



COPYRIGHT CLAIMS BOARD

Docket number: 23-CCB-0199

August 21, 2023

Bobby Razak

CLAIMANT

v.

Bosley

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 June 29, 2023, and additional issues explained below also must be resolved for the claim to go forward.

If you wish to proceed with this claim, you must file a second amended claim by **September 20, 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.

Clarity – Allegedly Infringed Works

The allegations in your copyright infringement claim about which works were infringed remain confusing. You list five allegedly infringed works, with the following titles:

- “Network Engineer Gets Sexy Back!”
- “The Truth Behind Hair Transplants - 7 Men Tell Their Stories”
- “Bosley Lets Go”
- “Restoring Hair Re-energized My Marriage”
- “Erick S.”

As explained in the noncompliance order issued June 29, 2023:

You state that each is a motion picture or audiovisual work, describe each work as a “commercial,” “spec commercial,” or “commercial campaign,” and provide Registration Number PAU4166196 or PAU4166197 for each of the five works. The Copyright Office issued Registration Number PAU4166196

for a motion picture titled “Bosley ‘Let’s Go,’” as indicated in the claim. However, the four other works listed in that section appear to be the respondent’s allegedly *infringing* works, not your allegedly infringed works.

Registration Number PAU4166197 issued for a work titled “Brandon ‘Let’s Go.’” You did not list “Brandon ‘Let’s Go’” as one of the allegedly infringed works. However, supplemental documents filed with the claim include a copy of the [Certificate of Registration](#) for that work, and what appears to be a screenshot, labeled “[YouTube Dispute 4](#),” which seems to reflect that you asked YouTube to remove works from the respondent’s YouTube channel, in May 2023, with the titles of the four allegedly infringing works listed above (“Network Engineer Gets Sexy Back!,” and so on).

You list the same five works as allegedly infringed in your amended claim. In the “Describe the infringement” section, you appear to identify “Bosley ‘Let’s Go’” as an infringed work, and the other four works as *infringing* works (“The remaining four other works listed in this claim are also a copyright infringement. . .”), not *infringed* works.

If you file a second amended claim, you must clarify these issues so that the Board and the respondent can understand which of your works was infringed. Specifically, for each work that you allege was infringed, the claim must include the title, the author, and either the registration number, if registered, or the service request number for a pending application for registration. 37 C.F.R. § 222.2(c)(7)(ii)(A)-(D). If you allege that “Bosley ‘Let’s Go’” was infringed, include that work in the “Works infringed” section. Do not list the respondent’s allegedly *infringing* works in that section.

Implied License

You must also clarify facts about a potential “implied license” between you and the respondent. Facts asserted in the amended claim suggest that, by your actions, you may have granted the respondent an implied license to use your work. “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)). If you submit a second amended claim, it must include allegations that indicate that: an implied license was not created; the license was not effective because the respondent failed to satisfy a “condition precedent”; or the respondent’s use of the work went beyond the scope of the uses permitted by the implied license. Those issues are discussed below.

I. Elements of an Implied License

You state in the “Describe the infringement” section, “I was not a ‘work for hire’ employee as there was no expressly written agreement between me any other company.” However, a license does not need to be in writing. It “may be granted orally, or even implied from conduct.” *Effects Assocs. v. Cohen*, 908 F.2d 555, 558 (9th Cir. 1990).

An implied license is created when “(1) a person (the licensee) requests the creation of a work, (2) the creator (the licensor) makes that particular work and delivers it to the licensee who requested it, and (3) the licensor intends that the licensee-requestor copy and distribute his work.” *Asset Mktg. Sys. v. Gagnon*, 542 F.3d 748, 754-55 (9th Cir. 2008) (quoting *I.A.E., Inc. v. Shaver*, 74 F.3d 768, 776 (7th Cir. 1996)).

Allegations in your amended claim seem to show that your actions may have created an implied license. You state that you directed, edited, and produced the “Bosley ‘Let’s Go’” commercial, and sent a rough cut “directly to Bosley’s representatives,” and that “Bosley received the rough cut after partial payment and decided to use that and create their own final versions . . . without providing full compensation.” You further allege that after delivery, the respondent edited the rough cut to create the other four works:

The remaining four other works listed in this claim are also a copyright infringement as they are parts of the original copyrights that the respondent is creating into several different commercials on YouTube. They have disbanded the original work and recut into similar works. . . To be clear, the entirety of the works that are listed in this claim are either derived directly from the rough cut of film that Bosley had access to or, in the case of “Bosley ‘Let’s Go’”, the final cut. The works are not only similar, they are one and the same, just strategically recut and reformatted.

It seems that you created and delivered the commercial in consultation with Bosley representatives, after “advising on locations and scheduling” and “organizing the shoot.” Therefore, it appears that an implied license may have existed for the respondent to use your work in a commercial. The allegations in your amended claim suggest that the respondent specifically requested the creation of your work, and that you made the work and delivered it to the respondent as requested. It also appears likely that you intended that the respondent would copy and distribute a “final cut” version of the rough cut you provided.

For your claim to proceed, you must provide more facts detailing any discussions and negotiations about your work on the commercial, and how the commercial could be used. The Board may only hear an infringement claim 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, both of which are explained below. If you file a second amended claim, it must state facts indicating that a “condition precedent” to the license was not satisfied or that the use of your work went beyond what the license allowed.

II. Condition Precedent to an Implied License

Your claim can proceed if you state facts in an amended claim that indicate that a “condition precedent” had to occur before the implied license could take effect, and that it did not occur.

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. Or, if a photographer allows a website to use his photograph “if” the website credits the photographer by name, that credit could be a condition precedent. If a copyright license depends on the licensee first satisfying a condition precedent, and the licensee does not satisfy it when using the work under copyright, then the license is not effective and the licensor may raise a copyright infringement claim.

You allege that Bosley used your work “without any final authorization,” that you received only “partial payment,” and that “[t]he understanding from me, since I did not have a fully executed contract, was that I would shoot the commercial and then get paid for it.” You may be able to address this issue if your second amended claim

states facts that indicate that some term was a required “condition precedent,” for example, if it was agreed that you would be paid in full or would approve the “final cut” of the finished work before Bosley could use it.

However, California law, which applies to any license related to this claim, disfavors interpreting a contract or license provision as a condition precedent. “[N]o obligation of a contract is to be regarded as a condition precedent unless made so by express terms or necessary implication.” *FDIC v. Air Florida System, Inc.*, 822 F.2d 833, 841 (9th Cir. 1987). “Conditions precedent must be expressed in plain, clear, and unambiguous language[.]” *International Brotherhood of Teamsters, Local 396 v. NASA Services, Inc.*, 957 F.3d 1038, 1043 (9th Cir. 2020). Full payment is not considered a condition precedent to forming an implied license in California unless there is an indication that failure to pay would be viewed as a copyright violation. *Effects Assocs.*, 908 F.2d at 558-59 & n.7; *Reinecke v. Creative Empire LLC*, 38 F. Supp. 3d 1192, 1202 (S.D. Cal. 2014), *aff’d*, 669 Fed. Appx. 470 (9th Cir. 2016).

You have not provided the specific wording of any promise Bosley made to you related to the commercial project. In order to show that a promise of payment, final authorization, or any other term was a “condition precedent” to an implied license, your amended claim must include enough details about the promise—who made the promise, when, and how; what was specifically promised; and how the promise was stated—to show that the term had to be satisfied before the implied license would take effect.

III. Scope of an Implied License

Your claim could also proceed if you present facts in a second amended claim that indicate that, even if an implied license existed, the respondent exceeded its scope by using your work in a way that the license would not allow. To support a contention that the respondent’s use of your rough cut exceeded the scope of an implied license, you must provide more details in a second amended claim to indicate how the use went beyond the scope of the implied license formed when you created and delivered the allegedly infringed work on request of the respondent.

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.** 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