



## What's the Point of a Disclaimer?

*A federal appellate court finds that Boston magazine's qualifying statement is not enough to deprive a teenage plaintiff of a jury trial on her defamation claim.*

A recent decision by the United States Court of Appeals for the First Circuit confirms that while the use of an appropriate disclaimer may be of some use in defending against certain claims of defamation, it does not provide distributors of risky content with a "free pass." *Stanton v. Metro Corp.*, \_\_\_ F.3d \_\_\_, Case No. 05-1552 (1st Cir. February 23, 2006). The decision has application not only to print publications, but also to producers of motion pictures and television programs and providers of content on the Internet.

Nothing draws the attention of readers and viewers quite like a scandalous headline, a provocative story or, perhaps, the juxtaposition of inflammatory text with a jarring photograph. And few things are more entertaining than the biting commentary of a political cartoon, an irreverent monologue or a tongue-in-cheek spoof. But entertainment content "with an edge" can also subject the company disseminating such material to claims of defamation, violation of right of privacy, trademark infringement and trademark dilution, among others.

Media and Internet companies frequently seek to reduce the risk of such claims by placing some type of disclaimer somewhere within the content. For example, a spoof advertisement that is intended to criticize the policies of a well-known soft drink company might simply label the advertisement "Parody." A motion picture about a fictional character who in many respects is similar to a controversial real person might include a statement in the opening or closing credits to the effect that all of the characters are fictional and any resemblance to actual persons, whether living or dead, is purely coincidental.

The value of such a disclaimer may depend not only upon its size and placement but also upon the specific statement and the overall context in which the disclaimer and the challenged content appear. The recently decided *Stanton* case drives this point home.

The cover of the May 2003 edition of *Boston* magazine, a monthly general interest publication, included a teaser for one of its articles, which read: "Fast Times at Silver Lake High: Teen Sex in the Suburbs." The article itself was entitled "The Mating Habits of the Suburban High School Teenager." Above the story's title was a "superhead" which read, provocatively, "They hook up online. They hook up in real life. With prom season



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looming, meet your kids - they might know more about sex than you do.”

The gist of the article was that teenagers in the Boston area had become more sexually active and promiscuous over the prior decade. It included statistical information, interviews with high school students and theories about the possible causes of the trend.

A photograph of five teenagers at a high school dance occupied the entire first page of the article and half of the facing page. The photograph depicted three males and two female subjects, one of whom was Stacey Stanton, a teenager from Manchester, New Hampshire. Stanton was clearly identifiable in the photograph. After this issue of *Boston* magazine was published, Stanton sued the magazine’s publisher, asserting that the juxtaposition of her photograph with the story about increased teenage promiscuity “insinuated that [she] was engaged in the activity described in the article.”

Stanton’s allegations are similar to the defamation claim asserted by the plaintiff in *Ward v. Klein*, 10 Misc.3d 648 (N.Y.Sup. 2005). Ward claimed to have had a three-year, monogamous romantic relationship with Gene Simmons, the bass-playing co-founder of the rock and roll band KISS. But in a documentary about the group, her photograph was shown in conjunction with statements by Simmons describing himself as “a 24 hour whore,” and by a narrator who said that “everywhere Simmons went he found a woman and it didn’t matter who they were, what size, shape or anything, he’d find a woman and disappear with her.” The court in that case concluded that the juxtaposition of the plaintiff’s photograph alongside commentary recounting Simmons’ repeated casual sexual encounters with strangers was reasonably susceptible to a meaning that was defamatory to the plaintiff.

The district court in *Stanton*, however, dismissed the plaintiff’s claim, ruling that the statements in the article were not “of and concerning” Stanton and were “not reasonably capable of a defamatory meaning.” In reaching this conclusion, the district court relied heavily on the

existence of the statement that appeared at the bottom of the first column of the article, rendered in the smallest font on the page, which read:

The photos on these pages are from an award-winning five-year project on teen sexuality taken by photo journalist Dan Habib. The individuals pictured are unrelated to the people or events described in this story. The names of the teenagers interviewed for this story have been changed.

The district court acknowledged that without the so-called “disclaimer,” a reasonable reader of the article could conclude that Stanton was sexually active and engages in at least some form of sexual misconduct. But it found that the disclaimer “adequately negates the negative connotations about [Stanton] otherwise arising from the article and the photograph.”

On appeal, the First Circuit disagreed with this analysis and reversed, finding that the district court placed “undue weight on the disclaimer in contravention of Massachusetts law.” The appellate court observed that placing a disclaimer on the first page of an article does not ensure that a reasonable reader will see it. Rather, such a disclaimer must be considered in the context of the entire article in its totality. In addition, while courts must give some weight to cautionary terms (such as a disclaimer)

used by the person publishing the statement, “the non-defamatory character of a statement will rarely depend solely upon the presence of qualifying language.”

In the case of the article at issue, the Court of Appeals found that the size and placement of the disclaimer made it easy for readers to overlook, or for readers to stop reading before getting to the critical sentence that disassociated the teenagers in the photograph from those described in the article. The court also concluded that readers of general interest publications such as *Boston* magazine frequently read only the headline of an article, or read an article so hastily that they often do not realize its full significance.



*“Nothing draws the attention of readers and viewers quite like a scandalous headline”*

The appellate court was careful to make clear that it was not suggesting that “language in the nature of a disclaimer can never serve to render a statement incapable of conveying a defamatory meaning.” But “given the placement of the disclaimer in the article and the nature of the publication in general, a reasonable reader could fail to notice it.” Viewed in its context, the juxtaposition of the photograph and the article was reasonably susceptible to a defamatory meaning. So Stanton will be entitled to present her claim of defamation to a jury.

The First Circuit’s decision in *Stanton* is consistent with the weight historically given to similar disclaimers by other courts. In *Pring v. Penthouse Int’l, Ltd.*, 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983), for example, the Tenth Circuit reviewed a jury’s judgment that an article in *Penthouse* magazine about a fictional Miss Wyoming and a fictional Miss America contest defamed the real-life Miss Wyoming. The court observed that “[t]he test is not whether the story is or is not characterized as ‘fiction,’ ‘humor,’ or anything else in the publication, but whether the charged portions in context could be reasonably understood as describing actual facts about the plaintiff or actual events in which she participated.”

*San Francisco Bay Guardian v. Superior Court*, 17 Cal.App.4th 655 (1993), involved an April Fools edition of a newspaper that included a specially labeled parody section, in which the publication lampooned itself, public officials and various private parties. One of the individuals identified in the edition sued for libel and invasion of privacy based upon a fictional letter to the editor falsely attributed to him. The California Court of Appeal noted that “[t]he question of whether the average reader would have recognized the issue as a parody and the letter as a part of the joke depends upon a view of the entire issue, i.e., the ‘totality of circumstances.’” The fact that a disclaimer identified the relevant section of the paper as a parody was significant, but not by itself determinative.

In *Anheuser-Busch, Inc. v. Balducci Publications*, 28 F.3d 769 (8th Cir. 1994), the trademark owner for the Michelob brand of beer sued for infringement based upon an

advertisement parody included in the humor magazine *Snickers* that made use of various Anheuser-Busch trademarks. The fictitious ad, for “Michelob Oily,” purportedly was intended as a social commentary. But in finding that a likelihood of confusion existed between the ad parody and the actual trademarks the Eighth Circuit emphasized that the magazine took no significant steps to remind readers that they were viewing parody and that the disclaimer, which ran in extremely small text vertically along the edge of the page, was “virtually undetectable.”

In *Bryson v. News America Publications, Inc.*, 672 N.E.2d 1207 (Ill. 1996), a defamation action was filed against the publisher of *Seventeen* magazine based upon a short story entitled “Bryson.” The story, which was one of several

published as a group entitled *New Voices in Fiction*, recounts a conflict between the narrator and her high school classmate, Bryson. Bryson is described in the short story as a “platinum-blond, blue-eye-shadowed, faded-blue-jeaned, black polyester-topped shriek” and is referred to variously as a “slut” and implied that she was “unchaste.”

The defendant argued that these statements could not reasonably be interpreted as stating actual facts about the plaintiff because the story was clearly labeled as fiction. But the Illinois Supreme Court rejected that argument, holding that “the test is not whether the story is or is not characterized as ‘fiction,’ or ‘humor,’ but whether the charged portions, in context, could be reasonably understood as describing actual facts about the plaintiff or actual events in which she participated.”



“In *Anheuser-Busch*, the Eighth Circuit found the disclaimer ‘virtually undetectable.’”

In *Muzikowski v. Paramount Pictures Corp.*, 322 F.3d 918 (7th Cir. 2003), a real life Little League coach who was identified in the non-fiction novel *Hardball* asserted that the fictional main character in a motion picture inspired by the book was actually him, and falsely attributed to him negative characteristics and actions that injured his reputation. The credits of the motion picture included the statement: “While this motion picture is in part inspired by actual events, persons and organizations, this is a fictitious story and no actual persons, events or organizations have been portrayed.” But the Seventh Circuit found this disclaimer

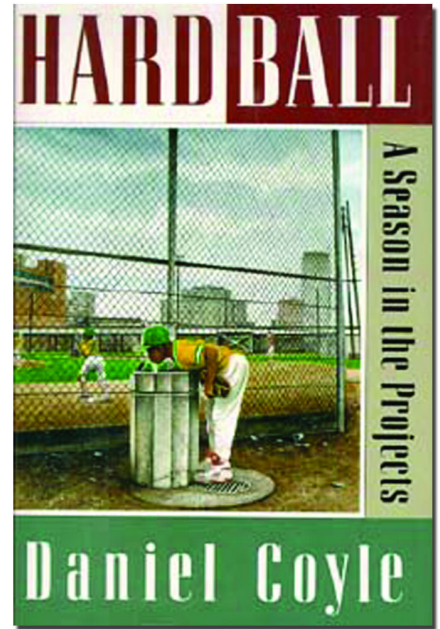
an insufficient basis upon which to dismiss the plaintiff's claims as a matter of law: "[S]imply because the story is labeled 'fiction' and, therefore, does not purport to describe any real person does not mean that it may not be defamatory per se."

*"[S]imply because the story is labeled "fiction" . . . does not mean that it may not be defamatory per se."*

And in *New Times, Inc. v. Isaacks*, 146 S.W.3d 144 (Tex. 2004), the Texas Supreme Court concluded that the while the presence of a disclaimer accompanying a humorous article would have aided the reasonable reader in determining that the article was a satire, neither the presence nor absence of such a disclaimer would be dispositive on the issue of whether a reasonable reader would understand that the publication states an actual fact.

A number of useful conclusions may be drawn from *Stanton* and the other decisions discussed above. A disclaimer that is clear and very prominently placed will afford the publisher of risky content the best chance of obtaining summary dismissal of a defamation claim. If the disclaimer is placed in a less prominent location - such as one appearing in a footnote of a magazine article, in the "crawl" at the end of a film or television program, or "below the fold" on an Internet website (or, worse, on a "Terms and Conditions" page) - it is far more likely that a court will consider the disclaimer an insufficient basis upon which to dismiss summarily a plaintiff's defamation claim.

Even if such a disclaimer will not, by itself, justify dismissal, it almost certainly will be a relevant factor in assessing whether a provocative piece of journalism, broadcasting or Internet content is "of and concerning" the claimant or is otherwise defamatory.<sup>b</sup>



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