'exclusive rights under 17 U.S.C. §§ 106, 501 and 602 to reproduce and distribute the copyrighted material in the United States.'"³¹ The District Court, Ninth Circuit Court of Appeals, and the Supreme Court all rejected this argument under the first sale doctrine.³²

The Supreme Court highlighted an important distinction: this case did not involve copyright piracy.³³ The copyright holder "does not claim that anyone has made unauthorized copies of its copyrighted labels. Instead, [the copyright holder] is primarily interested in protecting the integrity of its method of marketing the products to which the labels are affixed."³⁴ Much like in previous cases, the plaintiff attempted to use copyright to circumvent issues of contract privity.³⁵

²⁷ 523 U.S. 135, 138 (1998).

²⁸ *Id.*

²⁹ *Id.* at 138–39.

³⁰ *Id.* at 139.

³¹ *Id.* at 139–40.

³² *Id.* at 140, 152, 154.

³³ *Id.* at 146–48.

³⁴ *Id.* at 140.

³⁵ *Id.* at 143. The copyright holder advanced that "contractual provisions are inadequate to protect it from the actions of foreign distributors who may resell [the copyright holder's] products to American vendors unable to buy from [its] domestic distributors." *Id.*

This argument did not move the Supreme Court. The Court ruled that § 602 does not prohibit the importation of copyrighted material;³⁶ § 106 grants the copyright holder the exclusive right to distribute copies;³⁷ and § 109 authorizes the resale of legally purchased copies—including to another person in another country.³⁸ The Court expanded the first sale doctrine to protect subsequent purchasers from an infringement liability standpoint: “whether [they purchased] from a domestic or from a foreign reseller, [they are] obviously an ‘owner’ of that item.”³⁹

Comments from the majority and concurring opinions left some doubts about the reach of the first sale doctrine. The majority opinion referred to trademark but refused to make the parallel with the “gray market.”⁴⁰ Justice Ginsburg stated that “[t]his case involves a ‘round trip’ journey, travel of the copies in question from the United States to places abroad, then back again [W]e do not today resolve cases in which the allegedly infringing imports were manufactured abroad.”⁴¹ Commentators worry that the *Quality King* ruling meant that the first sale doctrine would treat goods manufactured home and abroad differently.⁴²

The Supreme Court returned to this open question fifteen years later. In *Kirtsaeng*, the defendant was a Thai college student who moved to the U.S. to study mathematics.⁴³ During his studies, he asked his family to buy copies of textbooks in Thailand and ship them to him in the United States as the books were cheaper in Thailand.⁴⁴ After

³⁶ *Id.* at 146–51. The Supreme Court held that § 602 prohibits the importation of copyrighted copies and does not extend to “copies that are lawfully made under the law of another country.” *Id.* at 148. As such, it would not apply since the good was manufactured in the U.S.

³⁷ *Id.* at 144. The Supreme Court held that the first sale doctrine applies to the rights granted under § 106. *Id.* at 150.

³⁸ *Id.* at 152.

³⁹ *Id.* at 145, 152–53.

⁴⁰ *Id.* at 153.

⁴¹ *Id.* at 154 (Ginsburg, J., concurring).

⁴² Michael Stockalper, Case Note and Comment, *Is There a Foreign “Right” of Price Discrimination Under United States Copyright Law? An Examination of the First-Sale Doctrine as Applied to Gray-Market Goods*, 20 DEPAUL J. ART TECH. & INTELL. PROP. L. 513, 514–15 (2010).

⁴³ 568 U.S. 519, 527 (2013).

⁴⁴ *Id.*

using them, he was able to resell them in the U.S. for a profit.⁴⁵ A publisher of such textbooks filed a suit for copyright infringement and illegal importation of copyrighted products.⁴⁶ The defendant argued that the material was lawfully manufactured and purchased.⁴⁷ He also argued that the copyright holder authorized the production and sale of these books in Thailand.⁴⁸ As such, he invoked the first sale doctrine.⁴⁹

The Court discussed whether “[the] ‘first sale’ doctrine applies only to ‘the owner of a particular copy . . . lawfully made under this title.’”⁵⁰ The Court distinguished *Kirtsaeng* from *Quality King*. In *Quality King*, the goods made a round trip and as such were made under the U.S. copyright title whereas, in *Kirtsaeng*, the goods were made abroad.⁵¹ The Supreme Court had to decide whether the first sale doctrine had geographical boundaries, and it held that the first sale doctrine should be interpreted non-geographically.⁵²

The Supreme Court stepped away from a literal interpretation of “lawfully made under this title” because it would make the first sale doctrine unworkable.⁵³ The *Kirtsaeng* textbook was legally made and purchased abroad so it should be allowed to move within the stream of commerce without constraints.⁵⁴ Any other interpretation would grant a copyright holder more power over foreign-manufactured books, as compared to locally-manufactured books.⁵⁵

The *Quality King* and *Kirtsaeng* rulings have the potential to impact the price of copyrighted products in the U.S. and abroad. The next section discusses that impact as well as copyright treaties and how the treaties can influence the U.S. ruling and interpretation of the first sale doctrine.

⁴⁵ *Id.*

⁴⁶ *Id.* at 525, 527.

⁴⁷ *Id.* at 527.

⁴⁸ *Id.* at 529–30.

⁴⁹ *Id.* at 527, 530.

⁵⁰ *Id.* at 528 (quoting *John Wiley & Sons v. Kirtsaeng*, 654 F.3d 210, 218–19 (2d Cir. 2011)).

⁵¹ *Id.* at 525.

⁵² *Id.* at 529–30.

⁵³ *Id.* at 530–31.

⁵⁴ *Id.* at 533.

⁵⁵ *Id.*

C. The First Sale Doctrine and International Treaties

The Court distinguished between copyrighted products manufactured in the U.S. (*Quality King*) and those manufactured abroad (*Kirtsaeng*). In reality, the ideas and embodiment of the copyrighted works remained the same, regardless of where they were produced. In both, the copyrighted goods targeted foreign markets. They were sold at lower prices as compared to the home market. So, the impact on the copyright holder would be the same regardless of where the copyrighted good was manufactured. In *Kirtsaeng*, Justice Kagan's concurrence points to this problem: both should be treated the same.⁵⁶

In *Kirtsaeng*, Justice Ginsburg disagreed. She wrote in her dissent that the majority had applied the first sale doctrine to “copies that were ‘lawfully made’ not under the United States Copyright Act, but instead, under the law of some other country.”⁵⁷ She argued that Congress had not intended for such a reading but instead intended for the first sale doctrine to apply to domestic made copies, not foreign manufactured copies of copyrighted works.⁵⁸

The Justices disagreed about the same principle as it applied to a different proxy. Copyright laws aim at promoting progress in the arts.⁵⁹ Without being able to profit, authors may be less inclined to write, and the arts may not progress. Therefore, the first sale doctrine should apply when an author has been able to benefit from its labor—regardless of the amount profited.⁶⁰

⁵⁶ *Id.* at 555–57 (Kagan, J., concurring).

⁵⁷ *Id.* at 559–60 (Ginsburg, J., dissenting) (quoting *Quality King Distrib. v. L'anza Research Int'l*, 523 U.S. 135, 147 (1998)).

⁵⁸ *Id.* at 561–64.

⁵⁹ See U.S. CONST. art. I, § 8, cl. 8 (“The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

⁶⁰ Justice Ginsburg made the comparison between the first sale doctrine and its parallel in the patent system, the patent exhaustion doctrine. In *Impression Products v. Lexmark International*, she argues that because patent protection is territorial, as compared to copyright where countries harmonize their protection, then the patent exhaustion doctrine should not extend to patent-embodied products made outside the U.S. 137 S. Ct. 1523, 1538 (2017) (Ginsburg, J., concurring in part and dissenting in part). For an in-depth discussion of the patent exhaustion doctrine, see Garry A. Gabison, *Worldwide FRAND Licensing Standard*, 8 AM. U. BUS. L. REV. 139, 154–62 (2019).

Authors can profit from exploiting their rights in foreign countries because these countries afford comparable copyright protections. The U.S. Copyright Act reflects the copyright treaties that the U.S. has joined.⁶¹ The U.S. is a signatory to the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”) and the Universal Copyright Convention (“UCC”). In total, 176 other countries are signatory to the Berne Convention⁶² and 101 other countries are signatory to the UCC.⁶³

The Berne Convention was adopted in Berne, Switzerland in 1886 and later amended in 1979.⁶⁴ The U.S. passed the Berne Convention in 1988⁶⁵ and the Convention entered into force in 1989.⁶⁶ The Berne Convention aimed at removing formalities for foreign works to obtain copyright protection.⁶⁷ The UCC was adopted in Geneva in 1952.⁶⁸

⁶¹ See 17 U.S.C. § 101 (2010).

⁶² As of February 13, 2020, 177 countries were signatories to the Berne Convention. *Contracting Parties, Berne Convention*, WORLD INTELL. PROP. ORG., https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15 [<https://perma.cc/FG93-2UV2>].

⁶³ As of February 13, 2020, 102 countries were signatories to the UCC. *Contracting Parties/Signatories, Universal Copyright Convention*, WIPO LEX, http://www.wipo.int/wipolex/en/other_treaties/parties.jsp?treaty_id=208&group_id=22http://www.wipo.int/wipolex/en/other_treaties/parties.jsp?treaty_id=208&group_id=22 [<https://perma.cc/P85X-4D8C>].

⁶⁴ *Berne Convention for the Protection of Literary and Artistic Works*, WORLD INTELL. PROP. ORG., <https://www.wipo.int/treaties/en/ip/berne/> [<https://perma.cc/YLZ8-YV4A>].

⁶⁵ *Treaties and Contracting Parties, United States of America*, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/remarks.jsp?cnty_id=1045C [<https://perma.cc/7WFX-9HAM>].

⁶⁶ “The Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, as revised at Paris on July 24, 1971. Appearing within parentheses is the latest Act of the Convention to which the listed country is party. The Berne Convention, as revised at Paris on July 24, 1971, and amended on October 2, 1979, did not enter into force with respect to the United States until March 1, 1989.” 17 U.S.C. § 104 note (2020) (Key to Symbols: Treaties and Conventions: Berne).

⁶⁷ *Cosmetic Ideas v. IAC/InteractiveCorp*, 606 F.3d 612, 619 n.9 (9th Cir. 2010), *abrogated by* *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com*, 139 S. Ct. 881 (2019).

⁶⁸ *World Trade Organization Agreement Implementation Act, Schedules II to IV*, WIPO LEX, <https://wipolex.wipo.int/zh/text/125542> [<https://perma.cc/GN34-BEYB>].

The U.S. ratified the UCC in 1954 and it came into force in 1955.⁶⁹ The UCC attempted to accommodate for countries who disagreed with the Berne Convention.⁷⁰

These treaties attempt to harmonize copyright protection. Since these signatory countries afford copyright holders similar protections, “under this title” could be read narrowly or broadly. A narrow reading implies that protection of copyright extends only to works made under the U.S. Copyright Act (i.e., in the U.S.). A broad reading implies that the protection applies to works made under comparable foreign laws that arose out of the same treaty. In other words, the merger of the U.S. copyright law with other treaties would imply the merger of other principles or doctrines and the first sale doctrine should subsequently be harmonized as well.

Harmonization can take two forms. Each jurisdiction could construe its first sale doctrine as stopping at its border. The doctrine would specify that any product manufactured and sold within a given jurisdiction could be resold without the consent of the right holder within that jurisdiction but not beyond. Alternatively, the first sale doctrine could cover all treaty jurisdictions. If an author copyrights his or her work in such a jurisdiction, the right holder enjoys copyright protection in all signatory countries.⁷¹ A goods purchaser should be able to resell the goods under the first sale doctrine in any signatory jurisdiction. In other words, the copyrighted goods should be able to move within the stream of commerce in treaty countries—regardless of the premium the right holder received.

The first version of harmonization provides clear limitations. A copyright holder could argue that intellectual property grants the right

⁶⁹ 17 U.S.C. § 104 note (2020) (Key to Symbols: Treaties and Conventions: UCC) (“Done at Geneva September 6, 1952. Came into force on September 16, 1955. United States became a party, effective on that same date.”).

⁷⁰ Dr. Silke von Lewinski, *The Role and Future of the Universal Copyright Convention*, COPYRIGHT BULL. (UNESCO), Oct.–Dec. 2006, at 1.

⁷¹ The majority opinion in *Impression Products v. Lexmark International* compares the first sale doctrine to the patent exhaustion doctrine. 137 S. Ct. 1523, 1535–36 (2017). Both doctrines limit the ability of the right holder to control the intellectual property embodying good once it reaches the stream of commerce. *Id.* at 1536–37. The majority opinion remarks that “[e]xhaustion does not depend on whether the patentee receives a premium for selling in the United States, or the type of rights that buyers expect to receive. As a result, restrictions and location are irrelevant; what matters is the patentee’s decision to make a sale.” *Id.* at 1538. Extrapolating to copyright, the right holder is not guaranteed a U.S. premium but only to receive some form of premium.

to stop the movement between borders.⁷² Because market conditions differ substantially, these markets ought to be treated separately.⁷³

In the textbook market, prices depend on many factors (i.e., demand for the product, budget constraint, competition, etc.). Therefore, adapting to the market condition ensures that the individual self-interests of market participants maximize societal welfare.⁷⁴ Without a jurisdictional first sale doctrine, publishers would have to use a single price, which could price some consumers out of the market in some jurisdictions.

The second version of harmonization facilitates trade. The signatory countries could all decide that the first sale doctrine would apply to all goods made in a treaty jurisdiction. The purchasers and sellers of goods need not worry about the origin of the product as long as it came from a treaty country. Such harmonization would simplify the flow of copyrighted goods between signatory countries because wholesalers, retailers, and consumers could move their goods between signatory jurisdictions without having to obtain an authorization or license from the copyright holder. The *Kirtsaeng* majority opted for this approach.⁷⁵ Under this approach, applying the first sale doctrine determination depends on whether the author had benefited (i.e., whether the product originated from a treaty country).

In the *Kirtsaeng* case, the work was developed and originated in the U.S.⁷⁶ It was then affixed onto paper in Thailand. Both countries were signatories to both treaties. So, the copyright holder enjoyed protection in both countries. This protection allowed the publisher to claim supracompetitive prices in Thailand—even if the publisher could have sold the book in the U.S. at a higher price.

Justice Ginsburg considered the implications of international treaties. She pointed out that other countries do not have a first sale

⁷² *Id.* at 1535–36.

⁷³ *Id.*

⁷⁴ This idea that an individual's self-interest leads to a socially efficient outcome was first developed by Adam Smith in *The Wealth of Nations*. ADAM SMITH, *THE WEALTH OF NATIONS* 231 (Simon & Brown 2010) (1776). This is now referred as the “invisible hand.” *Id.*

⁷⁵ *Kirtsaeng v. John Wiley & Sons*, 568 U.S. 519, 530 (2013).

⁷⁶ *Id.* at 527. If the work was not protected in the manufacturing country (e.g., lack of copyright system) and the work was then imported to the U.S., the work could qualify as pirated. This pirated work could be excluded from the U.S. because, in this example, the publisher is never able to reap some benefits from his work. *Id.* at 532–33.

doctrine as broad as the U.S. and lamented the adoption of such a broad doctrine.⁷⁷ She argued that the World Trade Organization, the Agreement on Trade Related Aspects of Intellectual Property Rights, World Intellectual Property Organization, and other treaties do not create a consensus on the first sale doctrine.⁷⁸ Therefore, she argued that the Court should not interpret the U.S. first sale doctrine to mean an *international* first sale doctrine.⁷⁹

Both her dissent and the majority opinion failed to discuss whether Thailand had such protection. The presence of such a treaty should have been part of the deliberation. Some courts have considered international treaties when deciding other issues such as infringement.⁸⁰ The first sale doctrine question should enjoy a similar treatment.⁸¹

The next section discusses in more detail the economics of the first sale doctrine and its policy implications.

III. THE ECONOMICS OF THE FIRST SALE DOCTRINE

This section discusses the impact of the first sale doctrine on the incentives of consumers to purchase the copyrighted product and the incentives of authors to write books.

A. The First Sale Doctrine and End Users

The first sale doctrine affects the incentives of wholesalers, retailers, and consumers to purchase the product. Wholesalers and

⁷⁷ *Id.* at 573–78 (Ginsburg, J., dissenting).

⁷⁸ *Id.* at 574.

⁷⁹ *Id.* at 557.

⁸⁰ *See* *InduSoft, Inc. v. Taccolini*, No. 13–50042, at *5 (5th Cir. Mar. 19, 2014) (West) (“We discern no conflict arising out of InduSoft’s copyright infringement claims because both Brazil and the United States are signatories of the Universal Copyright Convention and the Berne Convention for the Protection of Literary and Artistic Works. Those agreements commit each country to apply foreign copyright law when required.”).

⁸¹ In *Kirtsaeng*, the Supreme Court highlighted that the sale was voluntary. The Court left open the question of whether the first sale doctrine applies only when the benefits are voluntarily extracted (i.e., the copyright holder sold the good at the price it wanted in the treaty country) or when the benefits are not voluntarily negotiated (i.e., a court ordered the copyright holder to sell its product at a specific price). This question remains open for patents and the patent exhaustion doctrine as well.

retailers buy copyrighted products to resell them for a profit. Consumers buy these products to consume and, after consumption, they may want to sell the product as well. Their ability to resell these copyrighted products depends on whether the good is free of claims.⁸² The first sale doctrine ensures that copyrighted goods are free of any claims.

Additionally, besides being free of claims, the first sale doctrine decreases transaction costs.⁸³ The doctrine sets the boundaries of property rights for each market participant.⁸⁴ The consumers need not contact the copyright holder before selling the good. Thus, the doctrine eliminates the need for negotiations and the associated hold-up problems.⁸⁵

The ability and ease of resale increases consumers' willingness to purchase and pay for the copyrighted good. This greater willingness to engage with copyrighted goods benefits the copyright holders. In other words, by removing uncertainties (such as competing claims and transactions costs), the first sale doctrine indirectly incentivizes authors by ensuring consumers are willing to partake in the market for copyrighted products.

⁸² See, e.g., Ariel Katz, *The First Sale Doctrine and the Economics of Post-Sale Restraints*, 1 *BYU L. REV.* 55 (2014) (discussing how the first sale doctrine implication can help circumvent issues of imperfect vertical integration to incentivize the efficient use of copyrighted goods by decreasing transaction costs).

⁸³ *Kirtsaeng*, 568 U.S. at 541–43; see Guy A. Rub, *Rebalancing Copyright Exhaustion*, 64 *EMORY L.J.* 741 (2015) (discussing the use of the first sale doctrine as a means to decrease transaction costs).

⁸⁴ Transaction costs play an important role in voluntary transactions. See R. H. Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1, 16 (1960) (“[T]he granting of an injunction (or the knowledge that it would be granted) or the liability to pay damages may result in an activity being discontinued (or may prevent its being started) which would be undertaken if market transactions were costless.”). The Coase Theorem can be rephrased to say that without transaction costs, the efficient outcome will occur regardless of the law. *Id.* at 12–21. Delaminating property rights decreases the transaction costs associated with trading goods. *Id.* It removes uncertainty about the reach of the right holder. *Id.*

⁸⁵ A holdup problem occurs when the right holder leverages its exclusionary rights to extract supra-competitive profits from a right user who already invested. Matthew J. Sag, *Beyond Abstraction: The Law and Economics of Copyright Scope and Doctrinal Efficiency*, 81 *TUL. L. REV.* 187, 212 (2006) (discussing the hold-up problem within the context of second generation works of art).

Furthermore, the first sale doctrine ensures that some consumers can access the copyrighted product through public lending and commercial rentals (e.g., library and rental).⁸⁶

The *Kirtsaeng* majority worried about the welfare of consumers.⁸⁷ If the consumers are willing to participate in the market, the authors will be incentivized to join and supply copyrighted products. Justice Ginsburg, in her dissent, worried more about the incentive created for copyright owners.⁸⁸ She argued that the first sale doctrine is unnecessary to reach those efficiencies.⁸⁹

Courts (and policymakers) can adjust the breath, depth, and length of copyright to reach the correct balance.⁹⁰ When adjusting these dimensions, they have to balance the interest of the copyright holders against the interest of copyright users. Benefiting one often harms the other. While Justice Ginsburg worried more about the copyright holders, the majority worried more about copyright users. Research has shown that the optimal mix can be complicated to obtain and

⁸⁶ R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577, 583–92 (2003) (discussing how the first sale doctrine can open access to many users through resale, public lending, etc.).

⁸⁷ 568 U.S. at 540–41.

⁸⁸ *Id.* at 575 (Ginsburg, J., dissenting).

⁸⁹ First, Justice Ginsburg argued the first sale doctrine was overbroad because vertical restrictions have procompetitive effects. *Id.* at 577–78. Second, the majority argued that the decreased transaction costs also benefit the judicial system. *Id.* at 538–39 (majority opinion). The first sale doctrine enhances judicial efficiencies because courts need not trace the origin of the goods. Justice Ginsburg argues that a clear rule that imported goods do not fall under the first sale doctrine could reach a similar outcome. *Id.* at 579–80 (Ginsburg, J., dissenting). Third, copyright holders have private incentives not to exercise control over second markets because consumers would have a lower willingness to pay with goods carrying potential copyright claims. *Id.* at 582–83, 585 n.26. See, e.g., Stefan Voigt, *Determinants of Judicial Efficiency: A Survey*, 42 EUR. J.L. & ECON 183 (2016) (providing a literature review of the determinants of judicial efficiency).

⁹⁰ These dimensions have been discussed in detail by scholars. See, e.g., Richard Watt, *The Past and the Future of the Economics of Copyright*, 1 REV. ECON. RES. ON COPYRIGHT ISSUES 151 (2004). “Copyright can be defined according to

1. duration; the length of time for which the legal copyright is enforced,
2. depth; the particular aspects of the creation that are protected (and those that are not), and
3. breadth; what particular acts are deemed to be copyright infringing (and what are not).” *Id.* at 157.

extending copyright does not necessarily lead to more or better work product.⁹¹

The same issue could be said of the first sale doctrine. Implementing a narrow first sale doctrine, as Justice Ginsburg argued, may not lead to more or better works. In fact, it may lead to more returns for copyright holders without benefits for copyright users. The next section discusses how the first sale doctrine affects copyright holders and their incentives.

B. The First Sale Doctrine and Copyright Holders

The U.S. Constitution gives Congress authority to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁹² To this end, Congress created the copyright system. Within this system, copyright grants authors an exclusive right to exploit the expression of an idea. Copyright attempts to incentivize authors to create original works.⁹³

The first sale doctrine affects the exploitation rights and the associated incentives of a copyright holder in a number of ways. First, the first sale doctrine turns every copyrighted product into a durable good. Without the first sale doctrine, a consumer would be limited in their ability to enjoy the good. The enjoyment would be nominal and limited to the first consumer. With the first sale doctrine, a consumer

⁹¹ Some scholars have questioned whether these dimensions have been correctly set. For example, Michela Giorcelli and Petra Moser tested empirically the impact of copyright on the production rate and quality of opera following the staggered introduction of copyright in Italy. They found that copyright did improve both the rate and quality of operas but moving from a twenty-year copyright protection to a thirty-year copyright protection had no impact on either dimension. Michela Giorcelli & Petra Moser, *Copyrights and Creativity: Evidence from Italian Opera* 25–28 (May 16, 2019), <https://ssrn.com/abstract=2505776> [<https://perma.cc/922A-65EP>].

⁹² U.S. CONST. art. I, § 8, cl. 8.

⁹³ *See, e.g.*, *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”).

can legally resell the copyrighted book. Therefore, the right holder enters into competition with the first period purchaser.

A copyright holder can resolve this problem⁹⁴ without resorting to the law. A copyright holder can increase the price of their product in period one to capture the monopoly profits of multiple follow-on consumers. A copyright holder can use a lease-only business where they retain ownership of the copyrighted work and lease its use.⁹⁵ This approach has become more widespread with the vulgarization of digital media.⁹⁶

Second, the first sale doctrine decreases the right holder's ability to price discriminate.⁹⁷ Without the first sale doctrine, a right holder could charge different prices in different jurisdictions and prevent

⁹⁴ R. H. Coase, *Durability and Monopoly*, 15 J.L. & ECON 143 (1972). Coase investigated the durable good problem within the monopoly context. *Id.* at 143. He used the example of the monopolist where a durable good is non-depreciable. *Id.* He found that the competition from the second-hand market drives the price of the good to competitive level even in the first period when consumers are willing to temporally displace their consumption. *Id.* at 143–44. The relative mass of impatient and patient consumers affects the willingness to pay for the good in the first period: impatient consumers will be willing to pay more because they know they can recoup some cost in the second period. *See, e.g.*, Nancy L. Stokey, *Rational Expectations and Durable Goods Pricing*, 12 BELL J. ECON. 112 (1981) (establishing that the buyers' expectations depend on the stock of the durable good). This problem has been referred as the Coase Conjecture. *See, e.g.*, Faruk Gul et. al, *Foundations of Dynamic Monopoly and the Coase Conjecture*, 39 J. ECON. THEORY 155, 156 (1986).

⁹⁵ *See, e.g.*, Jeremy I. Bulow, *Durable-Goods Monopolists*, 90 J. POL. ECON. 314 (1982) (discussing how monopolists who manufacture durable goods benefit more by renting rather than selling the good); Michael Waldman, *Eliminating the Market for Secondhand Goods: An Alternative Explanation for Leasing*, 40 J.L. & ECON. 61 (1997) (explaining that one way durable goods manufacturers use a lease-only policy is to eliminate the market for secondhand goods).

⁹⁶ Unsurprisingly, textbook publishers have used digital and rental textbooks to attempt to keep control of their copyright. According to a report from 2017/2018 by the National Association of College Stores ("NACS"), 45% of students have rented one or more textbooks. NAT'L ASS'N OF COLL. STORES, HIGHLIGHTS FROM STUDENT WATCH ATTITUDES & BEHAVIORS TOWARD COURSE MATERIALS 2017-18 REPORT, <https://www.nacs.org/research/studentwatchfindings.aspx> [<https://perma.cc/D5VM-7YA8>] [hereinafter, NACS, HIGHLIGHTS FROM STUDENT WATCH]. In the same report, NACS also found 25% of students bought digital versions of their textbooks. *Id.* These methods avoid putting durable goods on the market that compete with the right holder.

⁹⁷ Wendy J. Gordon, *Intellectual Property as Price Discrimination: Implications for Contract*, 73 CHI.-KENT L. REV. 1367, 1374–75 (1998) (describing every intellectual property right as a tool to price discriminate).

arbitrage.⁹⁸ With the first sale doctrine, a low-value consumer can resell to a high-value consumer. The resale prevents the right holder from collecting high premiums. The price discrimination (and its absence) has ambiguous price and welfare effects.⁹⁹ This issue is discussed in more detail in section IV.A.

Third, the first sale doctrine eliminates the right holder's ability to dictate vertical restrictions on the retailer based on copyright grounds. For example, the right holder cannot use copyright to dictate the resale price to consumers.¹⁰⁰ Resale price maintenance has ambiguous welfare effects.¹⁰¹ But, it always decreases the intra-brand competition and likely increases prices.¹⁰² Resale price maintenance and other vertical restrictions are, however, not barred.¹⁰³ The first sale doctrine prevents the right holder from using copyright law to justify these vertical restrictions,¹⁰⁴ which are better dealt with through contract law.¹⁰⁵

⁹⁸ “Effective price discrimination requires satisfaction of three conditions: (1) the seller has market power; (2) the seller can sort customers according to their preferences; and (3) customers cannot arbitrage away price differentials.” Michael J. Meurer, *Price Discrimination, Personal Use and Piracy: Copyright Protection of Digital Works*, 45 *BUFF. L. REV.* 845, 850 (1997).

⁹⁹ See, e.g., Hal R. Varian, *Price Discrimination and Social Welfare*, 75 *AM. ECON. REV.* 870 (1985) (discussing how, in a simplified model, allowing price discrimination can increase social welfare).

¹⁰⁰ *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350 (1908).

¹⁰¹ Howard P. Marvel & Stephen McCafferty, *The Welfare Effects of Resale Price Maintenance*, 28 *J.L. & ECON.* 363, 370–71 (1985).

¹⁰² *Id.* at 372.

¹⁰³ Resale price maintenance can violate the antitrust laws under a rule of reason. See *Leegin Creative Leather Prods., Inc. v. PSKS*, 551 U.S. 877, 906 (2007). Other vertical restrictions can also violate the antitrust laws (e.g., territorial restraints). See *Continental T.V. v. GTE Sylvania*, 433 U.S. 36, 51 n.17 (1977).

¹⁰⁴ In the textbook industry, publishers still frequently implement resale price maintenance. For example, the *United States v. Apple* case involved an antitrust violation where six publishers colluded to change the e-book pricing model from a wholesale model where the retailers could price at will once they acquire the book to an agency model where the publishers retain control over the price. 791 F.3d 290, 327 (2d Cir. 2015). The agency model artificially created a resale price maintenance by being combined with a most favored nation clause. *Id.* at 304.

¹⁰⁵ *Kirtsaeng v. John Wiley & Sons*, 568 U.S. 519, 552–53 (2013). The Court considered contract law better situated to deal with restrictions such as territorial restrictions. *Id.*

The *Kirtsaeng* Court argued that the doctrine encourages competition at the retail level.¹⁰⁶ The resale price maintenance discussed in *Bobbs-Merrill* and the territorial restrictions discussed in *Quality King* and *Kirtsaeng* aim at decreasing intra-brand competition.¹⁰⁷

Intra-brand competition occurs when different distributors of the same (copyrighted) products compete for the same consumers.¹⁰⁸ The first sale doctrine encourages resellers to compete over price. If the consumers value lower prices, they will benefit from the first sale doctrine;¹⁰⁹ but if they value the additional services associated with the product (e.g., the ability to exchange the product), then allowing vertical restraints may benefit societal welfare.¹¹⁰

In the textbook case, consumers usually place price first¹¹¹ because teachers select textbooks whereas students pay for the textbooks.¹¹² Students are more price sensitive than teachers and they do not value

¹⁰⁶ *Id.* at 539.

¹⁰⁷ Intra-brand competition is facilitated by barring vertical restraint; however, intra-brand can be considered procompetitive. *See, e.g.*, Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 UNIV. CHI. L. REV. 6, 9 (1981) (arguing that vertical restriction should be per se legal based on efficiency reasons and that “territorial restriction affects both price and service competition; the [resale] price restriction affects only price competition.”).

¹⁰⁸ *See* Ralph A. Winter, *Vertical Control and Price Versus Nonprice Competition*, 108 Q.J. ECON. 61 (1993) (modeling intra-brand competition and finding that if a large proportion of consumers values low prices over services, retailers will overemphasize price competition and underemphasize service competition relative to the efficient levels).

¹⁰⁹ *Id.* at 63.

¹¹⁰ *Id.* at 63–64.

¹¹¹ The textbook market suffers from the principal-agent problem because the purchase decisionmaker differs from the cost bearer. Principal-agent problems are a version of the moral hazard problem. *See* Oliver Hart & Bengt Holmström, *The Theory of Contracts*, in *ADVANCES IN ECONOMIC THEORY: FIFTH WORLD CONGRESS 75–76* (Truman F. Bewley ed., 1987).

¹¹² Although surveyed teachers considered the cost of the material in their material selection, only 12% considered it to be the most important factor in their material selection decision. NAT’L ASSOC. OF COLL. STORES, HIGHLIGHTS FROM FACULTY WATCH ATTITUDES & BEHAVIORS TOWARD COURSE MATERIALS 2016-17 REPORT (2017), <http://www.nacs.org/research/FacultyWatchKeyFindings2017.aspx> [<https://perma.cc/VT2D-PQA6>].

additional services as much.¹¹³ Students could benefit from barring vertical restraints.

The *Kirtsaeng* decision made third degree price discrimination more difficult. The next section discusses whether it benefitted American textbook consumers.

IV. THE IMPACT OF *KIR TSAENG* ON THE PRICE OF TEXTBOOKS IN THE UNITED STATES

The *Kirtsaeng* ruling made price discrimination more difficult. This section first discusses how publishers can react to facing more arbitrage. This section then tests whether this decision had any effect on the pricing behavior of textbook publishers.

A. Third Degree Price Discrimination

Third degree price discrimination¹¹⁴ refers to the practice of charging different prices to different consumers based on observable characteristics. As Justice Ginsburg explained: “Because economic conditions and demand for particular goods vary across the globe, copyright owners have a financial incentive to charge different prices for copies of their works in different geographic regions.”¹¹⁵ In *Kirtsaeng*, the publisher requested the ability to engage in geographical price discrimination. But “[t]heir ability to engage in such price discrimination, however, is undermined if arbitrageurs are permitted to import copies from low-price regions and sell them in high-price regions.”¹¹⁶

¹¹³ In 2017-18, 63% of surveyed students purchased their textbooks new and 56% of surveyed students purchase used textbooks. NACS, HIGHLIGHTS FROM STUDENT WATCH, *supra* note 96.

¹¹⁴ Jean Tirole, the 2014 Nobel Laureate in Economic Sciences, struggled to define price discrimination. “Roughly, it can be said that the producer price-discriminates when two units of the same physical good are sold at different prices, either to the same consumer or to different consumers.” JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION 133 (2d. ed. 1989).

¹¹⁵ *Kirtsaeng v. John Wiley & Sons*, 568 U.S. 519, 557 (2013) (Ginsburg, J., dissenting).

¹¹⁶ *Id.* at 557–58.

From a legal standpoint, price discrimination rarely raises a competition problem.¹¹⁷ From a policy standpoint, the Justices have to balance the interests of the end-user and the copyright owners.

From a societal welfare analysis standpoint, price discrimination has ambiguous effects. Price discrimination can increase societal welfare. It can be used to cross-subsidize between consumers. These cross-subsidies can increase welfare when compared to a market without price discrimination.¹¹⁸

¹¹⁷ Most forms of price discriminations do not raise legal issues. The Clayton Antitrust Act of 1914 prohibits the discrimination “in price between different purchasers . . . substantially to lessen competition.” Pub. L. No 63-212, § 2, 38 Stat. 730 (1914) (codified as amended 15 U.S.C § 13 (2012)). For the most part, it remains legal if it has no impact on competition (e.g., volume discounts available to all consumers) or unenforced because parties struggle to prove competitive effects. That is why most of the enforcement of § 2 of the Clayton Act has focused on predatory pricing. Daniel J. Gifford & Robert T. Kudrle, *The Law and Economics of Price Discrimination in Modern Economies: Time for Reconciliation?*, 43 U.C. DAVIS L. REV. 1235, 1262–71 (2010) (discussing the diminished enforcement of price discrimination in the U.S.). Similarly, most third-degree price discriminations do not raise legal issues either. Some forms of price discrimination based on protected classes raise legal issues. For example, offering different classes based on gender or ethnicity (e.g., offering different wages) raises legal problems under the Equal Pay Act of 1963, which amended the Fair Labor Standards Act of 1938. Equal Pay Act of 1963, Pub. L. No. 88-38, § 3, 52 Stat. 1062; 63 Stat. 912 (1963). In the copyright context, copyright holders are, in theory, able to enjoy a monopoly over their work. However, this monopoly is not without limitation. In 2017, the U.S. Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) published their latest Antitrust Guidelines for the Licensing of Intellectual Property. U.S. DEP’T. OF JUSTICE & FED. TRADE COMM’N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (Jan. 12, 2017). In these guidelines, the antitrust authorities explain how copyright can be used to limit competition, and can be found unlawful under a rule of reason. *Id.* at 6, 16–17. At the international level, geographical price discrimination can raise trade violation concerns: dumping. Richard I. Hiscocks, *International Price Discrimination: The Discovery of the Predatory Dumping Act of 1916*, 11 INT’L LAW. 227, 227 (1977). The pricing threshold to trigger dumping liability is lower than the predatory pricing threshold under antitrust laws. Harvey M. Applebaum, *The Interface of Trade/Competition Law and Policy: An Antitrust Perspective*, 56 ANTITRUST L.J. 409, 410–12 (1987) (comparing predatory pricing under the Robinson-Patman Act and anti-dumping regulations and arguing that dumping can be easier to prove because dumping does not require below-cost sales or intent). In *Kirtsang*, it is unclear whether moving the textbook can raise dumping concerns—the product would still be sold at a higher price in the U.S. than in Thailand but below the U.S. manufacturing cost. The parties did not raise these issues.

¹¹⁸ Varian, *supra* note 99, at 870–71.

For example, assume that the market is composed of 100 consumers with a high valuation of the good, \$10, and 100 consumers with a low valuation, \$5. To make a good, a company must incur \$4 marginal cost per textbook and a fixed cost of \$300. If the company can price discriminate and avoid arbitrage, then it can charge \$10 to 100 high-valuation consumers and \$5 to 100 low-valuation consumers. The company would collect \$1,500 in revenues, incur \$1,100 in costs, and raise \$400 in profits. If it cannot price discriminate, it must decide between pricing at \$10 and selling to 100 consumers or pricing at \$5 and selling to 200 consumers. At \$10, the company brings \$1,000 in revenues and incurs \$700 in costs whereas at \$5, it brings \$1,000 revenues and incurs \$1,100 in costs. Therefore, the company would be better off pricing to the high-valuation consumers and avoid selling to low-valuation consumers altogether. Profits would be \$300. In this case, the societal welfare would increase if the company was able to price discriminate.¹¹⁹

However, price discrimination can also decrease societal welfare. Assume that the company must pay \$100 to maintain two prices and the low valuation increases to \$8. With price discrimination, the company makes \$600 charging \$10 to high-valuation consumers and \$8 to low-valuation consumers. Without price discrimination, the company makes \$500 if it caters to both low and high types and \$300 if it only caters to high types. Thus, the company would prefer to cater to both types of consumers because it makes more profits. However, society would be better off if it could not price discriminate because societal welfare would be \$700 (\$500 in profits and \$200 in consumer welfare) as compared to \$600 with price discrimination (\$600 in profits). In this case, the societal welfare would decrease if the company was able to price discriminate.

This stylized example demonstrates how price discrimination can affect societal welfare. These examples use two consumer types with flat willingness to pay. However, demand is usually composed of more consumer types, which makes the effect of price discrimination even harder to generalize.

¹¹⁹ Societal welfare would be greater under a price discrimination scenario (\$400) as compared to no price discrimination (\$300). Societal welfare is the sum of consumer surplus and producer surplus. In this example, consumer surplus is zero under both scenarios because the company sets the prices at the consumers' willingness to pay; therefore, consumers receive no gains from consumption. So, producer surplus (i.e., profits) equals societal welfare.

More generally, when arbitrage restricts price discrimination, companies can react in three ways. First, they can decide to only sell to high-valuation consumers. Low-valuation consumers (i.e., foreign consumers) are priced out of the market. Here, societal welfare usually decreases because the profit from selling to low-valuation consumers and the corresponding consumer surplus disappear. The company can also increase the price because it need not worry about arbitrage with a single price. Such a price increase further decreases societal welfare because the high-valuation consumers' consumer surplus would decrease more than profits would increase.

Second, the company may decide to sell to both types. This decreases the price for the high-valuation consumers. If the price decreases post-prohibition, societal welfare increases because more consumers (i.e., those in the U.S.) can afford the good.

Finally, the publisher (using the textbook market as an example) can decide to price the textbook at a value between the two prices selected under price discrimination. Within some countries, the quantity demanded decreases as a function of the willingness to pay.¹²⁰ Thus, pricing in between may be profitable depending on the elasticity of the demand in each region. If the publisher adopts this strategy, the price decreases in one geographic region while it increases in the other.

However, even if the first sale doctrine enables arbitrage, the company can still price differently between the two countries. For example, the U.S. price could still reflect the Thailand price plus the transport cost and other transaction costs (e.g., import duties).

The next section tests whether publishers reacted to the *Kirtsaeng* decision.

B. Impact of *Kirtsaeng* on the Price of College Textbooks in the United States

This section uses data collected by the Bureau of Labor Statistics (“BLS”).¹²¹ The BLS collects data as part of its mission to collect,

¹²⁰ The stylized example above uses flat willingness to pay (demand). But in general, demand is downward sloping within each geographical region. The price in each region determines the demand (i.e., budget constraint, taste for English language textbook, etc.).

¹²¹ The data was collected as part of the BLS Consumer Price Index program. *College Tuition and Fees Increase 63 Percent Since January 2006*, U.S. BUREAU LAB. STAT. (Aug. 30, 2016), <https://www.bls.gov/opub/ted/2016/>

analyze, and disseminate economic information to support decision-making.¹²² The data on textbooks and college tuition is collected to calculate the Consumer Price Index (“CPI”). The BLS publishes the college textbook data from December 2001 to the present.¹²³ The BLS publishes the college tuition data from December 1977 to the present.¹²⁴ The data is collected on college textbooks in the U.S. by city average for all urban consumers.¹²⁵

Figure 1 shows the relative prices of college textbooks, college tuition, and the CPI from December 2001 (benchmark 100%) to October 2018. Prices increased steadily over this period. By October 2018, the prices of both college textbooks and college tuition more than doubled. The price of textbooks increased more rapidly after the *Kirtsaeng* decision in March 2013.

college-tuition-and-fees-increase-63-percent-since-january-2006.htm
[<https://perma.cc/ZZ9Q-EFN6>].

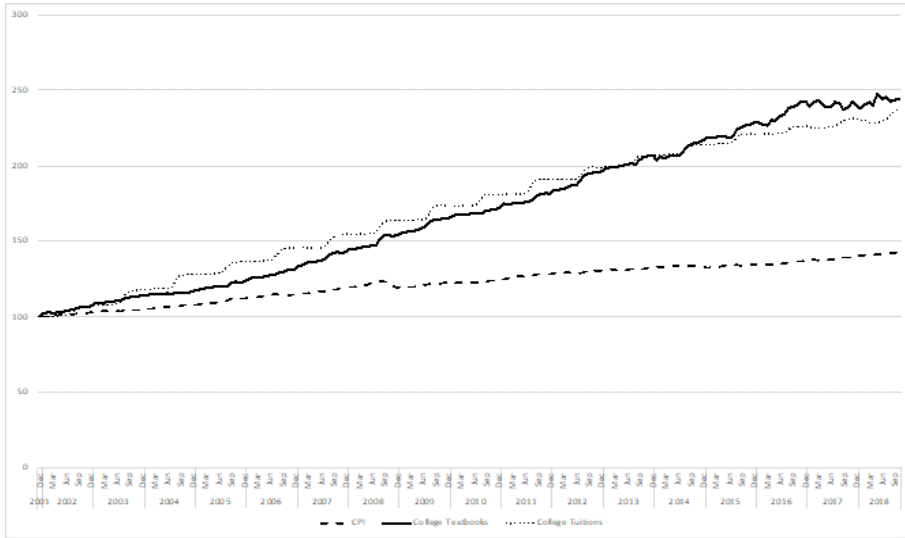
¹²² U.S. BUREAU OF LABOR STATISTICS, BLS STRATEGIC PLAN: FY 2020-2025, 2, <https://www.bls.gov/bls/bls-strategic-plan-2020-25.pdf> [<https://perma.cc/XZ68-7Y7N>].

¹²³ *Data Series CUUR0000SSEA011*, U.S. BUREAU LAB. STAT., <https://www.bls.gov/data/> (click “Series Report” from the left-hand column on the page; then enter “CUUR0000SSEA011” and click “next”; specify the desired year range and click “Retrieve Data”) [<https://perma.cc/RAR8-UXK5>].

¹²⁴ *Data Series CUUR0000SEEB01*, U.S. BUREAU LAB. STAT., <https://www.bls.gov/data/> (click “Series Report” from the left-hand column on the page; then enter “CUUR0000SEEB01” and click “Next”; specify the desired year range and click “Retrieve Data”) [<https://perma.cc/RAR8-UXK5>].

¹²⁵ “The Consumer Price Index (CPI) measures the change in prices paid by consumers for goods and services. The CPI reflects spending patterns for each of two population groups: all urban consumers and urban wage earners and clerical workers. The all urban consumer group represents about 93 percent of the total U.S. population. It is based on the expenditures of almost all residents of urban or metropolitan areas, including professionals, the self-employed, the poor, the unemployed, and retired people, as well as urban wage earners and clerical workers. Not included in the CPI are the spending patterns of people living in rural nonmetropolitan areas, farming families, people in the Armed Forces, and those in institutions, such as prisons and mental hospitals. Consumer inflation for all urban consumers is measured by two indexes, namely, the Consumer Price Index for All Urban Consumers (CPI-U) and the Chained Consumer Price Index for All Urban Consumers (C-CPI-U).” U.S. BUREAU OF LABOR STATISTICS, CONSUMER PRICE INDEX – MAY 2019, https://www.bls.gov/news.release/archives/cpi_06122019.pdf [<https://perma.cc/5K32-BFB3>].

Figure 1: Evolution of the Price of College Textbooks and Tuition Prices 2001-2018 (Source: Bureau of Labor Statistics)



I tested the impact of the *Kirtsaeng* decision on the price of college textbooks. To test this impact, I proceeded in two steps. First, I pooled the information provided by the textbook and tuition index and attempted to see whether the growth rate of textbook prices changed post-*Kirtsaeng*. In other words, I carried a difference-in-difference for the price of textbooks. Second, I estimated whether tuition should be used as a control variable. The price of textbooks is likely related to tuition as complementary goods. In other words, I used the tuition rate as a control variable to see whether the *Kirtsaeng* decision affected the price of textbooks.

As described, I first tested the following time series relationship:

$$g_t = \alpha g_{t-1} + \beta D_{post-Kirtsaeng} + \varepsilon_t,$$

where g_t represents the growth rate of the price of college textbooks and tuition at time t , α represents the autoregressive factor, the $D_{post-Kirtsaeng}$ is a dummy variable that measures the impact of the *Kirtsaeng* decision taking the value “1” of textbook pricing post 2013 and ε_t represents the error term. β is the estimator of interest. This difference-in-difference estimation allows to test whether only textbooks were affected by the decision.

College tuition should not have been affected by the *Kirtsaeng* decision. College textbooks represent a marginal added cost to

education as compared to college tuition. But college tuition and college textbooks are probably affected by the same shocks (e.g., economic crisis). β should be negative if the decision led to more arbitrage, as Justice Ginsburg feared. β should be positive if the publishers reacted by getting rid of price discrimination because of potential arbitrage and increasing prices in the U.S. as a consequence to capture more profits. β should be non-different from zero if the decision had no effect.

Table 1 shows the results of these estimations. Estimation (1) looks at the estimation described by the equation above. Estimations (2-6) use an interaction variable between the dummy variable and the price at $t - 1$ to account for potential non-constant effects. Estimations (3) and (5) include a time trend. Estimations (4) and (6) include year dummies.

Estimations (5) and (6) control for the growth rate of median weekly and hourly earnings (which data is available quarterly)¹²⁶ and of the CPI.¹²⁷ Earnings should affect tuition and book prices because they affect the ability of students to pay for those goods and services. They also affect the outside opportunity of getting a college education. The CPI also affects tuition and book prices as universities and book publishers should adapt their prices to those changes to keep the real price of books constant.¹²⁸

¹²⁶ *Data Series LEU0252881500*, U.S. BUREAU LAB. STAT., <https://www.bls.gov/data/> (click “Series Report” from the left-hand column on the page; then enter “LEU0252881500” and click “Next”; specify the desired year range and click “Retrieve Data”) [<https://perma.cc/RAR8-UXK5>].

¹²⁷ *Data Series CUSR0000SA0*, U.S. BUREAU LAB. STAT., https://www.bls.gov/data (click “Series Report” from the left-hand column on the page; then enter “CUSR0000SA0” and click “Next”; specify the desired year range and click “Retrieve Data”) [<https://perma.cc/RAR8-UXK5>].

¹²⁸ Note that the CPI is a composite indicator of which the price of textbooks and the tuitions contribute. While these may create some estimation problems, the weight attributed to textbooks and tuitions is so small in the CPI basket that it should have little influence on the outcome.

Table 1: Difference-in-difference regressions of the growth rate of college textbook and tuition prices

	Difference -in- difference	Difference -in- difference	Difference -in- difference	Difference -in- difference	Difference-in- difference (quarterly data)	Difference-in- difference (quarterly data)
	(1)	(2)	(3)	(4)	(5)	(6)
Growth rate of price at $t - 1$	0.233*** (0.048)	0.351*** (0.053)	0.335***	0.328*** (0.56)	-0.264*** (0.097)	-0.288*** (0.104)
Post- <i>Kirtsang</i> Book Dummy	-0.001 (0.001)					
Post- <i>Kirtsang</i> & Book Dummy \times growth rate at $t - 1$		-0.484*** (0.102)	-0.454*** (0.105)	-0.471*** (0.108)	0.263 (0.243)	0.269 (0.267)
Growth rate of earnings					-0.058 (0.115)	-0.068 (0.125)
Growth rate of the CPI					0.295 (0.227)	0.341 (0.267)
Constant	0.004*** (0.0005)	0.003*** (0.0004)	0.004*** (0.0008)	0.002 (0.002)	0.0178*** (0.003)	0.019*** (0.006)
Time trend	No	No	Yes	No	Yes***	No
Year dummy	No	No	No	Yes	No	Yes
<i>Observation Periods</i>	402	402	402	402	132	132
Standard error in parenthesis * significant at 10%, ** significant at 5% *** significant at 1%						

Estimations (1-4) show that the prices of textbooks and tuition have continued to increase steadily and exponentially over this period. Once the growth rates of earnings and of the CPI are introduced in estimations (5-6), the growth rates of textbook prices and tuition have not followed the same pattern of exponential growth; instead, the growth rates have oscillated around zero.

In estimations (1-4), the post-*Kirtsang* dummy shows that the decision has had a negative and statistically significant effect on the price of textbooks. Once the growth rate of earnings and CPI has been controlled in estimations (5-6), the impact of the decision is positive and not statistically different from zero. In other words, the price of

textbooks did not grow faster or slower than the price of tuition after the *Kirtsaeng* decision. The year dummies do not return statistically significant results.

As described above, I then used tuition as a control variable because college textbooks are a complement to college tuition. When a textbook publisher sets their prices, they might consider the price of tuition to determine whether to increase textbook prices. Thus, I tested the following time series relationship:

$$g_{book,t} = \alpha g_{book,t-1} + \gamma g_{tuition,t-1} + \beta D_{post-Kirtsaeng} + \varepsilon_t,$$

where $g_{book,t}$ represents the growth rate of the book prices and $g_{tuition,t}$ is the growth rate of tuition at time t , α represents the autoregressive factor, the $D_{post-Kirtsaeng}$ is a same dummy variable, and ε_t represents the error term. β and γ are the estimators.

The estimations in Table 2 show the same estimations as those presented in Table 1 using the price of tuition as a control variable.

Table 2: Regressions of the price of college textbooks

	Ordinary Least Square	Ordinary Least Square	Ordinary Least Square	Ordinary Least Square	Ordinary Least Square (prices averaged per quarter)	Ordinary Least Square (prices averaged per quarter)
	(1)	(2)	(3)	(4)	(5)	(6)
Growth rate of book prices at $t - 1$	-0.127** (0.073)	-0.028 (0.104)	-0.049 (0.108)	-0.154 (0.117)	-0.165 (0.217)	-0.539* (0.284)
Growth rate of tuition prices at $t - 1$	0.168** (0.066)	0.155** (0.070)	0.152** (0.070)	0.183** (0.071)	-0.131 (0.106)	-0.009 (0.128)
Post- <i>Kirtsaeng</i> Book Dummy	-0.002 (0.001)					
Post- <i>Kirtsaeng</i> & Book Dummy \times growth rate at $t - 1$		-0.154 (0.129)	-0.122 (0.137)	-0.062 (0.150)	0.109 (0.413)	0.415 (0.344)
Growth rate of earnings					0.117 (0.127)	0.061 (0.142)
Growth rate of the CPI					0.301 (0.235)	0.336 (0.234)
Constant	0.005*** (0.001)	0.004*** (0.0006)	0.005*** (0.001)	0.002 (0.002)	0.014*** (0.003)	0.17** (0.007)
Time trend	No	No	Yes	No	Yes	No
Year dummy	No	No	No	Yes	No	Yes
Observation Periods	201	201	201	201	66	66
Standard error in parenthesis * significant at 10%, ** significant at 5% *** significant at 1%						

In all estimations, the *Kirtsaeng* decision does not have a statistically significant effect on the price of textbooks. In estimations (1-4), the growth of textbook prices has followed the growth rate of tuition. When controlling for earning and CPI growth in estimations (5-6), the growth rate of tuition becomes insignificant. Therefore, both earnings, CPI, and tuition may be picking up the same effects.¹²⁹

Based upon the results from Table 1 and Table 2, the *Kirtsaeng* decision does not have an effect on the growth rate of textbook prices. Publishers have continued to increase the price of textbooks in the U.S. over this period, but the rate of increase has not been affected by the decision.

In other words, either the publishers increased the prices in foreign countries to avoid arbitrage or they ignored *Kirtsaeng* and kept price discriminating because arbitrage remains marginal. Unfortunately, without information about the price change pre- and post-*Kirtsaeng* in Thailand, it remains impossible to confirm one of these two alternatives theories.

V. CONCLUSION

The *Kirtsaeng* decision expanded the first sale doctrine with ambiguous effects on the author's incentives to publish. On the one hand, the doctrine makes copyrighted goods more desirable by removing uncertainties. On the other hand, authors cannot price discriminate geographically, which limits their ability to recoup profits.

However, in the case of textbooks, authors have other incentives to write textbooks than monetary rewards. Academic authors value publications for prestige or tenure. Therefore, the *Kirtsaeng* decision should not have affected the creation of textbooks but may have affected the dissemination.

The *Kirtsaeng* decision does not bar price discrimination but allows arbitrage.¹³⁰ Cabolis et al. found that textbooks were more

¹²⁹ Note that estimation removing the CPI for fear that the CPI picks up the weight of the tuition and textbooks in the composite indicator returns similar results.

¹³⁰ The Circuit Courts have applied the *Kirtsaeng* decision to mean that the first sale doctrine allows the distribution and importation of copyrighted products regardless of where the item was manufactured or first sold. *See, e.g.*, *Close v. Sotheby's, Inc.*, 894 F.3d 1061, 1073 (9th Cir. 2018); *Geophysical Serv., Inc. v. TGS-NOPEC Geophysical Co.*, 850 F.3d 785, 793–94 (5th Cir. 2017); *Omega S.A. v. Costco Wholesale Corp.*, 776 F.3d 692, 695 (9th Cir. 2015).

expensive in the U.S. than in other international markets.¹³¹ They did not observe the same phenomenon in the general audience book markets.¹³² Malueg and Schwartz have found that if a monopolist does not price discriminate, then it often ends up catering to the high-valuation consumers while foreclosing the low-valuation consumer access to the good.¹³³ These studies lend support to the idea that the *Kirtsaeng* decision should lead to an increase in textbook prices in Thailand without affecting prices in the U.S.

Some of Justice Ginsburg's fears may not have been realized.¹³⁴ The decision did not affect the U.S. textbook prices nor the price growth rate. Over the period of observation (2001-18), textbook publishers, however, have had to deal with other issues (e.g., digital duplication and dissemination). Publishers have met these issues head-on using the same technologies to create new business models (e.g., digital publishing, digital rental) that decrease the publishers' reliance on copyright to prevent resale. These technologies have made the first sale doctrine almost redundant and could explain why the decision has not had any marked effect on price.

¹³¹ Christos Cabolis et al., *A Textbook Example of International Price Discrimination*, 95 ECON. LETTERS 91, 92 (2007) (finding that general audience books are similarly priced internationally but textbooks are more expensive in the U.S.).

¹³² *Id.*

¹³³ David A. Malueg & Marius Schwartz, *Parallel Imports, Demand Dispersion, and International Price Discrimination*, 37 J. INT'L ECON. 167, 191 (1994).

¹³⁴ For the publisher in *Kirtsaeng*, John Wiley & Sons, about half of its revenues come from foreign sales. From this half, an even smaller fraction comes from textbooks sold abroad. The fraction has not changed over the years. See e.g., *Financial Highlights*, JOHN WILEY & SONS, INC. (2011), https://www.wiley.com/legacy/annual_reports/ar_2011/financial.html [<https://perma.cc/SMQ2-NFF7>]; *Financial Highlights*, JOHN WILEY & SONS, INC. (2010), https://www.wiley.com/legacy/annual_reports/ar_2010/financial.html [<https://perma.cc/SR6W-FE3Y>]; *Wiley Reports Fourth Quarter and Fiscal Year 2018 Results*, WILEY (June 12, 2018, 8:00 AM), <https://newsroom.wiley.com/press-release/all-corporate-news/wiley-reports-fourth-quarter-and-fiscal-year-2018-results> [<https://perma.cc/83R4-QQ5J>]; *Wiley Reports Fourth Quarter and Fiscal 2017 Results*, WILEY (June 13, 2017, 8:00 AM), <http://newsroom.wiley.com/press-release/all-corporate-news/wiley-reports-fourth-quarter-and-fiscal-2017-results> [<https://perma.cc/WY56-HS7R>].