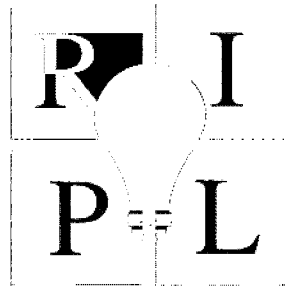


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AN IMMORAL FIGHT: SHIELDING MORAL RIGHTS WITH FIRST AMENDMENT JURISPRUDENCE WHEN FAIR USE BATTLES WITH ACTUAL MALICE

MARK A. PETROLIS

ABSTRACT

Moral rights give an artist personal rights to her work. Because an artist puts her personality, spirit, and soul into the creation of her work, her honor and reputation may be harmed if her works are mistreated. In 1990, the Visual Artists Rights Act incorporated moral rights into U.S. copyright law. However, fair use became an absolute defense to moral rights violations. This comment proposes that fair use should not be an absolute defense, and applies First Amendment jurisprudence developed from defamation law to both fair use and moral rights. Defamation shares similarities with both. Like moral rights, defamation law protects one's reputation. In addition, the actual malice standard, which is derived from defamation law, encourages public debate, which is similar to fair use. Fair use's purpose is to encourage the dissemination of works that would otherwise be restrained by a copyright holder. By analyzing how moral rights, fair use, and defamation's actual malice standard work together, moral rights can prevail against fair use, without fair use being sacrificed.

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AN IMMORAL FIGHT: SHIELDING MORAL RIGHTS WITH FIRST AMENDMENT
JURISPRUDENCE WHEN FAIR USE BATTLES WITH ACTUAL MALICE

MARK A. PETROLIS*

*Good artists copy. Great artists steal.*¹

- Pablo Picasso

INTRODUCTION

Pablo Picasso is one of the most famous and important artists of the twentieth century.² *Guernica*,³ arguably his most famous work, is a powerful painting that screams the horrors of war by uniquely depicting the Nazi massacre at the Spanish city of Guernica in 1937.⁴ A mural of *Guernica* hangs at the entrance of the United Nations Security Council chamber,⁵ but was infamously covered so its anti-war message would not be viewed as hypocritical when Secretary of State Collin Powell urged for the invasion of Iraq in February of 2003.⁶ Did this act dishonor Picasso's reputation? What happens if a mural of *Guernica* is used by another artist, who is a Neo-Nazi? What if this artist believes the Guernica massacre never happened and

* J.D. Candidate, May 2009, The John Marshall Law School. B.S.E. Engineering Management, Purdue University, May 2000. I would like to thank my editors Ian Botnick and Kirk Rowe. I would like to point out their indefatigable and selfless efforts in helping me with this comment. In addition, I would like to thank Dan Sullivan, P.J. McCarthy, and the editorial board of *The John Marshall Review of Intellectual Property Law* for their support. A special thanks to Professors Kevin Hopkins and Doris Long for their influence on this comment. Finally, thank you mom and dad for all your support! Any mistakes in this article are my own.

¹ Jessica Lack, *The Guide: Exhibitions: Goshka Macuga London*, THE GUARDIAN, June 30, 2007, at 36.

² See MARK STEVENS & ANNALYN SWAN, DE KOONING: AN AMERICAN MASTER 137–38, (2004) (stating that Picasso spurred the Modern Art movement, is the father of cubism, and was a major influence on American artists like William De Kooning).

³ GUERNICA (Pablo Picasso 1937), available at <http://www.museoreinasofia.es/museoreinasofia/live/coleccion/obras/guernica.html>.

⁴ See Don Murray, *Guernica, 70 Years Later: The Massacre That Prompted a Masterpiece*, CBC NEWS, Apr. 26, 2007, <http://www.cbc.ca/news/reportsfromabroad/murray/20070426.html> (last visited Nov. 7, 2008). Guernica is a city in the Basque region of Spain. *Id.* General Francisco Franco during the Spanish Civil War allowed Nazi Germany to bomb the city as part of a military exercise. *Id.* Casualties ranged from 300 to 1,000 civilians. *Id.*

⁵ Lawrence Van Gelder, *Arts Briefing*, N.Y. TIMES, Feb. 5, 2003, at E2. The United Nations action was international news because it did not want to pollute what *Guernica* represents. *Id.*

⁶ Doree Shafir, *Artist Enlists Picasso in Fight Against War: He Suggests Using the 1937 Image Guernica to Make Statement About Iraq*, ORLANDO SENTINEL, Jan. 14, 2006, at E4; see also Maureen Dowd, *Powell Without Picasso*, N.Y. TIMES, Feb. 5, 2003, at A27 (discussing how the U.N. plans to prevent a mixed message by covering *Guernica*, and its anti-war message, when Collin Powell argues for the invasion of Iraq).

writes the word “Lies” all over the mural? Should this artist’s “new” work be protected under the doctrine of fair use, or should Picasso’s moral rights prevail?

Fair use allows an artist to comment on or criticize the work of another without being liable for copyright infringement,⁷ which serves as catalyst for the promotion of the arts.⁸ Moral rights, on other hand, protect an artist’s reputation and honor in her own work, and allow her to participate in the marketplace of ideas without fear of losing her individuality.⁹ While both doctrines are important to artists, the policies that underline fair use conflict with the interests that moral rights are designed to protect. Currently, in the United States, the Copyright Act proscribes that fair use will prevail over moral rights.¹⁰

Fair use should not be an absolute defense. Society would be better served by a more balanced approach to artists’ rights. Accordingly, this comment explores the application of the actual malice standard developed from defamation law to show that moral rights and fair use can coexist.

Part I provides an overview of the history and the current law regarding moral rights, fair use, defamation law and the constitutional standard of actual malice. Part II analyzes the similarities between defamation law and moral rights, and explores the issues that would arise with applying an actual malice standard to the moral rights/fair use dichotomy. Part III proposes that such an application would be feasible, even preferable, because of the similarities that moral rights and fair use share with defamation law.

I. BACKGROUND

A. Moral Rights

Moral rights are personal rights that protect an artist’s investment in her work. Specifically, under moral rights, the artist has the right to be attributed to her work and to maintain the physical integrity of her works.¹¹ Violations of these rights

⁷ 17 U.S.C. § 107 (2006) (promulgating the factors and uses that are considered in determining if there is fair use).

⁸ U.S. CONST. art. I, § 8, cl. 8 (“To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”); *see also* JANICE M. MUELLER, AN INTRODUCTION TO PATENT LAW 30 (2nd ed. 2006). This is the Copyright and Patent clause of the U.S. Constitution. *Id.* The word “science” under the clause does not refer to patents. *Id.* The colonial interpretation of the word “science” means knowledge and learning, thus copyrightable materials. *Id.* Consequently, the term “Useful arts” refers to patents. *Id.*

⁹ *See* Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 558 (1940). The right to create works is the “right of individual liberty.” *Id.* Historically, the right to create has been restrained through incarceration by oppressive governments. *Id.*

¹⁰ Visual Artists Rights Act, 17 U.S.C. § 106A(a). An artist’s moral rights are “[s]ubject to [17 U.S.C. § 107].” *Id.*; *see id.* § 107 (“Notwithstanding the provisions of sections [17 U.S.C. §§ 106–106A], the fair use of a copyrighted work . . . is not an infringement of copyright”).

¹¹ *See* Dane S. Ciolino, *Rethinking the Compatibility of Moral Rights and Fair Use*, 54 WASH. & LEE L. REV. 33, 39(1997) (“While there are considerable differences among the particular moral

damage the artist's honor or reputation. The following section discusses the development of moral rights and highlights the importance of protecting these rights.

1. *The Origins and Essence of Moral Rights.*

The birthplace of moral rights, or *droit moral*,¹² is 19th century France.¹³ As stated, moral rights give artists personal rights to their work.¹⁴ France and other civil law countries¹⁵ believe the artist puts her personality, spirit, and soul into the creation process, which is radiated in the final work.¹⁶ Essentially, moral rights allow an artist to safeguard her work from becoming an inaccurate reflection of her personality or soul. Consequently, several moral rights developed from this underlying theory of protection, including: (1) the right of integrity;¹⁷ (2) the right of attribution;¹⁸ and (3) the right to withhold (withdrawal).¹⁹

The right of integrity protects the artist's work as a whole and prevents any mutilation, distortion, or altering of the work.²⁰ This allows the work to be presented in a manner consistent with the artist's personality.²¹ Otherwise, any alteration amputates the artist's personality from the work and, thus, harms her reputation and honor.²² Indeed, the artist would have to go through the agony of seeing her work dismembered.²³

rights recognized in different jurisdictions, the most commonly recognized are the right of attribution and the right of integrity.”).

¹² 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.01[A] (2007). Nimmer states that the notion of a spiritual or personal right included in *droit moral* is lost in the English translation. *Id.* Another French translation is that it means a non-economic right. *Id.* Nimmer also warns that “moral rights” should not be interpreted as something that involves the moral judgment of right or wrong, or good and evil. *Id.*

¹³ Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795, 803 (2001).

¹⁴ NIMMER, *supra* note 12, § 8D.01.

¹⁵ See RALPH E. LERNER & JUDITH BRESSLER, ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS & ARTISTS 1252–54 (3d ed. 2005) (specifying the moral rights protected in Germany, Italy, and Spain).

¹⁶ Lee, *supra* note 13, at 801.

¹⁷ John Henry Merryman, *The Refrigerator of Bernard Buffet*, HASTINGS L.J. 1023, 1027 (1976).

¹⁸ *Id.* Also known as the right of paternity in other countries. *Id.*

¹⁹ *Id.* at 1028. This is also known as the right of divulgation. *Id.*

²⁰ Ciolino, *supra* note 11, at 40.

²¹ *Id.* at 41.

²² JOHN HENRY MERRYMAN, ALBERT E. ELSER & STEPHEN K. URICE, LAW, ETHICS, AND THE VISUAL ARTS 423 (5th ed. 2007). Professor Merryman states a violation of this right is a mistreatment of the artist's personality. *Id.* Personality encompasses one's identity, name, reputation, occupation, privacy, honor and in essence one's person. Merryman, *supra* note 17, at 1025.

²³ Lee, *supra* note 13, at 815. It has been argued it protects the author's personality interest in the creative process by preventing the “agony” of seeing their work altered in a different manner. *Id.* However, the complete destruction of a work may not violate the right to integrity. Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?* 38 VAND. L. REV. 1, 9 (1985). This is because when a work is altered, it is presented in a form that is not her own and generates criticism for a work she has not created. Roeder, *supra* note 9, at 569. In

The right of attribution allows an artist to be identified with her work.²⁴ Similarly, the artist also has the right *not* to associate her name with her art if she wishes; the artist may attribute her work anonymously or with a pseudonym.²⁵ Furthermore, the right allows an artist to refrain from being associated with a work that is not hers.²⁶ As a result, this further protects an artist's reputation and reaffirms the notion that her personality is encompassed in her work.²⁷ Lastly, the right of attribution prohibits a low quality work from being associated with the artist and, thus, prevents the artist's reputation from being diluted.²⁸

The right to withdrawal, or withhold, allows an artist to withdraw his work from the public, or prevent the work from even entering the public realm, respectively.²⁹ This gives the artist the right to dictate the time, place, and manner on how her work will be seen by public, even if it is to be displayed or seen at all.³⁰ This allows for the artist to control some of her work's criticisms and helps shield her reputation.³¹ Additionally, this right gives an artist more power in protecting her personality or persona.³² Indeed, when a work no longer reflects who the artist is, it can be removed from the public.³³

Historically, moral rights encompass the right of integrity, the right of attribution, and the right to withhold.³⁴ These rights are important to an artist because it preserves the artist's honor, reputation, and personality. Moreover, these rights ensure the artist's message will be conveyed to the public as intended.³⁵ Accordingly, moral rights embrace First Amendment principles.³⁶

contrast, destruction of a work cannot generate criticism because a destroyed work can no longer be displayed. *Id.* Accordingly, an additional policy issue for the right of integrity is the public's right to having a work fully preserved. Merryman, *supra* note 22, at 423.

²⁴ W.W. Kowalski, *A Comparative Law Analysis of the Retained Rights of Artists*, 38 VAND. J. TRANSNAT'L L. 1141, 1158 (2005). An example of this pertained to a French artist who was commissioned to produce several works of arts, and in his contract he was suppose to sign the works with a pseudonym and not his own. *Id.*

²⁵ Lee, *supra* note 13, at 802.

²⁶ Ciolino, *supra* note 11, at 40.

²⁷ See Merryman, *supra* note 22, at 423. All other moral rights do not have an economic incentive. *Id.* This right is important because the professional reputation of an artist is critical for an artist to be lucrative in the art market. *Id.*

²⁸ See Roeder, *supra* note 9, at 563 (stating such tactics are unfair competition).

²⁹ See Kowalski, *supra* note 24, at 1160, 1161.

³⁰ *Id.* at 1160. This right is based on the fact the artist is the only person who knows when the work is done. *Id.*

³¹ See *id.* at 1161. Consequently, an artist may withdraw a work that is not well received to prevent further damage to her reputation.

³² See *id.*

³³ See *id.* An artist may withdraw a work from the public when the work no longer expresses the artist's opinions. *Id.*

³⁴ See Merryman, *supra* note 17, at 1027–28 (using three cases from French law to highlight the historical importance of these rights).

³⁵ See *id.* at 1029. The artist's vision is best served when her work is protected and kept in the same state it emerged from.

³⁶ Cf. Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 358–61 (1988). Copyright protection, it has been argued, should have First Amendment protection because *freedom of expression is meaningless without assurances that the expression will remain unadulterated.* *Id.* at 359. In addition, moral rights are implicated with this argument. *Id.* Accordingly, "free speech requires that speech be guaranteed some integrity. It follows that if intellectual property is

2. Moral Rights in the United States – Before the Visual Artists Rights Act of 1990

Moral rights did not exist in America until the United States joined the Berne Convention in 1988.³⁷ However, this did not prevent moral rights claims from being made prior to joining.

In New York, for example, some professionals brought libel claims against publishers who attributed to them to works they did not write or edit.³⁸ These actions resembled moral rights claims and suggested that moral rights were protected in some form by the American legal system. Rulings favorable to the authors' seemed to suggest that moral rights were protected in America. However, the courts relied more on a theory of publishing false statements rather than misattribution in determining reputational harm and, thus, masked any formal adoption of moral rights.³⁹ Similar pre-Berne claims were also brought under the Lanham Act.⁴⁰ While these claims resembled, and even discussed, moral rights, the

expression, it merits the same guarantee." *Id.* Further, if free speech's goals are the promotion of political debate or market efficiency, then it is critical the speaker's message is not distorted, or the goals become significantly hindered. *Id.* at 360. Moreover, expression must be protected for those who cannot overcome such distortions. *Id.* For example, public officials or figures can overcome such alterations because their positions allow them to clarify their expressions through the media or other channels. *Id.* Justice Brennan articulated this position:

[I]n the absence of an effective means of communication, the right to speak would ring hollow indeed. And, in recognition of these principles, we have consistently held that the First Amendment embodies, not only the abstract right to be free from censorship, but also the right of an individual to utilize an appropriate and effective medium for the expression of his views.

Id. at 361 (quoting *Columbia Broad. Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 193 (1973) (Brennan J., dissenting)).

³⁷ Lee, *supra* note 13, at 805 (noting that the United States initially joined through the Berne Convention Implementation Act of 1988); see Berne Convention for the Protection of Literary and Artistic Works art. 6bis, adopted Sept. 9, 1886, S. Treaty Doc. No. 99-27, 1161 U.N.T.S. 3 ("[An] author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."); see also David M. Spector, *Implications of United States Adherence to the Berne Convention*, 17 *AIPLA Q.J.* 100, 105 (1989) (stating Berne's purpose was to unify international copyright law and fight piracy).

³⁸ See, e.g., *Clevenger v. Baker Voochris & Co.*, 168 N.E.2d 643, 644 (N.Y. 1960) (regarding Joseph Clevenger, the renowned author on New York state law, bringing suit against his former publishers for continuing to use his name on a treatise he no longer edited); *Ben-Oliel v. Press Pub. Co.*, 167 N.E. 432, 432 (N.Y. 1929) (regarding, a newspaper that published an article the plaintiff did not write and attributed her as the author); *Gershwin v. Ethical Publ'g Co., Inc.*, 1 N.Y.S.2d 904, 905 (N.Y. City Ct. 1937) (regarding a case where Ethical Publishing printed an advertisement that had Dr. Gershwin endorsing a medicinal drug).

³⁹ See, e.g., *Clevenger*, at 168 N.E.2d at 644–45, 646 (noting that there were over 200 errors that consisted of omitted citations, misapplied annotations, and mis-described amendments which harmed Clevenger's reputation); *Ben-Oliel*, at 167 N.E. at 433 (holding that an article which attributed opinions to the plaintiff which she did not hold and blatantly misstated facts was libelous).

⁴⁰ See, e.g., *Gilliam v. Am. Broad. Co.*, 538 F.2d 14, 19, 24–25 (2d Cir. 1976) (holding that Monty Python could sustain a Lanham Act violation when it did not want to be associated with an overly edited broadcast of its sketch because it hurt the group's reputation in America and, therefore, entitled it to protection); *Smith v. Montoro*, 648 F.2d 602, 603 (9th Cir. 1980) (involving an actor's performance in a movie being credited to another person, an act the court believed harmed

courts never recognized these claims as a moral rights violation.⁴¹ Collectively, these cases show that the idea of moral rights was prevalent in the American justice system even before it was formally accepted in 1988.

3. *The Visual Artists Rights Act of 1990*

The Berne Convention's particular article dealing with moral rights was not treated as self-executory, meaning the moral rights provisions were not incorporated into U.S. law when the treaty was ratified.⁴² Instead, Berne allows for modification before its execution.⁴³ Subsequently, Congress passed the Visual Artists Rights Act of 1990 ("VARA"), which has been incorporated into the Copyright Act as a result of joining Berne.⁴⁴

VARA is similar to Berne in that it grants both the right of attribution⁴⁵ and integrity.⁴⁶ The right of attribution under VARA, however, not only gives the artist the right to associate her name with her work, but also grants two negative rights:⁴⁷ (1) the right to prevent attribution to any visual work the artist did not create;⁴⁸ and (2) the right to disassociate from distorted, mutilated, or modified works that result in prejudicial harm to the artist's honor or reputation.⁴⁹ Honor⁵⁰ is defined as "[one's] good name or public esteem," and reputation⁵¹ means an artist's worth or merit.

Similar to Berne, VARA's integrity right⁵² is violated when a visual work is mutilated, distorted or modified and causes prejudice to an artist's honor or

the actor's reputation because it could prevent him from receiving future work do to the miscredit and, therefore, allowed the actor to maintain a Lanham Act claim).

⁴¹ See *Gilliam*, 538 F.2d at 24. The court discussed moral rights, however it stated those rights were not recognized by U.S. law. *Id.* at 24–25.

⁴² See NIMMER, *supra* note 12, § 8D.02[C]. Self-executory means the United States would have to follow Article 6bis strictly.

⁴³ *Id.*; see also *Berne Convention*, *supra* note 37 ("The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.")

⁴⁴ See 17 U.S.C. § 106A(a) (2006) ("Rights of attribution and integrity [are s]ubject to section of the exclusive rights provided in section 106.")

⁴⁵ *Id.* §§ 106A(a)(1)(A)–(B) (granting the creator of a work the right to claim authorship to works she has created and the right to prevent any misuse of her name that is associated with works she did not create).

⁴⁶ *Id.* §§ 106A(a)(1)–(3). An author has the right to protect the integrity of her work. *Id.*

⁴⁷ See NIMMER, *supra* note 12, § 8D.06[B][1] (stating that these negative rights would most likely be the ones asserted).

⁴⁸ *Id.* § 106A(a)(1)(B) ("[T]o prevent the use of his or her name as the author of any work of visual art which he or she did not create").

⁴⁹ *Id.* § 106A(a)(2) ("[An author] shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation.")

⁵⁰ *Carter v. Helmsley-Spear*, 861 F. Supp. 303, 323 (S.D.N.Y. 1994), *aff'd in part, rev'd in part on other grounds, vacated in part on other grounds*, 71 F.3d 77 (2d Cir.) (using this definition was not against the purpose of VARA).

⁵¹ *Id.* (emphasizing the definition was not against the purpose of VARA).

⁵² 17 U.S.C. § 106A(a)(3)(A). This section states that VARA is "to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her

reputation.⁵³ In contrast to Berne, the right of integrity allows an artist to prevent or recover damages from a work that is destroyed.⁵⁴

VARA, in general, is more limited than Berne because it only applies to certain visual arts, whereas Berne applies to all literary and visual works.⁵⁵ Accordingly, the ability to make a moral rights claim under VARA is significantly hindered.

VARA imposes several limitations on moral rights. Moral rights are subject to fair use,⁵⁶ and are independent of the rights granted by copyright.⁵⁷ Only the creator⁵⁸ of an artwork attains moral rights.⁵⁹ These rights can be waived but cannot

honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right.” *Id.* The same definitions for prejudice, honor, and reputation also apply to this right. *Id.*; see also *Carter*, 861 F. Supp. at 323 (S.D.N.Y. 1994) (applying terms apply the same to both the right of integrity and the right of attribution).

⁵³ 17 U.S.C. § 106A(a)(3)(A).

⁵⁴ *Id.* § 106A(a)(3)(B) (“[The author of a work shall have the right] to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.”).

⁵⁵ Compare *id.* § 101 (narrowly defining visual arts), with *Berne Convention, supra* 37, art. 2 (“The expression ‘literary and artistic works’ shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression.”). The Copyright Act defines a “work of visual art” as:

- (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or
- (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

17 U.S.C. § 101. However, “a work of visual art does not include”

- (A) (i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;
- (ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;
- (iii) any portion or part of any item described in clause (i) or (ii);
- (B) any work made for hire; or
- (C) any work not subject to copyright protection under this title.

Id.

⁵⁶ 17 U.S.C. § 106A(a) (“Rights of attribution and integrity . . . [are] subject to [17 U.S.C. § 107].”).

⁵⁷ *Id.* (“Rights of attribution and integrity . . . [are] independent of the exclusive rights provided in [17 U.S.C. § 106].”).

⁵⁸ See *id.* § 101 (defining that an author cannot retain any moral rights when her work was created as a work for hire).

⁵⁹ *Id.* § 106A(e)(2). Moral rights are distinct from the copyright owner. *Id.* If a copyright is transferred from an author to another it does not transfer, or waive, the author’s moral rights. *Id.*

be transferred to another.⁶⁰ Finally, moral rights only last for the life of the author if created after the enactment of VARA, otherwise for the duration of the copyright.⁶¹

While incorporation of moral rights into copyright law is not a novel concept, it was not until the adoption of VARA that the incorporation formally took place. As a result, the honor and reputation of American artists can now be better protected. Furthermore, the public's interest in preserving a work's original expression can also be protected.⁶²

B. Fair Use

The doctrine of fair use is an affirmative defense to copyright infringement⁶³ and, therefore, to moral rights.⁶⁴ It is important to understand the policies of fair use because fair use is a statutory defense, which cannot be neglected. The following section discusses the policies and features of fair use.

Fair use recognizes the public's interest in the dissemination of information and balances that interest against a copyright owner's right to control her work.⁶⁵ A good illustration of this was when the reclusive Howard Hughes moved for a preliminary injunction against the publishers of an unflattering biography about him.⁶⁶ The United States Court of Appeals for the Second Circuit stated the fair use doctrine protected the publisher's use of the material.⁶⁷ The public's interest in the information outweighed Hughes's copyright interest because Hughes was newsworthy and the biography disseminated information on a public figure.⁶⁸

⁶⁰ *Id.* § 106A(e)(1). This section states that moral rights cannot be transferred, and that moral rights can only be waived if it is expressed in a written instrument. *Id.* This instrument has to also expressly mention the work. *Id.* Additionally, moral rights are waived for joint authors when one author chooses to do so. *Id.*

⁶¹ *Id.* § 106A(d) (stating that authors who created works before VARA have moral rights that last as long as the copyright, and artists that created works afterwards only have a moral rights for the duration of her life).

⁶² *See* Hughes, *supra* note 36, at 359 (stating when speech is distorted the democratic process is hindered).

⁶³ *See* *Chi. Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 629 (7th Cir. 2003) ("The burden of proof is on the copier because fair use is an affirmative defense" (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994))).

⁶⁴ 17 U.S.C. § 107 ("Notwithstanding the provisions of sections 106 and 106A [the rights granted to copyright holders, and VARA, respectively] . . . fair use . . . is not infringement of copyright.").

⁶⁵ *See* NIMMER, *supra* note 12, § 19E.02[A][1] (emphasizing fair use is vital "for the creation and maintenance of a robust public discourse"); *see also* *Chi. Bd. of Educ.*, 354 F.3d at 628. The court stated one purpose of fair use is to "facilitate criticism of copyrighted works by enabling the critic to quote enough of the criticized work to make his criticisms intelligible." *Id.* Furthermore, the court should not use copyright to stifle criticism. *Id.*

⁶⁶ *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 305 (2d Cir. 1966). Howard Hughes was alerted to an upcoming release of a biography about him that would make "trouble" for him. *Id.* Therefore, Hughes bought the copyrights of magazine articles about him from the 1950s and then moved for a preliminary injunction a few days later. *Id.*

⁶⁷ *Id.* at 304.

⁶⁸ *Id.* at 309 ("Thus, in balancing the equities at this time in our opinion the public interest should prevail over the possible damage to the copyright owner.").

The Copyright Act states that appropriate uses for fair use include: criticism, commentary, news reporting, teaching, scholarship, and research.⁶⁹ However, these uses are not exhaustive.⁷⁰ Accordingly, the Copyright Act gives four factors to be used in determining if a use is fair.⁷¹ There can be other considerations in addition to these four factors.⁷²

One such consideration is whether the defendant's actions constitute good faith.⁷³ This idea was brought up in *Harper & Rowe Publishers v. Nation Enterprises*,⁷⁴ which held "[f]air use presupposes 'good faith' and 'fair dealing.'" However, in *Campbell v. Acuff-Rose Music, Inc.*,⁷⁵ the Supreme Court implied that good faith should be only a small consideration.⁷⁶ In *Campbell*, the rap group, 2 Live Crew, created a parody of Roy Orbison's song *Pretty Woman*.⁷⁷ The plaintiff argued the group's state of mind should be considered because the group acted in bad faith.⁷⁸ The Supreme Court rejected this argument and stated that even absent good faith, the rap group's actions still indicated a fair use because there was no threat of harm to the market value of Orbison's work.⁷⁹ Hence, *Campbell* was the first step in the retreat from having good faith being central to a fair use analysis.

The debate regarding the defendant's state of mind did not end with *Campbell*. In *NXIVM Corp v. Ross Institute*,⁸⁰ the defendant gained access to the plaintiff's

⁶⁹ 17 U.S.C. § 107 ("[T]he fair use of a copyrighted work, . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.").

⁷⁰ See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 447 (1984). The fair use was whether home VCR recording was legitimate. *Id.* The court defined "time-shifting" as "the practice of recording a program to view it once at a later time, and thereafter erasing it." *Id.* at 423. The Court held time-shifting was a fair use. *Id.* at 454-55.

⁷¹ 17 U.S.C. § 107. The four factors being:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Id. These factors must be "explored together" in deciding fair use, and are not elemental. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) (stating that the four factors used in determining fair use "must be explored together, and not in isolation").

⁷² See 17 U.S.C. § 107 (stating the four given fair use factors shall be included in a fair use determination); *Wright v. Warner Books, Inc.*, 953 F.2d 731, 740 (2d Cir. 1991). The court stated that fair use is to be determined by the totality of the circumstances and facts of the case. *Id.* Moreover, it could be possible for a party to be "shut-out" by the four factors and still prevail on fair use. *Id.*

⁷³ *Harper & Rowe Publishers v. Nation Enters.*, 471 U.S. 539, 562 (1985).

⁷⁴ *Id.*

⁷⁵ 510 U.S. 569 (1994).

⁷⁶ See *Campbell*, 510 U.S. at 585 n.18. The Court implies that good faith is not central to fair use by stating "[e]ven if good faith were central to fair use." *Id.*

⁷⁷ *Id.* at 571.

⁷⁸ *Id.* at 575 n.18.

⁷⁹ See *id.* at 575 n.18, 593-94.

⁸⁰ 364 F.3d 471 (2d Cir. 2004).

seminar materials and posted a portion of them on its website.⁸¹ The majority equated the defendant's actions to misappropriation done in bad faith.⁸² Accordingly, the court suggested that bad faith is relevant in determining fair use.⁸³ Despite this being the case, the majority held the use was fair because the other factors still indicated fair use.⁸⁴ The court took a narrow approach in considering bad faith, and stated bad faith should not be weighed heavily.⁸⁵ As a result, good faith cannot be central to a fair use analysis, thus reaffirming *Campbell*.⁸⁶

The concurring opinion, however, stated it was wrong for the majority to even consider the defendant's conduct.⁸⁷ Judge Jacobs believed the defendant's morality and state of mind should not have had any bearing on fair use because copyright law does not deal with virtue.⁸⁸ Rather, Judge Jacobs believed that considering a defendant's state of mind would deter authors from creating new works because they would not want to deal with the burden of proving their benevolent state of mind.⁸⁹

Overall, fair use is important in copyright law because it benefits the public by allowing information and ideas to flow freely. Accordingly, the doctrine of fair use cannot, and should not, be discounted when a moral rights claim has been made.

C. Defamation in General, Libel in Particular

The main goal of defamation law is to protect an individual's reputation.⁹⁰ The underlying policies behind defamation law are similar to those of moral rights.

⁸¹ *Id.* at 475.

⁸² *Id.* at 477, 478.

⁸³ *Id.* at 478.

⁸⁴ *Id.* at 477.

⁸⁵ *Id.* at 478 (“we read *Harper & Row*'s holding more narrowly”).

⁸⁶ *Id.* at 479 (“a finding of bad faith is not to be weighed very heavily within the first fair use factor and cannot be made central to fair use analysis”).

⁸⁷ *Id.* at 483 (Jacobs, J., dissenting) (“Copyright itself would be distorted if its contours were made to depend on the morality and good behavior of secondary users.”).

⁸⁸ *Id.* at 485. The dissents states: “[C]opyright is not about virtue; it is about the encouragement of creative output, including the output of transformative quotation. Its goals are not advanced if bad faith can defeat a fair use defense.” *Id.*

⁸⁹ *Id.* at 486. The goals of copyright are to derive benefits to the public. *Id.* Moreover, “the fair use defense exist to further these same goals”. *Id.*

⁹⁰ *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966). The majority stressed there is a “pervasive and strong interest in preventing and redressing attacks upon reputation.” *Id.* Moreover, emphasizing the protection of a reputation may be a fundamental right, because “[t]he right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of *ordered liberty*.” *Id.* at 92 (Stewart, J., concurring) (emphasis added); see *Dunn & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 793 n.16 (1985) (Brennan, J., dissenting) (acknowledging “the individual's interest in reputation is certainly at the core of notions of human dignity”) (citation omitted). *But see Paul v. Davis*, 424 U.S. 693, 711–12 (1976) (holding that reputation was neither a liberty or property right, hence a state deprivation of one's reputation was not protected by the Fourteenth Amendment's due process clause); see also Christina Bohannan & Thomas F. Cotter, *When the State Steals Ideas: Is the Abrogation of State Sovereign Immunity From Federal Infringement Claims Constitutional in Light of Seminole Tribe?*, 67 *FORDHAM L. REV.* 1435, 1507–08 (1999) (discussing intellectual property rights based on reputation “might be

However, defamation law is steeped in the tradition of the common law and has been more legally developed.⁹¹ From this development, First Amendment considerations have been applied to defamation. As a result, an actual malice standard has been applied for the promotion of public debate. Thus, the following section introduces defamation law, and discusses the actual malice standard.

1. *Libel Under the Common Law*

Defamation includes libel and slander.⁹² The principle difference between the two is libel involves the publication of defamatory statements, whereas slander involves oral statements.⁹³ Accordingly, only libel is relevant to this discussion because libel law deals with fixed communication.⁹⁴

The common law elements⁹⁵ of libel are: (1) the publication⁹⁶ of a statement that; (2) is false;⁹⁷ (3) is defamatory; and (4) is “of and concerning” the aggrieved party. Indeed, even opinions may be libelous.⁹⁸ However, an exaggeration or mere hyperbole may not be actionable because such obvious statements cannot reasonably be taken as truthful.⁹⁹

2. *The Relationship between Visual Arts and Libel*

In general, libel causes of actions are not applicable to visual works. The best known case that highlights this is *Silberman v. Georges*.¹⁰⁰ In *Silberman*, Georges, the accused artist, painted a symbolic allegory that included three men, resembling

protected under a substantive due process theory”). *See generally* Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555, 590–615 (1997) (arguing reputation is a fundamental property right and deserves constitutional protection).

⁹¹ See DAN B. DOBBS, *THE LAW OF TORTS* §§ 400–01 (2000).

⁹² VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, *PROSSER, WADE AND SCHWARTZ’S TORTS* 851 (11th ed. 2005).

⁹³ *Id.*

⁹⁴ *Id.* (including “pictures, signs, statues, motion pictures and the like”).

⁹⁵ *Id.* § 401. Some jurisdictions may include the following elements: some degree of fault on the publisher, or actual damages instead of presumed damages. *Id.*

⁹⁶ *Id.* § 402. Publication occurs when one or more parties can understand the statements at issue. *Id.* This makes the term “publication” a legal term of art, and should be understood as such in defamation cases. *Id.*

⁹⁷ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). There is no value in protecting a false statement that purports untrue facts. *Id.* The Court noted even there is “no constitutional value in false statements of fact.” *Id.*

⁹⁸ *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) (holding opinions that imply false facts can be actionable for defamation).

⁹⁹ *Greenbelt Coop. Publ’g Ass’n., Inc. v. Bresler*, 398 U.S. 6, 14 (1970) (declaring the description of an official’s negotiation tactics as “blackmail” could not be taken literally, or truthfully, even by the most careless reader).

¹⁰⁰ 91 A.D.2d 520 (N.Y. App. Div. 1982). The painting was called *The Mugging of the Muse* and was an attack on the plaintiffs’ views on art. *Id.* The plaintiffs were former colleagues of the defendant and were well known artists. *Id.*

the plaintiffs, mugging the goddess Muse.¹⁰¹ The painting also contained a cherub and a fire hydrant spewing blood.¹⁰² The court held that the painting's interpretation was speculative. The work had several different meanings, some of which were not false statements.¹⁰³ Thus, the court did not apply the principles of libel law to the painting and did not hold Georges liable.¹⁰⁴

*Cort v. St. Paul Fire and Marine Insurance Companies, Inc.*¹⁰⁵ is another example of a case illustrating the relationship, or lack thereof, between a libel cause of action and a visual work.¹⁰⁶ There, a new owner of a building sprayed a mural with an opaque sealant to prevent leaks and, consequently, covered the mural completely.¹⁰⁷ The libel claim turned on whether the destruction of the painting was a false statement. The Ninth Circuit held that the destruction conveyed at least two potential messages, neither of which could have been construed to be false. To those people who knew of the mural's existence, the message communicated was that the new owners did care enough about the mural to refrain from covering it.¹⁰⁸ Alternatively, to those who did not know of the murals existence, no message was communicated at all.¹⁰⁹ Similar to *Silberman*, this court stated that the visual work was subject to multiple meanings and, therefore, was not sufficient to sustain a libel cause of action.¹¹⁰ These two cases illustrate the obstacles an artist faces when trying to bring a moral rights claim under libel law.

3. The "Actual Malice" Standard

Historically, the right to free speech was never a factor in defamation cases.¹¹¹ Thus, the First Amendment could not be a defense in libel. Under the old strict liability standard, a defendant would automatically be found liable if he could not prove that the statements at issue were true.¹¹² This included political speech. Consequently, common law defamation restrained speech on public issues or officials

¹⁰¹ *Id.* at 520–21. The painting was called *The Mugging of the Muse* and was an attack on the plaintiffs' views on art. *Id.* The plaintiffs were former colleagues of the defendant and were well known artists. *Id.*; see Harriette K. Dorsen & Colleen McHahon, *Art as Libel: A Comment on Silberman v. Georges*, 9 COLUM. J.L. & ARTS 1, 2 (1984) (researching when Georges displayed the painting during a slide show that the audience began to laugh because of the resemblance of the plaintiffs).

¹⁰² *Silberman*, 91 A.D.2d, at 521.

¹⁰³ See *id.* (discussing a few meanings the painting had and holding it was not reasonable to believe the plaintiffs actually committed assault).

¹⁰⁴ *Id.* at 521–22.

¹⁰⁵ 311 F.3d 979 (9th Cir. 2002).

¹⁰⁶ *Id.* at 986.

¹⁰⁷ *Id.* at 982.

¹⁰⁸ *Id.* at 986. The court stated this message "would have been insulting to the artists, but it would have been true." *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See DOBBS, *supra* 91, § 417 (stating that in 1964, the Supreme Court recognized the First Amendment's free speech provisions imposed limits on the common law strict liability).

¹¹² *Id.* § 410. The common law recognizes "truth as an affirmative defense with the burden upon the defendant to prove it." Additionally, only "substantial truth" is needed for the defense. *Id.*

because the defendant's burden of proof was, at times, too difficult to prove—even when his statements were in fact truthful.¹¹³ Hence, a speaker fearful of a lawsuit may withhold truthful statements, even to society's detriment.¹¹⁴

This all changed in the landmark Supreme Court case, *New York Times Co. v. Sullivan*.¹¹⁵ The Court there abolished the application of strict liability to statements concerning public officials and applied the actual malice standard.¹¹⁶ The actual malice standard shifts the burden of proof to the plaintiff by requiring him to prove the speaker believed the statement at issue was false by clear and convincing evidence.¹¹⁷ This standard was later applied to public officials as well.¹¹⁸

¹¹³ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (“[W]ould-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so”).

¹¹⁴ *Id.* (emphasizing speakers who cannot prove truth would “make only statements which ‘steer far wider of the unlawful zone’”) (citation omitted).

¹¹⁵ 376 U.S. 254 (1964). This case involved a full page advertisement ran by the *N.Y. Times*, entitled “Heed Their Rising Voices.” *Id.* at 256. The advertisement was to bring awareness to the civil rights movement in the south, particularly Montgomery, Alabama. *Id.* The advertisement purported a “wave of terror” for those involved in the movement, including Dr. Martin Luther King, Jr. *Id.* at 257. The advertisement included some misstatement of facts involving King. *Id.* at 258, 259. The advertisement stated Dr. King, was arrested seven times for trivial offenses, but charged him for felonies, which the authorities tried to imprison him for ten years. *Id.* at 257–58, 259. It was clear, the Court said, that some of these statements were not true, or even took place in Montgomery. *Id.* at 258. Also, included in the advertisement were 64 names or people widely known to be involved with these incidents against Dr. King and the movement. *Id.* at 257. Sullivan, was the Commissioner of Public Affairs in Montgomery, and he felt his reputation was harmed by the misstatements. *Id.* at 256. In analyzing the situation, Justice Brennan understood that the civil rights movement was one of the “major public issues of our time,” and deserved constitutional protection. *Id.* at 271. Thus, the Court weighed whether such issues deserve constitutional protections, and if they did so, did they lose out to a public official claiming defamation. *Id.* Justice Brennan, and the majority, gave careful consideration with the issues at hand, and enunciated one of the most endearing statements about the First Amendment, which is: “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.” *Id.* at 270; see also Thurgood Marshall, *A Tribute to Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 1, 7 (1990). Justice Marshall recalls the importance of Justice Brennan’s historic opinion by giving the First Amendment the “breathing space” it “need[s] to survive.” *Id.* (quoting *N.Y. Times*, 376 U.S. at 486); Abner J. Milka, *A Tribute To Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 9, 10–11 (1990). Chief Judge Milka recalls Justice Brennan believed *N.Y. Times* was his most important decision in his thirty four years as a Supreme Court Justice. *Id.*

¹¹⁶ *N.Y. Times*, 376 U.S. at 279 (“The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’”).

¹¹⁷ *Harte–Hanks Comm’n v. Connaughton*, 491 U.S. 657, 659 (1989) (“A public figure may not recover damages for a defamatory falsehood without clear and convincing proof that the false ‘statement was made with ‘actual malice’”).

¹¹⁸ *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 155 (1967) (“[A] ‘public figure’ who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct . . .”). The standard, to determine unreasonable conduct was the actual malice standard. *Harte–Hanks Comm’n*, 491 U.S. at 659.

“Actual malice” is a legal term of art.¹¹⁹ To rise to the level of actual malice, a speaker must make statements that are knowingly false or made with reckless disregard for the truth to be held liable under this standard.¹²⁰ “Knowingly false” occurs when a speaker makes a statement with a “high degree of awareness of . . . probable falsity.”¹²¹ For a statement to be considered reckless, the speaker must have entertained serious doubts as to the truth of the statement.¹²² Despite the term malice, it is not necessary to show any ill will or enmity.¹²³

Unlike most areas of tort law, the standard for actual malice is subjective to what the speaker actually thought.¹²⁴ This is a stark difference to the objective standard, where the analysis is based on what the “reasonable man” would have thought.¹²⁵ The actual malice standard evaluates the actual speaker’s state of mind.¹²⁶ Admittedly, this makes it harder for a public figure or official to recover on libel claims because the burden is on them.¹²⁷ Nonetheless, the actual malice standard is needed for the encouragement of debate on public people.

The actual malice standard encourages public debate while remaining fair to public figures. Public officials or figures know they will be subjected to criticism that may be defamatory.¹²⁸ Furthermore, these public figures have greater media access, allowing them to protect their reputations by using the proper channels to refute any unfavorable statements.¹²⁹ Therefore, a higher burden is more than reasonable to all parties.

Because the actual malice standard shifts the burden of proof to the public person, it is essential to know who is viewed as a public person under the law. A public official is any government employee who has substantial responsibility in

¹¹⁹ See *Garrison v. Louisiana*, 379 U.S. 64, 77–78 (1964). The Court defined what the term “actual malice” meant, by citing *N.Y. Times. Id.* It ruled “actual malice” only means the false statements were made with “knowledge of their falsity or in reckless disregard of whether they are true or false.” *Id.* at 78. Consequently, “hatred, ill will or enmity or a wanton desire to injure . . .” has no bearing in determining the falsity of statement. *Id.* at 77–78 (citations omitted).

¹²⁰ *N.Y. Times Co.*, 376 U.S. at 280 (holding a statement is made with actual malice when the speaker made it with “knowledge that it was false or with reckless disregard of whether it was false or not”).

¹²¹ See *Garrison*, 379 U.S. at 74.

¹²² *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (stating, “recklessness” is when the defendant entertained serious doubts as to the truth of his publication).

¹²³ See *Garrison*, 379 U.S. at 77–78 (highlighting this distinction); see *supra* text accompanying note 119.

¹²⁴ *St. Amant*, 390 U.S. at 731 (“There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.”).

¹²⁵ *Id.* (“These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing.”).

¹²⁶ *Id.*

¹²⁷ See *id.* (“Concededly the reckless disregard standard may permit recovery in fewer situations than would a rule that publishers must satisfy the standard of the reasonable man or the prudent publisher”).

¹²⁸ Cf. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342. (1974) (implicating public figures seek the public’s attention thus the actual malice standard should apply).

¹²⁹ *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 164 (1967).

government affairs.¹³⁰ A public figure is a person, or organization,¹³¹ that has attained a prominent status in society. There are two types of public figures: the all-purpose public figure and the limited-purpose public figure.¹³² An all-purpose public figure is someone who has either “pervasive power or influence,” or “pervasive fame or notoriety” in public affairs.¹³³ Limited public figures are those who have voluntarily thrust themselves¹³⁴ or have been drawn into a particular controversy.¹³⁵ A limited purpose public figure can arise also where a person knowingly receives unfair criticism by entering the public arena.¹³⁶ The actual malice standard is applied to both types of public figures, but it is important to recognize this distinction because an artist will most likely be a limited public figure when she makes a moral rights claim.¹³⁷

4. *The Application of Actual Malice to Other Areas of Tort Law*

In addition to defamation, the actual malice standard has also been exported to other areas of tort law. In *Time Inc. v. Hill*,¹³⁸ the Supreme Court applied the actual malice standard to false light causes of action.¹³⁹ A false light tort occurs when a person is placed in a false light in a manner that a reasonable person would find offensive.¹⁴⁰ *Life* magazine (owned by *Time*) wrote an article involving the Hill

¹³⁰ See *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) (stating a “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.”).

¹³¹ See generally DOBBS, *supra* 91, § 418. (listing that organizations such as businesses, public interests groups, charities, and religious organizations may qualify as a public figure).

¹³² *Gertz*, 418 U.S. at 351. This is because certain public figures may be involved in a wide range of public issues, or just from fame or notoriety is a public figure for “all purposes and in all contexts.” *Id.* Other public figures are involved in a “limited” range of issues, but still hold a special prominence in the resolving those issues. *Id.* “In either case such persons assume special prominence in the resolution of public questions.” *Id.*

¹³³ *Id.*; see, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 57 n.5 (1988) (inferring that the Reverend Jerry Falwell was an all purpose public figure because he hosted a nationally syndicated radio show, was the head of a political organization known as the Moral Majority, and was listed in the *Who’s Who in America*); see also DOBBS, *supra* note 91, § 418 (highlighting the attributes of an all-purpose public figure).

¹³⁴ *Gertz*, 418 U.S. at 345 (“[Limited] public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved”).

¹³⁵ *Id.* at 351 (noting a limited public figure may be drawn into a particular public controversy).

¹³⁶ *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 273 (3d Cir. 1980) (“[Limited] public figures effectively have assumed the risk of potentially unfair criticism by entering into the public arena and engaging the public’s attention.”).

¹³⁷ See *Gertz*, 418 U.S. at 351. In discussing that the actual malice standard does not apply to private citizens, the Court expounded on the two types of public figures.

¹³⁸ 385 U.S. 374 (1967).

¹³⁹ See *id.* at 387–88 (“We hold that the constitutional protections for speech . . . to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.”).

¹⁴⁰ See DOBBS, *supra* note 91, § 428. The four elements needed for a false light tort are:

- (a) the defendant publicized a matter about the plaintiff to a substantial group of persons or to the public;
- (b) the matter put the plaintiff in a false light;

family.¹⁴¹ The Hills became famous when they were held captive by three escaped convicts.¹⁴² Their story was so endearing to public that a play was based on their terrible ordeal.¹⁴³ However, the play incorrectly portrayed the fugitives as violent, and even had them molesting the family.¹⁴⁴ In actuality, the convicts were courteous to the Hills.¹⁴⁵

The Court applied the actual malice standard, created in *New York Times*, to the false light claim because it felt this was a public issue that deserved protection under the First Amendment.¹⁴⁶ The Court noted that a false light claim was similar to a libel claim because both actions dealt with falsities.¹⁴⁷ Consequently, the actual malice standard is now applied to false light claims involving newsworthy stories.

The actual malice standard has also been used in the tort of intentional infliction of emotional distress (“IIED”). In *Hustler Magazine, Inc. v. Falwell*,¹⁴⁸ the hardcore pornographic magazine published a parody advertisement involving the Reverend Jerry Falwell.¹⁴⁹ The parody had Falwell discussing how he lost his virginity to his mother.¹⁵⁰ Falwell brought a libel, invasion of privacy, and an IIED claim against *Hustler* magazine.¹⁵¹ The Western District of Virginia gave a directed verdict in *Hustler*’s favor in regard to the invasion of privacy, and the jury determined there was no libel because *Hustler* did not act with actual malice.¹⁵² However, the jury did award Falwell damages for his IIED claim, which the Fourth Circuit of the Court of Appeals affirmed.¹⁵³

The Supreme Court reversed on appeal,¹⁵⁴ holding that political and public debate should not be restrained simply because Falwell was emotionally

- (c) the false light would be highly offensive to a reasonable person; and
- (d) the defendant knew of the falsity or acted in reckless disregard whether the matter was false or not.

Id. The false light claim differs from defamation because the false light does have to be defamatory, but rather only offensive. *Id.*

¹⁴¹ *Time Inc.*, 385 U.S. at 376–77.

¹⁴² *Id.* at 378.

¹⁴³ *Id.* at 377.

¹⁴⁴ *Id.* at 378. (“[The Hills] stressed the convicts had treated the family courteously, had not molested them, and had not been at all violent.”).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 386–87, 388. The Court stated “[t]hree years ago Americans all over the country read about the desperate ordeal of the James Hill family, who were held prisoners in their home outside Philadelphia by three escaped convicts.” *Id.* at 377. Furthermore, this new story was in the public interest. *Id.* at 386.

¹⁴⁷ *See id.* at 396 (rationalizing “‘fictionalization’ was synonymous to ‘falsity’”).

¹⁴⁸ 485 U.S. 46 (1988).

¹⁴⁹ *Id.* at 48. The November issue of *Hustler* featured a parody advertisement for Campari Liqueur, where the Reverend Jerry Falwell was featured. *Id.* The parody contained a mock interview with Falwell, which portrays him as drunk and him having a sexual encounter with his mother. *Id.* The parody advertisement did contain the following disclaimer on the bottom: “ad parody—not to be taken seriously.” *Id.*

¹⁵⁰ *See id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 48, 57.

¹⁵³ *Falwell v. Flynt*, 797 F.2d 1270, 1275, 76 (4th Cir. 1986), *rev’d sub nom.* *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

¹⁵⁴ *Hustler Magazine, Inc.*, 485 U.S. at 57.

distressed.¹⁵⁵ Accordingly, the Court espoused that First Amendment principles and the actual malice standard are required when a public figure or official makes an IIED claim.¹⁵⁶ Indeed, the actual malice standard encourages public debate involving public figures.¹⁵⁷ Ultimately, Falwell did not prevail because the jury did not find actual malice due to the unbelievable nature of the parody.¹⁵⁸

In summary, defamation in general, and libel in particular, protect an individual's reputation. One's reputation is important to one's liberty.¹⁵⁹ These principles are similar to the principles of moral rights, but have had the time to be further developed. This development resulted in the adoption of the actual malice standard. This standard shifts the burden to the plaintiff and requires him to prove the statements at issue were made by a defendant who knew them to be false, or made them with a reckless disregard for the truth. This encourages debate on the public officials and figures who shape our society. In addition, it does not impose an undue burden on public people because they knowingly subject themselves to criticism and have the power to easily refute any defamatory statements.

The relationship between moral rights and fair use is important to understand. Moral rights give an artist a personal interest in her works. Fair use is an affirmative defense to moral rights, and allows the dissemination of information that is in the public's interest. The actual malice standard can maintain the differing goals of both moral rights and fair use without hindering either.

II. DETERMINING THE CONGRUENCY BETWEEN DEFAMATION, MORAL RIGHTS, AND FAIR USE.

The application of the actual malice standard to moral rights serves as a wedge between the fair use/moral rights conflict. It allows for the interests of both fair use and moral rights to thrive, without offending either one. However, a careful analysis is required to effectively balance the two doctrines.

The following section analyzes the similarities between moral rights and the actual malice standard. The first part evaluates whether an artist is a public figure, which is necessary for the application of actual malice. The second part dissects whether the actual malice standard is appropriate for moral rights. The third part discusses how the actual malice standard does not alter the purposes of fair use, but rather promotes it.

¹⁵⁵ *Id.* at 51. The Court specifically turned to *N.Y. Times* in its analysis. Indeed, it stated that "public figures as well as public officials will be subject to 'vehement, caustic, and sometimes unpleasantly sharp attacks.'" *Id.* (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Further, the Court espouses statements made with actual malice can only give "breathing space" to the freedoms protected by the *First Amendment*." *Id.* at 52, 56.

¹⁵⁶ *Id.* at 56.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 57.

¹⁵⁹ *See Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966) ("The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.") (Stewart, J., concurring).

A. The Portrait of the Artist as a Public Figure

It is necessary to show that the artist is a public figure in order to apply the actual malice standard to a moral rights violation. *New York Times* and its progeny incorporated First Amendment protections into the actual malice standard when speech involves a public person.¹⁶⁰ *Hustler*, reevaluated this policy and affirmed it by applying the actual malice standard to IIED claims made by a public person.¹⁶¹

The similarities between a public figure and an artist are quite apparent. Like a public figure, an artist knowingly accepts public discussion and criticism when she submits her work into the public arena.¹⁶² This is true even when the criticism is harsh or unfair.¹⁶³ Moreover, the work is often put into the public arena to encourage open debate, further substantiating the claim that an artist is a public figure.¹⁶⁴

B. True or False?: The Actual Malice Standard is Appropriate for a Moral Rights Violation

New York Times raised the bar for a public official to recover from defamation. As noted before, the actual malice standard places the burden of proof on the plaintiff, requiring him to show that the defendant knowingly made false statements or acted with a reckless disregard for the truth.¹⁶⁵ Admittedly, the Supreme Court has acknowledged this standard still allows for some false speech because of the difficulty involved in proving the actual malice standard.¹⁶⁶ It is appropriate under the principles of the First Amendment to allow for some false statements to permeate because the actual malice standard is designed not to preclude truthful speech.¹⁶⁷ In

¹⁶⁰ See *Harte-Hanks Commc'ns v. Connaughton*, 491 U.S. 657, 659 (1989); *N.Y. Times Co.*, 376 U.S. at 279–80.

¹⁶¹ See *Hustler Magazine, Inc.*, 485 U.S. at 56.

¹⁶² See, Kathryn A. Kelly, *Moral Rights and the First Amendment: Putting Honor Before Free Speech?*, 11 U. MIAMI ENT. & SPORTS L. REV. 211, 212 (1994) (“Artists’ reputations and honor are also at stake whenever they submit their work for public inspection.”).

¹⁶³ *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 273 (3d Cir. 1980) (“[P]ublic figures effectively have assumed the risk of potentially unfair criticism by entering into the public arena and engaging the public’s attention.”); see Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603, 627 (1990). The policy that authors of public works should expect unfair and defamatory criticism dates back to the early 19th Century case involving the “fair comment” privilege. *Id.* There, the author could not recover from a defamation claim because “[e]very man who publishes a book commits himself to the judgment of the public.” *Id.* (citing *Carr v. Hood*, 170 Eng. Rep. 983 (1808)).

¹⁶⁴ *Steak Unlimited, Inc.*, 623 F.2d at 273; Kelly, *supra* note 162, at 212.

¹⁶⁵ *N.Y. Times*, 376 U.S. at 279–80; *Harte-Hanks Commc'ns*, 491 U.S. at 659.

¹⁶⁶ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (“Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test.”).

¹⁶⁷ *Gertz*, 418 U.S. at 341 (“The First Amendment requires that we protect some falsehood in order to protect speech that matters”).

short, the essence of the actual malice standard is falsity.¹⁶⁸ Falsity occurs when a speaker knowingly makes a false statement.¹⁶⁹

The Fourth Circuit questioned whether falsity was needed to determine actual malice in IIED actions involving public figures. The court in *Falwell v. Flynt*,¹⁷⁰ acknowledged that while actual malice was needed, falsity should not play a part because falsity is not an element of IIED.¹⁷¹ The court felt including falsity would drastically alter the nature of an IIED claim.¹⁷² On appeal, the Supreme Court reversed and stated that any application of the actual malice standard required an evaluation of falsity.¹⁷³ The Court felt that preserving First Amendment free speech rights was more important than maintaining the integrity of an IIED claim.¹⁷⁴ *Hustler* is important because it stands for the proposition that falsity must be evaluated even if it is not relevant to the cause of action. The cause of action may not require falsity, but it still must be addressed in determining whether actual malice occurred.

New York Times, which was reaffirmed in *Hustler*, indicates that speech involving public figures requires falsity in determining actual malice.¹⁷⁵ This development weighs in favor of the application of the actual malice standard to a moral rights violation. Indeed, a moral rights violation occurs when either the artist is falsely attributed to a work she did not create, or when a work is altered such that it falsely represents how the work was intended to be shown.¹⁷⁶

Another similarity between moral rights and the actual malice standard is the principle that a public person's reputation must be protected. Indeed, actual malice still protects public people from defamatory falsehoods that damage their reputation.¹⁷⁷ Further, the rule recognizes this reputational interest: "[t]he right of a man to the protection of his own reputation from unjustified invasion and wrongful

¹⁶⁸ See *St. Amant v. Thompson* 390 U.S. 727, 731 (1968).

¹⁶⁹ See 1 RODNEY A. SMOLLA, *LAW OF DEFAMATION* § 3.10 (2d ed. 2008) (stating falsity is implicit to the actual malice standard).

¹⁷⁰ 797 F.2d 1270 (1986), *rev'd sub nom.* *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

¹⁷¹ *Id.* at 1274–75 (discussing IIED's fault standard is not based on falsity, thus the *N.Y. Times* standard for actual malice should not apply, because IIED is based on the "defendant's intentional or reckless misconduct has proximately caused the injury").

¹⁷² *Id.* at 1275 ("Requiring a plaintiff to prove knowledge of falsity or reckless disregard of the truth in an action for intentional infliction of emotional distress would add a new element to this tort, and alter its nature.").

¹⁷³ *Hustler Magazine, Inc.*, 485 U.S. at 56–57 ("[P]ublic figures and public officials may not recover for the tort of intentional infliction of emotional distress . . . without showing in addition that the publication contains a false statement of fact which was made with 'actual malice'").

¹⁷⁴ See *id.* at 50–56. The court emphasized the First Amendment recognizes "the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." *Id.* at 50. In addition, "[t]he freedom to speak one's mind is not only an aspect of individual liberty . . . but also is essential to the common quest for truth and vitality of society as a whole." *Id.* at 51. Further, there should be robust debate involving public figures. *Id.*

¹⁷⁵ *Id.* at 56. Consequently, the actual malice standard "is necessary to give adequate 'breathing space' to the freedoms protected by the *First Amendment*." *Id.* at 56.

¹⁷⁶ 17 U.S.C. §§ 106A(a)(1)–(3) (2006); see also Roeder, *supra* note 9, at 569 (presenting a work that is not the artist's own makes "him subject to criticism for work he has not done").

¹⁷⁷ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding a public official may recover from defamation if she can prove actual malice).

hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.”¹⁷⁸

Moral rights involve personal rights. Indeed, the right of attribution and integrity protect the personality, soul, and spirit that an artist puts into her work.¹⁷⁹ Consequently, a violation of either of these rights directly tarnishes the artist’s honor and reputation. Accordingly, the application of the actual malice standard to moral rights is appropriate.

In conclusion, the actual malice standard does not offend the purposes and interests of moral rights. First, both deal with actions that involve falsities. Second, the actual malice standard shares a common goal with moral rights, which is to protect reputation from falsehoods. Therefore, applying the actual malice standard to moral rights is well founded because both are in agreement.

C. Whether the Actual Malice Standard is a Fair Use for Fair Use?

In addition to upholding the principles of moral rights, the actual malice standard also sustains the policies of fair use. Both the actual malice standard and fair use promote the necessary dissemination of speech needed for public discourse.¹⁸⁰ This section analyzes how the First Amendment is implicated by both and, therefore, further suggests that the actual malice standard should be applied to moral rights when there is a fair use defense.

As stated earlier, *New York Times* removed the strict liability aspect of defamation when speech involved public figures, and shifted the burden of proof to the plaintiff.¹⁸¹ This change encouraged “uninhibited, robust, and wide-open” debate about public officials that otherwise would have been restrained.¹⁸² Moving the burden of proof to the plaintiff makes the defendant’s speech less actionable. Naturally, less legal apprehension means less self-censorship and more statements being made.¹⁸³ In effect, the more statements or speech that enter the public sphere the better, because a more informed public “[brings] about [the] political and social changes desired by the people.”¹⁸⁴ This is the heart of the First Amendment.

¹⁷⁸ *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

¹⁷⁹ Lee, *supra* note 13, at 801.

¹⁸⁰ Compare *N.Y. Times*, 376 U.S. at 279 (placing the burden of the statement’s truth on the defendant leads to “self-censorship” of criticism regarding public officials, because the defendant may believe it is too difficult to prove he is telling the truth), with *Chi. Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 628 (7th Cir. 2003) (stating public discourse is not stifled by the copyright owner because fair use “facilitate[s] criticism of copyrighted works by enabling the critic to quote enough of the criticized work to make his criticisms intelligible” without fear of liability), and NIMMER, *supra* note 12, § 19E.02[A][1] (stating fair use allows “for the creation and maintenance of a robust public discourse”).

¹⁸¹ *Harte-Hanks Commc’ns v. Connaughton*, 491 U.S. 657, 659 (1989).

¹⁸² *N.Y. Times*, 376 U.S. at 270 (“[D]ebate 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.”).

¹⁸³ See *id.* at 279 (stating having a defendant proving truth in libel leads to self-censorship because the burden of proof may deter true speech from being disseminated).

¹⁸⁴ *Id.* at 269 (citing *Roth v. United States*, 354 U.S. 476, 484 (1957)). Further, “[t]he maintenance of the opportunity for free political discussion to the end that government may be

Similarly, fair use promotes the dissemination of ideas and knowledge to the public that copyright owners and artists could otherwise restrict.¹⁸⁵ In essence, without fair use, the copyright owner would be able to “maintain a monopoly of sentiment and opinion” in regard to her work.¹⁸⁶ This power would enable an author to block negative commentary or criticism and completely avoid the principles of the First Amendment. In other words, the artist would control public debate and dictate how her work will be evaluated. Fair use remedies this abuse and allows for more speech involving the work to be disseminated without fear of liability or restriction.¹⁸⁷ This is consistent with the First Amendment and comparable to the ideals of the actual malice standard.

Another similarity between the actual malice standard and fair use is the aspect of falsity. As demonstrated above, and in *Hustler*, falsity is always an aspect of actual malice, even if it is not implicated in the cause of action.¹⁸⁸ Therefore, the only question is whether fair use involves falsity. Admittedly, the four factors for determining fair use do not expressly mention falsity.¹⁸⁹ However, the fourth factor, which deals with “the [new work’s] effect . . . upon the potential market . . . value of the copyrighted work,” has implicated falsity as a consideration.¹⁹⁰ In *Campbell*, the Supreme Court discussed whether a rap parody of Roy Orbison’s *Pretty Woman* harmed the potential market for Orbison’s song.¹⁹¹ The Court stated the parody could be a legitimate fair use even though it generated negative criticism because the market harm was not unreasonable.¹⁹² It was not unreasonable because Orbison created his work knowing such criticisms may arise. Arguably, the fact that the Court looked at the legitimacy of the market harm suggests that truthful criticism or commentary is indicative of fair use, while false criticism is not. Even though the other fair use factors must still be considered, it can nonetheless be argued that

responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.” *Id.* (citing *Stromberg v. California*, 283 U.S. 359, 369 (1931)).

¹⁸⁵ NIMMER, *supra* note 12, § 19E.02[A][1].

¹⁸⁶ Post, *supra* note 163, at 627 (citing *Carr v. Hood*, 170 Eng. Rep. 983 (1808)).

¹⁸⁷ See *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 486 (2d Cir. 2004) (Jacobs, J., concurring). If good faith, or state of mind is a factor in fair use then, “[i]ncremental risks drive up the cost of publication, thus the prudent publisher may elect to forgo a new work altogether if the good faith of the creator cannot be assured.” *Id.* Consequently, the benefits derived from fair use will be lost to the public. *Id.* at 485–86.

¹⁸⁸ See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 54 (1988) (recognizing that IIED involves a party’s intent, but a party’s bad motive cannot be reconciled with the First Amendment’s promotion of public debate about public figures).

¹⁸⁹ See 17 U.S.C. § 107 (2006).

¹⁹⁰ *Id.* § 107(4).

¹⁹¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590–94 (1994).

¹⁹² *Id.* at 591–92. The Court stated that “a parody may not harm the market at all, but when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act.” *Id.* More specifically, the Court stated its role “is to distinguish between ‘biting criticism [that merely] suppresses demand [and] copyright infringement, which] usurps it.’” *Id.* at 592 (citing *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir 1986) (alterations in original)).

falsity is implicated in deciding fair use.¹⁹³ Accordingly, this demonstrates another similarity between the actual malice standard and fair use.

In total, both fair use and the actual malice standard encourage the dissemination of information to the public. In addition, the requirement of falsity for actual malice does not antagonize fair use. Indeed, falsity could be a consideration in fair use's fourth factor. As a result, the actual malice standard and fair use can coexist without conflict.

Overall, this section analyzed how an actual malice standard would affect artists, moral rights, and fair use. Consequently, a visual artist is a public figure, thus any speech involving her should not be actionable unless there is actual malice. Next, the actual malice standard prevents falsehoods that harm reputation. Similarly, moral rights prevent falsities that also damage reputation. Hence, the application of the actual malice standard to a moral rights violation is appropriate. Finally, the actual malice standard and fair use's promotion of public debate are tantamount. Moreover, fair use recognizes an aspect falsity. Therefore, the actual malice standard does not completely oppose fair use.

III. PAINTING THE PICTURE WITH THE DELICATE BRUSH OF THE ACTUAL MALICE STANDARD – VARA AND FAIR USE WILL NOT BE DISTORTED

The application of the actual malice standard in asserting a fair use defense to a moral rights violation is appropriate because it allows for the purposes of moral rights and fair use to thrive, without either being sacrificed. In essence, the actual malice standard serves as a bridge whereby the differences between moral rights and fair use can be reconciled. The first section reaffirms the actual malice standard should apply because it has similar policies in common with moral rights and fair use. The second section discusses the concerns that arise when applying the actual malice standard to fair use. The last section describes a proposed test.

A. Actual Malice is Appropriate

The application of the actual malice standard to fair use is appropriate because it takes in account both the values of moral rights and the importance of public debate. As demonstrated above, actual malice applies when speech is made against public people. Consequently, the actual malice standard should apply to fair use because an artist, like a public figure, opens herself to criticism. Further, the actual malice standard recognizes that reputation is still a valid interest for public figures or officials and provides suitable protection. Similarly, moral rights are designed to protect the artist's reputation. At the same time, the actual malice standard does not

¹⁹³ *Cf.* Nat'l Ass'n of Gov't Employees/Int'l Bhd. of Police Officers v. BUCI Television, Inc., 118 F. Supp. 2d 126, 129 (D. Mass. 2000). The plaintiff claimed the *Boston Globe's* use of his copyrighted video was for a smear campaign, and did not constitute fair use. *Id.* at 127, 128–29. However, the court stated that the plaintiff's argument only considered one of the fair use factors, and that the other factors indicated fair use. *Id.* at 129–30.

sidestep the importance of fair use. The burden shifting mechanism of the actual malice standard promotes the dissemination of information. Further, this precludes false commentary and criticism from entering the public sphere. Coincidentally, this is consistent with the goals of fair use. The essence of fair use is to promote public discourse that would otherwise be restrained. The congruency of the actual malice standard, moral rights, and fair use makes it practical to apply. In sum, the actual malice standard upholds the values of both moral rights and fair use and allows for the court to fairly consider the principles behind the two philosophies.

B. Concerns of Applying the Actual Malice Standard

There are a few concerns that need to be addressed in using the actual malice standard with fair use and moral rights. The first is that the actual malice standard would apply a bad faith analysis. This is a concern because “[b]ad faith is a slippery concept in the copyright context. It (i) is difficult to define, (ii) may be impossible to detect, and (iii) given weight, may lead to the suppression of transformative works that are valuable to the expansion of public knowledge.”¹⁹⁴ Simply put, bad faith or motive is not a requirement of actual malice.¹⁹⁵ Actual malice only requires that a person knowingly made false statements, or had a reckless disregard for the truth. However, some critics will say bad faith is implicit in the determination of falsity.

This argument carries little weight because the Supreme Court addressed this concern in *Hustler Magazine*. There, Larry Flynt, the owner of *Hustler*, created a parody ad which suggested the Reverend Jerry Falwell lost his virginity to his mother.¹⁹⁶ In his deposition, Flynt said his purposes for the parody were to upset Falwell, by showing he was a glutton, a liar, a hypocrite, and to assassinate Falwell’s integrity.¹⁹⁷ Despite Flynt’s bad intentions, the Supreme Court ruled that bad motive should not preclude speech involving public figures; instead, the falsity of the statement was at issue, not the motive behind the statement.¹⁹⁸ Accordingly, this case shows that the speaker’s intentions are irrelevant in determining actual malice.

¹⁹⁴ NXIVM Corp. v. Ross Inst., 364 F.3d 471, 486 (2d Cir. 2004) (Jacobs, J., concurring).

¹⁹⁵ See *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964). The Court Stated:

Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth. Under a rule like the Louisiana rule, permitting a finding of malice based on an intent merely to inflict harm, rather than an intent to inflict harm through falsehood, “it becomes a hazardous matter to speak out against a popular politician, with the result that the dishonest and incompetent will be shielded.”

Id. (citation omitted).

¹⁹⁶ *Falwell v. Flynt*, F.2d 1270, 1272 (1986), *rev’d sub nom. Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

¹⁹⁷ *Id.* at 1273.

¹⁹⁸ *Hustler Magazine, Inc.*, 485 U.S. at 53, 56 (1988). The Court stated how the First Amendment supersedes tort liability in the area of public debate on public figures: “Thus while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures.”

The next concern is that the actual malice standard applies an unnecessary examination of the defendant's state of mind. Proponents of this argument may argue such an examination goes against fair use. Critics may believe authors of new works would be fearful that their benevolent state of mind could not be assured, and would rather choose not to create new works than risk a lawsuit.¹⁹⁹ This is a valid concern because less works mean less dissemination of information and knowledge that is needed for society.

The actual malice standard is a difficult standard to prove. Indeed, the plaintiff holds the burden of showing actual malice occurred with clear and convincing evidence.²⁰⁰ Further, the plaintiff must show, subjectively, that the new author made knowingly false statements, or did so with a reckless disregard for the truth. These factors mitigate the risks associated with a state of mind requirement being applied to fair use and make it more difficult to defeat the fair use defense. In fact, actual malice does not prohibit fair use; it just makes it more effective because it only prohibits fair use done with falsity. This is consistent with the principles of fair use because now the dissemination of information that would otherwise be tainted with falsity will not enter and infect the public sphere. Thus, these proponents should welcome the actual malice standard to fair use because it promotes healthy public discourse.

Overall, applying the actual malice standard to fair use, when asserted as a defense to moral rights, is not without concerns. Even though these concerns raise critical issues, the nature and development of the actual malice standard alleviates these problems through burden shifting and heightening the evidentiary standard. In fact, the actual malice standard makes fair use more efficient by precluding fair use done with falsity. This counters the critics' notion that an evaluation of state of mind would restrain the benefits derived from fair use.²⁰¹ Consequently, because the actual malice standard pairs well with both fair use and moral rights the core values of each are not only sustained but also promoted. Thus the concerns of critics are rendered trivial.

C. A Final Look at the Proposed Test.

As stated previously in this section, the actual malice standard allows an artist to recover from a violation of her moral rights when the defendant's fair use was knowingly false, or done with the reckless disregard for the truth. The test below shows how an artist can recover without fair use being trampled.

Id. Consequently, the Court held the actual malice standard applies to public figures making IIED claims. *Id.* at 56.

¹⁹⁹ *NXIVM Corp.*, 364 F.3d at 486.

²⁰⁰ *Harte-Hanks Commc'ns v. Connaughton*, 491 U.S. 657, 659 (1989).

²⁰¹ *See NXIVM Corp.*, 364 F.3d at 485–86.

1. *The Defendant Must Disprove the Plaintiff is a Public Figure*

Before the burden of proof shifts to the plaintiff, the defendant has the opportunity to show that the artist is not a public figure. This is critical because the actual malice standard only applies to public figures or officials.²⁰² Implicitly, fair use involves criticism or commentary about the plaintiff's work, and because the plaintiff submits this work for public discourse, the plaintiff is essentially a limited public figure. Consequently, it must be presumed the plaintiff is a public figure. It is more likely than not that an artist will be a public figure. Like politicians and celebrities, artists knowingly enter the public sphere and submit their work to influence society, or at the very least the art world. Further, it is very likely an artist would have the means or access to minimize the damages to her reputation.

However, if the defendant can show his new work is not within the scope of the plaintiff's public persona then the plaintiff is not a limited public figure. Thus, fair use prevails against moral rights. Again, it should be noted that being a public figure is a critical ingredient to the actual malice standard because actual malice only protects public debate on public officials or figures.²⁰³ Therefore, the presumption that the plaintiff is a public figure is appropriate. As a result, actual malice applies.

2. *Passing the Burden Back – The Plaintiff Must Show Fair Use Was Committed With Actual Malice*

Actual malice shifts the burden of proof to the plaintiff and requires the plaintiff to show with clear and convincing evidence that the defendant's new work was made with actual malice.²⁰⁴ Thus, the defendant's absolute defense of fair use fails. Again, actual malice dictates that the defendant knew the fair use was false, or committed with reckless disregard for the truth.²⁰⁵ A statement is "knowingly" false if the new author had a "high degree of awareness . . . of probable falsity."²⁰⁶ In addition, recklessness can be shown if the new author entertained serious doubts about the truth.²⁰⁷ The actual malice standard requires subjective proof that the defendant committed actual malice, not objective proof that a reasonable person would have committed actual malice.²⁰⁸ This allows for a plaintiff to recover when fair use is knowingly committed with falsity. Consequently the plaintiff's reputation and honor can now be protected.

At the same time, this standard does not disregard the fundamentals of fair use. Defendants can still create new works under fair use, just as long as they made them

²⁰² See *Harte-Hanks Commc'ns*, 491 U.S. at 659; *Hustler Magazine, Inc.*, 485 U.S. at 56; *N.Y. Times Co. v. Sullivan* 376 U.S. 254, 279–80 (1964).

²⁰³ See *Harte-Hanks Commc'ns*, 491 U.S. at 659; *Hustler Magazine, Inc.*, 485 U.S. at 56; *N.Y. Times Co.*, 376 U.S. at 279–80.

²⁰⁴ *Harte-Hanks Commc'n*, 491 U.S. at 659.

²⁰⁵ *N.Y. Times Co.*, 376 U.S. at 279–80.

²⁰⁶ *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

²⁰⁷ *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

²⁰⁸ See *id.*

without committing falsity. Because actual malice requires a rigorous showing the defendant will not be hesitant in creating new works. Thus, the actual malice standard promotes fair use by only blocking works made with actual malice.

Overall, this test should be accepted by both the proponents of moral rights and fair use. Without such a test, a fair use defense absolutely prevents an artist to recover from a moral rights violation. Now, when fair use is committed with actual malice, an artist's moral rights can prevail. This is not unfair to fair use. Indeed, the actual malice standard precludes works committed with falsity from entering the public arena, which is the ultimate goal of fair use. Even the most stringent of fair use proponents could not condone works that are riddled with falsity. Accordingly, the application of the actual malice standard allows for moral rights and fair use to coexist.

CONCLUSION

Under the current standard, Picasso's estate would not be able to recover if a party took Picasso's *Guernica* and painted the word "lies" all over the canvas. Thus, his legacy would be injured and his honor and reputation would be damaged. By applying an actual malice standard, the estate could save his honor because it gives the estate the power to recover from such false attributions or representations of his work. At the same time, the actual malice standard still provides for truthful works derived from fair use to contribute to the overall discussion of Picasso and his work and, thus, does not completely override the ideas of fair use. Therefore, artworks not of the same magnitude or importance of *Guernica* can be protected with the actual malice standard.

The United States historical reluctance of incorporating moral rights should not overshadow the importance protecting an artist's honor and reputation. Furthermore, such interests should not be unilaterally denied when fair use is involved. This country's rich development of defamation law in general, and libel law in particular, carries goals similar to those as moral rights and fair use. Accordingly, the adoption of the actual malice standard to both fair use and moral rights allows for the honor and reputation of artists to be protected without sacrificing new works needed to foster public debate.