

## **APPENDIX**

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**APPENDIX A**

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**FOR PUBLICATION**

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

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

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

**[Filed: July 13, 2022]**

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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,	)
<i>Plaintiffs-Appellants/</i>	)
<i>Cross-Appellees,</i>	)
	)
v.	)
	)
ALAN WOF SY; ALAN WOF SY & ASSOCIATES,	)
<i>Defendants-Appellees/</i>	)
<i>Cross-Appellants.</i>	)

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**OPINION**

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

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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,<sup>\*</sup> 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*.

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<sup>\*</sup> The Honorable Joan N. Ericksen, United States District Judge for the District of Minnesota, sitting by designation.

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

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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 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

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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.

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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

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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 proceeding in sufficient time to enable [him] to defend." Cal. Civ. Proc. Code § 1716(c)(1).

Fifth, Wofsy argued that Sicre de Fontbrune obtained the French judgment by fraud that deprived Wofsy of an adequate opportunity to present his case. The panel held that even assuming that Sicre de Fontbrune deceived the TGI as to his legal interest in the *astreinte*, Wofsy was not entitled to summary judgment on the claim that the misrepresentation "deprived [him] of an adequate opportunity to present [his] case." *See* Cal. Civ. Code § 1716(c)(2). A question remains as to whether Wofsy reasonably should have detected the alleged fraud during the French proceedings, and therefore as to whether such fraud



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deprived him of an adequate opportunity to present his case. The panel concluded that the district court did not err by denying Wofsy summary judgment on the fraud defense.

The panel held that Wofsy was not entitled to summary judgment based on the public policy defense. No other ground for nonrecognition at issue in this appeal supplied an alternative basis for affirming the judgment below. The panel reversed and remanded for further proceedings.

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**OPINION**

ERICKSEN, District Judge:

**INTRODUCTION**

Yves Sicre de Fontbrune brought this action in California state court seeking recognition of a French money judgment. The French judgment found that Defendants, Alan Wofsy and Alan Wofsy & Associates (collectively, “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 that *astreinte* as a form of relief in a 2001 French judgment finding that the photographs’ copyrights were infringed.

After removal, the district court considered motions for summary judgment on eight defenses to recognition under the California version of the Uniform Foreign-Country Money Judgment Recognition Act, Cal. Civ. Proc. Code §§ 1713–1725. The district court granted summary judgment for Wofsy based on one of those defenses: that the French judgment was repugnant to United States public policy protecting free expression. Sicre de Fontbrune appeals,<sup>1</sup> and Wofsy cross-appeals the denial of summary judgment on other defenses. We

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<sup>1</sup> Sicre de Fontbrune died in 2015. His wife and children were later substituted as successors in interest. *Sicre de Fontbrune v. Wofsy*, 838 F.3d 992, 996 n.3 (9th Cir. 2016), *as amended on denial of reh’g and reh’g en banc* (Nov. 14, 2016). For convenience, we refer to them collectively as “Sicre de Fontbrune.”

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conclude that summary judgment was not proper, and we reverse and remand for further proceedings.

**FACTUAL AND PROCEDURAL BACKGROUND**

Starting in 1932, the photographer Christian Zervos created a *catalogue raisonné*<sup>2</sup> (the “*Zervos Catalogue*”) of the works of the Spanish artist Pablo Picasso. *Sicre de Fontbrune*, 838 F.3d at 995. The catalogue ultimately featured nearly 16,000 photographs of Picasso’s works. *Id.* Zervos originally published this catalogue under the label of *Cahiers d’Art*. *Id.* In 1979, Sicre de Fontbrune acquired the rights to the business capital of *Cahiers d’Art*, including its intellectual property. *Id.*

In 1991, Alan Wofsy Fine Arts LLC acquired permission from the Estate of Pablo Picasso to publish a work illustrating and describing works by Picasso. Wofsy then produced a series of books on Picasso, titled “*The Picasso Project*”—a chronological illustrated catalogue of Picasso’s works. *The Picasso Project* contained reproductions of photographs from the *Zervos Catalogue*.

In 1996, at Sicre de Fontbrune’s request, French police seized two volumes of *The Picasso Project* that were offered for sale at a book fair in Paris. Sicre de Fontbrune then sued Alan Wofsy in France for copyright infringement. Alan Wofsy appeared, and

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<sup>2</sup> A *catalogue raisonné* is the “complete published catalogue of an artist’s work.” *Sicre de Fontbrune*, 838 F.3d at 995 n.1 (quoting The Concise Oxford Dictionary of Art Terms Online (Michael Clarke & Deborah Clarke eds., 2d ed. 2010)).

Alan Wofsy & Associates intervened. In 1998, a trial court, the *Tribunal de Grande Instance de Paris* (“*TGI*”), determined that the photographs in the *Zervos Catalogue* were documentary in nature and therefore ineligible for copyright protection.

On September 26, 2001, the French *Cour d’Appel* (Court of Appeal) reversed and entered judgment in favor of Sicre de Fontbrune, determining that the photographs at issue did not merely copy Picasso’s works, but rather added creative features through “deliberate choice[s] of lighting, the lens, filters, [and] framing or angle of view.”<sup>3</sup> The court also confirmed that Sicre de Fontbrune had obtained “the intellectual property rights on the intangible items attached to the stock, to the [Zervos] catalogue and the photographs that it contains” when he acquired the *Cahiers d’Art* business in 1979. The *Cour d’Appel* found Wofsy “guilty of infringement of copyright,” and awarded various relief to Sicre de Fontbrune, including a legal device known as an *astreinte*, under which Wofsy would be liable for damages of 10,000 francs for each proven infraction of the prohibition on using the photographs at issue. Wofsy appealed to the *Cour de Cassation* (the French Civil Supreme Court), but that court removed the appeal from its docket after Wofsy did not pay the other damages and costs the *Cour d’Appel* awarded to Sicre de Fontbrune. On December 20, 2001, Sicre de Fontbrune sold his business capital in *Cahiers d’Art*, including all its tangible and intangible components, to a third party.

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<sup>3</sup> The original judgments appear in French. We refer to the certified translations provided by the parties.

Sicre de Fontbrune initiated a new lawsuit (the “*Astreinte* Proceeding”) in the *TGI* against Wofsy on July 22, 2011, seeking to “liquidate” the *astreinte* awarded by the *Cour d’Appel* in 2001. Sicre de Fontbrune claimed that copies of *The Picasso Project* were offered for sale in a French bookstore in 2011, and that 1,492 photographs from the *Zervos Catalogue* were reproduced in these works in violation of the *astreinte*.

Wofsy maintains that he was never served with process in the *Astreinte* Proceeding. Sicre de Fontbrune asserts that a *huissier*—a bailiff-like officer of the French court—sent the complaint and French equivalent of a summons to Wofsy through procedures consistent with the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965 (“Hague Service Convention”), 20 U.S.T. 361, T.I.A.S. No. 6638. The French court official requested service at addresses that the French courts already had on file: 401 China Basin Street in San Francisco, and P.O. Box 2210 in San Francisco. The U.S. process server, however, failed to effect service.

The *TGI* held a hearing in the *Astreinte* Proceeding on October 25, 2011. Wofsy did not appear. On November 15, 2011, the *TGI* ordered another hearing. The order contained a brief description of the claim and proceedings to date and the decision to reopen the proceedings for a hearing on December 13, 2011, “for the production by [Sicre de Fontbrune] of the certificate from the foreign authority responsible for notification of the document instituting the proceedings,” as requested in accordance with Article 6 of the Hague

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Service Convention. Wofsy received a copy of that order in late November 2011. A letter accompanying the order explained the time limits for appealing the order.

At the December 2011 hearing, the *TGI* accepted the requested service certificates, and concluded that Wofsy had been “duly summoned” in accordance with the French Civil Procedure Code. But Wofsy again failed to appear. The *TGI* entered a default judgment against Wofsy on January 10, 2012, ordering Wofsy to pay 2,000,000 Euros to Sicre de Fontbrune in liquidation of the *astreinte*.

While the *Astreinte* Proceeding was pending, Sicre de Fontbrune commenced another lawsuit in the *TGI* on September 20, 2011. The suit alleged copyright infringement by Wofsy and two defendants not party to the instant lawsuit: Alan Wofsy Fine Arts LLC, and the French bookstore where copies of *The Picasso Project* had been discovered for sale in 2011. In January 2013, the *TGI* found that on December 20, 2001, Sicre de Fontbrune had sold the “commercial rights which [he] had acquired on May 31, 1979,” and that he no longer had standing to sue for copyright infringement.

On February 25, 2014, Wofsy initiated a proceeding in the *TGI* seeking to vacate the 2012 *astreinte* judgment, arguing that Sicre de Fontbrune’s transfer of copyrights in December 2001 deprived him of standing to bring the *Astreinte* Proceeding. The *TGI* dismissed this “Review Proceeding” in August 2014. Wofsy appealed, and the *Cour d’Appel* affirmed the dismissal in April 2018, finding the filing of the Review Proceeding untimely. The *Cour de Cassation* affirmed

that decision on October 17, 2019. ECF Nos. 24 (Case No. 19-16913), 22 (Case No. 19-17024).<sup>4</sup>

Before Wofsy filed the Review Proceeding, though, Sicre de Fontbrune brought the instant action in the Superior Court of California in Alameda County in November of 2013, seeking recognition of the *astreinte* judgment. After Wofsy removed the action to federal court, the district court dismissed the case with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6). We reversed, holding that the *astreinte* was not a penalty but rather a judgment for “a sum of money” cognizable under the Recognition Act. *Sicre de Fontbrune*, 838 F.3d at 1007.

On remand, the district court heard cross-motions for summary judgment on eight defenses under the Recognition Act. *See* Cal. Civ. Proc. Code § 1716. The district court granted summary judgment for Wofsy on only one of those defenses, determining that the *astreinte* judgment was repugnant to public policy, and exercising its discretion to decline recognition. Sicre de Fontbrune appeals the grant of summary judgment to Wofsy on that issue, and appeals the district court’s denial of partial summary judgment to Sicre de Fontbrune on the defense of lack of subject matter jurisdiction. Wofsy cross-appeals the grant of partial summary judgment to Sicre de Fontbrune on the defense of lack of personal jurisdiction, and appeals the denial of summary judgment to Wofsy on the defenses

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<sup>4</sup> We take judicial notice of the 2019 *Cour de Cassation* opinion and its certified English translation.

based on lack of subject matter jurisdiction, insufficient notice, and fraud.

### **JURISDICTION AND STANDARD OF REVIEW**

We have jurisdiction to review a district court’s final judgment under 28 U.S.C. § 1291. Our review extends to an order denying partial summary judgment that has become part of a final judgment. *Scribner v. WorldCom, Inc.*, 249 F.3d 902, 907 (9th Cir. 2001).

We review a summary judgment *de novo*. *Id.* We “view the evidence in the light most favorable to the nonmoving party, determine whether there are any genuine issues of material fact, and decide whether the district court correctly applied the relevant substantive law.” *Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987, 989 (9th Cir. 2016) (en banc) (per curiam).

### **DISCUSSION**

“In international diversity cases such as this one, ‘enforceability of judgments of courts of other countries is generally governed by the law of the state in which enforcement is sought.’” *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 990 (9th Cir. 2013) (quoting *Yahoo! Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme*, 433 F.3d 1199, 1212 (9th Cir. 2006)). In this removed action, California law—the Recognition Act—governs.<sup>5</sup>

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<sup>5</sup> Although there is no contest about diversity of citizenship, the district court determined that the defendants in this case are citizens and residents of California—a finding not disputed on appeal. Although a defendant’s citizenship in the state where an action is brought ordinarily prevents removal, 28 U.S.C.



California’s Recognition Act is modeled on the 2005 version of the Uniform Foreign-Country Money Judgments Recognition Act. *AO Alfa-Bank v. Yakovlev*, 230 Cal. Rptr. 3d 214, 221 (Ct. App. 2018), *as modified on denial of reh’g* (Apr. 3, 2018); *see* Unif. Foreign-Country Money Judgments Recognition Act (Nat’l Conf. of Comm’rs on Unif. State L. 2005). Amendments to California’s Recognition Act became effective in 2018. *See Alfa-Bank*, 230 Cal. Rptr. 3d at 221. But those amendments apply only to claims commenced after their effective date. *Id.* at 222. The district court was thus correct to apply the version of the state Recognition Act effective at the time Sicre de Fontbrune filed this action in 2013.<sup>6</sup>

A majority of states have adopted either the 1962 version of the Uniform Foreign-Country Money Judgments Recognition Act, or its 2005 update. *Ohno*, 723 F.3d at 990 n.8. Non-California authorities that interpret the 1962 or the 2005 uniform acts, or that apply principles of comity-based recognition to foreign judgments, carry persuasive value in the application of California’s Recognition Act. *Alfa-Bank*, 230 Cal. Rptr. 3d at 222–23 (citing Cal. Civ. Proc. Code § 1722).

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§ 1441(b)(2), that rule is “procedural, or non-jurisdictional,” *Lively v. Wild Oats Markets, Inc.*, 456 F.3d 933, 939 (9th Cir. 2006). Removal is unchallenged here.

<sup>6</sup> As in the district court’s order, all citations to the Recognition Act in this opinion refer to the version of the Recognition Act in effect at the time this suit began in 2013, unless otherwise noted. *See* Cal. Civ. Proc. Code §§ 1713 *et seq.* (West 2013).

“Once coverage under the Uniform Act is established,” as it has been here,<sup>7</sup> “the presumption in favor of enforcement applies,” and the party resisting recognition must establish a ground for nonrecognition. *Ohno*, 723 F.3d at 991 (quoting Cal. Civ. Proc. Code § 1716(d)). The Recognition Act lists several grounds for nonrecognition. Some grounds, if established, preclude recognition, Cal. Civ. Proc. Code § 1716(b), but others only confer discretion on courts to deny recognition, Cal. Civ. Proc. Code § 1716(c).

Five statutory grounds for nonrecognition are at issue in this appeal. First, Sicre de Fontbrune challenges the district court’s conclusion that the French judgment was repugnant to U.S. public policy favoring free expression, and argues that he was entitled to partial summary judgment on this issue. Second, both parties appeal the district court’s denial of summary judgment concerning the assertion that the French court lacked subject matter jurisdiction. Third, Wofsy challenges the district court’s grant of partial summary judgment to Sicre de Fontbrune regarding the assertion that the French court lacked personal jurisdiction over Wofsy. Fourth, Wofsy asserts that he was entitled to summary judgment on the defense that he received inadequate notice of the proceedings that resulted in the French judgment. And fifth, Wofsy argues that Sicre de Fontbrune obtained the French judgment by fraud that deprived Wofsy of an adequate opportunity to present his case.

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<sup>7</sup> Given our previous opinion, the parties no longer dispute that the 2012 *Astreinte* Judgment falls within the coverage of the Recognition Act. See *Sicre de Fontbrune*, 838 F.3d at 1007.

We conclude that Sicre de Fontbrune—not Wofsy—was entitled to summary judgment on the defense of repugnancy to public policy. We also conclude that no other defenses raised on appeal provide an alternate basis to affirm the grant of summary judgment. *See Spencer v. Peters*, 857 F.3d 789, 797 n.3 (9th Cir. 2017). Accordingly, we reverse the district court’s judgment and remand for further proceedings.

### **I. Public Policy**

The California Recognition Act allows a court to decline to recognize a foreign-country money judgment if the “judgment or the cause of action or claim for relief on which the judgment is based is repugnant to the public policy of [California] or of the United States.” Cal. Civ. Proc. Code § 1716(c)(3). The United States undoubtedly has robust public policy favoring free expression. *See Cohen v. California*, 403 U.S. 15, 24 (1971) (“The constitutional right of free expression is powerful medicine[.]”). But “some restriction on expression is the inherent and intended effect of every grant of copyright.” *Golan v. Holder*, 565 U.S. 302, 327–28 (2012). The fair use defense to copyright infringement is one of the “built-in First Amendment accommodations” that ease the apparent tension between free expression and U.S. copyright law. *See Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

The district court determined that Wofsy would have prevailed on a fair use defense to the copyright infringement claim on which the *astreinte* judgment was based. The court also concluded that French law’s failure to allow for Wofsy’s fair use defense made the

judgment repugnant to U.S. public policy protecting expression.

“California courts have set a high bar for repugnancy under the Uniform Act.” *Ohno*, 723 F.3d at 1002. The issue is not simply whether the “foreign judgment or cause of action is contrary to our public policy.” *Id.* Rather, the question is whether either is “so offensive to our public policy as to be prejudicial to recognized standards of morality and to the general interests of the citizens.” *Hyundai Sec. Co. v. Lee*, 182 Cal. Rptr. 3d 264, 272 (Ct. App. 2015) (cleaned up), *as modified* (Jan. 14, 2015). Under this standard, a “difference in law, even a marked one, is not sufficient to raise a public policy issue. Nor is it relevant that the foreign law allows a recovery that the forum state would not allow.” *Id.* (cleaned up). Instead, public policy is violated “only if recognition or enforcement of the foreign-country judgment would tend clearly to injure public health, the public morals, or the public confidence in the administration of law, or would undermine that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel.” *Id.* (cleaned up).

The standard is not lower where the asserted repugnancy arises from inconsistency with constitutional principles rather than with statutes or common law. *Ohno*, 723 F.3d at 1004. In such cases, “only judgments presenting a *direct and definite* conflict with fundamental American constitutional principles will be denied recognition because repugnant.” *Id.* at 1004–05 (emphasis added) (noting cases finding repugnancy to the First Amendment

where the foreign judgments “would *unquestionably* violate the Constitution were they issued here with respect to domestic activity”). Thus, in *Ohno*, this Court determined that a judgment was not repugnant to public policy in part because the defendant’s position—that imposing tort liability on a church’s religious practice was incompatible with the religion clauses of the California and United States constitutions—was debatable. *Id.* at 1009.

Wofsy’s public policy defense rests on two assertions: first, that the fair use doctrine of U.S. copyright law—a feature that France’s copyright scheme lacks—would have protected the copying of the photographs at issue; and second, that a judgment imposing copyright liability based on copying that would qualify as fair use is repugnant to our public policy. For the reasons below, we reject the first of these contentions, and therefore need not reach the second. See *S.A.R.L. Louis Feraud Int’l v. Viewfinder, Inc.*, 489 F.3d 474, 483 (2d Cir. 2007) (“If the publication of photographs of copyrighted material in the same manner as [the defendant] has done in this case would not be fair use under United States law, then the French intellectual property regime sanctioning the same conduct certainly would not be repugnant to public policy.”).

The fair use defense under U.S. copyright law requires the analysis of four statutory factors. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994). They are “(1) the purpose and character of the use, . . . (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in

relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107.

While Wofsy claims fair use of the *Zervos Catalogue* as a whole, the individual *photographs* within the *Zervos Catalogue* are at issue in this case. The 2001 *Cour d’Appel* decision held that these photographs were eligible for copyright protection in France and that the copyright had been infringed. And the *astreinte* provided for damages of 10,000 francs for each violation of the prohibition on further use of the *photographs*. The 2012 *astreinte* judgment recognized damages of 14,920,000 francs,<sup>8</sup> based on the 1,492 photographs copied from the *Zervos Catalogue*. We accordingly examine the fair use factors with respect to the photographs, and need not analyze fair use with respect to the *Zervos Catalogue* as a whole.

#### A. Purpose and character of use

The “purpose and character” of an allegedly infringing use may indicate fair use, depending in part on “whether such use is of a commercial nature or is for nonprofit educational purposes.” 17 U.S.C. § 107. Commercial use “tends to weigh against a finding of fair use.” *Campbell*, 510 U.S. at 585 (quoting *Harper & Row Publ’ers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985)). It is “not conclusive . . . but rather a fact to be weighed along with others in fair use decisions.” *Id.* (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448–49 (1984)) (cleaned up). The

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<sup>8</sup> The court limited the actual *astreinte* award to the amount that Sire de Fontbrune had sought—2,000,000 Euros.

“central purpose” of considering the “purpose and character” of the work is to determine whether the new work is “transformative”—that is, whether it “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” *Id.* at 579.

Wofsy concedes that *The Picasso Project* is a commercial venture. But 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. *See* 17 U.S.C. § 107. The district court relied on that conclusion to find that the first fair use factor weighed “strongly” in favor of fair use.

We disagree. The “use” at issue is the allegedly infringing one—the reproduction of copyrighted photographs in a book offered for sale. The “end-user’s utilization of the product is largely irrelevant.” *Zomba Enters., Inc. v. Panorama Recs., Inc.*, 491 F.3d 574, 582 (6th Cir. 2007); *see also Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381, 1386 (6th Cir. 1996) (rejecting a fair use defense where a college-town copy shop copied portions of books and sold them to students in “coursepacks” intended for educational use).

Nor does the evidence support a finding of transformative use that could rebalance this factor in

Wofsy's favor.<sup>9</sup> It is true that even exact copies can be transformative. For example, this Court has recognized transformative use in the replication of copyrighted photographs as low-resolution thumbnails for an internet search engine, because the thumbnails "served an entirely different function," i.e., improving access to information. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818–19 (9th Cir. 2003). The reduction in resolution made it "unlikely that anyone would use [the] thumbnails for [the] illustrative or aesthetic purposes" of the protected works. *Id.* at 819.

Wofsy argues that he used the photographs only as documentation of Picasso's works, without regard to the photographs' creative qualities. But a mere "difference in purpose is not quite the same thing as transformation." *Monge v. Maya Mags., Inc.*, 688 F.3d 1164, 1176 (9th Cir. 2012) (quoting *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998)). Moreover, the purposes of the works overlap. *The Picasso Project* and the photographs both present the works of Picasso. This much is evident from the fact that the photographs—though deemed by the French *Cour d'Appel* to include creative or artistic qualities of their own—originally were published as part of a *catalogue raisonné* documenting Picasso's works. The exact copies in this case therefore did not serve an

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<sup>9</sup> Wofsy argues that Sicre de Fontbrune waived any argument about transformative use by failing to address it in the district court. But as the party resisting recognition of the French judgment, Wofsy bore the burden to establish a ground for nonrecognition. *Ohno*, 723 F.3d at 991; Cal. Civ. Proc. Code § 1716(d).



“entirely different function” than the originals. *Cf. Kelly*, 336 F.3d at 818–19.

The fact that *The Picasso Project* included informative captions and organized the photographs so as to facilitate research does not change our conclusion. Adding informative captions does not necessarily transform copyrighted works. *See Monge*, 688 F.3d at 1174 (finding that “neither minor cropping nor the inclusion of headlines or captions transformed” copyrighted photographs).

In sum, the undisputed evidence shows that the use of the copyrighted photographs was commercial and nontransformative. This factor therefore weighs against a finding of fair use.

### **B. Nature of the copyrighted work**

The second fair use factor considers “two aspects of the work: the extent to which it is creative and whether it is unpublished.” *Id.* at 1177. The “scope of fair use is narrower with respect to unpublished works” than with respect to published ones. *Harper & Row*, 471 U.S. at 564. The parties agree that the photographs were published in the *Zervos Catalogue*. Accordingly, the district court properly focused its inquiry on creativity.

“Photos are generally viewed as creative, aesthetic expressions of a scene or image and have long been the subject of copyright.” *Monge*, 688 F.3d at 1177. This is so “especially when they are created for public viewing.” *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 743 (9th Cir. 2019). Even “point-and-shoot” photographs that are “not highly artistic” can merit copyright protection. *Monge*, 688 F.3d at 1177.

Wofsy emphasizes the documentary purpose of the *Zervos Catalogue*. But that purpose does not negate any creative character displayed by the photographs themselves. Wofsy points to the expert declaration of a prominent art historian opining that photographs in *catalogues raisonnées*, in general, lack an artistic purpose, and that the photographs in the *Zervos Catalogue* are “not themselves works of art.” Yet, the French *Cour d’Appel* recognized that the photographs have creative elements reflecting deliberate choices of lighting, filters, framing, and angle of view. The fact that gallery owners and readers of *Cahiers d’Art* (rather than Zervos himself) may have created some of the disputed photographs does not contradict the French court’s finding that the photographs exhibit creativity.

The photographs’ creative qualities prevent this factor from weighing heavily, if at all, in favor of fair use.<sup>10</sup>

### **C. Amount and substantiality of the portion used**

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. “[C]opying an entire work militates against a finding of

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<sup>10</sup> The Second Circuit has concluded, albeit in dicta, that copied works’ ineligibility for copyright in the United States does not, by itself, suffice to establish repugnancy of a judgment based on that copying. *Louis Feraud*, 489 F.3d at 483. Wofsy does not argue on this appeal that the photographs would be uncopyrightable under U.S. law, and we therefore do not address the issue.

fair use.” *VHT*, 918 F.3d at 744 (quoting *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1118 (9th Cir. 2000)) (cleaned up). But, because the purpose of the copying informs the analysis, copying entire works can qualify as fair use in some circumstances, as where the copying is transformative. See *Kelly*, 336 F.3d at 821.

The district court focused on the fact that *The Picasso Project* reproduced only 1,492 photographs out of the roughly 16,000 photographs in the *Zervos Catalogue*. But the copying included the entirety of the copyrighted photographs at issue. And especially in view of our conclusion that Wofsy did not transform the photographs, we are unpersuaded that this is a case like *Kelly* in which copying the entirety of each photograph was necessary. See *id.* This factor weighs against fair use.

#### **D. Effect on potential market or value**

The fourth fair use factor is “the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107. “This last factor is undoubtedly the single most important element of fair use.” *Harper & Row*, 471 U.S. at 566. We consider not only the effect of the allegedly infringing work itself, but also “whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market for the original.” *Campbell*, 510 U.S. at 590 (cleaned up).

Wofsy offered evidence that auction prices for the *Zervos Catalogue* have *increased* during the time that

*The Picasso Project* has been on the market. While this is circumstantial evidence that *The Picasso Project* has not depressed the market for the *Zervos Catalogue*, it proves nothing about the effect on the market for licensing the disputed photographs. The record supplies no evidence that widespread appropriation of those photographs in published books would only negligibly affect the market for the photographs.

Furthermore, where the allegedly infringing use is both commercial and non-transformative, a presumption of market harm arises. *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 861 (9th Cir. 2017) (citing *Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522, 531 (9th Cir. 2008)). We have concluded that *The Picasso Project's* use of the photographs was commercial and non-transformative. With no evidence countering the resulting presumption of market harm, this factor weighs against fair use.

#### **E. Conclusion on fair use and public policy**

Fair use may depend on factual findings, but the ultimate question of whether facts indicate fair use is legal in nature. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1199 (2021). After weighing the four factors above, we have 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. Because it is at least highly debatable—if not absolutely clear—that a fair use defense would not protect the conduct underlying the judgment of which Sicre de Fontbrune seeks recognition, Wofsy's inability to urge a fair use defense in France does not place the French judgment in "direct and definite

conflict with fundamental American constitutional principles.” *Ohno*, 723 F.3d at 1004. Sicre de Fontbrune is therefore entitled to partial summary judgment on this defense.<sup>11</sup>

## II. Lack of Subject Matter Jurisdiction

The applicable version of the California Recognition Act provides that a court “shall not” recognize a foreign-country judgment if the “foreign court did not have jurisdiction over the subject matter.” Cal. Civ. Proc. Code § 1716(b)(3). “Courts and commentators agree that subject matter jurisdiction must be assessed with reference to foreign law.” Tanya J. Monestier, *Whose Law of Personal Jurisdiction? The Choice of Law Problem in the Recognition of Foreign Judgments*, 96 B.U. L. Rev. 1729, 1747 (2016). “In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.” Fed. R. Civ. P. 44.1; *Sicre de Fontbrune*, 838 F.3d at 997.

The district court determined that the French court’s jurisdiction over the subject matter of the 2012 *Astreinte* Proceeding depended on Sicre de Fontbrune’s standing; that his standing depended on whether he retained rights in the *astreinte*; and that whether he retained rights in the *astreinte* turned on the disputed question of whether Sicre de Fontbrune had

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<sup>11</sup> We leave for another day the question of whether a defendant’s lack of opportunity to assert a clearly *meritorious* fair use defense would render a foreign judgment repugnant to the public policy of the United States or of California.

transferred those rights. Our conclusion regarding the first of those assertions diverges from the district court's view and disposes of the subject matter jurisdiction defense.

The French appellate courts did not evaluate whether the *TGI* had subject matter jurisdiction over the *Astreinte* Proceeding. Instead, they concluded that Wofsy's effort to set aside the *Astreinte* Judgment was untimely. We therefore lack an authoritative statement from the French courts as to whether the *TGI* possessed subject matter jurisdiction over the *Astreinte* Proceeding.

The parties' submissions and our own research, however, assure us that the *TGI*'s subject matter jurisdiction did not depend on Sicre de Fontbrune's standing. Wofsy's own expert explained that French courts assess standing in terms of "admissibility," rather than jurisdiction. The French Code of Civil Procedure provides, as translated, that no claim is "admissible" unless brought by a person who has the right to act; and that the right to act is "available to all those who have a legitimate interest in the success or dismissal of a claim." *Code de Procédure Civile* arts. 31, 32 (Fr.).

We acknowledge, as the district court emphasized, that the "practical result" of a lack of standing in French courts resembles that of a failure of subject matter jurisdiction in the federal courts of the United States: dismissal without a decision on the merits. *See Brownback v. King*, 141 S. Ct. 740, 749 (2021) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101–02 (1998)) ("Ordinarily, a court cannot issue a

ruling on the merits ‘when it has no jurisdiction’ because ‘to do so is, by very definition, for a court to act ultra vires.’”). But the plain language of California’s Recognition Act requires a proponent of the subject matter jurisdiction defense to establish that the foreign court “did not have jurisdiction over the subject matter.” Cal. Civ. Proc. Code § 1716(b)(3). We are aware of no authority holding that a procedural defect that produces a similar practical result can suffice.

Our own research similarly yields no indication that a plaintiff’s lack of standing circumscribes the judicial power—the subject matter jurisdiction—of French courts. The provisions of the Code of Civil Procedure that set forth the requirements for standing appear within Title II of the Code, titled “L’action” (“The Action”). *Code de Procédure Civile* tit. II (Fr.). A separate title addresses the “compétence” (competence) of the courts, including their jurisdiction. *Code de Procédure Civile* tit. III (Fr.).

Even if we were to assess subject matter jurisdiction with reference to domestic law, we could not say that a lack of standing necessarily deprives a court of subject matter jurisdiction. To be sure, a party must show the “irreducible constitutional minimum of standing” to vest an Article III federal court with subject matter jurisdiction. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). But California is one of numerous states whose judiciaries’ subject matter jurisdiction does not depend on standing. *Jasmine Networks, Inc. v. Super. Ct.*, 103 Cal. Rptr. 3d 426, 432 (Ct. App. 2009); *Weatherford v. City of San Rafael*, 395 P.3d 274, 278 (Cal. 2017) (observing that California’s “state

constitution has no case or controversy requirement imposing an independent jurisdictional limitation on our standing doctrine”); *Tax Found. of Hawai‘i v. State*, 439 P.3d 127, 143 (Haw. 2019) (collecting examples of states where “standing is a prudential concern and not an issue of subject matter jurisdiction”).

Wofsy’s arguments on the subject matter jurisdiction defense rest entirely on the assertion that Sicre de Fontbrune had transferred his rights in the *astreinte* at the time he sought to liquidate it. That assertion, even if proven, does not establish a defect in the French courts’ subject matter jurisdiction over the *Astreinte* Proceeding. Sicre de Fontbrune is entitled to partial summary judgment on this defense.

### **III. Lack of Personal Jurisdiction**

A court applying California’s Recognition Act must refuse to recognize a foreign-country judgment if the “foreign court did not have personal jurisdiction over the defendant.” Cal. Civ. Proc. Code § 1716(b)(2). But a court shall not refuse recognition for lack of personal jurisdiction if the defendant “voluntarily appeared in the proceeding, other than for the purpose of protecting property seized or threatened with seizure in the proceeding or of contesting the jurisdiction of the court over the defendant.” Cal. Civ. Proc. Code § 1717(a)(2). We agree with the district court that Wofsy waived this defense through a voluntary appearance.

Courts applying other states’ analogues to Section 1717(a)(2) have recognized that a voluntary appearance may occur “in the proceeding” either before or after judgment. *See CIBC Mellon Tr. Co. v. Mora Hotel Corp.*



*N.V.*, 792 N.E.2d 155, 162 (N.Y. 2003) (quoting Restatement (Second) of Conflict of Laws § 33, cmt. b) (noting that a defendant may be deemed to have submitted to a court’s jurisdiction by “taking steps in the action *after judgment either in the trial court or in an appellate court*”); *S.C. Chimexim S.A. v. Velcro Enters. Ltd.*, 36 F. Supp. 2d 206, 215 (S.D.N.Y. 1999) (defense waived where one of defendant’s arguments in appellate proceedings in the foreign forum “concerned the merits of the underlying dispute”); *In re Transamerica Airlines, Inc.*, No. CIV.A. 1039-VCP, 2007 WL 1555734, at \*10 (Del. Ch. May 25, 2007) (waiver where one of defendant’s arguments on appeal went “to the *merits*” of the contested judgment). We have confirmed that this principle applies to California’s Recognition Act. *See In re Rejuvi Lab’y, Inc.*, 26 F.4th 1129, 1134 (9th Cir. 2022) (holding that a defendant “waived its personal jurisdiction challenge by voluntarily appearing in [the trial court that had entered a default judgment] in its attempt to set aside the default judgment”).

Wofsy “voluntarily appeared in the proceeding” by petitioning the *TGI* to set aside the 2012 Judgment. Wofsy does not specify the French procedural mechanism through which he brought the Review Proceeding in 2014, but contends that it was a “collateral attack” without a direct analogue in American law. The *Cour d’Appel* in 2018, however, characterized the application to set aside the 2012 Judgment as a *recours en révision* pursuant to Article 593 and subsequent provisions of the French Code of Civil Procedure. That chapter of the Code explains that this procedure is available only to one who has been a

party to the judgment of which review is sought, and only for a limited set of reasons, including the discovery of false statements or certain documents. *Code de Procédure Civile* arts. 593–95 (Fr.). In this sense, a *recours en révision*—loosely translated as an “appeal for review”—resembles a motion to set aside a judgment under Rule 60 of the Federal Rules of Civil Procedure. We reject the argument that the Review Proceeding constituted a wholly separate action. *Cf. CIBC Mellon*, 792 N.E.2d at 162 (treating an application to a court to set aside its judgment as a voluntary appearance “in the proceedings”). The mere fact that the French courts viewed the Review Proceeding as untimely did not convert it into a separate “proceeding” from the one that resulted in the judgment.

Wofsy’s voluntary appearance also reached beyond “protecting property seized or threatened with seizure in the proceeding or . . . contesting the jurisdiction of the court over the defendant[.]” *See* Cal. Civ. Proc. Code § 1717(a)(2). In the Review Proceeding, Wofsy argued that Sicre de Fontbrune had transferred his interest in the *astreinte*; that, therefore, the 2012 Judgment rested on a flawed assertion of standing; and that the judgment should be set aside. That effort does not fit within the safe harbor for protecting seized property or disputing personal jurisdiction.<sup>12</sup> It therefore precludes

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<sup>12</sup> We need not conclude—as the district court did—that Wofsy challenged the *merits* of the 2012 Judgment. We simply observe that Wofsy argued issues other than the two that Section 1717(a)(2) exempts from triggering waiver of a defense based on lack of personal jurisdiction.

Wofsy from asserting the personal jurisdiction defense to recognition. *See id.*

The district court properly granted partial summary judgment to Sicre de Fontbrune regarding the defense of lack of personal jurisdiction.

#### **IV. Insufficient Notice**

The Recognition Act provides that a court may refuse to recognize a foreign judgment if the “defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend.” Cal. Civ. Proc. Code § 1716(c)(1). The district court determined that issues of fact precluded summary judgment regarding this defense. Only Wofsy challenges that determination. The parties dispute the adequacy of two efforts at notice: a failed effort to serve the summons and complaint for the *Astreinte* Proceeding, and a letter that the French *TGI* mailed to Wofsy after the first hearing in the *Astreinte* Proceeding but before the *TGI* entered judgment. Although the district court reserved issues for the fact finder that should have been decided as a matter of law, we agree with the district court’s ultimate conclusion regarding this defense.

The California Supreme Court has not clarified the showing that a defendant must make to prove the insufficient notice defense. But we “will ordinarily accept the decision of an intermediate appellate court as the controlling interpretation of state law, unless we find convincing evidence that the state’s supreme court likely would not follow it.” *Mudpie, Inc. v. Travelers*

*Cas. Ins. Co. of Am.*, 15 F.4th 885, 889 (9th Cir. 2021) (cleaned up).

A California Court of Appeal<sup>13</sup> has held that a mere failure of actual notice does not prove the inadequate notice defense. Rather, the proponent of this defense must show the absence of notice “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Alfa-Bank*, 230 Cal. Rptr. 3d at 224 (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)). The applicable standard, in other words, aligns with the constitutional minimum for due process. *See id.* at 233. Under that standard, where “notice is a person’s due,” the “means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.” *Id.* at 225 (quoting *Mullane*, 339 U.S. at 315).

Wofsy urges us to depart from this rule and hold instead that a failure of actual notice proves this defense. He argues that if a failure of actual notice does not suffice, then this defense collapses into the “lack of personal jurisdiction” defense. According to Wofsy, that interpretation of the statute would render the insufficient notice defense mere surplusage—a result that should be avoided. *See Delaney v. Super. Ct.*, 50 Cal. 3d 785, 799 (1990).

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<sup>13</sup> A decision of a California Court of Appeal that is not in conflict with another appellate decision binds all inferior courts across the state. *Auto Equity Sales, Inc. v. Super. Ct. of Santa Clara Cnty.*, 369 P.2d 937, 940 (Cal. 1962) (en banc).

But we do not see “convincing evidence,” *Mudpie*, 15 F.4th at 889, that the California Supreme Court would reject the Court of Appeal’s interpretation of the insufficient notice defense. In *Alfa-Bank*, the Court of Appeal considered that the “notice ground may have broader application than the service of process prerequisite for personal jurisdiction.” *Alfa-Bank*, 230 Cal. Rptr. 3d at 233 (citing *Isack v. Isack*, 733 N.W.2d 85 (Mich. Ct. App. 2007)). In *Isack*, the Court of Appeals of Michigan—interpreting the analogous provision of that state’s codification of the Uniform Act—concluded that “recognition of a judgment may be declined where the defendant was aware, or waived notice, of the litigation, but where the defendant was not notified of certain actions taken within the suit.” 733 N.W.2d at 86–87; *see also* Restatement (Fourth) of Foreign Relations Law § 484 (2018) (recognizing that “the notice requirement governs not just the initiation of a proceeding, but relevant actions taken within the suit”). Although the insufficient notice and personal jurisdiction defenses “overlap[ped]” under the particular facts of *Alfa-Bank*, the Court of Appeal recognized that they would not always do so. *See Alfa-Bank*, 230 Cal. Rptr. 3d at 233. We therefore accept the Court of Appeal’s conclusion that the insufficient notice defense requires the proponent to prove the absence of a constitutionally adequate attempt at actual notice. *See id.*

We begin by considering whether the attempts to serve Wofsy before the October 2011 hearing constituted sufficient efforts at notice, despite their failure. An officer of the French *TGI* attempted to serve both defendants through procedures established in

accordance with the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965 (“Hague Service Convention”), 20 U.S.T. 361, T.I.A.S. No. 6638. The Hague Service Convention was “intended to provide a simpler way to serve process abroad, to assure that defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad.” *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 698 (1988). Its “primary innovation” is a requirement that each state party designate a “Central Authority” that can receive foreign requests for service of process and arrange for service on an addressee. *Id.* at 698–99; Hague Service Convention, 20 U.S.T. 361, art. 2.

In accordance with that procedure, the French court’s officer sent the complaint and the French equivalent of a summons to the United States’ Central Authority, and requested service on the defendants at their addresses as listed in the summons. The summons listed the address of Alan Wofsy & Associates as 401 China Basin Street in San Francisco. For Alan Wofsy himself, the summons listed Post Office Box 2210 in San Francisco.

Article 6 of the Hague Convention requires the Central Authority (or another designee of the state where process is to be served) to send to the applicant for service a certificate stating the method, place, date, and recipient of service, or the reasons that have prevented service. Hague Service Convention, 20 U.S.T. 361, art. 6. Accordingly, the *huissier’s* requests for service also included requests for these certificates.

The U.S. process server's attempt to serve Alan Wofsy & Associates failed. The process server—a contractor of the U.S. Central Authority—issued a certificate of non-service dated August 12, 2011, attesting that service had been attempted at 401 China Basin Street; that no such address existed; and that the process server had confirmed on the U.S. Postal Service website that the address was “non deliverable.”<sup>14</sup>

Upon learning of a failure of notice, “[d]eciding to take no further action is not what someone desirous of actually informing [the addressee] would do; such a person would take further reasonable steps if any were available.” *Jones v. Flowers*, 547 U.S. 220, 230 (2006) (internal quotation omitted). The Supreme Court accordingly held that a state failed to afford constitutionally adequate notice where the state sold a tax-delinquent property after the state's certified-mail

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<sup>14</sup> The delivery trouble apparently arose from the fact that San Francisco renamed the old China Basin Street as “Terry Francois Boulevard” in the 1990s, and reassigned the name “China Basin Street” to a newly built road at some point after 2010. But it is undisputed that Wofsy continued to receive mail addressed to 401 China Basin Street for years after the *Astreinte* Proceeding. In any event, Sicre de Fontbrune offers no indication that Wofsy was obligated to apprise Sicre de Fontbrune or the French courts of any change of address at the time the *Astreinte* Proceeding commenced. Thus, there is no indication that Wofsy is to blame for the *huissier's* use of an outdated address or for the process server's failure to effect service. *Cf. Alfa-Bank*, 230 Cal. Rptr. 3d at 230 (holding that a Russian court's mail service to a defendant's last known address was adequate notice, where the defendant was required by a surety agreement to keep his address up to date with the Russian government).

notice to the property owner was returned unclaimed and the state failed to take further reasonable and available steps to accomplish notice. *Id.* at 239. “Although the State may have made a reasonable calculation” of how to reach the property owner, the state had “good reason to suspect when the notice was returned that [the addressee] was ‘no better off than if the notice had never been sent.’” *Id.* at 230 (quoting *Malone v. Robinson*, 614 A.2d 33, 37 (D.C. 1992)); see also *United States v. Ritchie*, 342 F.3d 903, 911 (9th Cir. 2003) (“[W]hen initial personal notice letters are returned undelivered, the government must make reasonable additional efforts to provide personal notice.”).

Since the French *huissier* had requested a certificate of service in accordance with the Hague Service Convention, the absence of any confirmation of successful service signaled a problem. And the issuance of a certificate of non-service left no doubt that service had failed. It thus triggered an obligation to take any available and reasonable further steps to give notice of the proceeding to Alan Wofsy & Associates. See *Jones*, 547 U.S. at 230.

Before considering whether such steps were available or pursued, we turn to the process server’s attempt to inform Alan Wofsy himself. It unfolded similarly. When the *Astreinte* Proceeding was filed in July 2011, the U.S. Central Authority received a request to serve process at “POB 2210 San Francisco”—the address listed for Alan Wofsy on the French summons. The U.S. process server eventually issued a certificate of non-service, indicating that a server had



attempted to contact Alan Wofsy at 401 China Basin Street on October 22, 2011, but had found “[n]o such address.” The certificate of nonservice did not issue until October 31—six days after the October merits hearing in the *TGI*.

Under these circumstances, the failed service on Alan Wofsy was as insufficient an attempt at notice as was the failed service on Alan Wofsy & Associates. The request for a certificate of service was unfulfilled at the time of the first *astreinte* hearing. That should have alerted the *huissier* that Wofsy might have lacked notice of the proceedings, and that actual notice therefore might require further reasonable efforts if any were available. Moreover, the certificate of non-service issued more than two months before the *TGI* entered judgment.

Wofsy suggests several “further reasonable steps” to accomplish notice, *see id.*, that were available but went unpursued. For example, it is undisputed that both defendants were successfully served in the instant proceedings at Alan Wofsy’s residence, and that since 1998 the website of Alan Wofsy Fine Arts LLC has listed its gallery address on Geary Boulevard in San Francisco, where staff are available to accept deliveries during workdays. The record does not indicate any attempt to deliver notice of the *Astreinte* Proceeding at either of those addresses.

Sicre de Fontbrune claims that copies of the summons and complaint were mailed to Wofsy at P.O. Box 2210. But Wofsy contends that no such documents ever arrived. The Supreme Court has “repeatedly recognized that mail service is an inexpensive and

efficient mechanism that is reasonably calculated to provide actual notice.” *Tulsa Pro. Collection Servs., Inc. v. Pope*, 485 U.S. 478, 490 (1988). The Hague Service Convention allows mail service directly to a defendant—circumventing the Central Authority—if the receiving country has not objected to mail service and if mail service is authorized by otherwise applicable law. *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1513 (2017). The applicable law in California permits service via mail, with acknowledgment of receipt, at a Post Office box. Cal. Civ. Proc. Code § 415.30.

But the record does not support a finding that notice was mailed. It contains no evidence of any attempt at mail service apart from the failed attempt to send process to Alan Wofsy through the U.S. Central Authority. Indeed, Sicre de Fontbrune’s brief specifies that the supposed mail service was performed “via the Hague Convention Central Authority for the United States.”<sup>15</sup>

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<sup>15</sup> Some confusion may originate from the *huissier’s* request to serve Alan Wofsy at his U.S. Post Office box. The record contains no direct evidence that either the U.S. Central Authority or its process service contractor responded to that request by attempting mail service. To the contrary, it contains a form indicating that the U.S. process server sent the San Francisco postmaster as many as three requests for “boxholder information needed for service of legal process.” See 39 C.F.R. § 265.6(d)(5)(ii) (2011) (current version at 39 C.F.R. § 265.14(d)(5)(ii)) (permitting disclosure of post office boxholder name and information to a person authorized to serve legal process). The Postal Service, in turn, provided an address for Alan Wofsy at 401 China Basin Street. That is where the certificate of nonservice on Alan Wofsy shows that the process server unsuccessfully attempted service. The documentation in the

Even if the U.S. process server had mailed notice to P.O. Box 2210, our conclusion as to the sufficiency of the service efforts would not change. The certificates requested pursuant to the Hague Service Convention revealed that neither defendant had been served. Taking no further steps to give notice would not have been the response of one “desirous of actually informing” the addressee. *Jones*, 547 U.S. at 229; see also *Mullane*, 339 U.S. at 315. The failed attempts to serve process do not, by themselves, disprove the notice defense.

There is, however, a factual dispute as to whether Wofsy received *actual* notice of the “pendency of the action and . . . an opportunity to present [his] objections.” *Alfa-Bank*, 230 Cal. Rptr. 3d at 224; see Cal. Civ. Proc. Code § 1716(c)(1). Wofsy received mail correspondence from the *TGI* in November 2011. The correspondence included a letter, dated November 16, 2011, accompanying a brief written order of the *TGI* based on the October 2011 *astreinte* hearing. That order included a half-page description of the October 2011 hearing that had occurred on Sicre de Fontbrune’s claim for liquidation of the *astreinte*. It announced that because Wofsy had not appeared and Sicre de Fontbrune had failed to prove that Wofsy had been served, the proceedings would be reopened for another hearing on December 13, 2011, “for the production by [Sicre de Fontbrune] of the certificate from the foreign

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record is thus consistent with the possibility that the U.S. process server simply dispatched an agent to attempt personal service at the street address provided by the Postal Service, without ever attempting service by mail at P.O. Box 2210.

authority responsible for notification of the document instituting the proceedings,” in accordance with Article 6 of the Hague Service Convention. The correspondence was entirely in French. Wofsy testified at a deposition in the present litigation, however, that he could “reasonably” read French.<sup>16</sup>

“Notice to be effective must be informative.” *Julen*, 101 Cal. Rptr. at 798. The letter and order stated that a proceeding was pending. But the correspondence nowhere mentioned any remaining opportunity to argue the merits of Sicre de Fontbrune’s claim for liquidation of the *astreinte*, even at the December 2011 hearing. The letter provided instructions only as to how to appeal the order. Because the letter omitted any mention of an opportunity to participate in the proceedings in the *TGI*—and, indeed, stated that the reopening of the hearing was for a specific purpose that did not include Wofsy appearing—we cannot say as a matter of law that the letter was “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” See *Alfa-Bank*, 230 Cal. Rptr. 3d at 224 (citation omitted).

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<sup>16</sup> Wofsy directs us to *Julen v. Larson*, 101 Cal. Rptr. 796, 798 (Ct. App. 1972), for the proposition that notice, to be adequate, must be given in the “language of the jurisdiction in which [the defendant] is served,” among other requirements. In *Julen*—unlike here—the foreign legal documents were written in German, which no one argued the defendant could read. *Id.* And *Alfa-Bank* later clarified that *Julen* did not “defin[e] constitutional ‘requirements’ for adequate notice.” 230 Cal. Rptr. 3d at 232.

Whether it actually resulted in notice, however, is disputed. Wofsy avers that the correspondence led him to believe that it was already too late to raise a defense in the proceedings. But some evidence suggests that the letter, despite its deficiencies, may have accomplished actual notice. The declaration of Sire de Fontbrune’s French counsel—cited by Sire de Fontbrune in his response, and unchallenged in Wofsy’s reply—indicates that French procedural rules in fact would not have precluded Wofsy from asserting a defense on the merits even after he received the November 2011 mailing. And past copyright litigation had given Wofsy more than five years of familiarity with French litigation.

There accordingly remains a factual dispute about the effect of the November 2011 correspondence on Wofsy’s knowledge of his options. The district court appropriately left to the finder of fact to determine whether Wofsy “receive[d] notice of the proceeding in sufficient time to enable [him] to defend.” Cal. Civ. Proc. Code § 1716(c)(1).

## **V. Fraud**

A court may refuse to recognize a foreign judgment if the judgment “was obtained by fraud that deprived the losing party of an adequate opportunity to present its case.” Cal. Civ. Proc. Code § 1716(c)(2). Wofsy challenges the district court’s determination that disputes of material fact precluded summary judgment in Wofsy’s favor based on alleged fraud in the French proceeding. Wofsy asserts that Sire de Fontbrune falsely represented to the *TGI* in the *Astreinte* Proceeding that he owned the copyrights to the

photographs at issue, and that Sicre de Fontbrune failed to disclose that he no longer had an interest in liquidating the *astreinte* that would make his claim admissible. See *Code de Procédure Civile* arts. 31, 32 (Fr.).

The comments to the 2005 Uniform Act—on which California’s Recognition Act is based, *Alfa-Bank*, 230 Cal. Rptr. 3d at 221—explain that the language used in Section 1716(c)(2) refers only to “extrinsic fraud.” Unif. Foreign-Country Money Judgments Recognition Act § 4 cmt. 7 (Nat’l Conf. of Comm’rs on Unif. State L. 2005). Examples of extrinsic fraud include instances where “the plaintiff deliberately had the initiating process served on the defendant at the wrong address, deliberately gave the defendant wrong information as to the time and place of the hearing, or obtained a default judgment against the defendant based on a forged confession of judgment.” *Id.* Extrinsic fraud differs from intrinsic fraud, which includes “false testimony of a witness or admission of a forged document into evidence during the foreign proceeding.” *Id.* Those are concerns that “should be raised and dealt with in the rendering court.” *Id.*

California caselaw indicates that concealing material information from a court can, in some circumstances, constitute extrinsic fraud. For example, in *Pentz v. Kuppinger*, a plaintiff sought restitution for “assertedly excessive amounts collected by defendant under a Mexican judgment” that the defendant had obtained against the plaintiff. 107 Cal. Rptr. 540, 541 (Ct. App. 1973). The court held that the plaintiff had alleged extrinsic fraud against the creditor of the

foreign judgment, because the judgment-creditor had failed to disclose to the plaintiff or to the courts that the judgment-creditor already had received payments that would have reduced the amount of the foreign judgment. *Id.* at 544–45. The plaintiff allegedly had inquired about some of these payments while the foreign action was pending, but the defendant’s attorney had denied knowledge of them. *Id.* at 544 n.5. As to other payments, the Court of Appeal observed that the plaintiff “had not even a suspicion that credit should have been given.” *Id.* at 544. Taking the complaint’s allegations as true, then, the “plaintiff was denied the opportunity to acquaint the [Mexican] court” with information crucial to her case. *Id.* at 545. The court accepted that this conduct would constitute extrinsic fraud, concluding that on the alleged facts of the case, the plaintiff “was denied her day in court as to *all* of the issues tendered by her pleading[.]” *Id.* (italicization in original).

Sicre de Fontbrune stated in his 2011 complaint in the *Astreinte* Proceeding that he owned the copyrights to the photographs that the resulting judgment found to have been copied. In fact, as the French *Cour d’Appel* later confirmed in a separate copyright infringement proceeding, Sicre de Fontbrune had transferred those copyrights in December 2001 to a business entity. Whether this false representation mattered depends on whether Sicre de Fontbrune nonetheless retained a legal interest in liquidating the *astreinte* after transferring the relevant intellectual property that the *astreinte* was awarded to protect. That is, at least in part, a question of French law.

We need not resolve it in this appeal. Even assuming that Sicre de Fontbrune deceived the *TGI* as to his legal interest in the *astreinte*, Wofsy is not entitled to summary judgment on the claim that the misrepresentation “deprived [him] of an adequate opportunity to present [his] case.” *See* Cal. Civ. Proc. Code § 1716(c)(2). The misrepresentation may have enabled Sicre de Fontbrune to obtain the *astreinte* judgment. But unlike the party asserting fraud in *Pentz*, Wofsy did not participate in the proceeding to liquidate the *astreinte*. He accordingly did not request evidence that was denied. *Cf. Pentz*, 107 Cal. Rptr. at 544 n.5. Moreover, Sicre de Fontbrune affirmatively represented in his complaint that he owned the copyrights. That fact suggests that if Wofsy had participated in the *Astreinte* Proceeding, he might have had occasion to question that assertion. *Cf. id.* at 544 (losing party “had not even a suspicion” regarding the concealed information). For the reasons discussed with respect to the notice defense, whether Wofsy had a valid explanation for failing to mount a defense in the *Astreinte* Proceeding is subject to factual dispute.

A question thus remains as to whether Wofsy reasonably should have detected the alleged fraud during the French proceedings—and, therefore, as to whether such fraud deprived him of an adequate opportunity to present his case. The district court did not err by denying Wofsy summary judgment on the fraud defense.

## CONCLUSION

Wofsy was not entitled to summary judgment based on the public policy defense. No other ground for



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nonrecognition at issue in this appeal supplies an alternative basis for affirming the judgment below. We therefore **REVERSE** and **REMAND** for further proceedings consistent with this opinion.

**REVERSED AND REMANDED.**

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**APPENDIX B**

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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

**Case No. 5:13-cv-05957-EJD**

**[Filed: September 12, 2019]**

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Vincent Sicre de Fontbrune; Loan Sicre de )  
Fontbrune; Adel Sicre de Fontbrune; Anais )  
Sicre de Fontbrune, in their capacity as the )  
personal representatives of the Estate of )  
Yves Sicre de Fontbrune, )  
)  
Plaintiffs, )  
)  
)  
v. )  
)  
Alan Wofsy, an individual; Alan Wofsy & )  
Associates; Does 1 through 100, inclusive, )  
)  
Defendants. )  
)  

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**ORDER GRANTING DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT; DENYING IN  
PART AND GRANTING IN PART PLAINTIFFS'  
CROSS-MOTION FOR SUMMARY JUDGMENT**

Re: Dkt. Nos. 61, 63

This case arises from French litigation over copyrights of photographs of the works of Pablo Picasso. Yves Sicre de Fontbrune first sued Alan Wofsy and Alan Wofsy & Associates (“Defendants”) in France in the late 1990s for publishing volumes of a book, *The Picasso Project*, that reproduced copyright-protected photographs of Picasso’s works. In 2001, de Fontbrune prevailed on the appeal of that suit, and the French court issued a French legal device, called an *astreinte*, that would subject Defendants to damages for any further acts of infringement. About ten years later, de Fontbrune discovered copies of *The Picasso Project* in a French bookstore and initiated legal proceedings in France to liquidate the *astreinte*. Defendants did not appear in the proceeding and contend that they were not properly served. In early 2012, the enforcement division of the French trial court, the *Juge de l’Exécution près le Tribunal de Grand Instance de Paris* (the “JEX”) granted an award of €2 million for de Fontbrune (the “2012 Judgment”).

The next year, de Fontbrune brought suit against Defendants in the Superior Court of Alameda County seeking recognition of the 2012 Judgment under California’s Uniform Foreign Country Money Judgments Recognition Act (the “Recognition Act”). Defendants removed the case to federal court. The court granted Defendants’ initial motion to dismiss, finding that the *astreinte* was a “fine or other penalty” under the statute and therefore not appropriate for recognition. Dkt. No. 27. De Fontbrune appealed the order, and the Ninth Circuit, finding that the *astreinte* was not a fine or other penalty, vacated the dismissal order, reversed, and remanded. Dkt. No. 33 (*de*

*Fontbrune v. Wofsy*, 838 F.3d 992 (9th Cir. 2016), as amended on denial of reh'g and reh'g en banc (Nov. 14, 2016)). While on appeal, de Fontbrune died. His wife and children filed a motion to continue as his successors in interest, which the Ninth Circuit granted. *Id.* at 9 n.3.<sup>1</sup> On remand, the case was reassigned to the undersigned. The parties have both moved for summary judgment. For the reasons set forth below, the court grants Defendants' motion, and grants in part and denies in part Plaintiffs' motion as to certain defenses raised by Defendants.

Federal jurisdiction arises from 28 U.S.C. § 1332(a) because Plaintiffs are citizens and residents of France and Defendants are citizens and residents of California, and the amount in controversy exceeds \$75,000.

## I. Factual Background

Beginning in 1932, Picasso's friend Christian Zervos and his company Cahiers d'Art compiled and published a series of photographs of Picasso's art in the "Zervos Catalogue." Compl. (Dkt. No. 1-1) Ex. 2 at 3. The Zervos Catalogue comprises some 16,000 photographs of Picasso's work. *Id.* Plaintiffs acquired Cahiers d'Art and the rights to the Zervos Catalogue in 1979. *Id.*; Popović Decl. Ex. 7. In 1995, Wofsy began to publish a series of works reproducing Picasso's art called *The Picasso Project*. Mot. Wofsy Decl. (Dkt. No. 61-3) ¶¶ 6-8. In 1996, after copies of two volumes of *The Picasso Project* were seized in France, Plaintiffs

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<sup>1</sup> For the sake of convenience, this order refers to de Fontbrune and his heirs collectively as "Plaintiffs."

brought suit against Defendants for copyright infringement (the “First Copyright Proceeding”). *Id.* ¶¶ 9-10; Dkt. 70-2<sup>2</sup> at 1 (Fact 1).<sup>3</sup> Defendants appeared in the First Copyright Proceeding. Dkt. 70-2 at 1 (Fact 2); Mot. Wofsy Ex. 7. Defendants prevailed at the trial court in 1998; Plaintiffs then appealed. *See* Dkt. 70-2 at 1 (Fact 3). Defendants appeared in this appeal. Dkt. No. 70-1<sup>4</sup> at 9-10 (Additional Fact 2). On September 26, 2001, the *Cour d’Appel de Paris* issued a ruling reversing the trial court’s ruling (the “2001 Judgment”). Dkt. 70-2 at 1 (Fact 3). The 2001 Judgment found Defendants guilty of copyright infringement, awarded relief to Plaintiffs, and prohibited Defendants from using the at-issue photographs subject to an *astreinte* of 10,000 francs per violation. Dkt. 70-2 at 1 (Fact 4). The parties agree that generally an *astreinte* is transferrable. Mot. Sirinelli

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<sup>2</sup> Citations to “Dkt. No. 70-2” refer to Defendants’ Response Separate Statement in Opposition to Plaintiffs’ Cross Motion For Summary Judgment. Plaintiffs did not file a reply separate statement in support of their cross motion for summary judgment. Pls. Reply (Dkt. No. 71) at 1 n.1.

<sup>3</sup> Defendants object to this fact as “[d]isputed as unsupported by admissible evidence. . . .” Dkt. 70-2 at 1 (Pls.’ Fact 1). Defendant Wofsy’s declaration supports this fact, so it is not disputed. Mot. Wofsy Decl. ¶ 10. Defendants purport to dispute several of Plaintiffs’ facts on the grounds that Plaintiffs’ cited evidence is inadmissible, while ignoring that Defendants’ own evidence supports the facts in question. To the extent that their own evidence contradicts Defendants’ objections, those objections are overruled.

<sup>4</sup> Citations to “Dkt. No. 70-1” refer to Defendants’ Reply Separate Statement in Support of Motion For Summary Judgment.

Decl. (Dkt No. 61-5) ¶¶ 11-20; Cross-Mot. Serre Decl. (Dkt. No. 63-1) ¶ 18; *see infra* § III.B. Defendants initiated an appeal of the 2001 Judgment to the *Cour de Cassation*, but abandoned the appeal before it was decided. Dkt. No. 70-1 at 10 (Additional Fact 3); Wofsy Decl. ¶ 12. In December of that year, Plaintiffs transferred away their rights to the copyrights underlying the 2001 Judgment to the company Editions Cahiers d'Art. Dkt. 70-1 at 11-12 (Fact 26).

About ten years later, copies of *The Picasso Project* were found in a French bookstore. Mot. Popović Decl. Ex. 3 at 3-5.<sup>5</sup> On July 22, 2011, Plaintiffs began legal proceedings in France to, among other things, enforce the *astreinte* against Defendants (the “*Astreinte* Proceeding”). *See generally id* at 1-5. These proceedings took place before the JEX. Plaintiffs asserted that, in violation of the 2001 Judgment, Defendants had continued to publish *The Picasso Project*. *Id.* at 3. The summons and complaint for the *Astreinte* Proceeding stated that the purchased copy contained many hundreds of Plaintiffs’ photographs, and later that the “rights to [the photographs] are the property of [Plaintiffs].” *Id.* at 3-4. The summons and complaint also stated that the proceedings were “for the settlement of the non-compliance penalty” of the 2001 Judgment. *Id.* at 4. There is no evidence that Plaintiffs ever informed the JEX that they no longer owned the copyrights underlying the *astreinte*. Dkt. 70-1 at 15 (Fact 30).

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<sup>5</sup> All citations and quotations to the record are the English language translations of French documents.

Defendants were not served with the summons and complaint during the pendency of the *Astreinte* Proceeding. *See* Dkt. No. 70-1 at 1 (Fact 2). Plaintiffs contend that they attempted to serve Defendants at the San Francisco address that Defendants had provided to the French court during the First Copyright Proceeding, but the name of Defendants' street had been changed prior to that proceeding. Dkt. 70-2 at 1-2 (Facts 5-6); *id.* at 2 (Facts 8-10). In October 2011, the JEX held a hearing on the merits of the *Astreinte* Proceeding; Defendants were unaware of the hearing and did not attend. *Id.* at 2 (Fact 10); Dkt. No. 70-1 at 2 (Fact 7). The next month, the JEX issued a written order directing Plaintiffs to provide further evidence of service on Defendants at a hearing set for December. Dkt. No. 70-2 at 2 (Fact 11). Defendants received the order through the mail that month. Dkt. No. 70-1 at 2 (Fact 7); Dkt. No. 70-2 at 2 at 2-3 (Fact 12). Defendants did not attend the hearing or otherwise join the *Astreinte* Proceeding. *See* Mot. Wofsy Decl. ¶ 23. On January 10, 2012, the French court granted judgment in favor of Plaintiffs (the "2012 Judgment") and awarded € 2 million to Plaintiffs. Dkt. No. 70-2 at 3 (Fact 14); Mot. Mooney Decl. (Dkt. No. 63-2) Ex. B. Defendants, who never appeared in the proceeding, did not appeal. *See* Dkt. No. 70-2 at 3 (Fact 17).

Around the same time that Plaintiffs initiated the *Astreinte* Proceeding, they filed another lawsuit against Defendants and a French bookseller for infringement of the copyrights to the Zervos Catalogue (the "Second Copyright Proceeding"). Dkt. No. 70-1 at 13 (Fact 28). Defendants received notice of the Second Copyright Proceeding in October 2011 but did not appear in the

lawsuit. Dkt. No. 70-2 at 3-4 (Fact 18). That French court *sua sponte* dismissed the Second Copyright Proceeding in January 2013 (the “2013 Judgment”). Dkt. No. 70-1 at 15-16 (Fact 31). The 2013 Judgment stated that Plaintiffs are “not permitted to bring an action of infringement of copyright on the date of the summons since [they] lack[] locus standi.” Compl. Ex. 16 at 4; Cross-Mot. Serre Decl. (Dkt. No. 63-1) ¶ 11, Ex. B.

On February 25, 2014—after the period for a timely appeal of the 2012 Judgment and after this litigation began—Defendants filed a new action in French court seeking to vacate the 2012 Judgment (the “Review Proceeding”). Dkt. No. 70-2 at 4 (Fact 19). In this case, Defendants challenged the 2012 Judgment arguing that Plaintiffs’ 2001 transfer of intellectual property rights included the transfer of their right to liquidate the *astreinte*. Second Reply Serre Decl. (Dkt. No. 71-4) Ex. A at 4.<sup>6</sup> The trial court dismissed the Review Proceeding on procedural grounds. Cross-Mot. Serre Decl. ¶ 12; *see* Dkt. No. 70-2 at 4 (Fact 20). Defendants

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<sup>6</sup> Defendants object to Serre’s Second Reply Declaration—and presumably this exhibit—because Serre did not sign or date the declaration. Dkt. No. 73 at 2. The court overrules the objection for the following reasons. The declaration attests that the contents are true and correct, that Serre would testify to the facts contained therein, and that it was made under penalty of perjury under U.S. law. Second Reply Serre Decl. at 1-2; *see Kersting v. United States*, 865 F. Supp. 669, 676 (D. Haw. 1994). Moreover, Serre filed a signed and dated version of his Second Reply Declaration two weeks after Plaintiffs’ filed the original unsigned version and Defendants do not dispute the authenticity of the exhibit. The court finds no reason to doubt that this exhibit is a true and correct copy of the 2018 Judgment.



appealed. Dkt. No. 70-2 at 4 (Fact 21). In April 2018, the French appellate court affirmed the dismissal (the “2018 Judgment”). *Id.* (Fact 22); Second Reply Serre Decl. Ex. A at 6-7.

## II. Summary Judgment Standard

A party may move the court to grant summary judgment on a claim or defense—or on a part of a claim or defense. Fed. R. Civ. P. 56(a). “A principal purpose of the summary judgment procedure is to identify and dispose of factually unsupported claims.” *O’Brien as Tr. of Raymond F. O’Brien Revocable Tr. v. XPO CNW, Inc.*, 362 F. Supp. 3d 778, 781 (N.D. Cal. 2018). “Summary judgment is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine dispute as to any material fact.” *Zetwick v. Cty. of Yolo*, 850 F.3d 436, 440 (9th Cir. 2017). A fact is “material” where it may affect the outcome of the case, and a dispute is “genuine” where a reasonable fact finder could find for either party. *O’Brien*, 362 F. Supp. 3d at 782.

## III. Application of the Recognition Act

Plaintiffs seek recognition of the 2012 Judgement through the Recognition Act. Cal. Civ. Proc. Code §§ 1713–1725. In 1962, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Foreign Money-Judgments Recognition Act (the “1962 Act”). *AO Alfa-Bank v. Yakovlev*, 21 Cal. App. 5th 189, 198 (Ct. App. 2018), *as modified on denial of reh’g* (Apr. 3, 2018). California adopted the 1962 Act in 1967. *In re Marriage of Lyustiger*, 177 Cal. App. 4th 1367, 1370 (2009). In 2005, the National

Conference approved changes to the 1965 Act (the “2005 Act”), and California adopted those changes in 2007 as its Recognition Act. *Id.* California made minor amendments to the 2007 version of the Recognition Act that became effective on January 1, 2018. *Alfa-Bank*, 21 Cal. App. 5th at 198-99.<sup>7</sup> Most states have enacted either the 1962 Act or the 2007 Act, including New York, Delaware, and Texas.<sup>8</sup> Authorities from outside California that apply another state’s enactment of the 1962 Act or the 2005 Act have persuasive value for applying the Recognition Act. *Alfa-Bank*, 21 Cal. App. 5th at 200 (citing Cal. Civ. Proc. Code. § 1722).

The Recognition Act employs a burden-shifting framework. First, the party seeking to enforce the foreign judgment must establish that the judgment grants a sum of money; is final, conclusive, and enforceable under the law of the country where it was rendered; and is not a judgment for taxes, a fine or other penalty, or a judgment arising from domestic relations. Cal. Civ. Proc. Code. § 1715; *Ohno v. Yasuma*, 723 F.3d 984, 991 (9th Cir. 2013); *Alfa-Bank*,

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<sup>7</sup> The Court of Appeal held that the 2018 amendments were not retroactive, so this order applies and cites to the Recognition Act as it was prior to the 2018 amendments. *Alfa-Bank*, 21 Cal. App. 5th at 199.

<sup>8</sup> Uniform Law Commission, *Foreign Money Judgments Recognition Act*, <https://www.uniformlaws.org/committees/community-home?CommunityKey=9c11b007-83b2-4bf2-a08e-74f642c840bc>; Uniform Law Commission, *Foreign-Country Money Judgments Recognition Act*, <https://www.uniformlaws.org/committees/communityhome?CommunityKey=ae280c30-094a-4d8f-b722-8dcd614a8f3e>.

21 Cal. App. 5th at 199. The Ninth Circuit has already held that the *astreinte* does not qualify as a fine or penalty. Dkt. No. 33 at 21-30. Plaintiffs argue that the 2012 Judgment meets the other criteria of § 1715 and Defendants do not dispute this point. “Once the initial showing is made, there is a presumption in favor of enforcement, and the party resisting recognition bears the burden of establishing” that one of the enumerated bases for nonrecognition set forth in § 1716 applies. *Alfa-Bank*, 21 Cal. App. 5th at 199; *see also* Cal. Civ. Proc. Code. § 1716(d) (“If the party seeking recognition of a foreign-country judgment has met its burden of establishing recognition of the foreign-country judgment . . . a party resisting recognition of a foreign-country judgment has the burden of establishing that a ground for nonrecognition stated in [§ 1716] exists.”). A court must recognize the foreign judgment unless the resisting party can carry its burden. Cal. Civ. Proc. Code. § 1716(a). The Recognition Act’s defenses are, therefore, affirmative defenses. *Ohno*, 723 F.3d at 991. The Recognition Act provides three mandatory grounds for nonrecognition. Cal. Civ. Proc. Code. § 1716(b). Defendants argue that two apply here: (a) the JEX lacked personal jurisdiction over him, and (b) the JEX lacked subject matter jurisdiction. *Id.* §§ 1716(b)(2), (3). The Recognition Act provides nine bases where a court “is not required to recognize a foreign-country judgment.” *Id.* § 1716(c). Defendants argue that the following defenses under § 1716(b) bar recognition of the 2012 Judgment: (1) Defendants received insufficient notice to defend in the *Astreinte* Proceeding; (2) Plaintiffs obtained the 2012 Judgment through fraud; (3) Plaintiffs’ claim underlying the 2012 Judgment is repugnant to U.S.

policy; (4) the 2012 Judgment conflicts with another final and conclusive judgment—the 2013 Judgment; (5) circumstances around the 2013 Judgment raise substantial doubt as to integrity of the French court in the *Astreinte* Proceeding; and (6) the 2012 Judgment is not compatible with due process.

For Defendants to prevail, they must show that there is no dispute of material fact as to just one of the defenses. Plaintiffs, though, must show that there are no triable issues on all of the defenses for the court to grant their motion in its entirety. But, where Plaintiffs show that no triable issue exists for a particular defense, the court will grant partial summary judgment as to that defense.

**a. Whether the foreign court had personal jurisdiction over the defendant (Cal. Civ. Proc. Code § 1716(b)(2))**

Defendants' first argument is that the JEX had no personal jurisdiction because they lacked minimum contacts with France, they were never properly served, they did not have adequate notice and opportunity to defend the action, and they did not consent to jurisdiction. Plaintiffs counter those arguments and also argue that Defendants waived this defense by voluntarily appearing in the First Copyright Proceeding and/or the Review Proceeding. Plaintiffs base this argument on § 1717(a)(2), which provides that “a foreign-country judgment shall not be refused recognition for lack of personal jurisdiction if . . . [t]he defendant voluntarily appeared in the proceeding, other than for the purpose of protecting property seized or threatened with seizure in the proceeding or of

contesting the jurisdiction of the court over the defendant.”

The court finds that, under § 1717, Defendants’ challenge to the 2012 Judgment in the Review Proceeding waived any personal jurisdiction defense. The parties do not cite any cases that apply this section of the California Recognition Act, but Plaintiffs cite cases that apply New York’s version of the 1962 Act (the “New York Recognition Act”) and Delaware’s version of the 2007 Act. In *S.C. Chimexim S.A. v. Velco Enterprises Ltd.*, a district court in the Southern District of New York considered whether the defendant’s appeal of a foreign judgment constituted a voluntary appearance. 36 F. Supp. 2d 206, 215 (S.D.N.Y. 1999). The defendant, who maintained an office in the foreign nation, contended that it was not properly served in the foreign action and that it did not appear in the proceeding against it. *Id.* at 209-10. The foreign court entered a money judgment against the defendant. *Id.* at 210. The defendant appealed, but the foreign appellate court affirmed the judgment. *Id.* When the plaintiff brought suit in the United States to recognize the judgment, the district court found that, under the provision of the New York Recognition Act that corresponds to § 1717, the defendant had waived its personal jurisdiction defense. *Id.* at 215. The district court reasoned, “Velco contends that its appeal from the Bucharest Judgment does not constitute a voluntary appearance. Velco is mistaken. One of Velco’s arguments on appeal concerned the merits of the underlying dispute. . . . On this basis alone, Chimexim has met its burden of proving that the Romanian courts had personal jurisdiction over Velco.” *Id.* at 210, 215. In

*CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.*, the New York Court of Appeals held that defendants who had appealed the foreign court decision challenging the merits of that decision had waived their personal jurisdiction defense in the U.S. litigation. 100 N.Y.2d 215, 225 (2003). And the Delaware Court of Chancery court found that a defendant had waived any personal jurisdiction defense, in part, because that defendant had challenged the underlying merits on appeal. *In re Transamerica Airlines, Inc.*, 2007 WL 1555734, at \*10 (Del. Ch. May 25, 2007). Another district court in New York ruled against a defendant's summary judgment motion where the defendant had, amongst other actions, "sought to have the Judgment reversed or nullified on various grounds." *Chevron Corp. v. Donziger*, 886 F. Supp. 2d 235, 280 (S.D.N.Y. 2012).

The court finds that that the reasoning of these cases is persuasive to the matter at hand. Defendants protest that in those cases there were firmer grounds for finding that the foreign courts had personal jurisdiction over each defendant. But, this argument overlooks that in each case the court applied the New York or Delaware statutory analog to § 1717(a)(2). *Chevron*, 886 F. Supp. 2d at 280; *Velco*, 36 F. Supp. 2d at 215; *In re Transamerica Airlines, Inc.*, 2007 WL 1555734, at \*10; *Mora Hotel*, 100 N.Y.2d at 225. In the Review Proceeding, Defendants went beyond merely challenging the "jurisdiction of the [*Astreinte* Proceeding] court over" Defendants; they brought an action to argue that Plaintiffs had transferred their rights to enforce the *astreinte* when Plaintiffs sold the underlying copyrights such that the 2012 Judgment should be vacated. Second Reply Serre Decl. Ex. A at 4.

Because Defendants brought the Review Proceeding as a direct challenge to the 2012 Judgment on the merits, the court is not moved by the fact that it was not a direct appeal. Defendants cannot voluntarily submit to the jurisdiction of the French courts to bring a challenge on the merits of the 2012 Judgment and simultaneously complain that the French courts lack jurisdiction over them. *See Dow Chem. Co. v. Calderon*, 422 F.3d 827, 834 (9th Cir. 2005) (assuming, without deciding, that the Ninth Circuit would adopt “an affirmative relief rule, specifying that personal jurisdiction exists where a defendant also independently seeks affirmative relief in a separate action before the same court concerning the same transaction or occurrence. Such action may take place prior to the suit’s institution, or at the time suit is brought, or after suit has started.” (citation and quotations omitted)); *cf. Mora Hotel*, 100 N.Y.2d at 225-26 (“[A] defendant may be deemed to have made an appearance in an action and, therefore, to have submitted to a court’s jurisdiction, by, among other things, ‘taking steps in the action after judgment either in the trial court or in an appellate court.’” (quoting Restatement [Second] of Conflict of Laws § 33, Comment b)).

Because Defendants voluntarily initiated the Review Proceeding, the court finds that they are precluded from raising personal jurisdiction as a defense. The court grants partial summary judgment in favor of Plaintiffs on this issue. The court does not consider the parties’ other arguments regarding personal jurisdiction.

**b. Whether the foreign court had jurisdiction over the subject matter (Cal. Civ. Proc. Code § 1716(b)(3))**

Defendants argue that when Plaintiffs transferred the rights to the copyrights underlying the *astreinte* in 2001, they also transferred the right to liquidate the *astreinte*. Plaintiffs, the argument goes, therefore did not have the French equivalent of standing to bring the *Astreinte* Proceeding and the JEX did not have the subject matter jurisdiction over the *astreinte* required to enter the 2012 Judgment. Plaintiffs make several counter arguments: First, they argue that the Defendants are attempting to re-litigate ownership of the *astreinte*, which was decided in the *Astreinte* Proceeding. Next, they contend that the JEX, as a court in the enforcement division of the French trial court system, possessed subject matter jurisdiction over the question of liquidating the *astreinte*. Third, they argue that they did not transfer the rights to the *astreinte* when they transferred the underlying copyrights. And fourth, they argue that the Recognition Act considers the subject matter jurisdiction under French law, so the entire question of their standing is inappropriate.

Whether this court may even consider the ownership of the right to liquidate the *astreinte* at the time of the *Astreinte* Proceeding is a threshold question. Plaintiffs' argument that under the Recognition Act a U.S. court should not inquire into the merits underlying the foreign judgment is correct so far as it goes. *Ohno*, 723 F.3d at 996-97. Plaintiffs omit, however, that a U.S. court should still consider whether there are grounds for nonrecognition under



§ 1716(b) or (c). *Id.* (The Recognition Act “requires a court to recognize a final, conclusive foreign monetary award that is enforceable where rendered, without inquiry into the merits of the underlying judgment, once the court determines that there is no ground for nonrecognition under § 1716(b) or (c) of the [Recognition] Act.” (citation omitted)); *see S.A.R.L. Louis Feraud Int’l v. Viewfinder, Inc.*, 489 F.3d 474, 479 (2d Cir. 2007) (refusing to “second-guess” whether the defendant’s actions infringed the plaintiff’s intellectual property rights, but still considering defenses under § 1716). Thus, the first question for this court is whether ownership of the *astreinte* goes to the subject matter jurisdiction of the French court.

Plaintiffs assert this court should apply French law to determine whether the JEX had subject matter jurisdiction over the *Astreinte* Proceeding, and Defendants do not object. “[F]oreign law interpretation and determination is a question of law.” Dkt. No. 33 at 15. “Independent research, plus the testimony of foreign legal experts, together with extracts of foreign legal materials, has been and will likely continue to be the basic mode of determining foreign law. Importantly, such material and testimony may be considered at any time whether or not submitted by a party.” *Id.* at 12 (citation and quotations omitted). Both parties have filed declarations from French legal experts to assist the court in determining French law, and the court has conducted its own research on the matter.

Defendants’ position is that under French law, a party must have an interest in the outcome of a suit in

order to bring the suit, or the suit will be dismissed. Such a suit with a party lacking an interest is “inadmissible” under French law. This requirement is equivalent to standing under U.S. law, so when a plaintiff lacks an interest in the outcome of the case, the court lacks subject matter jurisdiction over the case. Article 31 of the French Code of Civil Procedure states in part, “[t]he right of taking legal action is available to all those who have a legitimate interest in the success or dismissal of a claim.” Le Guillou Decl. (Dkt No. 61-8) Ex. 4. And Article 32 provides, “[n]o claim is admissible that is filed by or against any person who does not have the right to act.” *Id.* at Ex. 6. Article 122 provides that a party may argue that the opposing party is inadmissible “without examination of the grounds” underlying the opposing party’s claim, because the opposing party “lack[s] . . . a right to legal action, such as . . . lack of interest.” *Id.* at Ex. 8. And Article 123 allows a party to argue that a claim is inadmissible at any stage of the proceeding. *Id.* at Ex. 10.

Defendants submitted a declaration from Vonnick Le Guillou in support of their position. Le Guillou is a partner at DLA Piper’s office in Paris and is the head of the firm’s Litigation and Regulatory Group in France. *Id.* ¶ 1. She obtained her Master’s degree in Private Law from a French school, has been admitted to the Paris Bar since 1984, and has extensive experience litigating in French trial and appellate courts. *Id.* She is well qualified to offer her opinion on this question. Based on the Articles of the French Code of Civil Procedure referenced above, she opines that while French law refers to standing as “inadmissibility”

rather than “jurisdiction,” “the practical result of a lack of standing is the same,” because lack of admissibility will lead to dismissal without consideration of the merits at any stage of the proceeding. *Id.* ¶ 5.

Plaintiffs counter that inadmissibility is a defense that a defendant may raise, but it does not go to the subject matter jurisdiction of the court. Plaintiffs offer the Second Reply Declaration of Eric Serre in opposition. Serre is a litigator practicing in France who has multiple Master’s degrees in law from French schools and has been admitted to the Paris bar since 1996. Second Reply Serre Decl. ¶ 1. He is well qualified to offer opinions on this question. He states that, under French law, maintaining that an action is inadmissible is a defense, and that if a defendant does not raise that defense, the plaintiff does not have the burden to prove the absence of such a defense, and the court is not obligated to investigate the matter on its own. *Id.* ¶ 2.

The court finds that the question of admissibility under French law is comparable to standing under U.S. law, and that if an action is inadmissible, then the French court does not have subject matter jurisdiction over the action for the purposes of § 1716(b)(3). Under U.S. law, a plaintiff must possess, among other requirements, “a legally protected interest” that is likely to be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992); *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011) (“[L]ack of Article III standing requires dismissal for lack of subject matter jurisdiction.”). This requirement directly aligns with Article 31 of the French Code of Civil Procedure’s requirement that a party have “a

legitimate interest in the success or dismissal of a claim.” Le Guillou Decl. Ex. 4. And—critically—under both countries’ laws, where a party lacks this “interest,” then courts will dismiss the action without considering the merits underlying the claim. *Compare Righthaven LLC v. Hoehn*, 716 F.3d 1166, 1173 (9th Cir. 2013) (affirming dismissal for lack of standing) *with* le Guillou Decl. Ex. 8 (allowing dismissal of inadmissible actions without consideration of the merits). Because the question of whether a matter is inadmissible may lead to dismissal without consideration of the merits, the court finds that if a matter is inadmissible in French courts, then, those courts lack subject matter jurisdiction under the Recognition Act.

The court’s conclusion here has support from at least one case that considered standing under French law. In *Oveissi v. Islamic Republic of Iran*, the court, applying French law to tort claims, found “standing” to be a “threshold” question that required resolution before the court could consider the underlying merits. 768 F. Supp. 2d 1, 11 (D.D.C. 2010). That court’s consideration of standing turned on whether the plaintiff could demonstrate that he had been “directly injured” by the conduct of the defendants. *Id.* French law, like U.S. law, requires that the plaintiff be able to bring the dispute-in-question into the court’s jurisdiction. That the French legal system is more lenient on this requirement by neither obligating a plaintiff to affirmatively demonstrate the claim is admissible nor requiring the court to investigate admissibility on its own does not change this court’s analysis. *See* Second Reply Serre Decl. ¶ 2. The court

finds that whether the JEX had subject matter jurisdiction over the *Astreinte* Proceeding turns on the question of whether Plaintiffs owned the right to liquidate the *astreinte*.

The court briefly addresses Plaintiffs' second argument—that the JEX had subject matter jurisdiction over the *Astreinte* Proceeding because it is a court in the enforcement division of the French trial courts. The court agrees that the JEX, as a court of the enforcement division, would be the proper court to consider generally whether to liquidate an *astreinte*; and Defendants do not appear to dispute that point. But, the issue is whether this JEX had subject matter over this *astreinte*. If Plaintiffs did not possess the right to liquidate this *astreinte*, then this JEX did not have subject matter jurisdiction to enter the 2012 Judgment.

The court now considers whether Plaintiffs transferred the right to liquidate the *astreinte* when they transferred the Cahiers d'Art business and the underlying copyrights in 2001. On Defendants' behalf, Sirinelli offers a declaration that describes the purpose and use of *astreintes* in the French legal systems. He references several French legal texts to argue that an *astreinte*, while transferable, attaches to the underlying right that it is intended to protect. Mot. Sirinelli Decl. ¶¶ 12-20. He opines, when Plaintiffs transferred the copyrights, they also transferred the right to liquidate the *astreinte*. *Id.* ¶ 28; *see id.* ¶¶ 21-28. Plaintiffs counter with a declaration from Didier Le Prado filed

with their Reply.<sup>9</sup> Dkt. No. 71-2. Le Prado is a French attorney who practices before the *Cour de Cassation* and formerly served as President of the Bar Council of Attorneys before the Council of State and the *Cour de Cassation*. Le Prado Decl. ¶ 1. At the time of his declaration, he was the President of the European Association of Supreme Court Bars. *Id.* The court finds that he is well qualified to opine on this matter. In his declaration, Le Prado analyzes an unpublished 2012 case from the *Cour de Cassation*. Le Prado Decl. ¶¶ 22-26, 37-44 (discussing *Cour de Cassation* case no. 11-10488, Feb. 14, 2012). In that case, the *Cour de Cassation* ruled that a business owner, who possessed an *astreinte* arising from a judgment related to the business, could still liquidate the *astreinte* after selling the business because the *astreinte* attached to the judgment. *Id.* ¶ 39. Le Prado opines that when intellectual property rights are transferred as a part of the sale of a business, the original business owner retains the right to liquidate any *astreinte* issued in connection with those rights after the sale of the business without “the need to prove an agreement to that effect.” *Id.* ¶ 51. Thus, the parties dispute whether, under French law, the *astreinte* should be

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<sup>9</sup> Defendants object to Le Prado’s declaration because Plaintiffs’ originally filed only the French version and did not file an English translation until several days later. The court overrules this objection because Federal Rule of Civil Procedure 44.1 provides: “In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.” The court finds Le Prado’s declaration relevant to the determination of French law.

presumed to have transferred with Plaintiffs' transfer of the copyrights.<sup>10</sup>

However, the court need not resolve this question of French law for these motions. The parties agree that an *astreinte* can be transferred. Pls.' Mot (Dkt. No. 63) at 16-17; Mot. Sirinelli Decl. ¶ 12. So, regardless of whether an *astreinte* should be presumed to attach to the underlying intellectual property right or to the judgment, the question here is whether this *astreinte* was part of the 2001 transfer. And based on the available evidence this question is subject to a genuine issue of material fact. The contract for Plaintiffs' transfer of the copyrights does not expressly address whether the *astreinte* was transferred. See Mot. Popović Decl. Ex. 9. But, a 2011 document that Plaintiffs, along with the buyer of the copyrights, filed in another French court addressed the rights arising from the 2001 Judgment. *Id.* at Ex. 15. The document, though, is ambiguous. It first provides, "Mr. Yves SICRE de FONTBRUNE confirmed and reaffirmed, as required, to the company EDITIONS CAHIERS D'ART, the rights that he held to the works of Christian ZERVOS (exhibit 3) and those that he had acquired under the Ruling of the Court of Appeals of September 2001, cited below," which would indicate that the *astreinte*, as a right acquired from the 2001 Judgment

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<sup>10</sup> At oral argument, Defendants argued that the Ninth Circuit's decision implied that the *astreinte* attached to the copyrights, not the judgment. However, they did not raise this argument in their briefs, so the court will not consider it. Hr'g. Tr. at 13:12-14:14; see *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001).

was transferred. *Id.* at 2. But, the document later states that de Frontbrune is “the holder of the residual rights which he held to the works of Christian ZERVOS under the ruling of September 26, 2001, which he owns with the Company CAHIERS D’ART,” indicating that he retained at least some rights connected to the 2001 Judgment. *Id.* at 3. This document is ambiguous as to whether, following the transfer of the copyrights, de Frontbrune retained any rights arising from the 2001 Judgment. The interpretation of this document is a task for the fact finder. *See Wolf v. Superior Court*, 114 Cal. App. 4th 1343, 1359-60 (2004), *as modified on denial of reh’g* (Feb. 19, 2004). The court holds that whether Plaintiffs transferred the *astreinte* as part of the 2001 transfer of copyrights is a genuine issue of material fact essential for determining if the JEX had subject matter jurisdiction over the *Astreinte* Proceeding.

**c. Whether the defendant in the proceeding in the foreign court received notice of the proceeding in sufficient time to enable the defendant to defend (Cal. Civ. Proc. Code § 1716(c)(1))**

The Recognition Act provides that a court may decline to recognize a foreign money judgment where “[t]he defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend.” Cal. Civ. Proc. Code § 1716(c)(1). Plaintiffs initiated the *Astreinte* Proceeding in July 2011. *See generally* Mot. Popović Ex. 3. Plaintiffs attempted service through Hague Convention procedures, but Defendants did not receive



the summons or complaint before the JEX issued the 2012 Judgment. *See* Dkt. No. 70-1 at 2 (Fact 6).<sup>11</sup> Plaintiffs contend that actual service did not occur because Defendants had provided an out-of-date physical address during the First Copyright Lawsuit so the process server could not find the address. Dkt. No. 70-2 at 1-2 (Facts 5, 8, 9).<sup>12</sup> On October 25, 2011, the JEX held a hearing on the merits in the *Astreinte* Proceeding. Dkt. No. 70-2 at 2 (Fact 10). Defendants did not learn of the *Astreinte* Proceeding until late November 2011 when they received through the mail an order, entirely in French, from the JEX. Dkt. No. 70-1 at 2 (Fact 7). The order stated that another hearing concerning Plaintiffs' service on Defendants had been set for December 13, 2011. Dkt. No. 70-2 at 2 (Fact 11).

A defense based on notice is proper only if the defendant "was not served in a manner reasonably calculated to give him actual notice of the pendency of the [foreign] proceeding." *Alfa-Bank*, 21 Cal. App. 5th at 213-14. "Due process of law does not require actual notice, but only a method reasonably certain to accomplish that end. The means employed must be such as one desirous of actually informing the absentee

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<sup>11</sup> Plaintiffs argue that this fact is disputed because Defendants filed the Review Proceeding in 2014, but provide no facts indicating the Defendants received the complaint or summons to the *Astreinte* Proceeding prior to the 2012 Judgment.

<sup>12</sup> Defendants object that these facts are disputed because they are not supported by admissible evidence. The court overrules this objection because these facts, even if they were not in dispute, would not be material to the court's ruling on this defense.

might reasonably adopt to accomplish it.” *Id.* at 209 (citations and quotations omitted). While, “no great amount of formality is required for effective notice,” effective notice will “normally” include information “location of the pending action, the amount involved, the date defendant is required to respond, and the possible consequences of his failure to respond.” *Julen v. Larson*, 25 Cal. App. 3d 325, 328 (Ct. App. 1972).

Defendants argue that because they did not receive actual notice of the *Astreinte* Proceeding until late November 2011, it was insufficient for them to defend themselves. Plaintiffs counter first that this case is like *Alfa-Bank*, where the Court of Appeal held that reasonable efforts to provide service can preclude this defense even in the absence of actual notice, and second that the mailing Defendants received in November 2011 was sufficient for Defendants to mount a defense. But, this case is not like *Alfa-Bank*. There, the Court of Appeal found that service of process, while unsuccessful, had been “[u]nder the[] circumstances . . . reasonably calculated to apprise [the defendant] of the pendency of the [foreign] action and afford him an opportunity to respond.” 21 Cal. App. 5th at 209. “Critical” to the decision of the Court of Appeal was the fact that the defendant was contractually bound to keep the foreign government apprised of his address and he failed to do so. *Id.* at 210. There is no suggestion that Defendants were under similar obligations here. And it is undisputed that Defendants were publicly listed in the phone book at the time and that the French court successfully sent another document to Defendants through the mail. Dkt. No. 70-1 at 2, 5 (Facts 7, 13). Plaintiffs cannot establish that their

efforts to serve Defendants were, as a matter of law, sufficient to preclude a notice defense under *Alfa-Bank*. Whether Plaintiffs' attempt at service was "reasonably calculated to apprise" Defendants of the *Astreinte* Proceeding is a factual question and is inappropriate for summary judgment. *Alfa-Bank*, 21 Cal. App. 5th at 209. Plaintiffs' second argument—that the November 2011 mailing was sufficient notice for Defendants to defend in the *Astreinte* Proceeding—is also a question of material fact.

**d. Whether the judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case (Cal. Civ. Proc. Code § 1716(c)(2))**

The Recognition Act provides that when "[t]he [foreign] judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case," then the U.S. court need not recognize the judgment. Cal. Civ. Proc. Code § 1716(c)(2). The comments to the 2005 Act state that only extrinsic fraud—that is "conduct of the prevailing party that deprived the losing party of an adequate opportunity to present its case"—provides a ground for nonrecognition. 2005 Act Comments, § 4 comment 7 (quotations omitted). An example of extrinsic fraud would be if a plaintiff "obtained a default judgment against the defendant based on a forged confession of judgment." *Id.* "Extrinsic fraud should be distinguished from intrinsic fraud, such as false testimony of a witness or admission of a forged document into evidence during the foreign proceeding;" intrinsic evidence is not a basis for nonrecognition. *Id.*

Defendants' argument here turns on Plaintiffs' representation to the JEX that Plaintiffs' owned the copyrights to the at-issue photographs and the right to liquidate the *astreinte*. Defendants contend that Plaintiffs "deceived the French court as to [their] ownership of the underlying intellectual property rights, and as a result of that deception, wrongfully obtained a judgment liquidating an *astreinte* to which [they] w[ere] not legally entitled. [Plaintiffs'] misrepresentation regarding [their] ownership of the rights compounded [their] failure to effect service, making it so neither Defendants nor the French court knew the true state of affairs." Mot. at 16.

Defendants present evidence that is analogous to the example provided in the Comments to the 2005 Act. Here, Plaintiffs presented information to the JEX—that they owned the copyrights underlying the *astreinte*—that is contrary to a factual finding by the French court that issued the 2013 Judgment. That information contributed to Plaintiffs obtaining a default judgment against Defendants in the 2012 Judgment. Moreover, as discussed above, whether Plaintiffs transferred the *astreinte* is a disputed fact that goes to whether the JEX had jurisdiction, and "[e]xtrinsic fraud . . . goes to the question of jurisdiction." *Iraq Middle Mkt. Dev. Found. v. Harmoosh*, 175 F. Supp. 3d 567, 577 (D. Md. 2016) (citation and quotation omitted), *vacated on other grounds*, 848 F.3d 235 (4th Cir. 2017). If Plaintiffs did not own the right to liquidate the *astreinte* and if they intentionally misled the JEX as to that fact, then those facts could constitute extrinsic fraud. *See Pentz v. Kuppinger*, 31 Cal. App. 3d 590, 597 (Ct. App. 1973).

Accordingly, there are genuine disputes of material fact that preclude summary judgment on this defense.

**e. Whether the judgment or the cause of action or claim for relief on which the judgment is based is repugnant to the public policy of this state or of the United States (Cal. Civ. Proc. Code § 1716(c)(3))**

The Recognition Act provides that a court is not required to recognize a foreign judgment when “[t]he judgment or the cause of action or claim for relief on which the judgment is based is repugnant to the public policy of this state or of the United States.” Cal. Civ. Proc. Code § 1716(c)(3). Defendants argue that this court should decline to recognize the 2012 Judgment because it is repugnant to U.S. public policy favoring (1) free speech and (2) promotion of the arts. Plaintiffs contend that any differences between U.S. and French law do not meet the stringent standard for repugnancy.

“California courts have set a high bar for repugnancy under the [Recognition] Act. The standard . . . measures not simply whether the foreign judgment or cause of action is contrary to our public policy, but whether either is so offensive to our public policy as to be prejudicial to recognized standards of morality and to the general interests of the citizens.” *Ohno*, 723 F.3d at 1002 (citations and quotations omitted). “[T]he public policy exception codified at § 1716(c)(3) does not apply unless a foreign-country judgment or the law on which it is based is so antagonistic to California or federal public policy interests as to preclude the extension of comity.” *Id.*

(citation, quotations, and alteration omitted). In *Ohno*, the Ninth Circuit recognized that “courts in other jurisdictions have declined to enforce foreign-country money judgments on grounds of repugnance to the public policy embodied in the First Amendment, but only where there were stark differences between foreign and domestic law.” *Id.* at 1003. The Ninth Circuit explained that “[s]uch direct conflict is more apt to arise where the foreign-country judgment—or the law underlying it— does not incidentally or indirectly affect conduct that may be protected in the United States, but expressly targets such conduct.” *Id.* So, judgments based on “foreign laws specific to speech or expression—such as libel, defamation and hate speech laws—not laws of general application” are more likely to be found repugnant. *Id.* On this basis, the Ninth Circuit distinguished *Ohno*—which dealt with Japanese tort laws—from the Second Circuit’s decision in *Viewfinder*. *Id.* at 1004 n. 23. In *Viewfinder*, after the district court for the Southern District of New York found a French copyright judgment to be repugnant to public policy under the New York Recognition Act because it conflicted with U.S. and New York policy protecting free expression, the Second Circuit vacated and remanded with instructions to conduct a more thorough analysis of French and U.S. copyright laws and the fair use exception for activity protected by the First Amendment. *See Viewfinder*, 489 F.3d at 478-84.

Plaintiffs argue that Defendants’ reliance on *Viewfinder* is misplaced because *Viewfinder* is a Second Circuit case applying the New York Recognition Act, and this court should instead find that the 2012 Judgment does not meet the high standard for

repugnancy articulated in *Ohno*. This argument fails to persuade. First, as discussed above, the Recognition Act provides that courts, “[i]n applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.” Cal. Civ. Proc. Code § 1722, *see also Alfa-Bank*, 21 Cal. App. 5th at 199. The New York Act is based on the 1965 Act, so cases interpreting it, like *Viewfinder*, are persuasive even if they are not binding. Second, *Ohno* specifically distinguished *Viewfinder*, so the two decisions are not in conflict. Accordingly, while Plaintiffs are correct that the standard for repugnancy is a difficult one to meet, “[f]oreign judgments that impinge on First Amendment rights will be found to be repugnant to public policy.” *Viewfinder*, 489 F.3d at 480 (quotations omitted); *see also Ohno*, 723 F.3d at 1004 (“[Foreign] judgments presenting a direct and definite conflict with fundamental American constitutional principles will be denied recognition because repugnant.”).

The 2012 Judgment arises, through the 2001 Judgment, from French copyright law. Defendants contend that it is repugnant to public policy set forth in the U.S. Constitution because (1) it conflicts with the fair use doctrine, which is rooted in the First Amendment, and (2) it conflicts with policy favoring the promotion of the arts as articulated in the Intellectual Property Clause. U.S. Const. Art. I, § 8, cl. 8. In *Viewfinder*, the Second Circuit articulated a framework for applying the Recognition Act to this sort of circumstance: First, a court should identify the constitutional protections for the unauthorized use of the intellectual property at issue, and second, it should

determine whether French intellectual property laws provide comparable protections. *Viewfinder*, 489 F.3d at 481-82 (citing *Bachchan*, 585 N.Y.S.2d at 663-65; *Abdullah v. Sheridan Square Press, Inc.*, 1994 WL 419847, at \*1 (S.D.N.Y. May 4, 1994)).

**i. Fair Use**

The court first considers Defendants' fair use argument. It is well accepted that the fair use doctrine implicates the First Amendment. *Viewfinder*, 489 F.3d at 482 (“[A]bsent extraordinary circumstances, the fair use doctrine encompasses all claims of [F]irst [A]mendment in the copyright field.”) (citations and quotations omitted); *L.A. News Serv. v. Tullo*, 973 F.2d 791, 795 (9th Cir. 1992) (“First Amendment concerns are . . . addressed in the copyright field through the ‘fair use’ doctrine.”). “Because the fair use doctrine balances the competing interests of the copyright laws and the First Amendment, some analysis of that doctrine is generally needed before a court can conclude that a foreign copyright judgment is repugnant to public policy.” *Viewfinder*, 489 F.3d at 482. If Defendants' use of the copyright protected photographs would not be protected by the fair use doctrine under U.S. law, then the 2012 Judgment liquidating the *astreinte* arising from Defendants' infringing use of the photographs would not be repugnant. *See id.* at 483. The court must therefore determine whether Defendants' use of the photographs constitutes fair use. *See id.*

The Copyright Act allows for the fair use of copyright-protected works for criticism, commentary, news reporting, scholarship, research and other such



purposes. 17 U.S.C. § 107. In assessing whether conduct constitutes fair use, courts should consider four factors: “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.” *Id.*

As to the first factor, Defendants contend that the purpose and character of their use of the photographs should qualify as fair use. While conceding that *The Picasso Project* is a commercial venture, Defendants point out that their books are reference works intended for libraries, academic institutions, art collectors and auction houses, and such institutions find it an attractive reference due to its price point. Dkt. No. 70-1 at 16, 19 (Facts 33, 42). *The Picasso Project* also includes information about the photographed works, such as their titles, literary references, provenance, current ownership and sales information, that is generally not included in the Zervos Catalogue. Dkt. No. 70-1 at 18 (Fact 39). Plaintiffs do not contest these facts. *Id.* Rather, Plaintiffs argue that Defendants’ copying has a commercial purpose, which weighs against fair use. However, the mere commercial nature of a work does not create a presumption against fair use; such a presumption “would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities are generally conducted for profit in this

country.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (citation and quotations omitted). Because Plaintiffs do not dispute that *The Picasso Project* is intended for libraries, academic institutions, art collectors, and auction houses, it falls within the exemplary uses named in the preamble of § 107 of the Copyright Act. This factor weighs strongly in favor of fair use.

Defendants next argue that the nature of the Zervos Catalogue weighs in favor of finding fair use because the photographs are unoriginal and documentary in nature. However, as Plaintiffs point out, in the 2001 Judgment the *Cour d’Appel* found the photographs to be creative works: “the photograph of his work seeks to find its quintessence through the deliberate choice of lighting, the lens, filters, framing or angle of view, it has expressed in the representation that it has made of it, its own personality, highlighting an aspect that should be brought out in one place, or a contrast or effect coming from the support in another . . . [and thus] reveals a true creator.” Compl. Ex. 2 at 10. However, Plaintiffs do not dispute that the Zervos Catalogue is documentary in nature. The Zervos Catalogue is a *catalogue raisonné*, and the purpose of a *catalogue raisonné* is to faithfully reproduce an artist’s work, not to showcase the original artistic expression of the photographer. Dkt. No. 70-1 at 16-17 (Facts 34-35). On balance, the court finds that this factor tilts slightly away from finding fair use.

The third factor “asks whether the amount and substantiality of the portion used in relation to the copyrighted work as a whole, are reasonable in relation

to the purpose of copying.” *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 803 (9th Cir. 2003) (citation and quotations omitted). “This factor has both a quantitative and a qualitative component, so that courts have found that use was not fair where the quoted material formed a substantial percentage of the copyrighted work . . . or where the quoted material was essentially the heart of the copyrighted work.” *New Era Publ’ns Int’l, ApS v. Carol Publ’g. Grp.*, 904 F.2d 152, 158 (2d Cir. 1990) (quotation, citation, and parenthetical omitted). The Zervos catalogue contains some 16,000 photographs of Picasso’s work (Compl. Ex. 2 at 3), while the JEX found that Defendants had copied 1,492 of those photographs (*see* Compl. Ex. 6 at 3; *see also* Reply Mooney Decl. ¶ 3 (“more than 1,000”). In the 2001 Judgment, the *Cour d’Appel* found that *The Picasso Project* did not copy the “sequences and the specific representations which, coming from the personal choices of Mr. ZERVOS . . . cause [the Zervos Catalogue] to be [an] original work[.]” Compl. Ex. 2 at 9. Because Defendants copied less than ten percent of The Zervos Catalogue’s photographs and because Plaintiffs have not presented evidence that the copied photographs go to “the heart” of the Zervos Catalogue, the court finds that the third factor weighs in favor of fair use.

The last factor considers the effect of the use upon the potential market for or value of the copyrighted work. This factor is “undoubtedly the single most important element of fair use.” *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985). Here, the fourth factor weighs heavily in favor of fair use. First, the Zervos Catalogue and *The Picasso*

*Project* do not compete. Plaintiffs argue that they are competing products, but they provide no factual basis for this position. *The Picasso Project* can be purchased by individual volumes for about \$150 per volume. Mot. Wofsy Decl. ¶ 38. When sold as a collection of all 28 volumes, it retails for either \$2,780, \$3,400, or \$3,780. *Id.*; Reply Mooney Decl. (Dkt. No. 71-1) ¶ 3 & Attachment. By contrast, the original Zervos Catalogue is only available on the second-hand market, and a 2013 reprint is only available as a complete set of all of its volumes and sells for \$20,000. Dkt. No. 70-1 at 17 (Facts 36, 37). Plaintiffs do not dispute that *The Picasso Project* is intended for libraries, academic institutions, art collectors, and auction houses, whereas the Zervos Catalogue has a niche market due to its historic nature and high price. Dkt. No. 70-1 at 16, 18-19 (Facts 33, 41). Given their disparate markets and wildly different price points, no reasonable fact finder could conclude that the Zervos Catalogue and *The Picasso Project* compete.

This lack of competition is further shown in the Zervos Catalogue's market. In 1994 and 1995, the price of the original Zervos Catalogue at auction houses, such as Sotheby's, was at different times \$35,000 and £38,900. Dkt. No. 70-1 at 18 (Fact 40); Little Decl. (Dkt. No. 61-9) ¶ 6. *The Picasso Project* was first published in 1995. Dkt. No. 70-1 at 18 (Fact 40). Thereafter, the price of the Zervos Catalogue rose significantly, going for over \$100,000 at no fewer than three auctions from 2007 to 2011, and for \$74,200 at an auction in 2012. *Id.*; Little Decl. ¶ 6. While the auction price of the original Zervos Catalogue has declined since then, that appears to be attributable to its 2013 reprint. Since the

release of the reprint in 2013, the auction price of the original Zervos Catalogue has declined, going for as little as \$8,750 at an auction in 2015. Dkt. No. 70-1 at 18 (Fact 40); Little Decl. ¶ 7. Plaintiffs offer no evidence indicating that Defendants use of the photographs in *The Picasso Project* has had any effect—let alone a negative one—on the market for the Zervos Catalogue. This fourth factor weighs heavily in favor of Defendants.

The first, third, and fourth factors all support fair use—with the first and fourth factors strongly supporting fair use. While the second factor slightly leans towards Plaintiffs’ position, the Ninth Circuit has characterized that factor as “not . . . terribly significant in the overall fair use balancing.” *Mattel*, 353 F.3d at 803 (9th Cir. 2003). The fair use doctrine exists to promote criticism, teaching, scholarship, and research. *See* 17 U.S.C. § 107. It is undisputed that *The Picasso Project*, unlike the Zervos Catalogue, is intended for a market serving those interests. Moreover, the two publications have distinctly separate markets and do not compete. Accordingly, the court finds that the Defendants’ use of the photographs falls within the fair use exception.

Having identified a protection for Defendants’ use of the photographs, the court continues the *Viewfinder* framework by determining whether French laws provide a comparable fair use protection. 489 F.3d at 481-82. It does not. Plaintiffs concede that the French intellectual property regime makes no exception for the fair use of copyright-protected works. Cross-Mot. (Dkt. No. 63) at 21 (“French law does not provide a ‘fair use’

defense . . .”). Sirinelli opines the fair use doctrine is “completely foreign to French law.” Mot. Sirinelli Decl. ¶ 53. Commentators have stated that “the French Intellectual Property Code has no comparable fair use provisions.” Lyombe Eko, Anup Kumar, Qingjiang Yao, *To Google or Not to Google: The Google Digital Books Initiative and the Exceptionalist Intellectual Property Law Regimes of the United States and France*, 15 J. Internet L. 12, 24 (2012) (footnote omitted). The court holds that French law does not provide comparable protections for the fair use of copyright protected materials.

The court is mindful of concerns over comity between the French and U.S. courts. However, the court finds that the Defendants’ use of Plaintiffs’ photographs qualifies as fair use. The 2012 Judgment is, therefore at odds to the U.S. public policy promoting criticism, teaching, scholarship, and research. Defendants have carried their burden of showing that there is no genuine issue of material fact that the 2012 Judgment is repugnant to U.S. public policy.

Having reached this conclusion, the court will not recognize the 2012 Judgment. The parties did not brief the standards for deciding to decline to recognize a foreign judgment under a § 1716(c) defense. The Restatement, though, provides that if a court finds a § 1716(c) defense to be applicable, then “the court is not required to deny recognition, *but may do so in the interests of justice.*” Restatement (Third) of Foreign Relations Law § 482 (1987) (emphasis added). The court finds that it is in the interest of justice to deny recognition of the 2012 Judgment.

**ii. Public Policy Favoring Promotion of the Arts**

Defendants also argue that the 2012 Judgment is repugnant to public policy favoring the arts, as expressed by the Intellectual Property Clause of the U.S. Constitution. This argument is based on their conclusion that the copied photographs are not protectable under U.S. copyright law because they are not original creative works. However, as they acknowledge, the *Cour d'Appell* has already found that the photographs are themselves original works of art. Compl. Ex. 2 at 10; Mot. at 18. The court will not reconsider the merits of the French judgments. *Ohno*, 723 F.3d at 997. Accordingly, Defendants, as a matter of law, cannot pursue this argument.

**f. Whether the judgment conflicts with another final and conclusive judgment (Cal. Civ. Proc. Code § 1716(c)(4))**

Defendants next argue that the 2012 Judgment conflicts with the 2013 Judgment from the Second Copyright Proceeding. Their theory is that there is a conflict between the 2013 Judgment, wherein the French court in the Second Copyright Proceeding found that Plaintiffs lacked standing to sue for copyright infringement, and the 2012 Judgment, in which the JEX allowed Plaintiffs to liquidate the *astreinte*. This argument fails though because it conflates the copyrights in the photographs of the Zervos Catalogue with the right to liquidate the *astreinte*. *See supra* § III.B. Whether the *astreinte* transferred away from Plaintiffs with the copyrights is an unresolved factual question. But even if it did, the 2012 Judgment and

2013 Judgment would still arise from separate subject matters, so the two judgments are not in conflict. The court grants partial summary judgment in favor of Plaintiffs on this defense.

**g. Whether the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment (Cal. Civ. Proc. Code § 1716(c)(7))**

Defendants ask the court to decline to recognize the 2012 Judgment because the circumstances surrounding the 2012 Judgment raise substantial doubts as to the integrity of the JEX. A federal bankruptcy court that considered the comparable provision of the Texas Recognition Act found that it “requires a showing of corruption in the particular case that had an impact on the judgment that was rendered.” *In re Carmona*, 580 B.R. 690, 710 (Bankr. S.D. Tex. 2018) (quoting *Savage v. Zelent*, 777 S.E.2d 801, 808 (2015)). Mere “doubt about the fairness of a case” will not suffice. *Id.*

Defendants argue that (1) The JEX did not explicate its assertion of personal jurisdiction over Defendants, and it did not require any demonstration by Plaintiffs of efforts to locate and serve Defendants before declaring them in default, (2) it not comply with its own law regarding default judgments over foreign defendants who have not received notice of the proceedings by waiting the requisite six months after the first mailing of the initiating documents before declaring a foreign defendant in default and ruling on the merits, (3) the euro 2 million award is arbitrary,



(4) the wrong defendants were sued, and (5) the JEX allowed Plaintiffs to proceed despite not having standing. These arguments go to whether the JEX's ruling was correct on the merits; they do not support a finding that the JEX was corrupt. "[T]his Court will not attempt to insert itself into the shoes of the [French] court and usurp its decision-making." *Id.* at 711. Because Defendants have presented no evidence that the JEX was corrupt, the court grants partial summary judgment in favor of Plaintiffs on this defense.

**h. Whether the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law (Cal. Civ. Proc. Code § 1716(c)(8))**

Defendants' final defense is the *Astreinte* Proceeding was not compatible with due process of law. This grounds for nonrecognition is "reserved for challenges as to the integrity or fundamental fairness with regard to the particular proceeding leading to the foreign country judgment." *Alfa-Bank*, 21 Cal. App. 5th at 215 (citation and quotations omitted). "[F]oreign courts are not required to adopt every jot and tittle of American due process." *Id.* (citation and quotation omitted). France "is not bound by our notions of due process, and we do not insist on the additional niceties of domestic jurisprudence in deciding whether to enforce a [French] judgment." *Id.* at 215-16. (citation and quotations omitted). The court's task is to "decide whether the foreign procedures [were] fundamentally fair and d[id] not offend basic fairness." *Id.* at 216 (citations and quotations omitted).

Defendants raise several points showing the *Astreinte* Proceeding was not compatible with due process: (a) they had insufficient notice, (b) the 2012 Judgment issued against the wrong parties, (c) Plaintiffs misrepresented that they still owned the rights to the *astreinte* to the JEX, and (d) the award was arbitrary. California courts have recognized that adequate notice is a requirement for due process. *See, e.g., Alfa-Bank*, 21 Cal. App. 5th at 216. The court has found that whether Defendants had sufficient notice to defend the action is a triable question, so the court will not grant partial summary judgment in favor of Plaintiffs on this defense. However, whether all of Defendants' arguments, taken together, show that the *Astreinte* Proceeding was not compatible with due process is a question of material facts.

#### **IV. Conclusion**

For the reasons discussed above, the court orders as follows: Partial summary judgment is granted in favor of Plaintiffs on the following defenses (i) that the JEX did not have personal jurisdiction over Defendants under § 1716(b)(2), (ii) that the 2012 Judgment conflicts with the 2013 Judgment under § 1716(c)(4), and (iii) that there are concerns about the integrity of the JEX under § 1716(c)(7). The court grants Defendants' motion because the 2012 Judgment is repugnant to U.S. public policy under § 1716(c)(3). The court will not recognize the 2012 Judgment.

**IT IS SO ORDERED.**

Dated: September 12, 2019

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/s/ Edward J. Davila

EDWARD J. DAVILA

United States District Judge

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**APPENDIX C**

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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

**Case No. 5:13-cv-05957-EJD**

**[Filed: September 12, 2019]**

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Vincent Sicre de Fontbrune; Loan Sicre	)
de Fontbrune; Adel Sicre de Fontbrune;	)
Anais Sicre de Fontbrune, in their capacity	)
as the personal representatives of the Estate	)
of Yves Sicre de Fontbrune,	)
	)
Plaintiffs,	)
	)
v.	)
	)
Alan Wofsy, an individual; Alan Wofsy &	)
Associates; Does 1 through 100, inclusive,	)
	)
Defendants.	)

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**JUDGMENT**

Re: Dkt. No. 61

On September 12, 2019, the court granted Defendants' motion for summary judgment. Pursuant to Federal Rule of Civil Procedure 58, the Court hereby ENTERS judgment in favor of Defendants and against

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Plaintiffs. The Clerk of Court shall close the file in this matter.

**IT IS SO ORDERED.**

Dated: September 12, 2019

/s/ Edward J. Davila  
EDWARD J. DAVILA  
United States District Judge

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**APPENDIX D**

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**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

**Nos. 19-16913, 19-17024**

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

**Northern District of California, San Jose**

**[Filed: September 6, 2022]**

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VINCENT SICRE DE FONTBRUNE, in	)
their capacity as the personal representatives	)
of the Estate of YVES SICRE	)
DE FONTBRUNE; et al.,	)
	)
Plaintiffs-Appellants,	)
	)
v.	)
	)
ALAN WOFSY; ALAN WOFSY &	)
ASSOCIATES,	)
	)
Defendants-Appellees.	)

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**ORDER**

Before: HURWITZ and VANDYKE, Circuit Judges, and ERICKSEN,\* District Judge.

The panel unanimously voted to deny the petitions for panel rehearing. Judges Hurwitz and VanDyke voted to deny the petitions for rehearing en banc, and Judge Erickson so recommended. The petitions for rehearing en banc were circulated to the judges of the Court, and no judge requested a vote for en banc consideration. Fed. R. App. P. 35.

The petitions for panel rehearing and for rehearing en banc, **Dkt. No. 83 (19-16913)** and **Dkt. No. 81 (19-17024)**, are **DENIED**.

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