

Case No. S260736

IN THE SUPREME COURT OF CALIFORNIA

Vera Serova,
Plaintiff and Respondent Below,

v.

Sony Music Entertainment; John Branca, as Co-Executor of the
Estate of Michael J. Jackson; and MJJ Productions, Inc.
Defendants and Appellants Below.

After A Decision By The Court Of Appeal,
Second Appellate District, Division 2
Case No. B280526

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INTRODUCTION

Plaintiff Vera Serova (“Serova”) alleges that a posthumous Michael Jackson album includes three recordings with vocals performed by an impersonator. She concedes that the album’s distributors—defendants MJJ Productions, Inc. (“MJJP”), the Estate of Michael Jackson (“Estate”), and Sony Music Entertainment (“Sony”) (collectively, “MJJ”)—were not involved in creating the recordings. She admits that the producers who did create the recordings falsely represented to MJJ that the vocals were Jackson’s. And she admits that MJJ included the recordings on the album in reliance on these misrepresentations. She nevertheless contends that MJJ is strictly liable for misattributing the artistic work.

This appeal therefore raises this question: Is speech identifying the vocal artist in a work of musical expression “commercial speech” such that strict liability may be imposed where the identity of the artist cannot be verified, and the result would directly chill musical expression in the marketplace?

Under core First Amendment principles, the answer has been, is, and has to be no—particularly in this unique situation where the artistic attribution was made after Jackson died and MJJ could not verify the vocals, but where MJJ had investigated and publicized its investigations, and then released the album in the midst of an ongoing public debate over the issue.

In asking the Court to impose strict liability, Serova ignores binding constitutional law articulating the basis for lowering First Amendment protection for commercial speech. The speech at issue here is not commercial speech, but speech entitled to First Amendment protection that precludes imposing strict liability.

SUMMARY OF ARGUMENT

Solely to reach the legal issues raised by this anti-SLAPP motion, the parties stipulated that the vocal artist on the three disputed recordings was not Michael Jackson. But even with that stipulation, this case remains far removed from the “textbook false advertising case” Serova describes. Serova admits that MJJ did not know that the vocals were not Jackson’s and that, in fact, the producers of the recordings intentionally misrepresented and actively concealed the identity of the vocalist. She admits that in response to a public controversy over whether Jackson was the vocal artist, and before releasing the album, MJJ conducted extensive investigations that included listening sessions with Jackson’s closest collaborators, and analyses by two expert musicologists. And she admits that MJJ issued public statements detailing its investigations and only then released the album, entitling it *Michael*. Finally, and rather remarkably, Serova admits that she read all of the public statements discussing the vocals before buying *Michael* and then filing this lawsuit.

Against this background, the anti-SLAPP statute's two-prong analysis compels striking Serova's Consumer Legal Remedies Act (CLRA) and Unfair Competition Law (UCL) claims against MJJ.

Prong One. MJJ's speech was directly connected to an issue of widespread public interest. Michael Jackson, the King of Pop, was always of public interest, and his first posthumous album certainly was too. There was also widespread public controversy on the specific issue of the identity of the artist on the three recordings, which surfaced after Jackson's death. MJJ publicly disclosed its investigation into the issue, stated its view based on its investigation that Jackson was the artist, and noted that "ultimately, Michael's fans will be the judges of these songs, as they always are." MJJ then included the recordings on *Michael*, attributed them to Jackson, and released the album. That attribution and release participated in and furthered the public conversation on the issue, and therefore falls within the anti-SLAPP statute under the standard this Court articulated in *FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133 (*FilmOn*).

Prong Two. The CLRA and UCL regulate only commercial speech, speech deemed less deserving of First Amendment protection. MJJ's challenged speech was not commercial under federal First Amendment authority and this Court's test set forth in *Kasky v. Nike* (2002) 27 Cal.4th 939, 946, as modified (May 22, 2002) (*Kasky*):

- Commercial speech does nothing more than propose a commercial transaction. The attribution of an artist to an expressive work does far more because the identity of the artist imparts additional, subjective meaning to the expression itself.

- Seller verifiability is at the heart of reduced First Amendment protection for commercial speech. With Michael Jackson deceased, no one, including MJJ, could ultimately and objectively verify whether Jackson was the vocal artist in the recordings.

- Commercial speech receives only minimal First Amendment protection because it is deemed hardy enough to withstand being chilled by regulation. Imposing strict liability on MJJ here would directly chill the dissemination of First Amendment protected artistic expression—a result never intended for commercial speech.

- Regulation of commercial speech must be consistent with traditional governmental regulation of commercial transactions. Subjecting MJJ to strict liability in these circumstances is outside traditional governmental authority to regulate commercial transactions.

Finally, even if the challenged speech was commercial, Serova's claims would still fail because they are based on the premise that MJJ is passing off the recordings (copyrightable expression) as Michael Jackson's when they are not his, a theory that is preempted by the Copyright Act.

The Court should affirm.

FACTUAL BACKGROUND

Michael Jackson may go down in history as the most influential musical artist of all time. He was the youngest artist to enter the Billboard Top 100.¹ He had thirty top ten hits; thirteen were number ones.² His album *Thriller* is the world's best-selling album by a solo artist, and won a record-setting eight Grammy awards.³ He sold an estimated 750 million albums worldwide, and redefined popular music on a global scale.⁴ His art is meaningful to millions, if not billions, and he was the subject of constant and intense public interest throughout his life.

Serova's claims arise from MJJ distributing and selling *Michael*, the first posthumous artistic release, which Serova asserts contains three (of ten) tracks that Michael Jackson supposedly did not sing. (CT 1:116 [First

¹ McDermott, Ranking Michael Jackson's No. 1 Hits, in Honor of What Would Have Been His 60th Birthday (Aug. 29, 2018) USA TODAY <<https://www.usatoday.com/story/life/music/2018/08/29/ranking-michael-jacksons-no-1-hits-honor-his-60th-birthday/1112672002/>> [as of Sept. 21, 2020].

² Michael Jackson, Billboard <<https://www.billboard.com/music/michael-jackson/>> [as of Sept. 21, 2020].

³ Huddleston, Michael Jackson's Iconic 'Thriller' is 36 Today – and it's Still the World's Best-Selling Album (Nov. 30, 2018) CNBC <<https://www.cnbc.com/2018/11/30/michael-jacksons-thriller-anniversary-still-all-time-best-seller.html#:~:text=While%20the%20Eagles%20album%20%E2%80%9CTheir,in%20terms%20of%20global%20sales>> [as of Sept. 21, 2020].

⁴ Ditzian, Michael Jackson's Groundbreaking Career, By the Numbers (June 26, 2009) Viacom International Inc. <<http://www.mtv.com/news/1614815/michael-jacksons-groundbreaking-career-by-the-numbers/>> [as of Sept. 21, 2020].

Amended Complaint (“FAC”) ¶¶ 10, 13].)⁵ At the time of Jackson’s death, those three recordings (the “Cascio Recordings”) were in “demo” format, having been recorded in the basement studio of Jackson’s friends, the Cascios, while Jackson was living there. (CT 1:116 [FAC ¶ 11]; 2:279 [Weitzman statement].) Serova’s lawsuit targets statements and related “speech” that “falsely represent” that Jackson was “the source” of the Cascio Recordings. (AOB 9; CT 1:125 [FAC ¶ 46]; Civ. Code § 1770, subd. (a)(2) [misrepresenting the “source” of the goods].)

Notably, Serova also alleges that the Cascio Recordings’ producers (the “Cascio Defendants”) “represented to [MJJ] that Michael Jackson performed the lead vocals” on the Cascio Recordings. (CT 1:117 [FAC ¶ 14].) She also alleges that the Cascio Defendants had “exclusive knowledge of the fact that Jackson did not perform the [Cascio Recordings],” and that they “failed to disclose” and “actively concealed” this fact from MJJ. (CT 1:117 [FAC ¶ 18].) Serova alleges that, “based on” these allegedly false representations by the Cascio Defendants, MJJ selected the Cascio Recordings “for inclusion on the album,” and “remixed, edited, produced, and otherwise finalized” them. (CT 1:117 [FAC ¶¶ 17, 19].)

Serova alleges that before the album’s release, public “controversy” surrounded whether Jackson sang the lead vocals on the Cascio Recordings. (CT 1:116 [FAC ¶¶ 11-13].) She also admits that Sony conducted an

⁵ The three recordings are “Breaking News,” “Monster,” and “Keep Your Head Up.” (CT 1:117 [FAC ¶ 17].)

investigation into whether Jackson performed on the Cascio Recordings. (CT 1:118 [FAC ¶¶ 21-22].) After the investigation, Sony publicly stated that it had “complete confidence in the results of [its] extensive research as well as the accounts of those who were in the studio with Michael that the vocals on the new album are his own.” (CT 1:118 [FAC ¶ 21].)

An attorney for the Estate, Howard Weitzman, also issued a statement explaining that the Estate had investigated the “authenticity of the lead vocals on the Cascio tracks.” (CT 2:279.) Weitzman identified the many people who “concluded that Jackson performed the lead vocals on the tracks,” including: (i) six of Jackson’s former producers and engineers, who “listened to raw a capella versions of the Cascio tracks” (ii) Jackson’s former musical director, piano player, and vocal director; (iii) two forensic musicologists who conducted wave form analyses; and (v) two people in the music industry who played crucial roles in Jackson’s career. (CT 1:118 [FAC ¶ 22]; 2:279-2:280.) Weitzman also explained that he spoke to a “soundalike” singer who allegedly sang in Jackson’s place on the Cascio Recordings, who said he “had no involvement.” (CT 2:280.) Weitzman’s statement concluded by saying that despite MJJ’s conclusions, “ultimately, Michael’s fans will be the judges of these songs, as they always are.” (CT 2:280.)

In the midst of this public controversy, in December 2010 MJJ released a video announcing *Michael*’s release (the “Video Announcement”). (CT 1:119 [FAC ¶ 24].) The Video Announcement included a montage of painted images of Jackson and an excerpt of a song from *Michael* that Jackson undisputedly

performed. (See Video 1, authenticated at CT 2:269–2:270; 2:275 at ¶5c.) At the end, the narrator states: “a brand new album from the greatest artist of all time.” (CT 1:119 [FAC ¶ 24]; Lodged CD, Video No. 1 at 0:23.)

Shortly thereafter, MJJ released *Michael*, which contained 10 songs—the three Cascio Recordings and seven undisputed Jackson recordings. (AOB 12; CT 1:119 [FAC ¶¶ 26-27].) The album cover features artistic images of Jackson, including Jackson performing his iconic “Moonwalk” and “Smooth Criminal Lean.” On the back cover, it states: “This album contains 9 previously unreleased vocal tracks performed by Michael Jackson. These tracks were recently completed using music from the original vocal tracks and music created by the credited producers.” (AOB 13; CT 1:119 [album back cover]; FAC ¶ 27.)⁶ The album artwork and description of the album contents (together the “Album Content”), along with the Video Announcement (collectively, the “Challenged Speech”), are the “speech” forming the basis of Serova’s claims. (CT 1:119 [FAC ¶¶ 24, 27].)

Serova alleges that before she purchased *Michael*, she saw each of MJJ’s statements describing its extensive investigations, and relied on them in purchasing *Michael*. (CT 1:118-120 [FAC ¶¶ 21-30].) Then, having concluded for herself that Michael Jackson did not sing on the Cascio Recordings, she filed class action claims for violation of the CLRA (Civ. Code,

⁶ One of the tracks had previously been released. (CT 1:119 [FAC ¶ 27].)

§ 1770, subds. (a)(1)-(5), (7)) and the UCL (Bus. & Prof. Code, § 17200, et seq.). (CT 1:125-128 [FAC ¶¶ 45-59].)

STATEMENT OF THE CASE

Serova sued MJJ and the Cascio Defendants under the CLRA and UCL, and included a separate fraud claim against the Cascio Defendants. MJJ moved to strike Serova's CLRA and UCL claims under the anti-SLAPP statute, Code of Civil Procedure section 425.16. (CT 1:151-1:173.) The trial court granted the motion as to the claims based on Weitzman's statement, but denied the motion as to the claims based on the challenged Album Content and Video Announcement. (*Serova v. Sony Music Entertainment* (2018) 26 Cal.App.5th 759, 764, as modified on denial of reh'g. Sept. 13, 2018, review granted Dec. 12, 2018.)

The Court of Appeal reversed as to the claims based on the Album Content and Video Announcement, striking those claims under the anti-SLAPP statute. In doing so, the court held that Serova had not shown a reasonable probability of success because MJJ's speech constituted noncommercial speech that is not actionable under the CLRA and UCL. (*Ibid.*)

This Court granted review on a grant-and-hold basis, then directed the Court of Appeal to re-evaluate its decision in light of *FilmOn, supra*, 7 Cal.5th 133, which provides a framework for the first prong of the anti-SLAPP analysis. (*Serova v. Sony Music Entertainment* (2019) 252 Cal.Rptr.3d 227.) The Court of Appeal followed this Court's direction, and

again ruled in favor of MJJ. (*Serova v. Sony Music Entertainment* (2020) 44 Cal.App.5th 103 (*Serova*), review granted Apr. 22, 2020, S260736.)

Applying *FilmOn*, the Court of Appeal found that the speech on the challenged Album Content and in the Video Announcement was of public interest in light of Jackson's popularity, his artistic legacy, and the widespread interest regarding whether he was the artist on the Cascio Recordings. (*Id.* at pp. 119-120.) The court also found that the Challenged Speech participated in the ongoing public controversy about whether Jackson sang the Cascio Recordings. (*Id.* at pp. 121-124.) With the elements of the *FilmOn* test satisfied, the Court of Appeal found that MJJ's speech triggered anti-SLAPP protection. (*Ibid.*)

FilmOn did not address the second prong of the anti-SLAPP analysis—whether the plaintiff demonstrated a reasonable probability of success on her claims. (7 Cal.5th 133.) Accordingly, the Court of Appeal adhered to its prior analysis of that issue, again concluding that the contested speech was not commercial, and therefore not subject to the CLRA or UCL. (*Serova, supra*, 44 Cal.App.5th at p. 126.) The court reasoned that the Challenged Speech spoke to an issue of public interest about which MJJ lacked personal knowledge and could not verify, and the statements identifying Michael Jackson as the artist imparted meaning and significance to the music—artistic expression that is itself protected by the First Amendment. (*Ibid.*)

This Court again granted review.

ANTI-SLAPP ANALYSIS AND THE STANDARD OF REVIEW

The anti-SLAPP statute authorizes a special motion to strike any “cause of action against a person arising from any act . . . in furtherance of the person’s right of . . . free speech under the United States Constitution or the California Constitution in connection with a public issue.” (Code Civ. Proc., § 425.16, subd. (b)(1).) “To encourage ‘continued participation in matters of public significance’ and to ensure ‘that this participation should not be chilled through abuse of the judicial process,’ the Legislature expressly provided that the anti-SLAPP statute ‘shall be construed broadly.’” (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21, quoting Code Civ. Proc., § 425.16 (“§ 425.16”).)

Anti-SLAPP motions require a two-step analysis. (*Id.* at p. 21.) First, the defendant must make a prima facie showing that the challenged cause of action arises from protected activity. (*Ibid.*) Second, “[i]f a defendant meets this threshold showing,” the burden shifts to the plaintiff and “the cause of action shall be stricken unless the plaintiff can establish ‘a probability that the plaintiff will prevail on the claim.’” (*Ibid.*, quoting § 425.16, subd. (b)(1).)

This Court reviews a trial court’s ruling on an anti-SLAPP motion de novo. (*Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 645.)

ARGUMENTS

I. SEROVA’S ARGUMENTS RELY ON THE INCORRECT PREMISE THAT EXPRESSIVE WORKS ARE TREATED UNDER THE FIRST AMENDMENT LIKE ALL OTHER CONSUMER GOODS.

Serova’s arguments rely on a central, erroneous premise: that *Michael* is a consumer product no different than a personal care product, a computer, or a car. (AOB 24, 48.) Music in any form, however, belongs to a distinct category of products—expressive works of art. Expressive works of art are “not mere commercial products,” but rather “implicat[e] anti-SLAPP concerns and [are] plainly entitled to full First Amendment protection.” (*Forsyth v. Motion Picture Ass’n of Am., Inc.* (N.D.Cal., Nov. 10, 2016, No. 16-CV-00935-RS) 2016 WL 6650059, at *3 [discussing films]; accord, *Mattel, Inc. v. MCA Records, Inc.* (9th Cir. 2002) 296 F.3d 894, 901 (*Mattel*) [a movie title “was not a brand of shoe,” and for First Amendment purposes “deserved to be treated differently”].)

“[E]ntertainment, as a mode of self-expression, is entitled to constitutional protection” because “expression is an integral part of the development of ideas, of mental exploration and of the affirmation of self.” (*Guglielmi v. Spelling-Goldberg Productions* (1979) 25 Cal.3d 860, 867, concurring opinion, internal quotation and citation omitted.) Indeed, music and other artistic expression are among the most fully protected forms of speech under the First Amendment, even when they are sold for profit. (*Ward v. Rock Against Racism* (1989) 491 U.S. 781, 790 [“Music, as a form of

expression and communication, is protected under the First Amendment”]; *Stewart v. Rolling Stone LLC* (2010) 181 Cal.App.4th 664, 682 (*Stewart*) [First Amendment protections extend to all forms of expression “whether or not sold for a profit,” internal quotation and citation omitted]; *De Havilland v. FX Networks, LLC* (2018) 21 Cal.App.5th 845, 850 [fact that creative works generate income “does not diminish their constitutional protection”].)

Importantly, this constitutional protection extends not only to the music, but to the album title *Michael* and to the artwork on the cover, which in their own right are independent forms of artistic expression. And as discussed below, identification of the artist is also protected because it imparts unique meaning to the art, and without it the expressive work changes, or even loses, its meaning. (See Section III.A.2, below.)

Serova ignores the First Amendment implications of imposing strict liability in this case, but the Court of Appeal did not. It properly evaluated the Album Content and Video Announcement with the First Amendment in mind, and found that (1) MJJ met its burden to show that Serova’s claims arise from protected activity under the anti-SLAPP statute; and (2) MJJ’s speech was not commercial, and thus, not actionable under the consumer statutes.

II. MJJ MET ITS BURDEN ON PRONG ONE OF THE ANTI-SLAPP STATUTE BECAUSE THE CHALLENGED SPEECH CONSTITUTES PROTECTED ACTIVITY.

The first prong of the anti-SLAPP statute requires the defendant “to identify the activity each challenged claim rests on and demonstrate that that activity is protected by the anti-SLAPP statute.” (*Wilson v. Cable News Network, Inc.* (2019) 7 Cal. 5th 871, 884 (*Wilson*).) Activity protected by the anti-SLAPP statute includes: (1) a written or oral statement made in a place open to the public or in a public forum in connection with an issue of public interest; and (2) any other conduct in furtherance of the right to free speech in connection with a public issue or an issue of public interest. (§ 425.16, subds. (b)(1), (e)(3) & (4).) Serova’s claims based on the Album Content and Video Announcement fall squarely into these categories.

A. MJJ’s Speech and Conduct Were in Furtherance of the Right to Free Speech.

Serova does not dispute that this lawsuit arises from activities in furtherance of MJJ’s right of free speech. (AOB 20-33). Courts have held the creation and publication of artistic works are acts in furtherance of the right of free speech. (*Stewart, supra*, 181 Cal.App.4th at p. 678 [holding defendant’s “publication of the [plaintiffs’] names within the graphic design of the Feature, constitutes conduct in furtherance of defendants’ right of free speech”]; *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1347 [defendant’s interview of plaintiff and broadcast of the interview “constituted conduct in furtherance of the defendants’ right of free speech”]; *Tamkin v.*

CBS Broad., Inc. (2011) 193 Cal.App.4th 133, 143 (*Tamkin*) [holding defendant’s conduct that “advance[d] or assist[ed] in the creation, casting, and broadcasting of an episode of a popular television show” was conduct in furtherance of free speech].)

Serova’s claims arise from MJJ’s conduct of (a) naming the album *Michael*, (b) incorporating expressive, artistic depictions of Jackson on the album cover, (c) selecting the Cascio Recordings to be part of *Michael*, and (d) identifying Michael Jackson as the artist in the challenged Album Content and the Video Announcement. (CT 1:125-1:127 [FAC ¶¶ 46, 49, 51, 54-55].) These activities both constitute and further MJJ’s creation and distribution of the artistic work *Michael*, which are part and parcel of its right of free speech.

B. MJJ’s Statements and Conduct Were In Connection With Issues of Public Interest.

In *FilmOn*, this Court articulated a two-part analysis for whether challenged speech meets section 425.16’s public interest requirement. First, the court evaluates what public issue or issue of public interest the speech implicates, “by looking to the content of the speech.” (*FilmOn*, *supra*, 7 Cal.5th at p. 149.) Second, the court assesses “the functional relationship” between the speech and the public conversation about a matter of public interest. (*Id.* at pp. 149-150.) At this second step, the court considers the “context” of the speech, including the speech’s “audience, speaker, and purpose.” (*Id.* at p. 152.) For example, a court considers whether the

statements were made privately or publicly, and specifically whether they were made as “part of any attempt to participate in a larger public discussion.” (*Id.* at p. 140.)

This framework’s purpose is to “discern what the challenged speech is really ‘about’—a narrow, largely private dispute” or “the asserted issue of public interest.” (*Id.* at p. 149.) The framework demands “‘some degree of closeness’ between the challenged statements and the asserted public interest.” (*Id.* at p. 150, (internal citation omitted).

FilmOn emphasized that “the social utility of the speech at issue” and “the degree to which [the speech] propelled the conversation in any particular direction” are of no concern. (*Id.* at p. 151.) Rather, the crucial issue is whether “a defendant—through public or private speech or conduct—*participated in*, or furthered, the discourse that makes an issue one of public interest.” (*Ibid.*, italics added.)

1. Serova agrees that Michael Jackson and the controversy over the Cascio Recordings were issues of public interest.

The first step of the *FilmOn* analysis is identifying the issue of public interest the speech implicates. (*FilmOn*, *supra*, 7 Cal.5th at p. 149.) Serova agrees that the Album Content and Video Announcement implicate two issues of public interest.

Serova of course concedes that there is a public interest in Michael Jackson. (AOB 22.) As the Court of Appeal found, “Michael Jackson was a

famous entertainer who was very much ‘in the public eye.’” (*Serova, supra*, 44 Cal.App.5th at p. 119 [public interest attaches to people who “by their accomplishments” create “a legitimate and widespread attention to their activities,” quoting *Stewart, supra*, 181 Cal.App.4th at pp. 677-678]; *No Doubt v. Activision Publishing, Inc.* (2011) 192 Cal.App.4th 1018, 1027 [video game was a “matter of public interest because of the widespread fame” of the subject band].) The public interest in Jackson also naturally included widespread public interest in the creation and dissemination of his first posthumous album *Michael*. (See *Kronemyer v. Internet Movie Database, Inc.* (2007) 150 Cal.App.4th 941, 949 (*Kronemyer*) [motion picture “was a topic of widespread public interest”]; *Tamkin, supra*, 193 Cal.App.4th at p. 144 [“public interest in the writing, casting and broadcasting” of a television episode].)

Serova also concedes that since *Michael*’s inception there was a specific “unresolved public controversy over the authenticity of the Cascio Recordings”—i.e., whether Jackson sang them. (AOB 7, 11.) And the Court of Appeal properly found that “[t]he controversy over the identity of the singer on the Disputed Tracks was also of widespread interest among Michael Jackson fans.” (*Serova, supra*, 44 Cal.App.5th at p. 119.) MJJ issued statements detailing its investigation and conclusion in direct response to that controversy. (CT 1:118-1:119 [FAC ¶¶ 21-22]; AOB 12.)

2. MJJ's speech and conduct in furtherance of its right to free speech were directly connected to the issues of public interest.

The second step of the *FilmOn* analysis is whether the defendant's speech or conduct "participat[es] in' or furthers [] some public conversation" on an issue of public interest. (7 Cal.5th at p. 151.) The answer is informed by "context," including the speaker, the audience, and the purpose. (*Id.* at p. 152.)

This Court has recognized that "some individuals may be so prominent, or in such a prominent position, *that any discussion of them concerns a matter of public interest.*" (*Wilson, supra*, 7 Cal.5th at p. 901, italics added.) As one of the most prominent musical artists of all time, there was a widespread public interest in Michael Jackson and in his music. MJJ's conduct giving rise to Serova's claims—selecting the recordings for inclusion in Jackson's posthumous album, naming the album *Michael*, selecting the accompanying artwork, and identifying Jackson as the artist—all participated in and furthered the creation and distribution of *Michael*. The release of the album, including a description of it, was itself an issue of public interest due to Jackson's international fame as a musical artist.

MJJ's attribution of the Cascio Recordings to Jackson also directly participated in the specific public controversy over whether Jackson was the vocalist. Indeed, Serova's entire claim is based on her assertion that the challenged Album Content and Video Announcement falsely identify Jackson

as the vocalist on the Cascio Recordings—*the very issue in public controversy*. On the heels of its investigation on the Cascio Recordings, MJJ made the editorial decision to include the recordings in *Michael* and to identify them as Michael Jackson-performed tracks. In so doing, MJJ affirmatively expressed its position on the controversial issue. The Court of Appeal therefore correctly found that MJJ’s “challenged statements *made a direct claim about the controversy itself*,” and furthered the public discussion by “articulating a consistent and unqualified belief [that] the identity of the artist” was Michael Jackson. (*Serova, supra*, 44 Cal.App.5th at p. 109, italics added.)

Serova argues that the Challenged Speech is only tenuously connected to whether Jackson sang the Cascio Recordings because, when considered alone in a vacuum, the Album Content and Video Announcement did not expressly allude to the controversy or provide evidence supporting or disproving the allegations. (AOB 23.) But *FilmOn* makes clear that whether speech constitutes protected activity includes looking specifically at “whether the activity ‘occur[red] *in the context* of an ongoing controversy, dispute or discussion.’” (*FilmOn, supra*, 7 Cal.5th at p. 145, quoting *Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal.App.4th 107, 119, italics added.)

MJJ released *Michael* with the challenged Album Content and Video Announcement in the midst of public discussion about whether Jackson was the vocal artist on the Cascio Recordings. With “contextual cues” that include public statements concerning its investigation and its view that Jackson was

the vocalist, MJJ's release of *Michael* with the Cascio Recordings contributed directly to this public discussion. That MJJ sold copies of *Michael* and released the Video Announcement to an audience including potential purchasers does not negate that MJJ's speech and conduct participated in the public conversation. Under *FilmOn*, the anti-SLAPP statute may protect speech with a "commercial or promotional aspect." (*FilmOn*, *supra*, 7 Cal.5th at p. 154.)

Finally, Serova cites no authority conditioning anti-SLAPP protection on the speaker specifying the public issue or controversy to which its speech relates. And it makes no difference that not every member of the public actually knew about the controversy over who sang the Cascio Recordings. (AOB 23-24.) The question is whether the speech furthered the conversation on an issue of public interest, and it did.

3. Serova's remaining arguments challenging the lack of connection to issues of public interest miss the mark.

Contrary to Serova's arguments, *All One God Faith, Inc. v. Organic & Sustainable Industry Standards, Inc.* (2010) 183 Cal.App.4th 1186 (*All One God Faith*) (AOB 24-26) does not preclude finding that the Challenged Speech is protected speech. In *All One God Faith*, the plaintiff contended that a defendant trade association's "organic" certification constituted unfair competition and misleading advertising. (*Id.* at p. 1192.) The court of appeal

held that the anti-SLAPP statute did not apply to the claims because the defendant’s “organic” certification was not protected speech. (*Id.* at p. 1200.)

The court reasoned that the only public interest that the defendant demonstrated was in the development of a standard for what is considered “organic,” but plaintiff’s claims were on a different issue—whether labeling *certain specific products* “organic” was misleading. (*Id.* at p. 1202.) In other words, labeling a particular consumer product organic did not participate in the general public discussion about the standards that should apply for labeling a product “organic.” And of course, there was no pre-existing public controversy about whether *this particular product* was or was not organic such that by affixing the label, defendant was contributing to that discussion.

Here, there was a specific public controversy surrounding whether the Cascio Recordings, were or were not Michael Jackson’s music. Thus, the decision to attribute those artistic works to Jackson was speech on an issue of public interest.

The other cases Serova cites are likewise distinguishable. In *Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610, 614-615 (AOB 27), this Court rejected a city’s anti-SLAPP motion because, although building a sports stadium was a matter of public interest, the city “failed to suggest anything more than the most attenuated connection” between its statements on which agent it should use for negotiations, and this matter of public interest. (*Id.* at p. 626.) And in *Consumer Justice Center v. Trimedica*

International, Inc. (2003) 107 Cal.App.4th 595, 599, 601 (AOB 25), the anti-SLAPP motion failed because there was no connection between the asserted public interest in herbal supplements and defendant's product offer for breast enlargement supplements. Here again, by contrast, MJJ's activities were directly connected to the issues of public interest of Michael Jackson, the album *Michael*, and the public controversy surrounding the Cascio Recordings.

Nor, contrary to Serova's argument (AOB 27-28), do the facts of *FilmOn* suggest that the speech at issue here is unprotected. In *FilmOn*, the Court concluded that a *privately-issued* report marking FilmOn's website as copyright-infringing and containing adult materials was not an issue of public interest, even though media reports had covered FilmOn's controversial streaming model. (*Ibid.*, citing 7 Cal.5th at pp. 141, 150-153.) That conclusion is readily distinguishable. There, the reports were "generated for profit [and] exchanged confidentially, without being part of any attempt to participate in a larger public discussion"; "[t]he information never entered the public sphere, and the parties never intended it to." (*Id.* at pp. 140, 153.) By contrast, the Album Content and Video Announcement were *designed* to be public, and to reach a sizeable audience that was likely to be interested in the issue. The Challenged Speech contributed to the public conversation, making this case markedly different from *FilmOn*.

Finally, Serova argues that MJJ needed to submit evidence to prove the Challenged Speech's focus "was so significantly tied to making the point in

controversy that it overshadowed the obvious commercial purpose.” (AOB 33.) Serova cites nothing for her “so significantly tied” test. To the contrary, the *FilmOn* test is whether the speech “participated in, or furthered” the issue of public interest, without regard to the speech’s social utility or the degree to which it advances the conversation. (*FilmOn, supra*, 7 Cal.5th at p. 151.)

Serova is also wrong as to the evidentiary requirement: It is well-settled that a defendant filing an anti-SLAPP motion “may rely on the plaintiff’s allegations alone in making the showing necessary under prong one [of the anti-SLAPP statute] without submitting supporting evidence.” (*Bel Air Internet, LLC v. Morales* (2018) 20 Cal.App.5th 924, 936.) *Wilson, supra*, 7 Cal.5th at p. 900 (AOB 33) is not to the contrary. There, defendant claimed that an employee’s professional competence was a matter of public interest, but there were no allegations in the pleadings showing that the employee was a public figure. (*Wilson, supra*, 7 Cal.5th at pp. 881-882, 900-902.)

Here, Serova’s First Amended Complaint describes the creation and release of *Michael* and details, at length, the ongoing public controversy that surrounded the Cascio Recordings. She includes MJJ’s public statements in response to the public controversy, and that in the midst of these discussions MJJ elected to include the Cascio Recordings on *Michael* and attribute them to Jackson. (CT 1:116-1:120 [FAC ¶¶ 10-31].) These allegations more than suffice to connect attributing the disputed recordings to Michael Jackson on

Michael, to the public controversy she alleges on the very issue of whether he was the vocal artist.

The Court of Appeal correctly held that MJJ met its burden to show that Serova's claims arise from protected activity. The burden therefore shifts to Serova to establish a probability that she will prevail on the merits. (§ 425.16, subd. (b)(1).)

III. SEROVA FAILS TO MEET HER BURDEN ON PRONG TWO OF THE ANTI-SLAPP STATUTE BECAUSE SHE CANNOT SHOW A PROBABILITY OF PREVAILING ON HER CLAIMS.

The second prong of the anti-SLAPP inquiry requires Serova to demonstrate that her complaint is both “legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment[.]” (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 26, internal quotations and citation omitted.) The Court of Appeal correctly held that Serova failed to meet this burden.

Serova's claims fail as a matter of law because the Album Content and Video Announcement were not commercial speech, and only commercial speech is actionable under the CLRA and UCL. Even if the Challenged Speech was commercial, Serova's claims are preempted by the Copyright Act.

A. The CLRA And UCL Claims Fail Because The Challenged Speech Is Not Commercial.

The parties agree that the CLRA and UCL only regulate commercial speech. (AOB 6 [issue is whether the challenged statements “constitute

commercial speech”]; see also *Rezec v. Sony Pictures Entertainment, Inc.* (2004) 116 Cal.App.4th 135, 140, as modified Feb. 26, 2004 [“California’s consumer protection laws, like the unfair competition law, govern only commercial speech”].) Because the Challenged Speech is not commercial, Serova’s claims fail as a matter of law.

1. **Federal law requires that speech can only be regulated as “commercial” when it does no more than propose a commercial transaction, it is readily verifiable, regulation is unlikely to chill it, and it is consistent with traditional regulation of commercial transactions.**

Even commercial speech is entitled to some First Amendment protection. (*City of Cincinnati v. Discovery Network, Inc.* (1993) 507 U.S. 410, 423 (*Discovery Network*).) But the determination whether speech is deemed “commercial” or “noncommercial,” affects how much First Amendment protection it receives. Commercial speech “receives a lesser degree of constitutional protection than many other forms of expression.” (*Kasky, supra*, 27 Cal.4th at p. 946.)

The United States Supreme Court has explained that core “commercial speech” is speech that “does no more than propose a commercial transaction.” (*Bolger v. Youngs Drug Products Corp.* (1983) 463 U.S. 60, 66, internal quotation and citation omitted.) Statements on “price and quantity information” routinely constitute core commercial speech because they generally serve no purpose outside of a commercial transaction. (*Discovery Network, supra*, 507 U.S. at p. 422)

The mere fact that statements are contained in advertisements “d[oes] not make them commercial speech because paid advertisements are sometimes used to convey political or other messages unconnected to a product or service or commercial transaction.” (*Kasky, supra*, 27 Cal.4th at p. 956, citing *Bolger, supra*, 463 U.S. at p. 66.) That “books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.” (*Joseph Burtsyn, Inc. v. Wilson* (1952) 343 U.S. 495, 502.)

In *Kasky v. Nike*, this Court considered the United States Supreme Court’s precedent on commercial speech, and formulated a limited-purpose test for “when a court must decide whether particular speech may be subjected to laws aimed at preventing false advertising or other forms of commercial deception.” (27 Cal.4th at p. 960.) In that instance, “categorizing a particular statement as commercial or noncommercial speech requires consideration of three elements: the speaker, the intended audience, and the content of the message.” (*Ibid.*)

With commercial speech, “the *speaker* is likely to be someone engaged in commerce—that is, generally, the production, distribution, or sale of goods or services—or someone acting on behalf of a person so engaged, and the *intended audience* is likely to be actual or potential buyers or customers of the speaker’s goods or services.” (*Id.* at p. 960.)

Importantly, in evaluating the speech’s *content*, the underlying rationale for regulating commercial speech must be considered. (*Id.* at pp.

963-964.) And this is where Serova cannot meet her burden. Commercial speech is regulated on the premise that “the truth of commercial speech is ‘more easily verifiable by its disseminator’” and “is less likely than noncommercial speech to be chilled by proper regulation” because it is “motivated by the desire for economic profit.” (*Id.* at p. 962, quoting *Virginia State Bd. of Pharmacy. v. Virginia Citizens Consumer Council, Inc.* (1976) 425 U.S. 748, 772, fn. 24 (*Virginia State Bd. of Pharmacy*).) Verifiability is a touchstone of commercial speech because “commercial speakers have extensive knowledge of both the market and their products,” they are “well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity.” (*Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York* (1980) 447 U.S. 557, 564, fn. 6 (*Central Hudson*).)

Commercial speech is also “particularly hardy or durable,” such that “regulation aimed at preventing false and actually or inherently misleading speech is unlikely to deter [defendants] from speaking truthfully or at all.” (*Kasky, supra*, 27 Cal.4th at p. 963; *Central Hudson, supra*, 447 U.S. at p. 564, fn. 6 [commercial speech “is a hardy breed of expression”].) The regulation of the speech should also be “consistent with traditional government authority to regulate commercial transactions for the protection of consumers by preventing false and misleading commercial practices.” (*Kasky, supra*, 27 Cal.4th at p. 964.)

Serova’s analysis ignores the constitutional foundation for regulating commercial speech: she fails to demonstrate that the challenged Album

Content and Video Announcement contained verifiable information—because they don’t; she fails to demonstrate that regulation will not chill attributional statements linking artists to artistic works—because it will; and she fails to demonstrate that regulating the speech is consistent with traditional government authority to regulate commercial transactions—because it is not.

As part of the commercial speech test, *Kasky* requires an evaluation of the speech’s verifiability, the potential to chill speech, and consistency with traditional regulation. Indeed, if *Kasky* omitted these considerations, it could not be squared with the United States Supreme Court precedent. (See *Virginia State Bd. of Pharmacy, supra*, 425 U.S. at p. 772, n. 24 [commercial speech is both “more easily verifiable by its disseminator” and less likely to be “chilled by proper regulation”]; *Central Hudson, supra*, 447 U.S. at p. 564, fn. 6 [commercial speech is a “hardy breed of expression that is not particularly susceptible to being crushed by overbroad regulation”]; *44 Liquormart, Inc. v. Rhode Island* (1996) 517 U.S. 484, 501 [“the purpose of a state’s regulation [should be] consistent with the reasons for according constitutional protection to commercial speech”].)

Pursuant to United States Supreme Court First Amendment jurisprudence and *Kasky*, the challenged Album Content and Video Announcement are not commercial speech. Even if the speaker and intended audience suggest that the speech is commercial, the Court of Appeal correctly held that the speech’s *content* “is critically different from the type of speech

that may be regulated as purely commercial speech.” (*Serova, supra*, 44 Cal.App.5th at p. 126.)

2. The Challenged Speech proposed more than a commercial transaction because it imparted subjective meaning to artistic work fully protected under the First Amendment.

Serova does not dispute that the “music on the album itself is entitled to full protection under the First Amendment,” and is not commercial speech. (*Serova, supra*, 44 Cal.App.5th at p. 130; *see also Sarver v. Chartier* (9th Cir. 2016) 813 F.3d 891, 905 [the movie “The Hurt Locker is not speech proposing a commercial transaction” and is protected by the First Amendment].) But the speech she does attack—the challenged Album Content and the Video Announcement—is likewise noncommercial because it is in some instances expressive itself, and in others directly imparts meaning and significance to the artistic expression.

The pictures of Michael Jackson on the album cover include iconic images of Jackson performing his signature dance moves, as well as artistic renderings of his face. This is pure artistic expression, not commercial speech. (*Armstrong v. Eagle Rock Entertainment, Inc.* (E.D.Mich. 2009) 655 F.Supp.2d 779, 787 [“The cover of the DVD, which includes artwork [such as plaintiff artist’s picture] and information about the contents of the DVD, contains expression protected by the First Amendment”].)

The album title *Michael* is also part of the expressive work, regardless if there was economic motivation involved in choosing it. (See, e.g., *Bery v.*

New York (2d Cir. 1996) 97 F.3d 689, 695 [“words may form part of a work of art, and images may convey messages and stories”]; *Rogers v. Grimaldi* (2d Cir. 1989) 875 F.2d 994, 998 [“Titles, like the artistic works they identify, are of a hybrid nature, combining artistic expression and commercial promotion”]; *Winchester Mystery House, LLC v. Glob. Asylum, Inc.* (2012) 210 Cal.App.4th 579, 585 588-595 [the title and visual depiction on a DVD cover were protected by the First Amendment in part because of its “artistic relevance to the underlying work” even though they were chosen “to generate interest” in the film].) Titling a musical work is expression reflecting a creative choice, whether it’s the Beatles’ *Abbey Road* or MJJ’s *Michael*.

The other elements of the Challenged Speech are the attributional statements identifying Michael Jackson as the vocal artist of *Michael*. The back of the album states: “This album contains 9 previously unreleased vocal tracks performed by Michael Jackson.” (AOB 12-13; CT: 1:119 [FAC ¶ 27].) And the Video Announcement states that *Michael* “is a brand new album from the greatest artist of all time.” (Lodged CD, Video No. 1 at 0:23.) These statements of attribution do far more than simply propose a commercial transaction. They impart subjective meaning because art is self-expression and the identity of the artist reveals whose expression we are experiencing. (*White v. City of Sparks* (9th Cir. 2007) 500 F.3d 953, 956 [“an artist conveys *his* sense of form, topic, and perspective,” *italics added*]; Eberle, Edward J. (2007) 11 Univ. of Penn. Journal of Law and Social Change 1, 19 [“The personality of the artist is revealed in the art”]; *Stewart, supra*, 181

Cal.App.4th at p. 682 [First Amendment exists “to further individual rights of self-expression,” internal quotation and citation omitted].)

As the Court of Appeal recognized, “[t]he identity of a singer, composer, or artist can be an important component of understanding the art itself. No one could reasonably dispute that knowing whether a piece of music was composed by Johann Sebastian Bach or a picture was painted by Leonardo Da Vinci informs the historical understanding of the work.” (*Serova, supra*, 44 Cal.App.5th at p. 130.) Artists express themselves in relation to their own identities and experiences, and who the artist is undeniably forms an inseparable part of their expression.

The Court of Appeal also rightly held that “whether Michael Jackson was actually the lead singer of the songs on the Disputed Tracks certainly affects the listener’s understanding of their significance.” (*Id.* at p. 131.) Serova does not dispute “that the identity of the singer on the Disputed Tracks affected the musical experience for many listeners.” (*Id.* at p. 123.) The Court of Appeal thus correctly found that because attributing the Cascio Recordings to Jackson imparts meaning and significance to the expressive works, it was noncommercial speech. (*Id.* at pp. 130-132.)

It makes no difference for these purposes that the parties stipulated that the attribution here was false. (AOB 38.) First Amendment protection “does not turn upon the truth” of the speech. (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 271 (*Sullivan*).) Commercial speech “must be

distinguished [from noncommercial speech] *by its content*,” i.e. the type of speech at issue. (*Metromedia, Inc. v. City of San Diego* (1981) 453 U.S. 490, 505, fn. 11, quoting *Virginia State Bd. of Pharmacy, supra*, 425 U.S. at p. 761, italics added.) Falsity is simply not the test because “if speech is found to be non-commercial speech, even falsehoods contained in the speech will be given protection.” (*Oxycal Laboratories, Inc. v. Jeffers* (S.D.Cal. 1995) 909 F.Supp. 719, 723.)

Some falsehoods are protected by the First Amendment “to give freedom of expression the ‘breathing space’ it needs to survive.” (*Kasky, supra*, 27 Cal.4th at p. 953, quoting *Sullivan, supra*, 376 U.S. at p. 272.) In other words, “to protect speech that matters.” (*Gertz, supra*, 418 U.S. at p. 341; see e.g. *Hoffman v. Capital Cities/ABC, Inc.* (9th Cir. 2001) 255 F.3d 1180, 1182-1186 (*Hoffman*) [finding magazine’s portrayal of actor was entitled to full First Amendment protection even though it was alleged to be false].) Accordingly, just because a good-faith attribution turns out to be incorrect does not mean that the speech is commercial and automatically subject to strict liability under the CLRA and UCL.

Serova does not identify a single case where a statement linking an artist to an artistic work was treated as commercial speech. The only case that Serova relies on involving an artistic work is *Keimer*, which involved a non-fiction book on investing. (*Keimer v. Buena Vista Books, Inc.* (1999) 75

Cal.App.4th 1220 (*Keimer*), cited at AOB 37.)⁷ In *Keimer*, false statements in the book’s advertising materials were “of a core commercial nature”: They claimed the authors had achieved specific returns on their investments, and were made to promote the authors’ claims that buying their product would enable consumers to “learn how to outperform mutual funds and professional money managers 3 to 1.” (*Id.* at pp. 1223-1224, 1229.) Thus, even though *Keimer* involved an artistic work, the speech was indistinguishable from commercial speech touting objective qualifications of a professional speaker. (See also, *Peel*, *supra*, 496 U.S. at pp. 102-104 [treating attorney’s certification as commercial speech where it was verifiable].) In contrast to the false statements about investment returns in *Keimer*, the identity of an artist conveys additional and subjective meaning *to the art itself*.

The bottom line: The Challenged Speech proposed more than a commercial transaction because it was part of the artistic expression and imparted subjective meaning on how the art was experienced. Identifying an artist is not commercial speech.

⁷ The other cases that Serova cites do not involve artistic works at all. (See AOB 36-38, citing *Peel v. Attorney Registration and Disciplinary Com’n of Illinois* (1990) 496 U.S. 91 (*Peel*) [professional certification on attorney’s letterhead constituted commercial speech]; *Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 48-49 [listing of ingredients for weight loss drug]; and *Benson v. Kwikset Corp.* (2007) 152 Cal.App.4th 1254, 1268 [“Made in U.S.A.” labels on merchandise].)

3. The Challenged Speech was not commercial because it did not contain objective information that MJJ could readily verify.

As the United States Supreme Court has explained, reduced protection for commercial speech is justified because “ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and *presumably knows more about than anyone else.*” (*Virginia State Bd. of Pharmacy, supra*, 425 U.S. at p. 772, fn. 24, italics added.) “The truth of commercial speech” therefore “may be more easily verifiable by its disseminator” than news reporting or political commentary. (*Ibid.*) “[T]he greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker.” (*Ibid.*)

For instance, “[a] lawyer’s certification by [the National Board of Trial Advocacy] is a verifiable fact, as are the predicate requirements for that certification.” (*Peel, supra*, 496 U.S. at p. 101; see also *Ibanez v. Fla. Dept. of Bus. & Prof.* (1994) 512 U.S. 136, 145, fn. 9 [individual’s status as a Certified Financial Planner was verifiable]; *Rubin v. Coors Brewing Co.* (1995) 514 U.S. 476 [commercial speech consisted of verifiable alcohol content on beer label].) Similarly, the speakers in *Keimer* certainly could verify the actual investment returns they touted. (*Keimer, supra*, 75 Cal.App at p. 1231.) And in *Kasky*, Nike had expressly assumed responsibility for and could itself verify the working conditions that were the subject of the contested speech. (*Kasky, supra*, 27 Cal.4th at pp. 947, 963.)

Here, by contrast, MJJ was not in a position to verify who sang on the Cascio Recordings because, as Serova acknowledges, MJJ was not involved in the creation of the Cascio Recordings. (CT 1:116 [FAC ¶¶ 12-13]; *Serova, supra*, 44 Cal.App.5th at p. 127.) And Serova specifically alleges that the Cascio Defendants had “exclusive knowledge” that Jackson did not perform the vocals, and they “actively concealed” that fact from MJJ. (CT 1:117 [FAC ¶ 18].)

Because Michael Jackson had died, MJJ could only draw a conclusion based on third party interviews and expert opinions—but could not *verify*—the identity of the vocal artist. (*Serova, supra*, 44 Cal.App.5th at p. 128.) MJJ’s research included obtaining accounts from “those who were in the studio with Michael” (the Cascio Defendants), having Jackson’s former producers and engineers listen to a cappella versions of the recordings and provide their thoughts and opinions, and hiring professional forensic musicologists to analyze the tracks and do the same. (CT 1:118 [FAC ¶¶ 21-22].) Based on its investigations, MJJ concluded that the vocals on the Cascio Recordings were Jackson’s and accordingly attributed them to him. Unlike every case cited above involving speech deemed commercial, the identity of the vocal artist was not an objectively verifiable fact to MJJ.

In analyzing a similar type of speech, courts have consistently found that credits for movies and television shows—which identify those creating and performing expressive works—are not commercial speech. (*Kronemyer, supra*, 150 Cal.App.4th at p. 949.) In *Kronemyer*, plaintiff sued the Internet

Movie Database (IMDB) website, claiming that IMDB incorrectly attributed production credit for a movie to another person. (*Id.* at p. 944.) Plaintiff argued that IMDB’s website constituted unprotected commercial speech. (*Id.* at p. 948.) The court held that even though the credit listings provided the “prospect of some financial benefit” to IMDB, they were not commercial speech. (*Id.* at p. 949.) Rather, the listing of credits was “informational rather than directed at sales” and was in furtherance of IMDB’s right of free speech. (*Id.* at p. 947-949.)

The court also emphasized that the “constitutional right of free speech includes the right not to speak.” (*Id.* at 947.) Specifically, the court held that IMDB’s free speech right included refusing to make changes to the credit listing because it was “unable to verify” that plaintiff deserved attribution for the credit. (*Id.* at pp. 944-945, 949-952; see also *IMDb.com Inc. v. Becerra* (9th Cir. 2020) 962 F.3d 1111, 1122 [holding public profiles on the IMDB website that contain information on a film’s cast and crew do not constitute commercial speech].)

Serova incorrectly contends that if statements attributing an artistic work are noncommercial whenever the seller has no personal knowledge, then willful ignorance and avoidance of provenance investigation would insulate sellers from liability. (AOB 39.) Serova is wrong, and it is beside the point. Determining that artistic attributions are noncommercial speech does not mean that *no* liability can ever be imposed, it simply determines the level of protection applicable to the speech. (*Kasky, supra*, 27 Cal.4th at 946.)

MJJ's argument is only that artistic attribution should not be wholly unprotected such that it is subject to strict liability. A seller that is willfully ignorant or intentionally avoids provenance investigation is not without fault. In any event, this issue is not present here and the Court need not reach it. Serova *admits* MJJ and Sony did not engage in willful ignorance or avoid any provenance investigation. Just the opposite. She affirmatively alleges that MJJ and Sony actively investigated the issue, publicly disclosed the details of that investigation, and announced their results before including the Cascio Recordings on *Michael*. (CT 1:118-1:119 [FAC ¶¶ 21-22, 26].)

Similarly unavailing is Serova's argument that finding the Challenged Speech to be noncommercial renders the CLRA's bona fide error defense obsolete. (AOB 45.) The bona fide error defense precludes a damages award if the defendant "(a) proves that such violation was not intentional and resulted from a bona fide error notwithstanding the use of reasonable procedures adopted to avoid any such error, and (b) makes an appropriate correction, repair or replacement, or other remedy" (Civ. Code, § 1784.)

But the bona fide error defense is not the same as First Amendment protections. To avail itself of the defense, MJJ would be forced to undergo expensive litigation, bear the burden of establishing an affirmative defense, and make a correction if it was ultimately determined by a jury that, contrary to their own conclusion, Jackson was not the vocal artist. Moreover, the defense is premised on the assumption that the defendant can avoid making an error.

As set forth above, MJJ had no ability to guarantee that its determination about the vocalist was accurate in the first place. So it was faced with the Hobson's Choice of: (a) not including the tracks on *Michael*, (b) stating on the album that the Cascio Recordings "might not be" Jackson's vocals, thereby submitting to forced speech contrary to its own conclusions and those of its experts, or (c) including the recordings and being saddled with strict liability should Serova's experts convince a jury that their opinions are better than MJJ's experts. These restrictions on speech and artistic expression cannot be squared with the First Amendment.

The bottom line: Commercial speech contains objective information about the speaker's product that the speaker can readily verify as true or false. The challenged Album Content and Video Announcement identifying the deceased Michael Jackson as the vocalist, on recordings discovered after his death, simply do not meet this standard.

4. Regulation of the Challenged Speech would chill artistic expression.

The Challenged Speech also must be deemed noncommercial because subjecting MJJ to strict liability for misattributing an artistic work would chill expression. Put another way, attribution of artistic works is speech that is not at all "hardy."

Uncertainty over credit and attribution for expressive works is common. (See, e.g., *Kronemyer, supra*, 150 Cal.App.4th at p. 944 [noting there are "frequent disputes among industry professionals and studios

regarding who should and should not be included in the [filmography] credits”].) Indeed, there is routinely litigation over who is owed attribution for expressive works. (See, e.g., *Aalmuhammed v. Lee* (9th Cir. 2000) 202 F.3d 1227 [plaintiff claimed he was a co-author of the movie *Malcolm X* and deserved a writing credit].)

The uncertainty involved with attributing artistic works means this is not a situation where strict liability will encourage entities to make only accurate attributions, such as when a defendant is speaking on the objective, verifiable characteristics of how its own products are made. (*Kasky, supra*, 27 Cal.4th at p. 963.) When speech is verifiable, regulation may cause a defendant “to make greater efforts to verify the truth of its statements,” which “serve[s] the purpose of commercial speech protection by ‘insuring that the stream of commercial information flow[s] cleanly as well as freely.’” (*Id.* at pp. 963-964, quoting *Virginia State Bd. of Pharmacy, supra*, 425 U.S. at p. 772.) But when, as here, the speech is not readily verifiable and expert analysis and opinions are called upon to help evaluate authorship, mistakes or inadvertent misattributions would still occur. As one article noted, “[a] reasonable estimate might be that at least 20 per cent of the paintings held by our major museums, some up on the walls, many others in the vaults, will no longer be attributed to the same painter 100 years from now.” (Michael Glover, *The Big Question: How many of the paintings in our public museums are fakes?* (Apr. 16, 2010) Independent.) This is not because of intentional forgery, but because “many works were bought because they were, at the

point of acquisition, believed by the harumphing experts of the day to be by painter X, without a doubt.” (*Ibid.*)

Accordingly, regulating attributional statements identifying artists will not encourage greater accuracy. It will only impose harsh penalties for mistakes in attributing artwork, even if made in good faith. In the face of strict and substantial liability, entities would err on the side of *not* distributing artistic works or not attributing them to an author whenever there was uncertainty, which would chill artistic expression and hinder its dissemination.

The chilling effect would be particularly problematic, when, as here, an artist has passed away, because uncertainty on whether works were created by the deceased are common. As the Court of Appeal noted, there is controversy surrounding whether compositions by Johann Sebastian Bach were attributable to him or his wife, and doubt about whether Leonardo da Vinci actually painted a famous work attributed to him. (*Serova, supra*, 44 Cal.App.5th at p. 130, fn. 17.) Likewise, there is a centuries old controversy on whether someone other than William Shakespeare wrote the works attributed to him.⁸

⁸ The Tennessee Law Review devoted a symposium to “Who Wrote Shakespeare? An Evidentiary Puzzle.” (See, e.g., William F. Causey, *Burden of Proof and Presumptions in the Shakespeare Authorship Debate* (2005) 72 Tenn. L. Rev. 93 [explaining the “controversy over who wrote the works attributed to William Shakespeare is a fascinating intellectual debate” that has “existed for over two hundred years”].)

Given the uncertainty involved with identifying credit and attribution for expressive works, media defendants require editorial discretion and deference over these decisions, not the threat of liability for even innocent mistakes. Courts recognize that a media defendant's right of free speech includes editorial discretion on what content should be included for dissemination to the public and how it should be presented. (*City of Los Angeles v. Preferred Communications, Inc.* (1986) 476 U.S. 488, 494 ["cable operators exercise a significant amount of editorial discretion regarding what their programming will include," internal quotation and citation omitted]; *Wilson, supra*, 7 Cal.5th, at p. 895 [courts recognize "the full freedom and liberty of the petitioner to publish the news as it desires" which guides them in "distinguish[ing] between permissible regulation and unconstitutional interference with a newspaper's editorial judgment," internal quotation and citation omitted]; *Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.* (9th Cir. 2014) 742 F.3d 414, 423 [CNN's editorial discretion includes "affirmative decisions about what content to post on its web site and how that content is displayed" which "furthers CNN's free speech right"].)

In ultimately selecting the Cascio Recordings for inclusion on *Michael*, MJJ exercised its editorial discretion, based on the best available information available to it, on whether the recordings belonged in Jackson's catalog of work. Even if MJJ's decision was unknowingly erroneous, that editorial decision-making requires breathing room that should not be subject to government regulation imposing strict liability. (See *McFarlane, supra*, 74

F.3d at pp. 1299, 1303-1304 [where plaintiff alleged article falsely conveyed he was a spy, editorial embellishment that pushed the theory forward had to be shown to be made with actual malice].)

Serova's assertion that MJJ could avoid liability by including a disclaimer misses the point. (AOB 53.) Serova's cited authority provides that disclaimers may be a remedy for false advertising (*ibid.*, citing *In re R.M.J.* (1982) 455 U.S. 191, 203), which is necessarily *after* the speech is already deemed commercial. But where speech is not commercial, a disclaimer is improper because the right to free speech "inherently involves choices of what to say and what to leave unsaid." (*Pacific Gas & Elec. Co. v. Pub. Utilities Comm'n of California* (1986) 475 U.S. 1, 11 (*Pacific Gas*).) The "essential thrust" of First Amendment protection is "shield[ing] the man who wants to speak or publish" and also protecting the "concomitant freedom not to speak." (*Harper & Row Publishers, Inc. v. Nation Enterprises* (1985) 471 U.S. 539, 559.) This does not mean that a speaker has the "right to be free from vigorous debate," but a regulation cannot require a speaker "to assist in disseminating [its opponent's] views." (*Pacific Gas, supra*, 475 U.S. at p. 14 [striking down law that required defendant to include opponent's view].) In this case, once MJJ conducted its extensive investigations, it was entitled to formulate an opinion and conclusion, exercise their editorial judgment, and make decisions going forward consistent with its conclusion. By identifying Michael Jackson as the artist on the Cascio Recordings, MJJ took a position on the public controversy surrounding whether Jackson was the artist on the

Cascio Recordings, and was not required to further publicize the controversy, or worse, disavow its beliefs and give credence to the oppositional view.

The bottom line: Regulating attributional statements of art to artists is likely to chill speech, which means that such speech is not hardy, a fundamental attribute of commercial speech.

5. Regulating the Challenged Speech is not consistent with traditional government authority to regulate commercial transactions.

Under *Kasky*, speech should only be deemed commercial—i.e., subjecting the speaker to strict liability for falsity—if it is “consistent with traditional government authority to regulate commercial transactions for the protection of consumers by preventing false and misleading commercial practices.” (*Kasky, supra*, 27 Cal.4th at p. 964.) Regulation of the Challenged Speech here does not meet this requirement.

As an initial matter, the Challenged Speech in this case falls outside traditional regulation of speech on matters of public concern. Generally, for false statements on issues of public concern, states may define their own standard of liability “so long as they *do not impose liability without fault.*” (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 347 (*Gertz*), italics added.) This is so because a “rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to

intolerable self-censorship.” (*Id.* at p. 340.)⁹ Accordingly, “the First Amendment generally precludes the imposition of liability upon a publisher for its expressive activities, except upon a finding of fault.” (*Stewart, supra*, 181 Cal.App.4th at p. 681.)

MJJ’s Challenged Speech directly relates to matters of public concern: namely, Michael Jackson himself and his album *Michael*, and the public controversy over the identity of the artist on the Cascio Recordings. (CT 1:116 [FAC ¶ 11].) Given this connection, MJJ’s Challenged Speech cannot be subject to strict liability because doing so would be inconsistent with how the government ordinarily regulates statements of public concern, and fails to withstand constitutional scrutiny.

Regulating the Challenged Speech is also not consistent with the type of speech that has traditionally been regulated as misleading commercial practices. *Kasky* explained that the government has traditionally regulated false statements about products, their origin, how they were made, or by whom. (*Kasky, supra*, 27 Cal.4th at p. 964 [listing statutes].) All of the statutes *Kasky* referred to regulate some aspect of the production of the

⁹ Analogously, California courts have preserved this constitutional protection in right-of-publicity cases, by requiring a plaintiff suing based on a statement of public concern to prove that the statement was a “knowing or reckless falsehood.” (*Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 425 (*Eastwood*), superseded by statute on other grounds as explained by *KNB Enterprises v. Matthews* (2000) 78 Cal.App.4th 362, 367, fn. 5.)

tangible commercial product, such as ensuring truthful statements on a product labeled as “Made in U.S.A.” or that a product was “made by blind workers” or “made by authentic American Indian labor.” (*Ibid.*, citations omitted.) Statements such as these are consistent with the type of speech that this Court has identified as being readily verifiable by the manufacturer like the “working conditions in factories where Nike products are made.” (*Ibid.*) Here, the Challenged Speech, statements of attribution identifying the artist of an artistic work, is not speech relating to the production of a tangible commercial product.

The bottom line: Regulating the Challenged Speech fundamentally diverges from traditional regulation of commercial transactions, indicating that it should not be deemed commercial speech.

6. Even assuming the attribution of artistic expression is commercial speech, it is “inextricably intertwined” with fully protected speech and is therefore entitled to full First Amendment protection.

Even if material is found to meet the threshold classification for commercial speech because it does no more than propose a commercial transaction, “courts must determine whether the speech still receives full First Amendment protection, because the commercial aspects of the speech are ‘inextricably intertwined’ with otherwise fully protected speech.” (*Dex Media West, Inc. v. City of Seattle* (2012) 696 F.3d 952, 958.) When commercial speech is “inextricably intertwined” with noncommercial speech it does not retain its commercial character. (*Riley v. Nat. Federation of the*

Blind of N.C., Inc. (1988) 487 U.S. 781, 796.) As such, the “level of scrutiny” that applies to speech must be determined from “the nature of the speech taken as a whole.” (*Ibid.*) When, as here, it would be “both artificial and impractical” to “parcel out the speech, applying one test to one phrase and another test to another phrase,” the “test for fully protected expression” applies. (*Ibid.*)

For example, in *Hoffman v. Capital Cities/ABC, Inc.* (9th Cir. 2001) 255 F.3d 1180, an actor brought suit against a magazine and its publisher for *inter alia* violation of his right of publicity and unfair competition based on a published photograph that falsely depicted him wearing fashion designers’ women’s clothes. (*Id.* at p. 1182-1183.) The actor contended that the feature in which the photograph appeared was commercial speech because it highlighted fashion items by brands that advertised in the magazine. (*Id.* at 1185.) The court held that the magazine feature was entitled to full First Amendment protection afforded to noncommercial speech, even if the portrayal was false and despite the commercial elements. (*Id.* at 1185-1186.) In context, “the article as a whole [was] a combination of fashion photography, humor, and visual and verbal editorial comment on classic films and famous actors,” such that any commercial aspects were “inextricably entwined with expressive elements.” (*Id.* at 1185.) Thus, the article was deemed noncommercial speech and the actor had to prove actual malice to recover damages. (*Id.* at 1186-1187.)

Similarly, in *Stutzman v. Armstrong* (E.D.Cal., Sept. 10, 2013, No. 2:13-CV-00116-MCE) 2013 WL 4853333, the court applied the inextricably intertwined doctrine to bar plaintiffs’ UCL and CLRA claims against cyclist Lance Armstrong and the publishers of his book. The statements at issue were false statements on the book’s jackets and flyleaves that Armstrong did not use performance enhancing drugs, including that the book was “non-fiction.” (*Id.* at pp. *1, *17-18.) The court found it impossible to separate the cover’s content—which included a summary of the book’s content, its description as non-fiction, and its description of Armstrong as a Tour de France champion even though he had been stripped of his titles—from the fully protected contents of the book itself. (*Id.* at pp. *17-18.) In finding the books’ covers and flyleaves were protected, the court reasoned that for a book to be sold at all, there has to be some leeway to describe the work and its author without transforming that expression into commercial speech. (*Id.* at p. *18; see also *Mattel, supra*, 296 F.3d at pp. 903-907 [holding the song “Barbie Girl” was commercial speech because it used Mattel’s famous mark, but that it was inextricably intertwined with noncommercial speech commenting on the cultural use of Barbie so the entire song was “fully protected”]; *Boule v. Hutton* (2d Cir. 2003) 328 F.3d 84, 88, 91-92 [statements on the authenticity of plaintiff’s paintings made in an article on “a matter of public concern—fraud in the art market” were inextricably intertwined with protected speech and thus “not commercial speech”].)

Other courts have similarly held that commercial speech that is merely adjunct to noncommercial speech, i.e. “promotes only the protected publication,” is itself protected absent a showing that the publishers knew their statements were false or published them in reckless disregard for their truth. (*Cher v. Forum Internat., Ltd.* (9th Cir. 1982) 692 F.2d 634, 639 [First Amendment protections extend to advertising that “is merely an adjunct” of protected speech]; *William O’Neil & Co., Inc. v. Validea.com Inc.* (C.D.Cal. 2002) 202 F.Supp.2d 113, 1119 [holding that “because the book cover, flyleaf, and other material advertising The Market Gurus is ‘an adjunct’ of The Market Gurus, it is protected to the same extent as the book itself”]; *People v. Fogelson* (1978) 21 Cal.3d 158, 165, fn. 7 [“promotion of constitutionally protected written works is protected as an incident to the First Amendment value of the underlying speech or activity”].)

In this case, statements identifying the artist/performer as Michael Jackson are inextricably intertwined with the musical work (the *Michael* album including the Cascio Recordings) and “cannot be separated.” (*Hoffman, supra*, 255 F.3d at p. 1185.) Indeed, one could not, as a practical matter, distribute musical recordings without identifying the artist because this is the common way that music is identified, sorted, and consumed. In contrast, a company can sell a padlock without claiming that it was “Made in America” (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 329), and can sell a personal care product without calling it “organic” (*All One God Faith, supra*, 183 Cal.App.4th at p. 1206-1210). Musical albums, like other

forms of entertainment, “are not mere commercial products,” but are expressive works “plainly entitled to full First Amendment protection.” (See *Forsyth, supra*, 2016 WL 6650059, at pp. *1-3.) And identifying the artist is adjunct to, and inextricably intertwined with, the expression itself.

The bottom line: The attribution to Michael Jackson as the artist on the Cascio Recordings is noncommercial speech entitled to full First Amendment protection, and is not subject to strict liability under the CLRA and UCL.

B. Serova’s Claims Are Preempted by the Copyright Act.

Finally, even if the Challenged Speech is deemed commercial, Serova still could not show a reasonable probability of success on her CLRA and UCL claims for another, independent reason: they are preempted by the Copyright Act.¹⁰

The Copyright Act “govern[s] exclusively” “all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright.” (17 U.S.C. § 301(a).) Courts follow a two-part test to determine when a cause of action is preempted by the Copyright Act: (1) whether the “subject matter” of the claim “falls within the subject matter of copyright”; and (2) if it does, whether the right plaintiff asserts is “equivalent” to one of

¹⁰ Although Defendants did not raise this issue below, copyright preemption can be raised and decided for the first time on appeal because it goes to the Court’s jurisdiction. (*Balboa Ins. Co. v. Trans Glob. Equities* (1990) 218 Cal.App.3d 1327, 1338 (*Balboa*).)

the exclusive rights of copyright holders. (*Laws v. Sony Music Entertainment, Inc.* (9th Cir. 2006) 448 F.3d 1134, 1137-1138 (*Laws*); *Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 791 [same].)

Here, the first step is easily met: Serova's claims all arise from MJJ's distribution and sale of the Cascio Recordings, which are sound recordings. (AOB 11-14.) Sound recordings are within the scope of copyright law (17 U.S.C. § 102(a)(7)), and it is undisputed that defendant MJJ Productions, Inc. holds the copyright to *Michael*. (CT 1:116 [FAC ¶ 10].)

On the second step, the right that Serova seeks to protect is equivalent to the exclusive rights protected by the Copyright Act. To avoid preemption, the cause of action "must protect rights which are *qualitatively different* from the copyright rights," such that the cause of action has "an extra element which changes the nature of the action." (*Laws, supra*, 448 F.3d at p. 1143, internal quotation and citation omitted, italics added; *Balboa, supra*, 218 Cal.App.3d at p. 1340 [same].) The additional element must "transform" the nature of the action into something that is substantively different than a claim for violation of an exclusive right granted under the Copyright Act. (*Laws, supra*, 448 F.3d at p. 1444.)

The gravamen of Serova's claims is that MJJ passed off the Cascio Recordings as Jackson recordings, when they were not Jackson's. Serova bases her CLRA claim on provisions that prohibit the misrepresentation of

the “source” of a good. (See AOB 9; Civ. Code, § 1770, subds. (a)(1) [“[p]assing off goods or services”], (a)(2) [misrepresenting the “source” of the goods].) Serova’s UCL claim is based on two theories: (1) the CLRA violation is an unlawful business practice; and (2) MJJ’s actions “deceive[d] Plaintiff and the public,” which is an alleged fraudulent business practice. (CT 1:127 [FAC ¶¶ 54-55].) By Serova’s own account, her “claims target misleading advertisements which falsely represent *the source* of the work,” i.e., the Cascio Recordings. (AOB 9, italics added.)

Cases uniformly hold that the Copyright Act preempts a state law claim based on a defendant misleading the public that another’s expressive work is his own. (See, e.g., *Fisher v. Dees* (9th Cir. 1986) 794 F.2d 432, 440 (*Fisher*) [Copyright Act preempted California unfair competition claim that defendant sold song “as if it were his” on a music album when it was allegedly authored by plaintiff]; *Lacour v. Time Warner, Inc.* (N.D.Ill., May 24, 2000, No. 99 C 7105) 2000 WL 688946, at *1-2, 5-8 (*Lacour*) [Copyright Act preempted unfair competition claims alleging defendant “made false and misleading representations to the consuming public by giving R. Kelly attribution credit for being the sole and original author” of a song]; *Nutter v. Clear Channel Commc’ns, Inc.* (N.D.W.Va., Sept. 26, 2006, No. CIV.A. 505CV65) 2006 WL 2792903, at *5 [Copyright Act preempted state law claim based on allegations that defendant used plaintiff song but “denied him attribution”]; 1 Nimmer on Copyright § 1.15 [when state law unfair competition claims allege “B is selling B’s products and representing to the

public that they are B's," but allegedly uses A's work, that conduct is "in fact a disguised copyright infringement claim and, hence, preempted"].¹¹

Such state law claims are preempted because they are not qualitatively different than a copyright claim over the distribution and use of an expressive work. (*Fisher, supra*, 794 F.2d at p. 440; *Media.net, supra*, 198 F.Supp.3d at pp. 1087-1088; *Lacour, supra* 2000 WL 688946, at *7.) "[T]he right to copy creative works, with or without attribution, is the domain of copyright, not of . . . unfair competition, and the failure to credit the true author of a copyrighted work is not a false designation of origin, but a violation of copyright." (*Patterson v. Diggs* (S.D.N.Y., Aug. 23, 2019, No. 18 Civ. 03142) 2019 WL 3996493, at *6.)

Accordingly, where, as here, the only misrepresentations that plaintiff alleges are "from a defendant passing off someone's work as his own," this is not "qualitatively different" from a copyright claim. (*Terarecon, Inc. v. Fovia, Inc.* (N.D.Cal., July 6, 2006, No. C 05-4407 CW) 2006 WL 1867734, at *3-4, internal citations omitted.) Indeed, the "failure to award [the alleged proper] credit and any resulting confusion or deception of consumers" is "nothing more than the inherent misrepresentation that accompanies unauthorized

¹¹ See also *Media.net Advert. FZ-LLC v. Netseer, Inc.* (N.D.Cal. 2016) 198 F.Supp.3d 1083, 1087-1088 (*Media.net*) [UCL claim preempted because it "[was] not qualitatively different from a copyright infringement claim" where defendant marketed plaintiff's product as its own]; *Xerox Corp. v. Apple Computer, Inc.* (N.D.Cal. 1990) 734 F.Supp. 1542, 1550 [UCL claim preempted by copyright law where "Xerox allege[d] that Apple [was] selling Xerox' work as its own].

copying and reproduction of another’s copyrighted work.” (*Lacour, supra* 2000 WL 688946, at *8.) Thus, allegations that a defendant has “deceive[d] the public”¹² or “the consuming public in California will be misled”¹³ by a defendant passing off another’s work as his own, is not qualitatively different from a copyright claim and is preempted. (See, e.g., *Enerlites, Inc. v. Century Products, Inc.* (C.D.Cal., Aug. 13, 2018, No. SACV18839JVSKEsx) 2018 WL 4859947, at *6 [UCL claim that alleged misrepresentations based solely on the marketing or promotion of selling defendant’s work, without more, is preempted].)

Additionally, a state law claim is preempted if it alleges that the defendant misappropriated someone else’s voice or performance embodied in a copyrighted work. (*Laws, supra*, 448 F.3d at p. 1136; *Butler v. Target Corp.* (C.D.Cal. 2004) 323 F.Supp.2d 1052, 1057-1058 [California UCL claim based on use of sound recording which plaintiff alleged caused consumer confusion was preempted]; *No Doubt v. Activision Publ’g, Inc.* (C.D.Cal. 2010) 702 F.Supp.2d 1139, 1145-1146 [noting if plaintiff’s claims were based on misuse of plaintiff’s “videotaped musical performance, its claims would be preempted by the Copyright Act”].)

¹² *Angelini Metal Works Co. v. Hubbard Iron Doors, Inc.* (C.D.Cal., Jan. 5, 2016, No. CV116392GHKPLAX) 2016 WL 6304476, at *7-8 [holding UCL claim preempted].

¹³ *Lukens v. Broder/Kurland Agency* (C.D.Cal., Sept. 14, 2000, No. CV 00-08359 NM JWJX) 2000 WL 35892340, at *5-6 [holding UCL claim preempted].

Accordingly, Serova cannot assert a state law claim based on MJJ's alleged passing off the Cascio Recordings as Jackson's. Although Serova alleges that MJJ's conduct "deceive[d] Plaintiff and the public" (CT 1:127 [FAC ¶¶ 54-55]), the only source of that deceit was MJJ labeling the Cascio Recordings as Jackson's. Indeed, Serova's entire theory is that MJJ must be held liable based on strict liability, as she admits that MJJ did not make any intentional misrepresentations. (AOB 8-9.)

It does not matter that Serova is not a copyright holder claiming that *her* copyright has been infringed. Allowing a third party to litigate a copyright claim under the "guise of state law" would "defeat Congress's intent to have federal law occupy the entire field of copyright law." (*Sybersound Records, Inc. v. UAV Corp.* (9th Cir. 2008) 517 F.3d 1137, 1150-1151 [plaintiff who lacked standing to bring a copyright claim could not bring state law claims that were preempted by the Copyright Act].) Specifically, a plaintiff "cannot premise its UCL claim on . . . intellectual property rights of third parties." (*Perfect 10, Inc. v. Megaupload Ltd.* (S.D.Cal., July 27, 2011, No. 11CV0191-IEG BLM) 2011 WL 3203117, at *10, vacated pursuant to settlement (S.D.Cal., Oct. 11, 2011, No. 11CV0191-IEG BLM) 2011 WL 10618723.) "If [plaintiff] were permitted to proceed on its UCL claim under the theory that [defendant] is exploiting the intellectual property rights of third parties, [plaintiff] would be litigating a third party copyright claim under the guise of state law." (*Id.* at p. *10; see also *Perfect 10, Inc. v. Cybernet Ventures, Inc.* (C.D.Cal. 2001) 167 F.Supp.2d 1114, 1125 [dismissing

claims due to preemption and stating “[a]lthough California law may allow plaintiffs to assert third party claims, federal copyright law only allows the owner of a copyright to bring suit. . . . Allowing [plaintiff] to defeat this express requirement through application of state law is incompatible with the federal scheme of copyright protection.”]; *Laws, supra*, 448 F.3d at p. 1136 [holding the Copyright Act preempted plaintiff’s claims even though plaintiff had no claim to the underlying copyright].)

Last, finding that Serova’s claims are preempted does not mean that all false advertising claims involving a copyrighted work of artistic expression would be preempted. To the contrary, claims for *fraud* or *knowingly* false advertising (Bus. & Prof. Code, § 17500) are not substantially equivalent to a copyright claim, and thus, are not preempted. (See, e.g., *Valente-Kritzer Video v. Pinckney* (9th Cir. 1989) 881 F.2d 772 [fraud claim]; *Silicon Image, Inc. v. Analogix Semiconductor, Inc.* (N.D.Cal., May 16, 2007, No. C-07-0635 JCS) 2007 WL 1455903, at *5 [section 17500 claim].)¹⁴

¹⁴ Serova did not bring a fraud claim or a section 17500 claim for false advertising against MJJ, nor could she have, since either would have required proving that MJJ knew or should have known the representation that Michael Jackson was the artist on the Cascio Recordings was false. (See Bus. & Prof. Code, § 17500; *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638 [elements of fraud include “misrepresentation (false representation, concealment, or nondisclosure),” internal quotation and citation omitted].)

The bottom line: Serova’s claims fail as a matter of law for the independent reason that they are preempted by the Copyright Act. The anti-SLAPP statute therefore requires striking them.

C. Consumers Are Not Without Remedies For Intentional Forgery.

The trial court expressed a concern that if MJJ was to prevail, “forgery is without redress[.]” (RT 643:8-643:10; see also RT 642:1-645:9.) But the trial court was mistaken. Serova is not without a remedy. Serova can and did bring a fraud claim against the Cascio Defendants. In her fraud claim, Serova alleged that the Cascio Defendants intentionally misrepresented that the Cascio Recordings were performed by Michael Jackson. (CT 1:128-1:29 [FAC ¶¶ 61–63].)¹⁵ Affirming the Court of Appeal’s opinion does not open the floodgates to intentional forgery. The only issue here is whether a defendant may be *strictly liable* under the UCL and CLRA for distributing a work of art with an attribution to the artist, *with no allegation of any knowledge of falsity of that attribution*. For the reasons discussed above, the statutes do not have the unprecedented reach that Serova claims they do.

¹⁵ Serova may not amend her complaint to add a fraud claim against MJJ. (See *Mobile Medical Services for Physicians and Advanced Practice Nurses, Inc. v. Rajaram* (2015) 241 Cal.App.4th 164, 171 [holding that once it has been “determined [that] the speech at issue is constitutionally protected, it may not grant leave to amend to omit facts to take the claim out of the protection of section 425.16.”].)

CONCLUSION

For the foregoing reasons, the Court should affirm the Court of Appeal's decision and hold that (1) the Challenged Speech is protected activity under the anti-SLAPP statute and (2) Serova cannot establish a probability of prevailing on her claims.

Dated: October 2, 2020

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Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **DEFENDANTS' ANSWERING BRIEF** contains 13,205 words, not including the tables of contents and authorities, the caption page, the signature block, or this Certification page.

Date: October 2, 2020

/s/ Zia F. Modabber

Zia F. Modabber

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