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The Visual Artist and the Law of Defamation

Robert C. Lind*

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I. INTRODUCTION

The law of defamation protects a person's professional and personal reputation. A visual artist may find himself involved in this area of the law either as a plaintiff, suing for damage to his reputation, or as a defendant, who is being sued for injuring the reputation of another. As a possible plaintiff, the visual artist must understand the difficulties involved in bringing a successful action in defamation. As a possible defendant, the visual artist must be aware of the legal protection afforded him. However, he must also be informed as to the nature of the Pyrrhic victory he may win after expending a good deal of time and money defending himself.¹

The area of defamation law is fairly complex, involving demanding elements of proof for plaintiffs as well as a number of defenses and constitutional protections afforded to defendants.² The United States

¹ Unlike authors, publishers, and broadcasters, most artists will not have an insurance policy designed to protect them against liability for defamation. Thus, the artist is left open, not only to the possibility of a large verdict, but also the great expense associated with defending against a defamation lawsuit. *See generally* ROBERT D. SACK & SANDRA S. BARON, *LIBEL, SLANDER, AND RELATED PROBLEMS* 821-33 (2d ed. 1994); Peter H. Karlen, *Artists and Insurance*, in *THE VISUAL ARTIST'S BUSINESS AND LEGAL GUIDE* 269 (Gregory T. Victoroff ed., 1994).

² Although the torts of libel and slander are creations of state law, the First Amendment protection of speech has created a federal constitutional defense. This has brought about an interplay between state and federal law that is at times confusing. *See generally* DAVID A. ELDER, *DEFAMATION: A LAWYER'S GUIDE* (1993); LAURENCE H. ELDREDGE, *THE LAW OF DEFAMATION* (1978); REX S. HEINKE, *MEDIA LAW* § 2 (1994); NEIL J. ROSINI, *THE PRACTICAL GUIDE TO LIBEL LAW* (1991); SACK & BARON, *supra* note 1; BRUCE W. SANFORD, *LIBEL AND PRIVACY* (2d ed. 1993); RODNEY A. SMOLLA, *LAW OF DEFAMATION* (1994).

Constitution does not protect the reputational interests of plaintiffs in defamation actions.³ However, defendants in defamation cases, particularly media defendants, may rely on the First Amendment to prevent the self-censorship that could result from defamation suits unhindered by constitutional protections of speech and the press.

Because the visual artist places his work before the public, is engaged in a business, and is often active in social settings and public commentary, the artist may find himself a plaintiff, as the subject of a defamatory statement that causes him injury. Unflattering statements made about an artist's work that reflect poorly on his abilities as an artist or maligning statements concerning a well-known artist will most likely have to be suffered without legal redress.⁴

On the other hand, the artist may find himself a defendant if he makes statements or creates works of art that others may find

³ A person's reputation is not protected by the United States Constitution, *Paul v. Davis*, 424 U.S. 693, 712 (1976), though the Supreme Court has recognized that "society has a pervasive and strong interest in preventing and redressing attacks upon reputation." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 22 (1990) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966)). Some state constitutions have been interpreted as granting constitutional protection to an individual's reputation. See *Brown v. Kelly Broadcasting Co.*, 48 Cal. 3d 711, 746, 771 P.2d 406, 427 (1989) ("[Article I, § 2 of the California Constitution] makes clear that the right to speech is not unfettered and reflects a considered determination that the individual's interest in reputation is worthy of constitutional protection."); *Troman v. Wood*, 340 N.E.2d 292, 297 (Ill. 1975) ("The freedom of speech provisions of both our former and present constitutions (Const. of 1870, art. II, § 4; Const. of 1970, art. I, § 4) recognize the interest of the individual in the protection of his reputation, for they provide that the exercise of the right to speak freely shall not relieve the speaker from responsibility for his abuse of that right."); *Gobin v. Globe Publishing Co.*, 531 P.2d 76, 83-84 (Kan. 1975); *McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882, 886 (Ky. 1981); *Madison v. Yunker*, 589 P.2d 126, 129-30 (Mont. 1978).

⁴ But see Katherine Bishop, *The Eyes Have It: Waif Paintings Are Back by Popular Demand*, SEATTLE POST-INTELLIGENCER, Mar. 5, 1992, at C3, which discusses the claim by Margaret Keane that it was she, and not her former husband, who painted the "haunted, saucer-eyed waifs" which were popular in the 1960s. After her former husband, Walter Keane, stated in a newspaper interview that he was the creator of the waif paintings, she sued him for libel. During the trial she executed a waif painting in front of the jury in less than an hour. The defendant declined to create a similar painting, citing a sore shoulder. The jury found in Ms. Keane's favor with a \$4 million verdict. However, the damage award was later overturned as "grossly excessive." *Keane v. Keane*, No. 87-1741, 1990 WL 2874 (9th Cir. Jan. 18, 1990) (unpublished disposition).

defamatory.⁵ The nature of art is to reflect upon issues of the day. This oftentimes requires comment regarding individuals, particularly those with political, social or economic power.⁶

The law of defamation is traditionally comprised of two torts: libel and slander. If the defamatory statement was written, sculpted, printed or painted, the injured party can sue for libel.⁷ If the

⁵ See, e.g., Eve Zibart, *Nightlife—French Quarter Toujours Gai?*, WASH. POST, Sept. 6, 1991, at N13 (After William Glasgow, a self-described “family life” defender, complained to a state liquor agency about four drawings of male nudes in a bar, the tavern’s owner painted boxer shorts on the drawings, one of which was emblazoned with the words, “Glasgow Cover-Ups.” Glasgow filed a libel action against the owner, which was later dismissed. As part of a settlement of the owner’s legal costs, Glasgow agreed to make a contribution to an AIDS clinic that dealt mostly with gay men.); *NW Tavern Owner Agrees to Pay \$5,000 to Policeman*, OREGONIAN, Oct. 31, 1991, at C4 (After a physical confrontation in defendant’s tavern occurred as a result of police officer Rocky Balada’s attempt to arrest defendant for public urination, the defendant displayed in his tavern a painting of a police officer, labeled “Rocky,” using excessive force. The police officer suit against the tavern owner for defamation was settled for \$5000, the painting at issue, and a letter of apology.)

⁶ See *Sefick v. City of Chicago*, 485 F. Supp. 644 (N.D. Ill. 1979) (holding that a sculpture entitled “The Bilandics” which satirized the failure of the mayor of Chicago to act in the face of a major snow storm that crippled the city was unlawfully removed from display in the city hall); John Brennan, *Sports Talk*, THE RECORD, May 14, 1991, at D2 (Two New York Mets baseball players sued a toy company for defamation after the company started producing a line of overweight blowup dolls with the players’ likenesses painted on them.)

⁷ “Libels are generally in writing or printing, but this is not necessary; the defamatory matter may be conveyed in some other permanent form. For instance, a statue, a caricature, an effigy, chalk marks on a wall, signs, or pictures may constitute a libel.” *Monson v. Tussauds Ltd.*, 1 Q.B. 671, 692 (1894) (Lopes, L.J.); CAL. CIV. CODE § 45 (West 1982) (“Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye. . . .”); RESTATEMENT (SECOND) OF TORTS § 568(1) (1977) (“Libel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication which has the potentially harmful qualities characteristic of written or printed words.”). Where the defamatory statement is contained in a medium that conveys the statement for some substantial period of time, it is deemed actionable in libel. ELDREDGE, *supra* note 2, at 80; see, e.g., *Burton v. Crowell Pub. Co.*, 82 F.2d 154 (2d Cir. 1936) (holding that a photograph used in an advertisement, which due to an optical illusion exposed the plaintiff to ridicule, was libelous); *Dunlop v. Dunlop Rubber Co.*, 1 I.R. 280 (1920) (holding that a trademark, which depicted plaintiff “in an exaggeratedly foppish manner,” was libelous); *Monson*, 1 Q.B. 671 (holding that the placement of a wax figure of plaintiff, who was recently tried without conviction for murder, with a group of murderers and in proximity to the celebrated Chamber of Horrors exhibit in Madam Tussaud’s Museum was libelous); *Du Bost v. Beresford*, 2 Camp. 511 (1810) (holding that a painting titled, “La Belle et la Bête,” or “Beauty and the

defamatory statement was spoken, the injured party may sue for slander.⁸

II. THE VISUAL ARTIST AS PLAINTIFF

Plaintiffs must meet stringent requirements to prove a defamation case. Where the artist finds himself the victim of an attack, he may consider an action for libel or slander. Such actions require that the plaintiff prove the following elements: 1) a defamatory statement, 2) of purported fact, 3) regarding the plaintiff, 4) made by the defendant, and 5) communicated to a third person. In certain situations the plaintiff will have to prove out-of-pocket loss or other damages resulting from the defamatory statement. Even if the plaintiff meets these requirements, a defendant may ultimately defeat the lawsuit by relying on one of several affirmative defenses.⁹

A. *The Defendant Must Utter a Defamatory Statement*

To be actionable, the defendant's statement must be defamatory. A statement is defamatory if it tends to injure the reputation of the plaintiff, that is, if it exposes the plaintiff to hatred, contempt or ridicule, causes him to be shunned or avoided, or has a tendency to

Beast," was a libel upon "a gentleman of fashion and his lady.").

⁸ "Slander consists of the publication of defamatory matter by spoken words, transitory gestures, or by any form of communication other than those stated in Subsection (1)." RESTATEMENT (SECOND) OF TORTS § 568(2) (1977). In some jurisdictions, defamatory radio and television broadcasts are deemed to be slander. *See, e.g.*, CAL. CIV. CODE § 46 (West 1982). Other jurisdictions treat defamatory broadcasts as libel. *See, e.g.*, ILL. ANN. STAT. ch. 38, § 27-1 (1964). Apart from historical reasons, the distinction between libel and slander primarily concerns the proof of damages required of a plaintiff in a defamation action. *See generally* SMOLLA, *supra* note 2, § 1.04[4].

⁹ These defenses will be discussed when the artist is viewed as the defendant, *infra* discussion beginning p. 94.

injure him in his occupation.¹⁰ It is not necessary that the general public would find the statement to be defamatory, but it must be proven that the statement would be deemed defamatory by at least a substantial and respectable group of persons.¹¹ It is possible that a statement could be made about an artist that would not be deemed defamatory by the general public, but the artist's peers may think less of him upon hearing or seeing the statement. As such, it would be actionable.¹²

To be defamatory, a statement is not required to be an explicit statement impugning the subject's moral character. A statement may be defamatory due to the insinuations it makes,¹³ unauthorized changes made to otherwise innocuous photographs,¹⁴ the context in

¹⁰ CAL. CIV. CODE § 45 (West 1982); see RESTATEMENT (SECOND) OF TORTS § 559 (1977) ("A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."). Often the question of whether a statement is defamatory is difficult to determine. Statements may be ambiguous, or have a dual meaning, particularly when made in an artistic context. This ambiguity, however, does not necessarily benefit the author of the statement. In most jurisdictions, any statement that is capable of carrying a defamatory meaning may be deemed actionable. SACK & BARON, *supra* note 1, § 2.4.16; SANFORD, *supra* note 2, § 4.7. *But see* John v. Tribune Co., 181 N.E.2d 105 (Ill.), *cert. denied*, 371 U.S. 877 (1962) (Under the "innocent construction rule. . . words allegedly libelous that are capable of being read innocently must be so read and declared nonactionable as a matter of law."). An artist who is considering making a statement about an identifiable person, either in print, on canvass or in a three dimensional work, must take into account that a jury may decide in what manner a statement can be interpreted.

¹¹ Grant v. Reader's Digest Ass'n, 151 F.2d 733, 735 (2d Cir. 1945), *cert. denied*, 371 U.S. 797 (1946); RESTATEMENT (SECOND) OF TORTS § 559 cmt. e (1977).

¹² See Kelly v. Loew's, Inc., 76 F. Supp. 473, 486 (D. Mass. 1948) (The court held that the portrayal of plaintiff in the motion picture "They Were Expendable" would be deemed defamatory by his fellow naval officers. "[I]f the community or audience includes a professional group to which the subject of the statement belongs, the question is the effect of the statement upon that group with its special professional standards.").

¹³ Nicole A. LaBarbera, *The Art of Insinuation: Defamation by Implication*, 58 FORDHAM L. REV. 677 (1990).

¹⁴ Several libel cases have been brought against photographers or publications that disseminated photographs. Photography provides the medium for an increasing degree of adaptation. This is particularly true with digital technology. Digital editing presents an increased risk of defamation by permitting undetected changes to be made to a preexisting photograph. While photographic alteration has been possible in the past, the changes to a photograph made possible through digitization make it easier to alter a photograph or combine it with another photograph to depict its subject in such a manner as to make it defamatory.

which a photograph appears,¹⁵ or additional statements that create a defamatory meaning where there otherwise was none.¹⁶

See Robert C. Lind, *Artworks in the Digital Era*, in THE VISUAL ARTIST'S BUSINESS AND LEGAL GUIDE 230, 231 (Gregory T. Victoroff ed., 1994). This malleability is a two-edged sword. As artist Scott Mutter has written: "Photographs don't lie . . . unless you alter them. One kind of alteration produces the lie, an attempt to defame, to incriminate, to alter history. Another kind produces art." SCOTT MUTTER, *SURRATIONAL IMAGES* (1992), reviewed in Duane Braley, *Albums Show Hollywood Stars in 3D and, of Course, Nature*, MPLS. STAR TRIBUNE, Dec. 6, 1992, at 10F. Photographer Annie Leibovitz has recently sued Paramount Pictures claiming that Paramount made an unauthorized use of her famous photograph of a naked pregnant Demi Moore by superimposing the face of actor Leslie Nielsen on her photograph and using it to promote Paramount's movie, *Naked Gun 33 1/3: The Final Insult*. Sean Monique Faustina, *Leibovitz Sues Paramount*, L.A. TIMES, Dec. 24, 1994, at F2.

¹⁵ While the adage, "The camera never lies" is generally true, there are several exceptions that may produce a defamatory impression. Subjects of photographs taken while they were nude have sued for defamation when the photograph was published in a context in which it could be understood the subject had voluntarily posed for such a use. See, e.g., *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985), cert. denied, 475 U.S. 1094 (1986); *Nude Photo Album Worries Women*, SUN SENTINEL, Aug. 7, 1991, at 8A (A photographic subject sued a photo processing lab for invasion of privacy and defamation after she learned that lab employees had compiled a book containing 300 photographs of women in the nude and displayed the book at parties). Subjects of photographs have successfully sued where the camera has created an optical illusion that injured the subject's reputation. See, e.g., *Burton v. Crowell Pub. Co.*, 82 F.2d 154 (2d Cir. 1936).

¹⁶ Otherwise innocent photographs can be used in connection with an article or caption that provides a defamatory meaning. See, e.g., *Lawyer Suing Newspaper Wins \$75,000*, BOSTON GLOBE, May 31, 1990, at 50 (An attorney pictured with a defendant in a racketeering case succeeded in a libel action, claiming his presence at the courthouse was not properly explained.); *The Reliable Source*, WASH. POST, Nov. 18, 1992, at C3 (Arnold Schwarzenegger settled a libel suit brought against the British Sunday Mirror for its publishing a photograph of him in a gymnasium shower room under the headline: "Arnie Gay Snaps Shocker"); Christine Pickering, *King Regrets Bptcy, Wants to Repay*, FRESNO BEE, July 30, 1992, at A2 (Michael Jackson obtained a British court injunction prohibiting republication by the London Daily Mirror of a photograph Jackson claims was retouched and published with the caption "Scarface" along with a story that stated Jackson's face was badly damaged from too much plastic surgery.); K. Heller, PHILA. INQUIRER, July 30, 1992, at C2 (London Daily Mirror filed a libel suit against Michael Jackson for his statements that the Jackson "Scarface" photograph was touched up and that the Mirror's earlier story was untrue.). Model Anna Nicole Smith recently sued *New York* magazine claiming she was duped into posing for an unflattering cover photo for an article entitled "White Trash Nation." Smith, who allegedly thought she was posing for a "gag photo," "was pictured squatting in a halter top and cutoff jeans and scarfing a bagful of snack food between her legs." Smith claimed the photograph damaged her reputation. Mary Huzinec, *Passages*, PEOPLE WEEKLY, Nov. 7, 1994, at 95; Richard Roeper, *Telling a Year by its Covers*, CHICAGO SUN-TIMES, Dec. 25, 1994, at Show 2.

Although the statement must reasonably be interpreted as stating actual facts about the plaintiff,¹⁷ it is not necessary that the recipient of the statement believed it to be true.¹⁸ It is sufficient that the recipient understood its defamatory meaning.¹⁹ Statements that are merely unpleasant, hostile, annoying, or embarrassing to the plaintiff are not actionable.²⁰

On rare occasions, a plaintiff may not have the requisite

¹⁷ When *Hustler Magazine* published an ad parody which implied that Reverend Jerry Falwell's "first time" was with his mother in an outhouse, the United States Supreme Court held that the statement could not reasonably be interpreted as stating actual facts about Reverend Falwell and was not actionable. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

¹⁸ "It is not necessary that anyone believe [the defamatory words] to be true, since the fact that such words are in circulation at all concerning the plaintiff must be to some extent injurious to his reputation—although obviously the absence of belief will bear upon the amount of the damages. There must be, however, a defamatory meaning conveyed. Thus it is always open to the defendant to show that the words were not understood at all, that they were taken entirely in jest, or that some meaning other than the obvious one was attached by all who heard or read." *Arno v. Stewart*, 245 Cal. App. 2d 955, 963, 54 Cal. Rptr. 392, 397 (1966) (quoting WILLIAM L. PROSSER, *THE LAW OF TORTS* 763-64 (3d ed. 1964)); see also *Polygram Records, Inc. v. Superior Court*, 170 Cal. App. 3d 543, 555, 216 Cal. Rptr. 252, 260 (1985). The failure of recipients of a defamatory statement to believe the statement to be true affects the extent of damages that may be recovered by the plaintiff. *Pirre v. Printing Devs., Inc.*, 468 F. Supp. 1028, 1042 n.20 (S.D.N.Y. 1979).

¹⁹ *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 783 (9th Cir. 1980).

²⁰ HEINKE, *supra* note 2, § 2.5. This common law rule has today been bolstered by the breadth of protection provided to offensive language by the First Amendment. See, e.g., *Cohen v. California*, 403 U.S. 15 (1971) (holding that a jacket emblazoned with the phrase "Fuck the Draft" was protected speech); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (giving offensive visual art constitutional protection).

The First Amendment is not limited to ideas, statements, or positions which are accepted; which are not outrageous; which are decent and popular; which are constructive or have some redeeming element; or which do not deviate from community standards and norms; or which are within prevailing religious or moral standards. Although a story may be repugnant in the extreme to an ordinary reader . . . the typical standards and doctrines under the First Amendment must nevertheless be applied. The magazine itself should not have been tried for its moral standards. Again, no matter how great its divergence may seem from prevailing standards, this does not prevent the application of the First Amendment. The First Amendment standards are not adjusted to a particular type of publication or particular subject matter.

Pring v. Penthouse Int'l, Ltd., 695 F.2d 438, 443 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983).

reputational interest to bring a defamation action. The art world has its share of shady characters with questionable reputations.²¹ Such a person may be "libel proof" in that he no longer has a good reputation capable of being harmed.²²

Another somewhat unique situation may occur when an artist finds herself the subject of a joke or humorous commentary. This situation tends to arise where the artist or his work has become a cultural icon, or when the artist's work is controversial or is the hallmark of a new school of thought, social dispute, or artistic movement.

Works of visual art, as well as comedy routines, films, television, and stage shows, at times present the issue of whether humorous statements can be understood as being defamatory and, therefore, actionable. While courts have declined to adopt an absolute protection of comedy from defamation actions,²³ they have been strongly protective of humorous statements. Where the statement at issue is humorous it is generally nonactionable, so long as its comedic nature is understood by those viewing or hearing it.²⁴ If the audience understands that the statement is poking fun at someone or is making light of a particular situation, the audience does not understand the statement to have a defamatory meaning, therefore the statement is not

²¹ See generally LEE CATTERALL, *THE GREAT DALI ART FRAUD & OTHER DECEPTIONS* (1992); *FAKE? THE ART OF DECEPTION* (Mark Jones ed., 1990).

²² See, e.g., *Wynberg v. National Enquirer, Inc.*, 564 F. Supp. 924, 927-29 (C.D. Cal. 1982) (holding that a former boyfriend of Elizabeth Taylor had a bad reputation for taking advantage of women that precluded him from successfully suing for injury to his reputation); *Ray v. Time, Inc.*, 452 F. Supp. 618, 622 (W.D. Tenn. 1976) (holding that the convicted killer of Martin Luther King, Jr. was "libel-proof"). Some courts have adopted the "incremental harm doctrine" which holds that if a communication contains sufficient true or unchallenged derogatory information to seriously damage the plaintiff's reputation, an additional false defamatory statement which does not materially add to the overall defamatory impact of the communication is not actionable. See, e.g., *Sharon v. Time, Inc.*, 575 F. Supp. 1162 (S.D.N.Y. 1983). *Contra* *Masson v. New Yorker Magazine, Inc.*, 960 F.2d 896, 898-99 (9th Cir. 1993). See SACK & BARON, *supra* note 1, § 2.4.18.

²³ See *Polygram Records, Inc. v. Superior Court*, 170 Cal. App. 3d 543, 547, 216 Cal. Rptr. 252, 257-58 (1985).

²⁴ "As long as it is recognizable to the average reader as a joke, it must be protected. . . ." *San Francisco Bay Guardian, Inc. v. Superior Court*, 17 Cal. App. 4th 655, 662, 21 Cal. Rptr. 2d 464, 468 (1993).

actionable.²⁵

In determining liability in these cases, courts place differing emphasis on context and content. Most courts tend to emphasize the context in which the humorous statement was made.²⁶ Although not absolutely determinative, the more comedic the setting, the more likely the statement will not be actionable.²⁷ Political cartoons, caricatures,

²⁵ The same law applies when the artist creates a work that makes a humorous commentary at an individual's expense. The Los Angeles Times and its political cartoonist, Paul Conrad, were unsuccessfully sued by then Los Angeles Mayor Sam Yorty for a cartoon lampooning his desire to be appointed to President Nixon's cabinet. The cartoon depicted the plaintiff as he is about to be placed into a straightjacket and taken from his office desk by medical orderlies. The caption read, "I've got to go now . . . I've been appointed Secretary of Defense and the Secret Service men are here!" Although the court held that a cartoon could be libelous if it presented as fact defamatory material that is false, it found the Yorty cartoon to be "[n]o more than rhetorical hyperbole, a vigorous expression of opinion by those who considered Mayor Yorty's aspiration for high national office preposterous." As such it was a form of protected editorial comment that was not reasonably susceptible to a defamatory meaning. *Yorty v. Chandler*, 13 Cal. App. 3d 467, 476-77, 91 Cal. Rptr. 709, 715 (1970). See generally ELDER, *supra* note 2, § 8:8[J] ("The courts have generally taken the position that '[c]artoons, by their very nature, are rhetorical hyperbole or exaggerated statements of opinion' which cannot be reasonably construed by the average reader as literal depictions of actual situations.") (footnotes omitted); Donna Stricof Kramer, Note, *Drawing Fire: The Proliferation of Libel Suits Against Cartoonists*, 5 CARDOZO ARTS & ENT. L.J. 573 (1986); Gregory R. Naron, Note, *With Malice Toward All: The Political Cartoon and the Law of Libel*, 15 COLUM.-VLA J.L. & ARTS 93 (1990). But see *Brown v. Harrington*, 95 N.E. 655 (Mass. 1911) (holding that the publication of a cartoon depicting emaciated inmates being ill-fed, next to an article that accused the plaintiff-mayor of ill-treating the city's dependent poor, constituted actionable libel. Published at a time when First Amendment protection was not afforded to state laws, including state defamation law, the court had no difficulty in determining that the recipient of the statement would understand it as having a defamatory meaning. "It represented the mayor as officially and personally responsible for a great wrong upon the dependent poor of the city of Lowell, and for bringing the city into disrepute for a failure to support its paupers properly."). *Id.*

²⁶ See *Polygram Records, Inc. v. Superior Court*, 170 Cal. App. 3d 543, 551, 216 Cal. Rptr. 252, 257 (1985) ("An obvious joke, told during an obvious comedy performance, is a form of irrelevant social commentary, is not taken seriously, and thus does not affect reputation in a manner actionable in defamation.") (quoting petitioner's brief); *Raye v. Letterman*, 14 Media L. Rep. (BNA) 2047, 2047 (Cal. Super. Ct. 1987) ("A viewing of the cited passage of the ['Late Night'] broadcast, in context, makes it clear that no one could reasonably understand it in a defamatory sense. The remark was delivered as a joke, apparently intended as a parody.")

²⁷ "In any context that creates a reasonable expectation of comedy, the effort is more likely to be recognized as humor the more ridiculous and unlikely the exaggeration." SANFORD, *supra* note 2, at 193.

or comic strips are generally presented in a context where the audience expects to be entertained. Other courts emphasize the content of the statement at issue.²⁸ The content of the statement assists both in determining whether the statement could be understood in a defamatory sense as well as whether the statement could be viewed as a purported fact or an opinion.²⁹ Courts also may focus on the performer's intent to injure at the time the statement was made.³⁰ Some courts look to several of these factors in conjunction to determine liability.³¹

B. *The Defendant's Statement Must Be of Purported Fact*

To be actionable, the statement must be regarding a purported fact, not merely the stated opinion of the defendant. It must be a

²⁸ See, e.g., *Frank v. NBC*, 506 N.Y.S.2d 869, 873 (App. Div. 1986) (No action for defamation will lie "where the allegedly defamatory statements were patently humorous, devoid of serious meaning or intent and impossible of being reasonably understood otherwise.").

²⁹ *Id.* at 875 (stating that the "lunacy of the statements themselves" was a factor in finding the statements not defamatory as a matter of law). See *infra* part II.B.

³⁰ See, e.g., *Arno v. Stewart*, 245 Cal. App. 2d 955, 962, 54 Cal. Rptr. 392, 396 (1966) ("Resort to humor will not preclude responsibility for defamatory matter, but a distinction may be drawn between jocular utterances which are intended to be and are susceptible of a defamatory interpretation; those which are made without intent to defame but which may be susceptible to such an interpretation, and those which are made without intent to defame and which are not reasonably subject to such an interpretation."); *Triggs v. Sun Printing & Publishing Ass'n*, 71 N.E. 739 (N.Y. 1904); *Frank*, 506 N.Y.S.2d at 873, 875 ("[A]uthors of humorous language will be insulated from liability in defamation cases even where the comic attempt pokes fun at an identifiable individual. The line will be crossed, however, when humor is used in an attempt to disguise an intent to injure; at that point a jest no longer merits protection, because it ceases to be a jest.")

³¹ Perhaps the most complete multi-factor test was enunciated by the court in *Freedlander v. Edens Broadcasting, Inc.*, 734 F. Supp. 221 (E.D. Va. 1990), *aff'd*, 923 F.2d 848 (4th Cir. 1991), which dealt with allegedly defamatory lyrics of a satirical song broadcast by a radio station. The court dismissed the action, holding that the song was not defamatory as a matter of law. In addressing the comedic nature of the song, the court opined, "in cases involving comedic expressions, courts must examine the challenged statement in light of its content, its effect on its audience, and the context of its delivery." *Id.* at 228. See also *San Francisco Bay Guardian, Inc. v. Superior Court*, 17 Cal. App. 4th 655, 658-60, 21 Cal. Rptr. 2d 464, 465-66 (1993) (using the "totality of the circumstances" test to find that a letter to the editor which appeared in the April Fool issue of a newspaper was not actionable).

“purported” fact because if it were an actual fact the statement could not be the basis for a defamation action.³² The actionability of a published “opinion” is an issue that has been given a great deal of judicial attention of late. Although several courts had attempted to constitutionalize the determination of fact versus opinion, the United States Supreme Court has found that this issue is to be decided, not under the First Amendment, but by state law. In *Milkovich v. Lorain Journal Co.*,³³ the Court determined that there is no independent federal constitutional defense of opinion in defamation, thereby rejecting the notion of a special First Amendment protection for opinion.³⁴ The *Milkovich* Court did emphasize, however, that its prior decisions had recognized constitutional limitations on the type of speech that may be the subject of defamation actions, “without the

³² Defamatory statements that are true are not actionable. Under the common law, a defamatory statement was presumed to be false. Truth was an affirmative defense that the defendant had the burden of proving. ELDREDGE, *supra* note 2, at 323-38. As discussed *infra* notes 70-71 and accompanying text, today the burden of proving truth or falsity may vary between the plaintiff and defendant. A plaintiff now has the burden of proving the falsity of the defamatory statement whenever the statement deals with a matter of public interest or public concern. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986). In any event, if a statement is substantially true it is not actionable in a suit for libel or slander. See *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516 (1991) (“The common law of libel takes but one approach to the question of falsity, regardless of the form of the communication. It overlooks minor inaccuracies and concentrates upon substantial truth.”) (citations omitted).

³³ 497 U.S. 1 (1990). In *Milkovich*, the plaintiff wrestling coach had sued a newspaper columnist who had suggested in a sports column that the plaintiff had perjured himself in a court proceeding regarding the probation of the plaintiff’s team after an altercation during a wrestling match. The Supreme Court refused to recognize a First Amendment defense of opinion, stating that existing law sufficiently protected defendants in defamation actions. In analyzing the situation in *Milkovich* to determine whether the statements were provably false, the Court considered several factors relied on by earlier courts including the type of language used, the general tenor of the article and whether the allegation is “sufficiently factual to be susceptible of being proved true or false.” *Id.* at 21.

³⁴ This notion was based on language in the Court’s opinion in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), which stated, “however pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.” *Id.* at 339-40 (footnote omitted). In *Milkovich*, the Court interpreted this language as “merely a reiteration of Justice Holmes’ classic ‘marketplace of ideas’ concept. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (dissenting opinion).” 497 U.S. 1, 18. The *Milkovich* decision does not preclude a court from finding constitutional protection of opinion in a state constitution. See, e.g., *Immuno AG v. Moor-Jankowski*, 567 N.E.2d 1270, 1278 (N.Y. 1991).

creation of an artificial dichotomy between ‘opinion’ and fact.”³⁵ The Court’s earlier cases had found that statements that are not provable as false,³⁶ or cannot reasonably be interpreted as stating actual facts about an individual,³⁷ cannot be the basis of liability.

The Court held that these earlier cases, along with the constitutional fault and damage requirements of *New York Times Co. v. Sullivan*³⁸ and *Gertz v. Robert Welch, Inc.*,³⁹ and the enhanced appellate review required by *Bose Corp. v. Consumers Union of*

³⁵ 497 U.S. at 19.

³⁶ *Philadelphia Newspapers*, 475 U.S. 767.

³⁷ See *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). Therefore, statements that constitute rhetorical hyperbole or name-calling are deemed to be non-actionable opinion. See *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 284-86 (1974) (Referring to nonunion letter carriers as “traitors” and “scabs” in a union newsletter during a continuing organizational drive was found to be opinion because use of pejoratives to manifest the union’s strong disagreement with the views of workers opposing unionization would not lead recipients to understand the statement as charging the plaintiffs with committing the criminal offense of treason.); *Greenbelt Coop. Publishing Ass’n v. Bresler*, 398 U.S. 6, 13-14 (1970) (Referring to a real estate developer’s negotiating tactics with the city as “blackmail” during a city council meeting was found to be non-actionable opinion because recipients of the statement would not understand it as charging the plaintiff with the commission of a criminal offense.)

³⁸ 376 U.S. 254, 279-80 (1964). The Court in *Sullivan* held that a public official who brings a defamation action for a statement involving his public actions must prove the statement was published knowing it to be false, or with reckless disregard of its truth or falsity. *Id.* This “actual malice” was to be proven by convincing clarity, a higher burden of proof than the traditional “preponderance of the evidence” standard in civil cases. *Id.* at 285-86.

³⁹ 418 U.S. 323, 347 (1974). In *Gertz*, the Court clarified the law regarding the ability of public figures to bring defamation actions. The Court had already expanded the “actual malice” requirement to public figures in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). In *Gertz*, the Court rejected the application of the “actual malice” requirement to all defamation cases involving matters of public interest which a plurality of the Court had recognized in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). After *Gertz* the “actual malice” fault requirement was required of those plaintiffs deemed public figures for all purposes and those who are public figures for a limited issue. 418 U.S. at 345. The fault requirement for private individuals were to be determined by individual states, so long as the states did not adopt a strict liability standard. *Id.* at 347. The Court in *Gertz* also instituted constitutional damage requirements. Punitive damages and presumed damages were no longer available without a showing of “actual malice.” *Id.* at 349-50. In addition, if a private person plaintiff had met the state standard of fault without a showing of “actual malice,” the plaintiff was required to prove actual injury. *Id.* at 349-50.

United States, Inc.,⁴⁰ constituted the limit of First Amendment protections granted to defamation defendants.⁴¹ As a result, the determination of the extent to which a published opinion is actionable was a matter left to the discretion of state courts interpreting common law tort doctrine.

Although the law varies from state to state, many generations of state court decisions have provided factors to be used in determining whether a statement is one of fact or of opinion.⁴² The content of the

⁴⁰ 466 U.S. 485 (1984). Ever since the United States Supreme Court constitutionalized the tort of defamation, it recognized that the determination of liability in a defamation action involved facts of constitutional significance which required an appellate court to make an independent examination of the whole record. *Sullivan*, 376 U.S. at 284-86. In *Bose*, the Court held that independent appellate review also applied to the findings of federal trial court judges. "The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" 466 U.S. at 511.

⁴¹ The United States Supreme Court has repeatedly refused to expand the constitutional protections granted to defendants in defamation actions further than those already permitted by *Sullivan* and *Gertz*. In *Herbert v. Lando*, 441 U.S. 153 (1979), the Court refused to grant an "editorial privilege" in defamation actions against the media. In *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), the Court rejected the media argument that the incremental harm doctrine was "compelled as a matter of First Amendment protection for speech." *Id.* This refusal to provide the media with an even more privileged status has been echoed by the California Supreme Court as well. In *Brown v. Kelly Broadcasting Co.*, 48 Cal. 3d 711, 771 P.2d 406 (1989), the court refused to grant a statutory newsworthiness privilege to the media on grounds that the media would claim everything printed or broadcast is newsworthy and on the basis that the United States Supreme Court, in *Sullivan* and *Gertz*, had provided sufficient protection for the media, making further protections unnecessary. See also *Polygram Records, Inc. v. Superior Court*, 170 Cal. App. 3d 543, 552, 216 Cal. Rptr. 252, 257-58 (1985) (refusing to adopt a *per se* rule that the First Amendment absolutely protected humorous statements from defamation suits).

⁴² See SMOLLA, *supra* note 2, § 6.08. California's "totality of the circumstances" test is an example of this multi-factor approach. Prior to *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), the California Supreme Court adopted a test for opinion which focused on the nature and content of the communication taken as a whole. *Baker v. Los Angeles Herald Examiner*, 42 Cal. 3d 254, 721 P.2d 87 (1986), *cert. denied*, 479 U.S. 1032 (1987). Under this approach, the court first focused on the language of the statement, finding that "where the language of the statement is cautiously phrased in terms of apparency, the statement is less likely to be reasonably understood as a statement of fact rather than opinion." *Id.* at 260-61. The court would then look to the context in which the statement was made. This entailed

alleged defamatory statement is of prime importance. The precision and specificity of the language used in the disputed statement is a relevant factor. It is difficult to deem a vague or imprecise statement a "fact."⁴³ For this reason, mere name calling, epithets or rhetorical hyperbole is not actionable.⁴⁴ The more specific the language used,

focusing on several factors: (1) full content of the communication; (2) nature of the communication; (3) knowledge and understanding of the audience; (4) the statement must be construed in light of the whole scope and apparent object of the writer; and (5) the statement must be construed in light of the sense and meaning presumably conveyed to those who read it. *Id.* at 261-62.

The continuing force of this approach in the aftermath of the *Milkovich* decision is not yet known. Some courts have read *Milkovich* as overruling all prior state case law regarding the determination of opinion. *See, e.g.*, *Unelco Corp. v. Rooney*, 912 F.2d 1049, 1053 (9th Cir. 1990), *cert. denied*, 499 U.S. 961 (1991). Other courts have found that *Milkovich* did not have any impact on state law determinations of opinion. *See, e.g.*, *Moyer v. Amador Valley Joint Union High Sch. Dist.*, 225 Cal. App. 3d 720, 275 Cal. Rptr. 495 (1990). Attempts to create a California constitutional protection of opinion have been rejected. *See Weller v. ABC*, 232 Cal. App. 3d 991, 1001, 283 Cal. Rptr. 644, 654 (1991). The California courts are not in agreement as to the current test to be used in "opinion" cases, leaving the continued vitality of *Baker's* "totality of the circumstances" test uncertain. *See, e.g.*, *Edwards v. Hall*, 234 Cal. App. 3d 886, 903, 285 Cal. Rptr. 810, 819-20 (1991) (In "determining whether a false statement is actionable . . . the *Milkovich* court relied on the following three factors: (1) whether '[t]his [was] the sort of loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining [the plaintiff] committed the crime of perjury'; (2) whether 'the general tenor of the article negate[s] this impression'; and (3) whether 'the connotation that [the plaintiff] committed perjury is sufficiently factual to be susceptible of being proved true or false.'" (citations omitted); *Weller*, 232 Cal. App. 3d 991 ("[W]e must determine whether the statements that form the basis of a defamation claim: (1) expressly or impliedly assert a fact that is susceptible to being proved false; and (2) whether the language and tenor is such that it cannot 'reasonably [be] interpreted as stating actual facts.'" (citation and footnotes omitted).

⁴³ *See Ollman v. Evans*, 750 F.2d 970, 979-81, 987 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985) (Referring to a college professor as "an outspoken proponent of political Marxism" is a loosely definable, variously interpretable statement of opinion.) The author of a book that gives practical advice to working journalists tells his readers: "notwithstanding the rules, caveats, signposts and other directives in this book toward the straight and narrow, reports with a tendency to injure reputation need not be dry and lifeless . . . writing with some flair, provided the writing is channeled into certain favored categories like loose, figurative or hyperbolic language, jokes, satire and epithets can actually reduce risk." ROSINI, *supra* note 2, at 143.

⁴⁴ New York artist Paul Georges was unsuccessfully sued by two fellow artists for his use of their likenesses in his painting *The Mugging of the Muse*. The painting depicted the plaintiffs, armed with knives, attempting to assassinate a woman on a city street. The court held that the painting was an allegory using persons and symbols to convey a hidden

the more likely it will be deemed a statement of fact.⁴⁵ Allegations of specific criminal conduct, for example, will not be construed as protected opinion.⁴⁶

The use of cautionary language or words of apparenacy are indications that the statement constituted an opinion.⁴⁷ Therefore, the use of phrases such as "it appears that," "apparently," "in my opinion," or "in my view" may be an indication that the statement was an opinion.⁴⁸ In addition, the verifiability of the statement is a relevant factor. Statements that are not provably false cannot be the basis of liability.⁴⁹ If a statement cannot be plausibly verified—if it cannot be determined whether the statement described an actual

meaning—that the plaintiffs' artistic beliefs and activities are destructive of the arts. As such, it was merely visual rhetorical hyperbole and not actionable. *Silberman v. Georges*, 456 N.Y.S.2d 395, 399 (App. Div. 1982); see Harriette K. Dorsen & Colleen McMahon, *Art as Libel: A Comment on Silberman v. Georges*, 9 COLUM. J. ART & L. 1 (1984).

⁴⁵ See *Ollman*, 750 F.2d at 980 (The court focused on "whether the allegedly defamatory statement has a precise meaning and thus is likely to give rise to clear factual implications," or whether the "statements . . . are 'loosely definable' or 'variously interpretable' [and therefore] cannot in most contexts support an action for defamation."). In *Ollman*, a professor of political science sued two conservative newspaper columnists for statements that he was a Marxist who used his classroom to indoctrinate his students and convert them to socialism. In determining whether the statements in the column were actionable, a fractured Court of Appeals developed a four factor "totality of the circumstances" test which considered: 1) the common usage or meaning of the specific language of the challenged statement itself; 2) the statement's verifiability; 3) the full context of the statement, such as the entire offending article or column; and 4) the broader social context or setting in which the statement appears, such as the type of writing or speech, the atmosphere in which the statement was made, and the location of the article or column in the publication. *Id.* at 979-84.

⁴⁶ See, e.g., *Cianci v. New York Times Publishing Co.*, 639 F.2d 54 (2d Cir. 1980); *Catalano v. Pechous*, 419 N.E.2d 350 (Ill. 1980), *cert. denied*, 451 U.S. 911 (1981); *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 366 N.E.2d 1299 (N.Y.), *cert. denied*, 434 U.S. 969 (1977); *Cushman v. Day*, 602 P.2d 327 (Or. Ct. App. 1979).

⁴⁷ *Gregory v. McDonnell Douglas Corp.*, 17 Cal. 3d 596, 603, 552 P.2d 425, 427 (1976).

⁴⁸ It must be noted that such language is merely a factor to be considered. The use of such language, alone, would not excuse the defamatory nature of the statement. "[I]t would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.'" *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990) (quoting *Cianci*, 639 F.2d at 64).

⁴⁹ *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1304 (8th Cir.) (en banc) (holding that whether prosecution by plaintiff as state Attorney General was motivated by personal revenge was not easily verified), *cert. denied*, 479 U.S. 883 (1986).

event—it cannot be seen as “fact.” For instance, in *McNally v. Yarnall*,⁵⁰ an art historian employed by the Metropolitan Museum of Art to direct the publication of *The Catalogue Raisonne of the Works of John La Farge* was sued by an art collector for statements that stained glass windows claimed by the collector to be the works of La Farge were not authentic. The statements were held to be the personal views of the art historian, which were not capable of being proved false.⁵¹

The context in which the defendant’s statement is made is often relevant to whether the statement is considered to be an opinion or a statement of fact. Artists, as creators of artworks that make statements regarding specific identifiable individuals, benefit from the tendencies of courts to recognize artistic, literary, or poetic license to make comments that in other contexts would be deemed actionable.⁵² The courts will consider the specific context of the statement in relation to the rest of the article or broadcast or the entirety of the artistic work,⁵³ to the headline used, and to the section of the publication in which the statement appears.⁵⁴ Courts will also

⁵⁰ 764 F. Supp. 838 (S.D.N.Y. 1991).

⁵¹ *Id.* at 848.

⁵² See *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 497 (1991) (holding that incorrect quotations are permitted so long as they do not materially alter the statements made); *Baker v. Los Angeles Herald Examiner*, 42 Cal. 3d 254, 263, 721 P.2d 87, 92-93, (1986) (“[I]t has been well understood that ‘a critic may resort to caricature or rhetorical license.’”) (citation omitted), *cert. denied*, 479 U.S. 1032 (1987).

⁵³ The court must “look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed.” *Baker*, 42 Cal. 3d at 261.

⁵⁴ See *Ollman v. Evans*, 750 F.2d 970, 984 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985); *National Rifle Ass’n v. Dayton Newspapers, Inc.*, 555 F. Supp. 1299, 1309 (S.D. Ohio 1983) (stating that editorial writers and commentators frequently “resort to the type of caustic bombast traditionally used in editorial writing to stimulate public reaction.”) (footnote omitted); SANFORD, *supra* note 2, § 5.5.2.3.2.

Dan Moldea, author of *Interference: How Organized Crime Influences Professional Football*, sued the New York Times for publishing an unflattering review of his book in the *New York Times Book Review*. Moldea claimed he was defamed by statements made in the review, including the statement that his book contained “too much sloppy journalism.” The trial court had dismissed the suit, finding that the book review consisted only of unverifiable statements of the reviewer’s opinion of Moldea’s book. The D.C. Circuit reversed, stating that “the review clearly is capable of a meaning that would tend to injure Moldea in his

consider the broader context, the circumstances in which the statement is made, its intended audience, and the medium in which it is communicated.⁵⁵

Most importantly to the art world, statements of quality are often viewed as opinions.⁵⁶ Where the defendant's statement refers to the artist's talents or creations, the law expects artists and other members of the art community to have a thick skin.⁵⁷ For this reason, statements of quality are often deemed nonactionable.⁵⁸ If the

chosen profession, investigative journalism" *Moldea v. New York Times Co.*, 15 F.3d 1137, 1143 (D.C. Cir.), *modified by* 22 F.3d 310 (D.C. Cir.), *cert. denied*, 115 S. Ct. 202 (1994). The court found that the allegation that a journalist and author is "sloppy," or that his book's portrayals of central events are incorrect or misleading may be actionable. Statements of opinion can be actionable, the court held, if they imply a provably false fact. "[I]t simply cannot be the case that a writer may attack a person's work with impunity, and without substantiating his charges with facts, merely by using arguably imprecise terms." 15 F.3d at 1145. The case was remanded to the trial court for a jury evaluation of the falsity of two of the statements made in the book review. The D.C. Circuit reversed itself on a subsequent motion for reconsideration, finding that it had not given sufficient weight to the fact that the statement had been made in the context of a book review. *Moldea v. New York Times Co.*, 22 F.3d 310, 313 (D.C. Cir.) (The court declared that the earlier decision was "short-sighted . . . in failing to take account of the fact that the challenged statements were evaluations of a literary work which appeared in a forum in which readers expect to find such evaluations."), *cert denied*, 115 S. Ct. 202 (1994).

⁵⁵ The context in which the statement is made is often relevant to whether the statement is considered to be an opinion or a statement of fact. The circumstances in which the statement is made, its intended audience, and the category of publication in which it is printed are important factors. *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 783-84 (9th Cir. 1980) (holding that statements regarding ongoing commercial litigation made in a trade journal by one of the litigants were opinion where the audience was aware of the litigation).

⁵⁶ See *Moldea*, 22 F.3d at 315, 317 (holding that statements underlying a claim in a book review that the book contained "too much sloppy journalism," were a "supportable interpretation" of the work which was "rationally supportable by reference to the actual text" being evaluated); *Mr. Chow of New York v. Ste. Jour Azur S.A.*, 759 F.2d 219, 227-29 (2d Cir. 1985) (stating that critical reviews are to a large extent controlled by personal tastes); *Avins v. White*, 627 F.2d 637, 640 (3d Cir.), *cert. denied*, 449 U.S. 982 (1980) (holding that matters of personal taste, aesthetics, and literary criticism in critics' reviews constitute evaluative opinion and are not actionable).

⁵⁷ Artists know better than most the truth of the maxim, "Criticism is easier than composition." See *Monson v. Tussaud's Ltd.*, 1 Q.B. 671, 696 (1894) (Lopes, L.J.).

⁵⁸ A *Washington Post* article that criticized an art gallery exhibit of 20 oils by artist Irving Amen was the subject of a defamation lawsuit brought by the gallery owner. The article stated the works "were badly hung" among many "commercial" paintings. The court found

defendant has stated that the artist's sculpture is poorly proportioned or that his painting is one of the worst examples of minimalist art, the law understands that such determinations are controlled by personal tastes and should not be actionable.⁵⁹ "[W]hen a reviewer offers commentary that is tied to the work being reviewed, and that is a supportable interpretation of the author's work, that interpretation does not present a verifiable issue of fact that can be actionable in defamation."⁶⁰

In what is possibly the most famous defamation case brought by an artist against an art critic, the artist James Whistler sued John Ruskin, perhaps the most influential art critic of Victorian England, for libel in 1878. Ruskin was a traditionalist who believed the primary function of art was as a response to the moral and social aspects of what the artist saw in the world. This view conflicted with Whistler, a leading theoretician of the "Art for Art's Sake" school, which developed into modern abstract art.⁶¹

In 1877, Ruskin published his reaction to the exhibition of one of Whistler's paintings, "Nocturne in Black and Gold: The Falling Rocket," in his periodical, *Fors Clavigera*, and the London popular press:

that the gallery owner, by requesting the newspaper's art critic to review the exhibit, had invited criticism. "He should not be heard to complain if the criticism so invited is not gentle." *Fisher v. Washington Post*, 212 A.2d 335, 337 (D.C. App. 1965).

⁵⁹ See *Trump v. Chicago Tribune Co.*, 616 F. Supp. 1434, 1438 (S.D.N.Y. 1985) (applying the Latin maxim, "there is no disputing about tastes"); *Dworkin v. L.F.P., Inc.*, 839 P.2d 903, 918 (Wy. 1992) ("We believe that when dealing with interpretation of a literary work, we must be especially careful to guard the critic's right to express his opinion about the meaning of the work. Any author who places a book in the marketplace of ideas makes his work subject to criticism. Dworkin's book itself reinterprets fairy tales from a feminist perspective. Who is to say which interpretation is 'true' and which 'false?'); *SMOLLA*, *supra* note 2, § 6.12[7][a] ("As a general principle, authors, journalists, and artists invite criticism of their work product, and although there are cases holding that such criticism in certain circumstances is actionable as fact, the mainstream position is clearly to construe such criticism as opinion or fair comment.") (footnotes omitted).

⁶⁰ *Moldea*, 22 F.3d at 315 (holding that statements underlying a claim in a book review that the book contained "too much sloppy journalism," were a "supportable interpretation" of the work which was "rationally supportable by reference to the actual text" being evaluated).

⁶¹ Carol Strickland, *From Whistler to Warhol American Artists Have Reshaped How We Look at the World—Especially Ourselves*, *ROCKY MOUNTAIN NEWS*, June 5, 1993, at 10C.

For Mr. Whistler's own sake, no less than for the protection of the purchaser, Sir Coutts Lindsay (of the Grosvenor [Gallery]) ought not to have admitted works into the gallery in which the ill-educated conceit of the artist so nearly approached the aspect of willful imposture. I have seen, and heard, much of Cockney impudence before; but never expected to hear a coxcomb ask two hundred guineas for flinging a pot of paint in the public's face.

At the end of the landmark trial the jury found Ruskin liable, not for his statements regarding the painting, but for referring to Whistler as a "coxcomb," or a vain conceited fool, falsely proud of his achievements. The jury assessed the damages at one farthing, approximately a penny. The jury also required Whistler to pay court costs, which eventually drove him into bankruptcy. Shortly thereafter, Ruskin resigned his position as Slade Professor of Art at Oxford University, stating, "I cannot hold a Chair from which I have no power of expressing judgment without being taxed for it by British Law."⁶²

Statements of a more factual nature, such as those that accuse the plaintiff of a crime or allege improper behavior in business dealings, are actionable. False allegations that the artist imports heroin, lied in an NEA grant application or infringed the copyright in another artist's work, would constitute defamatory statements of purported fact that could be actionable.⁶³

Even statements that on their face may not seem to constitute openly factual statements may be actionable if the recipient of the statement understands that the statement was based upon undisclosed defamatory facts.⁶⁴ For example, if the defendant states, "In my

⁶² Edward J. Sozanski, *John Ruskin: The Critic Scrutinized the English Aesthetician Was No Passive Viewer. But Do His Victorian Views Still Apply? An Indianapolis Exhibit Looks at His Influence*, PHILADELPHIA INQUIRER, Aug. 1, 1993, at N1. See generally GORDON FLEMING, JAMES ABBOTT MCNEIL WHISTLER: A LIFE (1991); LINDA MERRIL, A POT OF PAINT: AESTHETICS ON TRIAL IN WHISTLER V. RUSKIN (1992).

⁶³ See ELDER, *supra* note 2, § 8:8[B]; SMOLLA, *supra* note 2, § 6.12[9].

⁶⁴ "Liability for libel may attach . . . when a negative characterization of a person is coupled with a clear but false implication that the author is privy to facts about the person that are unknown to the general reader." *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir.), cert. denied *sub nom.* *Hotchner v. Doubleday & Co.*, 434 U.S. 834 (1977); RESTATEMENT (SECOND) OF TORTS § 566 (1977) ("A defamatory communication may consist of a statement in the form of an opinion; but a statement of this nature is actionable only if

opinion, Mary Jones has demonstrated by her questionable dealings with children that she is not worthy of the honor of being named Artist of the Year," no explicit defamatory statement has been made. Although nothing specific was alleged by the defendant, one who read or heard that declaration could think that the defendant had knowledge of facts that supported his statement. Assuming no facts existed that indicated Mary Jones had ever acted improperly toward children, Mary Jones would have a successful cause of action against the defendant for libel or slander.

In *Daniel Goldreyer Ltd. v. Van de Wetering*,⁶⁵ plaintiff Goldreyer, a prominent art restorer, sued *Time Magazine* and the *Wall Street Journal*, among others, for defamation. The plaintiff had been paid in excess of \$270,000 to restore a painting by Barnett Newman, "Who's Afraid of Red, Yellow and Blue III," which had been slashed by an enraged museum viewer. After the restoration, a controversy grew over the perceived changes plaintiff had made in the work and the materials used in the restoration.

Time Magazine published an article regarding the controversy with the headline "Was a Masterpiece Murdered?" The article stated that "the restorer had used alkyd, a synthetic paint commonly used on window frames," and further that "the painting no longer exists." The *Wall Street Journal* published an article headed, "For That Price, Why Not Have the Whole Museum Repainted?" The article began by asking whether Goldreyer had used housepaint and a roller brush to repair the painting and asked, and "Should the accused restorer be extradited?" The text of the article referred to an official report of a laboratory analysis made of the restoration as having "concluded that Mr. Newman's canvas was completely painted over using an inappropriate type of paint."⁶⁶

Goldreyer complained that the articles conveyed the meaning that he was dishonest, unethical, and incompetent, and that he grossly overcharged for inadequate work. The media defendants replied that

it implies the allegation of undisclosed defamatory facts as the basis for the opinion."). See generally SACK & BARON, *supra* note 1, § 4.3.2.

⁶⁵ 210 N.Y.L.J. 27 (N.Y. Sup. Ct. Dec. 6, 1993).

⁶⁶ *Id.* at 27-28.

the statements were mere expressions of opinion, which are not actionable. The trial court acknowledged that "if a statement is purely a simple expression of opinion, it is not actionable [P]articularly in such fields as art and literary criticism, adverse and critical opinions may be permitted to flourish, since expressed differences of taste can never be regarded as equivalent to the utterance of untrue facts."⁶⁷ However, the court found that in this case the defendants did more than merely express an opinion that the restoration was unskillful. By asserting as a fact that the original work of art had been utterly destroyed, the defendants had implied a basis in facts that were not disclosed. As a result, the court held that the plaintiff's libel claim must be resolved at trial.⁶⁸

One method of enhancing the chances that a statement may be deemed nonactionable opinion is for the author to first fully disclose all of the facts or factors that led him to that opinion. If the audience of the statement is first informed of the facts or factors that formed the basis for the author's stated judgment, it will be able to evaluate the statement of the author's opinion on its own merits and not assume that there is some defamatory reason for the author reaching this conclusion.⁶⁹ Of course, the author should be sure of the accuracy of those underlying facts or factors. If he is not sure of them, no statement should be made. This dictate may be difficult to follow for the visual artist who often uses hints, allusion, and allegory to make his statements.

⁶⁷ *Id.* at 28.

⁶⁸ *Id.*

⁶⁹ It is suggested that when an opinion is offered, the factual basis underlying that opinion should be provided to the recipient of the statement. The opinion is then buttressed with all the data relied on by its author, permitting the reader or listener to derive her own conclusions from the statement. See *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 730-31 (1st Cir.), *cert. denied*, 112 S. Ct. 2942 (1992); *Sall v. Barber*, 782 P.2d 1216 (Colo. Ct. App. 1989); see also *Carr v. Warden*, 159 Cal. App. 3d 1166, 1170, 206 Cal. Rptr. 162 (1984); *Okun v. Superior Court*, 29 Cal. 3d 442, 452, 629 P.2d 1369, 1374-75 (1981) (en banc).

C. *The Defendant's Statement Must Be False*

To be actionable, the defamatory statement also must be false. If the statement of the defendant dealt with a purely private matter, the statement is presumed to be false and the defendant has the burden of proving truth as an affirmative defense.⁷⁰ If the statement dealt with a matter of public interest or concern, the plaintiff, rather than the defendant, has the burden of proving the falsity of the statement. This is due to the fact that a statement regarding a matter of public interest or concern comes within the First Amendment protection of expression and the constitutional falsity requirement developed by the Supreme Court.⁷¹

D. *The Statement Must Be "Of and Concerning" the Plaintiff*

To be actionable, a recipient of the communication⁷² must understand that the defamatory statement refers to the plaintiff.⁷³ This requirement, known as the "colloquium," attaches the defamatory meaning of the statement to the plaintiff. The statement must be "of and concerning" the plaintiff. It is not necessary that the plaintiff be named; it is enough that the offending statement identified the plaintiff

⁷⁰ See *Ramirez v. Rogers*, 540 A.2d 475 (Me. 1988); *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412 (Tenn. 1978); ELDREDGE, *supra* note 2, § 63; SANFORD, *supra* note 2, §§ 6.1-6.3.

⁷¹ *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986); *Don King Prods., Inc. v. Douglas*, 742 F. Supp. 778 (S.D.N.Y. 1990). See HEINKE, *supra* note 2, § 2.9; SACK & BARON, *supra* note 1, § 3.3.2.2.1-2. See discussion *infra* notes 122-24 and accompanying text.

⁷² The recipient must be a person, other than the plaintiff, who heard or saw the defendant's statement. "Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed." RESTATEMENT (SECOND) OF TORTS § 577 (1977).

⁷³ *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 728 P.2d 1177 (1986) (en banc), *cert. denied*, 485 U.S. 934 (1988).

in some manner.⁷⁴ Of course, an artist can be identified not only by his name and likeness, but also by his work. Defamatory statements referring to the unnamed author of a particular work would meet this “of and concerning” requirement.⁷⁵ It is not enough, however, that the plaintiff alone views the defamatory statement of the defendant as referring to him. Recipients of the statement, other than the plaintiff, must make the connection between the statement and the plaintiff.⁷⁶

There are additional concerns that arise where the artist’s statements or works are the subject of a defamation action. For example, the artist is free to defame the dead as defamation of a deceased person is not actionable.⁷⁷ Conversely, when the plaintiff is among the living, the artist may be liable for defamation even though the plaintiff is not specifically named in the artwork. If there is enough information presented in the artwork to identify the plaintiff, the defamatory artwork may be actionable. Where the identification is visual, it may be sufficient for the plaintiff to prove that only one person understood the defamatory visual image to be a depiction of the plaintiff.⁷⁸

In the situation where the artist finds himself presented in a

⁷⁴ SACK & BARON, *supra* note 1, § 2.8.1 (“If it can be shown either that the implication of the article was that the plaintiff was the person meant or that he or she was understood to be the person spoken about in light of the existence of extrinsic facts not stated in the article, then it is ‘of and concerning’ the plaintiff as though the plaintiff was specifically named.”) In what is perhaps the earliest reported case of a defamatory work of visual art, *Du Bost v. Beresford*, 2 Camp. 511 (1810), the identities of the figures portrayed were determined by spectators who had viewed the painting while it had been exhibited to the public.

⁷⁵ A city official, describing a painting as “morally objectionable” and “obscene,” ordered it removed from a museum. The official made no mention of the artist who had created the painting. The creator of the painting sued the official for defamation. The court found that an accusation that the artist painted an obscene picture could defame the character of the artist, even though the city official had not mentioned the artist’s name. *Walker v. D’Alessandro*, 129 A.2d 148 (Md. 1957).

⁷⁶ ELDER, *supra* note 2, § 1:7[A].

⁷⁷ See *Flynn v. Higham*, 149 Cal. App. 3d 677, 197 Cal. Rptr. 145 (1983).

⁷⁸ See *Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 79, 155 Cal. Rptr. 29, 39, *cert. denied*, 444 U.S. 984 (1979).

defamatory manner in a work of fiction,⁷⁹ the law is less clear. Various approaches have been adopted by the courts to determine whether a presumably fictitious character can be sufficiently identified with the plaintiff to be actionable.⁸⁰ In most cases the recipient viewing or hearing the statement must understand that the plaintiff was realistically depicted as acting in the manner suggested by the defendant.⁸¹

Where the work at issue has not isolated a particular individual, but is commenting on a group of individuals or an event that involves a group of individuals, it is more difficult for the plaintiff to prove that the statement was “of and concerning” him. Mere membership in a large group that has been defamed has been deemed to be too tenuous a connection between the defamatory statement and an individual plaintiff.⁸² Although somewhat arbitrary, as a rule of

⁷⁹ Such an occurrence may not be limited to a work of literary fiction. Visual art has been analogized to fictional works. See *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992). Therefore, this analysis may come into play where the artist has been depicted in another artist's artwork.

⁸⁰ See, e.g., *Bindrim*, 92 Cal. App. 3d at 78 (The test is whether a reasonable person, reading the book, would understand that the fictional character was, in actual fact, the plaintiff acting as described.); *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438, 441 (10th Cir. 1982), cert. denied, 462 U.S. 1132 (1983) (There can be no liability where the events that take place in the fictional work are so fantastical or bizarre that no reasonable reader would treat them as realistic depictions.); *Aguilar v. Universal City Studios, Inc.*, 174 Cal. App. 3d 384, 389, 391, 219 Cal. Rptr. 891, 893, 894-95 (1985) (holding that although close parallels between real and fictional events may establish a reasonable belief in identity, despite the author's efforts to hide the real person through alteration of name or physical appearance, the plaintiff must prove that “persons who knew or knew of the plaintiff could reasonably have understood the exhibited picture to refer to [her].”); *Springer v. Viking Press*, 457 N.Y.S.2d 246, 249 (App. Div. 1982) (For a defamatory statement made about a character in a fictional work to be actionable, the description of the fictional character must be so closely akin to the real person claiming to be defamed that a reader of the book, knowing the real person, would have no difficulty linking the two; superficial similarities are insufficient, as is a common first name.).

⁸¹ See *SMOLLA*, *supra* note 2, § 4.09[7][a].

⁸² See, e.g., *Weatherhead v. Globe Int'l, Inc.*, 832 F.2d 1226 (10th Cir. 1987) (955 dog breeders); *Barger v. Playboy Enters., Inc.*, 564 F. Supp. 1151 (N.D. Cal. 1983) (100 to 125 “Hell's Angels brides”), *aff'd*, 732 F.2d 163 (9th Cir.), cert. denied, 469 U.S. 853 (1984); *Michigan United Conservation Clubs v. CBS News*, 485 F. Supp. 893 (W.D. Mich. 1980), *aff'd*, 665 F.2d 110 (6th Cir. 1981) (more than one million hunters); *Sims v. KIRO, Inc.*, 580 P.2d 642 (Wash. Ct. App. 1978), cert. denied, 441 U.S. 945 (1979). It has also been found that defamatory statements directed to large groups are not understood by reasonable persons

thumb, mere membership in a group of more than twenty-five individuals is not sufficient to constitute an identification of an individual member for purposes of defamation.⁸³ An artwork that depicts Congress as a group of greedy stealing bandits would not enable an individual member of Congress to sue for defamation, assuming that the artwork did not physically depict that particular individual. If the group depicted was a seven person city council, however, an individual councilmember may be able to meet the “of and concerning” requirement.⁸⁴

E. The Statement Must Be Published by the Defendant to a Third Person

Statements communicated only to the plaintiff are not actionable.⁸⁵ In the area of defamation, the law is primarily concerned with the defamatory statement’s effect on the plaintiff’s reputation, on how others view the plaintiff, rather than the mental and

to refer to any individual member of the group, *Neiman-Marcus v. Lait*, 13 F.R.D. 311, 316 (S.D.N.Y. 1952), and, if actionable, could chill free expression regarding groups. SACK & BARON, *supra* note 1, § 2.8.4.

⁸³ Membership in a defamed group numbering more than twenty-five is insufficient to prove the statement was of and concerning an individual member. *Barger v. Playboy Enterprises, Inc.*, 564 F. Supp. 1151, 1153 (N.D. Cal. 1983), *aff’d*, 732 F.2d 163 (9th Cir.), *cert. denied*, 469 U.S. 853 (1984); RESTATEMENT (SECOND) OF TORTS § 564A cmt. b (1977); *see generally*, ELDER, *supra* note 2, § 1:7[B]. This demarcation point between a large and a small group had its genesis in *Neiman-Marcus v. Lait*, 13 F.R.D. 311 (S.D.N.Y. 1952), where fifteen salesmen of a total of twenty-five were permitted to sue the author of a book which stated “most of the sales staff are fairies” but the 382 saleswomen referred to as call-girls were not. This group libel rule has been jettisoned in some jurisdictions for an “intensity of suspicion” test which views the totality of the circumstances and makes a determination as to the degree that the group accusation focuses on each individual member of the group. *See Brady v. Ottaway Newspapers, Inc.*, 445 N.Y.S.2d 786 (1981); *McCullough v. Cities Service Co.*, 676 P.2d 833 (Okla. 1984).

⁸⁴ “American Gothic” by Grant Wood “initially provoked controversy when angry Iowa women protested the drab, sterile image Wood painted of them.” *Passing Americana*, BALTIMORE EVENING SUN, Dec. 18, 1990, at A8. Even assuming the painting adversely affected the reputation of Iowan women throughout the rest of the country, no individual would be able to successfully sue for libel.

⁸⁵ *Bonkowski v. Arlan’s Dep’t Store*, 174 N.W.2d 765 (Mich. 1970); *Ostrowe v. Lee*, 175 N.E. 505, 505 (N.Y. 1931).

emotional well-being of the plaintiff.⁸⁶ Therefore, there must be a “publication” of the defamatory statement by the defendant. “Publication” has a highly technical meaning in defamation law. It does not refer to a public distribution; the statement need only be received by one person to be actionable. The defamatory meaning of the statement and the plaintiff’s identity must be communicated to the recipient of the statement.⁸⁷

Someone other than the plaintiff must have heard or read the statement and understood it to be defamatory and to refer to the plaintiff. A statement made by the defendant in Swahili to recipients who do not understand the Swahili language is not actionable.⁸⁸ In the case of visual art, which often lends itself to multiple and personal interpretations, it frequently may be problematic as to what message the artist was attempting to communicate through his work. For purposes of the publication element, however, the focus is not on the intended meaning of the artist, but the understanding of the viewer.

It is generally not a defense for a defendant to argue that he was simply repeating a statement made by someone else.⁸⁹ One who republishes a defamatory statement adopts the statement as his own and is responsible for the statement.⁹⁰ An artwork that incorporates

⁸⁶ ELDREDGE, *supra* note 2, § 35; *see* HEINKE, *supra* note 2, § 2.5. *But see* O’Hara v. Storer Communications, Inc., 231 Cal. App. 3d 1101, 282 Cal. Rptr. 712 (1991) (holding that diminution of business income due to psychic injury resulting from the broadcast of a false allegation that plaintiff was a prostitute is recoverable in defamation).

⁸⁷ SMOLLA, *supra* note 2, § 4.12[1].

⁸⁸ *See, e.g.*, Economopoulos v. A.G. Pollard Co., 105 N.E. 896 (Mass. 1914) (holding that an accusation in Greek understood only by plaintiff was not actionable); Puochan v. Godeau, 167 Cal. 692, 695, 140 P. 952, 953 (1914) (en banc) (holding that an accusation in French was understood by witnesses, and was therefore actionable).

⁸⁹ In *Daniel Goldreyer Ltd. v. Van de Wetering*, 210 N.Y.L.J. 27 (N.Y. Sup. Ct. Dec. 6, 1993), the media defendants could be held liable for repeating the defamatory statements of the Stedelijk Museum of Amsterdam’s chief in-house conservator, an art authenticator, and an art critic. “[U]tterances based upon the statements of others in the field as to a plaintiff’s incompetence can still form the predicate for a libel action against one who adopts such statements.” *See* discussion *supra* notes 65-68 and accompanying text.

⁹⁰ Each repetition of a defamatory statement by a new person constitutes a new publication, rendering the repeater liable for that new publication. *Vegod Corp. v. ABC*, 25 Cal. 3d 763, 603 P.2d 14, *cert. denied*, 449 U.S. 886 (1979); RESTATEMENT (SECOND) OF TORTS § 578 (1977). As a general rule, a defendant is not responsible for a publication of the defamatory statement by the plaintiff. The belief is if anyone repeats a defamatory

a defamatory view of a particular person or event espoused by another may be actionable.

F. *Requirement of Special Damages*

Under certain circumstances, plaintiffs may be required to prove "special damages." These are out-of-pocket losses, generally business losses, suffered by the plaintiff as a result of damage to his reputation.⁹¹ These damages must be proven to a reasonable certainty and cannot be remote.⁹² Damages that meet the special damages requirement for a visual artist include loss of employment, loss of customers, a decrease in the sale price of plaintiff's artwork,

statement about herself, she has only herself to blame for any injury resulting from the statement. In a few states there is an exception to this general rule in the area of employment. Some courts have adopted a "self-publication" exception. Under this exception, when a person has been fired from a job for stated reasons that are false and would be harmful to her reputation, it is anticipated that the person will be requested by a prospective employer to give the reasons for her earlier dismissal. Since the law assumes the person will truthfully restate the reasons given by the former employer, the former employer is deemed to have published the defamatory statement through the former employee and is responsible for the statement. *See McKinney v. County of Santa Clara*, 110 Cal. App. 3d 787, 168 Cal. Rptr. 89 (1980); ELDER, *supra* note 2, § 1:6[F]. This exception has not been expanded beyond the employment arena.

⁹¹ *Terwilliger v. Wands*, 17 N.Y. 54 (1858). "Special harm must result from the conduct of a person other than the defamer or the one defamed and must be legally caused by the defamation." RESTATEMENT (SECOND) OF TORTS § 575 cmt. b (1977). "'Special damages' are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other. . . ." CAL. CIV. CODE § 48a(4)(b) (West 1982). It has long been established that a plaintiff's own distress or illness caused by the defamation cannot constitute special damages. *See, e.g., Afro-American Publishing Co. v. Jaffe*, 366 F.2d 649, 659 (D.C. Cir. 1966). *But see O'Hara v. Storer Communications, Inc.*, 231 Cal. App. 3d 1101, 282 Cal. Rptr. 712 (1991) (holding that where plaintiff's emotional injury resulting from the defamatory statement is so severe as to render her unable to perform the ordinary duties of her profession, such loss of employment constitutes a special damage).

⁹² *Blue Ridge Bank v. Veribanc, Inc.*, 866 F.2d 681, 690 (4th Cir. 1989); *O'Hara*, 231 Cal. App. 3d 1102. *See also Kirby v. Wildenstein*, 784 F. Supp. 1112 (S.D.N.Y. 1992) (dismissing owner of a painting's product disparagement claim because plaintiff's allegations of special damages were too generalized).

or refusal of a gallery to sell plaintiff's artwork.⁹³

Defamatory statements that constitute slander⁹⁴ are not actionable unless the plaintiff has proven special damages. Traditionally, slanderous statements are excused from the special damages requirement if they constitute "slander *per se*," that is, when the subject matter of the statement falls within one of four categories: (1) imputation of serious criminal wrongdoing;⁹⁵ (2) imputation of wrongdoing in one's trade, business, profession, or office;⁹⁶ (3) imputation of a loathsome disease;⁹⁷ or (4) imputation of unchastity or serious sexual misconduct.⁹⁸

In the case of defamatory statements that constitute libel, proof of special damages is not required so long as the statement is defamatory on its face, without the need of extrinsic facts. While most states never require proof of special damages in the case of libel, a minority of states will require proof of special damages where the libelous statement is not defamatory on its face, but requires the recipient to have knowledge of extrinsic facts to establish the defamatory meaning. In these states, a libelous statement that requires such extrinsic facts, known as "libel *per quod*," will not be actionable without proof of special damages. A few of these minority states will excuse the

⁹³ See *MacLeod v. Tribune Publishing Co.*, 52 Cal. 2d 536, 343 P.2d 36 (1959); *W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* 793-96 (5th ed. 1984).

⁹⁴ See *supra* note 8.

⁹⁵ See, e.g., *60 Minute Man, Ltd. v. Kossman*, 555 N.Y.S.2d 152, 154 (App. Div. 1990) (use and sale of drugs); *Starobin v. Northridge Lakes Dev. Co.*, 287 N.W.2d 747, 752-54 (Wis. 1980).

⁹⁶ See, e.g., *Mason v. Sullivan*, N.Y.S.2d 314, 315-16 (App. Div. 1966) (statement that comedian was barred from further television performances because he had had "recourse to obscenity" in his comedy routines); *Bock v. Zittenfeld*, 672 P.2d 1237, 1239 (Or. Ct. App. 1983) (statement that journalist lacked competence as a news reporter).

⁹⁷ A defendant's circulation of a false rumor that the plaintiff was afflicted with AIDS was found to be a false imputation of a "loathsome and communicable disease" which was actionable without the need to prove special damages. *McCune v. Neitzel*, 457 N.W.2d 803 (Neb. 1990).

⁹⁸ *RESTATEMENT (SECOND) OF TORTS* § 574 (1977). See *CAL. CIV. CODE* § 46 (West 1982); *ELDER, supra* note 2, § 1:4[c]. Compare *Boehm v. American Bankers Ins. Group, Inc.*, 557 So. 2d 91, 94 (Fla. Dist. Ct. App. 1990) (stating that imputation of homosexuality is not slanderous *per se*) with *Manale v. New Orleans*, 673 F.2d 122, 125 (5th Cir. 1982) (holding that imputation of homosexuality is defamatory *per se* under Louisiana law).

special damages requirement for a statement that is libel *per quod* if the subject matter of the libel falls within one of the four traditional slander *per se* categories.⁹⁹ For instance, in *Daniel Goldreyer Ltd. v. Van de Wetering*,¹⁰⁰ the court found that allegations accusing the plaintiff art restorer of destroying a highly valued painting through incompetence had harmed the plaintiff in the practice of his business or profession and, therefore, were libelous *per se*, excusing the special damages requirement.¹⁰¹

G. Damages

If the plaintiff is excused from proving special damages or has been able to prove them, the plaintiff is able to recover for all the injuries caused by the defendant's statement.¹⁰² These would include not only impairment of reputation and standing in the community, but also personal humiliation and mental suffering.¹⁰³

In many states, a plaintiff's permissible recovery may be limited if the plaintiff fails to demand a retraction in a timely manner or if a media defendant does make a retraction upon the demand of the plaintiff.¹⁰⁴ A retraction demand is a letter sent, within a statutorily

⁹⁹ See generally SMOLLA, *supra* note 2, § 7.05-7.08; HEINKE, *supra* note 2, §§ 2.5(I)-(J).

¹⁰⁰ 210 N.Y.L.J. 27 (N.Y. Sup. Ct. Dec. 6, 1993).

¹⁰¹ *Id.* at 28.

¹⁰² An antique dealer was awarded \$2.3 million after a television news program alleged that two candelabra sold by the dealer to a museum were stolen, not authentic and grossly overvalued. The dealer had provided evidence that his reputation was injured, he was continually forced to explain his innocence to other dealers, he lost clients, and his business suffered a drop in consignments and customers. *Weller v. ABC*, 232 Cal. App. 3d 991, 283 Cal. Rptr. 644 (1991).

¹⁰³ See, e.g., *Time, Inc. v. Firestone*, 424 U.S. 448 (1976). The common law of defamation presumed that a person who has been the subject of a published defamatory statement has been injured. SANFORD, *supra* note 2, § 9.3.1. Under this approach the plaintiff was not required to prove damages. This aspect of state law has been restricted by federal constitutional law. ELDER, *supra* note 2, §§ 9:1[D]-[E]. See discussion *infra* notes 158-61 and accompanying text.

¹⁰⁴ The type of limitation varies from state to state. While some states preclude the right to bring a civil suit in the absence of notice or a retraction demand, see, e.g., FLA. STAT. § 770.01 (1985), or limit recovery to special damages, see, e.g., CAL. CIV. CODE § 48a (West 1982), most states limit the availability of punitive damages, see, e.g., MICH. COMP. LAWS

mandated period of time, to the publisher of the defamatory statement demanding that the publisher print a statement that the story was false.¹⁰⁵ The retraction demand letter must specifically set forth the portions of the story that the plaintiff believes are false and defamatory, as well as the reasons for this belief.¹⁰⁶ To be effective, the retraction must be placed in an equally conspicuous place in the publication as was the offending story.¹⁰⁷

In the most egregious cases, a plaintiff may be awarded punitive damages. These damages are awarded to punish the defendant for making the defamatory statements or to make an example of the defendant and thereby prevent others from making similar statements.¹⁰⁸ To obtain these damages the plaintiff must generally prove that the defendant made the defamatory statement with "personal malice," that is with hatred, ill-will, or spite.¹⁰⁹ In certain cases, where the defendant is constitutionally protected because the statement at issue dealt with a matter of public interest,¹¹⁰ the plaintiff may have to prove that the defendant knew at the time of publication that the defamatory statement was false, or acted with reckless disregard for its truth or falsity.¹¹¹

§ 600.2911(2)(b) (1991). See HEINKE, *supra* note 2, § 2.16(C) n.610; SACK & BARON, *supra* note 1, §§ 9.1-9.2.

¹⁰⁵ See *Freedom Newspapers, Inc. v. Superior Court*, 4 Cal. 4th 652, 842 P.2d 138 (1992); SMOLLA, *supra* note 2, § 9.12.

¹⁰⁶ See *Kapellas v. Kofman*, 1 Cal. 3d 20, 30, 459 P.2d 912, 918 (1969); *Mahnke v. Northwest Publications, Inc.*, 124 N.W.2d 411, 415 (Minn. 1963).

¹⁰⁷ See *Twin Coast Newspapers, Inc. v. Superior Court*, 208 Cal. App. 3d 656, 256 Cal. Rptr. 310 (1989); *Burnett v. National Enquirer, Inc.*, 144 Cal. App. 3d 991, 193 Cal. Rptr. 206 (1983), *appeal dismissed*, 465 U.S. 1014 (1984); *Southeastern Newspapers, Inc. v. Walker*, 44 S.E.2d 697 (Ga. Ct. App. 1947).

¹⁰⁸ ELDER, *supra* note 2, § 9:1[E].

¹⁰⁹ *Marcone v. Penthouse Int'l Magazine*, 754 F.2d 1072 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985); *Burnett v. National Enquirer, Inc.*, 144 Cal. App. 3d 991, 193 Cal. Rptr. 206 (1983), *appeal dismissed*, 465 U.S. 1014 (1984).

¹¹⁰ See discussion *infra* notes 122-24 and accompanying text.

¹¹¹ "[T]he states may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). Some states have banned the awarding of punitive damages in cases involving freedom of expression. See, e.g., *Stone v. Essex County Newspapers, Inc.*, 330 N.E.2d 161, 164, 169 (Mass. 1975); *Wheeler v. Green*, 593 P.2d 777, 789 (Or. 1979).

III. THE VISUAL ARTIST AS DEFENDANT

An artist, through his artwork, during an interview or in a writing, may make a statement that becomes the basis of a defamation action. In such a case, the artist may prevail if he persuades a judge or jury that the plaintiff bringing the action has failed to prove the requirements outlined above. If the plaintiff meets these requirements, the defendant artist may still prevail by relying on several available federal and state affirmative defenses.

A. *Federal Constitutional Defenses*

Unless the defamatory statement of the defendant is part of a purely private dispute, the First Amendment protection of speech may make it more difficult for the plaintiff to succeed in his defamation action. Even though a jury may find that the defendant artist had indeed published a false defamatory statement about the plaintiff to a third person which caused reputational injury, the artist's First Amendment rights may prevail, permitting the plaintiff no recovery.

In an effort to protect the speech of the media and others, the United States Supreme Court has created a constitutional defense to the tort of defamation.¹¹² The defense is based on the understanding that all speech, including the messages contained in works of visual art, has the capacity of containing erroneous statements that may harm another. In the past, this ability to harm was of preeminent importance. Defamatory statements were deemed no more protectable than obscenity¹¹³ and the media was expected to earn its First

¹¹² This federal constitutional defense places several burdens on a plaintiff in a defamation action which often did not exist under the common law. These include a falsity requirement, *see infra* notes 125-27 and accompanying text; a fault requirement, *see infra* notes 128-57 and accompanying text; and damage requirements, *see infra* notes 158-61 and accompanying text. In addition, the Court instituted a heightened appellate review of defamation cases. *See supra* note 40.

¹¹³ *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any

Amendment protection by acting responsibly.¹¹⁴ In 1964, the balance was restructed in favor of the media, at the expense of the injured plaintiff.¹¹⁵ In what is arguably its most important First Amendment decision, the Supreme Court in *New York Times Co. v. Sullivan*¹¹⁶ determined that the harm that could be caused by defamatory erroneous statements was subsidiary to the country's need for strong uncensored statements regarding the issues of the day.¹¹⁷ The Court subsequently refined this balance in *Gertz v. Robert Welch, Inc.*¹¹⁸ by allowing a greater possibility of recovery for private persons. The Court's concern for protecting the free debate of issues

Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Id. at 571-72 (footnotes omitted). In one of the earliest reported cases concerning a defamatory artwork, an artist sued to recover the value of a painting he had created of "a gentleman of fashion and his lady," as well as the profit he lost from exhibiting the painting to the paying public after the gentleman's brother cut the painting to pieces. The court held that the artist could only recover the value of the canvas and paint, because the defamatory nature of the painting prohibited the jury from considering it as a work of art. "If it was a libel upon the persons introduced into it, the law cannot consider it valuable as a picture." *Du Bost v. Beresford*, 2 Camp. 511 (1810).

¹¹⁴ See *Near v. Minnesota*, 283 U.S. 697 (1931).

[I]t is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common-law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our Constitutions.

Id. at 715.

¹¹⁵ The motivation for this restriking of the balance was the use of defamation law as a tool by Southern segregationists against the Northern press during the civil rights struggles of the early 1960s. See generally ANTHONY LEWIS, *MAKE NO LAW* (1991).

¹¹⁶ 376 U.S. 254 (1964).

¹¹⁷ [W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

. . . [E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . [t]o survive."

Id. at 271-72.

¹¹⁸ 418 U.S. 323 (1974).

concerning the public¹¹⁹ has an important impact on artists.¹²⁰ The political and social vitality of the visual statements of artists is clearly recognized.¹²¹

¹¹⁹ "Freedom of discussion . . . must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

¹²⁰ See *Chicago v. Aubin*, No. 89 CH 8763 (Circuit Court, Cook County, Ill., 1989), reprinted in FRANKLIN FELDMAN & STEPHEN E. WEIL, *ART LAW: RIGHTS AND LIABILITIES OF CREATORS AND COLLECTORS* 50 (1993 Supp.) (finding unconstitutional a city ordinance prohibiting the showing of artwork, including paintings, sculpture, and displays, using American flags):

Artworks clearly are a form of communication. The paint, clay, or other materials are arranged in a purposeful manner to communicate feelings, moods, and ideas. The communication need not be printed or spoken words to be communication; in a group of cases the United States Supreme Court has grouped symbolic communication with actual written or oral communication. (See *Spence v. Washington*, 418 U.S. 405 (1974), and the cases cited therein).

. . . .

This opinion says that ten artworks are no longer off-limits, but open for all to see. The flag and its backers, of which there are many, have the ability to exercise their First Amendment rights as well. For every artist who paints our flag into a corner, there are others who can paint it flying high. All of these expressions of thought are protected and through the operation of thought—expression of thoughts—creation of other thoughts—expressions of other thoughts—all citizens become aware, and [the] country becomes stronger each and every time.

Id. at 52, 56.

¹²¹ Nonverbal expression, such as visual art, is clearly within the province of the First Amendment. See *Texas v. Johnson*, 491 U.S. 397, 405-06 (1989) (holding the act of burning an American flag during a protest rally was expressive conduct within protection of First Amendment); *Stromberg v. California*, 283 U.S. 359 (1931) (striking down as unconstitutional a statute prohibiting the display of a red flag as a symbol of protest); *Piarowski v. Illinois Community College Dist.* 515, 759 F.2d 625, 628 (7th Cir.), cert. denied, 474 U.S. 1007 (1985) (finding purely artistic as well as political expression protected by the First Amendment).

With the now accepted and increasingly important place of philosophy and "ideas" in all modern art, including literature, it should be no surprise that expression in the visual arts falls within the intellectual freedom protected by the first amendment to the U.S. Constitution. After all, we speak of artists making their "statements," and we debate passionately over the intricate meanings that artists attempt to communicate to us.

1 JOHN HENRY MERRYMAN & ALBERT E. ELSÉN, *LAW, ETHICS, AND THE VISUAL ARTS* 276 (2d ed. 1987); see also *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

Music is one of the oldest forms of human expression. From Plato's discourse to the Republic to the totalitarian state in our own times, rules have known its capacity to appeal to the intellect and to the emotions, and have censored musical

The affirmative defense devised in *Sullivan* and *Gertz* arises when the First Amendment is implicated, that is, when the subject matter of the statement at issue deals with a matter of public interest or public concern.¹²² Where the statement at issue is contained in artwork that

compositions to serve the needs of the state. The constitution prohibits any like attempts in our own legal order. Music, as a form of expression and communication, is protected under the First Amendment.

Id. at 789 (citations omitted); *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 567 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985) (finding all musical expression protected by First Amendment, regardless of ideological content).

The fear of this impact has led to efforts to direct the subject matter depicted by artists receiving federal government grants. See Stephen E. Rohde, *Art, Sex and Protest: Censorship and Freedom of Artistic Expression*, in *THE VISUAL ARTIST'S BUSINESS AND LEGAL GUIDE* 290 (Gregory T. Victoroff ed., 1994). These restrictions have not met with success in the judicial arena; see, e.g., *Finley v. National Endowment for the Arts*, 795 F. Supp. 1457 (C.D. Cal. 1992) (finding amendment to NEA statute which required grant decisions to take into consideration "general standards of decency and respect for the diverse beliefs and values of the American public" in judging applications unconstitutionally vague and overbroad); *Bella Lewitzky Dance Found. v. Frohnmayer*, 754 F. Supp. 774 (C.D. Cal. 1991) (holding National Endowment for the Arts grant requirement that recipients certify that NEA funds would not be used to promote or produce obscene material unconstitutionally vague and violative of the First Amendment).

Such attacks are not limited to the United States. Australian artist Juan Davila created a controversy in Chile with his painting, "The Liberator Simon Bolivar 1994," which was produced with government funds and reproduced on postcards as part of an art-promotion project. As a comment on the over-emphasis of masculine figures in history books, the artist depicted the South American independence hero with feminine breasts, lace stockings, no pants and making a lewd gesture with his extended middle finger. The painting caused public demonstrations and official protests from several South American countries. The Colombian ambassador stated, "This painting is a blasphemy from the historical point of view, pornographic as art and incomprehensibly defamatory." William R. Long, *Lewd Painting of Revolutionary Draws Outrage in S. America*, L.A. TIMES, Aug. 20, 1994, at A2; see also Lynn Pyne, *Chinese Artist Breaks Rules, Flees to U.S.*, PHOENIX GAZETTE, June 27, 1994, at G1 (Artist decided to emigrate to the United States after he was charged with defaming Mao Tse-Tung in a painting. The artist had depicted the Chinese leader at such an angle that only one ear was visible. A complaint was filed on the ground that the single ear in the painting meant Mao was not listening to his people.).

¹²² The various constitutional requirements adopted in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), have no application where the First Amendment is not implicated. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (finding constitutional protections did not apply to credit report made available to a specific business audience because it was not a matter of public concern). A similar analysis has taken place in the area of a governmental employee's right of free expression. See Robert C. Lind & Alan D. Ullberg, *Institutional Regulation of Employee Expression: Writing as a Conflict of Interest Within Museums and*

provides a commentary or criticism of society or its leaders, the work would undoubtedly receive First Amendment protection.¹²³ However, if the work is a private matter, such as part of a personal vendetta against the plaintiff, the statement may not be deserving of constitutional protection.¹²⁴ Once the First Amendment is implicated, the degree of fault that must be proved by the plaintiff is based upon the status of the plaintiff. The defendant must prove whether the plaintiff is a public or private person. If the requisite proof of fault is made, the plaintiff must, in addition, meet certain constitutional standards of proof regarding damages.

Related Nonprofit Institutions, 32 SANTA CLARA L. REV. 427, 491 n.144 (1992).

¹²³ The use of the visual arts as a vehicle for social commentary is well established. "Throughout history, paintings have been used to advocate ideas, to make social and political comment and criticism, and to influence attitudes." Harriette K. Dorsen & Colleen McMahon, *Art as Libel: A Comment on Silberman v. Georges*, 9 COLUM. ART & L. 1, 10 (1984). See FRANKLIN FELDMAN & STEPHEN E. WEIL, ART LAW: RIGHTS AND LIABILITIES OF CREATORS AND COLLECTORS § 1.1.7. (1986); RALPH E. LERNER & JUDITH BRESLER, ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS 316-23 (1989). See generally, HEINKE, *supra* note 2, § 2.12. Art that does not present a direct societal critique may also be deemed to be of public interest and a matter of public concern. See *Porcella v. Time, Inc.*, 300 F.2d 162, 166 (7th Cir. 1962) (holding that questions concerning the qualification, competence, and honesty of an "art expert" who purported to render "expert counsel, advice, opinions, evaluation and authentications" of art works were a matter of public concern); *McNally v. Yarnall*, 764 F. Supp. 838, 847 (S.D.N.Y. 1991) (Statements regarding the authenticity and value of artworks affect the market for the artwork, the tax implications of donating the artwork, and the community of scholars with an interest in the artwork, and, therefore, are a matter of public concern.).

¹²⁴ See *Dun & Bradstreet*, 472 U.S. at 761 n.4; *Phyfer v. Fiona Press*, 12 Media L. Rep. 2211 (N.D. Miss. 1986) (holding that the publication of a photograph of a nude woman was a matter of private concern). Most court determinations that the defamatory statement was outside the ambit of First Amendment protection have arisen in the context of business disputes. See, e.g., *Dun & Bradstreet*, 472 U.S. 749; *Roffman v. Trump*, 754 F. Supp. 411, 418 (E.D. Pa. 1990) (holding that disparaging comments regarding investment analyst's professional abilities and personal integrity was a private issue of no concern to the general public); *Staheli v. Smith*, 548 So. 2d 1299, 1305 (Miss. 1989); *Cooper v. Portland General Elec. Corp.*, 824 P.2d 1152, 1155-56 (Or. 1992); *Harley-Davidson Motorsports, Inc. v. Markley*, 568 P.2d 1359, 1361-64 (Or. 1977); *Vern Sims Ford, Inc. v. Hagel*, 713 P.2d 736, 741 (Wash. 1986).

1. Constitutional Falsity Requirement

The United States Supreme Court has determined that any defamatory statement regarding a matter of public interest or public concern is entitled to some constitutional protection.¹²⁵ As a result, whenever the defendant's defamatory statement deals with a matter of public interest or public concern, the plaintiff is required to prove the statement is false.¹²⁶ The Supreme Court has failed to define the phrase "matter of public interest or concern," but it is agreed that a purely private dispute between two individuals, such as an artist and his gallery, would not come within the meaning of the phrase.¹²⁷

2. Constitutional Fault Requirement

Once it is determined that the defendant artist's statement or work deals with a matter of public interest or public concern, and is not merely a private dispute, the plaintiff's status as a public or private person must be determined. If the plaintiff is found to be a public person—a public official or a public figure—the First Amendment rights of the defendant artist will be emphasized and the plaintiff will be required to prove by clear and convincing evidence that the defendant artist published the statement with constitutional malice,¹²⁸

¹²⁵ *Dun & Bradstreet*, 472 U.S. 749.

¹²⁶ *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). Where the statement does not involve a matter of public interest or public concern, the statement is presumed false and the defendant has the burden of proving truth as an affirmative defense. *See supra* note 70 and accompanying text and *see infra* text accompanying note 165.

¹²⁷ *See Dun & Bradstreet*, 472 U.S. 749. *See supra* note 124 and accompanying text.

¹²⁸ In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court originally labeled this test "actual malice," a term which already had several meanings in common law torts, and is "unfortunately confusing." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667 n.7 (1989). The Court itself has backed away from the term. *See Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 511 (1991) ("[I]n place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity."). The term "constitutional malice" is used in this Article for purposes of clarity. Since the type of evidence available to prove reckless disregard has been expanded, *see Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), the Court's definition of "actual

that is, he published the statement knowing it was false or published it with reckless disregard of its truth or falsity.¹²⁹ If the plaintiff is found to be a private person, the interests in protecting reputation will be more heavily weighed and the defendant artist's First Amendment rights may be given less protection.¹³⁰

a. *Public Person Status*

A plaintiff is considered to be a public person when the plaintiff is a public official or a public figure. A public official is a public employee who appears to the public to have substantial responsibility for the conduct of governmental affairs.¹³¹ A high school janitor would not be deemed a public official, while a person elected to public office would be considered a public official, and therefore more susceptible to defamatory commentary by a visual artist.¹³²

A person can be a public figure for all purposes or a public figure

malice" is now similar to the common law definition of "actual malice," or "scienter," used in intentional misrepresentation cases. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 741-42 (5th ed. 1984) (Sufficient intent is found where the defendant made the statement knowing it to be false, without any belief as to its truth, with reckless disregard whether it be true or false, knowing he had no sufficient basis of information to justify the statement, and conscious ignorance of the truth.); RESTATEMENT (SECOND) OF TORTS § 526 (1977).

¹²⁹ *Sullivan*, 376 U.S. at 279-80.

¹³⁰ *See* *Brown v. Kelly Broadcasting*, 48 Cal. 3d 711, 744, 771 P.2d 406, 426 (1989) (Private individuals are more deserving of recovery in defamation actions than public figures due to their failure to assume any risk of media attention and their inability to access media channels of communications.).

¹³¹ *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) ("[T]he 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."). In the art world, the foremost example of this category would be Jane Alexander, the chairperson of the National Endowment for the Arts. Although she was most likely a limited purpose public figure as an actress, she is now a public official.

¹³² *See* *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) (holding that the category of "public officials" does not include all public employees); *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971) (treating a candidate for public office as a public figure); *Desert Sun Publishing Co. v. Superior Court*, 97 Cal. App. 3d 49, 158 Cal. Rptr. 519 (1979) (candidate for public office is treated as a public official for purposes of defamation law); *Madison v. Yunker*, 589 P.2d 126 (Mont. 1978) (state university print shop director not a public official).

for a specific issue.¹³³ To be considered a public figure for all purposes, the plaintiff must be a well-known celebrity whose name is a household word.¹³⁴ Only the most famous artists or performers would meet this definition.¹³⁵

It is easier for a plaintiff to be deemed a public figure for a limited purpose. To make this determination the court first looks to whether the statement made by the defendant artist dealt with a matter of "public controversy" that existed prior to the defendant's utterance.¹³⁶ A public controversy is an issue more focused than a matter of interest to the public. It must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way. "Its ramifications will be felt by persons who are not direct participants."¹³⁷ A private disagreement will not constitute a public controversy, even if it attracts public attention.¹³⁸

Artists whose work invites public comment, or those who are involved in controversial site-specific works or in a political dispute regarding NEA funding, would likely be deemed public figures for purposes of statements concerning such controversies.¹³⁹ In *Wojnarowicz v. American Family Ass'n*,¹⁴⁰ a professional artist was

¹³³ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

¹³⁴ [An all-]purpose public figure in the context of a defamation suit may be defined as a person whose name is immediately recognized by a large percentage of the relevant population, whose activities are followed by that group with interest, and whose opinions or conduct by virtue of these facts, can reasonably be expected to be known and considered by that group in the course of their own individual decision-making.

Harris v. Tomczak, 94 F.R.D. 687, 700-01 (E.D. Cal. 1982).

¹³⁵ See, e.g., *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976) (Johnny Carson and his wife stipulated that they were both public figures. The court found Carson to be a public figure for all purposes and his wife to be a public figure at least for a limited purpose.).

¹³⁶ *Hutchinson*, 443 U.S. at 135 ("Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.").

¹³⁷ *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1296 (D.C. Cir.), cert. denied, 449 U.S. 898 (1980).

¹³⁸ *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

¹³⁹ At least one respected legal authority has stated that any well-known artist is a public figure in connection with any statements concerning her creative efforts. SMOLLA, *supra* note 2, § 2.21[6].

¹⁴⁰ 745 F. Supp. 130, 147 (S.D.N.Y. 1990).

found to be a public figure for a limited purpose in a libel action he brought against Donald Wildmon and the American Family Association for statements made in a pamphlet decrying the use of federal tax dollars to fund certain types of art. The court found that many of the plaintiff's artworks were "assertedly directed at bringing attention to the devastation wrought upon the homosexual community by the AIDS epidemic," that the plaintiff attempted "through his work to expose what he views as the failure of the United States government and public to confront the AIDS epidemic in any meaningful way," and that the plaintiff's artworks had "been the subject of controversy and public debate concerning government funding of non-traditional art."¹⁴¹

Merely applying for and receiving federal grant money would not be a sufficient basis for limited purpose public figure status.¹⁴² An artist who receives a NEA grant would not automatically become a public figure regarding comments made about the NEA, the artist's grant or the artist's use of the grant money.

If the subject matter of the defendant artist's statement is found to deal with a preexisting public controversy, it must be determined that the plaintiff voluntarily involved himself with that controversy prior to the defendant's statement.¹⁴³ Lastly, the plaintiff must have become involved in the public controversy in an effort to influence the

¹⁴¹ *Id.* at 133.

¹⁴² *See Hutchinson v. Proxmire*, 443 U.S. 111 (1979) (scientist who obtained government grants was not a public figure).

¹⁴³ *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 166 (1979) (holding that plaintiff, who was "dragged unwillingly" into a controversy regarding spy activity by the Soviet Union, was not a limited purpose public figure); *Time, Inc. v. Firestone*, 424 U.S. 448, 457 (1976) (finding plaintiff's involvement in a highly publicized divorce case was not voluntary because she was compelled to resort to legal process to obtain a divorce). In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Supreme Court used an assumption of risk rationale for distinguishing between public and private figures. The Court stated that those who have assumed roles of special prominence have impliedly assumed the risk of greater media scrutiny. Therefore, a person who has not "voluntarily" become involved with a public controversy cannot be said to have assumed the risk of greater scrutiny and should not be deemed a public figure. Elmer Gertz, the plaintiff in that case, had been accused by the John Birch Society of being a communist and framing a police officer in a criminal proceeding. The Court found that although Mr. Gertz had been active in community and professional affairs, he was a private person for purposes of the litigation. *Id.* at 345.

resolution of the issues involved.¹⁴⁴ If these three tests have been satisfied by the defendant artist by a preponderance of the evidence, the plaintiff will be deemed a public figure for purposes of the issues raised by the artist.

If the plaintiff is found to be a public figure, he must prove by clear and convincing evidence that the defamatory statement was published with constitutional malice: *i. e.*, that the defendant published the defamatory statement knowing it was false or with reckless disregard of its truth or falsity.¹⁴⁵ Constitutional malice is extremely difficult to prove. In essence, the plaintiff must prove that the defendant intended to publish a false defamatory statement about the plaintiff. It is not enough that the defendant failed to investigate or otherwise acted unreasonably.¹⁴⁶

To prove constitutional malice, the plaintiff must prove that the defendant artist fabricated the information contained in the statement, relied on sources of doubtful veracity, used quotations that materially altered the statements made by the plaintiff¹⁴⁷ or that the allegations made in the statement were inherently improbable.¹⁴⁸ Failure to investigate a story before publication is not determinative of

¹⁴⁴ *Hutchinson*, 443 U.S. at 135-36 (finding that a scientist who applied for and received federal funds had made no effort to influence others); *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 136-38 (2d Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985). Some courts prefer to analyze the plaintiff's prominence in the controversy. "The more peripheral the role played by the plaintiff in the controversy, the less likely the plaintiff is to be deemed a public figure." SMOLLA, *supra* note 2, § 2.18.

¹⁴⁵ The federal constitution requires that whenever a defamation action is brought by a public figure, the plaintiff must prove constitutional malice, that is, that the defendant published the statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964); *see also* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342-43 (1974); *Yiamouyiannis v. Consumers Union of United States*, 619 F.2d 932, 940 (2d Cir.), *cert. denied*, 449 U.S. 839 (1980). The term "reckless disregard" does not have the traditional tort meaning of recklessness. *Reliance Ins. Co. v. Barron's*, 442 F. Supp. 1341 (S.D.N.Y. 1977).

¹⁴⁶ *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). *See generally*, SMOLLA, *supra* note 2, §§ 3.13-3.23; ROSINI, *supra* note 2, at 74-91; SACK & BARON, *supra* note 1, § 5.5; ELDER, *supra* note 2, § 7.

¹⁴⁷ *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991) (holding that the defendant's use of quotes that materially altered the plaintiff's statements is sufficient evidence of constitutional malice).

¹⁴⁸ *St. Amant*, 390 U.S. 727.

constitutional malice,¹⁴⁹ but it may be relevant evidence. Recently, the United States Supreme Court has made the plaintiff's burden somewhat easier by holding that a failure to investigate which constituted a purposeful avoidance of the truth is sufficient proof of constitutional malice.¹⁵⁰ The Court also found that evidence of motive, lack of due care, and personal malice may be used, in the aggregate, to prove constitutional malice.¹⁵¹

This type of evidence may be relevant in the paradigm of investigative reporting. In the context of an artistic rendering, however, the defendant artist is setting forth his world view as seen through his personal belief system. It would be highly unlikely that constitutional malice could be found in such a case.

b. *Private Person Status*

If the plaintiff is neither a public official nor a public figure, he is deemed to be a private person.¹⁵² While the defendant artist continues to have constitutional protection against the private plaintiff's lawsuit, the protection is not as strong as it is when the case is brought by a public person.

The private person plaintiff must prove that the defendant artist was at fault in publishing the defamatory statement.¹⁵³ Although some states require a standard of fault higher than negligence, such as gross negligence,¹⁵⁴ or even the intent standard of constitutional

¹⁴⁹ *Id.* at 731.

¹⁵⁰ *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989).

¹⁵¹ *Id.*

¹⁵² *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

¹⁵³ The private person plaintiff must prove fault on the part of the defendant when the subject matter of the statement deals with a matter of public concern. *Id.* at 347.

¹⁵⁴ New York law requires the private plaintiff to prove that the publisher acted in a "grossly irresponsible manner" for statements which deal with a matter of public concern. *Chapadeau v. Utica Observer-Dispatch, Inc.*, 341 N.E.2d 569 (N.Y. 1975); *Pollnow v. Poughkeepsie Newspapers, Inc.*, 486 N.Y.S.2d 11 (App. Div. 1985), *aff'd*, 492 N.E.2d 125 (N.Y. 1986).

malice,¹⁵⁵ in most states the plaintiff must prove the defendant artist acted negligently.¹⁵⁶ Under this standard the plaintiff must prove that the defendant acted unreasonably by failing to investigate before making the statement, misinterpreting documents, or relying on a questionable source.¹⁵⁷ Once again, these considerations most often arise in the context of investigative journalism. Unless the basis for the defamation lawsuit is an article in which the artist is quoted, a letter to the editor sent by the artist, or a statement written by the artist setting forth specific allegations regarding the plaintiff, negligence would be difficult to prove. It would be unlikely that visual artwork could be found to be negligently created.

If the plaintiff is not able to meet this fault standard, he will lose the case. If the plaintiff is able to meet the state's standard of fault, he must then also meet the constitutional damage requirements before he can recover against the defendant artist.

3. Constitutional Damage Requirements

The law also provides protection to a defendant artist in a defamation action by placing limits on the type of damages for which the defendant artist may be liable. For the public person plaintiff who has satisfied all of the state and constitutional requirements stated

¹⁵⁵ A few states have adopted a "public interest" standard similar to the one that was used in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), under which the plaintiff is required to prove constitutional malice if the subject matter of the offending publication dealt with a matter of public interest. See, e.g., *Gay v. Williams*, 486 F. Supp. 12 (D. Alaska 1979); *Walker v. Colorado Springs Sun, Inc.*, 538 P.2d 450 (Colo.), cert. denied sub nom *Woestendiek v. Walter*, 423 U.S. 1025 (1975), and overruled on other grounds by *Diversified Management, Inc. v. Denver Post, Inc.*, 653 P.2d 1103 (en banc) (Colo. 1982); *Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc.*, 321 N.E.2d 580 (Ind. Ct. App. 1974), cert. denied, 424 U.S. 913 (1976); *Sisler v. Gannett Co.*, 516 A.2d 1083 (N.J. 1986); but see, *Sisemore v. U.S. News & World Report, Inc.*, 662 F. Supp. 1529 (D. Alaska 1987) (holding that the Alaskan Supreme Court would now adopt a negligence standard).

¹⁵⁶ Where the plaintiff is not a public figure, most states require that the plaintiff prove negligence on the part of the defendant. *Brown v. Kelly Broadcasting Co.*, 48 Cal. 3d 711, 771 P.2d 406 (1989).

¹⁵⁷ SMOLLA, *supra* note 2, §§ 3.24-3.35; SACK & BARON, *supra* note 1, § 5.9.1; ELDER, *supra* note 2, §§ 6:4-6:7.

above, these limitations will not apply.¹⁵⁸ The public person plaintiff who has already proven constitutional malice will be permitted to receive both presumed damages and punitive damages if permitted under state law. For the private plaintiff, damage requirements imposed by the federal constitution will have to be satisfied.

To obtain presumed damages, which are damages found by the jury without any requirement that proof of damages be presented by the plaintiff, or punitive damages, the private person plaintiff must prove constitutional malice.¹⁵⁹ If the plaintiff has proven liability, but has not been able to prove constitutional malice, in a negligence jurisdiction for example, the plaintiff must prove he suffered actual injury.¹⁶⁰ This actual injury requirement is not burdensome, however. A plaintiff may meet this requirement by presenting proof of injury to his reputation or by testifying that he became upset when he saw the defendant artist's defamatory painting, photograph or sculpture.¹⁶¹

¹⁵⁸ In such a case the plaintiff must have proven constitutional malice and, therefore, has already met the constitutional damage requirements.

¹⁵⁹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974).

¹⁶⁰ "It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. We need not define 'actual injury,' . . . Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Id.* at 349.

¹⁶¹ *See Time, Inc. v. Firestone*, 424 U.S. 448, 459-60 (1976); *Hearst Corp. v. Hughes*, 466 A.2d 486, 490-91 (Md. Ct. App. 1983); David A. Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747, 757 (1984) ("[The actual injury requirement] is not a significant obstacle to recovering damages. Any plaintiff who can persuade a jury that a defamation caused him anguish apparently can satisfy the standard."). *But see Little Rock Newspapers, Inc. v. Dodrill*, 660 S.W.2d 933, 935 (Ark. 1983) ("An action for defamation has always required this concept of reputational injury and recovery for mental suffering has not been allowed."); *Gobin v. Globe Publishing Co.*, 649 P.2d 1239, 1243 (Kan. 1982) ("Unless injury to reputation is shown, plaintiff has not established a valid claim for defamation, by either libel or slander, under our law.").

B. *State Affirmative Defenses*

Numerous defenses to an action for defamation are made available to a defendant artist under state law. These defenses are in addition to the constitutional defenses provided by federal law. These state defenses can be categorized into two groups: absolute privileges and conditional privileges. If one of these defenses is successfully asserted by the defendant, the plaintiff's case is lost and the plaintiff will receive no recovery.

1. Absolute Privileges

Certain types of statements or statements made in specific situations may be absolutely privileged and may constitute a complete defense to an action for defamation. These situations include statements made by participants in judicial or legislative proceedings,¹⁶² fair and true reports of those proceedings,¹⁶³ statements made to spouses, and statements to which the plaintiff has consented.¹⁶⁴ These situations ordinarily have no special relevance

¹⁶² See, e.g., CAL. CIV. CODE § 47(b) (West 1982).

¹⁶³ See, e.g., *id.* § 47(d)-(e); N.Y. CIV. RIGHTS LAW § 74 (McKinney 1992). The media defendants in *Daniel Goldreyer Ltd. v. Van de Wetering*, 210 N.Y. L.J. 27 (N.Y. Sup. Ct. Dec. 6, 1993), claimed that their statements were absolutely privileged because they had merely reported on the 79-page official laboratory report which analyzed plaintiff's restoration of a damaged painting. *Id.* at 28. The court found that the defendants' articles were not fair and accurate reports of the official laboratory report. "The fact that there is some kind of official report does not entitle journalistic liberties to be taken with it, or to have the contents and import of the report misconstrued and conclusions drawn that are not in the report." *Id.* "The Time article goes further than the report in not merely stating the fact that alkyd [a synthetic paint used as a 'final coat' in the fine arts] was found, but in suggesting that this was inappropriate and a cheap, unprofessional and inartistic way to restore a painting, conclusions not found in the report." *Id.*

¹⁶⁴ RESTATEMENT (SECOND) OF TORTS § 583 (1977) ("[T]he consent of another to the publication of defamatory matter concerning him is a complete defense to his action for defamation."). See *Burton v. Crowell Pub. Co.*, 82 F.2d 154, 156 (2d Cir. 1936) (holding that plaintiff's consent to the use of the photographs for which he posed as an advertisement did not constitute consent to be depicted in a defamatory manner); *Kelly v. William Morrow & Co.*, 186 Cal. App. 3d 1625, 1633, 231 Cal. Rptr. 497, 501 (1986) ("The extent of the privilege conferred by consent . . . is determined by the language or acts by which the

to artists.

The best known absolute privilege is truth. Where the defamatory statement was part of a private dispute, it is presumed to be false.¹⁶⁵ The defendant has the burden of proving that the statement was true as an affirmative defense. If the defendant is successful, it will be a complete defense to the defamation action.¹⁶⁶ Where the statement involved a matter of public interest or concern, the plaintiff has the burden of proving the statement was false.¹⁶⁷

2. Conditional Privileges

Under certain circumstances the law will protect defamatory statements with the understanding that the need to communicate in those situations outweighs the possible injury suffered by the plaintiff. These privileges are known as conditional privileges because they can be overcome by a plaintiff who proves the defendant exceeded the scope of the privilege or acted with personal malice, *i.e.*, hatred, ill-will or spite.¹⁶⁸

a. *Fair Comment*

This privilege protects the right to express opinions about the acts of artists, composers, performers, authors, public officials, scientists, and other persons who place themselves or their work in the public eye.¹⁶⁹ Although the common law fair comment privilege has been

consent is given in the light of the surrounding circumstances.”).

¹⁶⁵ See *supra* note 70 and accompanying text.

¹⁶⁶ ELDREDGE, *supra* note 2, § 63.

¹⁶⁷ See *supra* notes 122-24 and accompanying text.

¹⁶⁸ See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 115 (5th ed. 1984); ELDER, *supra* note 2, § 2:3[I]; SACK & BARON, *supra* note 1, § 7.4; SMOLLA, *supra* note 2, § 8.09.

¹⁶⁹ See *Brown v. Kelly Broadcasting Co.*, 48 Cal. 3d 711, 771 P.2d 406 (1989). This defense was found to protect *Life* magazine when it published an article that questioned an art expert's honesty as well as his professional skill and competence. *Porcella v. Time, Inc.*, 300 F.2d 162, 166-67 (7th Cir. 1962) (“Plaintiff was engaged in a field which he admits (and even

constitutionalized to a great degree,¹⁷⁰ it remains a viable defense as a matter of state law. The policy underlying the defense is similar to the considerations expressed by the Supreme Court in *Sullivan* and *Gertz*: When individuals have exposed themselves or their works to the public, they have impliedly consented to public comment and criticism.¹⁷¹ They, therefore, cannot be heard to complain when that comment and criticism is derogatory. Such individuals also have the ability to make a public defense of themselves or their works in response to such attacks.

b. *Privilege to Protect the Publisher's Interest*

The law protects statements that are made in response to earlier claims or accusations. This form of verbal self-defense allows the defendant reasonably to counter statements made by the plaintiff or others that significantly affected his reputational interests.¹⁷² Pursuant to this privilege, an artist wrongly accused of plagiarism would be permitted to make defamatory statements regarding his accuser.

c. *Common Interest Privilege*

Statements regarding a subject in which the speaker and the

boasts) was in the public domain and, as such, he was subject to comment by the public press as to his activities in that field.”). An art expert was sued for his statement that a particular painting had not been painted by Leonardo da Vinci. The owner of the painting claimed that the expert’s false statement had caused a museum to end its negotiations to purchase the painting. The expert claimed the “fair comment” defense because his statement was a good faith opinion relating to a public artwork. The case was eventually settled out of court for \$60,000.

¹⁷⁰ SACK & BARON, *supra* note 1, § 4.4; SMOLLA, *supra* note 2, § 6.02.

¹⁷¹ See *supra* notes 143, 145.

¹⁷² The defense-of-reputation privilege allows the defendant to “publish in an appropriate manner anything that he reasonably believes to be necessary to defend his own reputation against the defamation of another, including the statement that his accuser is an unmitigated liar.” RESTATEMENT (SECOND) OF TORTS § 594 cmt. k (1977). See SANFORD, *supra* note 2, § 10.5.3.2.

recipient have a common interest may be conditionally privileged where the statement is made in furtherance of that interest and is not made with personal malice.¹⁷³ This privilege has often been applied to persons engaged in business activities or to groups sharing pecuniary interests.¹⁷⁴ Any artist who is a member of an artists' group that deals with a particular gallery may be permitted to make a defamatory statement to other members of the group regarding the gallery owner.

d. *Privilege to Protect the Interests of Another*

Defamatory statements made for the protection of the legitimate interests of another may be conditionally privileged.¹⁷⁵ While this privilege may exist whether the information is requested by the person whose interest is being advanced, or is simply volunteered, courts are generally more favorably inclined to grant the privilege when the information is furnished in response to a request.¹⁷⁶ An example of this privilege would be a gallery owner communicating with another gallery owner regarding the business ethics of an artist whom the former gallery owner had previously represented and with whom the latter is contemplating entering into a business relationship.

IV. CONCLUSION

A lawsuit for libel or slander is difficult to win and expensive to litigate, due to attorneys' fees and other costs.¹⁷⁷ This is especially

¹⁷³ See ELDER, *supra* note 2, § 2:3[B]; SACK & BARON, *supra* note 1, § 7.3.4.

¹⁷⁴ W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 828-30 (5th ed. 1984).

¹⁷⁵ ELDREDGE, *supra* note 2, § 86; SACK & BARON, *supra* note 1, § 7.3.3.

¹⁷⁶ SMOLLA, *supra* note 2, § 8.08[2][b].

¹⁷⁷ See *Brown v. Kelly Broadcasting Co.*, 48 Cal. 3d 711, 750-51, 771 P.2d 406, 431 (1989) (Only 1% of libel cases are actually tried, and 70% of libel awards are overturned on appeal. "In short, a defamation victim faces almost insurmountable obstacles to recovery

true where a plaintiff artist decides to sue a member of the media. In such cases, it is not unusual for the costs of litigation to reach \$1 million. It should also be noted that the vast majority of defamation lawsuits filed against the media are ultimately unsuccessful.¹⁷⁸ Even in defamation lawsuits brought by artists against nonmedia defendants or where the artist is the defendant, the lawsuit is time-consuming and often becomes an all-encompassing passion. Although these lawsuits may not be as expensive as suits against the media, they remain very costly and should be protected against or avoided.

One money-saving alternative to such expensive litigation is to take advantage of a mediator or mediation service or organization.¹⁷⁹ The majority of defamation plaintiffs are primarily concerned with setting the record straight, rather than collecting damages. Where a mediator can narrow the issues present in a dispute and cause each party to clarify their positions, a mutually agreed upon declaration may resolve the dispute without a costly lawsuit.

Lawsuits against artists based on their artwork, while legally possible, have not occurred often. The cost of bringing suit, as well as the constitutional protections given to such artwork, has been a strong disincentive to those contemplating such lawsuits.

within the constitutional limitations.”). See generally THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS (Everette E. Dennis & Eli M. Noam eds., 1989).

¹⁷⁸ See SMOLLA, *supra* note 2, § 9.14; Marc Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, AM. B. FOUND. RES. J. 795 (1981). Many of the defamation suits filed against the media are lost on motions to dismiss or summary judgment motions. While plaintiffs win 65% of the verdicts in cases that do go to trial, only 30% of those judgments are upheld on appeal. See HEINKE, *supra* note 2, § 2.26.

¹⁷⁹ One such organization, the Iowa Libel Research Project, which acts in cooperation with the American Arbitration Association, helps resolve disputes through the use of a nonjudicial procedure. The Iowa project is detailed in SMOLLA, *supra* note 2, § 9.13[5]. Local arts attorneys may be available to provide mediation or arbitration assistance on a less organized basis.

