

By David L. Hoffman and Robert J. Lauson

## Cease-and-Desist Letters in Intellectual Property Disputes

### Drafting letters to opponents requires full consideration of tactical and legal issues

Cease-and-desist letters seem to have become the tool of choice among attorneys who want to provide notice of a claim and to initiate a dispute in the hope of resolving it in its infancy. However, and particularly in intellectual property disputes, attorneys need to consider several pitfalls before hitting the send button on a fax machine or e-mail screen: if you threaten to sue, can your client be sued in an inconvenient forum under the Federal Declaratory Judgment Act?<sup>1</sup> In patent disputes, can you avoid a declaratory judgment

action and still provide adequate notice of infringement, which is a prerequisite for obtaining damages if the client did not mark its product with a patent number? In how much detail should you present your analysis and allegations in order to be convincing—without limiting your options or disclosing too much? Is it wise to tip off the recipient just yet, or should further investigation or preparations be undertaken? Should the letter also be sent to third parties, such as cus-

tomers of an infringer, or would that constitute wrongful interference? To an intellectual property lawyer sending a charge-of-infringement letter, these are all critical considerations.

#### The Home Field Advantage

When individuals and business entities from different states or countries become involved in disputes, the home field advantage in any future litigation can become an important consideration. Unless the parties operate primarily in the same geographic area, disputes can be settled in several forums, so the expense and inconvenience of waging a legal battle thousands of miles across the country can place the "visiting" party at a significant disadvantage.

There are various ways to protect your client from a declaratory judgment action. First, determine whether the opposing party's forum would have personal jurisdiction over your client. A client with absolutely no business contacts in the forum of a potential opponent should not be subject to suit there and need not be greatly concerned with the issue.<sup>2</sup>

Usually the mere sending of a cease-and-desist letter to a potential opponent in the forum<sup>3</sup> or the mere posting of a Web site accessible from the forum<sup>4</sup> is not sufficient to create personal jurisdiction. The sending of even a

single cease-and-desist letter to an opponent's customer, however, may constitute minimum contacts,<sup>5</sup> leaving the client open to suit in that forum. The minimum contacts threshold can also be established by even limited sales (for example, over the Internet) and the shipment of a client's products into the forum.<sup>6</sup>

Attending a trade show in the opponent's forum is usually insufficient to establish personal jurisdiction or proper venue.<sup>7</sup> However, a client is always vulnerable to being served when physically present in the forum, and its property in the forum may be subject to state attachment statutes to satisfy any judgment in some states.<sup>8</sup>

Other forum-related activities need to be evaluated on a case-by-case basis. For example, receipt of royalties from a licensee

located in a particular forum is insufficient to establish personal jurisdiction.<sup>9</sup> The courts have reasoned that doing business with a licensee who does business in a forum is not the same as conducting business in the forum. However, under certain circumstances, the licensee's conduct will be chargeable to the licensor, thereby enabling an accused infringer to assert personal jurisdiction over the licensor where the licensee does business.<sup>10</sup> In addition, bringing U.S. Trademark Office proceedings, such as an opposition or cancellation proceeding to stop or cancel an opponent's trademark registration, is generally not sufficient to create an actual infringement controversy.<sup>11</sup>

The situation becomes more complex if a client has sufficient contacts in an inconvenient forum

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to trigger personal jurisdiction. A well-advised tactic in such cases is to first file a lawsuit in the preferred forum—although not necessarily serving the complaint immediately—and then send the cease-and-desist letter. In most forums there is no legal obligation to try to resolve a dispute before filing, but local rules need to be checked thoroughly. Although federal courts in California do not require such efforts, the Central District requires a prefiling conference of counsel prior to bringing a motion.<sup>12</sup> This sue-first-write-later approach generally retains the home field advantage under the first-to-file rule. That is, courts usually allow the first-filed lawsuit to proceed.

The complaint-and-letter approach serves another important purpose: it helps prepare the client and attorney for litigation. If only a letter is sent, the client may view litigation as a far-off, theoretical possibility and may be unpleasantly surprised when faced with the reality of an expensive and time-consuming lawsuit. However, by filing a complaint, the client will almost certainly see the potential consequences of sending the letter. Additionally, the attorney, in meeting obligations under Federal Rule of Civil Procedure 11 or other similar rules requiring a prefiling investigation, may have uncovered any legal obstacles the client may face.<sup>13</sup>

If the client is particularly wary of litigation, or if for other reasons (such as the expense involved) no lawsuit is filed prior to sending a letter, an inconvenient forum can still be avoided by including in the letter a clearly stated deadline after which litigation will begin. This provides the sender with immunity to a "preemptive strike" or "anticipatory" declaratory judgment lawsuit until the deadline or other reasonable time for settlement negotiations has passed.<sup>14</sup> If the letter contains neither a clear deadline nor a concrete indication that suit is imminent, the recipient may properly bring a declaratory

judgment action in its chosen forum on the legal basis that it would otherwise be forced to wait indefinitely.<sup>15</sup>

A recent case shows how failure to set a deadline can be costly.<sup>16</sup> Precor, a Seattle-based exercise equipment maker, learned that certain Taiwanese companies were manufacturing allegedly infringing merchandise believed to be destined for marketing in the United States through infomercials. Precor blanketed infomercial producers, such as Santa Monica-based Guthy-Renker, with cease-and-desist letters warning against infringement of its U.S. patent but failed to set a deadline for compliance. Guthy-Renker filed a declaratory judgment action in the Central District of California against Precor and its exclusive licensee, Icon Health & Fitness.

Upon learning of the California declaratory judgment action, Precor filed an infringement action in the Western District of Washington, and moved to have the California action stayed, dismissed, or transferred. Even though Seattle was the situs of several other related cases previously filed by Precor, Guthy-Renker successfully opposed Precor's motion. The district court found that Precor's letter was sufficiently threatening to create a controversy. Accordingly, Guthy-Renker's California action could go forward because it was the first filed.

Precor argued that the first-to-file rule does not apply to a "preemptive strike." However, the court clearly stated that this exception only applies when a deadline is set, to prevent a defendant from being left in an indefinite state of wondering when suit will be brought. The court also found that Precor had sufficient contacts with California to have the suit decided here.

If sued for a declaratory judgment after sending a cease-and-desist letter, some clients may want to be able to say, "We didn't really mean it." For those clients who want to object to an adversary's behavior but avoid litigation

### A Checklist before Sending

In crafting cease-and-desist letters in intellectual property controversies, it is important, even if you are ready to litigate, to consider the following issues carefully:

- ✓ Avoid providing the opposing party with an opportunity to bring a declaratory judgment action. This can be avoided by stopping short of directly threatening a lawsuit in the letter.
- ✓ If you do want to threaten legal action, however, establish a reasonable deadline for negotiations—or file a complaint first to protect your preferred forum, even if you are fairly comfortable that your client has no contacts in the opposing party's state.
- ✓ Be sure to make the letter sufficiently detailed to put the opposing party on notice, which must include a direct allegation of infringement and a description of the infringing conduct.
- ✓ Take special care when determining how much information to put in the letter, how soon to act after sending the letter, and to whom to send the letter.

Above all, ensure the truth of all assertions made in the letter, if necessary by undertaking an investigation before sending any cease-and-desist communications.—**D.L.H & R.J.L.**

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(at least for the time being), one option is to send a nonthreatening letter that is insufficient to create a controversy. The letter puts the other side on actual notice of a client's rights but only expresses the client's concerns, perhaps including an invitation to negotiate a license. As long as the recipient, under the totality of the circumstances, has no reasonable apprehension of being sued, no actual controversy has been created.

In intellectual property controversies it is important to put the infringer on actual notice of a client's rights. For example, if a patent holder has not been properly marking its products with the patent number, damages do not begin to accrue until the infringer has actual notice of the patent,<sup>17</sup> which is commonly accomplished by a charge-of-infringement letter. The letter will also provide an argument that the defendant's conduct was intentional and lead to enhanced damages in a successful lawsuit.

The standards for creating a controversy and providing notice of patent infringement differ slightly, however. An effective letter should identify the patent and the activity believed to be an infringement, accompanied by a proposal to put an end to the infringement, by license or otherwise (e.g., by the infringer ceasing its infringing activities).<sup>18</sup> By contrast, sending a merely informational letter telling of the patent's existence and ownership, or saying an accused product "may infringe" may fall short of the notice requirements of the patent statute.<sup>19</sup> To avoid creating a controversy yet still provide notice of infringement, make a specific charge of infringement but no direct threat to sue.

### Walking the Tightrope

Generally, lawyers want to avoid disclosing information or taking a position in litigation until it is absolutely necessary. It is important to leave options open should discovery or other factors make it necessary to assume an unanticipated position. However, in order to make a cease-and-desist letter convincing, it is important to include sufficient facts to show that you mean business. You want to show opposing counsel your claim has merit, you have investigated and given the matter thought, and you intend to pursue the matter if you do not receive the result you want. In a patent case, this may mean listing the general elements of your claim (the claims define the patent rights) and pointing out the corresponding elements of the accused product or process.

This informs the opposing counsel or party of the strengths of your case and weaknesses of theirs. Such a letter usually cannot be dismissed as a baseless threat. To limit the possibility of having the letter used against

you later, you should mark the letter as a confidential settlement discussion under Federal Rule of Evidence 408 and an appropriate state rule<sup>20</sup> that excludes evidence generated by compromise negotiations "to prove liability for or invalidity of the claim or its amount."<sup>21</sup> Marking a letter confidential does not automatically provide protection against the use of the letter by an opposing party, but it logically will help to show that the letter had the purpose of promoting settlement, an important basis of Rule 408.<sup>22</sup> A detailed letter promotes settlement by disclosure, and thus, the privilege encourages out-of-court settlements.

Trademark cases provide another example of the difficulty in drawing the appropriate line in disclosing information. When both parties are using similar marks in the same geographic area and you believe priority—first use—may be an issue, you may not want to disclose your client's first date of use because you are uncertain of the opposing party's date of first use. Yet if you simply allege generally that you have prior use or do not make any specific allegation, you will be unlikely to reach a prompt settlement.

You should also think carefully before alleging confusion of trademarks. Alleging that there is a likelihood of confusion, without

a certainty that your client has priority of use, may constitute a serious admission. Even though the admission may be protected by a settlement discussion privilege, you have weakened your bargaining position. This principle could apply wherever there are conflicting rights. A thorough investigation is a wise prerequisite to a cease-and-desist letter in these as well as other situations.

Extent of disclosure may also become an issue in a copyright case. Copyright infringement can be substantiated through direct proof of copying or by showing a substantial similarity between the copyrighted work and the derivative together with access to the copyrighted work. Often the allegations in a cease-and-desist letter focus on a substantial similarity between the works, but if you are aware of facts that demonstrate access to the copyrighted work as well, some disclosure may assist in reaching settlement. On the other hand, disclosure of those facts may enable the opposing party to plan its defense. Your decision on how much to disclose will depend on a variety of factors: your client's goals, whether the other party already knows that access is an issue, and whether you think the other party can do anything in response to your disclosure to make a difference in the case. In deciding what to disclose, you

must also consider whether the opposing party is scrupulous or unscrupulous and may spoliage evidence.

Attorneys may also be tempted in a cease-and-desist letter to disclose as many potential causes of action as possible. This may seem like a good idea because it is threatening and may make your client happy by looking like you want to throw the book at the other side. However, allegations of tenuous causes of action may detract from your main allegations. Therefore, allegations of causes of action that are not your primary causes should be incorporated as examples supporting a general statement that the letter is being sent without limiting the causes of action and that other causes of action may exist.

### Taking Further Action

In sending an initial letter it is critical to have a follow-up strategy. If you do not take legal action within a certain period of time, you may lose the right to important relief, such as lost profits, at least until you actually do file suit. For example, the doctrine of laches is a common defense in intellectual property matters, and there is a presumption of laches when there is a delay of six or more years in bringing suit.<sup>23</sup> The sending of

*(Continued on page 56)*

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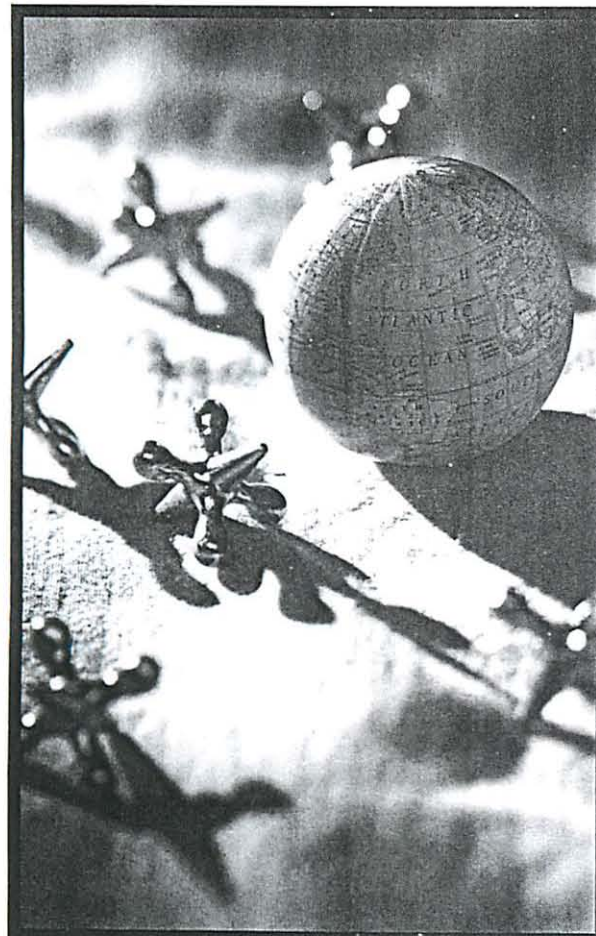
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## Cease-and-Desist Letters

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the cease-and-desist letter establishes when the plaintiff knew of the infringing activity and initiates the time period. In general, if you bring suit within a few months of sending the letter, laches is not a concern.<sup>24</sup> Moreover, the presumption of laches is rebuttable by proof of a reasonable excuse for the delay.<sup>25</sup>

Delays can also become an issue when moving for a temporary restraining order or preliminary injunction. As a practical matter, winning a motion for a preliminary injunction or a TRO is a good way to end a dispute quickly. However, the amount of time you wait to sue after you send the cease-and-desist letter will substantially affect whether you can claim true irreparable harm as a result of the infringement. Irreparable harm may be presumed in moving for a preliminary injunction in a patent case, but that presumption is rebuttable by undue delay.<sup>26</sup> Therefore, if you are considering a motion for a preliminary injunction or other preliminary relief, you should file as promptly as possible after it becomes clear that a cease-and-desist letter has not achieved its objective.

Since the elements of laches are unreasonable delay and prejudice, sending a cease-and-desist letter and then doing nothing may shorten the period for laches.<sup>27</sup> This is important to consider, especially if your letter sets a deadline. In trademark and copyright cases, the laches period generally depends on the circumstances, but a few months' delay is usually not a sufficient period, while years may be.<sup>28</sup>

### Contacting Third Parties

Clients will sometimes insist that cease-and-desist letters be sent to the infringer's sales representatives, customers, or suppliers. The problem with this approach is that it can create the basis for a counterclaim for wrongful interference with business relations or related claims. Generally, the success of a wrongful interference claim depends in part on the merits of the client's claim. If the client has a strong claim, threatening third parties may be worth the risk, but an alternative is to merely advise third parties of your client's claim without making a threat.

Whenever you write to a third party, the letter must be very carefully worded to avoid including any allegations that may be inaccurate. You may also want to consider other ways of apprising third parties of your claim, such as through a press release. Again, it is very important to avoid inaccuracies and to remain as factual as possible.

In the recent case of *Mikohn Gaming Corporation v. Acers Gaming, Inc.*,<sup>29</sup> the Court

of Appeals for the Federal Circuit considered whether patent holders can send infringement notices to the alleged infringer's customers. In that case, Acers owned a patent on a gaming machine and sent letters to Mikohn's customers and prospective customers stating: "It appears that the MoneyTime system manufactured and sold by Mikohn Corp. infringes at least some of the claims of the enclosed patent... Acers intends to use its patent to stop use of such systems." Acers also issued a press release stating, "Customers naturally hesitate to do business with a company whose products appear to infringe a patent." Mikohn filed a declaratory judgment action and brought claims for intentional interference with existing and potential business relations under Nevada common law. The district court found for Mikohn.

The Federal Circuit, on appeal, held that the claimant, Mikohn, had the burden of demonstrating that the purportedly interfering communications were not legally justified under Nevada common law. The Federal Circuit also held that federal law is preemptive, including the patent notice section of the patent statute<sup>30</sup> and related case law. Under those cases, a patent holder cannot be liable for publicizing a patent in the marketplace unless bad faith can be shown. The court cited another recent Federal Circuit decision,<sup>31</sup> which holds that a threshold showing of falsity or incorrectness or disregard for correctness or truth is required to find bad faith in "the communication of information about the existence or pendency of patent rights." It is worth noting that federal courts have exclusive jurisdiction over torts that involve significant patent issues.<sup>32</sup>

The settlement discussion privilege offers another means of defense against wrongful interference claims. Communications that are directed solely to the allegedly infringing parties should be protected by the privilege. This privilege would probably be exceeded, however, by sending letters to prospective customers or by publishing allegations. In any event, to belie a claim of bad faith it would be helpful to have a memorandum or other opinion of counsel that your claim is meritorious and that the party to whom the cease-and-desist letter is being sent is violating the law.

Remember, a cease-and-desist letter may have several important effects on any subsequent negotiations or litigation. Its contents should therefore be well planned. ■

<sup>1</sup> Declaratory Judgment Act, 28 U.S.C. §§2201 *et seq.*

<sup>2</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-76 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980).

<sup>3</sup> *Red Wing Shoe Co. v. Hockerson-Halberstadt Inc.*, 148

F. 3d 1355 (Fed. Cir. 1998); *Cascade Corp. v. Hiab-Foco AB*, 619 F. 2d 36, 37-38 (9th Cir. 1980).

<sup>4</sup> *Cybersell, Inc. v. Cybersell, Inc.*, 130 F. 3d 414 (9th Cir. 1997).

<sup>5</sup> *Meade Instruments Corp. v. Reddwarf Starware LLC*, 47 U.S.P.Q. 2d 1157 (C.D. Cal. 1998).

<sup>6</sup> *Millennium Enterprises, Inc. v. Millennium Music, LP*, 49 U.S.P.Q. 2d 1878, 1890-91 (D. Ore. 1999).

<sup>7</sup> *Congoleum Corp. v. DLW Aktiengesellschaft*, 729 F. 2d 1240, 1242-43 (9th Cir. 1984); *New York Xedit Corp. v. Harvel Indus. Corp.*, 456 F. Supp. 725 (S.D. N.Y. 1978); *Johlar Indus., Inc. v. Essex Eng'g. Co.*, 1998 U.S. Dist. LEXIS 7623 (N.D. Ill.); *Amateur-Wholesale Elec. v. R. L. Drake Co.*, 515 F. Supp. 580 (S.D. Fla. 1981).

<sup>8</sup> *Bourassa v. Desrochers*, 938 F. 2d 1056, 1057-58 (9th Cir. 1991); *e.g.*, N.C. Gen. Stat. §1-440; *Hutchison v. Bank of North Carolina*, 392 F. Supp. 888 (D.C. N.C. 1975).

<sup>9</sup> *Red Wing Shoe Co. v. Hockerson-Halberstadt Inc.*, 148 F. 3d 1355 (Fed. Cir. 1998).

<sup>10</sup> *Dainippon Screen Mfg. Co. v. CFM Technologies, Inc.*, 142 F. 3d 1266 (Fed. Cir. 1998).

<sup>11</sup> *American Pioneer Tours, Inc. v. Suntek Tours, Ltd.*, 46 U.S.P.Q. 2d 1779 (S.D. N.Y. 1998).

<sup>12</sup> CENT. DIST. OF CAL. LOCAL R. 7.4.1.

<sup>13</sup> FED. R. CIV. P. 11(b) requires that representations to the court: 1) not be made for any improper purpose, 2) be warranted by existing law or by a nonfrivolous argument for new law, 3) have or be likely to have evidentiary support, and 4) are warranted if in the form of denials.

<sup>14</sup> *Charles Schwab & Co. v. Duffy*, 49 U.S.P.Q. 2d 1862, 1998 U.S. Dist. LEXIS 19606 (N.D. Cal. 1998).

<sup>15</sup> *Ward v. Follett Corp.*, 158 F.R.D. 645, 648-49 (N.D. Cal. 1994).

<sup>16</sup> *Guthy-Renker Fitness v. Icon Health & Fitness*, 48 U.S.P.Q. 2d 58 (C.D. Cal. 1998).

<sup>17</sup> See 35 U.S.C. §287(a).

<sup>18</sup> *SRI Int'l v. Advanced Tech. Labs*, 127 F. 3d 1462 (Fed. Cir. 1997).

<sup>19</sup> *Amsted Indus., Inc. v. Buckeye Steel Castings Co.*, 24 F. 3d 178, 187 (Fed. Cir. 1994).

<sup>20</sup> In California, for example, EVID. CODE §1152.

<sup>21</sup> FED. R. EVID. 408.

<sup>22</sup> Advisory Committee Notes to FED. R. EVID. 408.

<sup>23</sup> *A. C. Aukerman Co. v. R. L. Chaides Constr. Co.*, 960 F. 2d 1020 (Fed. Cir. 1992) (en banc).

<sup>24</sup> *Meyers v. Asics Corp.*, 974 F. 2d 1304 (Fed. Cir. 1992) (While there is no fixed time period that definitively establishes laches, the court cited cases applying laches after at least three or four years and refused, under the circumstances, to apply laches to a delay of four years.)

<sup>25</sup> *A. C. Aukerman Co.*, 960 F. 2d 1020.

<sup>26</sup> *H. H. Robertson Co. v. United Steel Deck, Inc.*, 820 F. 2d 384 (Fed. Cir. 1987).

<sup>27</sup> *Meyers*, 974 F. 2d 1304.

<sup>28</sup> See, *e.g.*, *Ameritech Inc. v. American Information Technologies Corp.*, 811 F. 2d 960 (6th Cir. 1987) (six months not laches in a trademark case); *Cellularm, Inc. v. Bay Alarm Co.*, 20 U.S.P.Q. 2d 1340, 1346 (N.D. Cal. 1991) (thirteen months not laches in a trademark case); *Golden West Brewing Co. v. Milonas & Sons, Inc.*, 104 F. 2d 880 (9th Cir. 1939) (three years constitutes laches in a trademark case under the circumstances); *Ruolo v. Russ Berrie & Co.*, 886 F. 2d 931, 942 (7th Cir. 1989) (two-year delay not laches in a copyright case).

<sup>29</sup> *Mikohn Gaming Corp. v. Acers Gaming, Inc.*, 165 F. 3d 891 (Fed. Cir. 1998).

<sup>30</sup> See 35 U.S.C. §287.

<sup>31</sup> *Hunter Douglas, Inc. v. Harmonic Designs, Inc.*, 153 F. 3d 1318 (Fed. Cir. 1998).

<sup>32</sup> *Id.*