



COPYRIGHT CLAIMS BOARD

Docket number: 23-CCB-0375
April 17, 2024

James H. Dillard, II

CLAIMANT

v.

David McDowell

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 **May 17, 2024**. 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 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 Registration

You have raised a claim of copyright infringement before the Board. The claim must include the copyright registration number and effective date of registration for the allegedly infringed work or, if it has not yet been registered, the service request number for a pending application to register the copyright. 37 C.F.R. §§ 221.1(b) & 222.2(c)(7)(ii)(C)-(D).

Your amended claim identifies the allegedly infringed work as a specific photograph titled “Look up to the sky,” registered by the Copyright Office with registration number VAu00156282. That is a typo; the complete number is VAu001516282. If you file a second amended claim, include the second “1” in the registration number.

Allegedly Infringed Work

In addition to the “Look up to the sky” photograph, your amended claim seems to allege infringement of other material, including graphic “layout” and audio and video from a livestream on your YouTube channel. If you

submit a second amended claim, it must provide more information to clearly identify which work is the basis of your claim.

In the “Works infringed” section of the amended claim, your description of the work is: “Library file name is ‘img_148.jpg described as Black Male, Brown Skin, Sunglasses, Black Shirt, Highlighted Background, In addition the video clip, the vocals and the layout.” You provide the allegedly infringed photograph in a supplemental document labeled “[IMG_0148.jpg \(Look up to the Sky\)](#).” However, your allegations also refer to several other works. Your description of the allegedly infringed work also includes “the video clip, the vocals and the layout.” You allege that the respondent uploaded part of your YouTube livestream onto his YouTube channel, which was then shared on Rumble, using your “copyrighted content, not just the photos but the whole videos to make his content.” In the “Describe the infringement” section of the amended claim, you allege, “his short was not only built on the images but the surrounding elements which includes the claimant’s voice, his guest’s voice and surrounding graphics. The images, graphics, sounds and conversation taken from the complainant’s channel were displayed for the duration of the respondent’s videos with no commentary.”

It is not clear if you are seeking to expand the claim to seek relief from infringement of other works in addition to the “Look up to the sky” photograph. If you are seeking relief in this proceeding based on only the alleged infringement of that photograph, your second amended claim must state that your claim for relief is only for the alleged infringement of the photograph.

However, if you are seeking relief in this proceeding based on infringement of other works, your second amended claim must also include facts that comply with the issues raised in the Copyright Registration, Access, and Substantial Similarity sections below.

Copyright Registration – Other Works

If your second amended claim seeks relief based on infringement of works other than the “Look up to the sky” photograph, those works also must have been registered by the Copyright Office or subject to a pending application for registration *before* this claim was filed on November 6, 2023. The “Works infringed” section of the second amended claim must include the title, and the registration number or service request number, for each allegedly infringed work that is a basis of the claim.

Access – Other Works

In addition, if you are raising a claim of infringement of other works, your second amended claim must provide facts that indicate how the respondent had access to those works. In this context, “access” means a reasonable opportunity to see, hear, or copy the works before the alleged infringement took place. Acceptable allegations of access may include how your works (a) were sent directly to the respondent or a close associate of the respondent; (b) were widely disseminated or were available to the respondent; or (c) are so strikingly similar to the respondent’s works that they could not have been created independently. Alternatively, you could upload copies of your works and the allegedly infringing works if they demonstrate that the works are so strikingly similar that they could not

have been created independently. If you include copies of the works at issue as supplemental documents, they must be clearly labeled and identified so they can be properly compared to each other.

Substantial Similarity – Other Works

To raise a claim of infringement of works in addition to the “Look up to the sky” photograph, your second amended claim must also present facts that explain the similarities between those works and the respondent’s allegedly infringing works. As discussed in the March 4, 2024 Order to Amend Noncompliant Claim (March 4 Order), if it is not readily apparent from supplemental documents that are submitted with the claim, you must provide some specific allegations about how your works and the allegedly infringing works are substantially similar. Include a clear, detailed statement regarding which portions of your works were taken by the respondent in the allegedly infringing works, or documents that are sufficient to show the similarities. If you include copies of the works at issue as supplemental documents, then as stated above, they must be clearly labeled and identified.

Legal or Beneficial Ownership

Your amended claim still presents unclear information about your status as a legal or beneficial owner of the allegedly infringed work. You identify yourself as the author and owner of the allegedly infringed photograph, which you describe as a “work made for hire,” but your filings do not support that description.

It appears that the photograph was part of a photoshoot by photographer Robert Morales. In a supplemental document filed with the amended claim, labeled “Ownership.docx,” you state:

In late November 2011, prior to the photoshoot with Mr. Morales, a “work made for hire” agreement was established. This agreement was made before the photoshoot took place, outlining the specific terms and conditions under which the work was commissioned. I took an active role in the planning and execution of the photoshoot, providing direction on wardrobe, props, and overall creative direction, including angles, poses, lighting, and background settings to align with my vision for the project.

Upon completion of the photoshoot, I remunerated Mr. Morales in cash as per our agreement. Additionally, I received documentation from Mr. Morales on the same day, confirming the transaction and the terms of our agreement. Unfortunately, the original documentation has been misplaced over the course of 11 years, and I have been attempting to retrieve a copy from Mr. Morales for my records.

You have not presented facts that indicate that the “Look up to the sky” photograph qualifies as a work made for hire. As discussed in the March 4 Order,

There are only two situations in which a work made for hire is produced: (1) when the work is created by an employee as part of the employee’s regular duties or (2) when a certain type of work is created as a result of an express written agreement between the creator and a party specially ordering or commissioning the work. For a specially ordered or commissioned work made for hire, the parties must agree in writing that the work will be considered a “work made for hire” and the work must fall within one of nine specific categories. See pages 2 and 3 of [Circular 30](#) for more information. . . . It does not appear that either “work made for hire” situation (summarized in 1 and 2 above) applies.

Your allegations indicate that Mr. Morales was not your legal employee. You describe the photograph as a “commissioned” work, but such a work can only count as works made for hire if it is “commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas.”

17 U.S.C. § 101. The photograph does not appear to fall into any of those nine categories. As a result, it does not appear that copyright law would treat the photograph as a work made for hire.

If you submit a second amended claim, you must include more information that indicates that you are a legal or beneficial owner of the photograph at issue in this claim, and shows or explains how you gained ownership of it. To show that the photograph was a work made for hire, you must describe facts that show that (1) Mr. Morales was your employee, and that he took the photograph in the course of his regular duties; or (2) the photograph fits one of the nine categories of works listed above that can be considered works made for hire under copyright law.

Alternatively, you may present facts that indicate that Mr. Morales assigned, transferred, or conveyed the copyright to you, or gave you an exclusive license to use the photograph. However, if you present such facts, you must also show or explain why you were still seeking a transfer agreement after the photoshoot. As noted in the March 4 Order, Copyright Office records indicate “that after the photoshoot, you asked Mr. Morales to sign a ‘work for hire contract and copyright transfer’ for his photographs, and that he did not sign it.”

Relief Requested

Your amended claim requests \$5,000 in relief, which is the maximum the Board can grant in a “smaller claims” proceeding. However, your allegations still focus on harms for which the Board cannot grant relief, such as harassment, doxing, defamation, and threats. If you file a second amended claim, then as the March 4 Order stated, “the relief requested must be limited to forms of relief the Board can grant.”

Final Amendment

Your amended claim resolved some, but not all, of the compliance issues raised in the March 4 Order. **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 an 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