High court hears closely watched copyright case

Mark Sherman, Associated Press

WASHINGTON (AP) -- Costco, eBay, Google and the nation's top art museums are backing a Thai graduate student against book publishers, the movie and music industries and other manufacturers in a Supreme Court battle over copyright protections with important implications for consumers and multibillion dollar annual sales online and in discount stores.

Supap Kirtsaeng was studying in the United States when he struck a nerve in the publishing world by tapping into the market for cheaper college textbooks. Kirtsaeng re-sold copyrighted books that relatives first bought abroad.

His profitable venture provoked a copyright infringement lawsuit from publisher John Wiley & Sons. The case is being argued Monday at the high court.

Kirtsaeng used eBay to sell $900,000 worth of books published abroad by Wiley and others and made about $100,000 in profit. The international editions of the textbooks were essentially the same as the more costly American editions. A jury in New York awarded Wiley $600,000 after deciding Kirtsaeng sold copies of eight Wiley textbooks without permission.

The issue at the Supreme Court concerns what protection the holder of a copyright has after a product made outside the United States is sold for the first time. In this case, the issue is whether U.S. copyright protection applies to items that are made abroad, purchased abroad and then resold in the U.S. without the permission of the manufacturer. The high court split 4-4 when it tried to answer that question in a case in 2010 involving Costco and Swiss watch maker Omega.

Justice Elena Kagan sat out the Costco case, but will join the other justices in hearing the new dispute. She signed the government's legal brief in the Costco case that took Omega's side. The government is backing the publisher against Kirtsaeng.

The court already has rejected copyright claims over U.S.-made items that were sold abroad and then brought back to the United States for re-sale.

The current case has attracted so much attention because it could affect many goods sold on eBay, Google and other Internet sites, and at Costco and other discount stores. The re-sale of merchandise that originates overseas often is called the gray market, and it has an annual value in the tens of billions of dollars.

Consumers benefit from this market because manufacturers commonly price items more cheaply abroad than in the United States.

The federal appeals court in New York sided with Wiley in this case.

EBay and Google say in court papers that the appellate ruling "threatens the increasingly important e-commerce sector of the economy." Art museums fear that the ruling, if allowed to stand, would jeopardize their ability to exhibit art created outside the United States.

Conversely, the producers of copyrighted movies, music and other goods say that their businesses will be undercut by unauthorized sales if the court blesses Kirtsaeng's actions.

Kirtsaeng says the example of textbooks illustrates the larger point of how manufacturers already drive up prices for U.S. customers. "Textbook publishers have long exploited their captive customers," E. Joshua Rosenkranz, Kirtsaeng's lawyer, said in court papers. Citing government statistics, Rosenkranz said the price of textbooks has tripled over the past 20 years, rising much more quickly than the pace of inflation.

In response, Wiley argues that the other side's "parade of horribles" is speculative and unpersuasive. Current copyright law in place since 1976 has not resulted in any threats to museums or other institutions that house or display foreign-made works, lawyer Theodore Olson said on behalf of Wiley.

And Olson said there may be good reasons why manufacturers price the same goods differently for domestic and foreign sales, including lower incomes and standards of living in many foreign countries.

The case is Kirtsaeng v. John Wiley & Sons, 11-697.

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