



# COPYRIGHT CLAIMS BOARD

Docket number: 23-CCB-0201

November 4, 2024

Ethereal Co LC

CLAIMANT

v.

Flo Ruggeri and MB Picnic Co

RESPONDENTS

## ORDER TO AMEND NONCOMPLIANT COUNTERCLAIMS

On April 25, 2024, the Copyright Claims Board (“Board”) found the second amended claim (“Claim”) compliant and directed claimant Ethereal Co LC (“Claimant”) to serve the respondents. Respondents Flo Ruggeri (“Ruggeri” or “you”) and MB Picnic Co (“MB”) did not opt out of the proceeding. On October 25, 2024, Ruggeri filed a response to the Claim in which she raised two counterclaims.

Ruggeri’s response to the claim is complete and does not need to be changed. However, the Board finds that neither of the counterclaims comply with the requirements of the CASE Act and related regulations. To proceed with the counterclaim(s), Ruggeri must submit an amended counterclaim (or counterclaims) by **December 4, 2024**. If no amended counterclaim is filed, the Board must dismiss the counterclaims without prejudice, and the proceeding will continue with Claimant’s claim. If Ruggeri files an amended counterclaim, it will be reviewed for compliance and the parties will be notified if it is found compliant or noncompliant. 17 U.S.C. § 1506(f)(2).

If you wish to file an amended counterclaim(s), 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 counterclaims before you file again. For example, the “Provide a detailed description of your noninfringement counterclaim” section of your noninfringement counterclaim appears to include draft notes or communications about what to state in your counterclaims. If you file an amended counterclaim, you must omit those notes.

You do not need to provide a legal argument in your counterclaims – just a statement of facts and circumstances. Being specific in your description gives the other party and the Board more information about your counterclaims. There is no character limit, so please be as detailed as possible.

### Noninfringement

You have raised a counterclaim seeking a declaration of noninfringement. A counterclaim for a declaration of noninfringement asks the Board to find that your actions do not amount to an infringement of Claimant’s copyrighted works. 17 U.S.C. § 1504(c)(2). If someone has accused you of infringing their copyright, a noninfringement counterclaim requests an official declaration that you did not infringe.

It is not necessary to submit a counterclaim in order to have the Board consider the merits of the claim and of the defenses you raised in your response. More information is available in the [Counterclaims](#) chapter of the CCB

Handbook. You do not need to file a counterclaim that simply mirrors the claim or is identical to your defense of the claim against you. For example, because you state in your response that you did not infringe Claimant's works, there is no need to file a counterclaim for a declaration of noninfringement regarding your actions. You may choose to omit the noninfringement counterclaim and simply proceed on the basis of your defenses.

To proceed with such a counterclaim, there must be an "actual controversy" between the parties over whether you infringed Claimant's copyright. 28 U.S.C. § 2201(a); see 17 U.S.C. § 1504(c)(2). The counterclaim must identify who accused you of infringement and describe your allegedly infringing activity, the reasons why you believe no infringement occurred, and the reasons why you believe there is an "actual controversy" about the requested declaration. 37 C.F.R. §§ 222.2(c)(8)(i) & (iii)-(v).

Your noninfringement counterclaim does not clearly state facts that meet those requirements. Instead, most of the allegations in the counterclaim simply repeat allegations from Claimant's infringement claim. The "Describe the allegedly infringing activity" section of your counterclaim is a word-for-word repetition of the "Describe the infringement" section of the Claim, and the "Describe dispute with claimant" section of your counterclaim is a word-for-word repetition of the "Description of harm suffered and relief sought" section of the Claim. Because those sections accuse you of infringement, including them in your counterclaim undermines your contentions that you did not infringe Claimant's copyrights. Including those allegations appears to admit infringement and suggests that there is no actual controversy over the infringement claim. If you file an amended counterclaim of noninfringement, you must only include allegations that concern an accusation by Claimant that you infringed Claimant's copyright.

## **Misrepresentation**

You also raised a counterclaim of misrepresentation in connection with a takedown notice or counter-notice under 17 U.S.C. § 512(f). That kind of misrepresentation has a very specific meaning under copyright law that involves false statements made to an online service provider (OSP) related to a copyright-protected work posted online. Your counterclaim must make enough factual allegations to support each "element" of a section 512(f) misrepresentation claim. The elements of the claim are:

1. The respondent sent an OSP either
  - a. a takedown notice claiming online content or activity was infringing, or
  - b. a counter-notice denying infringement and claiming the online content was removed or disabled due to a mistake or a misidentification,
2. The respondent made a misrepresentation (a false or incorrect statement of fact) in the takedown notice or counter-notice,
3. The respondent knew the misrepresentation was false or incorrect,
4. The misrepresentation was important to the OSP's decision to take down or repost the content, and
5. You were harmed as a result of the OSP's decision.

17 U.S.C. § 512(f).

Your allegations do not describe a violation of section 512(f). The misrepresentation counterclaim is not compliant because it does not describe any statement, or any false statement, made to an OSP. You do not provide information about how Claimant made a misrepresentation in a takedown notice or counter-notice to an OSP about an allegedly infringing work. Instead, you state that no one sent or received a DMCA takedown notice, and that no counter-notice was sent. These allegations suggest that your counterclaim cannot proceed.

A misrepresentation claim must allege that the respondent made a false or incorrect statement in a takedown notice or counter-notice *to an OSP*. Your allegations do not support a counterclaim under section 512(f). Instead, your allegations contradict the basis for the counterclaim. If you submit amended counterclaims, you must omit the misrepresentation counterclaim unless you state facts in support of each element of the counterclaim.

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 [Noninfringement](#) and [Misrepresentation](#) chapters of the CCB Handbook for more assistance.

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