

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

VINCENT SICRE DE FONTBRUNE;
LOAN SICRE DE FONTBRUNE; ADEL
SICRE DE FONTBRUNE; ANAIS SICRE
DE FONTBRUNE, in their capacity as
personal representatives of the Estate
of YVES SICRE DE FONTBRUNE,
*Plaintiffs-Appellants/
Cross-Appellees,*

v.

ALAN WOF SY; ALAN WOF SY &
ASSOCIATES,
*Defendants-Appellees/
Cross-Appellants.*

Nos. 19-16913
19-17024

D.C. No.
5:13-cv-05957-
EJD

OPINION

Appeal from the United States District Court
for the Northern District of California
Edward J. Davila, District Judge, Presiding

Argued and Submitted February 8, 2022
San Francisco, California

Filed July 13, 2022

Before: Andrew D. Hurwitz and Lawrence VanDyke,
Circuit Judges, and Joan N. Ericksen, * District Judge.

Opinion by Judge Ericksen

SUMMARY**

Foreign Judgments

The panel reversed the district court's summary judgment entered for defendants Alan Wofsy and Alan Wofsy & Associates (collectively "Wofsy") in an action brought by Yves Sicre de Fontbrune in California state court seeking recognition of a French money judgment.

The photographer Christian Zervos created the *Zervos Catalogue* of the works of Pablo Picasso, which was originally published under the label of *Cahiers d'Art*. In 1979, Sicre de Fontbrune acquired the rights for the business capital of *Cahiers d'Art*. Wofsy produced a series of books, titled "*The Picasso Project*," that contained reproductions of photographs from the *Zervos Catalogue*.

The French judgment found that Wofsy had violated an *astreinte* – a French legal device that imposed money damages for the continued use of copyrighted photographs of Pablo Picasso's works. Sicre de Fontbrune had obtained

* The Honorable Joan N. Ericksen, United States District Judge for the District of Minnesota, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

that *astreinte* as a form of relief in a 2001 French judgment finding that the photographs' copyrights were infringed. The district court granted summary judgment for Wofsy based on a defense to recognition under California's Uniform Foreign-Country Money Judgment Recognition Act, Cal. Civ. Proc. Code §§ 1713-1725, namely, the defense that the French judgment was repugnant to United States public policy protecting free expression.

The panel held that in international diversity cases, such as this one, the enforceability of foreign judgments is generally governed by the law of the state in which enforcement is sought; and the California Recognition Act governed. The Recognition Act lists several grounds for nonrecognition. Five statutory grounds for nonrecognition of the French judgment are at issue in this appeal.

First, Sicre de Fontbrune challenged the district court's conclusion that the French judgment was repugnant to United States public policy favoring free expression. The fair use defense to copyright infringement is one of the built-in First Amendment accommodations that ease the tension between free expression and U.S. copyright law. As part of its public policy defense, Wofsy asserted that the fair use doctrine of U.S. copyright law – a feature that France's copyright scheme lacked – would have protected the copying of the photographs at issue. The panel rejected this contention. The fair use defense requires the analysis of four statutory factors, and the panel examined the factors with respect to the individual photographs in the catalogue at issue. Concerning the first factor - the "purpose and character" of the use, the panel held that the undisputed evidence showed that the use of the copyrighted photographs was commercial and non-transformative. This factor weighed against a finding of fair use. For the second fair use

factor – the nature of the copyrighted work, the panel held that the photographs’ creative qualities prevented this factor from weighing heavily, if at all, in favor of fair use. With the third factor – the amount and substantiality of the portion used, the panel held this factor weighed against fair use where the copying included the entirety of the copyrighted photographs at issue and Wofsy did not transform the photographs. With the fourth fair use factor – the effect on potential market or value of the copyrighted work, the panel held that this factor weighed against fair use where there was no evidence countering the presumption of market harm, which arose where the allegedly infringing use was both commercial and non-transformative. After weighing the four factors, the panel had serious doubts that a fair use defense would protect the copying of the photographs at issue, even if the nature of the copyrighted works were to favor fair use. Wofsy’s inability to urge a fair use defense in France did not place the French judgment in conflict with fundamental American constitutional principles, and Sicre de Fontbrune was therefore entitled to partial summary judgment on this defense.

Second, both parties appealed the district court’s denial of summary judgment concerning the assertion that the French court lacked subject matter jurisdiction. The French appellate courts did not evaluate whether the French trial court, the *Tribunal de Grande Instance de Paris* (“TGI”), had subject matter jurisdiction over the *astreinte* proceeding. The panel held that the TGI’s subject matter jurisdiction did not depend on Sicre de Fontbrune’s standing, and therefore the district court erred in holding otherwise. There is no indication that a plaintiff’s lack of standing circumscribes the judicial power – the subject matter jurisdiction – of French courts. The panel concluded that Sicre de Fontbrune is entitled to partial summary judgment on this defense.

Third, Wofsy challenged the district court's grant of summary judgment to Sicre de Fontbrune regarding the assertion that the French court lacked personal jurisdiction over Wofsy. A court applying California's Recognition Act shall not refuse recognition of a foreign-country judgment for lack of personal jurisdiction if the defendant "voluntarily appeared in the proceeding." Cal Civ. Proc. Code § 1717(a)(2). The panel agreed with the district court that Wofsy waived this defense through a voluntary appearance when he petitioned the TGI to set aside a 2012 judgment. The panel concluded that the district court properly granted partial summary judgment to Sicre de Fontbrune regarding the defense of lack of personal jurisdiction.

Fourth, Wofsy asserted that he was entitled to summary judgment on the defense that he received inadequate notice of the proceedings that resulted in the French judgment. The California Supreme Court has not clarified the showing that a defendant must make to prove the insufficient notice defense. A California Court of Appeal has held that a mere failure of actual notice does not prove the inadequate notice defense. The panel accepted the Court of Appeal's holding that the insufficient notice defense requires the proponent to prove the absence of a constitutionally adequate attempt at actual notice. The panel considered whether the attempts to serve Wofsy before the October 2011 hearing constituted sufficient efforts at notice, despite their failure. The panel held that the failed attempts to service process did not, by themselves, disprove the notice defense. There was, however, a factual dispute as to whether Wofsy received *actual* notice of the pendency of the action and an opportunity to present objections. The panel held that the district court appropriately left to the finder of fact to determine whether Wofsy "receive[d] notice of the

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