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# Six Copyright Law Resources for the Non-Copyright Practitioner

BY RAYMOND J. DOWD

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When Thompson West asked me to write the *Copyright Litigation Handbook*<sup>1</sup> in 2004, copyright law had long been considered a sleepy backwater of the law that had been largely ignored by the U.S. Supreme Court. How things have changed!

Although radical changes had been wrought in the law with the U.S. implementation of the Berne Convention in 1988, with protection of architectural works and works of the visual arts, with the Sonny Bono Copyright Term Extension Act of 1998, and with the Digital Millennium Copyright Act of 1998, these changes were the province of tech geeks and entertainment titans. Despite the Chicken Little predictions of Marshal McLuhan acolytes and other millenary alarmists, the copyright law sky did not seem to fall, yet copyright awareness seemed to slowly drizzle down into the average citizen's life and into the law school curriculum. Today, our quotidian existence includes clicks on "I accept" to end user license agreements that, unread, bind us to digital servitude.

Since the *Copyright Litigation Handbook* was first published in 2006, the U.S. Supreme Court has handled a number of cases relating to the constitutionality of the Copyright Act and addressed important questions of statutory interpretation. Law students and law schools have now decided that copyright law is hot stuff. The number of online free research tools has expanded and improved. Today, the ordinary lawyer is as likely at a cocktail party to come across questions about copyright law as a premillennial lawyer fumbled through questions relating to drafting a will, real estate transactions, or personal injury cases. Whether your interest is cocktail party chitchat or landing the next big client, here are a few copyright law resources that will help your banter.

## The Library of Congress

The U.S. Copyright Office is part of the Library of Congress,<sup>2</sup> thanks to Thomas Jefferson's vision of creating a federal system of copyright protection that would also stock the nation's foremost library at little cost to the taxpayer. When you file a copyright claim, with some

exceptions, you must deposit two copies of the work to which you claim a copyright. These "deposits" of books, music, and other works have created perhaps the greatest research library in the world, housed in one of the world's greatest buildings, in Washington, D.C.

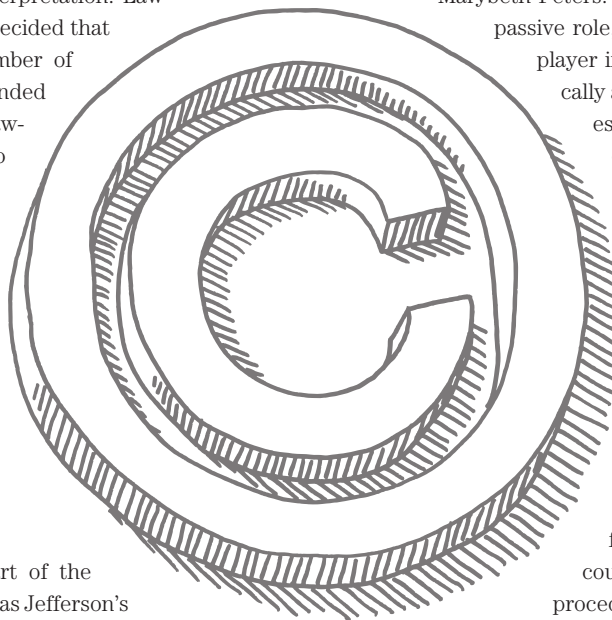
To research the *Copyright Litigation Handbook*, I visited the Library of Congress and had a wonderful tour. Understanding Jefferson's genius and the U.S. government's insistence on retaining the deposit requirement help to explain why and how copyright claims are registered today and to research past claims. On your next visit to the U.S. Supreme Court, include the Library of Congress and get your library card.

## The Copyright Office

The Register of Copyrights administers a system of copyright claims. The current Register is Maria Pallante; her predecessor was Marybeth Peters. Although the title "Register" implies a passive role, to the contrary, the Register is a key player in shaping copyright law both domestically and internationally. The Register advises and reports to Congress on a number of issues and maintains active educational programs around the country and internationally.

The Register administers the system by which you can register a copyright claim with the U.S. government. This system can be analogized to a Uniform Commercial Code filing in a local county. The Register registers competing claims to the same copyrightable work. As such, the Register plays a much different role from patent and trademark counterparts. Understanding registration procedures is critical to protecting your client's copyright and preserving litigation rights.

Unlike the patent or trademark context, where another person has registered a copyright claim on your client's work, the



appropriate first response is to register a competing claim, and only once such claim is registered, to sue in a U.S. District Court.

When I toured the copyright office in Washington, D.C., in 2005, I felt like the Indiana Jones character looking out on vast quantities of deposit materials in a vast warehouse. Huge piles of telephone directories were being carted off to the garbage dump (a shock to me: we don't keep all deposits for the Library of Congress, just the good ones). More shocking: vast shelving of pornographic videos. CD cases containing music and video materials entirely melted by overheated anthrax scanners. Card catalogs in hundreds of oak sliding drawers reminiscent of grammar school, requiring hand search-

1984 and revised in 1988 and 1998.

On Aug. 14, 2014, the copyright office published a draft for public comment of *The Compendium of U.S. Copyright Office Practices* (Third Edition) which is expected to be finalized in December 2014. The 1,222-page draft of "Compendium III" is available at [copyright.gov/comp3/docs/compendium-full.pdf](http://copyright.gov/comp3/docs/compendium-full.pdf). Compendium III is the first readable exposition of copyright office practices that is intended both for public consumption and to guide copyright office employees. Not everyone will cherish reading it cover to cover as I did, but it provides invaluable (and free) guidance and examples for practitioners to understand nuances of copyright registration

## Copyright law is full of obvious traps.

ing, leading back to copyright ownership claims from the founding of our nation. In short: when you are looking for a "certified deposit" for evidence in a litigation, don't be surprised if the copyright office doesn't have it. Visiting the copyright office and understanding the realities of registration and deposit retention will help you avoid unpleasant surprises in the courtroom.

### Copyright.gov

Copyright.gov is the website created and run by the U.S. Copyright Office. It has a number of circulars that address frequently asked questions on a wide variety of issues. If you are scratching your head over the difference between a copyright and a trademark, or a copyright and a patent, this is the place for you to start. (Q. How do I copyright my idea? A. Under the Copyright Act, ideas are not copyrightable.) For comfort's sake, some of the differences between these disciplines have not been fully litigated or thought out by the world's leading experts. But if you want answers to basic questions governing the scope of copyrightable subject matter, registering copyright claims, recording transactional documents involving copyrights such as assignments, corporate sales, or filing liens, the copyright office circulars are the best first stop.

Electronic filing of copyright claims is now preferred, as it's faster and cheaper. This filing can be done through [copyright.gov](http://copyright.gov). One important caveat is that a prerequisite for filing an action in federal court is to have either a copyright registration certificate or documentation that the Register of Copyrights has refused to register the claim. Because you need a copyright registration certificate to commence a litigation and the certificates may take months to issue, a litigator in a hurry needs to go through a procedure called "special handling." Special handling carries a hefty fee and requires a showing of urgency; however, a registration certificate can avoid outright dismissal of an entire case.

### Updated Compendium of U.S. Copyright Office Practices

For as long as I have been in law practice, copyright office employees have acknowledged that a volume known as "Compendium II" was sadly out of date and difficult to understand. However, we all understood that Compendium II was the only volume that the copyright office employees relied on in making decisions. "Compendium I" was an internal copyright office manual first made public in 1967. Compendium II was the second version of that manual, published in

procedures. This is an important step for transparency and for education of the bench, bar, and public, and any legal practitioner will need to consult it after looking at the copyright office circulars for basic information.

Copyright law is full of obvious traps. For example, "date of publication." If a copyright infringer published your copyrighted work, you should register it as "published," right? Wrong. If the true owner did not publish it, the copyright owner's claim should be registered in an "unpublished" work. Guidance like this is found in Compendium III in a readable, understandable format chock-full of practical examples. Lawyers, copyright owners, and courts will all benefit from guidance on points like this which may have important legal consequences.

### SCOTUS Blog

In updating the *Copyright Litigation Handbook* this year, I came across a new resource when writing about two cases from the 2013–2014 term. In the "Raging Bull" case, a purported copyright owner asserted decades-old claims against a movie studio and was found by the trial court and the Ninth Circuit to be barred in bringing suit by the doctrine of laches. *Petrella v. Metro-Goldwyn-Mayer Inc.*, -- U.S. --- No. 12-1315 (May 19, 2014). The Supreme Court reversed the Ninth Circuit, holding that a suit for infringements occurring within the three years immediately prior to the lawsuit was timely under the Copyright Act because each infringement creates a separate accrual for statute of limitations purposes.

In *American Broadcasting Cos. v. Aereo, Inc.*, --- U.S. --- (June 25, 2014) the Supreme Court overruled the Second Circuit Court of Appeals and held that a company that had hundreds of dime-sized antennas that it used to transmit television content to individual subscribers was engaging in unauthorized "public performances" in violation of the copyright owners' rights under the Copyright Act.

In reviewing these cases, I discovered through the SCOTUS blog that I could listen to the audio and read the transcript at the same time, with a video screen that scrolled, highlighting the actual words spoken by the justices. With headphones and my iPad, I found myself in the SCOTUS courtroom with justices sparring with the advocates. Although this audiovisual experience falls short of cameras in the courtroom, it makes listening and following the legal drama an enjoyable experience, particularly since the transcriptions catch words that I could not hear and simultaneously identify the speaker of a question or an answer. The SCOTUS blog also has case

materials and docket information organized in a clearly accessible manner.

### YouTube and the Ninth Circuit

The Ninth Circuit is renowned for its copyright jurisprudence. It is also the most tech-forward, videotaping its arguments and live streaming them. If you know of a copyright case on the Ninth Circuit's docket, you can visit the Ninth Circuit's website ([www.ca9.uscourts.gov/media/](http://www.ca9.uscourts.gov/media/)) and view the oral argument live. The videotaped arguments are archived on YouTube. However, the Ninth Circuit's YouTube channel is not easily searchable (a surprise for a Google product). To track down a recording, you should find out the hearing location and date on the Ninth Circuit's website (using the search feature) and then, armed with that information, scroll through the YouTube channel for that particular courthouse.

My firm represents Stan Lee Media Inc. in a lawsuit against Stan Lee, the creator of Spiderman, the Incredible Hulk, and many other Marvel characters. We retained Los Angeles attorney Robert E. Kohn as local counsel to argue an Oct. 9, 2014 appeal from a decision of the Central District of California before the Ninth Circuit.<sup>3</sup> Although the Ninth Circuit's live Web stream broke down at the time of the oral argument, we were able to listen to the audio shortly thereafter and make on-the-spot decisions regarding supplemental briefing to the court. The YouTube video was published the same day the case was argued. For practitioners preparing for oral argument in copyright cases or seeking information about the demeanor and style of individual judges, these archived videos are a real treasure.

Copyright law is changing dramatically. Free online resources are growing to meet practitioner needs. The *Copyright Litigation*

*Handbook* provides an overview of a wide range of free resources for copyright practitioners and may be accessed by Westlaw subscribers through the COPYLITIG database. To get a sense of the most extraordinary evolution of creative life in world history and to enrich your cocktail party banter as a well-rounded lawyer in the new millennium, consider visiting Thomas Jefferson's wonderful Library of Congress when you next visit Washington, D.C., and tool around copyright.gov so that you can answer your grandchildren's questions about mashups. ☺



*Raymond J. Dowd serves on the board of directors of the Federal Bar Association and has served as chair of the Circuit Vice Presidents (2011–2013), general counsel (2010–2011), and president of the Southern District of New York Chapter (2006–2008). He is a partner at Dunnington, Bartholow & Miller, LLP in New York City.*

### Endnotes

<sup>1</sup>RAYMOND J. DOWD, COPYRIGHT LITIGATION HANDBOOK (Thomson Reuters 7th ed. 2013-2014)(2006).

<sup>2</sup>Elizabeth Pugh, general counsel of the Library of Congress, is a member of the Federal Bar Association and serves as circuit vice president for the D.C. Circuit.

<sup>3</sup>See 9th Cir., 12-56733 *Stan Lee Media v. Stan Lee*, YouTube (Oct. 9, 2014) [www.youtube.com/watch?v=HupDxGn0xvs&index=12&list=UUeIMdiBTNTpeA84wmSRPDPg](http://www.youtube.com/watch?v=HupDxGn0xvs&index=12&list=UUeIMdiBTNTpeA84wmSRPDPg). Robert E. Kohn is chair of the Federal Bar Association's Litigation Section.

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