

FILED

AUG 31 2004

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KISS CATALOG LTD., a New York corporation; GENE KLEIN, an individual, aka Gene Simmons; PAUL STANLEY, an individual,

Plaintiffs - Appellees,

v.

PASSPORT INTERNATIONAL PRODUCTIONS, INC., a California corporation, dba Passport Entertainment; PASSPORT INTERNATIONAL PRODUCTIONS OF CALIFORNIA, INC.,

Defendants - Appellants,

and

DOES 1-10,

Defendants.

No. 04-55120

D.C. No. CV-03-08514-WJR

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
William J. Rea, District Judge, Presiding

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Argued and Submitted August 3, 2004
Pasadena, California

Before: **REINHARDT, KOZINSKI** and **CLIFTON**, Circuit Judges.

1. The district court abused its discretion in granting a preliminary injunction. See Goto.com, Inc. v. Walt Disney Co., 202 F.3d 1199, 1204 (9th Cir. 2000) (explaining the abuse of discretion standard). Most significantly, the court failed to undertake a nominative fair use analysis because it erroneously held that the defense does not apply when a defendant uses a trademark in its secondary, trademark sense. See Brother Records, Inc. v. Jardine, 318 F.3d 900, 908 (9th Cir. 2003); New Kids on the Block v. News Am. Publ'g, Inc., 971 F.2d 302, 308 (9th Cir. 1992). The court also failed to analyze defendants' copyright preemption defense with respect to plaintiffs' right of publicity claims. See Downing v. Abercrombie & Fitch, 265 F.3d 994, 1003–05 (9th Cir. 2001). Without considering whether either or both defenses are likely to prevail, the court could not have found that plaintiffs demonstrated probable success on their claims.

2. This panel retains jurisdiction over any future appeals from grants or denials of preliminary injunction motions. In the event that such an appeal is filed, the panel will set an abbreviated briefing schedule and resolve the case on an expedited basis.

VACATED.