



# COPYRIGHT CLAIMS BOARD

Docket number: 23-CCB-0235

September 28, 2023

Iosif G. Mermelshtayn

CLAIMANT

v.

300 Entertainment (Warner Music Group)

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. You have not resolved all of the compliance issues raised in the noncompliance order issued on August 17, 2023 (August 17 Order), and additional issues explained below also must be resolved so that the claim can go forward.

If you wish to proceed with this claim, you must file a second amended claim by **October 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.

### Copyright Infringement – Elements

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, and
4. The respondent’s work is substantially similar to the original elements of expression in your work.

Your amended claim does not provide clear facts to support the elements related to the respondent's access to your work and substantial similarity, as described below. Please provide more details and background regarding these elements in your amended claim.

### **Access**

Your amended claim does not provide facts about how the respondent had access to your work. "Access" means a reasonable opportunity to view or hear your work before the alleged infringement took place. You must amend your claim with allegations that make access a reasonable possibility, not just hypothetically or theoretically possible. Acceptable allegations of access may include that, before the alleged infringement, your work (a) was sent directly to 300 Entertainment, or a close associate of 300 Entertainment; (b) was widely disseminated or was available to the public or the respondent; or (c) is so strikingly similar to "My Way" that 300 Entertainment could not have created them independently. Your claim does not include allegations satisfying any of those requirements.

You do not allege that your work was sent directly to 300 Entertainment or a close associate of 300 Entertainment. Further, although you state that you were "touring with a band called Wall of Lions and had many people coming into rehearsals listening to various tracks we made," you do not allege that a representative of 300 Entertainment, or someone working with 300 Entertainment, was one of these people.

In your amended claim, you also ask a number of questions regarding what constitutes sufficient allegations of online access, noting that "[a]nybody online can view and copy anyone else's music at any time. Merely being online and having views should be enough to constitute access . . ." Merely posting a work online is not enough to establish access. *See O'Keefe v. Ogilvy & Mather Worldwide, Inc.*, 590 F. Supp. 2d 500, 515 (S.D.N.Y. 2008) ("the mere fact that [a] work was posted on the internet prior to the creation of [the alleged infringer's] work is insufficient by itself to demonstrate wide dissemination"). You must make allegations that there is a reasonable possibility – and not simply a "bare possibility" -- that 300 Entertainment could hear your work online before the alleged infringement took place. In your amended claim, you include a screenshot of the YouTube posting of "Blissful Endings" with 133 views on a channel with 7 subscribers. Although this screenshot is undated, it does not support a reasonable conclusion that your work was widely disseminated to the public. Additionally, your claim doesn't include allegations that 300 Entertainment accessed the YouTube video.

If you submit a second amended claim, you will need to make allegations that it was reasonably possible for 300 Entertainment to access your work, not speculate that anonymous or unknown individuals may have taken your work and passed it along or that 300 Entertainment was conceivably among a handful of persons who heard it on the internet.

### **Substantial Similarity**

Your claim does not include enough facts that explain the similarities between your work "Blissful Endings" and the allegedly infringing work, "My Way." If it is not readily apparent from 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.”

As explained in the [August 17 Order](#), your allegedly infringed work is a sound recording of “Blissful Endings,” not the underlying musical composition. You provide a copy of the allegedly infringed work, but do not provide a copy of the allegedly infringing work. The Board notes that you included an Audio Interchange File (AIF file) that speeds up “Blissful Endings” and raises the tone of the work. This does not provide any supporting information about the similarities between your work and the allegedly infringing work. You also provide written analysis comparing the two works, highlighting what you believe are similarities. For example, you state:

- “The Piano in ‘My Way’ is using a chime-like sound, but features the same notes in the same pattern but 1 semi-tone higher.”
- “The Drumbeat for ‘My Way’ is differs from ‘Blissful Endings,’ but some of the hi-hat effects are similar.”
- “The Main Melody that Fetty Wap sings is the same as the ‘Chime Piano Melody’ in ‘Blissful Endings.’”

These allegations suggest that the sound recording of “My Way” contains different sounds than the sound recording “Blissful Endings.” The scope of copyright in a sound recording is limited to reproduction or remixing of the actual sounds fixed in that particular sound recording. 17 U.S.C. § 114. Two sound recordings that were independently fixed, containing different actual sounds cannot, per se, be substantially similar, even if the tone, melody, or rhythm are similar. A sound recording of someone singing a similar melody to a sound recording of someone playing a piano cannot be substantially similar. Your allegations show that the actual sounds between the two works are different. If you file an amended claim, you will need to demonstrate that the sounds contained in “Blissful Endings” were themselves reproduced, rearranged, remixed, or otherwise altered in sequence or quality.

### Final Amendment

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 without prejudice.** 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](mailto: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