

**Nos. 19-16913 & 19-17024**

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

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VINCENT SICRE DE FONTBRUNE; LOAN SICRE DE FONTBRUNE; ADELE  
SICRE DE FONTBRUNE; ANAIS SICRE DE FONTBRUNE, IN THEIR  
CAPACITY AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF  
YVES SICRE DE FONTBRUNE

*Plaintiffs-Appellants/Cross-Appellees,*

v.

ALAN WOFSY and ALAN WOFSY & ASSOCIATES,

*Defendants-Appellees/Cross-Appellants.*

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On Appeal From The United States District Court  
For The Northern District of California  
District Court Case No. 3:13-cv-05957-SC  
Hon. Edward J. Davila

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**COMBINED PETITION FOR PANEL REHEARING AND  
REHEARING EN BANC**

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## TABLE OF CONTENTS

	Page
INTRODUCTION .....	1
FACTUAL AND PROCEDURAL BACKGROUND .....	3
PETITION FOR REHEARING EN BANC .....	5
I. The Panel’s Novel and Restrictive Analysis of the Fair Use Doctrine Conflicts Directly with the Law of This and Other Circuits .....	5
A. The Panel’s Conclusion that the Sale of a Scholarly or Educational Work Makes the Work “Commercial” for Purposes of Fair Use Conflicts with a Published Opinion of the Second Circuit .....	6
B. The Panel’s Conflation of Creativity Sufficient for Copyrightability with Creativity under the Second Fair Use Factor Conflicts with Opinions from the Fifth and Eleventh Circuits .....	8
C. The Panel’s Standard for Permissible Copying of an Entire Work Conflicts with this Court’s Precedent .....	12
D. The Legal Conflicts Created by the Panel’s Opinion Will Chill Expression among Those Who Wish to Make Fair Use of Copyrighted Works .....	13
PETITION FOR PANEL REHEARING.....	14
I. Due to a Misapprehension of Fact, the Panel Incorrectly Focuses Its Fair Use Analysis on Individual Photographs, Not the <i>Zervos</i> <i>Catalogue</i> .....	14
II. The Panel Should Rescind the Partial Summary Judgment for de Fontbrune on the Public Policy Defense Because the Panel Overlooks the Fact that de Fontbrune Did Not Meet His Burden .....	16
CONCLUSION .....	19

## TABLE OF AUTHORITIES

	Page(s)
<u>Cases</u>	
<i>ABS Ent., Inc. v. CBS Corp.</i> 908 F.3d 405 (9th Cir. 2018) .....	10, 11
<i>Baker v. F &amp; F Inv.</i> 470 F.2d 778 (2d Cir. 1972) .....	13
<i>Cambridge Univ. Press v. Patton</i> 769 F.3d 1232 (11th Cir. 2014) .....	1, 10
<i>Campbell v. Acuff-Rose Music, Inc.</i> 510 U.S. 569 (1994).....	6, 7
<i>Celotex Corp. v. Catrett</i> 477 U.S. 317 (1986).....	17
<i>Compaq Computer Corp. v. Ergonome Inc.</i> 387 F.3d 403 (5th Cir. 2004) .....	1, 9, 10
<i>De Fontbrune v. Wofsy</i> 838 F.3d 992 (9th Cir. 2016) .....	5
<i>Eat Right Foods Ltd. v. Whole Foods Mkt., Inc.</i> 880 F.3d 1109 (9th Cir. 2018) .....	16
<i>Ent. Rsch. Grp., Inc. v. Genesis Creative Grp., Inc.</i> 122 F.3d 1211 (9th Cir. 1997) .....	11
<i>Golan v. Holder</i> 565 U.S. 302 (2012).....	14
<i>Google LLC v. Oracle Am., Inc.</i> 141 S. Ct. 1183 (2021).....	11, 18
<i>Kelly v. Arriba Soft Corp.</i> 336 F.3d 811 (9th Cir. 2003) .....	2, 12, 13
<i>Nissan Fire &amp; Marine Ins. Co. v. Fritz Companies, Inc.</i> 210 F.3d 1099 (9th Cir. 2000) .....	17, 19

<i>Sega Enterprises Ltd. v. Accolade, Inc.</i> 977 F.2d 1510 (9th Cir. 1992) .....	7, 8
<i>In re Tam</i> 808 F.3d 1321 (Fed. Cir. 2015) .....	14
<i>Wright v. Warner Books, Inc.</i> 953 F.2d 731 (2d Cir. 1991) .....	1, 6, 7, 8
<u>Constitutional Provisions, Statutes, and Rules</u>	
17 U.S.C. § 107 .....	6, 7, 8, 12
Cal. Civ. Proc. Code §§ 1713-1725 .....	5
9th Cir. R. 29-2 .....	2
9th Cir. R. 35-1 .....	1
Fed. R. App. P. 35 .....	1
Fed. R. App. P. 40 .....	2
U.S. Const. amend. I .....	2, 5, 13, 14

## INTRODUCTION

On July 13, 2022, the panel issued a published opinion reversing the district court's summary judgment in favor of defendants Alan Wofsy and Alan Wofsy & Associates (collectively, Wofsy). ECF 80-1 (Slip Op.).

En banc consideration is necessary to secure uniformity of the Court's decisions and because the panel's opinion conflicts directly with opinions by other courts of appeals and substantially affects a rule of national application. *See* Fed. R. App. P. 35(a); 9th Cir. R. 35-1. Specifically, the panel's opinion applies three aspects of the federal copyright fair use inquiry in ways that substantially narrow the defense and deviate from the law of this and other circuits:

1) The panel's conclusion that the sale of a scholarly or educational work necessarily makes the work commercial for purposes of fair use conflicts with the Second Circuit's published opinion in *Wright v. Warner Books, Inc.*, 953 F.2d 731 (2d Cir. 1991).

2) The panel's conflation of creativity sufficient for copyrightability with creativity under the second fair use factor conflicts with published opinions of the Fifth and Eleventh Circuits in *Compaq Computer Corp. v. Ergonome Inc.*, 387 F.3d 403 (5th Cir. 2004), and *Cambridge University Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014).

3) The panel's standard for permissible copying of an entire work conflicts with this Court's precedent in *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).

There is an overriding need for national uniformity on these matters. To avoid stifling free expression, creators who wish to exercise their First Amendment rights in ways protected by the fair use doctrine must have clear and consistent guidance.

The opinion also misapprehends two material points that merit panel rehearing, Fed. R. App. P. 40(a)(2), namely:

1) The panel mistakenly focuses its fair use analysis on individual photographs instead of the *Zervos Catalogue* as a whole.

2) Because de Fontbrune did not meet his burden as the moving party, the panel should not have granted him partial summary judgment on the public policy defense.

Because the necessity of en banc review does not depend on the correction of these two misapprehended points, Wofsy presents the petitions for rehearing en banc and panel rehearing separately. Wofsy advises the Court that prospective amici have informed Wofsy they intend to file a brief in support of this petition. *See* 9th Cir. R. 29-2.

## FACTUAL AND PROCEDURAL BACKGROUND

Between 1932 and 1970, the Paris-based art critic and publisher Christian Zervos produced a compilation of photographic reproductions of the works of Pablo Picasso (a *catalogue raisonné*) that eventually comprised 33 volumes, published by his company Cahiers d'Art (the *Zervos Catalogue*). 4-ER-566, 807; 5-ER-817; 7-ER-1247. In 1979, plaintiff-appellant/cross-appellee Yves Sicre de Fontbrune purchased the Cahiers d'Art business from Zervos's heirs. 4-ER-517, 675-82.

Having obtained permission from Picasso's heirs in 1991 to create a publication illustrating and describing the artist's work, specifically including reproductions of the works of Picasso shown in the *Zervos Catalogue*, Alan Wofsy Fine Arts LLC<sup>1</sup> produced the first two volumes of *The Picasso Project* in 1995, covering Picasso's work from 1917 to 1921. 5-ER-816-17, 827, 833, 857. Wofsy included photographs from Volumes III and IV of the *Zervos Catalogue*, having first concluded that the Zervos volumes had entered the public domain in the United States and therefore were not subject to copyright protection. 5-ER-816, 824; *see also* 4-ER-813, 5-ER-966. In the art world, photographic reproductions of

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<sup>1</sup> Alan Wofsy Fine Arts LLC is an entity whose members are defendants-appellees/cross-appellants Alan Wofsy and Alan Wofsy & Associates.

art in a *catalogue raisonné* are not considered protectable art, and it is not unusual for one *catalogue raisonné* to use images from another. 7-ER-1259.

Unlike the *Zervos Catalogue*, which was a very expensive and out-of-print collector's item, *The Picasso Project* is sold for a much lower price that makes it accessible to libraries, art historians, and educational institutions. 7-ER-1247, 1249. *The Picasso Project* is more comprehensive than the *Zervos Catalogue* and, unlike the *Zervos Catalogue*, is carefully arranged in chronological order, includes literature references, and provides information on provenance, the location where Picasso created the work, current ownership when public, and sales. 5-ER-820-21; 7-ER-1247-49.

The complex procedural history of this case is detailed in the panel's opinion. Slip. Op. at 9-12. In 2010 and 2011, de Fontbrune obtained, and a bailiff seized, one copy each of the first two volumes of *The Picasso Project* from a Paris bookstore. 1-SER-1399. Based on those two copies and the photographs from the *Zervos Catalogue* contained within, de Fontbrune commenced a French proceeding in which Wofsy was not served and did not learn of until the French court had already decided the merits; de Fontbrune obtained a default judgment against Wofsy for €2 million. 5-ER-818-19, 898-901; 1-SER-1399-400. De Fontbrune later sought recognition of that judgment in Alameda County Superior Court. 1-SER-1348.



Following removal, the district court granted Wofsy's motion to dismiss because the French judgment was a fine or penalty not covered by California's Uniform Foreign-Country Money Judgments Recognition Act (UFCMJRA), Cal. Civ. Proc. Code §§ 1713-1725, but this Court reversed. *De Fontbrune v. Wofsy*, 838 F.3d 992, 1007 (9th Cir. 2016). On remand, the district court granted summary judgment for Wofsy (and denied it for de Fontbrune) on the ground that the French judgment is repugnant to U.S. public policy since Wofsy's use of photographs from the *Zervos Catalogue* would be protected by the fair use doctrine under the First Amendment. 1-ER-27, 30. The panel reversed, holding that three of the four statutory factors weighed against fair use and the French judgment was therefore not repugnant to U.S. public policy. Slip Op. at 19-24.

### **PETITION FOR REHEARING EN BANC**

#### **I. The Panel's Novel and Restrictive Analysis of the Fair Use Doctrine Conflicts Directly with the Law of This and Other Circuits**

In evaluating whether *The Picasso Project's* use of images from the *Zervos Catalogue* was fair, the panel creates new legal standards that conflict with published opinions from this and other circuits. The resulting confusion will chill expression among those who wish to exercise their First Amendment right to make fair use of copyrighted works.

**A. The Panel’s Conclusion that the Sale of a Scholarly or Educational Work Makes the Work “Commercial” for Purposes of Fair Use Conflicts with a Published Opinion of the Second Circuit**

The first factor in the fair use analysis is “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” 17 U.S.C. § 107(1). The Supreme Court has held the inquiry under this factor “may be guided by the examples given in the preamble to § 107.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994). The preamble provides that “fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . ., scholarship, or research, is not an infringement of copyright.” 17 U.S.C. § 107.

The panel acknowledges that “the district court observed that *The Picasso Project* was ‘intended for libraries, academic institutions, art collectors, and auction houses,’ and concluded that *The Picasso Project*’s purpose aligned with the ‘criticism, comment, news reporting, teaching . . ., scholarship, or research’ purposes that Section 107 characterizes as non-infringing.” Slip Op. at 19. But the panel rejects the district court’s conclusion because *The Picasso Project* is “a book offered for sale.” *Id.*

The panel’s position conflicts with the opinion of the Second Circuit in *Wright v. Warner Books, Inc.*, 953 F.2d 731 (2d Cir. 1991). There, the court considered whether a biographer had fairly used excerpts and paraphrases from her

subject’s letters, journal entries, books, and an essay. The court determined that as a scholarly biography, the work “fit[] comfortably” into the categories of fair use listed in the preamble to section 107 even though the biography was offered for sale. *Id.* at 736. “[I]f a book falls into one of these categories [i.e., criticism, scholarship or research], assessment of the first fair use factor should be at an end, *even though, as will often be the case, the biographer and publisher anticipate profits.*” *Id.* at 736-37 (2d Cir. 1991) (emphasis added, brackets in original, citations and internal quotes omitted).

The Second Circuit’s holding accords with the Supreme Court’s observation that “the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, . . . ‘are generally conducted for profit in this country.’” *Campbell*, 510 U.S. at 584. It also comports with this Court’s precedent that courts may “consider the public benefit resulting from a particular use notwithstanding the fact that the alleged infringer may gain commercially.” *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1523 (9th Cir. 1992).

The panel’s opinion reduces the commerciality question to whether an allegedly infringing work is “offered for sale.” Slip Op. at 19. By contrast, the Second Circuit, consistent with *Campbell*, holds that a book’s nature as a work of “scholarship or research” weighs in favor of fair use even though the author and

publisher anticipate profits. *See Wright*, 953 F.2d at 736-37. This represents a direct and substantial conflict.

**B. The Panel’s Conflation of Creativity Sufficient for Copyrightability with Creativity under the Second Fair Use Factor Conflicts with Opinions from the Fifth and Eleventh Circuits**

The second factor in the fair use analysis looks at “the nature of the copyrighted work.” 17 U.S.C. § 107(2). Functional and factual works are more likely to be subject to fair use than fictional or other highly creative works. *Sega Enterprises*, 977 F.2d at 1524 (“To the extent that a work is functional or factual, it may be copied, as may those expressive elements of the work that ‘must necessarily be used as incident to’ expression of the underlying ideas, functional concepts, or facts.” (citations omitted)).

The panel’s opinion concludes that a work is creative under this factor where the work is creative enough to be copyrightable. To understand the panel’s analysis, one must start in the opinion’s factual background discussion, where the panel notes that a French trial court concluded in 1998 “that the photographs in the *Zervos Catalogue* were documentary in nature and therefore ineligible for copyright protection.” Slip Op. at 9. It then explains that in 2001, a French appellate court reversed, determining that the photographs were copyrightable under French law because of “deliberate choice[s] of lighting, the lens, filters, [and] framing or angle of view.” Slip Op. at 9; 1-SER-1378. These qualities

(lighting, filters, etc.) identified by the French appellate court went to copyrightability, not to whether the photographs were creative compared to other copyrightable works.

Instead of performing an evaluation of the “nature of the work” under the second fair use factor, the panel opinion observes that photographs “can merit copyright protection” and then simply states that “the French *Cour d’Appel* recognized that the photographs have creative elements reflecting deliberate choices of lighting, filters, framing, and angle of view.” Slip Op. at 22. Thus, the panel holds that because a French court found the photographs sufficiently creative to be copyrightable under French law, they are also creative for purposes of the second fair use factor.

This holding conflicts with the law in the Fifth and Eleventh Circuits, which recognize that creativity sufficient for copyrightability does not establish creativity under the second fair use factor. As the Fifth Circuit explained, “[i]n order to be copyrightable, a work must contain a certain modicum of originality.” *Compaq Computer Corp. v. Ergonome Inc.*, 387 F.3d 403, 410 (5th Cir. 2004). The court went on to hold that “because fair use excuses otherwise actionable infringement . . . , a work will always be found ‘original’ for copyrightability purposes before the fair use analysis is applied. *The second statutory fair use*

*factor, then, refers to the ‘nature’ of the work beyond this initial inquiry.” Id.*  
(emphasis added).

Similarly, the Eleventh Circuit has stated that “‘the mere fact that the copied portions are themselves copyrightable cannot incline [the second] factor against fair use.’ ‘[A] work will always be found “original” for copyrightability purposes before the fair use analysis is applied. The second statutory fair use factor . . . refers to the “nature” of the work beyond this initial inquiry.’” *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1268 n.25 (11th Cir. 2014) (alterations in original, citation omitted).

Under the Fifth and Eleventh Circuits’ rule, even if the photographs at issue here were sufficiently original to warrant copyright protection under U.S. law, that would only trigger, not decide, the creativity inquiry under the second fair use factor. The panel’s opinion does not meaningfully engage on this factor, instead deferring to the copyrightability determination of a foreign court under foreign law, and using that copyrightability determination to supplant the fair use creativity factor.

The photographs in question here may not have even been sufficiently original to be copyrightable under U.S. law, much less creative for purposes of the second fair use factor. As this Court has held, “the mere act of translating” a work “into a different medium” does not result in copyrightability. *ABS Ent., Inc. v.*

*CBS Corp.*, 908 F.3d 405, 416 (9th Cir. 2018). “[T]he exercise of independent technical and aesthetic judgment” in copying another work does not make the derivative work copyrightable when “those efforts [a]re directed wholly to more effectively *representing* the underlying works, not to changing or adding to those works.” *Id.* at 419. It is not sufficient for one to make “decisions that enable one to reproduce or transform an already existing work into another medium or dimension—though perhaps quite difficult and intricate decisions.” *Ent. Rsch. Grp., Inc. v. Genesis Creative Grp., Inc.*, 122 F.3d 1211, 1222 (9th Cir. 1997).

Under this standard, the choices in “lighting, filters, framing, and angle of view,” Slip Op. at 22, that made photographs of Picasso paintings in the *Zervos Catalogue* copyrightable under French law are similar to choices in “timbre, spatial imagery, sound balance, and loudness range” this Court held insufficient to merit copyrightability for converting an audio recording from analog to digital. *ABS Ent.*, 908 F.3d at 420.<sup>2</sup>

Likewise, even if the *Zervos Catalogue* photographs would be copyrightable in the U.S., any such copyright would be “thin” because they primarily convey factual information about the appearance of Picasso’s paintings. *See* 7-ER-1258-59; *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1198 (2021). If a work is

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<sup>2</sup> Every photograph reflects choices about lighting, filters, framing, and angle of view, but not every photograph is copyrightable. *Cf. ABS Ent.*, 908 F.3d at 416, 420.

barely creative enough to be copyrightable, then it is certainly not creative in comparison to other copyrightable works. Had the panel separately analyzed creativity instead of conflating that analysis with copyrightability (as the Fifth and Eleventh Circuits prohibit), it would have concluded that the second factor weighed heavily in favor of fair use.

**C. The Panel’s Standard for Permissible Copying of an Entire Work Conflicts with this Court’s Precedent**

The third fair use factor is “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” 17 U.S.C. § 107(3). The panel concludes the relevant copyrighted works were the individual photographs, not the *Zervos Catalogue* as a whole, and *The Picasso Project* copied the photographs in their entirety. Slip Op. at 23. The panel notes that “the purpose of the copying informs the analysis,” and then concludes that it was “unpersuaded that this is a case like *Kelly* [*v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003)] in which copying the entirety of each photograph was necessary.” *Id.*

The purpose of *The Picasso Project* is to document the works of Picasso, which Picasso’s estate expressly authorized. 5-ER-827. It would be impossible to document a painting without showing a complete image of that painting.<sup>3</sup>

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<sup>3</sup> Indeed Wofsy had to reproduce the entire works. *See* [www.museepicassoparis.fr/en/image-rights](http://www.museepicassoparis.fr/en/image-rights) (“The works [of Picasso] must be reproduced as faithfully to the original as possible” and “any reproduction of a



Whatever standard of “necessity” the panel applied, it conflicts with *Kelly*. There, this Court addressed the use of complete pictures of copyrighted material appearing in internet search results. It held that “the extent of permissible copying varies with the purpose and character of the use. If the secondary user only copies as much as is necessary for his or her intended use, then this factor will not weigh against him or her.” *Kelly*, 336 F.3d at 820-21 (footnote omitted).

For purposes of the third factor, there is no material difference between *Kelly* and this case. Although the panel intimates that the transformative nature of the use in *Kelly* was a distinguishing feature, Slip Op. at 23, that was not part of *Kelly*’s analysis of the third factor. *The Picasso Project* “only copie[d] as much as is necessary for [its] intended use,” so under *Kelly*, “this factor will not weigh against” fair use. The panel’s contrary conclusion conflicts with *Kelly*.

**D. The Legal Conflicts Created by the Panel’s Opinion Will Chill Expression among Those Who Wish to Make Fair Use of Copyrighted Works**

Courts must be “mindful of the preferred position which the First Amendment occupies in the pantheon of freedoms.” *Baker v. F & F Inv.*, 470 F.2d 778, 783 (2d Cir. 1972). The fair use doctrine is a “built-in First Amendment

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detail from the work” is only “permitted provided the entire work is itself reproduced inside the document, with the caption referring to it.”).

accommodation[ ],” *Golan v. Holder*, 565 U.S. 302, 328 (2012), and the development of fair use law must honor the sacred nature of free speech rights.

Because it conflicts with the law of this and other circuits, the panel’s opinion undermines and confuses fair use standards. “[U]ncertainty of speech-affecting standards has long been recognized as a First Amendment problem.” *In re Tam*, 808 F.3d 1321, 1342 (Fed. Cir. 2015). When confusion in the law renders a speaker uncertain whether her speech will be protected, she is apt to refrain from speaking, producing a “chilling effect on speech.” *Id.*

When the application of fair use law is unpredictable, speakers cannot calibrate their speech to respect others’ copyrights while still fully exercising their First Amendment rights. To protect these important rights, the en banc Court should address and resolve the conflicts in fair use law the panel’s opinion creates.

### **PETITION FOR PANEL REHEARING**

#### **I. Due to a Misapprehension of Fact, the Panel Incorrectly Focuses Its Fair Use Analysis on Individual Photographs, Not the *Zervos Catalogue***

The panel’s opinion also overlooks a material point of fact, i.e., that de Fontbrune sued in France for infringing his copyright in the *Zervos Catalogue*, not the individual photographs. The distinction between the *Zervos Catalogue* and the individual photographs shapes the fair use analysis under each of the four factors: (i) the purpose and character of use; (ii) the nature of the copyrighted work; (iii) the amount and substantiality of the portion used; and (iv) the effect on the

potential market or value. When the panel tries to identify the relevant copyrighted work as either the *Zervos Catalogue* or the individual photographs, it mistakenly picks the individual photographs. Slip Op. at 18.

A review of the proceedings in France confirms the panel’s mistake. In the First Copyright Proceeding, the French *Cour d’Appel* explained that “Christian ZERVOS created a catalogue raisonné” and de Fontbrune “[c]laim[ed] to have the artistic and literary property rights to this catalogue.” 1-SER-1371. De Fontbrune accused Wofsy of “an infringement of copyright of the ZERVOS catalogue,” asking the court to “state that Christian ZERVO’s [sic] works constituting catalogues raisonnés of the works of PICASSO are original and copyrightable . . . .” 1-SER-1371-72. The *Cour d’Appel* concluded that “Mr. DE FONTBRUNE does indeed hold intangible property rights on the catalogue raisonné . . . .” 1-SER-1377.

Although the French court made comments about the copyrightability of the individual photographs, the claimed copyright was in the catalogue itself. De Fontbrune did not allege that *The Picasso Project* copied individual photographs in which de Fontbrune held individual copyrights, but rather that by using photographs from the *Zervos Catalogue*, *The Picasso Project* infringed de Fontbrune’s copyright in *the catalogue*.

This distinction is all-important because the definition of the copyrighted work controls the fair use analysis. The panel should have considered what sort of use *The Picasso Project* made of the *Zervos Catalogue*, and whether it was transformative; whether the *Zervos Catalogue* is a highly creative work; what percentage of the *Zervos Catalogue* *The Picasso Project* copied; and what impact *The Picasso Project* had on the market for the *Zervos Catalogue*. The panel does not address any of those questions because it misapprehends the subject of de Fontbrune's copyright. The panel should fix this mistake and correct its analysis.

**II. The Panel Should Rescind the Partial Summary Judgment for de Fontbrune on the Public Policy Defense Because the Panel Overlooks the Fact that de Fontbrune Did Not Meet His Burden**

The panel concludes Wofsy was not entitled to summary judgment on his public policy defense and therefore reverses the judgment in his favor. Slip Op. at 24. Wofsy challenges that decision. But even if the panel does not reverse course and affirm the judgment in favor of Wofsy, it should rescind the partial summary judgment in favor of de Fontbrune on the public policy defense.

When evaluating cross-motions for summary judgment, this Court is supposed to “review each motion . . . separately, giving the nonmoving party for each motion the benefit of all reasonable inferences.” *Eat Right Foods Ltd. v. Whole Foods Mkt., Inc.*, 880 F.3d 1109, 1117 n.4 (9th Cir. 2018). “[A] party seeking summary judgment always bears the initial responsibility of informing the

district court of the basis for its motion, and identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). De Fontbrune did not meet this burden with respect to fair use.

De Fontbrune did not argue or present evidence in his motion (or in opposition to Wofsy’s motion) that Wofsy could not meet his burden to establish fair use. Instead, he argued that a foreign judgment in conflict with the fair use doctrine would not be repugnant to public policy. FER-66-68. Because de Fontbrune did not satisfy his initial burden of production regarding fair use, the panel should have concluded that de Fontbrune was not entitled to summary judgment on the public policy defense. *Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1107 (9th Cir. 2000).

Instead, the panel holds that the effect on the market—the “most important element of fair use”—weighs against fair use because the relevant market is “the market for licensing the disputed photographs,” and “[t]he record supplies no evidence that widespread appropriation of those photographs in published books would only negligibly affect the market for the photographs.” Slip Op. at 23-24. The record contains no such evidence because de Fontbrune did not argue that the market for licensing individual photographs was the relevant market. In fact, his

motion did not even mention the relevant market. FER-66-68. De Fontbrune's reply alleged "direct competition between Defendants' product and the Zervos catalog" (evidently agreeing with Wofsy's position that the relevant market was the market for the catalogue), FER-18, and he did *not* argue or present evidence about "the market for licensing the disputed photographs."

Had de Fontbrune presented evidence or argument about the market for licensing individual photographs, Wofsy would have introduced evidence demonstrating that there was no such market that de Fontbrune could exploit. This is because only the Succession Picasso can license the reproduction of works by Picasso,<sup>4</sup> and the Picasso estate had forbidden de Fontbrune from reproducing any works by Picasso. *See* 5-ER-863.

When the copyright holder's ability to compete in the relevant market (absent the alleged infringement) is "uncertain," the market effects factor weighs in favor of fair use. *Google*, 141 S. Ct. at 1208. Here, it was certain that de Fontbrune could *not* compete.

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<sup>4</sup> The Picasso Estate (Succession Picasso) holds a copyright interest in photographs of Picasso's works. *See* [www.museepicassoparis.fr/en/image-rights](http://www.museepicassoparis.fr/en/image-rights) ("All commercial or non-commercial use must receive express prior permission from the Picasso Administration," and "reproduced work must always be accompanied by its caption and by the copyright notice '© Succession Picasso 202.. (year of print date)'").

Not only did de Fontbrune fail to meet his burden on the market effects factor, he did not address *any* of the fair use factors in his motion. FER-66-68. The panel stated that “as the party resisting recognition of the French judgment, Wofsy bore the burden to establish a ground for nonrecognition.” Slip Op. at 20 n.9. However, that ultimate burden of proof does not absolve de Fontbrune of his initial burden as the moving party. *Nissan Fire*, 210 F.3d at 1107. The panel should rescind its grant of partial summary judgment to de Fontbrune on the public policy defense.

### CONCLUSION

For the foregoing reasons, the Court should grant rehearing.

Dated: August 10, 2022 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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ASSOCIATES

## CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rules 35-4(a) and 40-1(a), I certify that the attached petition for panel rehearing is prepared in a format, typeface, and type style that complies with Federal Rule of Appellate Procedure 32(a)(4)-(6) and contains 4,188 words.

Dated: August 10, 2022 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By

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