

Policing the Cease and Desist Letter

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Abstract

Americans are renowned for being litigious. But only less than three percent of all disputes end up in court, and a paltry one percent of all filed lawsuits end with a decision on the merits. The answer to this paradox is that most disputes take place outside of the judicial system, and further, most disputes start and end with a cease and desist letter sent by the aggrieved party to the allegedly infringing party. This is particularly the case in the intellectual property area, where seasoned litigators admit that much of their practice revolves around drafting and following up on cease and desist letters. Although there is much to favor in the private resolution of disputes, the use of cease and desist letters appear entirely unregulated where such letters are sent to vulnerable parties, such as individuals and small businesses. It is often these vulnerable targets who will immediately comply with the demands (however outrageous or legally unsubstantiated they may be) or ignore the demands entirely because they lack the resources to consult with legal counsel. With the former category of targets (the compliers), compliance may result in bankruptcy because of the unanticipated costs of changing a trademark or finding a work-around. With the latter category of targets (the ignorers), they may face a default judgment if the aggrieved party files a lawsuit. However, in other areas of the law, such as debt collection practices, there are mechanisms that protect individuals and small businesses from such abuse. In this Article, I propose that the shadowy area of cease and desist letters should be similarly policed through a variety of mechanisms, including better oversight by attorney's bars, and by adopting a "groundless threats" cause of action.

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