



COPYRIGHT CLAIMS BOARD

Docket number: 22-CCB-0055

United States Copyright Claims Board

Freda J. Day

CLAIMANT

v.

Pryor Cashman LLC/Lionsgate Entertainment/Steve Berlowitz

RESPONDENTS

SECOND ORDER TO AMEND NONCOMPLIANT CLAIM

The Copyright Claims Board finds that your claim, as amended, still does not comply with the requirements of the CASE Act and related regulations. The claim cannot move forward unless it is properly amended.

If you wish to proceed with this claim, you must file a second amended claim by **October 11, 2022**. If you do not, the Board must dismiss your claim without prejudice, although you may file again in the future before the Board or in federal court. There is no extra filing fee for a second amended claim. If you file a second amended claim and it is found compliant, you will be notified and directed to proceed with service. However, if you file a second amended claim and it also is found not to comply, and a Copyright Claims Officer confirms that it is not compliant, the Board will dismiss the proceeding without prejudice. 17 U.S.C. § 1506(f)(1)(B); [37 C.F.R. § 224.1\(d\)](#).

To make your second amended claim compliant, you must resolve each of the issues identified below. [37 C.F.R. § 224.1\(c\)\(2\)](#). You may also choose to correct or edit any errors or other information in your amended claim before you file a second amended claim.

Respondent Contact Information

Your amended claim identifies three respondents and lists a single mailing address for all three. The claim must include each respondent's mailing address, unless you certify that the address is unknown and that you have a good-faith belief that the statute of limitations is likely to expire within 30 days after the amended claim listing those respondents was submitted. You must also describe the basis for that belief. [37 C.F.R. § 222.2\(c\)\(6\)](#). Your amended claim does not describe a basis for believing that the statute of limitations is about to expire. To address this issue, your second amended claim must include a mailing address for each respondent, or an explanation of facts that led you to have a good faith belief that the statute of limitations was likely to expire within 30 days after you submitted the amended claim.

Pending or Completed Litigation

The Board cannot hear any "claim or counterclaim that has been finally adjudicated by a court of competent jurisdiction or that is pending before a court of competent jurisdiction, unless that court has granted a stay to permit that claim or counterclaim to proceed before the Copyright Claims Board." 17 U.S.C. § 1504(d)(2). If your claims against the respondents are currently in litigation or have been finally determined in court, you cannot raise the same claims against them before the Board.

Materials included in your amended claim indicate that the dispute remains pending in court, and do not indicate that the court has granted a stay to permit your claims to proceed before the Board. Your claim for a declaration for noninfringement ("noninfringement claim") asserts: "We are still in court trying to resolve this matter." Your supplemental documentation includes what appears to be a copy of correspondence with Copyright Office staff, in which you stated, "this work has been under a copyright infringement claim in federal court since June 14, 2019," and "my case ... is now in the Appeals Court." Your supplemental documentation also includes what appears to be a record related to a Freedom of Information Act request, in which you asserted, "The requirement of my artistic works are still mandated for my court case which is still being held up in the U. S. Fourth District Court of Appeals."

Other assertions included in your amended claim, however, suggest that the dispute may have been finally adjudicated. In the "Basis for a good faith belief that the claim must be filed now" field, you state, "My manuscript was pertinent for a Federal lawsuit that was first held in the U. S District Court for the Western District of N. C, then it was upheld in the Fourth Circuit Court of Appeals." The timeline you provide in the same section states, "Fourth Circuit Court of Appeals makes a decision" on June 23, 2022. Claims still pending or finally adjudicated in court cannot be reheard by the Board.

Unless you submit a second amended claim that provides facts showing that your claims against the respondents have not already been fully and finally decided in the Western District of North Carolina or the Fourth Circuit, and that any aspect of the dispute still pending in either court has been stayed to permit your claims before the Board to proceed, the Board must dismiss this proceeding without prejudice.

Permissible Claim

The Board is only authorized to resolve certain types of copyright disputes. Three particular kinds of claims are permitted before the Board:

1. claims of copyright infringement;
2. claims seeking a declaration that activity is not infringement; and

3. claims about misrepresentations in connection with a takedown notice or counter-notice under the Digital Millennium Copyright Act (DMCA).

17 U.S.C. § 1504(c). Though you assert that you are raising each of these three kinds of claims, the allegations in your amended claim do not support any of these claims against these respondents.

In your amended claim, you assert that the respondents requested a copy of your manuscript from the Copyright Office in July 2019, and that it was mailed to Steve Berlowitz in August 2019, when your earlier dispute was already in litigation. You state, “My manuscript was pertinent for a Federal lawsuit that was first held in the U. S District Court for the Western District of N. C.,” and that “the information was released to the Defendants in the trial, before the first hearing in the year, 2019.” In the misrepresentation section, you appear to indicate that your infringement claim is related to the “unauthorized release of artistic works to unauthorized parties.” In the “Describe the infringement” section, you state that your manuscript “somehow ended in the possession of the infringers ... [a]fter I sent [it] to the copyright office.” Your allegations appear to indicate that the basis of your claims against the respondents is that they should not have been given access to your work by the Copyright Office. However, an attorney engaged in actual or prospective litigation that involves a copyright-registered work may obtain from the Copyright Office a copy of the deposit of the work submitted with the application for registration. [37 C.F.R. § 205.22\(a\)](#); see also U.S. Copyright Office, [Compendium of U.S. Copyright Practices § 2407.1\(A\)](#) (3d ed. 2021). Receiving such deposit materials for litigation purposes is authorized by law. It is not a basis for any claim that the Board may hear. Nor would receiving such materials implicate wrongful activities covered by the Copyright Act.

Your amended claim further contends that during the preexisting litigation, you could not secure a copy of the deposit of your manuscript from the Copyright Office or from the respondents. You allege that “[o]nce the author of the manuscript filed for copyright infringement, the information that was pertinent to the courts was never submitted to the author for a fair representation,” and that “the opposing party refused to introduce the manuscript to the Federal District Court.” Those allegations are not a basis for an infringement, noninfringement, or DMCA misrepresentation claim against the respondents before the Board.

In the “Describe the infringement” section, you also appear to assert that the infringing party is “OwnTV Network,” without stating clear or specific infringement allegations against OwnTV Network, which you did not name as a respondent. Your allegations do not appear to present any wrongful activity committed by the named respondents.

To address this issue, you must file a second amended claim in which you only select the types of claims you actually have, and state facts that support the claims you select. **Because this is your third and final opportunity to submit compliant claims in this proceeding, if you raise any claims that your allegations do not support, the entire proceeding will be dismissed.** For more information about what is required to support a claim of infringement, noninfringement, or misrepresentation please refer to the CCB Handbook:

- [Starting an Infringement Claim](#)
- [Starting a Noninfringement Claim](#)
- [Starting a Misrepresentation Claim](#)

Claim for a Declaration of Noninfringement – No Accusation by Respondent that Claimant Infringed

A noninfringement claim is available when there is a genuine dispute between the claimant and the respondent about whether the *claimant's activity* infringes the *respondent's* copyright. Your claims do not state facts that you have been accused of infringement. Instead, you assert that your copyright has been infringed. In the noninfringement claim, your list yourself (not any of the respondents) as the “Party asserting infringement.” If you do not submit a second amended claim that states facts that describe a disputed allegation by the respondent that you committed copyright infringement, the entire proceeding will be dismissed without prejudice. In the alternative, you can delete the allegations of noninfringement in your second amended claim. More information about what is required to assert a noninfringement claim is available in the [Starting a Noninfringement Claim](#) chapter of the CCB Handbook.

Claim for a Declaration of Noninfringement – Contradictory Allegations

When the Board reviews a claim for compliance with the applicable legal and formal requirements, it accepts the facts asserted in the claim materials “unless they are clearly contradicted by information provided elsewhere in the materials or in the Board’s records.” 37 C.F.R. § 224.1(f). In the “Describe why you believe no infringement occurred” field of your noninfringement claim, you allege: “Infringement did occur.” This allegation contradicts the basis of your noninfringement claim. If you do not submit a second amended claim that states facts that describe a disputed allegation by the respondent that you committed copyright infringement, the entire proceeding will be dismissed without prejudice. In the alternative, you can delete the allegations of noninfringement in your second amended claim.

Misrepresentation Claim – No DMCA Takedown Notice or Counter-Notice

You are asserting a claim of misrepresentation in connection with a takedown notice or counter-notice under section 512(f) of the Copyright Act, as added by the DMCA. Your claim must make enough factual allegations to support each “element” of the claim. The elements of a section 512(f) misrepresentation claim are that:

1. The respondent sent an online service provider either
 - a. a DMCA takedown notice claiming online content or activity was infringing, or
 - b. a counter-notice denying infringement and claiming the online content was removed or disabled due to a mistake or a misidentification.
2. The respondent made a misrepresentation (a false or incorrect statement of fact) in the DMCA takedown notice or counter-notice.
3. The respondent knew the misrepresentation was false or incorrect.
4. The misrepresentation was important to the online service provider’s decision to take down or repost the content.
5. The online service provider relied on the misrepresentation.
6. You were harmed as a result.

Your misrepresentation claim is not compliant because it does not provide enough information about how the respondent made a misrepresentation in a DMCA takedown notice or counter-notice to an online service provider, and instead contradicts the basis for that

claim. You allege that you sent a DMCA takedown notice in March 2012. In the field that asks, “What online service provider(s) received the DMCA takedown notice?” you entered, “N/A.” That allegation indicates that the takedown notice was not valid under the DMCA because it was not sent to an online service provider. In the field that asks, “Were any counter notices sent?” you entered, “No.” Your allegations do not state facts that the respondent sent any DMCA takedown notice or counter-notice relevant to a misrepresentation claim.

If you submit a second amended claim with a misrepresentation claim that does not make enough factual allegations to support each element of the section 512(f) misrepresentation claim, including facts that describe a DMCA takedown notice or counter-notice that the respondent sent to an online service provider, your entire proceeding will be dismissed without prejudice. In the alternative, you can delete those allegations in your second amended claim. More information about the elements required to assert a claim of misrepresentation is available in the [Starting a Misrepresentation Claim](#) chapter of the CCB Handbook.

You do not need to provide a legal argument in your claim – just a statement of facts and circumstances. Being specific in your description gives the other party and the Board more information about your claim. There is no character limit so please be as detailed as possible.

To submit a second amended claim, log into your eCCB account and take the following steps.

1. From your dashboard, click the “**Amend claim**” button and select your docket number from the dropdown list.
2. Your claim will unlock for editing. The information you originally entered will appear in the same order as in your amended claim.
3. Make the necessary edits. If your claim included supplementary documents, you must re-upload any documents you wish to include in the amended claim on the “**Documentation**” page. Please include only documents that are directly related to your claim.
4. Once you have completed your edits, continue to click through the fillable claim form until you reach the “**Review**” page. The Review page includes all the information that you have provided in the claim up to this point. Carefully double-check the information on this page. If you have any corrections, you can select “**Edit**” to revise any entries necessary. Each section of information has an “**Edit**” button, which will take you back to that section so you can make changes. After you make changes, you can click “**Save & review**” to return to the Review page. Please review your claim carefully. Once you submit your amended claim, you will be unable to edit the claim while it is in compliance review.
5. Once you have completed your review and any revisions, you must confirm that the information in your claim is accurate and truthful to the best of your knowledge. To complete the declaration, type your full name into the “**Digital signature**” box near the bottom of the “**Review filing**” page and click “**Agree & submit**.”

If you have questions, please contact asktheboard@ccb.gov. Include your docket number in the subject line. The Board is unable to provide legal advice. We can only provide legal information and assistance concerning Board procedures and requirements. You may also refer to the [Compliance Review](#) chapter of the CCB Handbook for more assistance.

Copyright Claims Attorney

September 9, 2022