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ILLEGAL IMMIGRANTS

by
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A federal appeals court recently clarified rights of copyright owners in the Ninth Circuit. The court decided that copyright-protected products manufactured abroad could not be imported into the United States without the copyright owner's permission. This decision will no doubt change how businesses dealing with imported products do business in the Ninth Circuit.

The decision, *BMG Music et al. v. Perez*, 952 F.2d 318 (9th Cir. 1991), involved sales of phonorecords copyrighted by BMG and other plaintiffs. BMG licensed foreign manufacturers to produce and sell BMG's copyrighted records abroad. BMG also licensed manufacture and sale of the same copyrighted records in the United States to domestic manufacturers. Perez bought some of BMG's copyrighted records that were manufactured abroad, and exported them to the United States for sale in California.

BMG sued Perez for copyright infringement based on § 602(a) of the Federal Copyright Act that stated that "importation into the United States without the authority of the owner of copyright . . . of . . . phonorecords of a work that have been acquired outside of the United States is an infringement of the exclusive right to distribute . . . phonorecords . . ." BMG charged Perez with violating this statute by selling foreign-made copies of copyrighted works in the U.S. without a license from BMG.

Although Perez acknowledged the validity of this statute, he argued that § 109(a) of the Copyright Act (the "First-Sale Doctrine") limited the power of § 602(a) (the "importation" clause). The "First Sale Doctrine," gives owners of particular copies of phonorecords the right to dispose of their copies in any way they choose, without the copyright owner's permission, if the copy was "lawfully made" under the copyright laws. Perez argued that the First Sale Doctrine permitted sale of his records in the U.S. although he had purchased them abroad, despite the statute prohibiting sale in the United States of foreign-made products copies the copyright owner's permission.

The Appeals Court held that Perez had infringed BMG's copyrights. The Court noted that federal court decisions on this issue had been split, with some courts holding that the right granted to owners of any copy under First Sale Doctrine rights was superior to the copyright owner's rights to control distribution of copyrighted products. However, the Ninth Circuit, relying on the phrase, "lawfully made under this title," in the First Sale Doctrine statute, limited the scope of the First Sale Doctrine to records manufactured within the United States. Without such limitation, the Court noted that the statute prohibiting importation of works produced abroad would be "virtually meaningless."

What the BMG decision means is that owners of works available for purchase in foreign countries can meaningfully give exclusive rights to distribute these works in the United States. This places new value on such works as foreign language books, movies, videotapes, records, compact discs, and foreign origin works of art, statues, jewelry, and other mass distributed, copyrighted works.

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