

# Nastygrams: Don't Let a "Legal Letter" Ruin your Day

*Look at who wrote the letter*

It is a beautiful Fall day as the early morning sun and fresh breeze cascade through your office window, an open invitation to an afternoon of golf. Then, the morning mail arrives, bringing with it a "cease and desist letter," and you know upon reading this threat of a lawsuit that your relaxing afternoon is shot. Then again, maybe it is not.

As lawyers, we tend to focus on the possibilities. As a business person, you tend to focus on the probabilities, evidenced by your willingness to assume some degree of risk in relation to the anticipated rewards. So, while an attorney must take every threat of litigation seriously, understanding that giving guidance to ignore a "cease and desist" letter could have dire consequences, a small or mid-sized business can make smart business decisions and assume some risk. You make tough business decisions every day, and dealing with a "cease and desist" notice should be just another business issue to address, not a reason to cancel that tee time.

There are several options available: You can ignore the notice; you can respond yourself by explaining your position; you can have your local lawyer deal with it; you can hire an online lawyer specialist to help out. But how do you get a feel for which route to take? Here are some tips for deciding how to proceed. Of course, these are general observations and not my legal advice to a single one of you!

**First, take a look at who wrote the letter.**

Is it from a business itself, in-house legal counsel, a pre-paid legal firm, a private general practice law firm, or a lawyer specializing in that particular area of law? Rule of thumb: measure the seriousness of the threat by the author. My listing of authors above goes from least serious to most serious. If the complaining party has gone out and hired a specialist they generally mean business.

**Second, review the content of the demand letter in detail.**

Does it have attachments and details showing significant effort invested in composing the letter and evaluating the merits of the claim being asserted? If so, this might very well be a tip for you to take the "cease and desist" seriously, because this indicates that the groundwork for a lawsuit has been completed already. On the other hand, if you get a one page generic "lawyer letter" that is full of allegations and demands that seem both generic and out of place, then you have received the infamous word-processed "one size fits all" lawyer letter. These are meaningless in the online world and should clue you in that the client and the lawyer do not take this matter seriously. If you are not sure whether the letter is generic, think of something someone else has done

to you in the online world, and then see if the letter could be easily modified to fit your situation. If yes, it is probably generic, and the complaining party apparently does not think this issue justifies an expenditure of effort and expense beyond the nominal. That speaks for itself.

**Third, who is complaining about your conduct?**

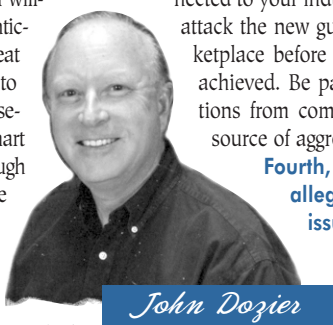
Is this cease and desist letter on behalf of a former employee just looking to live in peace, someone from out of the blue totally unconnected to your industry, or a business competitor? Competitors love to attack the new guy. They will try to take a company out of the marketplace before financial independence, and therefore leverage, is achieved. Be particularly careful in dealing with any communications from competitors because this seems to be the most likely source of aggressive litigation.

**Fourth, if you have not made much money from the alleged misconduct, it is less likely to become a real issue than if you have been making a lot of money.**

You know how much you made from the use, for instance, of another company's famous trademark in your online advertising. If the use of such intellectual property was highly profitable,

beware and be prepared because you are more likely to get sued. And while you are looking at how much you have made, consider how much you have to lose. If you are "judgment proof," the risk of suit is lower than if you have deep pockets. The issue of determining if you are judgment proof will have to wait for a future column. For now, understand that your small business corporation is most likely not going to shield you from personal liability and exposure, so you probably won't be hiding behind a shell corporation for protection.

Now that you have some insight into the risks associated with the cease and desist letter you have received, you can make a more informed business decision concerning how to proceed. If you decide to hire an Internet law specialist, expect that attorney to research the facts, apply the ever-evolving law of the Internet to those facts, consider the totality of the potential issues and claims involved, and respond in a robust and detailed manner. The tone will vary but the message will be clear that you are not a pushover: you have invested time and effort into finding a great lawyer, and seen the value in investing the money necessary for your lawyer to document the facts and prepare the arguments. And, if you are lucky, the complaining party will have read this column, understand the message you are conveying, and forget about it over a nice round of golf on a wonderfully cool and pleasant Autumn afternoon. ☐



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