

De Fontbrune v. Wofsy
39 F.4th 1214 (9th Cir. 2022)

Year	2022
Court	United States Court of Appeals for the Ninth Circuit
Key Facts	Plaintiffs own the rights to a catalogue comprised of 16,000 photographs of Pablo Picasso’s work, which was originally compiled by Picasso’s friend in 1932 (the “ <i>Zervos Catalogue</i> ”). In 1995, after obtaining permission from Picasso’s estate to publish a work illustrating and describing works by Picasso, Defendants Alan Wofsy and his company Alan Wofsy & Associates began publishing <i>The Picasso Project</i> —a series of volumes reproducing images of Picasso’s work, including 1,492 photographs from the <i>Zervos Catalogue</i> . Plaintiffs sued for copyright infringement. A French court held the photographs were protected by copyright because they “added creative features through deliberate choices of lighting, the lens, filters, [and] framing or angle of view.” In 2001, Plaintiffs obtained a judgment in France that subjected Defendants to damages for any further acts of infringement. In 2012, after discovering copies of <i>The Picasso Project</i> in a French bookstore, Plaintiffs enforced their judgment in France and were awarded €2 million. Plaintiffs sought recognition of the judgment in the U.S. courts. The district court granted summary judgment for Defendants, determining that the French judgment was “repugnant to U.S. public policy protecting free expression” because it failed to provide a fair use defense. Plaintiffs appealed; and Defendants cross-appealed on other defenses.
Issue	Whether reproduction of photographs documenting artwork in a reference book that was sold commercially is a fair use.
Holding	The panel held that the first factor, the purpose and character of the use, weighed against fair use because Defendants conceded that <i>The Picasso Project</i> was a commercial venture and the use at issue—reproduction of the photographs in a book illustrating Picasso’s works—was not transformative. Specifically, the court noted that Defendants’ use “did not serve an ‘entirely different function’ than the originals,” but had overlapping purposes, and the insertion of informative captions did not “necessarily” transform the works. The second factor, the nature of the copyrighted work, did not favor fair use because, although the works were published and documentary in nature, the French court had concluded that the photographs exhibited creative elements. The court determined that the third factor, the amount and substantiality of the work used, weighed against fair use because Defendants failed to demonstrate that “copying the entirety of each photograph was necessary.” The fourth factor, the effect of the use upon the potential market for or value of the copyrighted work, also weighed against fair use because there is a presumption of market harm when the use is commercial and non-transformative. Although Defendants presented evidence that auction prices for the <i>Zervos Catalogue</i> increased while <i>The Picasso Project</i> was on the market, Defendants had not provided evidence that “widespread appropriation” of the works would not harm the market for the photographs. Weighing all the factors, the court had “serious doubts” that fair use would protect Defendants’ use, and, accordingly, granted summary judgment to Plaintiffs on the public policy defense.
Tags	Education/Scholarship/Research; Photograph
Outcome	Fair use not found

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