

De Fontbrune v. Wofsy

Case No. 5:13-cv-05957-EJD, 2019 U.S. Dist. LEXIS 156246 (N.D. Cal. Sept. 12, 2019)

Year	2019
Court	United States District Court for the Northern District of California
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 “Zervos Catalogue”). In 1995, Defendants Alan Wofsy and his company Wofsy & Associates began publishing <i>The Picasso Project</i> —a series of volumes reproducing images of Picasso’s work, including 1,492 images from the Zervos Catalogue. In 2001, Plaintiffs obtained a judgment against Defendants in France that would subject Defendants to damages for further acts of copyright 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 considered cross-motions for summary judgment, including on the issue of whether the court was required to recognize the French copyright judgment or whether it was repugnant to U.S. public policy because it was inconsistent with the First Amendment.
Issue	Whether reproduction of photographs documenting artwork in a reference book is a fair use.
Holding	Beginning from the premise that the fair use doctrine implicates First Amendment concerns, the court held that the French judgment would be repugnant to U.S. public policy if Defendants’ use of the photographs was a fair use. The court found the first factor, the purpose and character of the use, strongly favored fair use because although <i>The Picasso Project</i> was a commercial venture, its intended use by “libraries, academic institutions, art collectors, and auction houses” fell within the exemplary fair uses in the preamble to section 107. On the second factor, the nature of the copyrighted work, the court observed that while photographs in general are creative works, the photographs in the Zervos Catalogue were documentary in nature and did not “showcase the original artistic expression of the photographer.” The third factor, the amount and substantiality of the work used, weighed in favor of fair use because Defendants copied “less than ten percent” of the catalogue and there was no evidence the copied images constituted the heart of the work. The court found the fourth factor, the effect of the use upon the potential market, also weighed heavily in favor of fair use because the works did not compete “[g]iven the disparate markets and wildly different price points.” Plaintiffs presented no evidence that the market for or price of the Zervos Catalogue had decreased when <i>The Picasso Project</i> volumes became available. Weighing the factors together, the court concluded that only the second factor favored Plaintiffs while the other factors favored or strongly favored fair use, and accordingly that Defendants’ use fell within the fair use exception. Because the court found the French judgment’s failure to provide a fair use defense to promote scholarship and research was repugnant to U.S. public policy, the court declined to recognize the French copyright judgment
Tags	Ninth Circuit; Education/Scholarship/Research; Photograph
Outcome	Fair use found

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