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Have you ever received a cease and desist letter? How did you respond?

lawsuit regarding internet freedom of expression

Recently a lawsuit has been filed against the Ross

LAW

Overzealous Lawyers Beware: Today's Sites Are Fighting Back

Online publishers hit with cease and desist letters are no longer rolling over in the face of unreasonable demands. With help, they're standing up to menacing legal threats -- and winning.

Mark Thompson
Posted: 2004-09-15

Lawyers for Michael Savage would probably just as soon forget about the letters they sent in a bungled bid to shut down two Web sites that aim to torment the acid-tongued radio talk show host. The people who run the Web site Chilling Effects on the other hand, would like to keep the memory of the legal debacle alive and are doing so by storing the letters in a permanent online archive.

Chilling Effects was created in 2002 by Wendy Seltzer, a lawyer at Harvard University's Berkman Center for Internet & Society. She was concerned that many Web publishers might be so intimidated by legalistic letters demanding the removal of content that they would comply whether they had to or not. Seltzer believed that creating a repository for letters threatening legal action over Web content, annotating them with explanations of the legalese, and appending links to FAQs, related news stories and other resources offering information on how to respond would encourage recipients to resist unreasonable demands.

"We had a few goals," Seltzer explains. "We wanted to help the little guys on the receiving end of these letters understand their rights and the limits of those rights." Chilling Effects also wanted to deliver a message to those who were sending out cease and desist letters. "The fact that the letters end up on Chilling Effects isn't making a judgment about them one way or the other. But if you have lots of silly looking letters up there [or] if they're poorly reasoned, and they're ending up on Chilling Effects, you and

Related Links

Chilling Effects

Chilling Effects: DMCA safe harbor provisions

Chilling Effects: Diebold Inc. withdrawal

Chilling Effects: letter to MichaelSavageSucks

Chilling Effects: letter to SavageStupidity

Cornell Legal Information Institute: online liability limitations

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Online Policy Group cease & desist letter

Online Policy Group versus Diebold Inc.

Public Citizen

Public Citizen: Internet free speech resources

Public Citizen: Internet legal rights outline

Public Citizen: Talk Radio Network drops suit

Public Citizen: response to Talk Radio Network suit

SavageStupidity

Talk Radio Network

USA Today: MSNBC fires Savage

Xenu

Institute of NJ (see www.rickross.com) by Landmark Education, which sponsors the seminar known as the Forum. The suit is for "product disparagement" and is essentially an effort to purge critical information about Landmark from the Internet.

The lawfirm Lowenstein and Sandler has taken on the case pro-bono to defend the Ross Institute.

This is an interesting case and another earlier case NXIVM vs. The Ross Institute, through which another seminar group known as NXIVM attempted to use copyright law to gain an injunction to remove critical material was recently appealed to the US Supreme Court. An injunction by NXIVM was deinied by a Albany federal court and upheld by the 2nd Circuit Court of Appeals in NYC.

Please contact Peter Skonick of Lowenstiend and Sandler in Roseland, NJ for comment on the Landmark v. Ross Institute filings and Tom Gleason attorney in Albany, NY regarding NXIVM.

Douglas Brooks a Massacheutsetts attorney is currently defending the Ross Institute against a frivolous filing by the group "The Gentle Wind Project" also attempting to squelch critical reports on the Internet. The Ross Institute is one of several defendants in this case.

All the attorneys assisting the Ross Institute, which is a non-profit educational 501 (c) (3) are doing so pro-bono.

The NXIVM case was

your lawyers might decide that you don't want to keep doing that."

Two letters in the database that were sent on behalf of Oregon-based Talk Radio Network may be cases in point. The network syndicates "The Savage Nation," a popular radio show hosted by Savage, who is perhaps best known outside his fan base for having been fired from a short-lived TV version of his show after he told a caller to "get AIDS and die." Savage apparently has a thin skin for invective aimed in his direction.

One of the letters was sent in April of 2003 by the Chicago law firm of Kane, Laduzinsky & Mendoza, Ltd. to Thomas and Gunilla Leavitt, of Santa Cruz, Calif. A year earlier, the Leavitts had launched SavageStupidity.com "to raise awareness about Michael Savage's hateful diatribes and the attitudes they foster." The law firm asserted that under trademark laws and the policies of the Internet Corporation for Assigned Names and Numbers, the Leavitts must relinquish their domain name to Savage because it is "confusingly similar" to the host's own trademarked name. "The only difference between Complainant's MICHAEL SAVAGE mark and the disputed domain name is the replacement of the word 'Michael' with 'stupidity'," the letter stated.

A letter sent in October of 2002 to the Coalition for Human Decency, which runs MichaelSavageSucks.com, accused that site of multiple violations of the law, including running an illegal "business interference campaign" by urging consumers to boycott companies that advertise on his radio show. The letter asserted, among many other things, that "all e-mail communications to third parties concerning the Show and/or Mr. Savage [must] stop immediately," or else the syndicate would sue for damages.

When those threats didn't work, Talk Radio Network filed suit against the Web site operators in May of 2003 in a federal court in Illinois. Savage's critics fired back by publicizing in Chilling Effects and elsewhere what they viewed as a brazen attack on their free speech rights, which helped attract a high-powered team of pro bono attorneys led by Paul Alan Levy, of Public Citizen in Washington, D.C. The lawyers filed a response in June of 2003 and the litigation ended with a whimper in December when the network withdrew its lawsuit without extracting a single concession from the two Web sites. "They ran away with

Wendy Seltzer, lawyer at Harvard University's Berkman Center and founder of Chilling Effects

Paul Alan Levy, attorney with Public Citizen's Litigation Group

written up in a NY Law Review and helped to define copyright law. It seems these cases are quite important regarding First Amendment issues as they are being defined through court cases regarding the Internet.

Rick Ross
www.rickross.com

Rick Ross
2004-09-22 08:27

What it's like to receive a Demand letter

I received the type of letter referred to in this excellent article. I was writing a blog post about John Kerry's Jewish background when all of a sudden I received an e mail from the author of an article from which I had quoted extensively (with hyperlnk & credit noted). The author demanded payment of a fee to use the aricle. I thought the demand preposterous & said so. Then the demand ratched upward into a verbal accusation of copyright infringement.

My wife is an attorney (though not in intellectual property or copyright law), but she was nevertheless freaked out at the prospect of a costly legal battle. She also blamed me for getting into the mess. I felt terribly alone & buffeted on all sides by stress & anxiety.

We ended up settling with the other side on terms vastly favorable to them. To this day, I'm torn up inside by my caving in to this demand. My Demand letter is now in the Chilling Effects archive.

My advice to others who face this situation: take a deep breath (as this article says), sit back, consider

their tails between their legs," crows Levy.

The victory by Savage's detractors was one of several recent triumphs for the targets of legal demands for the removal of Web content. A disgruntled car buyer named Tiffany Patterson won another significant victory on June 29 in Rohr-Gurnee Motors v. Patterson, a case in federal court in Illinois. Patterson had already succeeded in beating back a lawsuit that accused her of violating the company's trademark by setting up a Web site called GurneeVolkswagen.com, where she posted her complaints about the auto dealer. In the June 29 ruling, U.S. District Judge James Holderman ordered the dealer to pay Patterson more than $18,000 in attorneys' fees.

It's not easy to get attorneys' fees in trademark or copyright disputes, says Levy, though the Illinois ruling may encourage others hit with baseless take-down demands to try. "If the cost of sending these letters goes up, maybe people will be more careful about what they send," observes Levy. "When you hit their pocketbook, they really start to think."

Chilling Effects to the rescue

When Chilling Effects was launched, many recipients of demand letters were rolling over without a fight, says Seltzer. "I was seeing lots of cease and desist letters flying around on the Internet. People would sometimes post them on their Web sites or sometimes just take down content. People were scared by lawyer letters accusing them of unlawful activities. You'd see something interesting, and the next day it would be gone. I was concerned that a lot of that was happening without a deep understanding of what the legal issues were," Seltzer says.

Chilling Effects, which is a joint project of the Electronic Frontier Foundation, Harvard's Berkman Center and legal clinics at five other law schools, has filled that void with a wealth of analysis about the legal basis, or lack thereof, for hundreds of demand letters sent to Web publishers and services.

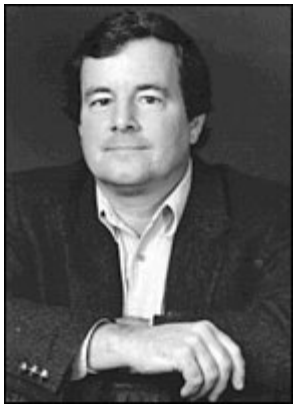
The searchable database now contains more than 770 take-down notices in more than 20 categories, ranging from letters alleging copyright infringement and defamation to those accusing a Web site operator of violating an e-commerce patent. As of mid-September, there were 38

your options, but fight back! Don't cave!

Richard Silverstein
2004-10-22 00:56

speak up! what do you think?

the author



Mark Thompson, a freelance writer based in Los Angeles, has written for publications ranging from the New Republic, the Wall Street Journal and the Atlantic Monthly to Islands and the Thai International Airlines inflight magazine. He is author of a biography of an eccentric journalist and Indian rights activist named Charles Fletcher Lummis, who lived in Los Angeles from the 1880s through the 1920s. Thompson earned a law degree in 1983 but has been a writer ever since.

letters targeting protest and parody Web sites and 55 accusing Web sites of copyright infringement. The largest number, 417 letters, invoked the safe harbor provisions of the Digital Millennium Copyright Act, which allows online service providers to escape liability for transmitting material that violates a copyright as long as they accede to requests to remove the allegedly infringing material. As of mid September, 379 of those "safe harbor" letters, and nearly half of the demand notices in the entire database, were sent to one company, Google, which submits all of the take-down notices it receives to Chilling Effects.

The relationship between Google and Chilling Effects dates back to the archive's earliest days. Google was getting complaints from the Church of Scientology about an anti-Scientology site Xenu.net, which was accused of violating the church's copyrights. As required by the DMCA, Google removed links to the allegedly offending sites from its search results, "and suddenly anti-Scientology sites didn't show up when you searched for Scientology," says Seltzer. The DMCA permits the publisher of the content to file counter-notification and get the material restored. But in the meantime, Web users won't know it is missing. "Google realized that didn't serve its public very well, but they were also looking for something to help minimize their legal risk and Chilling Effects was there to help. So the partnership grew from there," Selzer says.

Now, whenever Google receives a take-down notice pursuant to the safe-harbor provisions of the DMCA, the company forwards a copy to Chilling Effects, removes the listing from its index and, in place of the missing content, inserts a link to the notice in the Chilling Effects database.. "That tells people why links are missing from their search results," says Seltzer, and this is preferable to censoring the results without any notice.

Take-down target hits back

The Electronic Frontier Foundation is engaged in a more proactive response to take-down notices in the case of Online Policy Group v. Diebold Inc. The defendant in the case, a manufacturer of electronic voting machines, fired off a barrage of take-down notices last year seeking to block dissemination of leaked internal documents that discussed flaws in the machines. Diebold asserted that any publication of the documents violated the company's copyrights.

EFF and a cyberlaw clinic at Stanford Law School are

representing the recipient of one of Diebold's take-down demands, the Online Policy Group, a nonprofit Internet service provider in San Francisco. They contend that publishing the documents constitutes fair use of copyrighted material, particularly in light of the documents' relevance to the important public debate over whether to make wider use of electronic voting machines.

The publicity about its take-down campaign soon proved to be too much for Diebold, which withdrew its demands last December. But by then OPG and its lawyers were already pressing ahead with a suit against Diebold seeking declaratory relief under section 512(f) of the DMCA, which states that anyone who knowingly misrepresents that material is infringing "shall be liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer." That so far seldom-used provision allows one who has been hit with a purposely abusive demand letter to reply, "Not only am I not in the wrong, but you don't have the right to say I am," says Seltzer.

Oral arguments in the case were held in the U.S. district court in San Francisco in February, and a decision is expected soon. "The Diebold case is one of first cases where we are asserting that section 512(f) of the DMCA that allows someone who is harmed by an inappropriate takedown to sue for damages," says Seltzer. "We're waiting to see how that unfolds."

Public Citizen sets precedents

Public Citizen's litigation group is attempting to make its mark on the emerging law governing take-down notices by aggressively defending recipients of demand letters in a select number of cases.

Levy says he weighs an array of factors in deciding which cases to take -- including whether the recipient can afford counsel and whether the circuit in which any litigation will take place is one in which Public Citizen is "in the process of setting the standard," says Levy. "But ultimately we consider what is the potential for setting a good precedent that other people can rely on. That's the principal thing we worry about." Talk Radio Network's attack on the critics of Michael Savage was one such case that Public Citizen decided it could not pass up. "The theories that were being articulated by the plaintiffs were really dangerous ones,"

Levy explains.

"In a lot of the areas that I've been working on, such as anonymous free speech, domain names and metatags, a lot of bad law got created in the early going before anyone was paying attention, and so we have had to try to undo a lot of the excessive language in early cases," he says. "I was concerned that the same might happen in his case."

The case was particularly important because the legal action against Savage's critics was one of the first cases to address the issue of consumer boycotts organized through the Internet, Levy observes. "The right to engage in a consumer boycott of a business you don't like has been well recognized. But sometimes courts have said the Internet is more dangerous, and so we're going to make it especially hard to exercise free speech rights there. So I wanted to make sure that the law was done right in that case."

Self help for take-down targets

Public Citizen offers an array of resources on its Web site that online publishers can use to help themselves fend off cease and desist letters. "We post a legal outline that people who receive these letters might think about looking at," says Levy. "It suggests ways that you can promote and even finance your legal defense. Even better, you might look at it before you get threatened because there are things you can do to decrease the chance of a serious threat or a serious lawsuit."

Purchasing libel insurance is one simple preventative measure, Levy observes. "It's just amazing how many people have libel coverage in their homeowner's policy and they didn't even think about it. Or you can shop for that kind of policy," says Levy. "If you're going to set up a Web site that's going to make somebody angry, it's easy and cheap to get the kind of protection that will at least get you a standard insurance defense lawyer on your side, which often makes the plaintiff go away when they realize you're going to defend yourself."

To Web publishers who receive a cease and desist letter, Seltzer offers this advice: "First, sit back and relax a bit. Don't think that just because something comes in on fancy letterhead that it's worth the paper it's printed on. A lot of these letters still make wildly overreaching claims, and a lot of lawyers still seem to think that just because they send

something, the person on the other end will go away. My second piece of advice is that on a closer read of the letter, if it looks like something serious, seek legal advice if you can," Seltzer adds. "At Chilling Effects, we're willing to talk through situations or to help people find counsel."

Both Levy and Seltzer are also advocates of publicizing unreasonable demands. "It is certainly true that an intelligent strategy for somebody who's been threatened based on the exercise of their free speech rights is to call attention to what's been done, both to attract support and possibly even pro bono assistance and also to show what kind of company it is that is using the threat of litigation to silence the opposition," says Levy.

Seltzer believes that by stigmatizing unreasonable cease and desist demands, Chilling Effects in less than three years has begun to make a difference. "It has gotten some people thinking about other ways to enforce their rights and come to reasonable compromises with people who want to comment on a product but may not know the limits of trademark law and want to criticize something they've read in the news but don't know how fair use works," she says.

Hopefully, they're taking that approach in lieu of firing off a threat, Seltzer adds. "It's hard to quantify. We still see plenty of silly letters. But I also am encouraged when I'm out in the field and talking to people to hear lawyers say that they think twice about sending a letter because they don't want to see it on Chilling Effects."