

Ninth Circuit Reverses Ruling in Copyright Infringement Case Involving Photographs of Picasso's Artworks

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The Ninth Circuit reversed a lower court's decision in an action seeking recognition of a French money judgment for copyright infringement involving photographs of Pablo Picasso's artworks. The lower court found that the French money judgment was not enforceable due to fair use. The Ninth Circuit found that various factors weighed against the fair use defense and remanded to the lower court.

Christian Zervos, Picasso's friend, took almost 16,000 photographs of the painter's artworks between 1932 and 1970. *Cahiers d'Art* published the photographs in a catalog known as the Zervos Catalogue, and Yves Sicre de Fontbrune acquired intellectual property rights to the Zervos Catalogue under French law in 1979. In 1991, Alan Wofsy, an American art editor, acquired permission from Picasso's estate to publish *The Picasso Project*, which included republication of photographs that were published in the Zervos Catalogue. In 1996, Sicre de Fontbrune requested that the police seize two copies of *The Picasso Project*, which were being sold at a Paris book fair, and proceeded to sue Wofsy for copyright infringement.

A French court initially rejected the 1996 claim, but the French Court of Appeal reversed and found that Wofsy had infringed on Sicre de Fontbrune's copyright rights, determining that the photographs at issue did not merely copy Picasso's works but also added creative features through "deliberate choice[s] of lighting, the lens, filters, [and] framing or angle of view." The Court of Appeal entered a ruling prohibiting further use of the Zervos photographs and awarded damages in 2001.

In 2011, Sicre de Fontbrune sought to enforce the French judgment in the United States when Wofsy allegedly violated the judgment by reproducing photographs from the Zervos Catalogue again. However, a California district court tossed out the claim because the judge found that the ruling was "repugnant to U.S. law." Specifically, the court found that the French ruling was in conflict with the First Amendment of the U.S. Constitution and that the fair use doctrine would have protected the reproduction of the photographs. Sicre De Fontbrune appealed.

According to a three-judge panel of the Ninth Circuit, "the undisputed evidence showed that the use of the copyrighted photographs was commercial and non-transformative." The panel also held that,

“the photographs’ creative qualities prevented this factor [fair use] from weighing heavily.” The Ninth Circuit remanded the case back to the lower court on this basis.

The Ninth Circuit’s analysis gave a rather cursory treatment to some important facts in this case, including the nature of the photographs, the fact that the artist’s estate authorized the use of the images and the public interest in a catalogue raisonné of Picasso’s works to be used for reference purposes. Wofsy’s legal team is reviewing their next steps, including a possible certiorari petition.

- **Art News:** [Ninth Circuit Reverses Opinion on Picasso Copyright Case That Said French Law Was Not Enforceable in U.S. Under Fair Use](#)
- **Decision:** [U.S. Court of Appeals Ruling](#)

The remaining summaries of news headlines are separated by region for your browsing convenience.

United State

Ninth Circuit Disagrees with Second Circuit’s Approach to a “Damages Bar,” Finding that Starz Brought a Timely Copyright Infringement Suit against MGM

Starz Entertainment brought a lawsuit against MGM Domestic Television Distribution in May 2020, alleging copyright infringement and breach of contract, and claiming that more than 200 movies and television episodes had been licensed to rivals in violation of a 2013 exclusivity agreement.

MGM moved to dismiss the copyright allegations as untimely, requesting that the Ninth Circuit adopt the Second Circuit’s damages bar, which limits a copyright holder’s damages claims to within three years of discovering the alleged infringement. Declining to follow the Second Circuit’s approach to a “damages bar,” the Ninth Circuit found not only that Starz’s copyright infringement claim was timely but also that Starz could assert damages as early as 2016.

The Ninth Circuit panel explained that “[t]here is no reason for a discovery rule if damages for infringing acts of which the copyright owner reasonably becomes aware years later are unavailable,” leading the Court to find that “[t]his case provides a textbook example of the absurdity of such a rule.” Thus, the Ninth Circuit agreed with the California district court’s decision to deny MGM’s motion to dismiss and allowed damages to recover prior to its discovery of the infringement in 2020.

MGM expressed its disappointment with the ruling, saying it “conflicts with both the Supreme Court’s and the Second Circuit’s pronouncements on the limits Congress placed on relief for copyright infringement.”

“MGM is considering its further appellate options and looks forward to defending against Starz’s claims on the merits, which this ruling did not reach,” the company said.

- **The Wrap:** [U.S. Court of Appeals Allows Starz Lawsuit Against MGM to Proceed](#)
- **Holding:** [U.S. Court of Appeals](#)

Art Expert Denies Authenticating Disputed Paintings the FBI Seized from Orlando Museum of Art

Jordana Moore Saggese, art history professor at the University of Maryland and a Jean-Michel Basquiat expert, issued a statement denying that she ever claimed that 27 contested Basquiat works that were recently seized by the FBI were legitimate. The 27 paintings, which made up the Orlando Museum of Art's show "Heroes & Monsters: Jean-Michel Basquiat," were seized by the FBI's Art Crime Team in late June over concerns that they were fake.

The FBI is investigating the authenticity of these works that were allegedly discovered in a storage unit in Los Angeles in 2012. Saggese was retained in 2017 by the owners of the artworks to provide her professional opinion on the works. She provided the *Baltimore Sun* with a statement that she only reviewed a number of paintings "based solely" on photographs. She stated that she "rejected nine works outright. I concluded that 11 works 'could be' Basquiat's, based solely on a review of photographs while reserving the right to amend my opinion upon an in-person inspection, which was never provided."

Allegedly unbeknownst to Saggese and without her permission, wording from her report was published in the exhibition catalog. One of the co-owners is reportedly challenging Saggese's position, claiming that her report was "preliminary" and alleging that she provided a positive and definitive attribution of some of the paintings. It remains to be seen whether this will become the latest in a series of disputes against art authenticators after a string of such lawsuits has already led to many experts no longer being willing to authenticate artworks.

- **ArtNews:** [Art History Professor Denies That She Authenticated Disputed Basquiats Seized by FBI](#)
- **USA Art News:** [Basquiat Expert Denies She Authenticated Disputed Paintings the FBI Seized from Florida Museum](#)
- **Orlando Weekly:** [Orlando Museum of Art's "Heroes and Monsters" Reveals Unshown Works by Modern Master Jean Michel-Basquiat](#)

House Panel Approves Expanding Anti-Money Laundering Requirements that May Have Significant Effects on the Art Market

An anti-money laundering (AML) bill presently pending before Congress could subject galleries and auction houses to stricter reporting requirements about their customers based on an overall demand for transparency in art transactions. In this effort, the United States follows the European lead, where in 2018 the Fifth Anti-Money Laundering Directive required member states to impose such requirements on various participants in the fine art trade. The AML obligations are frequently critiqued as being especially challenging for small and mid-size galleries.

The U.S. House Armed Services Committee, a bipartisan group of lawmakers, recently cleared a major hurdle to revise the 52-year-old Bank Secrecy Act (BSA) that could have a significant impact on the art market. The Enablers Act is a bill that amends the BSA to require art dealers, trust companies, lawyers and others to investigate potential clients and to report potential red flags concerning suspected financial wrongdoings.

The bill would introduce strict regulations into the notoriously unregulated art market. Art dealers, advisers, galleries, auction houses and even museums are specifically identified in the new law and would face new legal obligations if the bill is passed, including having to report suspicious activity to the Department of the Treasury. Banks are already required to vet clients and their sources of wealth, but many other American financial gatekeepers have been exempted from “due diligence rules,” which has long been criticized as a “loophole” by financial crime experts and international watchdogs. The proponents of the Enablers Act explained that “middlemen in foreign transactions should be subject to the same anti–money laundering checks as banks.”

Recent history suggests that the expansion of the AML regulations to the art market is likely to pass, and the exact requirements will be subject to implementing regulations. In 2020, lawmakers included the Corporate Transparency Act, which requires antiquities dealers to follow the AML provisions of the BSA, in the National Defense Authorization Act. Doing so led to the Corporate Transparency Act’s passing. Implementing regulations are expected to come into effect sometime in 2023.

- **ArtNet:** [An Anti–Money Laundering Bill That Could Have Profound Effects on the Art Market Just Took a Big Step Forward](#)
- **Washington Post:** [House Panel Approves Expanding Anti–Money Laundering Reporting Requirements](#)

Africa

Repatriation of the Benin Bronzes

After more than a year of negotiations, Nigeria and Germany announced that they have concluded negotiations on repatriation of looted Benin Bronzes that Germany plans to return to Nigeria. On July 1, 2022, the German government signed a historic restitution agreement paving the way for the return of more than a 1,000 pieces that were taken from Africa more than 120 years ago. The restitution agreement “paves the way for the transfer of ownership of the Benin Bronzes.” Nigerian officials hope that this restitution agreement will prompt other countries to follow suit.

“The restitution of cultural assets cannot heal the wounds of brutal colonial rule,” said Germany’s Culture Minister, Claudia Roth, adding, “But it is a first step toward a new way of dealing with the past that has been largely ignored until now. People all over the world have a right to access to their own cultural heritage. They should be able to decide for themselves how this is preserved and passed on to future generations.”

- **ArtNet:** [Concluding a Slate of Negotiations, Germany and Nigeria Plan to Sign an Agreement on the Return of Benin Bronzes from Berlin](#)
- **The Art Newspaper:** [“The Benin Bronzes Are Returning Home”: Germany and Nigeria Sign Historic Restitution Agreement](#)

Europe

A Court in Paris Dismissed Claim by a Fabricator of Sculptures, Again Raising the Question of Authorship in Conceptual Art

French sculptor Daniel Druet, 80, claimed that he was not properly recognized as the creator of nine wax figures made between 1999 and 2006, which he was commissioned to make for Italian conceptual artist Maurizio Cattelan. Druet sought damages of nearly €5 million (US\$5.25 million) in compensation. The Paris intellectual property court ruled that Druet's claim was "inadmissible" because he never sued Cattelan, only the artist's gallery and the museum showing the works.

The judges also affirmed that the installation and scenography of the wax models in question "came from [Cattelan] only, Daniel Druet being in no position ... to take the slightest part in the choices relating to the scenic setting of the said effigies" nor "the content of the possible message to be conveyed through this staging." This observation – which is uncontested by both sides – means Druet cannot be named as the sole author of the completed artworks, which necessarily includes their conceptual installation by Cattelan.

Beyond the court's decision, the case stirred a debate on the meaning of conceptual art and the recognition of assistants who contribute to artworks under the direction of a single author. The ruling still leaves the question of whether a fabricator can rightfully claim authorship of an artwork made on commission for an artist. "The question of authorship – even the validity – of art ... is at the heart of this dispute," according to a group of more than 60 art professionals, including Annette Messager, Sophie Calle and Chris Dercon, who wrote an editorial supporting Cattelan that was published in *Le Monde* in May.

Although the case was dismissed, it could lead to a new claim to clarify Druet's claims, and if so, the issues will once again be reexamined and authorship in conceptual art will once again be the subject of debate.

- **ArtNet:** [Maurizio Cattelan Won His Legal Case Against His Disgruntled Fabricator. But, for Some, Key Questions Remain Unanswered](#)

Greater Penalties Are Being Imposed on Vandals Who Target Public Monuments in the United Kingdom

Many monuments in England were damaged when protests erupted worldwide following the murder of George Floyd by a police officer in the United States. For example, in London, an 18-year-old man spray-painted a statue of Winston Churchill. He was found to have caused damages of £1,642 (US\$1,956) but was fined only £200 (plus additional court costs, victim surcharge and compensation).

But not all destruction has been in the context of civil protests. In August 2021, a memorial to the war dead in the Bermondsey and Rotherhithe districts in London was set on fire with no clear motive. A new amendment to the UK criminal law seeks to discourage vandalism by increasing penalties to up to 10 years of prison time. Previously, in cases where the cost of the damage is less than £5,000 (US\$6,000), offenders could receive a maximum imprisonment of three months and a possible fine of up to £2,500 (US\$3,000). While the new law may appease the lobbyists who back the Desecration of War Memorials Bill, the new legislation is being criticized for ignoring a clear opportunity for public engagement and for potentially impacting the people's right to express themselves freely.

- **ArtNet:** [Vandals Who Target Public Monuments in the U.K. Now Face Drastically Harsher Fines and Prison Sentences Under a New Law](#)

Roman Mosaic Found in Rural British Town during a New Round of Excavations

During a round of excavations commissioned by a British museum, a Roman mosaic was found in a Roman building. The mosaic, colored in black, white and red tesserae, has suffered from centuries of ploughing the farmland. Archaeologists also discovered thousands of everyday objects at the site, including jewelry, coins, roof tiles and kiln fire bricks.

The mosaic dates back to the fourth century during the late Roman occupation. Researchers suggest that the mosaic could depict Constantine I, the first Roman emperor to have used the letters chi and rho (X and P). Researchers now propose that the site where the mosaic was found served a religious purpose for the region's small Christian community, possibly as monastic lodgings or a shrine.

- **ArtNews:** [Archaeologist Unearth Roman Mosaic in Rural British Town](#)

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