



COPYRIGHT CLAIMS BOARD

Docket number: 22-CCB-0247

United States Copyright Claims Board

Michelle A. Milano

CLAIMANT

v.

Eliza Davis

RESPONDENT

ORDER TO AMEND NONCOMPLIANT CLAIM

The Copyright Claims Board finds that your claim does not comply with the requirements of the CASE Act and related regulations. The claim cannot move forward unless it is amended.

If you wish to proceed with this claim, you must file an amended claim by **January 18, 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. If you file an amended claim and it is found compliant, you will be notified and directed to proceed with service. There is no additional filing fee for an amended claim. 17 U.S.C. § 1506(f)(1)(B).

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

Your claim does not present clear facts to support the elements of a copyright infringement claim related to the respondent’s infringing activity, access to your work, and substantial similarity, as discussed further below.

Copyright Infringement – Infringing Activity

Your claim does not present enough facts to clearly state how the respondent used any of your exclusive rights in the allegedly infringed work without permission.

Copyright law grants exclusive rights to copyright owners. These include the right to reproduce, distribute, and publicly display the work, and to make a “derivative work,” which is a work based on the original work. Someone who does one of those activities without the copyright owner’s permission may infringe the copyright, unless they have a legitimate defense. More information about exclusive rights is available on page 3 of the [Starting an Infringement Claim](#) chapter of the CCB Handbook.

Your claim does not discuss the respondent’s allegedly infringing activity in any detail or in a way that can be clearly understood. Your infringement claim says nothing about the infringing activity other than the following statement in both the “Describe the infringement” and the “Description of harm suffered and relief sought” sections: “Copying work derivative.” That brief statement does not describe the facts related to the alleged infringement with enough detail to let the respondent know what she is supposed to have done wrong. Your allegations in those sections instead focus on episodes of “online harassment” and “waves of attacks,” which do not illuminate how the respondent may have copied, distributed or displayed your work, or made a derivative work based on your work. If you submit an amended claim, you must include facts in the “Describe the infringement” section that specify how the respondent engaged in the infringing activity. You should be as detailed as possible, setting forth what the respondent did in relation to the work you allege was infringed.

Copyright Infringement – Access

Your 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. To address this issue, you must file an amended claim with allegations that make access a reasonable possibility, not just hypothetically or theoretically possible. Acceptable allegations of access may include that your work (a) was sent directly to the respondent or a close associate of the respondent; (b) was widely disseminated or was available to the public or respondent; or (c) is so strikingly similar to the respondent’s work that the respondent could not have created it independently.

Copyright Infringement – Substantial Similarity

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

In the "Works infringed" section of the claim, you identify the allegedly infringed work as "Fairy Orbs" and describe the work as "[g]lass ball filled with specific subject matter herbs based on metaphysical properties with a clay sculpted fairy inside." A supplemental document, dated December 14, 2021 and filed with the claim, appears to be a screenshot of part of a cease-and-desist message addressed to the respondent, which further identifies the title of your work as "Herb Infused Fairy Orbs." You do not provide any more detailed information describing or attaching the work that you allege was infringed, or how it was used in any infringing work. Another unlabeled document filed with the claim appears to be a screenshot of an Etsy listing for a "Witches' Sphere Ornament." That ornament might be the respondent's allegedly infringing work, but the screenshot does not make that obvious. If that Etsy listing depicts the allegedly infringing work, the similarity between your work and the respondent's work is not clear. For example, it is not evident that the work in the Etsy screenshot is "filled with specific subject matter herbs based on metaphysical properties," and the photograph in the Etsy listing does not show a sculpted fairy inside the work. No allegations in the "Describe the infringement" section describe your work or the respondent's work, or state or show that they are identical or substantially similar. In addition, you have not provided supplemental documents that clearly identify the works and show their similarities.

As a result, you do not provide enough information to enable the respondent to understand the claim and respond to it. When you submit an amended claim, it must include allegations that support the element of substantial similarity. Please provide more details and background regarding this element in your amended claim, including a clear, detailed statement regarding which portions of your work were taken by the respondent in an allegedly infringing work, or attach copies or other documents that are sufficient to show the similarities. If you include copies of the works at issue as supplemental documents, you must clearly label them so they can be properly compared to each other.

Misrepresentation Claim – Clarity

You are also bringing a claim of misrepresentation in connection with a counter-notice under section 512(f) of the Copyright Act, as added by the Digital Millennium Copyright Act ("DMCA"). The elements of a section 512(f) misrepresentation claim are that:

1. The respondent sent an online service provider either
 - a. a DMCA 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 DMCA takedown notice or counter-notice,
3. The respondent knew the misrepresentation was false or incorrect,
4. The misrepresentation was important to the online service provider's decision to take down or repost the content,
5. The online service provider relied on the misrepresentation, and
6. You were harmed as a result.

17 U.S.C. § 512(f). Your misrepresentation claim is not compliant because it does not provide factual allegations about the alleged misrepresentation. You state that you sent Etsy a takedown notice in 2021, and that the respondent sent a counter-notice to Etsy, but your claim does not identify any false or incorrect statement of fact in the counter-notice. A section 512(f) misrepresentation claim must provide the words in the counter-notice that you allege were a misrepresentation, and an explanation of the alleged misrepresentation. [37 C.F.R. §§ 222.2\(c\)\(9\)\(vi\)-\(vii\)](#). In the "Words that make up the misrepresentation and explanation of the misrepresentation" section, you state only "Automatic Etsy notice." Without further information about the specific statement(s) in the counter-notice that you contend was false or incorrect, your misrepresentation claim cannot proceed. If you maintain the misrepresentation claim in an amended claim, you must provide the words used in the respondent's counter-notice that made up the misrepresentation, and explain what made those words false or incorrect.

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 supplementary documents, you must re-upload any documents you wish to include in the amended claim on the "**Documentation**" page. Please include only documents that are directly related to your claim.
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. You may also refer to the [Compliance Review](#) chapter of the CCB Handbook for more assistance.

Copyright Claims Attorney

December 19, 2022