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California Supreme Court Holds That Seller's Promotional Statements About Controversial Album Are Commercial Speech Not Subject To Full First Amendment Protection

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Decided August 18, 2022 ***Serova v. Sony Music Entertainment*, S260736 The California Supreme Court held yesterday that a seller's promotional statements about an artistic work of interest to the public amounted to commercial speech, regardless of whether the seller knew of the statements' falsity. Background:** The plaintiff sued Sony under the Unfair Competition Law (UCL) and Consumers Legal Remedies Act (CLRA) on the theory that promotional materials for a posthumous Michael Jackson album misrepresented that Jackson was the lead singer. Sony filed a motion to strike under California's anti-SLAPP statute, arguing that the plaintiff's UCL and CLRA claims were unlikely to succeed because those statutes target only commercial speech, not noncommercial speech about art protected by the First Amendment.

The Court of Appeal held that the motion should be granted because the plaintiff's claims targeted protected speech that was immune from suit under the UCL and CLRA. It reasoned that the promotional statements about the album related to a public issue—the controversy over whether Jackson was the lead singer on the album—and were more than just commercial speech because they were connected to music. The plaintiff's allegation that the statements were false did not strip them of First Amendment protection, according to the Court of Appeal, because Sony didn't know the statements were false.

Issues: Were Sony's representations that Michael Jackson was the lead singer on Michael noncommercial speech subject to First Amendment protection (in which case California's anti-SLAPP statute would apply) or commercial speech (in which case the plaintiff could pursue UCL and CLRA claims against Sony)? **Court's Holding:** Sony's representations about the album constituted commercial speech, which can be prohibited entirely if the speech is false or misleading. And those representations did not lose their commercial nature simply because Sony made them without knowledge of their falsity or about matters that are difficult to verify.

> *"[C]ommercial speech does not lose its commercial nature simply because a seller makes a statement without knowledge or that is hard to verify."*

Justice Jenkins, writing for the Court **What It Means:**

> Although artistic works often enjoy robust First Amendment protections, the marketing of such works can constitute commercial speech that is regulated by consumer-protection laws.
>
> It makes no difference whether a seller knew or didn't know its statements are false, or whether the seller could or couldn't find out whether its

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statements are false. If the seller's speech is commercial, it will not receive full First Amendment protection in California.

In deciding motions to strike under the anti-SLAPP statute, courts have discretion to skip over the question whether a claim arises from the exercise of free-speech rights and first analyze whether the movant has shown a probability of success.

The Court's opinion is available here.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the California Supreme Court. Please feel free to contact the following practice leaders:

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