

PUBLIC CITIZEN LITIGATION GROUP

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Donald Morris, Esquire
Dozier Internet Law
West Shore III, Suite 300
301 Concourse Boulevard
Glen Allen, Virginia 23059

**Re: How not to write a cease and desist letter—
an open letter in response to your September 21 threat**

Dear Mr. Morris:

Here at Public Citizen, we frequently receive requests for assistance from prospective clients who have received cease and desist letters from lawyers whose clients have asked them to try to quash criticism by threatening litigation over some form of defamation, trademark, or copyright infringement. And we can understand why a client that has been criticized online might want to find **some** way to avoid the criticism, rather than having to speak publicly to respond to critics. But sometimes we receive demand letters that go over the top, making foolish legal assertions and seeing violations where a more detached, objective response might be to tell the client that this is a criticism that will have to be met – or ignored. Indeed, sometimes we wonder whether the lawyer sending the letter has thought to tell his client that the result of sending a demand letter might bring attention to criticisms that otherwise might have received less attention

On September 21, 2007, you sent a letter to Justin Leonard, complaining about criticisms of DirectBuy on the web sites www.infomercialblog.com, www.infomercialratings.com, and www.infomercialscams.com. These web sites give users of infomercial products the ability to post either criticisms of infomercial products or sales practices that they consider to be “scams,” or defenses of such products or processes. The letter begins by claiming that the words “scam” and “nightmare” on the web sites, in addition to the word “defense,” defame DirectBuy by endorsing the posters’ opinions. Of course, words like “scam” and “nightmare” are statements of rhetorical opinion that do not support a claim for defamation. *McCabe v. Rattiner*, 814 F.2d 839, 842 (1st Cir.1987). Moreover, the words fairly characterize the bulk of the opinions of former customers who have sent their accounts of their experiences with DirectBuy to Leonard’s web sites. Even worse is the claim that Leonard defames DirectBuy by pointing out that there had been a sudden influx of similarly worded favorable ratings from DirectBuy on his web site, all posted from the “same location” – and wondering whether DirectBuy might be “behind this.” This is a plain example

of opinion based on disclosed facts – unless you have some information suggesting that the stated facts are false.

Next, you assert that, by creating a category of report called “scam,” and allowing members of the public to complete reports within that category if the posting person believes that the company being criticized has misbehaved in the marketplace, Leonard becomes responsible for whatever falsity may exist in the posted reports. In fact, there is a long line of decisions in state and federal courts that recognize that providers of interactive computer services like Leonard’s are immune from liability, and even from suit, under the Communications Decency Act, 47 U.S.C. § 230. *E.g.*, *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003). You point to the Ninth Circuit’s recent decision in *Fair Housing Council v. Roommates.com*, 489 F.3d 921 (2007), which allowed a claim to go forward under the Fair Housing Act on the theory that the creation of questionnaire categories for gender preference, sexual preference, and family status is itself inherently unlawful under the federal Fair Housing Act. But of course there is nothing inherently unlawful about allowing consumers to characterize infomercial offers as “scams.”

You make the point that DirectBuy has operations in Canada, where it allegedly suffers injury. You told my colleague Greg Beck that you might bring suit in Canada, and you made a point of referring to operations in Canada when I called you. I gather that you hope to take advantage of the fact that there is no CDA and no First Amendment in Canada. Before you spend your client’s money on suing in Canada, you might consider whether Leonard has any assets there, and whether an injunction obtained in Canada would be worth the paper it is written on. Moreover, Canada does provide some protections for fair comment. Instead of suing in Canada, why not bring suit in Tashkent? At least you’d get an exotic trip out of it, and litigation in a totalitarian state would be more consistent with the view that the Internet makes it too easy for consumer criticisms to be heard. But Leonard won’t bother to defend a lawsuit in either location.

But the worst thing about your letter is the end: “Please be aware that this letter is copyrighted by our law firm, and you are not authorized to republish this in any manner. Use of this letter in a posting, in full or in part, will subject you to further legal causes of action.” Such a posting would be fair use. Moreover, inquiry by my colleague Greg Beck produced the interesting information that the copyright in the letter has not been registered. Sadly, according to what you told him, you have been successful in this intimidation because none of your cease and desist letters has ever been posted.

There is always a first time. We are posting the letter on the Public Citizen web site (the letter can be found at <http://www.citizen.org/documents/directbuycd.pdf>) so the public can assess our differences by comparing your contentions with our responses. By this letter, we are inviting you to test the validity of your theory that the writer of a cease and desist letter can avoid public scrutiny by threatening to file a copyright law suit if his letter is disclosed publicly on the Internet.

Sincerely yours,


Paul Alan Levy