Copyright Litigation Handbook

By Raymond J. Dowd
Dunnington, Bartholow & Miller, LLP
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Introduction to the 2018-2019 Edition

The Copyright Litigation Handbook 2018-2019, by Raymond Dowd, guides the subscriber through all the steps of copyright litigation. The author, a recognized expert, walks attorneys step-by-step from the moment a prospective client calls through the calculation of litigation costs and attorney’s fees. This book includes sample forms, pleadings, motions, checklists, and practice tips, and includes up-to-date citations.

Highlights of the New Edition

- **New Section: Satellites and the Federal Communications Act.** See § 1:31
- **New Section: Libel and the Communications Decency Act.** The First Circuit case, Small Justice LLC v. Xcentric Ventures LLC. See § 1:32
- **Television broadcasts and satellite transmissions and geoblocking:** Recent decisions, including the D.C. Circuit court’s finding of copyright infringement in Spanski Enterprises, Inc. v. Telewizja Polska, S.A., where the owner of a foreign website uploaded video content and then directed it to U.S. viewers upon request. See § 2:29
- **Databases:** Recent cases, including Ninth Circuit’s decision in Experian Information Solutions, Inc. v. Nationwide Marketing, involving a sophisticated process for selecting names and addresses, and the Fourth Circuit’s decision in Openrisk, LLC v. Microstrategy Services Corp., involving a cloud service provider. See § 2:55
- **Claims Against States:** Discussion of recent cases, including the Fourth Circuit’s decision in Allen v. Cooper, which involved underwater footage of Blackbeard’s sunken pirate ship. See § 7:24

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- **Licenses**: Discussion of several recent cases, including, e.g., the Fifth Circuit’s decision in *Stross v. Redfin Corporation*, the Second Circuit’s decision in *Meyer v. Uber Technologies, Inc.*, the Ninth Circuit’s decision in *Oracle USA, Inc. v. Rimini Street, Inc.* See § 8:13

- **Standing, Motion Practice and Discovery**: Recent cases, including the Federal Circuit’s decision in *James v. J2 Cloud Services, LLC*. See § 9:6

- **New Sections: Preemption**: Discussion of recent case law addressing preemption and misappropriation; preemption and patents; preemption and computer crimes; preemption and the droit de suite. See § 10:23


- **Litigation defenses**: Recent cases such as the Federal Circuit’s decision in *Oracle America, Inc. v. Google LLC* and the Second Circuit’s decision in *Fox News Network, LLC v. Tveyes, Inc.*, regarding fair use. See § 13:22

- **Damages and Profits**: Discussion of recent cases, including the Ninth Circuit’s decisions in *LHF Productions Inc. v. Doe 1*sup, involving a BitTorrent ‘swarm’ and in *Glacier Films (USA), Inc. v. Turchin*, a peer-to-peer piracy case. See § 17:24
To Dan Marotta, the best lawyer I know.
About the Author

Raymond J. Dowd is a member of Dunnington, Bartholow & Miller’s litigation and arbitration, intellectual property and art law and international practice areas. He has served as lead counsel in high-stakes, high-profile litigations and arbitrations in New York for over two decades. His book Copyright Litigation Handbook (Thomson Reuters/Westlaw) has received critical acclaim. Acting as a fiduciary by serving on non-profit boards has shaped his practical problem-solving approach and perspective. Business disputes form the core of Mr. Dowd's practice. He works with a lean, experienced team, including trusted experts, to contain, avoid, minimize, and settle disputes. Matters often involve foreign law and conflict-of-laws principles, service or discovery in foreign jurisdictions. Mr. Dowd regularly represents television broadcasters in disputes relating to brand protection and content distribution in the United States, particularly antipiracy work. Ground-breaking litigation to recover artworks lost during World War II has gained amicus curiae support from Holocaust survivors and heirs.

Mr. Dowd represents individuals, corporations, non-profits and governments in a wide range of matters. Trust and estates matters include contested probate proceedings through trial and disputes involving, trusts, heirship and decedents’ estates. Contested matters include copyright and trademark disputes, shareholder actions, business dissolutions, contract disputes, licensing disputes and contested audits or accounting proceedings, including bench and jury trials, arbitrations and administrative proceedings, emergency applications for injunctive relief, quashing subpoenas, obtaining, enforcing and collecting judgments. Sample representations:

**CTC Network v. Actava** (SDNY) — Obtained permanent injunction blocking unauthorized broadcasts of Russian-language internet protocol television (IPTV) on behalf of Russian broadcaster;

**Matter of Flamenbaum** (NY Court of Appeals — Surrogate’s Court Nassau County) — Represented the Republic of Germany in appeals from an estate accounting proceeding, obtained judgment returning 1200 B.C. tablet excavated
from the Temple of Ishtar;

**Reif v. Nagy** (NY County Supreme — Commercial Division) — Obtained emergency seizure of two artworks by the artist Egon Schiele displayed at the Park Avenue Armory;

**Energy Conservation Group v. Applied Underwriters** (Queens County Supreme — Commercial Division) — Obtained temporary and preliminary restraining orders blocking arbitration and obtained an order compelling a $1.4 million bond against insurer;

**Cartagena v. J.W. Thompson** (SDNY) — Achieved dismissal of copyright infringement action in favor of arbitration via pre-answer motion on behalf of a non-signatory to the arbitration agreement;

**Bakalar v. Vavra** (SDNY — Second Circuit) — Tried first-ever Holocaust-era art litigation in U.S. federal court; prevailed on appeal on significant conflict-of-laws question on New York, Swiss and Austrian law on stolen art;

**Chum Ltd. v. Lisowski** (SDNY) — Obtained summary declaration in trademark infringement and unfair competition action that mark FASHION TELEVISION is generic, then prevailed in bench trial for broadcaster of FASHIONTV channel;


**Gleason v. Gerson** (NY County Supreme) — Removed incumbent City Councilman from ballot and uncovered campaign misconduct;

**Gleason v. Scopetta/City of New York** (Second Circuit — EDNY) — Obtained reversal of ruling on stolen FDNY medical records on question of “state action,” asserted private right of action under Americans With Disabilities Act medical records confidentiality provision; obtained judgment under 42 U.S.C. § 1983 for disabled, retired New York City firefighter;

**Matter of Anonymous Child** (Surrogate’s Court NY County) — Finalized adoption for adoptive mother in contested adoption of sister’s child in the wake of September
Mr. Dowd also assists individuals, art owners, dealers and corporations with trademark and transactional work, including international licensing and distribution. He lectures regularly on art law and copyright law. In 2006, he co-founded the annual day-long Art Litigation and Dispute Resolution Institute at New York County Lawyers’ Association featuring the top judges and practitioners in art law.

Mr. Dowd has served as President of Network of Bar Leaders (2013-2014); General Counsel of the Federal Bar Association (2010-2011); FBA Vice President for the Second Circuit (2006-2012); FBA Board of Directors (2011-2016); The Federal Lawyer Magazine Editorial Board; FBA Government Relations Committee; FBA President of Southern District of New York Chapter (2006-2008); New York County Lawyers’ Association Board of Directors (2003-2006); National Arts Club Second Vice President, Chair Audit Committee (2016-Present); Co-Chair of Fordham Law School’s International Law Affinity Group (2016-Present); Village of Westhampton Beach Conservation Advisory Council (2014-Present).

Mr. Dowd is a member of the Copyright Society of the U.S.A.; New York State Bar Association, Commercial and Federal Litigation Section and Intellectual Property Law Section, Fellow, New York State Bar Foundation; Sustaining Lifetime Fellow, Foundation of the Federal Bar Association.

Mr. Dowd is admitted to practice law in New York State, the U.S. District Courts for the Southern and Eastern Districts of New York, U.S. Court of Appeals for the First, Second, Fifth, Ninth and Tenth Circuits, U.S. Supreme Court, U.S. Tax Court and U.S. Court of International Trade.

Mr. Dowd earned a Bachelor of Arts from Manhattan College in International Studies cum laude and a Juris Doctor from Fordham University School of Law, serving as Articles Editor for the *Fordham International Law Journal* where he currently serves as an Adjunct Professor.

Mr. Dowd is fluent in French and Italian.

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Acknowledgments

My clients, whose trust, support, and friendship make everything possible.

My friend Jacob Getz, who got me mixed up in all of this.

My editors at West publishing, Phil Dorsey and Molly McNulty, for their patient brand of tough love cheerleading that helped me put together this book during a period of intense litigation practice. I needed the drop-dead deadlines just as much as the adjournments. Ross Barron, a talented intern from New York Law School whose research and writing helped me through the home stretch and Professor Mariana Hogan for recruiting Ross.

Register of Copyright Marybeth Peters and the U.S. Copyright Office’s legal expert Jule Sigall, for showing me around the office and helping me understand some of the difficulties facing litigators and judges who try to interpret the Copyright Act.

The leaders and members of the Copyright Society of the United States of America. The warm reception and the stimulating scholarship that I’ve been exposed to has been tremendously valuable. Special thanks to Amy Nickerson, Jay Kogan, Barry Slotnick, Helene Blue, Judith Bresler, Alan Hartnick, Howard Abrams, Corey Field, Noel Silverman, Nancy Wolff, and Bob Clarida. Professor Hugh Hansen has been a great friend for many years. Judi Finell, one of the nation’s top musicologists, gave me a greater understanding of how experts can be used before a complaint is filed. Professor Carol Steinberg for the fine arts. Professor William Patry’s copyright blog has been a delight throughout. Scott Bain of the Recording Industry Association of America for the jury instructions. Mary Minow for the copyright duration charts.

The leaders and members of the New York County Lawyers’ Association and the Federal Bar Association. These two organizations have supported me through the years and helped me grow as a professional. Judge Stephen Crane and Barry Levy have been my mentors and role models. Steve Masur, Marty Novar and Olivera Medenica for their collaboration.
My editors at the New York Law Journal, Steve Homan, Mike Paquette and Editor-in-Chief Kris Fischer for supporting me through the years.

The judges of the Second Circuit and the Southern and Eastern Districts of New York, whose brilliance has informed the nation’s understanding of the Copyright Act, and whose patience I have tested on so many occasions. Judge Loretta Preska for the Nuts & Bolts of Copyright Litigation Continuing Legal Education program.

Finally, my many learned adversaries over the years. To learn chess, you must play the masters. I am grateful for the lessons and the many friendships that have resulted.

Special thanks to Michael Zussman, a student from New York Law School, for his help updating the 2007 edition.

Publisher and author gratefully acknowledge the contributions of Karen B. Tripp to the 2011 upkeep of this book.
Preface to the First Edition

This book was conceived during a copyright infringement trial before the Honorable Denny Chin in United States District Court, Southern District of New York. I realized at the time that much of the information I needed at my fingertips was scattered in different sources. Brilliant treatises have been written, but all too large to fit in a briefcase and carry into a courtroom for quick reference. This book began as an attempt to pull those scattered sources together and to provide practitioners with useful checklists.

While putting the book together, I realized that no book had been written for a litigator who knew nothing about copyright having to figure out the issues, and litigate a case. This work attempts to explain how to prepare and conduct a copyright litigation from beginning to end. I hope that specialists find it a handy complement to their existing libraries and that it will help nonspecialists to separate the forest from the trees.

I urge readers to contact me at rdowd@dunnington.com to point out my errors and omissions. Critical feedback will strengthen future editions.
Foreword

Purpose of this work

Copyright litigation has exploded in recent years. Many attorneys must confront litigation involving copyright with little or no experience involving the subject matter of copyright. This work is intended to assist those attorneys in investigating, pursuing, or defending a copyright litigation from the first client interview through judgment. It is also intended to be useful to the experienced practitioner wishing to consult a work organized around the Federal Rules of Civil Procedure. This work differs from available works on copyright by focusing on what a litigator will need at each stage of litigation in federal court involving copyright, with a particular focus on copyright infringement actions.

This reference is designed to be a handy volume kept at a practitioner’s desk; to fit in a briefcase; or to be brought to court. It provides a trial lawyer’s perspective of the laws and procedures with corresponding checklists and practice tips. Copyright office procedures described are only those most common for a litigator. The Copyright Act of 1976, 17 U.S.C.A. § 101 et seq. broadly preempts equivalent state law claims. Accordingly, this work’s emphasis is on the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and the issues related to choosing a forum such as removal and preemption. It is designed by and written for the civil, rather than the criminal, practitioner.

Scope and limitations of this work

This work is intended as a simple and handy reference for an attorney encountering copyright issues in a litigation with a particular emphasis on federal practice and copyright infringement litigation. The checklists and practice tips are subjective assessments of information that have proved useful in the author’s experience. Such checklists and practice
tips are not intended to be exhaustive or to substitute for
genuine independent legal research, nor may they be useful
or appropriate in every situation. Excellent scholarly
treatises analyze the many facets of copyright in depth and
should be consulted in the ordinary course of practice.¹
Constantly changing case law and statute mean that the
practitioner must check case citations for new developments.
Each chapter is designed to help the litigator separate
the forest from the trees in terms of focusing on the aspects
of copyright law relevant to the tasks to be accomplished.
Criminal aspects of copyright litigation are not covered. This
work covers practice before a Copyright Arbitration Royalty
Panel ("CARP") and litigation practice in state courts only in
passing.

Overview of chapters

Each chapter provides citations to relevant cases,
statutes, and rules; and includes practice tips and practical
examples.

Chapter 1. Copyright Law: A Litigation Perspective
Chapter 2. Copyrightable Matter
Chapter 3. The Client Interview and Initial
Investigation
Chapter 4. The Copyright Office: Litigation
Practice
Chapter 5. Calculating Dates Prior To Commencing
Litigation
Chapter 6. Cease and Desist Letters and Declara-
tory Judgment Actions
Chapter 7. Drafting the Infringement Complaint
Chapter 8. Copyright Ownership and Licensing
Litigation
Chapter 9. Motions Attacking the Complaint
Chapter 10. Removal from State Court and Preemp-
tion
Chapter 11. Class Actions
Chapter 12. Injunctions and Seizures

¹ See, e.g., Howard Abrams, The Law of Copyright (Thomson Reuters
2005).


Chapter 13. Answer and Defenses
Chapter 14. Discovery
Chapter 15. Evidence and Experts
Chapter 16. Jury Instructions
Chapter 17. Damages and Profits
Chapter 18. Costs and Attorney’s Fees

Appendices

The appendices include the three documents critical to the litigator: the Copyright Act, the Federal Rules of Civil Procedure, and the Federal Rules of Evidence.

Explosion of copyright issues

With the advent of the internet and a software-driven economy, average citizens and their children have become worldwide creators, publishers and distributors of text, photographs, music, graphics, and software. Entering into license agreements involving intellectual property occurs on a daily basis in the most ordinary of consumer transactions. Copyright has emerged from an arcane practice of the intellectual property “boutique” law firm into everyone’s lives. The average consumer uses licensed intellectual property, including copyrighted materials, on a daily basis and may make thousands of reproductions of copyrighted works—often without permission of the author.

These technological changes carry tremendous social, political and legal implications. Overzealous enforcement and pushing the protections of copyright law are serious threats to personal liberties such as freedom of speech, creative expression, and documentary filmmaking. On the other hand, authors, artists, and programmers are threatened with becoming unpaid laborers whose creative works are being stolen without fair compensation. Courts and commentators agree on little, and eminent jurists express widely divergent views and philosophies on where the boundaries of property should end and creativity should begin.

As the late Supreme Court Justice William Brennan put it: “Although the Court pursues the laudable goal of protecting the ‘economic incentive to create and disseminate ideas’,
... this zealous defense of the copyright owner’s prerogative will, I fear, stifle the broad dissemination of ideas and information copyright is intended to nurture.\(^2\) The clash between ideas and expression is at the heart of copyright law. As the Supreme Court recently noted: “every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation and the moment of publication. ... The First Amendment securely protects the freedom to make—or decline to make—one’s own speech; it bears less heavily when speakers assert the right to make other people’s speeches.”\(^3\)

**Copyright law moving forward**

New sources of information on developments in copyright law are sprouting up on the Internet. Gigalaw.com has a terrific daily update on developments in high-tech law.\(^4\) Professor William Patry maintains The Patry Copyright Blog, an entertaining and erudite collection of observations on new developments in copyright law.\(^5\) Professor Lawrence Lessig maintains a blog called the Lessig Blog.\(^6\) The Chilling Effects web site is an excellent resource for persons receiving Cease and Desist letters who wish to know what their rights are or to see what companies have sent out cease-and-desist letters.\(^7\) The Electronic Frontier Foundation maintains an excellent web site dedicated to free speech issues related to copyright and information regarding the latest litigation and legislative developments.\(^8\)

Other exciting resources abound. The Colombia Law School Arthur W. Diamond Law Library Music Plagiarism Project provides hundreds of documents including texts, scores, audio, and video associated with music copyright infringe-

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\(^5\) http://www.williampatry.blogspot.com/.

\(^6\) http://www.lessig.org/blog/.

\(^7\) http://www.chillingeffects.org/.

\(^8\) http://www.eff.org/.
ment cases in the United States from 1845 forward. Duke University Law School has produced an excellent introduction to copyright law from the point of view of documentary filmmakers wishing to understand what copyright protects; a discussion of the issues of fair use in copyright law and the extent of the public domain is found in a downloadable comic book titled “Tales from the Public Domain: Bound by Law?” on that site. The Piet Zwart Institute has produced an excellent “A Guide to Open Content Licenses” authored by Lawrence Liang.

In consulting any of these resources, it is important to understand that many come from a polemical point of view. The “copyleft” movement which has fostered use of the Creative Commons licenses and open source software now covers billions in assets. Little or no case law interprets issues covered by these licenses. “The Documentary Filmmakers’ Statement of Best Practices in Fair Use” published by American University’s Center for Social Media has attracted severe criticism from major film studios. These are exciting times for those who care about access to and management of the fruits of mankind’s intellectual achievements. From Google’s announcement that it will copy every book in the world to Wikipedia’s communal pooling of human knowledge, our world of copyright has become the celestial jukebox Professor Paul Goldstein described so well in Copyright’s Highway: From Gutenberg to the Celestial Jukebox.

Clearly, more and more copyright research and case law will be enhanced by the audiovisual experience, and trial lawyers will have to master the techniques of effectively using new technology to empower argumentation in legal briefs, in motion practice and oral argument, and in persuading juries. As the technology improves and the costs drop, the average litigator will be compelled to master techniques once reserved for high-priced consultants.

It is my sincere hope that this work proves useful in assisting the legal profession in meeting these challenges and in demystifying some of the challenges that copyright

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10 http://www.law.duke.edu/cspd/comics/.
11 http://pzwart.wdka.hro.nl/mdr/research/lliang/open_content_guide.
12 http://www.centerforsocialmedia.org/resources/fair_use/.
13 (Stanford University Press 1994).
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Intellectual Property Law for Business Lawyers
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Licensing

Eckstrom’s Licensing in Foreign and Domestic Operations: The Forms and Substance of Licensing
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