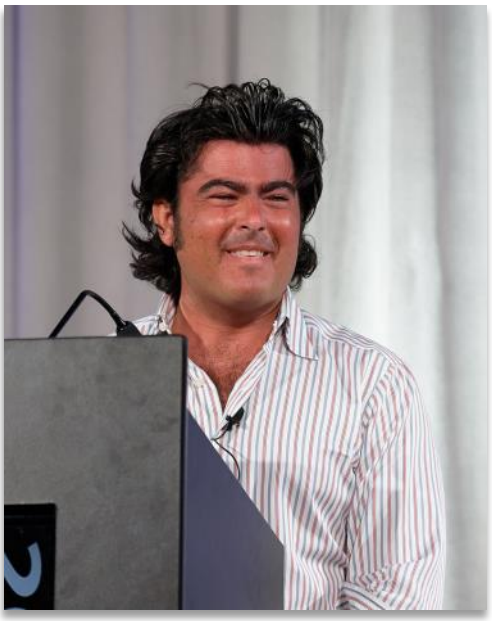
The (Unfinished) Ballad of Gunslinger/ ©Troll Richard Liebowitz

By Steven D. Zansberg

You are probably already far more familiar than you wish you were with Richard Liebowitz, the notorious copyright plaintiff's attorney based in Valley Stream, New York. Mr. Liebowitz has gained notoriety (some might say ignominy) for having filed over 1,500 copyright infringement actions across the nation (some 1,100 in S.D.N.Y.), and having been featured in *Slate*, *The Hollywood Reporter*, and even has his own Wikipedia page (do *you*?).

For those fortunate few *unfamiliar* with Mr. Liebowitz, his entrepreneurial spirit follows a well-developed business model: (1) represent photographers who have registered (or soon will register) their original works (now a requirement for instituting copyright infringement actions, and for recovery of statutory damages of up to $150K/violation plus attorneys' fees); (2) find infringing (non-licensed) uses of those photos online by using a reverse-image search engine like Google Images, Tin Eye, Pixsy, or Berify; (3) demand an exorbitant amount to settle such cases (typically $25K per photo, most of which would command license fees of, at best, in the tens or hundreds of dollars) and then agree to a settlement figure that is a fraction (often less than half) of the initial extortionate demand.



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Because it inevitably would cost more than the insurance deductible to defend such a case, the defendants – many of whom are large media companies – make the rational business decision to settle for "nuisance value." (One notable recent exception is Hearst Communications, Inc.; more on that below.)

Among other notorious practitioners who have adopted this lucrative business model are Higbee & Associates, ImageRights International, Sanders Law, Gafni & Levine, DeBoer IP, and the Intellectual Property Group. Mr. Liebowitz's unique "M.O." is that he first files suit then negotiates settlements. Almost all others send out pre-lawsuit "extortion letters" – some even provide a pre-populated license agreement and a PayPal link to facilitate easy and speedy payment.

These "copyright mill" lawyers operate on contingency fee basis and they receive up to 50% of the settlements they negotiate for the photographers they represent. These law firms and

individual lawyers (some times using non-lawyers to conduct the negotiations) extract four, and low-five figure settlements for each infringed photograph. Multiply half that amount by several hundred (to more than a thousand) settlements they obtain each year, and you quickly understand why this "cottage industry" has sprung up and continues to attract new members. There is even a cottage industry of lawyers who purport to specialize exclusively in defending such actions.

Rogues Gallery ("The Bad and the Ugly")

Although he denied saying it, legendary bank robber Willie Sutton is widely credited for offering this straightforward explanation for why he robbed banks: "that's where the money is." Of course, bank robbers and other gunslingers span a broad spectrum, from ruthless murderers like Jesse James and Billy the Kid to the other pole, comprised of so-called "gentlemen" bank thieves like Forrest Tucker of the Over the Hill Gang, or "Gentleman Robber" Bill Miner.

Mr. Liebowitz belongs somewhere on the spectrum of modern-day "gunslinger" copyright plaintiff's lawyers. On the Jesse James side of that spectrum is the (former) Prenda Law, responsible for extorting men who had illegally downloaded pornography; some of those lawyers were disbarred and one (Paul Hansmeier) is serving a 14-year sentence for mail and wire fraud, among other crimes. Closer to that end of the spectrum are the practitioners at the also- now-defunct Righthaven Press in Las Vegas who purported to represent rights-holders based on sham licenses in cases that were ultimately tossed out of court.

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On the opposite end of the spectrum are the attorneys who are "only in it for the money . . . err, uh, I mean to protect the rights of hardworking photographers." These less-culpable gunslingers tend to succumb to two related vices: (1) greed, and (2) (as a result), filing too many cases and inadequately staffing them—this causes them not to keep track of, and comply with, all the thorny litigation deadlines and procedural requirements, to the ire of federal judges and magistrates.

One might liken Liebowitz's extortionate settlement demands to a fellow who enters an FDIC-insured institution where he actually has an account, and therefore has *a lawful right* to withdraw $200 (at least in most of his case filings). Nevertheless, armed with the "statutory damages & attorney's fees" proverbial gun of copyright law, Liebowitz confronts a teller and demands not $200, or even $1,000, but $25,000 or $30,000**.** In the course of his rather short career in this field, Mr. Liebowitz has moved steadily from the more innocuous pole of sanctionable conduct towards the Prenda/Righthaven pole of the spectrum.

Judges in the S.D.N.Y. Show Their Dismay

The first federal judge to take Richard Liebowitz to task was U.S. District Court Judge Lewis A. Kaplan of the Southern District of New York. In February 2017, in a bench ruling in a *Kanongataa v. ABC, Inc.,* No. 16-cv-7392(LAK), Judge Kaplan dismissed three copyright actions Liebowitz had filed against three news media outlets who had covered the live-feed of a child birth on Facebook as an obvious, indisputable example of fair use. Judge Kaplan later determined that the three defendants were entitled to recover their attorney's fees:

> "Here, no reasonable lawyer with any familiarity with the law of copyright could have thought that the fleeting and minimal uses, in the context of news reporting and social commentary, that these defendants made of tiny portions [e.g. 30 or 40 seconds, or a single still frame] of the 45-minute Video was anything but fair."

2017 U.S. Dist. LEXIS 95812 at ** 4 - 5. In a subsequent ruling, in October 2017, Judge Kaplan awarded over $120,000 in attorneys' fees to ABC, NBC and COED against plaintiff Kanongataa. 2017 U.S. Dist. LEXIS 169534 at *6 (S.D.N.Y. Oct. 4, 2017).

The next month, in *Cruz v. ABC, Inc.*, No. 17-cv-8794 (LAK), 2017 U.S. Dist. LEXIS 196317 (S.D.N.Y. Nov. 17, 2017), Judge Kaplan, *sua sponte* required the plaintiff, represented by Liebowitz, to post security for costs, including attorneys' fees, as a condition of proceeding with the action. *Id*. at *4.

Liebowitz's reputation in the S.D.N.Y. took a dramatic turn for the worse in 2018. First, in January 2018, U.S. Magistrate Judge Andrew J. Peck, stopped just short of sanctioning Liebowitz for failing to comply with discovery obligations, warning that, "the Liebowitz Law Firm needs to consider its reputation with the Court and, frankly, clean up its act." *Janik v. SMG Media Inc*., No.16-cv-7308(JGK)(AJP), 2018 U.S. Dist. LEXIS 4567 at *46 (S.D.N.Y. Jan. 10, 2018).

Then, in February, U.S. District Judge Denise Cote issued two opinions that made clear Liebowitz's "reputation with the Court" was already firmly established. In the first of these rulings, *McDermott v. Monday Monday LLC,* No. 17-cv-9230(DLC), 2018 U.S. Dist. LEXIS 28664(S.D.N.Y. Feb. 22, 2018) after Liebowitz voluntarily dismissed the case (because he conceded the court lacked personal jurisdiction over an Idaho-based newspaper), Judge Cote warned Liebowitz not to file any further actions where personal jurisdiction was so obviously lacking. In the course of her ruling, Judge Cote declared that "Plaintiff's counsel, Richard Liebowitz, is a known copyright 'troll' filing over 500 cases in this district alone in the past twenty-four months." *Id.* at *8.

A week later, in *Steeger v. JMS Cleaning Services,* No. 17-cv-8013(DLC), [2018 U.S. Dist. LEXIS 32730 (S.D.N.Y. Feb. 28, 2018) Judge Cote again referred to Liebowitz as a "copyright

troll," in an order imposing $10,000 in sanctions for "Mr. Liebowitz's failure to serve the Notice of Pretrial Conference on defendant, his delay in serving the Complaint on the defendant, and his failure to communicate with the defendant effectively concerning settlement." *Id*. at *2. In fact, the case had already been settled and voluntarily dismissed days earlier (it involved a photo of a leaf that, the Court noted, was similar to others available for licensing on the internet for $12).

Judge Cote found that Leibowitz had presented a misleading recitation of his interactions with the defendants in a letter filed with court, and as a result, "Mr. Liebowitz needlessly delayed and prolonged [this] litigation." In response to Liebowitz's motion for reconsideration, Judge Cote reduced the amount of the sanction to $2,000, 2018 U.S. Dist. LEXIS 42797 (Mar. 14, 2018), but ordered him to complete four hours of CLE credits in ethics and professionalism by July 31. *Id.* at *8. Judge Cote noted that his motion for reconsideration "continues the pattern of omissions and misrepresentations that have plagued Mr. Libeowitz's earlier submissions," and that he does not "express any regret or acknowledgment that he has failed to adhere to the standards expected of officers of this court." *Id.* at *7.

Drawing Greater Attention to His Self-Inflicted Injury

Also in March, Leibowitz filed a motion asking Judge Cote to remove the label "copyright troll" from her unreported ruling in *McDermott v. Monday Monday, LLC*. In a decision issued in November 2018, which drew far greater press attention, Judge Cote doubled-down on (and provided academic support for) her characterization of Liebowitz's litigation practice: "Richard Liebowitz[] has filed over 700 cases in this District since 2016 asserting claims of copyright infringement ... His litigation strategy in this District fits squarely within the definition of a copyright troll." 2018 U.S. Dist. LEXIS 184049 at **1, 4 (S.D.N.Y. Oct. 26, 2018). Quoting her earlier opinion, Judge Cote declared:

> In common parlance, copyright trolls are more focused on the business of litigation than on selling a product or service or licensing their copyrights to third parties to sell a product or service. A copyright troll plays a numbers game in which it targets hundreds or thousands of defendants seeking quick settlement priced just low enough that it is less expensive for the defendant to pay the troll rather than defend the claim.

Id. at *5. Judge Cote noted that "[i]n the over 700 cases Mr. Liebowitz has filed since 2016, over 500 of those have been voluntarily dismissed, settled, or otherwise disposed of before any merits-based litigation. In most cases, the cases are closed within three months of complaint filing." *Id.* at *6. The ruling then recites a number of cases in which Liebowitz was chastised and/or actually sanctioned for litigation abuse.

Citing a 2015 Iowa Law Review article, Judge Cote stated that "the essence of trolling" is "seeking quick settlements priced just low enough that it is less expensive for the defendant to pay the troll rather than defend the claim." *Id*. at *9. Judge Cote concluded: "As evidenced by the astonishing volume of filings coupled with an astonishing rate of voluntary dismissals and quick settlements in Mr. Liebowitz's cases in this district, it is undisputable that Mr. Liebowitz is a copyright troll." *Id*. Thus, Judge Cote ruled, "Press coverage that accurately summarizes the status and outcomes of Mr. Liebowitz's cases in this District does not present an undue and extreme hardship" that warrants amending her earlier ruling. *Id*. at *10.

Summertime Blues

In July of this year, judges in the S.D.N.Y. dramatically intensified their expressions of disapproval, and formal sanctioning, of Liebowitz's litigation tactics. *See, e.g.,* Alison Frankel, *Manhattan Federal Judges Are Getting Fed Up With Notorious Copyright "Troll*", Reuters (July 11, 2019).

On July 9, U.S. District Judge Paul Oetken issued another blow to Liebowitz's reputation, and his wallet. In the case of *Craig v. UMG Recordings*, No. 16-cv-5439(JPO), 2019 U.S. Dist. LEXIS 113771 (S.D.N.Y. July 9, 2019), Judge Oetken denied Liebowitz's motion for reconsideration of an order Judge Oetken had entered earlier in the case, 2019 U.S. Dist. LEXIS 53973 (S.D.N.Y. Mar. 29, 2019), awarding the defendant attorney's fees, imposed *against Liebowitz personally*, for having filed a frivolous motion to disqualify the defendant's expert witness. Judge Oetken again rejected Liebowitz's claim that he had filed the motion in good faith: "Liebowitz's conduct was not the mere result of poor legal judgment." 2019 U.S. Dist. LEXIS 113771 at *6. Although the amount of attorney's fees awarded was reduced, on reconsideration, from $159,710 to slightly more than $98,000, Judge Oetken repeated that Liebowitz, himself, (i.e., not his client), was responsible for paying that amount: "Liebowitz ... acted in bad faith in filing this entirely frivolous motion." *Id*.

The very next day, U.S. District Court Judge Jesse M. Furman imposed $8,745.50 in sanctions against Liebowitz personally, and his firm, jointly and severally, for "failure to comply with multiple court orders." *Rice v. NBCUniversal, Inc*., No. 19-cv-447(JMF), 2019 U.S. Dist. LEXIS 114690 (S.D.N.Y. July 10, 2019). The case was resolved through a settlement just hours before the Initial Conference with the Court, notwithstanding plaintiff's failure to participate in the court-ordered mediation, and despite the fact that the defendant, NBCUniversal, had produced a license for its use of the plaintiff's photograph (depicting "the removal of a wild raccoon from a beauty shop in the Bronx"). Judge Furman found that Leibowitz's failure to comply with the Court's orders were willful, "not isolated but rather [part of] a pattern of non-compliance." Apparently expressing the views of himself and his fellow Southern District judges Furman, declared:

> In his relatively short career litigating in this District, Richard Liebowitz has earned the dubious distinction of being a regular target of sanctions-related

> motions and orders. Indeed, it is no exaggeration to say that there is a growing body of law in this District devoted to the question of whether and when to impose sanctions on Mr. Liebowitz alone.

Judge Furman denied Liebowitz's motion for reconsideration. 2019 U.S. Dist. LEXIS 134022 (S.D.N.Y. Aug. 8, 2019).

Liebowitz's business model, itself, suffered a blow a week later: following a one-day bench trial on damages on July 19, Judge Gregory Woods ruled that amateur photographer Jonathan Otto (the guy who took a iPhone photo of President Trump "crashing" a wedding party at his New Jersey golf resort) was entitled only to $750 - the minimum statutory damages available under the Copyright Act, other than for a successful defense of "innocent infringement." *Otto v. Hearst Comm'n Co*., No 17-cv-4712(GHW).

Judge Woods found Otto had sustained only $100 in actual damages, the "lost license fee," and that an award of five times that amount would provide sufficient deterrent effect, but then Judge Woods bumped the amount up to the statutory minimum. Otto had requested the maximum $30,000 statutory damages for non-willful infringement. As of this writing, Liebowitz's motion seeking $60,000 in attorney's fees has not been ruled upon.

On July 25, yet another shoe dropped. Judge Cote issued an Opinion and Order in *Mango v. Democracy Now! Productions, Inc*., No 18-cv-10588(DLC) 2019 U.S. Dist. LEXIS 123550 (S.D.N.Y. July 25, 2019), that required the plaintiff, Gregory Mango, to post an additional $50,000 bond (on top of the earlier required $10,000) to secure any possible attorney's fees award that defendant might obtain. Having determined that Mango had licensed the single photo at issue for a maximum $220 in the past, the defendant made an Offer of Judgment five times that amount ($1,100), which Mango (through Liebowitz) had rejected. Judge Cote noted that awards in cases like this one, involving a single photograph used in connection with a single article, "awards rarely exceed three to five times the license fee for a work." *Id*. at *12. (Judge Woods' $750 verdict in *Otto v. Hearst Comm'ns, Inc*. fully supports this). Democracy Now!, a 501(c)(3) non-profit entity, derived no profit from the use and it removed the photo from its website promptly upon receiving notice of the lawsuit. And, it has a potentially successful fair use defense. "In light of these facts, Mango is unlikely to recover an amount greater than the Rule 68 offer and moreover may be liable for [Democracy Now!'s] post-offer costs including attorney's fees." *Id.* at *13. Notably, Judge Cote surveyed the discovery requests that Liebowitz had tendered in the case (which she described as unreasonable and excessive) and she found the defendant's estimated defense cost, which exceeded $110,000, to be reasonable. *Id.* at *14. Lastly, once again, Judge Cote recounted Liebowitz's sullied reputation in the Southern

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District: "The history of Liebowitz's failure to comply with court orders counsels in favor of the imposition of an additional bond." *Id.* at *15.

As the above summary of this summer's events demonstrate, a growing number of judges in the Southern District of New York have expressed their dismay for Liebowitz's "file first and negotiate later" approach to extorting early settlements in single-work photo copyright infringement cases. The judges there appear to be signaling Liebowitz, not terribly subtly, to follow the well-beaten path of the vast majority of other copyright trolls who send pre-filing "shake down" or "extortion" letters, a tried-and-true practice that greatly reduces the number of cases clogging federal court dockets.

Those of you called upon to defend new claims Liebowitz files, particularly in the Southern District of New York, may want to file an early offer of judgment that is five times the typical licensing fee for the photo at issue (or others that are essentially interchangeable with it), and then seek an order requiring the plaintiff post a bond as a condition for continuing the litigation. That appears to be a successful maneuver to force Leibowitz's clients "pay the freight" to continue utilizing the federal courts as a tool of their extortionate efforts.

Movin' on Down the Trail

Musical cue: Billy Joel's The Ballad of Billy the Kid

As a result of the notoriety he has garnered in the S.D.N.Y., Leibowitz has followed the well-trodden path of western gunslingers of yesteryear: Once their M.O. becomes well-known in one area of the country, they are forced to ply their trade in other territories where they remain relatively anonymous. Notably, since filing his first copyright infringement action in the District of Colorado in 2018, Liebowitz has now filed 32 such actions there. Indeed, he has also filed some 430 copyright infringement cases outside the S.D.N.Y. Those of you (un)fortunate enough to defend those actions would be well advised to review the above rulings and, at every opportunity, to share them with "the marshal" (the person wearing the black robe) in your hometown court. Perhaps the day will come when Liebowitz's reputation will precede him as he seeks to escape the long dark shadow of his ignominious past: The rulings issued this past year from U.S. District Judges Cote, Kaplan, Furman and Oetken can serve as modern-day "WANTED" posters, hanging not in the town square or outside the local saloon, but on the front door of every federal courthouse across the land.

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Steve Zansberg is Senior Counsel in the Denver office of Ballard Spahr, LLP. He and his colleagues have extensive experience litigating copyright infringement cases on behalf of media companies sued by photographers represented by Richard Liebowitz and others.