

How to enforce your IP rights without waking the Internet

BY [PAIGE MILLS](#)
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Protecting intellectual property (IP) rights used to mean sending a stream of intimidating letters full of legalese on law firm stationery. These letters would catalog a long list of claims, demand immediate and sometimes drastic action, threaten suit and generally let the target know that he or she was in for the mother of all battles unless there was unconditional surrender. As a general rule, however, IP owners are better served by a more measured approach in today's marketplace and its soup of websites, blogs, Facebook pages, Twitter accounts and Instagram feeds.

Historically, the IP owner was in the driver's seat when trying to enforce its IP rights. It is no secret that IP litigation is the "sport of kings," because it is exorbitantly expensive. IP litigation can start in the low six figures and cost from between \$1 million and \$10 million in high stakes situations. The junior user often had no real economic choice; it is almost always cheaper to "switch than fight." Today, however, litigation is not the only defense available to the junior user. Rather than spend millions on litigation, the junior user can take the fight to the streets, letting it all play out on social media in an effort to force a quick and favorable settlement. This defense is cheap and often effective. The potential defendant will post the cease and desist letter on its website or Facebook page and mobilize its customers to sign petitions, comment on social media, boycott the IP owner, and generally ridicule the IP owner's brand and claims. The media then reports on the story, calling even more attention to the public relations nightmare. In short, waking the Internet can be a bad idea from the IP owner's perspective.

Brand owners like [Chick-Fil-A](#) (for trying to stop the use of "Eat More Kale" for t-shirts by an individual in Vermont); the [US Olympic Committee](#) (for trying to stop an online knitting community from holding the "Ravelympics"); and [Procter & Gamble](#) (for trying to stop the use of "Willa" for preteen skin care products made by an entrepreneurial mom); have all been painted as "bullies" by media savvy enforcement targets. Not only does the brand owner get a black eye, the lawyer who signed that cease and desist letter is also part of the story and googling his or her name now yields lots of articles about the brouhaha and [derogatory references to the lawyer's work](#). And, since the Internet never forgets, the whole embarrassing incident is immortalized forever.

So how do you avoid waking the Internet and being painted as an IP bully? Ask a few important questions before you fire off a traditional "mean" cease and desist letter. Is this use even a problem? Will anyone even see it? If people do see it, are they your customers? Will your customers be confused? Will the use otherwise damage the client's IP? Does the alleged infringer have obvious defenses to this conduct, such as fair use, parody, or even the First Amendment?

If this series of questions leads you to the conclusion that stopping the use is important, address the issue. However, unless you have reason to believe that the alleged infringer is directly competing with the IP owner and purposely trading on its good will, consider policing the rights with a softer approach. Do you even need to send a cease and desist letter? Can the IP owner's CEO place a friendly call to the president of the alleged infringer? For uses where the risk of harm is very low, this can be a good way to

start the conversation. Just be sure to document the call so there is record of all enforcement efforts made.

If a letter is warranted, write it with the following guidelines in mind:

1. **Write a letter that is well tailored to the facts of the current situation.** Make it as nice and professional as possible. Avoid using a belligerent or sarcastic tone and leave out stilted language and legalese.
2. **If the other side has an arguable defense, address that defense on the front end and state clearly why it would not apply.** Be especially wary of attempts to silence a critic rather than the protection of legitimate (IP) rights. A heavy handed approach to such a sensitive situation can backfire badly, leading to the involvement of free speech advocacy groups and AntiSLAPP lawsuits.
3. **Provide picture evidence.** Put effective pictures of the alleged infringement up front in the letter because the pictures are what the Internet will focus on if it gets interested in your dispute.
4. **Do not make unreasonable demands.** Just ask for what you really need to fix the problem.
5. **Do not claim that the letter is subject to copyright and that you will sue the recipient if he or she publishes the letter.** This demand is probably unenforceable and will bring free speech advocates to the alleged infringer's rescue.
6. **Do not explicitly threaten to sue the alleged infringer.** Threats of litigation will ensure a bad relationship from the beginning.
7. **Do not give a drop-dead date for response.** The problem with such a deadline is, if it is not met, you have to either sue the recipient immediately or remind him or her again, in which case it makes you look like a blowhard with empty threats.
8. **Follow Up.** If the letter was important enough to send, it is important enough to follow through to conclusion. Calendar a date to follow up with the recipient if he or she did not respond.

Hopefully, these guidelines can help moderate the tone of the enforcement conversation, resolve these issues quicker and cheaper and keep your name and brand out of the news for all the wrong reasons. Much like babies and dogs, it is usually best not to wake a sleeping internet.

About the Author

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