

## *Policing the Cease-and-Desist Letter*

**Leah Grinvald**

Associate Professor of Law, Suffolk University Law School

St. Louis, MO

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 reason for 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 an aggrieved party to an allegedly infringing party. This is particularly the case in the intellectual property area, where seasoned litigators admit that much of their practice revolves around cease-and-desist letters. Although there is much to favor in the private resolution of disputes, there are economic and legal factors that serve to incentivize some rights holders to send abusive cease-and-desist letters. At the same time, abusive cease-and-desist letters are not effectively regulated 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 abusive letters due to unique characteristics of this population, which when coupled with the abusive cease-and-desist letter, create a coercive settlement process. This is problematic because coercion is universally regarded as grounds for invalidating agreements. However, small businesses and individuals do not have the resources to bring the necessary lawsuits to invalidate such agreements, and as such, these coercive settlement agreements are never invalidated. State legislators, state attorney's generals and the United States Congress have all recognized the problems of abusive cease-and-desist letters in the intellectual property field, at least with respect to the practices of "patent trolls." In the past year state legislatures and Congress have enacted or initiated new legislation, and several state attorney's generals have undertaken enforcement action. While these efforts are laudable, a focus on patent trolls is short-sighted and narrow, as similar problems are occurring in the copyright and trademark area. This Article argues that proposals to assist small businesses and individuals with abusive cease-and-desist letters should be broad-based and also include non-legislative means. In addition, attempts to assist this vulnerable population should also target the characteristics that make them vulnerable to coercion. To do so, this Article proposes both legislative and non-legislative action: first, a new cause of action for abusive cease-and-desist letters for any type of intellectual property infringement; second, greater involvement by the American Bar Association and state and local bar associations; and finally, greater enforcement efforts by states' attorney generals.

**Biography:** Professor Grinvald received her B.A. in East Asian Studies, summa cum laude, from George Washington University. She later obtained a J.D. from the New York University School of Law.

**Email:** [lgrinvald@suffolk.edu](mailto:lgrinvald@suffolk.edu)

Grinvald