FIRST AMENDMENT PROTECTION FOR FALSE COMMERCIAL SPEECH BY A PUBLISHER REGARDING THE TRUTHFULNESS OF ITS PUBLICATION: A RESPONSE TO LITIGATION ARISING OVER JAMES FREY'S *A MILLION LITTLE PIECES*

JASON KESSLER*

* J.D., 2006, Columbia University School of Law, James Kent Scholar; A.B., 2003, Princeton University, *cum laude*; Associate (Bar admission pending) at Cahill Gordon & Reindel LLP. The author would like to thank Edward Klaris, General Counsel of *The New Yorker*, for his supervision and excellent feedback, and Katherine J. Trager, Senior Vice President, General Counsel of Random House, for all of her helpful comments on this article. The author must also acknowledge Claudio Storelli for his assistance. Please note that the above people do not necessarily endorse the views appearing in this article.

I. INTRODUCTION

The First Amendment of the Constitution provides protection for the freedom of speech: "Congress shall make no law . . . abridging the freedom of speech."[1] Various types of speech are afforded different levels of protection depending on certain factors. False speech is afforded less protection than true speech,[2] commercial speech less than noncommercial speech,[3] and speech about a private individual less than speech about a public individual.[4] Some areas of law repeatedly come into conflict with the First Amendment, with varying results. Such areas include copyright, defamation, unfair competition, incitement, and obscenity.[5] Recent litigation arising over false portions of James Frey's non-fiction book, *A Million Little Pieces*, pit state unfair competition law and related laws against the First Amendment. Specifically, Doubleday, the publisher[6] of *A Million Little Pieces*, is accused of having engaged in false representation through its classification of Frey's book as a nonfiction memoir. This litigation highlights the fact that commercial speech by a publisher regarding the truthfulness of its publication deserves special treatment, distinct from other types of commercial speech.

The purpose of this article is to use the litigation that has arisen in response to *A Million Little Pieces* as a guide for exploring the appropriate level of First Amendment protection that should be afforded to false commercial speech by a publisher regarding the truthfulness of its publication.[7] Part II of this article provides a brief factual background of the litigation. Part III discusses whether the speech at issue in the litigation should be considered false, ultimately assuming for the purposes of constitutional analysis that the speech is indeed false. Part IV explores the distinction between commercial and noncommercial speech, paying close attention to the different ways each type of speech is treated under the law. Part V identifies certain policy interests that should be considered, such as the First Amendment interest in not forcing publishers to be the guarantors of the accuracy of

---

1 U.S. CONST. amend. I, § 2.

2 *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

3 *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 772 n.24 (1976).

4 *See Gertz*, 418 U.S. 323.

5 Lacoff v. Buena Vista Publ'g, Inc., 705 N.Y.S.2d 183, 187 (N.Y. Sup. Ct. 2000).

6 The complaints name several defendants as publishers, including Doubleday, a division of Random House and Anchor books, who published the paperback version of *A Million Little Pieces*. In the interest of simplicity, the publisher defendants will be referred to throughout this article as "the publisher."

7 Though it is tempting to address in detail the merits of the litigation mentioned above and to examine the actual facts of the case closely, this is not the purpose of this article.

what they publish, and the interest of publishers in informing the public of the nature of their books. Finally, based on the Supreme Court's stated justifications for affording less First Amendment protection to commercial speech, as well as the other policy considerations discussed throughout this article, Part VI proposes that false commercial speech by a publisher regarding the truthfulness of its publication should be entitled to full First Amendment protection.[8]

II. FACTUAL BACKGROUND

In 2003, Doubleday Books, a division of Random House, Inc., published a book written by James Frey entitled *A Million Little Pieces*.[9] The book describes the life experiences of James Frey, a self-professed alcoholic, drug addict, and criminal.[10] James Frey appeared on the Oprah Winfrey show on October 26, 2005, for a personal interview about his life experiences. Oprah Winfrey selected Frey's book for her famous book club,[11] after which sales of the book skyrocketed with over 3.5 million copies sold.[12]

On January 8, 2006, a website known as *The Smoking Gun* exposed many factual inaccuracies in Frey's book.[13] According to *The Smoking Gun*, the author "wholly fabricated or wildly embellished details of his purported criminal career, jail terms, and status as an outlaw." *The Smoking Gun* also claimed that Frey "fictionalized" other stories such as inserting himself into the center of a tragic accident in which he actually took no part, and inventing a close relationship with one of the victims of that accident where none existed.[14] In a highly anticipated follow-up appearance on the Oprah Winfrey show on January 26, 2006, James Frey ultimately admitted to lying and embellishing events in his book, such as claiming to have spent eighty-seven days in jail, whereas in reality he spent only a few hours there.[15] Doubleday Books claimed to be unaware of any lies or inaccuracies in the book and to have learned of James Frey's embellishment at the

---

[8] An alternative way of framing the proposal is that false speech by a publisher regarding the truthfulness of its publication should never be considered commercial speech for purposes of First Amendment analysis.

[9] JAMES FREY, A MILLION LITTLE PIECES (2003).

[10] *Id.*

[11] *Winfrey Stands Behind 'Pieces' Author*, CNN.COM, Jan. 12, 2006, http://www.cnn.com/2006/SHOWBIZ/books/01/11/frey.lkl/.

[12] *Id.*

[13] *The Man Who Conned Oprah*, THESMOKINGGUN.COM, Jan. 8, 2006, http://www.thesmokinggun.com/archive/0104061jamesfrey1.html.

[14] *Id.*

[15] *Oprah to Author: 'You Conned Us All,'* CNN.COM, Jan. 27, 2006, http://www.cnn.com/2006/SHOWBIZ/books/01/27/oprah.frey/index.html.

same time as the rest of the public.[16]

It was not long before several ambitious class action lawsuits were filed against James Frey and the publisher in various states, including California, Illinois, New York, and Washington.[17] According to the complaints filed in Washington and New York, the plaintiffs were claiming negligent and intentional misrepresentation, gross negligence, breach of contract, unjust enrichment, and violation of state statutes based on unfair or deceptive acts or practices.[18] Many of the states where these suits were filed have general consumer fraud, unfair competition, or false advertising statutes that allow liability solely upon a mere showing of, for example, "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."[19] Most of the claims in the lawsuits were based upon, at most, a negligence standard; the suits did not allege that the publisher knew of James Frey's embellishments, but rather sought liability despite a lack of knowledge or intent on the part of the publisher.[20] The claims in these lawsuits pose a serious conflict with the First Amendment, which often requires a heightened standard of knowledge before liability may be imposed based solely on speech.[21]

The lawsuits were consolidated in an action before the United States District Court for the Southern District of New York

---

16 *Id.*

17 Ten such lawsuits were consolidated into the multidistrict litigation. In the Central District of California: Sara Rubenstein v. James Frey, C.A. No. 2:06-1029; Garrett Hauenstein v. James Frey, C.A. No. 2:06-1030. In the Northern District of Illinois: Ann Marie Strack v. James Frey, C.A. No. 1:06-933; Pilar More v. James Frey, C.A. No. 1:06-934; Marcia Vedral v. James Frey, C.A. No. 1:06-935. In the Southern District of New York: Michele Snow v. Doubleday, C.A. No. 1:06-669; Jimmy Floyd v. Doubleday, C.A. No. 1:06-693; Diane Marolda v. James Frey, C.A. No. 1:06-1167. In the Southern District of Ohio: Jill Giles v. James Frey, C.A. No. 1:06-58. In the Western District of Washington: Shera Paglinawan, et al. v. James Frey, C.A. No. 2:06-99. Schedule A, *In re* "A Million Little Pieces" Litig., 435 F. Supp. 2d 1336 (J.P.M.L. 2006).

18 First Amended Class Action Complaint at 7-9, Paglinawan v. Frey, No. 2:06-cv-00099 (W.D. Wash. Jan. 30, 2006), *available at* http://files.findlaw.com/news.findlaw.com/hdocs/docs/oprah/pagfrey13006fac.pdf; Amended Class Action Complaint at 19-24 , Floyd v. Doubleday, No. 06-cv-0693 (S.D.N.Y. Jan. 30, 2006), *available at* http://nblawfirm.com/files/Floyd%20Amended%20Complaint.pdf.

19 Washington Consumer Protection Act, WASH. REV. CODE § 19.86.020 (2006); Consumer Fraud and Deceptive Business Practices Act, 815 ILL. COMP. STAT. 505/2 (2006). *See also* CAL. BUS. & PROF. CODE §§ 17200, 17500 (2006).

20 An interesting question arises as to what responsibilities attach to a publisher who only gains knowledge that it did not represent the book accurately after-the-fact of publication. For example, in the case of *A Million Little Pieces*, after the publisher learned of James Frey's inaccuracies, what remedial measures were required in order to avoid liability? This, however, is not at issue in this article, which focuses solely on lawsuits that seek to hold a publisher liable for false commercial speech regarding the truthfulness of its publication despite having no knowledge that parts of the work may be false.

21 *See, e.g.,* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

in June 2006.[22] On September 7, 2006, the *New York Times* reported that Random House and James Frey had agreed in principle to a settlement with readers.[23] The settlement would allow purchasers of the book to get a refund if they submit a proof of purchase dated before January 26, 2006.[24] Although the settlement will allow the validity of the legal claims to go untested in the courts for now, it is important to explore the potential liability to which publishers may be exposed should such claims be found to contain merit in the future.

This article focuses solely on claims that do not require a showing that the publisher knew that the book contained lies or inaccuracies. Unlike the author, who clearly had knowledge of the falsity of his writing, the publisher was unaware of any fabrication. The plaintiffs nonetheless seek to impose liability on the publisher. The plaintiffs allege that the publisher promoted, marketed, and advertised the book as non-fiction and as a truthful and accurate description of events, whereas the book was actually fictional. The speech highlighted in the complaints as falsely representing the book as a work of non-fiction, and therefore, giving rise to liability, includes the publisher's reference to the book as a "memoir," "non-fiction," and "autobiographical," as well as describing the book as "brutally honest," and as "an uncommonly genuine account."[25]

There is a significant attribute that all of the examples of speech at issue in this lawsuit have in common. They are all statements that in some way attest to the truthfulness of the contents of the underlying book. Calling a book a memoir, a work of non-fiction, or an autobiography, conveys that what is written in the book is true and accurate. This type of speech—speech by a publisher regarding the truthfulness of its publication—requires treatment as a distinct category of speech that always deserves full First Amendment protection.

III. IS THE SPEECH FALSE?

In any lawsuit against a publisher for fraud or

---

22 *In re* "A Million Little Pieces" Litig., 435 F. Supp. 2d 1336 (J.P.M.L. 2006).

23 Motoko Rich, *James Frey and His Publisher Settle Suit over Lies,* N.Y. TIMES, Sept. 7, 2006, at E1.

24 *Id.* Under the terms of the agreement, neither Frey nor Random House admits any wrongdoing, and they will pay out no more than a total of $2.35 million, which will cover the cost of refunding customers, lawyers' fees, and a charitable donation. Customers claiming a refund will also have to submit a sworn statement that had they known of Frey's fabrications they would not have purchased the book. *Id.*

25 Amended Class Action Complaint, Floyd v. Doubleday, No. 06-cv-0693 (S.D.N.Y. Jan. 30, 2006), *available at* http://nblawfirm.com/files/Floyd%20Amended%20Complaint.pdf.

misrepresentation, a pivotal question is whether the contested speech was, in fact, false. This is important when dealing with First Amendment law because false speech is entitled to significantly less constitutional protection than true speech.[26] First Amendment analysis aside, the truthfulness of the speech is also crucial because if the speech is not false, there can be no claim of misrepresentation or fraud and a lawsuit cannot survive.

In evaluating the truthfulness of the speech at issue in the litigation over *A Million Little Pieces*, many interesting questions arise. The plaintiffs claim that if a non-fiction memoir contains enough inaccuracies, the book eventually ceases to be a non-fiction memoir and transforms into fiction. This is a creative, though suspicious, claim. After all, no matter how many inaccuracies are contained within the book, the publisher still intended it to be a memoir. It was a story told by the writer about his own life. It would seem that if the writer has lied, then it is a non-fiction memoir about the writer's life that has lies in it; it does not somehow become a fictional story.[27] Similarly, how many mistakes would have to appear in a history textbook before it becomes a work of historical fiction? How many mistakes in a daily newspaper would render the label "news" fraudulent?

If these lawsuits are truly about the mislabeling of the book, the plaintiffs' arguments should be just as compelling in the converse scenario where what is believed to be false turns out to be true. If a fictional bestseller was discovered to have contained significant portions that were actually based on true encounters of the author, at some point would the fictional book be transformed into a work of non-fiction? The majority of James Frey's book is unquestionably true. To attempt to reclassify his book as fiction based on some misrepresentations is no different than bringing a claim of fraud against the publisher of a predominantly fictional book that contains some passages based on actual events. It is clear that the real issue in the lawsuits filed against Frey and the publisher was not a mislabeling of the book, as alleged in the complaint, but that portions of the contents of the book itself that were expected to be true turned out to be false.

---

[26] *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

[27] A memoir is defined as "An account of the personal experiences of an author." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2004), *available at* http://dictionary.reference.com/browse/memoir (last visited Nov. 22, 2006). Just because *A Million Little Pieces* is a partially false account, that does not make it any less of "an account" by James Frey of his personal experiences, and, as such, it should still be considered a memoir. Upon a desire to explore the merits of the underlying case further, it may also be useful to explore the extent to which people generally expect authors of memoirs to take certain liberties with the facts in the story.

Words such as "memoir," "non-fiction," and "autobiography" represent the nature of the book to potential readers. Many readers were unpleasantly surprised when they found out that portions of the book were fabricated, and, as such, felt deceived. However, when a publisher labels its book according to a particular category, it may be argued that such classification is not a fact capable of being proven true or false. Rather, such a label should be considered a statement of opinion by the publisher regarding how best to classify the work.

In the area of defamation law, in order for liability to be imposed, a lawsuit must involve a verifiably false fact and not, for example, what courts refer to as "rhetorical hyperbole."[28] Descriptions of a book by a publisher such as "brutally honest" and "uncommonly genuine" should be considered examples of "rhetorical hyperbole" that cannot be proven false. Further, when choosing to which genre a book most appropriately belongs, perhaps a publisher's classification may be a statement of opinion that cannot be proven true or false. Therefore, referring to a book as a memoir or as non-fiction should not be considered a verifiably false fact, but rather as a subjective description. Pushing this argument to its outer limit, perhaps these lawsuits are analogous to claiming that a book is fraudulently labeled a comedy because there are significant portions that are not funny.

If, however, labeling a book non-fiction is not a subjective description, but rather a factual assertion, how should a court decide whether it is true or false with consistency? Is it wise to give such a question to a jury? It is extremely important to resolve such a question early in the case when dealing with issues of First Amendment law.[29] In a case where the speech at issue is true, such speech is entitled to strong First Amendment protection. Allowing a jury to resolve the issue of whether speech is true or false is undesirable and would significantly chill the speech in cases where the speech ultimately is found to be true. The chilling of speech refers to a self-censorship or suppression of speech that may take place due to a fear of incurring legal liability.[30] There will inevitably be many situations in which speech is determined to be

---

[28] *See, e.g.*, Milkovich v. Lorain Journal Co., 497 U.S. 1, 16 (1990).

[29] "[D]efamation is inextricably linked with First Amendment concerns. For that reason, courts frequently examine the constitutional implications of libel actions at the summary judgment stage." Lane v. Random House, Inc., 985 F. Supp. 141, 149 (D.D.C. 1995).

[30] *See* BLACK'S LAW DICTIONARY 257 (8th ed. 2004); *See, e.g.*, Multimedia Holdings Corp. v. Circuit Court of Florida, 544 U.S. 1301, 1304 (2005) ("A threat of prosecution . . . raises special First Amendment concerns, for it may chill protected speech . . . by putting that party at an added risk of liability."); Wash. Post Co. v. Keogh, 356 F.2d 965, 968 (D.C. Cir. 1966).

true, but the speaker is still forced to defend a lawsuit, which is undesirable because "[t]he threat of being put to the defense of a lawsuit . . . may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself."[31]

For purposes of examining the potential First Amendment protection that may be applicable, it is assumed for the remainder of this article that the speech at issue in the lawsuit against the publisher of *A Million Little Pieces* is verifiably false. Ultimately, this article will propose that even assuming the speech is false, it should be entitled to heightened First Amendment protection, thereby eliminating the chilling effects that would result by allowing such a lawsuit to reach a jury.

IV. IS THE SPEECH COMMERCIAL?

Given the assumption that the speech at issue is false, the appropriate level of First Amendment protection depends on whether the speech is treated as "commercial speech." Commercial speech is speech that "does 'no more than propose a commercial transaction.'"[32] In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the Supreme Court justified the separate treatment of commercial speech and noncommercial speech under the First Amendment, and afforded less protection to commercial speech.[33] This Part begins by describing one test used by the Supreme Court to determine whether speech should be treated as commercial or noncommercial, and the implications of treating the speech at issue as one or the other.

A. *Commercial Test*

In *Bolger v. Youngs Drug Products Corp.*, the Supreme Court laid out a test to determine whether speech is commercial.[34] The Court identified three characteristics that, if all are present, lend strong support to a finding of commercial speech: (1) if the communication is an advertisement; (2) if the communication concerns a product; and (3) if the speaker has an economic motivation.[35]

In the case at hand, the speech satisfies prongs two and three in that it concerns a product—the book *A Million Little Pieces*—and

---

31 *Wash. Post Co.*, 365 F.2d at 968.

32 Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 772 n.24 (1976) (quoting Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 385 (1973)). A more detailed test of whether speech should be treated as commercial is outlined below. *See infra* Part IV.A.

33 *Va. State Bd.*, 425 U.S. 748.

34 Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983).

35 *Id.* at 66-67.

the speaker had a clear economic motivation since the publisher wanted to sell as many copies of the book as possible. In addition, the publisher had an economic incentive to describe to consumers the contents of its product. With respect to whether the communication is an advertisement under prong one of the *Bolger* test, it is unclear whether in this case any of the complained of speech occurred in paid advertisements.[36]

For purposes of continuing the discussion of potential First Amendment protection of commercial speech by a publisher regarding the truthfulness of its publication, it is assumed that all of the speech complained of in the lawsuit can be found in paid advertisements by the publisher.[37] Given this assumption, it seems that the speech at issue satisfies all of the characteristics laid out in *Bolger*, lending as much support as possible to a finding that the speech is commercial. Nevertheless, it will be argued below that such speech should be treated the same as noncommercial speech for purposes of determining the appropriate level of First Amendment protection.[38]

B. *Implications of Whether Speech Is Treated as Commercial*

Whether the speech is treated as commercial or noncommercial is extremely significant because each type of speech implicates different levels of protection under the First Amendment.[39] If the lawsuits brought over *A Million Little Pieces* had actually gone to trial, understanding the different standards by which commercial and noncommercial false speech are treated would have been crucial in determining the outcome of the litigation.[40]

---

36 Whether speech on the cover of a book should be treated as commercial remains an open issue in the courts. *Compare* Keimer v. Buena Vista Books, Inc., 89 Cal. Rptr. 2d 781 (Cal. Ct. App. 1999) (treating false speech on the cover of a book as commercial speech entitled to no First Amendment protection), *with* Lacoff v. Buena Vista Publ'g, Inc., 705 N.Y.S.2d 183 (N.Y. Sup. Ct. 2000) (treating false speech on the cover of a book as a hybrid of commercial and noncommercial speech entitled to full First Amendment protection). *See also* William O'Neil & Co. v. Validea.com, Inc., 202 F. Supp. 2d 1113, 1122 (C.D. Cal. 2002) (discussing the conflict between the *Lacoff* and *Keimer* decisions and stating, "The Court declines to resolve at this time whether the speech on the book cover and flyleaf is commercial or noncommercial."). For a detailed discussion of this issue as it may apply to the *A Million Little Pieces* litigation, see Samantha J. Katze, *A Million Little Maybes: The James Frey Scandal and Statements on a Book Cover or Jacket as Commercial Speech*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 207 (2006) (arguing that speech on a book cover should not be treated as commercial speech, and therefore any speech on the cover of *A Million Little Pieces* should be afforded full First Amendment protection).

37 Absent this assumption, a court would be less likely to consider the speech to be commercial. If the speech was not considered to be commercial, it would be afforded full First Amendment protection. *See infra* Part IV.B.1.

38 *See infra* Part VI.

39 Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

40 This article does not address true commercial speech, which is governed by a

1. If the Speech Is Not Commercial

If the speech at issue is not treated as commercial speech, then it will be entitled to strong First Amendment protection, which generally requires that before liability may be imposed, the publisher must have acted with actual malice.[41] Actual malice was defined by the Supreme Court in *New York Times Co. v. Sullivan* as "having knowledge that [the speech] was false or [having] reckless disregard of whether [the speech] was false or not."[42] Although the Supreme Court has stated that there is "no constitutional value in false statements of fact,"[43] the Court has elaborated that in order to prevent a "cautious and restrictive exercise of the constitutionally guaranteed freedom[] of speech," the First Amendment "requires that we protect some falsehood in order to protect speech that matters."[44] Otherwise, there will be a chilling effect on the exercise of free speech that will lead to "intolerable self-censorship."[45] In *Sullivan*, the Supreme Court held that the false speech at issue, despite being located in a paid advertisement, must be protected by the First Amendment in order to allow necessary "breathing space" to freedoms of expression.[46] The *Sullivan* Court, therefore, held that the constitutional rights of the publisher required a showing of actual malice before liability could be imposed.[47]

In *William O'Neil & Co. v. Validea.com, Inc.*,[48] the district court for the central district of California considered a claim brought under the California Unfair Trade Practices Act which imposes liability for untrue or misleading statements.[49] In *William O'Neil*, the publisher of a book about investment strategies made use of a well-known financial analyst's name and identity without the analyst's permission.[50] The court noted that a claim could only survive to the extent that the claim was based on false or misleading advertising of the book, rather than the contents of the book itself.[51] The court dismissed the claim with leave to amend so

middle-ground standard. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) (holding that if commercial speech is neither misleading nor related to unlawful activity, any governmental regulation of that speech must directly advance a substantial governmental interest, and may be "no more extensive than is necessary to serve that interest").

41 N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

42 *Id.* at 280.

43 Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

44 *Id.* at 340-41.

45 *Id.* at 340.

46 *Sullivan*, 376 U.S. at 272 (quoting N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963)).

47 *Id.* at 280.

48 William O'Neil & Co. v. Validea.com, Inc., 202 F. Supp. 2d 1113 (C.D. Cal. 2002).

49 CAL. BUS. & PROF. CODE § 17500 (West 2006).

50 *William O'Neil*, 202 F. Supp. 2d at 1115.

51 *Id.* at 1121.

that the plaintiffs could identify "the precise statements on the cover or flyleaf that . . . are false or misleading."[52] The *William O'Neil* court declined to resolve whether speech on the book cover would be considered commercial or noncommercial, but the court did explain that a heightened standard must be used if the speech is not found to be commercial: "If the speech is not commercial, they must allege knowing falsity (or reckless disregard of the truth), and cannot succeed merely by alleging negligence."[53]

2. If the Speech Is Commercial

If the speech at issue in the *A Million Little Pieces* litigation is treated as commercial, then it falls into a class of false commercial speech to which many courts afford absolutely no First Amendment protection. Absent First Amendment protection, rather than being governed by the actual malice standard of *Sullivan*,[54] a publisher would be subject to whatever standard is required by state statute, which could be mere negligence, or even strict liability. For example, in *William O'Neil*, the court not only specified that if the speech is not commercial it is entitled to strong First Amendment protection, but also explained, on the other hand, that "[i]f the speech is commercial, Plaintiffs need only allege that [the defendant] knew or should have known that the statements made on the cover or flyleaf were false or misleading."[55]

The conclusion that false commercial speech is entitled to no First Amendment protection at all is questionable. Despite the broad subscription to that conclusion by many courts, the Supreme Court has never confirmed it. In fact, the issue came before the Supreme Court on appeal from the California Supreme Court case of *Kasky v. Nike, Inc.*[56] In *Kasky*, the Supreme Court of California stated that "commercial speech that is false or misleading is not entitled to First Amendment protection and 'may be prohibited entirely.'"[57] On appeal, the Supreme Court initially granted certiorari and then dismissed the writ of certiorari as improvidently granted.[58] Three Justices signed an opinion

---

52 *Id.* at 1122.

53 *Id. See also* Lacoff v. Buena Vista Publ'g, Inc., 705 N.Y.S.2d 183 (N.Y. Sup. Ct. 2000) (affording full First Amendment protection to false statements on book covers, and therefore rejecting any claim based on a negligence standard).

54 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

55 *William O'Neil*, 202 F. Supp. 2d at 1122.

56 Kasky v. Nike, Inc., 45 P.3d 243, 252 (Cal. 2002), *cert. granted*, 537 U.S. 1099 (2003), *cert. dismissed as improvidently granted*, 539 U.S. 654.

57 *Id.* (quoting *In re* R.M.J., 455 U.S. 191, 203 (1982)).

58 Nike Inc. v. Kasky, 537 U.S. 1099 (2003), *cert. dismissed as improvidently granted*, 539

describing why the writ of certiorari was dismissed.[59] Justice Kennedy wrote a dissenting opinion, joined by Justices Breyer and O'Connor, which provided several counterarguments to the California Supreme Court's belief that false commercial speech is entitled to no protection, including the notion that "speech on matters of public concern needs 'breathing space'—potentially incorporating certain false or misleading speech—in order to survive."[60] Ultimately, the dissent rejected the notion that false commercial speech is entitled to absolutely no First Amendment protection, and afforded protection to the speech at issue in the case.[61]

In *Keimer v. Buena Vista Books, Inc.*, the Court of Appeal of California found that false commercial speech was entitled to no First Amendment protection.[62] The court supported its conclusion by stating that "the Supreme Court in *Virginia State Board* stated, in no uncertain terms, that provably false commercial speech was entitled to no First Amendment protection at all."[63] In *Virginia State Board*, however, the Supreme Court wrote: "Untruthful speech, *commercial or otherwise*, has never been protected for its own sake."[64] Contrary to the explicit distinction made by the court in *Keimer* and the California Supreme Court in *Nike*, the Supreme Court in *Virginia State Board* made no such distinction, explicitly lumping commercial and noncommercial speech together.

Further, although the quote from *Virginia State Board* states that false speech is not protected for its *own sake*, it is important to view this statement in its full context. When making this statement, the Court cited *Gertz v. Robert Welch, Inc.*,[65] where the Court reasoned that "[a]lthough the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate."[66] Therefore, the Court in *Gertz* explained, although not protected for its own sake, false speech must often be afforded First Amendment protection in order to avoid a

---

U.S. 654.

59 Nike Inc. v. Kasky, 539 U.S. 654, 657-58 (2003). The writ of certiorari was dismissed on grounds unrelated to the issue of whether false commercial speech is entitled to any constitutional protection. The three Justices were Stevens, Ginsburg, and Souter.

60 *Id.* at 676, 681 (Kennedy, J., dissenting) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 272 (1964)).

61 *Id.* at 678-79 (Kennedy, J., dissenting).

62 Keimer v. Buena Vista Books, Inc., 89 Cal. Rptr. 2d 781, 786 (Cal. Ct. App. 1999).

63 *Id.*

64 Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974)) (emphasis added).

65 *Id.*

66 Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

chilling effect on true speech.[67] Ironically, the Supreme Court's "no uncertain terms" as claimed in *Keimer*, are terms taken from two Supreme Court opinions that not only explicitly lumped commercial and noncommercial speech together, but also stand for the proposition that false speech *should* be afforded First Amendment protection.

However, even if false commercial speech is entitled to some amount of protection in order to avoid chilling effects, it is still entitled to significantly less protection than noncommercial speech. If the speech at issue in the *A Million Little Pieces* litigation were treated as commercial speech, it is possible that the claims in the lawsuit would have had enough merit to survive a motion to dismiss or summary judgment. However, if the speech at issue were treated as noncommercial speech, the lawsuits would have been dismissed absent an allegation of actual malice.

V. POLICY CONSIDERATIONS

In supporting the proposal that false commercial speech by a publisher regarding the truthfulness of its publication should be treated as noncommercial speech and afforded full First Amendment protection, it is useful to draw upon certain relevant established policy interests. These policy considerations lend strong support for treating the speech in the *A Million Little Pieces* litigation as noncommercial speech and for shielding a publisher from liability unless there is evidence of actual malice. First, the policy justifications provided by the Supreme Court for affording less protection to commercial speech are not applicable to the speech at issue. Second, courts have determined that it is essential when dealing with First Amendment rights that publishers not become guarantors of the accuracy of what they publish.[68] Finally, publishers have an important interest in informing the public of the nature of their books.[69] The following Part will discuss all of these policy considerations in more detail.

A. *Applying the Policy Behind the Commercial Speech Distinction*

The Supreme Court has provided three main reasons why commercial speech may be afforded less First Amendment protection than noncommercial speech. First, the truth of commercial speech is more easily verifiable by its speaker than is noncommercial speech.[70] Second, commercial speech is less

---

67 *Id.* at 323.
68 *See, e.g., id.* at 340.
69 *See, e.g.*, Rand v. Hearst Corp., 298 N.Y.S.2d 405 (N.Y. App. Div. 1969).
70 *Va. State Bd.*, 425 U.S. at 772 n.24.

susceptible to being chilled than other kinds of speech because commercial speakers have strong economic motivations behind their speech.[71] Finally, commercial speech gives rise to commercial harms which, according to the Court, justifies more intensive regulation.[72] The false speech used in promoting *A Million Little Pieces*, however, does not satisfy any of these policy rationales. Therefore, upon closer examination of these three explanations, the justification for affording less First Amendment protection to this speech evaporates.

1. More Easily Verifiable

In *Virginia State Board*, the Supreme Court stated that "[t]he truth of commercial speech . . . may be more easily verifiable by its disseminator" than noncommercial speech because the speaker shares "information about a specific product or service that he himself provides and presumably knows more about that anyone else."[73] The scenario envisioned by the Court was that of a corporation disseminating information about a "product or service that [the corporation itself] provides" such as a pharmacist advertising the prices of prescription drugs.[74] The Supreme Court in *Virginia State Board* specifically contrasted more easily verifiable commercial speech, with the less easily verifiable speech involved in news reporting,[75] in which, as in the present case, there is a publisher, publishing facts that are purported to be true by other sources. This can be illustrated by a hypothetical: If the speech at issue in the case of *A Million Little Pieces* was a false claim in advertising by the publisher that all of its books were printed on 100% recycled paper, then the "more easily verifiable" rationale would be significantly more applicable. However, the speech that was complained of in the *A Million Little Pieces* litigation was speech that attested to the underlying truthfulness of the contents of the book. Such speech is only verifiable by double-checking the entire contents of the book, which by definition makes this speech just as difficult to verify as typical noncommercial speech.

2. Less Susceptible to Being Chilled

According to the Supreme Court in *Virginia State Board*, commercial speech is less susceptible to being chilled than noncommercial speech.[76] Commercial speech is hardier than

---

71 *Id.*
72 City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 426 n.1 (1993).
73 *Va. State Bd.*, 425 U.S. at 772 n.24.
74 *Id.*
75 *Id.*
76 *Id.*

other kinds of speech because commercial speakers have an economic incentive to speak and advertising is the "sine qua non of commercial profits."[77] Presumably, whereas noncommercial speakers would self-censor themselves in order to avoid costly litigation, the strong monetary incentives in the commercial setting would counteract any chilling effect that might otherwise occur from regulation.

If the speech at issue in the case of *A Million Little Pieces* was treated as commercial speech, however, the chilling effects would be far more significant than in normal commercial speech contexts. The chilling effects would be much more similar to the chilling that would occur if false noncommercial speech were afforded no First Amendment protection. If the speech at issue was merely a statement as to how the publisher's books were printed, then the chilling effect would conform with the rationale put forth by the Supreme Court. But the speech at issue attests to the truthfulness of the contents of the book. Holding a publisher liable for such statements is akin to holding the publisher liable for the accuracy of the underlying speech in the book. Liability would result in a chilling effect on the fully protected contents of the book, which is exactly the speech that the Supreme Court stressed should not be chilled in the noncommercial context.

It may be argued that rather than allowing a chilling effect on the contents of their books, publishers may avoid liability by not labeling their books with classifications such as non-fiction, memoir, or autobiography, unless they are willing to be held responsible for the accuracy of the book. Or, it may further be argued that publishers may escape liability by printing a warning or disclaimer on every book published. However, as the Ninth Circuit in *Winter v. G.P. Putnam's Sons* pointed out, forcing a publisher to print a warning in the event the information in the book may not be relied upon would effectively force the publisher to independently investigate the accuracy of the text.[78] Forcing publishers to refrain from printing words such as "memoir" or "autobiography" if the information in the book may not be relied upon would have the same effect.

In addition, pressure on publishers to avoid using certain genre classifications would have a serious impact on a publisher's right and ability to classify the nature of its books. It is certainly an undesirable result if book publishers no longer consider it safe to classify their books into genres for fear that doing so may give rise to a lawsuit. It is in the public interest for readers to have

---

[77] *Id.*

[78] Winter v. G.P. Putnam's Sons, 938 F.2d 1033, 1037 (9th Cir. 1991).

information about the type of book a publisher believes it is publishing. Whether the chilling effect is on the underlying contents of books or on publishers' ability to classify their books into different genres,[79] it is still an undesirable chilling, far more serious than the Supreme Court intended when it stated that commercial speech is unlikely to be chilled by reduced First Amendment protection.

3. Preventing Commercial Harms

In *Cincinnati v. Discovery Network, Inc.*, the Supreme Court provided the third rationale for affording less protection to commercial speech, stating that "the interest in preventing commercial harms justifies more intensive regulation of commercial speech than noncommercial speech."[80] This begs the question of what exactly is the harm at stake in this situation. Is the harm for purchasers of *A Million Little Pieces* that in a commercial setting they did not get what they bargained for? The commonsense answer appears to be no. If, for example, a book labeled as fiction contained significant portions that were found to be based on the author's real life experiences, the perceived harm would not be the same as in the case of *A Million Little Pieces,* and it is doubtful that any lawsuits would result. More plausibly, the perceived harm here arose when the First Amendment protected speech within the book that readers expected to be true turned out to be untrue, and *not* that the harm was a misrepresentation to the consumer of the book's genre classification. Any harm here is identical to the harm caused to readers of a newspaper who believe a factual error that they later find out is untrue, or readers of an American history book who later learn that their beliefs about the country were misinformed. And above all, the harm here is certainly less than that complained of in *Winter v. G.P. Putnam's Sons*, where a mushroom enthusiast became seriously ill in reliance on information found in *The Encyclopedia of Mushrooms*, but nonetheless no liability was found on the part of the publisher.[81]

In sum, none of the reasons put forth by the Supreme Court to justify separate treatment of commercial speech under the First Amendment are applicable to false commercial speech by a publisher regarding the truthfulness or accuracy of its publication. As such, there remains no justification for treating such speech

---

[79] Most likely, the chilling effect would be on both the classification of books and the underlying content of those books.

[80] City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 426 n.21 (1993).

[81] *Winter*, 938 F.2d 1033.

the same as other commercial speech. Rather, such speech should be entitled to the full First Amendment protection afforded to noncommercial speech. Therefore, if the litigation arising over *A Million Little Pieces* had gone to trial, the complained of speech should have been afforded full First Amendment protection.

B. *Publishers Should Not Be Guarantors of the Accuracy of What They Publish*

In order to safeguard the freedoms upheld by the First Amendment, publishers should not be held accountable as the guarantors of the accuracy of what they publish. This principle is particularly relevant to the litigation over *A Million Little Pieces*, as all of the complained of speech—"memoir," "non-fiction," "autobiographical," "brutally honest," and "an uncommonly genuine account"—are various ways of conveying the fact that the contents of the book were true. If a publisher is subject to liability if such speech is false, then, in effect, the publisher is being held as the guarantor of the accuracy of the contents of the book.

The Supreme Court wrote in *Gertz*: "[A] rule . . . that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship."[82] Similarly, the Ninth Circuit, in *Winter v. G.P. Putnam's Sons*, held that the First Amendment precluded imposing liability on a publisher for factual inaccuracies contained in a book, because a book publisher does not have a duty to independently investigate the accuracy of the contents of the books it publishes.[83] The court stated:

> We conclude that the defendants have no duty to investigate the accuracy of the contents of the books it publishes . . . . Indeed the cases uniformly refuse to impose such a duty. Were we tempted to create this duty, the gentle tug of the First Amendment and the values embodied therein would remind us of the social costs.[84]

In *William O'Neil*, the court stated that if

> "editorial speech can form the basis for a . . . claim simply because there was a factual error, then the publication of *any* work of nonfiction—including articles in magazines, newspapers, works of literary criticism or financial analysis—would expose a publisher to liability . . . any time there is a factual error, defamatory or not."[85]

---

[82] Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

[83] *Winter*, 938 F.2d at 1037.

[84] *Id.*

[85] William O'Neil & Co. v. Validea.com, Inc., 202 F. Supp. 2d 1113, 1121 (C.D. Cal. 2002) (quoting Def.'s Reply to Motion to Dismiss at 4).

C. *Publishers' Interest in Informing the Public of the Nature of Their Books*

Publishers have an interest in being free to inform the public of the nature of their books.[86] The court in *Rand v. Hearst Corp.* sought to avoid what it saw as "an impermissible restriction on . . . the right of a publisher in informing the public of the nature of his book."[87] This interest appears to be specific to publishers, above and beyond any general interest that a company may have in informing the public of the nature of its products.

It should be noted that this policy interest may be limited in its applicability since courts mainly refer to this interest when considering right of publicity claims or claims of misappropriation of a public figure's identity. At least according to the court in *Keimer*, the right of publicity in California has not been held to outweigh the value of free expression, whereas "the right of California consumers to be free from deceptive . . . advertising has been held to be sufficiently important to outweigh the unfettered right to free expression."[88] Nonetheless, it still reflects an important interest on the part of publishers, unique from other commercial actors.

VI. PROPOSED TREATMENT OF FALSE COMMERCIAL SPEECH BY A PUBLISHER REGARDING THE TRUTHFULNESS OF ITS PUBLICATION

The litigation arising over James Frey's *A Million Little Pieces* has inadvertently highlighted a very particular type of speech that deserves special treatment under the First Amendment. The speech at issue in the litigation can be described as false speech by a publisher regarding the truthfulness of its publication. Based on the Supreme Court's stated justifications for affording less First Amendment protection to commercial speech, as well as the other policy considerations discussed above, this article proposes that false commercial speech by a publisher regarding the truthfulness of its publication should be treated the same as noncommercial speech, which is afforded full First Amendment protection.[89] As such, a publisher would only be held liable for the false speech if it

---

86 Rand v. Hearst Corp., 298 N.Y.S.2d 405, 412 (N.Y. App. Div. 1969).

87 *Id.*

88 Keimer v. Buena Vista Books, Inc., 89 Cal. Rptr. 2d 786, 789 (citing People v. Superior Court (Olson), 157 Cal. Rptr. 628, 638 (Cal. Ct. App. 1979)).

89 Should a critic of this proposal argue that all false commercial speech should be dealt with under the same legal standard without exception, the goal of this article could alternatively be achieved by simply deeming all speech by a publisher regarding the truthfulness of its publication as noncommercial, without regard to whether such speech appears in an advertisement or otherwise satisfies the *Bolger* test of commerciality. The distinction between the two alternatives is merely a matter of semantics, as both proposals would result in affording the speech at issue full First Amendment protection.

was found to have acted with actual malice.

In addition to referring to a book as a memoir, non-fiction, or an autobiography, the category of speech implicated by this proposal would include describing a book as a textbook, guide, map, encyclopedia, news, "true story," or any other classification that implies that the contents of the book are true and accurate. The actual malice standard that would apply would prevent a publisher from intentionally publishing false information, or, for example, from publishing a memoir of a made-up character that the publisher knows to be completely fictitious.

Of the three main reasons provided by the Supreme Court to justify affording less First Amendment protection to commercial speech, none applies to the category of speech outlined above. False commercial speech by a publisher regarding the truthfulness of its publication is not easily verifiable, is not resistant to chilling effects, and does not cause significant commercial harms.

Absent the above proposal, publishers would either be forced to become guarantors of the accuracy of any non-fiction materials that they publish, or would be forced to completely refrain from categorizing and labeling any non-fiction works. In either scenario, the result is extremely contrary to the public interest and has devastatingly chilling effects on free expression.

Therefore, regardless of whether the speech appears in a completely commercial setting such as a paid advertisement, false speech by a publisher regarding the truthfulness of its publication should be treated the same as noncommercial speech under the First Amendment, requiring an actual malice standard. Therefore, if the litigation against the publisher of *A Million Little Pieces* had continued without settlement, absent a convincing allegation of actual malice, the lawsuits should have been dismissed.

VII. CONCLUSION

When the Supreme Court first discussed the justifications for treating commercial speech separately from noncommercial speech in *Virginia State Board*, the Court referred to the "commonsense differences"[90] that exist between the two types of speech. Here, commonsense instructs that the classification of a book into the genre of non-fiction is not a form of commercial speech. Commonsense requires that lawsuits against publishers based on false speech that does no more than attest to the truthful

[90] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 772 n.24 (1976).

nature of an underlying book should not be allowed absent a showing of actual malice. Finally, commonsense predicts that imposing liability in the litigation over James Frey's book would have had a serious chilling effect on the exercise of free speech, opening the door to a crumbling of the First Amendment that, if left unchecked, could eventually leave us with nothing but a million little pieces.