

S260736

**IN THE
SUPREME COURT OF CALIFORNIA**

**VERA SEROVA,
Plaintiff and Respondent,**

v.

**SONY MUSIC ENTERTAINMENT; JOHN BRANCA, AS CO-
EXECUTOR OF THE ESTATE OF MICHAEL J. JACKSON;
AND MJJ PRODUCTIONS, INC
Defendant and Appellant.**

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT
CASE NO. B280526

REPLY TO PETITION FOR REVIEW

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I. INTRODUCTION

The Petition for Review, the Sony Defendants' Answer, and the Court of Appeal ("COA") decision need to be put into proper perspective. In the midst of a controversy known only to a discrete part of the public at large over the authenticity of the vocals on the Cascio recordings, the Sony Defendants advertised an album containing the recordings to a worldwide audience of consumers, and placed a label on the album that represented (and continues to represent) to that audience, *as fact*, that Michael Jackson sang all the songs on the album.

The COA used the controversy fueled by good faith allegations of deceit to confer *extra protection* on representations to a worldwide audience, because the representations purportedly "participated" in the controversy. The COA then bootstrapped such attenuated "participation" into a basis to protect the Sony Defendants from liability for misrepresentations to the consuming public.

This outcome is patently absurd. Californians should not be required to forfeit their right to be told the truth in advertising simply because of a controversy they know nothing about.

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II. DISCUSSION

A. The COA’s first-prong analysis under *FilmOn* conflicts with multiple prior authorities, including *FilmOn* itself, and creates bad law.

1. *The COA’s holding that by describing qualities of its product the seller participates in a public debate conflicts with cases holding to the contrary.*

The Sony Defendants argue there is no split of authority that justifies review on the first anti-SLAPP prong. But there is such a split: the case contradicts multiple decisions holding that a defendant’s speech about mundane matters, such as a description of product qualities for consumers, does not participate in the debate on issues of public interest. (*See, e.g., All One God Faith, Inc. v. Organic & Sustainable Indus. Standards, Inc.* (2010) 183 Cal.App.4th 1186, 1203–1204 (*All One God Faith*); *Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 423.)

For example, in *All One God Faith*, repeatedly cited by *FilmOn* (*FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 145, 151), the court of appeal found the placement of the “OASIS Organic” seal on cosmetic products did not contribute to a debate about the meaning of the term “organic.” (*All One God Faith, supra*, 183 Cal.App.4th at 1203–1204.) Yet, here, the COA reasoned the placement of the “Michael Jackson” label on a music album *did* contribute to a debate about whether Jackson sang three controversial songs released on the album. The cases are not meaningfully distinguishable. According to the COA, attributing the songs to Jackson showed the Sony Defendants’ “acceptance of that fact” that Jackson sang the songs, which

“communicated [their] position” on the debated issue. (Slip. Op. 24). But OASIS similarly argued that by authorizing manufacturers to place the “OASIS organic” seal on certain products OASIS furthered its right to express a position on what is encompassed by the term “organic.” (*All One God Faith*, at 1203.) *All One God Faith* rejected that argument. (*Id.*)

This Court abolished such attempts to equate mundane matters with issues of public interest based on a mere attenuated connection in *Rand Res., LLC v. City of Carson* (2019) 6 Cal. 5th 610 (*Rand*), where the Court held the statements about who represented the City of Carson in negotiations about building an NFL stadium were not made “in connection” with the public issue of the stadium construction under the anti-SLAPP statute. (*Rand*, at 626.) The Sony Defendants argue that *Rand* is distinguishable because the identity of the City’s agent was not a matter of public concern, whereas “identifying Michael Jackson as the artist was directly responding to the public controversy.” (Pet. Answer, at 17 n. 7.)¹ But the album cover and the video

¹ Notably, the Sony Defendants took the exact opposite position in their appellate brief. (AOB 41 [“The Album Cover does not include any statements about who sang the lead vocals on the Cascio Tracks, and thus is not misleading as a matter of law.”], 43 [“The video does not state that Jackson sang lead vocals on the Cascio Tracks”].) So it is the Sony Defendants, not Plaintiff, who are trying to “have it both ways.” Plaintiff’s position is consistent: the challenged advertisements do not address the topic of the controversy, as evidenced by both their content and context, and therefore do not participate in the debate, but they do convey to consumers that the album contains 10, instead of 7, Michael Jackson songs, and by way of that mislead consumers.

commercial do not at all respond to the controversy: They do not convey a message that the three controversial songs are sung by Jackson, rather than another artist. Instead, they represent a fact to a worldwide audience of potential buyers who have no clue that the controversy exists: Buy this album and you will hear previously unreleased songs sung by Michael Jackson. What music is included on the CD available for sale is an issue just as “routine” and pertaining to a commercial transaction as the issue of who represents the City in negotiations about the construction of a stadium. (*Rand*, 6 Cal. 5th at 626.) The connection of this sales-oriented message to the public controversy about the three songs is “attenuated”. (*Id.*) Thus, the COA’s holding runs afoul of *Rand*.

2. *The COA’s analysis of context conflicts with FilmOn, creates bad law and eliminates defendant’s burden under the first anti-SLAPP prong.*

The Sony Defendants argue the COA did not offend *FilmOn* because it holistically reviewed the *FilmOn* factors and made the decision based on their combination. (Pet. Answer 20.) The problem with the COA’s “holistic review”, however, is that it managed to base its holding that the advertisements participated in the public debate upon the combination of three *purely commercial* factors. (Slip Op. 25 [stating the purpose is commercial], 30 [concluding the speaker and the audience are commercial]). The context of this case is not meaningfully distinguishable from *FilmOn*, except in one aspect: the speech here was public. Future courts facing the task to reconcile the

two cases will have no choice but to assume *FilmOn* is limited to private speech.²

Furthermore, the COA's conclusions that (1) a public controversy and consumers' interest in knowing the truth about the advertised products shield alleged misrepresentation (Slip Op. 25–26), and (2) publishers enjoy a protected right to shape consumers' experience of creative works by misrepresenting their source (Slip Op. 26–27) create bad law that warrants review and a superseding opinion.

Finally, this Court should clarify whether defendants are required to produce evidence of context showing participation under *FilmOn*. The anti-SLAPP statute places the burden of production under the first prong on defendants (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76), yet the COA made contextual findings in favor of the Sony Defendants without *any* evidence

² The COA also justified its first-prong holding by the purported need to avoid the risk of curtailing protected expression. (Slip Op. 26–27.) However, this argument is irrelevant to the analyzed issue: whether the challenged advertisements contributed to the debate about who sang on the Cascio recordings. Rather, this part of the COA's reasoning seems to suggest that attribution of music in general is protected by the anti-SLAPP statute. But this issue was neither proposed nor briefed by the parties, and Government Code section 68081 requires that in such cases, the court of appeal give the parties an opportunity for supplemental briefing. (*Adoption of Alexander S.* (1988) 44 Cal. 3d 857, 864–65). In light of multiple other problems with the COA's decision, the fact that the COA's holding was not based on this reasoning alone, and the *de novo* standard of review of anti-SLAPP motions, this Court should grant review and request supplemental briefing on this issue if the Court believes it should be considered, rather than remand the case for the COA to issue a third problematic published opinion.

produced by them (Pet. 16–19) in the face of a common-sense conclusion that what connects the speaker, the audience and the purpose of an advertisement is the contemplated commercial transaction, not the public debate. Absent review, the COA’s published decision effectively wipes out the defendants’ burden of production.

B. The COA’s decision creates an ambiguity in California consumer protection laws.

1. *The COA’s conclusion that personal knowledge is required for speech to be commercial is unqualified and not limited to the circumstances of this case.*

The Sony Defendants downplay the potential impact of the COA’s reinterpretation of the *Kasky* test for commercial speech by saying that personal knowledge was only one of the factors the COA considered. (Pet. Answer 23, 25.) The COA indeed considered multiple factors; however, it found personal knowledge to be a “critical element,” the lack of which made the speech at issue noncommercial. (Slip Op. 33.) The COA distinguished this case from *Kasky*, which found similarly controversial speech about Nike’s factories to be commercial, *solely* on the element of personal knowledge. (Slip Op. 33–34.) The COA expressly noted that, in its view, *Kasky* may have been decided differently if it had dealt with matters outside of Nike’s personal knowledge. (Slip Op. 34 fn. 11 and accompanying text.)³

³ What exacerbates the conflict is that, in reality, Nike *did not* have personal knowledge, just like the Sony Defendants here. Nike was making representations about its *subcontractors’* business operations. (*Kasky v. Nike, Inc.* (2002) 27 Cal. 4th 939,

The Sony Defendants argue their speech was properly characterized as noncommercial because they not only lacked personal knowledge of the singer’s identity but had “no means of verifying” it, and the controversy was “irresolvable.” (Pet. Answer 23, 25-26; Slip Op. 34 n. 12 and accompanying text [suggesting that lack of actual knowledge meant the Sony Defendants had to rely on the information available to them, which made their statements opinions]; 40 n. 18.) This reasoning improperly conflates the Sony Defendants’ failure to verify the truth of their statements with the proposition that these statements are not susceptible to verification as opinions. (*Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 21.) The identity of the singer was a verifiable fact known to defendants Cascio and Porte, as well as to Jason Malachi, the alleged real singer on the Cascio recordings. (CT 1:120 [FAC ¶ 32a].) That the Sony Defendants failed to obtain knowledge of this fact and resolve the controversy does not make it “irresolvable.” (See *Omnicare, Inc. v. Laborers*

947.) Like the Sony Defendants, defenders of Nike argued that Nike had limited opportunity to verify the conditions at the factories. (*Nike, Inc. v. Kasky*, 2003 WL 836205 (U.S.), [“human rights activists in Vietnam or Thailand may well be better able to verify working conditions at a plant in their country than the Nike executives in Beaverton, Oregon”]; *Nike, Inc. v. Kasky*, 2003 WL 836403 (U.S.), 20 (U.S.Amicus.Brief, 2003) [“speech on matters of public concern that do not directly relate to the characteristics of a product or service offered for sale (e.g., speech on an overseas labor policy) are far less easily verified.”].) What matters, is that, just like the Sony Defendants, Nike was *in a better position* to verify the truth of its factual assertions than its audience, and thus it made sense to place the burden of the mistake on Nike, and not the audience.

Dist. Council Const. Industry (2015) 575 U.S. 175, 183-184 [explaining why a company CEO’s statement “The TVs we manufacture have the highest resolution available on the market” is a statement of fact even if the CEO does not know of the competitor’s higher resolution TV].) Indeed, the Sony Defendants stipulated, for purposes of the anti-SLAPP motion, that Serova would prove that the vocals were not Jackson’s. It is simply illogical for the COA to hinge its decision on the non-verifiability of a fact that the Parties agreed was verifiable.

From the legal standpoint, only *principal* verifiability can support a distinction between opinions and facts because it provides a bright line between statements that are not susceptible to verification (“The weather is lovely”) and statements that are (“The vocalist on this song is Michael Jackson”). (*Milkovich, supra*, 497 U.S. at 21.) Contrast that with *practical* verifiability that the Sony Defendants argue for and the COA relied on. Statements uttered in the sales context fall on the infinite spectrum of practical verifiability: from those that are easy for the seller to verify (the highlighter labeled “red” is in fact blue), to statements that may be very expensive to verify (the labor conditions in foreign subcontractors’ factories), to statements that may be difficult to verify and require time-consuming investigation (who the vocalist is on a dubious song), to statements that are practically impossible for the seller to verify (whether peaches sold in the seller’s store were organically grown). If practical verifiability is adopted in place of principal verifiability as the standard for determining what statements are

factual and actionable, where exactly do the Sony Defendants and the COA propose to draw the line?

And how would a consumer discern that line when making the purchase decision? For example, in this instance, the album cover and the video commercial give the consumer no clues that the attribution of the album to Jackson is the record company's opinion about matters that were difficult to verify. Not only is the identity of a song's vocalist an obviously factual question in the mind of an average consumer, but record companies typically know such facts because they advance money for and oversee the recording process. Nothing in the advertisements tells the consumer that this was not the case here.

Neither personal knowledge, nor practical verifiability is a workable standard in the context of consumer protection laws, because these factors are determined by the specifics of the seller's business, which are generally not known to the consumer. Yet, the COA introduced both standards into California law.

2. *The COA decision makes speech not actionable under the UCL, CLRA or FAL absent the speaker's personal knowledge of falsity.*

The Sony Defendants argue that the COA did not import scienter into the UCL and CRLA (Pet. Answer 26–27), but the COA's decision has such a result. The COA's analysis of *Kasky* is not fact-specific. (Slip Op. 31–32, 33–34.) And this analysis does result in an unqualified conclusion that speech is not commercial absent “the critical element of personal knowledge” by the defendant. (Slip Op. 33.) In other words, absent such knowledge,

the speech is not actionable under the UCL, CLRA or FAL. Which is the same as to say no one can be liable under these statutes for inadvertent or negligent falsehoods—the plaintiff must establish not just scienter, but personal, first-hand knowledge.

The CLRA’s defense of bona-fide error is rendered obsolete. As the Sony Defendants correctly point out, “it applies only if the challenged statements are commercial speech.” (Pet. Answer 27.) Per the COA’s decision, however, the statements are commercial only if the defendant has personal knowledge of the matters he speaks about. No such defendant, to whom the bona fide error defense becomes available, would ever be able to raise it because errors made knowingly are not “bona fide” by definition.

Kasky does indeed contain language saying that Nike could “readily verify” the truth of its factual assertions, on which the COA relied. (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 963; Slip Op. 32.) And in discussing the policy for denying protection to false commercial speech, *Kasky* notes that such policy assumes commercial speech “describe[s] matters within the personal knowledge of the speaker or the person whom the speaker is representing.” (*Kasky*, at 962.) Courts have relied on this language in the past, too. (See *Bernardo v. Planned Parenthood Fed'n of Am.* (2004) 115 Cal. App. 4th 322, 348 [citing *Kasky* for this proposition].⁴) However, as this decision demonstrates, taken

⁴ In *Bernardo*, the lack of personal knowledge, although noted by the court, was incidental to the fact that the statement was not susceptible to proof at the time it was made. Additionally, unlike here, the speech was not made in connection with a sale of

to the extreme, this language has the potential to wipe out a large portion of the California consumer protection laws. To avoid this result now and prevent it in the future, this Court should grant review and clarify what, if any, weight lower courts should afford to *Kasky*'s language about the speaker's "personal knowledge" or ability to "readily verify" its claims in the consumer protection context.

3. *Holding sellers liable for false attribution of creative works does not create constitutional infirmities.*

The Sony Defendants argue that the COA's decision is carefully crafted to protect their First Amendment rights from remedies chilling creative speech, such as withholding music from release (Pet. Answer 9), selling it without attribution (*ibid.*), compelling a disclosure of the controversy to consumers (*ibid.*), or compelling the Sony Defendants to present views with which they disagree (Pet. Answer 28). But a false advertising lawsuit seeks none of these extraordinary remedies.

As discussed in the petition (Pet. 34), to avoid liability, the Sony Defendants had to be right in their attribution of the Cascio recordings to Jackson, or represent that their attribution was a belief and not a fact (e.g., "Tracks 3, 5 and 7 are believed to be sung by Michael Jackson"). Such disclosure neither forces the Sony Defendants to express views with which they disagree, nor burden the distribution of the Cascio recordings. It makes the

products or services, and the defendant's website indicated that the statement reflected its "position" (i.e. was an opinion). (*Bernardo, supra*, 115 Cal. App. 4th at 348, 350.)

album cover as a whole not misleading, allowing the Sony Defendants to use the cover image and title of their choice. It accurately reflects the Sony Defendants' position argued before the court (that they did not know who the singer was but believed it was Jackson), at the same time alerting consumers of the risk that the singer on these recordings may be someone else. It is constitutionally permissible and recommended by the United States Supreme Court. (*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."].)⁵ But when the Sony Defendants chose to state as a fact that the singer on the Cascio recordings was Jackson, they assumed the risk of liability should the songs turn out to be forgeries.

Because the regulation of misleading advertising in this case does not burden the creation or distribution of music, this case does not raise any constitutional concerns beyond those implicated in typical regulation of false commercial speech. Instead of striking a sensible balance between consumer rights and the Sony Defendants' First Amendment right, the COA's decision causes confusion and undermines California consumer protection laws.

⁵ Product distributors routinely provide such disclosures. For example, the statement "May contain traces of nuts" on the list of food ingredients allows the food distributor to avoid liability for harm to consumers when the distributor is not entirely sure that its assessment of the product's ingredients is accurate.

4. *The decision effectively immunizes sales of art forgeries.*

Finally, the Sony Defendants' dismissal of the consequences of this precedent defies reason. (Pet. Answer 30–31.) There can be no question that, absent reversal, the COA's decision will result in immunity for false attribution of art by resellers. The COA concluded that lack of personal involvement in the creation of the work immunizes the seller's false attribution of the work. (Slip Op. 34 n. 12.) Art dealers and publishers are never involved in the creation of the work, and thus always lack personal knowledge. Their means to verify the authorship are not unlike those of the Sony Defendants. Under this precedent, art dealers and publishers can continue selling forged works with immunity based on the lack of personal knowledge of forgery and the existence of a controversy between the forger and previous buyers.

The facts of this case illustrate the problem. Plaintiff can continue the fraud case against defendants Cascio and Porte seeking damages for the class for past misrepresentations.⁶

⁶ Plaintiff's brief on appeal noted that it was unclear whether defendants Cascio and Porte alone could pay damages compensating consumers for the loss they sustained in reliance on the misrepresentations. (RB 56.) The Sony Defendants have repeatedly twisted these words presenting them as Plaintiff's "admission" that she sued them because of "deeper pockets." (Pet. Answer 9 fn. 3.) It is not the depth of the Sony Defendants' pockets that matters, but that they, as the seller, appropriated the bulk of revenues from the forged songs, which Cascio and Porte may not be able to replace. Now the Sony Defendants argue for the right to retain those ill-gotten revenues. There is no reason to allow this; nor is there anything untoward in Plaintiff's

However, Cascio and Porte are not the ones selling the *Michael* album. They have not spoken about the Cascio recordings since 2010 and are not actively perpetuating the harm. It is the Sony Defendants who have continued selling the Cascio recordings misrepresenting them to consumers as Michael Jackson songs for the past nine years and will continue to do so to generations of new unwitting consumers. The COA’s decision prevents Plaintiff from enjoining these continued misrepresentations, effectively immunizing them well into the future.

C. The COA’s decision creates a far-reaching precedent.

The Sony Defendants argue that the COA’s decision is narrow because the COA stated its holding was “based on the record in this case and the issues that have been appealed” and that it did not “purport to decide whether statements in another context concerning the marketing of creative works might constitute commercial speech.” (Answer, at 6, 31–32; Slip Op. 42). However, these qualifications do not limit the breadth of the precedent in any way.

The first assertion states the given. Any decision by any court of appeal—including all published decisions—is “based on the record before the court and the issues that have been appealed.” A court of appeal does not have jurisdiction to go beyond these bounds. The COA made this statement merely to

expectation that consumers receive a full refund for their losses from all responsible parties—to the contrary, that is the very purpose of consumer class actions.

stress it did not opine on the validity of claims against the defendants who had not appealed the trial court’s ruling. (Slip Op. 42.)

The second statement conveys the COA’s position that not every kind of false advertisement by a media company is immune to consumer challenges and that in “another context”, such as when the record label misrepresents that a particular song is included in the album, “marketing of creative works might constitute commercial speech.” (Slip Op. 40–41, 42). However, the most significant allegations of misrepresentation concerning creative works arise in the context of forgery, i.e., misrepresentation about the work’s author, and fall squarely under this precedent, which makes it important.

More importantly, the COA’s language goes well beyond the facts of this case. The most dangerous fallacies of the COA’s *FilmOn* analysis—the conflict the decision created with cases such as *All One God Faith*, or the dismissal of defendants’ burden of production—did not depend on the fact that the product was a creative work. Nor did the COA’s analysis of *Kasky* depend on the type of the advertised product. As noted above, the COA opined that *Kasky* itself—the case involving speech about labor practices at *sports apparel* factories—might have been decided differently if Nike spoke about an independent supplier versus a subcontractor. (Slip Op. 34 n. 11.) Sellers of all types of products will undoubtedly cite this decision as controlling and allowing them to make misrepresentations in sales so long as they were

not personally involved in every step of the manufacturing process.

The COA's certification of the decision for publication clearly shows that the COA did not intend to limit the decision to the facts of the present case, but meant to issue a guideline for courts down the line in a variety of anti-SLAPP and false advertising scenarios.

III. CONCLUSION

This Court's initial grant of review in this case was in anticipation of the then undecided outcome of *FilmOn*. Inferentially, it was an acknowledgement that *FilmOn*'s outcome could impact speech in the marketplace—in advertising and on product labels. The opinion in *FilmOn*, and especially its emphasis on context, reflects this Court's recognition that there is a delicate balance between the First Amendment rights of those involved in commerce, like FilmOn and Sony Music, and the rights of consumer audiences when such businesses engage in “speech” in the promotion and labeling of commercial products. The COA undermined that balance by a failure, in a sales campaign context, to adhere to *FilmOn*, *Kasky* and California's consumer protection laws.

Commercial selling and buying is a pervasive aspect of life. It is extremely important that a clear and accurate picture of the rights of Californians, and the obligations of the businesses they interact with, exist. Review is necessary to realize this important goal.

Dated: March 19, 2020

Respectfully Submitted,

/s/
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RULE 14 CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.260(b)(1) of the California Rules of Court, the enclosed brief of Petitioner is produced using 13-point Century Schoolbook type including footnotes and contains approximately 4,196 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: March 19, 2020

/s/ _____

By: JEREMY F. BOLLINGER
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PROOF OF SERVICE

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 15300 Ventura Boulevard, Suite 207, Sherman Oaks, California 91403.
2. That on March 19, 2020 declarant served the REPLY TO PETITION FOR REVIEW by depositing a true copy thereof in a United States mail box at Sherman Oaks, California in a sealed envelope with postage fully prepaid and addressed to the parties listed on the attached service list.
3. That there is regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 19th day of March 2020 at Sherman Oaks, California.

/s/

By: Lea Garbe

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ENTERTAINMENT**

Case Number: **S260736**

Lower Court Case Number: **B280526**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

3/19/2020

Date

/s/Lea Garbe

Signature

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