

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION TWO

VERA SEROVA, on behalf of herself
and all others similarly situated,

Plaintiff and Respondent,

v.

SONY MUSIC ENTERTAINMENT;
JOHN BRANCA, as Co-Executor of the
Estate of Michael J. Jackson; and MJJ
PRODUCTIONS, INC.,

Defendants and Appellants.

Court of Appeal No. B280526

(Super. Ct. No. BC 548468)

Appeal from Interlocutory Ruling
Of The Superior Court, County Of Los Angeles
Hon. Ann I. Jones, Judge

PETITION FOR REHEARING

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I. INTRODUCTION

Respondent Vera Serova respectfully petitions this Court for rehearing on issues addressed by the Panel’s August 28, 2018 Opinion (“Opinion”). The Court should grant this Petition for Rehearing because the decision reached by the Panel was erroneous due to a mistake of law. (*In re Jessup* (1889) 81 Cal. 408, 471.)

The Panel erred in holding that the speaker’s knowledge is an element in the test for commercial speech articulated in *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939 (*Kasky*). By looking beyond the content of the challenged speech to examine Appellants’ state of mind, the Panel contravened *Kasky*’s directive that the third prong of the commercial speech test—whether the speech consists of representations of fact of a commercial nature—is based on consideration of the content of the message. The Opinion’s misinterpretation of the *Kasky* test will have far-reaching consequences as it effectively adds a scienter requirement to the Unfair Competition Law (“UCL”) and Consumers Legal Remedies Act (“CLRA”) in contradiction of the statutes’ plain language and interpretation by the California Supreme Court.

When the Legislature enacted the UCL and CLRA, it had a choice to protect California consumers who spend their money, or sellers who profit from these transactions. It chose as a matter of public policy to protect consumers. It eliminated the notion of

“buyer beware” and placed the cost of the seller’s mistakes on the seller. The Opinion defies the legislative intent by providing sellers a complete defense from liability for false advertising based on the seller’s subjective ignorance and the existence of a controversy—two factors, which may be entirely outside the knowledge of the average consumer.

As a practical matter, the Opinion may cause a ripple effect in the arts and entertainment market, allowing sellers to attribute works of dubious origin to famous artists of the past with immunity based on their lack of personal knowledge and a controversy over such attribution. In the present case, the Opinion provides far-reaching protection to false advertising of the forged songs, as Appellants can continue to rely on the lack of personal knowledge of the singer’s identity and the presence of a controversy even after the fraud has been admitted by some (but not all) of its participants.

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II. ARGUMENT

A. The Opinion misinterprets the third prong of the *Kasky* test for commercial speech articulated by the California Supreme Court.

1. The third prong of the *Kasky* test requires examination of the content of the message, not the speaker's state of mind.

The Opinion holds that, under the *Kasky* test, a manufacturer's speech about his product is commercial only if the manufacturer has personal knowledge of the matters he speaks about. (Opinion 21 ["Appellants' statements therefore lacked the critical element of personal knowledge under the *Kasky* standard."].) The Opinion concludes that because Appellants had no personal knowledge of who sang the Cascio songs, their statements attributing the songs to Michael Jackson were nonactionable opinions. (Opinion 23 ["Because Appellants lacked actual knowledge of the identity of the lead singer on the Disputed Tracks, they could only draw a conclusion about that issue from their own research and the available evidence. Under these circumstances, Appellant's representations about the identity of the singer amounted to a statement of opinion rather than fact."].) This holding misapplies *Kasky*, which requires courts to focus on the content of the message that is communicated to consumers, not the speaker's state of mind.

Kasky defines a message of commercial character as “representations of fact about the business operations, products, or services of the speaker... made for purposes of promoting the sales of ... the speaker’s products....” (*Kasky, supra*, 27 Cal. 4th 939, 961.) This definition focuses on examining the *content* on the message because its purpose is to determine whether the message can induce a member of the audience to enter into a commercial transaction. The speaker’s state of mind is irrelevant to this determination. It factors into assessing the character of the message only to the extent it can be gleaned from the message itself, making the message either factual or a statement of opinion.

Whether a statement is factual or an opinion is judged from the perspective of the audience, not the speaker. In making this determination, the California Supreme Court mandated courts to consider (1) the language of the statement and how it is understood by the audience; and (2) the context of the statement, which requires looking “at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed.” (*Baker v. Los Angeles Herald Exam’r* (1986) 42 Cal. 3d 254, 260–61 (*Baker*).) “[T]he publication in question must be considered in its entirety” (*Ibid.*)

Under this standard, the challenged statements on the album cover and in the video advertisement are factual. The language on the back of the album cover stating that “[t]his album contains 9 previously unreleased vocal tracks performed by Michael Jackson”, the album name “Michael” and the video ad presenting *Michael* as an album “from” Michael Jackson are each understood by the audience of music consumers as factual statements describing the performer of the album songs. That is the literal, plain meaning of those statements. The language does not contain any “apparency” or uncertainty typical of an opinion. (*Baker, supra*, 42 Cal. 3d 254, 260.) The full content of the album cover and the video advertisement do not reveal anything else relevant to the attribution of the album songs. Neither the album cover, nor the video advertisement communicate to consumers that there is a public debate about the attribution of certain album songs, that the statements at issue are the manufacturer’s personal beliefs, or that the manufacturer has no knowledge of who sang some of the songs included on the album.

Although Howard Weitzman’s November 11, 2010 statement indicated Appellants’ lack of knowledge as to the identity of the singer at the time that statement was issued, Weitzman’s statement cannot be considered when assessing whether the album cover or the video advertisement were factual in nature. These were separate communications conveyed to

separate audiences, at separate times, and through separate channels. Weitzman's statement was issued several weeks before the release of the album to a relatively narrow audience of online Jackson fan clubs. The album and the video advertisement were distributed later, through national stores and television, to the general public. A member of the public who could have purchased the album years later based on the representations on its cover had no way of learning from the cover—or from the video advertisement she might have seen on TV—that Appellants did not know who sang three of the songs on the album, or that there was a controversy about the singer's identity.

The Panel's decision predicates its holding that Appellant's statements were opinions on Appellants' subjective state of mind and fails to apply the standard articulated by the California Supreme Court that focuses on the content of the message as it is perceived by its audience.

When this standard is applied, the Panel's conclusion that Appellants' statements on the album cover and in the video advertisement "staked out a position in [the] controversy by identifying the singer as Michael Jackson" (Opinion 22) cannot stand because such reading of the statements is not evident from an independent examination of either the album cover, or the video advertisement. Under *Baker*, these statements are factual because they are perceived by the audience as such, and *Kasky*

makes clear that a seller’s factual statements about his products do not receive noncommercial status by virtue of the seller responding to a public controversy. (*Kasky, supra*, 27 Cal. 4th 939, 965-966.) In *Kasky*, Nike sent out press-releases defending working conditions in its factories in response to a public controversy. (*Kasky, supra*, 27 Cal. 4th 939, 947-948.) Nike argued that its allegedly false statements were not commercial speech because they were a part of “an international media debate on issues of intense public interest.” (*Id.* at 964.) The Supreme Court rejected this argument, stating that it “falsely assumes that speech cannot properly be categorized as commercial speech if it relates to a matter of significant public interest or controversy.” (*Id.*) “For purposes of categorizing Nike’s speech as commercial or noncommercial, it does not matter that Nike was responding to charges publicly raised by others and was thereby participating in a public debate.” (*Id.* at 965-966.)¹ The

¹ In *Kasky*, Nike merely responded with commercial speech to an already existing controversy. (*Kasky, supra*, 27 Cal. 4th 939, 964 [“when Nike made the statements defending its labor practices, the nature and propriety of those practices had already become a matter of public interest and public debate.”].) Here, the controversy began with Appellants’ commercial announcement that the Cascio songs would be sold with attribution to Michael Jackson. The Panel’s reasoning suggests that the debate about a consumer issue—which itself constitutes core First Amendment speech—confers immunity on the deceptive advertisement which triggered the debate.

The Opinion commits a similar fallacy when it concludes that the controversy turned Appellants’ statements into speech concerning a matter

Opinion distinguishes *Kasky* based on Appellants' lack of knowledge of the matter they spoke about (Opinion 22), but as discussed above, their lack of knowledge is irrelevant under *Kasky* unless it was communicated to the audience within the message in a manner that would turn the message into an opinion.

Nor is the Panel's analogy to the recent United States Supreme Court decision in *National Institute of Family and Life Advocates v. Becerra* (2018) 138 S.Ct. 2361 (*Life Advocates*) applicable here.² (Opinion 25 fn. 10 and accompanying text [analogizing this case to *Life Advocates*].) *Life Advocates* dealt with a regulation that compelled speakers to express controversial views with which they did not agree. Here, contrary to the Opinion's reasoning, Appellants were not required "to present views in their marketing materials with which they do not agree." (Opinion 25.) The law only required Appellants to clarify on the album cover and in the video advertisement that

of public interest within the meaning of the first prong of the anti-SLAPP analysis. (Opinion 16 [noting "[the] public controversy distinguishes this case from cases that Serova cites"]). This reasoning essentially means that a false advertisement which generates a public debate about whether the advertised product quality conforms to the manufacturer's claims is protected by the anti-SLAPP statute to a greater degree than a noncontroversial truthful advertisement.

² The parties did not have an opportunity to address *Life Advocates* in their briefs because this decision was issued on June 26, 2018, after the briefing in this case had been concluded.

“The singer is believed to be Michael Jackson” instead of “The singer is Michael Jackson.” Enforcement of such clarifications of misleading advertising is not only constitutional but recommended by the United States Supreme Court as the first remedy to avoid consumer deception. (*In re R.M.J.* (1982) 455 U.S. 191, 203 [“the remedy [to false or misleading advertising] in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation.”].)

The Opinion repeatedly distinguishes this case from a situation where the album is falsely advertised to contain a non-existent song. But consumers perceive a false statement that the music album contains 10 songs sung by a particular artist in the same way, whether in reality the album contains 7 songs by that artist and 3 forgeries, or just 7 songs by that artist, period. Absent the language indicating belief or uncertainty, consumers understand this statement as a representation of fact about the album, on which they rely in purchasing it. The policy of protecting these consumers is what underlies the *Kasky* test for commercial speech, which turns on the content of the statement and not on the nature of the problem with the product, the advertiser’s state of mind, or the existence of a public debate. When a manufacturer has no personal knowledge whether a statement is true and wants to express an opinion, consumer deception can only be avoided if the manufacturer indicates to

the consumer at the time of making the statement that it is an opinion. In other words, Appellants should have communicated *to the consumer* who saw the album cover or the video advertisement what they now argued to this Court.

2. The Panel’s reading of a knowledge requirement in the third element of the *Kasky* test repudiates the long-established absence of scienter in the CLRA and UCL and contradicts statutory language of Business & Professions Code Section 17500.

The Opinion’s incorporation of a knowledge requirement into the test for commercial speech articulated in *Kasky* not only fundamentally affects the analysis and outcome in this case, but dramatically narrows protections afforded to California consumers, in the face of both plain statutory language and interpretation of the consumer protection laws by the California Supreme Court.

When a speaker has personal knowledge of the matters he speaks about, he knows whether his speech is false. In other words, such knowledge indicates scienter. Because only commercial speech is actionable under the UCL and CLRA (*Rezec v. Sony Pictures Entertainment, Inc.* (2004) 116 Cal. App. 4th 135, 140), the Court’s reading of knowledge in the *Kasky* test for commercial speech makes scienter a required element of a false

advertising cause of action under the UCL and CLRA. This directly contradicts California Supreme Court and Ninth Circuit holdings that the UCL and CLRA have no such requirement. (*Kasky, supra*, 27 Cal.4th 939, 951 [“to state a claim under . . . the UCL . . . it is necessary only to show that ‘members of the public are likely to be deceived’ ”]; *In re Tobacco II Cases* (2009) 46 Cal. 4th 298, 312 [stating that the UCL does not require a showing that the deception was “known to be false by the perpetrator,” which “reflects the UCL’s focus on the defendant’s conduct . . . in service of the statute’s larger purpose of protecting the general public against unscrupulous business practices.”]; *Mazza v. Am. Honda Motor Co.* (9th Cir. 2012) 666 F.3d 581, 591 [observing the UCL and CLRA “have no scienter requirement”].) Prior to the Panel’s Opinion, this was the uncontroversial interpretation of the UCL and CLRA. (*See, e.g., Dorfman v. Nutramax Labs., Inc.* (S.D. Cal. Sept. 23, 2013) No. 13CV0873 WQH RBB, 2013 WL 5353043, at *14 [refusing to dismiss from a UCL and CLRA suit retailers Wal-Mart and Rite-Aid who had no knowledge of falsity of the manufacturer’s advertisements; concluding that retailers’ alleged participation in dissemination of those advertisements “sufficiently demonstrate[d] that Wal-Mart and Rite-Aid ‘participat[ed] in the unlawful practices’ with ‘unbridled control over the practices,’ such that they may be subjected to liability under the UCL and CLRA”].) The Opinion does not reconcile its

Kasky interpretation making speech nonactionable under the UCL and CLRA without scienter with the cited California Supreme Court and Ninth Circuit authorities holding the opposite.

Similarly, the Court's reading of a knowledge requirement in *Kasky*'s commercial speech test imported it into the False Advertising Law, Business & Professions Code Section 17500, which equally applies only to commercial speech. (*Rezec, supra*, 116 Cal. App. 4th 135, 140.) The result renders meaningless statutory language which makes negligent misrepresentation actionable under this section. (Bus. & Prof. Code § 17500 [prohibiting statements "which by the exercise of reasonable care should be known, to be untrue or misleading"]; *cf. People v. Superior Court (Olson)* (1979) 96 Cal. App. 3d 181, 195 [concluding that imposition of monetary sanctions "for the negligent dissemination of untruthful or misleading advertising does not offend the First Amendment"; noting that "[t]he injury to consumers victimized by false or deceptive advertising is no less when it results from negligence than when knowingly or recklessly made."])

The reach of this precedent is likely much farther than the controversial attribution of art. For example, take a laptop manufacturer who installs a new microchip in his laptops. Suppose the chip turns out to be faulty and causes the laptop to

crash occasionally, which sparks consumer debates about whether the hardware or third-party software causes the crashes. Suppose the manufacturer continues to advertise the laptop as stable based on the microchip developer's assurances that the chips are error-free. The Opinion suggests that such advertising is noncommercial because the laptop manufacturer had no personal knowledge that the chips were faulty and was stating his opinion about his product's stability in a public debate. It is now the consumer who must investigate the problem and trace the cause of the crashes to the chip, because the consumer's remedy is only against the chip developer. And if the chip developer was unaware of the bug in the chip program, he will point at the public debate about the cause of the issue and claim that his representations were opinions, too. Now the consumer—the one who lost data and money—is altogether without a remedy under the California consumer protection laws.

The Opinion purports to limit its holding to the specific context of this case involving creative works. (Opinion 30.) But the Panel's finding that speech is only commercial when the speaker has personal knowledge of the matters he speaks about is unconditional. The Opinion does not meaningfully distinguish—nor provide trial courts with a guide on how to distinguish—the Panel's reasoning in the current case from any such "mundane" yet foreseeable analogous scenarios.

B. The public's interest in understanding art does not justify finding Appellants' statements noncommercial under *Kasky*.

The Opinion concludes that the challenged statements are noncommercial also because the public is interested in the identity of the singer for purposes of understanding the art, not merely learning about the product. (Opinion 27.) But *Kasky* expressly rejected the same argument. (*Kasky, supra*, 27 Cal.4th 939, 964 [stating that it “falsely assumes that speech cannot properly be categorized as commercial speech if it relates to a matter of significant public interest”].) The public interest in the workers' conditions at Nike's factories was also not limited to utilitarian considerations of whether Nike's products are worth buying, but concerned broader issues of the “degree to which domestic companies should be responsible for working conditions in factories located in other countries, or what standards domestic companies ought to observe in such factories, or the merits and effects of economic ‘globalization.’” (*Id.* at 966.) The Supreme Court held that Nike was free to address these broader issues of public interest without making factual misrepresentations to consumers about its business operations. (*Id.* at 967.) Similarly, Appellants were free to address the public interest in the identity of the singer by expressing their belief that it is Jackson without making factual representations to

consumers that the *Michael* album consists of Michael Jackson's songs—which, unlike statements of belief, are misleading if the attribution is false.

The Panel's conclusion that a seller may attribute a work of art to a famous artist without any qualifying language as long as such attribution is controversial and the seller has no personal knowledge of the origins of the work has the potential to create a disaster in the arts and entertainment market. An art gallery will be able to sell a painting in the style of Degas as Degas as long as the gallery does not have personal knowledge that it's *not* Degas. A book publisher will be able to attribute a newly discovered manuscript to Mark Twain as long as the publisher doesn't know that it's *not* Twain. And the sellers will never have personal knowledge because they were not present at the creation of these works and Degas and Twain are long deceased. The names of Degas and Twain attributed to works of dubious origin will certainly generate debate in the artistic and literary circles sufficient to turn these attributions into fully protected non-commercial speech under this precedent.

This precedent discourages publishers and art dealers from engaging in due diligence as to the provenance of works they sell. The less they know, the better. It promotes dilution of the American cultural heritage through publishers' and sellers'

careless attribution of inauthentic works to famous artists of the past, to the great disadvantage of the general public.

By discouraging the seller's due diligence, this precedent puts on the consumer the onus of investigating the authenticity of creative works they wish to buy and enjoy. In the case of music and literature, where the cost of each copy of the consumer product is low, this burden is economically insurmountable for the consumer. Moreover, even if the consumer discovers that a work is inauthentic, she is likely without a remedy because her remedy will only be against the forger who is liable for fraud. Yet, publishers do not ordinarily reveal who they license the rights to creative works from, and art auctions do not reveal identities of the owners, so it may be impossible for the consumer to identify the forger.

Additionally, the consumer has no way of knowing whether the seller had personal knowledge that the creative work is a forgery. Thus, the fear of losing to an anti-SLAPP motion and being responsible for the seller's substantial attorney fees will always deter the consumer from suing the seller, regardless of whether the seller was involved in the fraud. This precedent protects the seller's right to falsely advertise artistic products, at the same time impairing consumers' constitutional right to petition the government for relief when they lose money in dishonest transactions.

In the context of the current case, the Opinion affords far-reaching protection to Appellants' false advertising even after the fraud is exposed.

In reaching its decision, the Panel had to rely on the pleadings and the parties' stipulation and has not had an opportunity to consider the evidence of forgery. However, there is no conclusive presumption that such evidence does not exist. Suppose that Appellants relied on sparse and speculative evidence in their conclusion that the songs are sung by Jackson because to do so served their commercial interest. Suppose there are no musicians, recording engineers or other witnesses to Michael Jackson ever performing the Cascio songs. Suppose that, on the other hand, Serova has sworn statements from Jason Malachi, the alleged singer of the Cascio songs (CT 1:120 [FAC ¶ 32a]), detailing his recording of the Cascio songs, and from the recording engineers who produced Malachi's songs at the direction of Cascio and Porte, with the goal of making them sound plausibly like Jackson to Sony Music.³ Such evidence

³ Serova must resort to hypotheticals because Appellants' waiver of the evidentiary issues of the anti-SLAPP motion and stipulation that Jackson is not the singer made presenting evidence of Malachi's involvement in the recording of the Cascio songs unnecessary. Consequently, Serova has not had an opportunity to do so. The stipulation satisfied the showing of a probability of success for purposes of this motion and had an advantage of efficiency; however, it has an obvious downside of looking more hypothetical than the actual evidence of fraud.

would ordinarily be sufficient to establish the fraud and achieve settlement with the fraud defendants. Yet, Appellants, with the shield of this Opinion, will be able to continue selling the songs as Jackson's claiming they have no personal knowledge of who the singer is because they were not present at the recording sessions. They can still argue their advertisements stake a position in the debate created by contradicting statements of Cascio and Porte on the one hand, and Serova's witnesses on the other.

It is unclear what, if anything, can confer on Appellants "personal knowledge" sufficient to make their continuing misrepresentations illegal in this situation. At a minimum, Serova will have to take her fraud case against Cascio and Porte all the way to judgment, foregoing all, even reasonable, settlement options, in order to give falsity the force of a legally determined fact. Then, a notice of the judgment on the issue of falsity may or may not be sufficient to imbue Appellants with "personal knowledge" that will make their advertising commercial and actionable.

This is clearly not the route to justice the California Legislature envisioned for consumers when it enacted strict liability statutes such as the CLRA and UCL.

III. CONCLUSION

It has long been the position of the United State Supreme Court that the First Amendment does not except media from

generally applicable laws. (*Cohen v. Cowles Media Co.* (1991) 501 U.S. 663, 669.) California courts have reaffirmed the same in the anti-SLAPP context. (*Wilson v. Cable News Network, Inc.* (2016) 6 Cal. App. 5th 822, 836.) Yet, the Panel's Opinion, by way of misapplying the California Supreme Court precedent, provides media defendants a free pass not permitted by the UCL and CLRA, which will inevitably license reckless advertising practices that California courts have never tolerated. In this case, the Opinion blesses continued consumer deception which monetizes what is alleged to be a textbook fraud.

For all of the above reasons, Serova respectfully. asks the Court to grant this Petition for Rehearing.

Respectfully submitted,

Date: September 11, 2018

MOSS BOLLINGER LLP

By: 
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Moss Bollinger LLP, 15300 Ventura Boulevard, Suite 207, Sherman Oaks, California 91403.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.
Executed on September 11, 2018 at Sherman Oaks, California.

Lea Garbe

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