DraftExpress, Inc. v. Whistle Sports, Inc.
Case No. CV 22-488-DMG, 2022 WL 16962285 (C.D. Cal. Aug. 2, 2022)

Year	2022
Court	United States District Court for the Central District of California
Key Facts	Plaintiff DraftExpress, Inc. is the registered owner of a copyright in a video interview of professional basketball player, Giannis Antetokounmpo ("Giannis"), when he was a teenager. The 2013 video is three minutes and ten seconds long, and consists of a static, close-up of Giannis being interviewed about his playing style, accomplishments, and ambitions by a person off-camera. In July 2021, DraftExpress discovered that a two-second excerpt of the interview of Giannis saying "my name is Giannis Antetokounmpo" was used in an edited highlight reel of Giannis posted by Defendant Whistle Sports, Inc. ("Whistle") on its Twitter account. The mostly unaltered clip appears at the beginning of the reel and is followed by clips of an adult Giannis performing athletic feats "interspersed with enthusiastic commentary and comedic memes conveying shock and awe." DraftExpress sued Whistle for copyright infringement. Whistle moved to dismiss, asserting the use of the clip was both fair use and *de minimis*.
Issue	Whether using a brief video clip of an interviewee introducing himself in an edited highlight reel about the interviewee amounts to fair use.
Holding	Under the first fair use factor, the purpose and character of the use, the court found that Whistle's use was transformative and not significantly commercial, and accordingly the factor favored fair use. The purpose of the video interview was to get to know a young basketball prospect. In comparison, Whistle's use of the clip, while only slightly altered to appear older, offered "implicit commentary" on the original by juxtaposing video of Giannis as a "young and green" teenager with his later dynamic highlights as a professional NBA star. In addition, as Whistle only posted the reel on Twitter, it was at most "partially commercial" to the extent that it promoted Whistle and indirectly boosted its revenue. Considering the second factor, the nature of the copyrighted work, the court concluded that the visually "simple" video consisting of "typical interview questions" and responses exhibited "relatively little creativity." As the work was factual, informational, and published, the court found that this factor weighed heavily in favor of fair use. The third factor, the amount and substantiality of the portion used, also heavily favored fair use. Quantitatively, the two-second clip used by Whistle comprised just 1% of the video interview. Qualitatively, the clip did not include the "heart" of the work, which the court considered to be any "particularly interesting or unique" interview responses and "not the interviewee simply stating his name." Finally, the court found that the fourth factor, the effect on the potential market for or value of the work, also favored fair use. Although the court acknowledged that a market for footage of a young Giannis may exist due to his later success, because the use of the clip was transformative, market substitution and market harm could not be readily inferred. Ultimately, the court concluded that Whistle's reel, which serves to "satiate the fan's appetite for impressive basketball highlights" accompanied by commentary, was not a market substitute for the interview, which conveys information about Giannis' perspective on his early career. In sum, all four factors favored fair use.
Tags	Film/Audiovisual; Internet/Digitization; Review/Commentary
Outcome	Fair use found

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