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Entertainment Promotion Gets The Same First Amendment Protection As The Content Promoted

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Advertising and promotion of entertainment is increasingly being challenged under false adverting laws. This is not just class action lawyers pursuing false advertising claims against all marketing, but also individuals who would like to pressure producers and authors to change content or obtain compensation by bringing a false advertising claim based on the promotion of the work as based on a true story as a way to get around the First Amendment limitations on false light or right of publicity claims. A recent California Court of Appeals case holds that advertising of expressive works, at least with respect to matters of "artistic significance," is entitled to First Amendment protection from false advertising claims. . Serova v. Sony Music Entertainment, 2018 WL 4356891, __Cal Rptr.3d___. No.B280536. In holding that even a claim about the product that could be proven true or false can be protected against a false advertising claim, this precedent should prove very helpful to getting dismissal of claims that media companies are falsely promoting content as true stories.

Attacks on Entertainment Content

Subjects of films and television programs seeking to suppress portrayals that they do not like have been adding false advertising of the content to their claims in order to overcome the First Amendment limitations on defamation, false light and right of publicity claims. See Porco v. Lifetime Entertainment Servs., 984 N.S. Y.2d (N.Y. App. Div. 4th Dep't 2017) (denying a motion to dismiss a right of publicity claim by a convicted murderer whose crime is the subject of a docudrama). It seems that promoting a work as based in fact-a documentary, or a docudrama or based on a true story or "inspired by a true story"-is essential to success, and the nuanced issues of dramatic license are not easily communicated. These promotional materials fall squarely within the holding in Serova that promotional materials that address disputed issues going to the meaning of artistic expression are not commercial speech but are protected by the First Amendment protection for the expressive work.

When Olivia de Havilland's suit against F X Networks seeking to enjoin the miniseries "Feud" over the way she is portrayed in "Feud," was upheld by the trial court entertainment lawyers argued it would be the end of docudramas. The trial court denied FX's anti-- SLAPP motion holding that there be an immediate trial of her mix of defamation and false light claims. The California Court of Appeals reversed that holding, but declined to address the question of whether she had stated a claim under California law. The Court, jumped to the Federal constitutional issue and held that the First Amendment protected expressive works from the claim of a false portrayal. 230 Cal. Rptr.3d 625 (2018). (review denied 7/11/18).

The case raised difficult questions about the promotion of the mini-- series as a docudrama and lead to speculation whether a false advertising claim that the promotion of the content falsely claimed it was an accurate presentation of the historical facts would save the plaintiff from having to prove actual malice-indeed false advertising claims do not have plead any degree of fault. Now the California Court of Appeals in Serova has rejected claims based on the producer's characterization of the artistic content in promoting the content. Consequently the ruling in Serova should be of great value at least to the entertainment industry, and perhaps to others who wish to address controversial issues of public importance in paid media insertions or custom content.

SEROVA

In, Serova, the court upheld an anti-SLAPP motion to dismiss a claim that the cover of the album "Michael" misrepresented that all of the 10 tracks were sung by Michael Jackson. The class action plaintiff contended three were not. The trial court denied the motion holding that the album cover statements about the contents of the album (and a promotional video for the album) were commercial speech advertising the content, and if they falsely described the content they would be actionable. The California Court of Appeals reversed, holding that the claim that Jackson was the lead singer on the three disputed tracks "stated a position on a disputed issue of public interest", and consequently "did not simply promote sale of the album". The Court went on to also hold that "the identity of the lead singer was also integral to the artistic significance of the songs themselves".

The question is whether these are two alternate holdings or the precedent is limited to advertising for expressive works. At first blush, statements on an issue of public importance even in the form of paid media insertions are entitled to First Amendment protection, since the Supreme Court held as much in New York Times v Sullivan. 376 U.S. 254 (1964) (Advertisement soliciting funds for a civil rights organization was entitled to First Amend protection against a libel claim). However, the California Supreme Court in a huge expansion of commercial speechfamously held that everything that is likely to influence potential consumers of the advertisers' products, including discussion of controversial issues of public importance is commercial speech open to false advertising claims. Kasky v. Nike, 27 Cal. 4th 939 (2002) (public relations campaign by Nike defending itself from charges that its subcontractors in Asia were not paying a living wage). Given the expansive definition of "advertising" under California false advertising law, the assertion that something in the advertising and promotion of an entertainment product (such as who is actually singing on the album) regardless of the advertiser not knowing if it is true would appear vulnerable to claims under California false advertising law. After all, under California law (and generally) an advertiser is required to have proof of any claims it makes in advertising, and if the claim is ambiguous, proof of any reasonable interpretation of the claim. Thus the holding in Serova is very significant.

Courts will undoubtedly be confronted with attempts to rely on the disputed issue of public importance as a defense to a false advertising claim, but they will be met with an argument that Serova should be limited to advertising for media and content where the underlying product is expressive content and the disputed facts pertain to the "artistic significance" of the expressive work. The Court's attempt to carve out an exception to Kasky just on the disputed issue of public importance does not hold up to scrutiny. Kasky also concerned an ongoing controversy over an issue of public importance--Nike's labor practices, and also involved Nike's advertising the results of its investigation into the claims. The court attempted to distinguish Kasky on the ground that Nike had full knowledge of its own labor practices, but Sony did not definitively know whether, as Jackson family members contended, the three contested tracks were indeed Michael. In an amendment to the decision, the Court attempted to bolster its effort to distinguish Kasky by stressing that Sony lacked personal knowledge of the disputed facts, relied on the supplier of the tracks at issue, and had published the results of its independent investigation of the matter. However, Nike was similarly addressing what it had been told by its suppliers and was advertising the results of its independent investigation of the claims. Thus, there is reason to doubt that showing that challenged advertising addresses a controversial issue of public importance (about which the advertiser does not have precise knowledge) will be sufficient to negate a false advertising claim.

However, Serova does clearly hold that when the challenged claim is directly related to the characterization of the content of an expressive work or its artistic value or meaning the advertising and promotion is entitled to full protection under the First Amendment that flows to the expressive work itself. This reinforces the protection for expressive works. See Sarver v. Chartier, 813 F.3d 891 (9th Cir. 2016) and DeHavilland v. F X, supra.

Right of Publicity Claims Based On Advertising of Expressive Works

There has always been an exception to the Right of Publicity for advertising of expressive works. In order to offer for sale or display an artistic work or publication, sellers need to advertise the cast or subjects of the work. Consequently truthful descriptions of the actual content of the work have been shielded from Right of Publicity claims. Montana v. San Jose Mercury News, Inc., 34 Cal. App. 4th 790 (Cal Ct App. 1995). This "media exception" to claims based on being referred to in advertising has been limited to truthful advertising about the product. See Cher v. Forum Int'l, 692 F.2d 634 (9th Cir. 1994) (falsely advertising the uniqueness of the interview and connection to the publication); Eastwood v. National Enquirer, Inc., 123 F.3d 1249 (9th Cir. 1997) (falsely representing that an interview was exclusive).

In a world of "Fake News", the advertising for docudramas and films based on actual events are being challenged as false for failing to accurately describe the nature of the content. Often the producer will not know for certain whether there are gaps in the known story that are filled in, creative embellishments or assumption about the dialog, or dramatic license taken in presenting the known facts. Serova should be helpful in arguing that as a matter of First Amendment protection of expressive works, false advertising claims, including right of publicity claims based on falsely advertising the nature of the content are barred as a matter of Constitutional protection regardless of the scope of the applicable State law of false advertising or commercial appropriation.

As is always the case in false advertising claims, the question is all about the context -- what does the audience to whom the promotion is directed take away from the advertising? Future plaintiffs arguing about what the audience understands to be the meaning of "based on a true story" as opposed to "inspired by a true story," at least in California, will now have to overcome the special First Amendment protection of advertising and promotion for expressive works.

Bottom line: the decision will be helpful to producers, entertainment companies, publishers, and the media in being able to advertise entertainment properties, as a defense to claims that properties were falsely promoted as a true story when there are disputed issues of historical fact.

About The Author

Rick Kurnit, leads the advertising and marketing practice at Frankfurt Kurnit Klein & Selz.He advises brands and content producers on regulatory and I P issues and has long been listed by Best Lawyers as a leader in advertising, media, entertainment, copyright, trademark, and IP litigation. He is a graduate of Columbia College (magna cum laude) and Harvard Law School (cum laude).