A COMIC CREATOR’S GUIDE TO LIBEL AND DEFAMATION

DEFAMATION DEFINED

There are two forms of defamation, slander and libel. Slander is the spoken form of defamation, and libel is a written, drawn, televised, or otherwise recorded form.

To be able to sue for defamation, the following elements must be present:

- A false and defamatory statement concerning another.
- An unprivileged publication of that statement to a third party.
- Fault amounting to at least negligence on the part of the publisher (fault amounting to “actual malice” in the case of a public figure). (See Appendix A: “Public Figures,”
- Harm caused by the publication, or presumed harm because the statement falls within a special class of defamatory statements known as defamation per se. ¹

A comic book or novel that contains false statements damaging to someone’s reputation may expose the producer to claims of libel and defamation.

Defamatory Statement

A defamatory statement is one that is both false ² and that tends to “harm the reputation of another as to lower him in the estimation of the community or to deter third persons from

¹ Restatement (Second) of Torts §558.
² Although some states, such as Massachusetts, allow libel for harmful true statements published with “actual malice.” See Noonan v. Staples, Inc., 556 F. 3d 20 (1st Cir. 2009).
associating or dealing with him.”\textsuperscript{3} Usually statements that are “merely unflattering, annoying, irksome, or embarrassing, or that hurt only the plaintiff’s feelings”\textsuperscript{4} do not support a defamation claim. Nor will humor or parody.

Some kinds of defamatory statements are considered especially harmful. Examples include:

- Accusations that the plaintiff has committed a crime.
- Statements that hurt the plaintiff’s business reputation.
- Allegations that the plaintiff has a “loathsome disease.”
- Accusations that the plaintiff has engaged in sexual misconduct.

**Statements “Of or Concerning Another”**

To sue someone for libel, a plaintiff must prove that the libelous statement was aimed at him or her. The “of or concerning another” test looks to whether a reasonable person would assume the statement was made about or concerned the plaintiff.

**Example:** A non-fiction comic alleges that Chateau, Montana (population 1,690) pharmacist Robert Martin poisoned all of his customers by filling prescriptions while he was drunk. If the allegations were false, a Chateau pharmacist named Robert Martin could sue the comic creator and the publishing company for defamation. After all, how many pharmacists named Robert Martin could there be in Chateau? However, it would be unlikely that a Los Angeles (population 3.82 million) pharmacist with the same name would win such a suit, as there are undoubtedly more than a few pharmacists named Robert Martin in LA.

\textsuperscript{3} Restatement (Second) of Torts §559.
Defamation in Works of Fiction

Although most people associate defamation with fact-based titles, like an autobiographical graphic novel, narrative titles can create problems for comic creators as well. It may seem surprising that a work of fiction can give rise to a defamation claim—after all, unlike in a non-fiction graphic novel, the author is not trying to say that the story is real. Trouble usually occurs when a creator fictionalizes an actual person’s life or creates a character that closely resembles an actual person. When faced with such a claim, a court may satisfy the “of or concerning another” test by asking whether a reasonable person reading the book would understand that the fictional character was, in actual fact, the plaintiff acting as described.5

To establish a connection between the fictional character and the real person of the plaintiff, a court may compare a host of characteristics, such as the names, backgrounds, physical characteristics, ethnic backgrounds, personality, and age of the plaintiff and the character. A court may place emphasis on whether the comic book creator knew and had a relationship with the plaintiff. A disclaimer stating that the comic book is a work of fiction and is not intended to represent actual persons may be given weight by the court but is not conclusive.6

Creators take heart: In cases involving fictional characters, similarity of names between fictional characters and real people, by itself, is usually not enough to transform coincidence into defamation.

5 *Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 78 (1979). The test of whether a fictional character so closely resembles an actual person as to satisfy the “of and concerning” test is “whether a reasonable person, reading the book, would understand that the fictional character therein pictured was, in actual fact, the plaintiff acting as described.”
6 For more on defamation in fictional characters see Matthew Savare’s excellent article, “Falsity, Fault, and Fiction: A New Standard for Defamation in Fiction” (Fall 2004). *UCLA Entertainment Law Review*, 12 (1).
Publication of Defamatory Statement

For a statement to defame someone, it must be published to a third party. “Published” does not mean printed in a book, nor does “published” have the same meaning as it does under copyright law (“the distribution of copies of a work to the public by sale”). For a defamatory statement to be published, it must be seen, heard, read, and so forth, by someone other than the person being defamed.

Example: Quill writes a comic script: “True Tales of Terrible Tellers” in which she includes the following caption: “Barney Banker steals from the cash drawer at the First National Bank to fund his Hummel porcelain box collection.” The allegation is false and defamatory. Quill shows the script only to Barney. Even though it is upsetting, Barney has not been defamed. But the moment Quill shows the script to another person, Barney can sue for defamation (libel).

Republication

If a defamatory statement is published again after its initial publication, it is considered “republished.” Generally, republishers may be sued for defamation as well. A creator must be very cautious here! An interview subject who defames someone on the record may create republication liability when it is published in the comic, when that comic is turned into an animated film and shown in the theaters, and when it is reproduced on a DVD. Because the creator has indemnified the publisher, and everyone else down the line of distribution, those parties’ legal claims and expenses will be passed on to the creator.
There are exceptions to this rule of republication liability, but it is best to nip the problems in the bud by avoiding libel publication altogether.

**Defamation of Public Figures**

A public figure is a politician, celebrity, or other individual who has voluntarily placed him- or herself in the midst of the public controversy. Public figures have a much more difficult time proving defamation. To prove defamation, public figures must show the statement was made with *actual malice*.

**Actual Malice Standard**

In the context of defamation, *actual malice* is the knowledge that the statement was false or was made with a reckless disregard for its truth.

*Example:* The Action Render Team create and publish a “tell all” nonfiction graphic novel about popular rock singer Opie Um’s decline into drug abuse. The novel depicts Opie’s police record: He was arrested once carrying a small amount of marijuana, and his friends give interviews saying that he routinely went on benders. The novel’s captions uses phrases like “Opie slid into the dark depths of drug abuse and despair”; and “there was a monkey on his back—a monkey named addiction!”

Opie sues for defamation. He produces evidence that the marijuana bust was the first and last time he ever took illegal drugs, and that he was far from an addict. He proves that the “benders” his friends referred to were actually stories cooked up by his agent to cover up the fact that he was in South America doing missionary work—a fact that
would hurt his public image with his hard rockin’ fans. In short, Opie demonstrates that the statements made in the graphic novel were false.

Will Opie automatically win his suit? Not necessarily. Because he is a public figure, Opie will still have to show that the statements were made with knowledge that they were false or that they were made with a reckless disregard for the truth. This may be tough, considering the producer relied on police records of a drug arrest and interviews with Opie’s friends.

DEFENSES TO DEFAMATION

There are a number of possible defenses to a charge of defamation.

**Truth.** The most basic defense to defamation is truth. No matter how scandalous or injurious to a person’s reputation a statement may be, it will not be considered defamatory if it is true.

*Example:* The Action Render Team creates another nonfiction graphic novel titled “Prostitutes and the Policemen Who Love Them,” which features interviews with prostitutes naming the police officers with whom they have had sexual congress.

Sergeant Lou Scivious, named in the book, sues A.R.T. for libel. At trial, A.R.T. shows footage of Officer Scivious handing money to, and entering a hotel room with, the call girl in question. A.R.T. produces evidence showing that Officer Scivious was not engaged in an undercover vice operation targeting prostitution. The court will most likely find that the film’s statements about the officer were true, and therefore none of the members of A.R.T. will be liable for libel.
**Consent.** If someone consents to the publication of a defamatory statement, he will not be able to bring a claim for defamation. *This is why any time you draw or write about a real living person for your graphic novel you should get them to waive all claims of defamation.*

**Example:** Quill interviews Dusty Rinkle, the owner of a retirement home under investigation. Prior to the interview, Rinkle signs an interview release form in which he waives the right to sue for defamation. The final graphic novel interweaves panels of Rinkle discussing the benefits of his retirement home with cartoons showing Rinkle burying little old ladies alive. If Rinkle sues, Freddy Filmmaker might win with a defense that Rinkle consented and waived his right to sue for defamation.

Note, however, if Rinkle can prove that he signed the interview release because he relied on Quill’s statement that he was going to be portrayed as the hero, he might be able to successfully argue that he was *fraudulently induced* to sign the agreement, therefore his did not in fact consent. (See Depiction Releases, Online Supplement.)

**Humor or parody.** This is generally protected by the First Amendment and is considered a form of protected opinion (see below). There is no libel when the material is clearly understood as parody, satire, humor, or fantasy and is not capable of a defamatory meaning.⁷

**Example:** Beard-O illustrates a Mad Magazine piece about Gus Grimes, insinuating that he is a crook. Because this is a well-known humor and satire magazine, the skit will probably not be considered defamatory.

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**Privilege.** Certain types of communications, such as judicial and legislative proceedings, are considered privileged, and therefore immune from claims of defamation.

*Example:* For her newest book on tobacco lobbyists, Quill transcribes congressional hearings in which a Congressman Abe O’Lition accuses a tobacco industry lobbyist of having a second job of selling crack cocaine to children. The lobbyist sues Quill, who may successfully defend by the virtue of the fact that the statement was made during the course of a legislative proceeding.

**Opinion.** Statements that reflect a point of view, or opinion, rather than specific allegations of fact are not considered defamatory. Also insulated from libel and slander are “vigorous epithets,” “rhetorical hyperbole,” “loose, figurative language,” or “lusty and imaginative expressions.”

*Example:* The Action Render Team creates a non-fiction graphic novel about the history of New York pizza. In an interview with famous French chef, S. Cargo, the gourmet bad-mouths the owner of Pete’s Za, a popular New York pizzeria. Cargo says: “Pete’s pizza is the worst I’ve ever tasted. If you looked up the word disgusting in the dictionary, you would find a picture of Pete. The man’s an idiot!” Pete sues the Action Render Team and Cargo for libel. The court will most likely find that Cargo’s statements are opinion and, therefore, not actionable as libel.

**Fair Comment.** In matters of public interest, many states require that a reputation-damaging false statement be made with a certain amount of malice before it can be considered libel.
However, this privilege does not extend to material that defames another and is not reasonably necessary to the development of the subject matter of the non-fiction graphic novel.

**Example:** The Action Render Team creates a non-fiction graphic novel about a small dinner theater company’s failure to pay the salaries it owes to the cast. They mistakenly say that the dinner theater manager is “holding out” on the cast. In fact, the manager is withholding the money because the cast had failed to show up for two shows, costing the theater money. The manager sues for defamation, claiming that the story A.R.T. created is one-sided. As the story involves the public interest, if they can prove that they didn’t create the novel maliciously, A.R.T. may assert a fair comment defense.\(^8\)

**CAUTION BOX!—WATCH YOUR OPINION**

**BE CAREFUL HERE!** Merely calling something an opinion does not insulate you from defamation. Whether a statement counts as an opinion depends upon whether it is falsifiable. In other words, can the statement be proven true or false? The statement, “In my opinion, Pete Za lied when he testified under oath,” if false may be defamatory, notwithstanding the use of the word “opinion,” because it accuses Mr. Za of the crime of perjury, and whether he lied might be proven true or false.

In determining whether a statement is an opinion, and therefore not defamatory, a court will take a look at the context in which the statement was made in the customary way in which the words used in the statement are typically uttered. The court may apply a “totality of circumstances” test to determine whether statement is fact or opinion. This test will take into

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account (1) the specific language used; (2) whether the statement is verifiable; (3) the general context of the statement; and (4) the broader context in which the statement appeared.9

Examples of statements found to be opinion:

- Union officials who are “willing to sacrifice the interests of the members of their union to further their own political aspirations and personal ambitions.”10
- An attorney was a “very poor lawyer.”11
- A university vice president was the “Director of Butt Licking.”12

**BOTTOM LINE**: It may be counterintuitive, but the more inflammatory and hyperbolic a statement is, the more likely a court will find it to be opinion, and not defamatory language. So instead of saying: “Pete Za cheats on his taxes,” you may be better off saying “Pete Za would cheat an orphan out of her last dime.”

**MATTERS OF PUBLIC CONCERN: GROSS IRRESPONSIBILITY TEST**

Good news for all of you political cartoonists out there: Thanks to the First Amendment, matters of public concern are given greater leeway to reporters. In New York, if the allegedly defamatory material is of public concern, the allegedly defamed person will have to show that a news reporter acted with **gross irresponsibility** with regard to the accuracy of his or her reporting. Said one court:

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11 *Sullivan v. Conway*, 157 F.3d 1092 (7th Cir. 1998).
“Under this ‘gross irresponsibility’ standard, if an article is ‘arguably within the sphere of legitimate public concern’ or ‘reasonably related to matters warranting public exposition,’ the party allegedly defamed can recover only by establishing, by a preponderance of the evidence, that ‘the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.”\(^{13}\)

**Gross Irresponsibility**

In determining gross irresponsibility, courts look to whether the reporter:

- Followed “sound journalistic practices” in preparing the allegedly defamatory piece.
- Followed “normal procedures,” including editorial review of the piece.
- Had any reason to doubt the accuracy of the source relied upon and thus a duty to make further inquiry to verify the information.
- Could have easily verified the truth.\(^{14}\)

**SPECIAL RULES REGARDING DEFAMATION**

- You can’t defame a dead person.
- “Defamatory statements” are not limited to words alone. Pictures, videos, and audio may also contain defamatory material.
- An artist can be held liable for defamation even if she did not intend to defame someone. The only intent that is required is the intent to publish a particular statement.

\(^{13}\) Chaiken v. VV Publishing Corp., 119 F.3d 1018 (2d Cir 1991).

\(^{14}\) Id.
• Defamation requires publication: the unprivileged dissemination of the statement to a third party. In other words, an otherwise defamatory statement made only to the person it allegedly defames is not defamation. However, for artists, a comic book containing defamatory statements shown or distributed to the public would be considered “published.”

• The liability for defamation extends beyond the initial publisher. Even those parties who disseminate the defamatory material can be held liable if they should have known of the defamatory content.

• Corporations may also sue for defamation when a graphic novel or comic book’s false statements prejudice it in the eyes of the business community by accusing it of criminal business practices, dishonest conduct, or lack of integrity.

• Defamation law differs from state to state. Massachusetts, for instance, recently recognized an exception to the rule “truth is an absolute defense to libel.” A federal court recently held that statements that are reputation-damaging but true can still give rise to a libel claim if they are made with “actual malice” (ill-will or malevolent intent). Although many attorneys, including yours truly, consider this a bad decision that flies in the face of years of contrary legal precedent, it is still the law ... in Massachusetts.\footnote{15 Noonan v. Staples, Inc., 556 F. 3d 20 (1st Cir. 2009).}

However, federal constitutional law—primarily judicial interpretations of the First Amendment—sets limits to state defamation law.
• In general, an artist has greater leeway regarding the kinds of statements she may publish when the statements concern a “public figure,” such as a politician or actor, than when they concern someone who is not in the public eye.

• Many states have *retraction laws* that allow the defaming party to retract her statements within a certain time period. If the statement is retracted, the defendant will be liable for fewer damages should she ultimately lose her case.

• Groups of under twenty-five people can be libeled, and if so, they can each sue! For example, if you say “lawyers are all thieves,” that’s not libel. But if you say “All the lawyers living in Kalawao County, Hawaii are crooks,” you may be open to a libel claim. At thirteen square miles, Kalawao County is the United States’ smallest county and probably has fewer than twenty-five attorneys (one would hope).