



COPYRIGHT CLAIMS BOARD

Docket number: 22-CCB-0257

February 28, 2023

David Gunther

CLAIMANT

v.

Arizona Breastnet, L.L.C.

RESPONDENT

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 **March 30, 2023**. 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 additional filing fee for an 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 your second amended claim also is found not to comply, 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 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 it again. 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.

Permissible Claim

The Board is only authorized to resolve certain types of copyright disputes, including copyright infringement claims. 17 U.S.C. § 1504(c)(1)-(3). You checked the box stating that your claim is a copyright infringement claim. In your amended claim, you added new facts to further describe your claim. However, the facts now described in the “Describe the infringement” section of your amended claim appear to describe a breach of contract dispute, not a copyright infringement. A “breach of contract” is a violation of any of the agreed-upon terms and conditions of a binding contract. When a party to a contract does not fulfill an obligation stated in the contract, such as payment, it is typically considered a breach of contract. The Board is not authorized to hear claims for breach of contract. 17 U.S.C. § 1504(d)(1).

The allegedly infringed work is a logo titled “Woman Silhouette Logo.” In the “Describe the infringement” section of your amended claim, you state, “Logo is being used without permission. Dr. Wolf agreed to pay me for my creation of her business logo, but failed to do so.” While you state that the use is “without permission,” your

allegations suggest that the logo was specifically created for the respondent's use, as per an agreement between you and respondent, but that respondent failed to pay the agreed upon price for your work. An agreement does not have to be in writing to be considered an enforceable contract. Your allegations appear to be consistent with a breach of contract claim, where the respondent has failed to meet its payment obligations set forth in a contract, license, or other written or oral agreement. "Generally, a 'copyright owner who grants a nonexclusive license to use his copyrighted material waives his right to sue the licensee for copyright infringement' and can sue only for breach of contract." *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1121 (9th Cir. 1999) (quoting *Graham v. James*, 144 F.3d 229, 236 (2d Cir. 1998)). A claim for nonpayment might be viable in state court but not before the Board.

The Board may only hear infringement claims against a licensee of a work if the claim is based on a licensee failing to satisfy a "condition precedent" of a license from the copyright owner, or if the licensee's use of the work went beyond the scope of the uses permitted under the license. A "condition precedent" is an act or event that must occur to trigger certain contract obligations. For example, if an author agrees that a licensee may publish her book "if, and only as long as" the licensee makes monthly payments to the author, then the payments may be a "condition precedent" to the licensee's right to publish. If a copyright license depends on the licensee first satisfying a condition precedent, and the licensee does not satisfy it before using the work, then the license is not effective and the licensor may raise a copyright infringement claim.

If you can state facts that identify such a condition precedent included in your written or oral agreement with Arizona Breastnet, L.L.C., or that Arizona Breastnet, L.L.C. used your work beyond what was permitted by your agreement, the Board may be able to hear your claim. If you submit a second amended claim, it must include allegations that state or show that any agreement with Arizona Breastnet, L.L.C. required it to satisfy a condition precedent, and that it did not satisfy that condition, or how Arizona Breastnet, L.L.C. used your work beyond what was permitted by your agreement. Please provide more details and background regarding your agreement with Arizona Breastnet, L.L.C., including a clear, detailed statement regarding any conditions precedent included in that agreement. In addition, if Arizona Breastnet, L.L.C. engaged in reproduction, distribution, or public displays of your work, or adapted the work, in ways that went beyond the scope of the uses permitted under your agreement, you should describe those uses and explain why they were beyond the scope of your agreement. You may also choose to include the agreement, or correspondence that plays a significant role in your allegations, as supplemental documentation in support of your claim.

Please review [Circular 1: Copyright Basics](#) and the [Introduction](#) chapter in the CCB Handbook for more information about copyright and the kinds of disputes that the Board can hear. You should only file an amended claim if you can state facts to support a claim under copyright law that can be heard by the Board. For more information about what is required to support a claim of infringement, please refer to the [Starting an Infringement Claim](#) chapter of the CCB Handbook.

Final Amendment

Your amended claim resolved the compliance issue raised in the December 16, 2022 Order to Amend Noncompliant Claim. This order identifies an additional compliance issue in your amended claim that also must be resolved. **This is your third and final opportunity to submit a compliant claim in this proceeding. If your claim remains noncompliant, the entire proceeding will be dismissed.** 17 U.S.C. § 1506(f)(1)(B).

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 original claim.
3. Make the necessary edits. If you have filed supplementary documents, you must re-upload any documents you wish to include in the amended claim on the “**Documentation**” page. Please include only documents directly related to your claim, and label them clearly.
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. If you would like to seek further guidance from a lawyer or a law student at reduced or no cost, please visit the [Pro Bono Assistance](#) page on ccb.gov. You may also refer to the [Compliance Review](#) chapter of the CCB Handbook for more assistance.

Copyright Claims Attorney