



COPYRIGHT CLAIMS BOARD

Docket number: 23-CCB-0066
May 16, 2023

Michelle Milano

CLAIMANT

v.

Elyza Davis

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 **June 15, 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.

Copyright Infringement Claim – Photographs

You have brought a copyright infringement claim before the Board. While most of your allegations describe an alleged infringement of “fairy orbs,” you also mention infringement of “copyrighted photographs.” However, the registration included with your claim is a group registration of works of “sculpture” and “works of artistic craftsmanship.” If you are alleging that the respondent also infringed on photographs of your works that you own, you will need to provide the registration number for the photographs or the service request number for the application to register the photographs.

Either the registration regarding those photographs must have been issued or the application must have been delivered to the Copyright Office before you filed your claim on February 14, 2023. If your work was neither registered nor subject to a pending application at that time, you cannot amend your claim to allege infringement of the photographs. Instead, you would need to apply to register the copyright for the allegedly infringed work before you could refile your claim as a new claim. For more information on registration, please refer to the Copyright

Office [Registration Portal](#). In addition, any amended claim regarding an alleged infringement of photographs would need to satisfy the elements of copyright infringement listed below.

Copyright Infringement Claim – Elements

You have brought a copyright infringement claim before the Board. Your claim must make enough factual allegations to support each “element” of the claim. Information about the elements required to assert a claim of copyright infringement is available in the [Starting an Infringement Claim](#) chapter of the CCB Handbook. The elements of a copyright infringement claim are:

1. You own a valid copyright in the work, or have been given an exclusive license to the copyright rights at issue in the work,
2. The respondent used one of your exclusive rights in the work without permission,
3. The respondent had access to your work, meaning a reasonable opportunity to view or hear your work, and
4. The respondent’s work is substantially similar to the original elements of expression in your work.

Your claim does not provide enough facts about substantial similarity. Please provide more details and background regarding this element in your amended claim.

Substantial Similarity

Your claim does not include enough facts that explain the similarities between your work and the respondent’s allegedly infringing work. If it is not readily apparent from the supplemental documents that are submitted with the claim, you must provide some specific allegations about how your work and the allegedly infringing work are similar.

The written allegations included in the amended state that the respondent “is using the same ornament with variety of herbs within which is part of and included in my copyrighted images and registration.” You have also included a screen recording video as supplemental material. The screen recording shows photographs of two “orbs” side by side at the 21-second mark. The “Michelle Milano Herb Infused Fairy Orb” appears to be a glass ornament filled with herbs and a sculptural fairy element. The “Elyza Davis No Copyright” shows a glass ornament filled with flowers and herbs. The video also includes a slide with text at the 26-second mark that states, “changing my fairy within for a store-bought charm is not a 30% change in my original work and photographs done in 2012. This constitutes copyright infringement.” The video then continues to show various orb-like products on respondent’s website.

There is no “30% change” rule when determining copyright infringement. The federal courts use different legal tests to determine if a work is substantially similar. Determining whether the allegedly infringing work is substantially similar to a claimant’s work will depend on a review of the similarities of the copyrightable expression between the two works in context.

As stated in the Board’s April 3, 2023, Noncompliance Order, the Copyright Act expressly excludes copyright protection for “any idea, procedure, process, system, method of operation, concept, principle, or discovery,

regardless of the form in which it is described, explained, illustrated, or embodied in such work.” 17 U.S.C. § 102(b). This means that while you may be able to protect the tangible creative expression of your **specific** fairy orb, you cannot protect the idea of combining certain materials to create a fairy orb. See 17 U.S.C. § 102(a). Further, a valid copyright only extends to copyrightable subject matter, and copyright law only protects the components of a work that are original to the author. Information about copyrightable authorship is available in Sections 302 and 308 of Chapter 300 of the [Compendium of U.S. Copyright Office Practices](#), Third Edition. The materials used to create a work have no bearing on the originality analysis. In fact, the registration included with your claim explicitly excludes the terms “glitter, material, arts/crafts feathers, material swatches, and ivy leaves, Glass hollow ball/ornament” in the “Material Excluded” section of the registration. Copyright protection does not extend to the preexisting empty ornament that you use to create your work.

Final Amendment

Your amended claim resolved some, but not all, of the compliance issues raised in the February 14, 2023 Order to Amend Noncompliant Claim. **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 supplemental 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