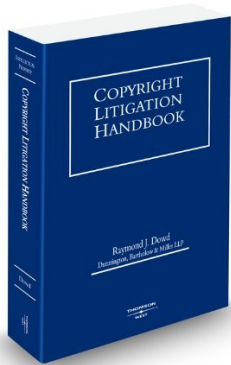


**Copyright Litigation Handbook (West 2009)**  
**by Raymond J. Dowd**



Copyright Litigation  
Handbook

Raymond J. Dowd

Praise from copyright experts for *Copyright Litigation Handbook*:

“The only book of its kind .... indispensable ...”

*Prof. Alan Hartnick, New York Law Journal*

“a valuable resource for copyright litigators ... it will be squeezed into trial bags for years to come.

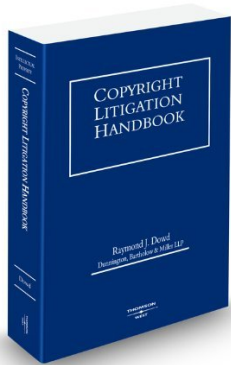
*Joseph Petersen, Kilpatrick Stockton LLP*

“extraordinary for more reasons than I have space to enumerate ... extremely valuable...”

*Corey Field, Ballard Spahr Andrews & Ingersoll LLP*

“for occasional dabblers ... and experienced copyright litigators ... the book I go to first when drafting a complaint ...”

*David Wolfsohn, Woodcock Washburn LLP*



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# Copyright Litigation Handbook

A desktop practice guide for litigators, handily sized for portability.

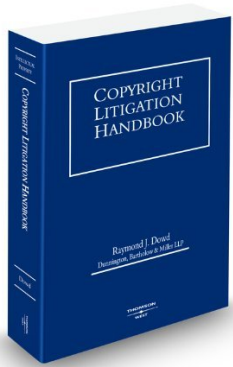
Features practical strategic and tactical guidance from an experienced federal trial lawyer.

Step-by-step walk from the first contact with the client, through the litigation and trial process, extensive coverage of statutory damages, attorneys' fees and costs.

Sample forms, pleadings, checklists and practice tips.

Citations to current case law on procedural, substantive and evidentiary issues.

Handy full texts of Copyright Act, 1909 Copyright Act, Federal Rules of Civil Procedure and Federal Rules of Evidence.



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## Raymond J. Dowd, Author





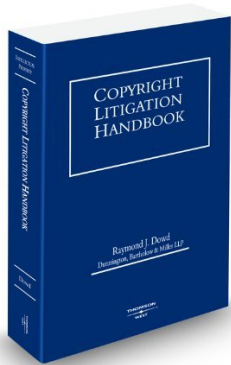
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**I wrote Copyright Litigation Handbook out of frustration. Existing treatises didn't tell me *how* to litigate a copyright claim, discussing theory only.**

**Based on hard experience, I wanted a small volume, easily referenced. During a phone conversation, in court at counsel table.**

**As a handbook, it should be lean, and useful: a time-saver. It is a work in progress, updated every year.**

**I hope that you find it accurate and valuable. Copyright covers such diverse subject matters and the case law and technology change rapidly.**



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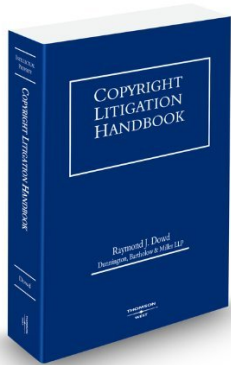
# Copyright Litigation Handbook

## Chapter 1: Copyright Law: A Litigation Perspective

This chapter provides an overview of copyright law, its source and development. It covers the source documents that a copyright attorney will need to find out what the law is, how the law came about and what secondary sources are available.

It discusses generally the scope of copyright law, what copyright protects and what it doesn't.

Copyright infringement and theories of liability are reviewed, together with a discussion of remedies and enforcement.



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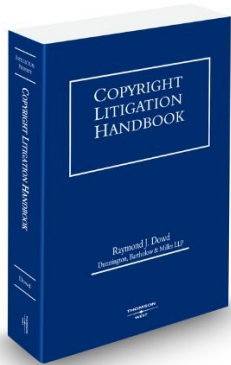
# Copyright Litigation Handbook

## Chapter 2: Copyrightable Matter

This chapter provides covers five general areas covered by copyright law:

- music and live performances
- dramatic works, film, television broadcasts and satellite transmissions
- literary works
- visual arts
- computer programs

For each subject matter a brief overview is provided for quick reference with citations to leading cases.



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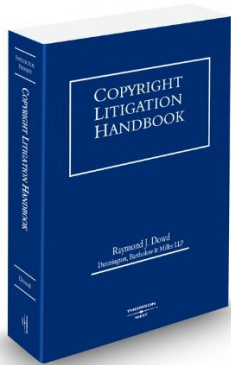
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## Chapter 3: The Client Interview and Initial Investigation

This chapter covers the initial considerations confronting an attorney when deciding whether or not to accept a case. Forms and checklists are provided for easy reference.

Investigations are discussed, together with a discussion of the wisdom of sending a cease and desist letter and issues arising immediately when defending a case.

Issues of professional responsibility flowing from initial client contacts are covered, including avoiding Rule 11 sanctions and common initial mistakes.



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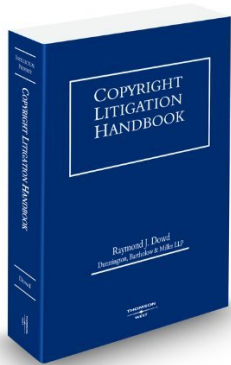
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## Chapter 4: The Copyright Office: Litigation Practice

Chapter 4 covers what a litigator needs to know to understand documents generated by the Copyright Office, including:

- how to properly document copyright ownership and avoid common traps
- obtaining and interpreting registration and deposit materials
- how, when and why to correct ownership and registration records
- how to handle injunctive relief issues and obtain expedited registration



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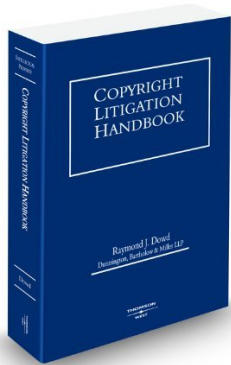
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## Chapter 5: Calculating Dates Prior To Commencing Litigation

Chapter 5 includes a litigator's checklist for handling issues relating to dates involving copyrights. It covers the issue-spotting that a litigator should undertake with respect to timeliness and deadlines involving copyright claims, including:

- understanding the impact of registration, creation and publication on copyright claims
- tackling issues relating to statutes of limitations, including accrual, tolling and laches
- calculating durations of copyrights



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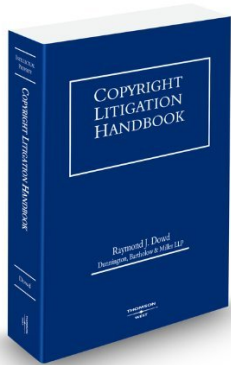
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## Chapter 6: Cease and Desist Letters and Declaratory Judgment Actions

A cease-and-desist letter carries often unexpected dangers. Every lawyer wants the home court advantage and every client wants a simple letter written.

But few understand the arcane first-to-file rule, its exceptions and handling a declaratory judgment action filed in response to a cease-and-desist letter. Understanding the first-to-file rule is critical for any attorney drafting a cease and desist letter.

Chapter 6 contains critical guidance for attorneys venturing outside their local jurisdictions to enforce copyrights.



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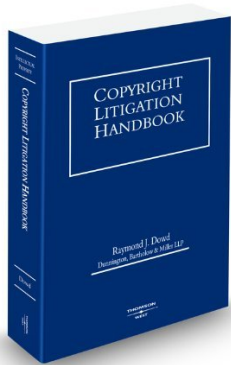
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## Chapter 7: Drafting the Infringement Complaint

Chapter 7 provides a checklist of considerations for drafting a complaint, including standing, jurisdiction, venue, and the rules for pleading substantive copyright claims.

Drafting the caption of the complaint and choosing the defendants is covered, including who is a necessary party under the Federal Rules of Civil Procedure, the pros and cons of including multiple defendants, personal liability of corporate officers, contributory liability, vicarious liability, and problems in suing internet service providers.

Foreign defendants, foreign copyrights and foreign infringements are covered.



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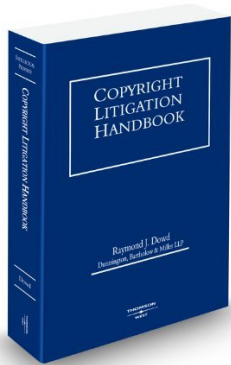
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## Chapter 8: Copyright Ownership and Licensing Litigation

Is it a copyright, and who owns it? Federal, state or even foreign law may provide the answers, depending on the issue. Chapter 8 charts the complex interactions of these laws.

Disputes over copyrightability, joint authorship, heirship, copyright transfers and licenses are covered.

Key decisions in the area of copyright licenses are included, including recordation of licenses with the Copyright Office, rescission, choice of law and choice of forum, the first sale doctrine and problems particular to software licenses.



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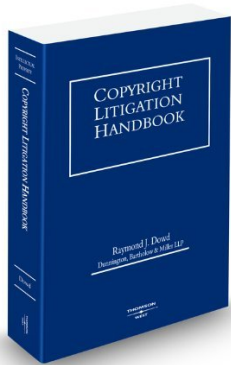
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## Chapter 9: Motions Attacking the Complaint

Your client has been sued. Do you make a motion? Which motions are appropriate under Rule 12 and which fall afoul of Rule 11 of the Federal Rules of Civil Procedure? Do you engage in discovery before making the motion?

Chapter 9 addresses these questions and provides citations to current case law. Motions to dismiss covered are:

-preempted claims, lack of registration, lack of standing, lack of subject matter jurisdiction, lack of federal question, lack of personal jurisdiction or venue, failure to state a claim, *forum non conveniens*, foreign sovereign immunity, a motion for a more definite statement and a motion to strike



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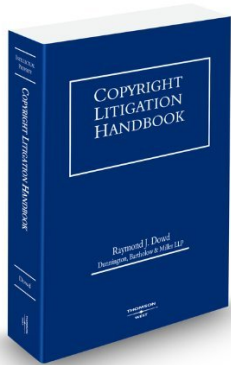
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## Chapter 10: Removal from State Court and Preemption

Your client has been sued in state court for copyright infringement. Does it belong in federal court? The answer lies in the unique application of the preemption doctrine to copyright law.

Chapter 10 shows how to get a case removed, the unique time clock applying to removal, consequences of late removal and some of the dangers that ensue from improper removal, such as remand and paying an adversary's attorneys fees.

Preemption is covered and applied to cases involving diversity jurisdiction, trademarks, contract claims, trade secrets, tortious interference and other related claims.



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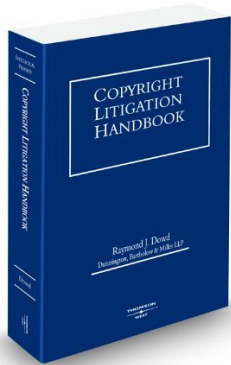
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## Chapter 11: Class Actions

Class actions have rocked the copyright world and shaped it throughout the last century.

But there are relatively few reported cases covering class actions and interpreting Rule 23 of the Federal Rules of Civil Procedure in the copyright context.

Chapter 11 covers that ground and covers the hurdles confronting the attorney seeking class certification.



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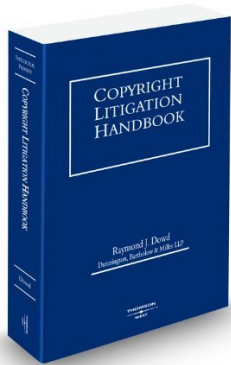
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## Chapter 12: Injunctions and Seizures

Prejudgment remedies such as temporary restraining orders, preliminary injunctions and *ex parte* seizures are all part of the copyright landscape.

Chapter 12 is essential reading for the attorney who wishes to represent the client zealously, yet who wishes to have the best chance of success before a judge who may not like over-reaching.

Rule 65 of the Federal Rules of Civil Procedure is covered, together with case citations on evidentiary issues, burdens to be met, defenses and irreparable harm, remedies for wrongful seizures and practice related to injunction bonds.



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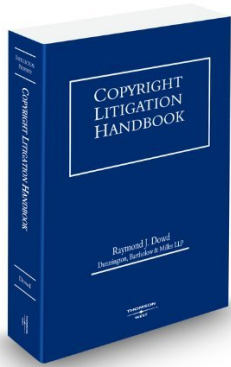
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## Chapter 13: Answer and Defenses

Chapter 13 is a handy checklist of defenses potentially available to defendants, together with case law citations on each defense.

Defenses include:

- laches, license, innocent publication, lack of originality
- independent creation, derivative works, public domain, work for hire doctrine, non-copyrightable subject matter, merger doctrine, *scenes a faire* doctrine
- fair use, estoppel, copyright misuse, First Amendment, statute of limitations, *de minimus* use
- first sale doctrine, implied consent, and lack of statutory damages or attorneys fees



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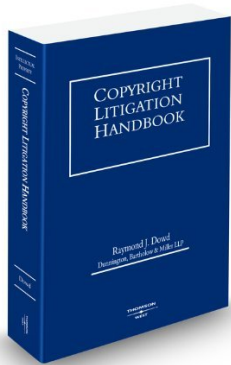
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## Chapter 14: Discovery

Chapter 14 describes

- initial discovery considerations and discovery tools
- mandatory disclosure under Rule 26 of the Federal Rules of Civil Procedure
- motion practice relating to discovery
- collecting evidence
- duties to supplement disclosure and sanctions
- requests for admissions



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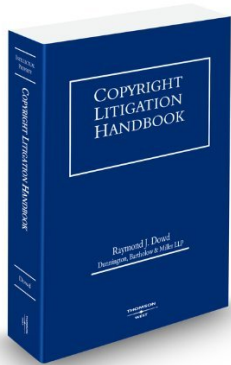
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## Chapter 15: Evidence and Experts

Chapter 15 addresses how to get evidence into the record, reviews the Federal Rules of Evidence and collects cases in which evidentiary issues have been handled in the copyright context. Motions *in limine* and challenges to expert testimony under Rule 702 are all discussed.

Evidentiary issues reviewed include:

- Evidence of precontractual negotiations, judicial notice, admissibility and exclusion,
- hearsay and exceptions, getting hearsay into evidence
- ancient documents, testimony, charts, learned treatises, authentication



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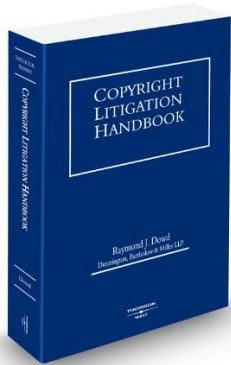
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## Chapter 16: Jury Instructions

Chapter 16 reviews litigation practice with respect to jury instructions and covers:

- jury instructions generally
- how to assemble jury instructions
- sanctions for improper jury instructions
- jury instruction on deference to Copyright Office determinations

Form jury instructions from the Ninth Circuit are included in the appendix, together with jury instructions from a case involving statutory damages



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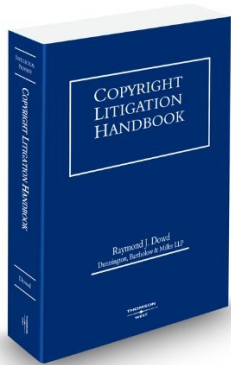
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## Chapter 17: Damages and Profits

What's it worth? Chapter 17 covers the tricky terrain of determining whether statutory damages are available, and if not, how are actual damages proved? Case law covers:

- calculating overhead, lost sales, value of use, reasonable license fee
- apportionment of infringer's profits
- motion practice relative to damages awards, remittitur
- counting statutory damages awards, enhancing the award, counting infringement awards
- damages for vicarious liability, prejudgment interest, bifurcating damages from liability



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## Chapter 18: Costs and Attorneys Fees

How do you get paid and make sure the other side pays for the litigation? Although attorneys fees and costs are said to be routinely granted, the case law shows surprisingly fickle results and unhappy winners. Chapter 18 covers:

- lack of attorneys fees and costs for unregistered copyrights
- when attorneys fees and costs are available under the Copyright Act
- relevance and effect of actual billing arrangements
- procedures for obtaining costs and attorneys fees