

January 2005

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Berkeley Technology Law Journal

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Recommended Citation

Berkeley Technology Law Journal, *Elvis Presley Enterprises, Inc. v. Passport Video*, 20 BERKELEY TECH. L.J. 730 (2005).

Link to publisher version (DOI)

<https://doi.org/10.15779/Z38339X>

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ELVIS PRESLEY ENTERPRISES, INC. v. PASSPORT VIDEO

349 F.3d 622 (9th Cir. 2003)

The Ninth Circuit upheld a preliminary injunction against producers of a biographical documentary about Elvis Presley containing unauthorized copyrighted material. The court found no fair use because the biography was not consistently transformational, was commercial in nature, and was likely to affect the market for the copyrighted works.

Passport Video created a sixteen-hour documentary on the life of Elvis Presley titled *The Definitive Elvis*. Retailing for \$99 and offering an exhaustive biography covering all aspects of Presley's life, *The Definitive Elvis* was composed partly of unlicensed video footage, still photographs, and music owned by Elvis Presley Enterprises, Inc. and several other companies and individuals. At least 5-10% of *The Definitive Elvis* consisted of unauthorized copyrighted material.

Following unsuccessful license negotiations and the plaintiffs' motion, the district court granted a preliminary injunction to stop distribution of *The Definitive Elvis* because the copying in question was not likely to be found fair use. The Ninth Circuit upheld the injunction, finding that the lower court did not abuse its discretion in granting injunctive relief and was not clearly erroneous in finding each of the four fair use factors to weigh against fair use.

The Ninth Circuit affirmed the district court's assessment of the fair use factors codified in 17 U.S.C. § 107: purpose and character of the use, nature of the copyrighted work, amount and substantiality of the portion used, and effect of the use upon the potential market. Under the first factor, the court held that the purpose of the use of copyrighted materials was to make a profit. The fact that the biography's packaging advertised the inclusion of "every film and television appearance," including the copyrighted material, showed that Passport Video was attempting to profit directly from unauthorized material. The court also found that *The Definitive Elvis* was not consistently transformative. Although the overall balance of the first factor was a close issue, the court found that many of the clips were "simply rebroadcast for entertainment purposes" and the lower court's finding on this factor was not erroneous.

The court found the nature of the copyrighted work to be another close call but again upheld the decision of the lower court to count it against fair use. Noting that television footage could be categorized as a news event and thus enjoy less protection, the court nonetheless recognized creative elements that are at the core of copyright protection in such footage, and identified still photographs and songs, for example, as clearly creative.

The third factor weighed against fair use because although defendants often used less than the entire work at issue, the portion used was often the most important part of the work.

Finally, the Ninth Circuit agreed with the district court that Passport Video's use would affect the market for the copyrighted Elvis materials. The court pointed to the commercial nature of *The Definitive Elvis*, the advertisement expressly mentioning the copyrighted works, and the lack of transformativeness as reasons why the use was likely to have a negative effect on the market for the original copyrighted material.