



# COPYRIGHT CLAIMS BOARD

Docket number: 23-CCB-0201

March 19, 2024

Andrea B. Cregger

CLAIMANT

v.

www.oneirphotography.com, Elias Janos,  
MB Picnic Co, Flo Ruggeri, and Lucy Janos

RESPONDENTS

## 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 **April 18, 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.

### Contact Information

The claim must include each respondent's name and mailing addresses. 37 C.F.R. §§ 222.2(c)(5)-(6). For each respondent, instead of providing a valid street address, you list, "On location," "Unlisted," or "Unknown." If you file a second amended claim, it must include addresses for each respondent where they can actually receive mail.

In addition, you list one respondent's name as www.oneirphotography.com. That seems to be a typo, as some supplemental documents filed with the amended claim refer instead to Oneir<sub>o</sub> Photography. If you file a second amended claim, include that entity's actual name in the "Respondent" section.

### Copyright Registration

A copyright infringement claim before the Board must include the registration number and effective date of registration for the allegedly infringed work, if it has been registered. 37 C.F.R. § 222.2(c)(7)(ii)(C). In the "Works

infringed” section of the claim, you instead list the service request number for the application for registration. If you file a second amended claim, you must state in the “Works infringed” section that the copyright has been registered, and include Registration Number VAu001516484 and the June 12, 2023 effective date of registration.

### **Allegedly Infringed Work**

If you submit a second amended claim, it must clarify certain discrepancies between the works identified in the registration and your description of the allegedly infringed work in the “Works infringed” section. In that section, you list a single allegedly infringed work titled “Beach Photoshoot,” which is one of the ten photographs covered by Registration Number VAu001516484. However, the “Describe the infringement” section alleges infringement of multiple photographs (“my images”), and supplemental documents appear to show use by respondents of several photographs included in the registration.

The claim must include the title of each allegedly infringed work at issue. 37 C.F.R. § 222.2(c)(7)(ii)(A). To raise a claim of infringement of more works than “Beach Photoshoot,” you must list each allegedly infringed work in separate entries in the “Works infringed” section when you file the second amended claim.

### **Legal or Beneficial Ownership**

A claimant who brings an infringement claim before the Board must be “the legal or beneficial owner of the exclusive right [in a copyrighted work] at the time of the infringement.” 17 U.S.C. § 1504(c)(1). The amended claim does not present clear facts that indicate that you personally are a proper claimant to bring this infringement claim, rather than Ethereal Co LC (Ethereal), the copyright owner identified in the registration. If you submit a second amended claim, it must clarify the discrepancy. As stated in the February 7, 2024 Order to Amend Noncompliant Claim (February 7 Order):

When you submitted your claim, you certified that you were the legal or beneficial owner of rights in the allegedly infringed work. However, the Copyright Office registered the work under Ethereal’s name. The Certificate of Registration for VAu001516484 does not list you as an author or copyright claimant of the registered pictorial works. Instead, it lists Ethereal as the author and copyright claimant of the works, which are identified as works made for hire. The “Works infringed” section of the claim also lists Ethereal as the author and describes the work as a “styled photoshoot by Ethereal Co LC.”

If information in the claim identifying the claimant or the author of the works is inaccurate, you may correct that information in a second amended claim. For example, if Ethereal is the owner and author of the registered works, the second amended claim should name Ethereal as the claimant, not you personally. On the other hand, if Ethereal is not the copyright owner and you are, you must clarify how.

### **Infringing Activity**

The amended claim does not indicate how two of the respondents engaged in any allegedly infringing activity.

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 be infringing 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.

You have not made any allegations that respondents Elias Janos and Flo Ruggeri committed any infringing act, such as copying, distributing, or publicly displaying your works. Your second amended claim must state facts that indicate how each named respondent participated in the alleged infringement, or the claim will be dismissed.

### **Impermissible Claim – Breach of Contract**

The Board is only authorized to hear certain kinds of copyright disputes, such as copyright infringement claims. However, your allegations about respondent MB Picnic Company (MB Picnic) in your amended claim appear to describe a dispute over a “breach of contract,” which is a violation of any of the agreed-upon terms and conditions of a binding agreement, and do not describe a copyright infringement dispute. In the “Describe the infringement” section, you allege:

During a styled shoot that I hosted mb picnic company used and distributed my intellectual property for profit. MB picnic company did not credit my work as agreed upon. Instead, she used my images for advertising and marketing materials as if the images were her own intellectual property.

You appear to allege that MB Picnic had a license or agreement allowing it to use your photographs, and that it also agreed to credit you as the photographer, but it failed to do so. If it did have a license to use your photographs, the Board could only hear your infringement claim against MB Picnic if you amend the claim to also state facts indicating that MB Picnic failed to satisfy a “*condition precedent*” of the agreement, or that its use of the photographs went beyond the *scope* of the uses permitted under the license, both of which are further explained below.

#### **A. Condition Precedent**

Your claim can proceed if you state facts in a second amended claim that indicate that a “condition precedent” had to occur before the 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, the payments may be a “condition precedent” to the licensee’s right to publish. 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 have not alleged that MB Picnic giving you credit, or any other requirement, was a condition that it had to meet before it could use your photographs. If there were terms that MB Picnic had to satisfy first, your second amended claim should provide the terms you imposed, including any specific conditional wording. To show that credit or any other term of use was a “condition precedent” to a license, your second amended claim must include enough details about the term stated to show that it had to be satisfied before the license would take effect. You

may also include the agreement, or correspondence that plays a significant role in your allegations, as supplemental documentation in support of your claim.

## **B. Scope**

Your claim against MB Picnic could also proceed if you present facts in a second amended claim that indicate that, even if a license existed, MB Picnic exceeded its scope by using your work in a way that the license would not allow. To support a contention that MB Picnic's use of your photographs exceeded the scope of a license, you must provide more details in a second amended claim to indicate how the use went beyond what the license permitted. As stated above, you may include the agreement or significant correspondence as supplemental documents.

## **Unrelated Respondents**

The Board can only hear claims asserted against multiple respondents if all claims in the proceeding "arise out of the same allegedly infringing activity or continuous course of infringing activities[.]" 17 U.S.C. § 1504(c)(6). In the "Describe the infringement" section of your claim, you seem to allege that Lucy Janos took your photographs from MB Picnic after it used your works without proper credits. However, you do not appear to allege that they acted together, or that your claims against them arise out of the same infringing activity or activities.

To address this issue, your second amended claim must either be raised against only one respondent (or set of respondents, if you allege that they acted together in the same course of conduct), or it must include facts that indicate that the respondents all engaged in the same allegedly infringing activities or were parts of a chain of one continuous course of infringing activities. For instance, if MB Picnic provided your works to Lucy Janos, state that in the "Describe the infringement" section and provide details of their relationship regarding your works.

## **Access**

You have not provided facts that clearly indicate how Elias Janos and Flo Ruggeri had access to your work. "Access" means a reasonable opportunity to view your work before the alleged infringement took place.

To address this issue, you must add allegations that make access by Elias Janos and Flo Ruggeri a reasonable possibility, not just hypothetically or theoretically possible. Acceptable allegations of access may include how your works (a) were sent directly to those respondents or a close associate of the respondents; (b) were widely disseminated or were available to those respondents; or (c) are so strikingly similar to the respondents' work that they could not have been created independently. Alternatively, you can 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 your works and the respondents' works as supplemental documents, they must be clearly labeled and identified so that your works can be properly compared to each respondent's allegedly infringing works.

## **Substantial Similarity**

You also do not include enough facts that explain the similarities between your works and the allegedly infringing works. If it is not readily apparent from supplemental documents that are submitted with the claim, you must provide more specific allegations about how your works and the allegedly infringing works are similar.

In the “Describe the infringement” section, you state that MB Picnic “used my images for advertising and marketing materials” and that Lucy Janos “advertised with those same images,” but you do not clearly describe the extent of their use. You do not name the particular works that each respondent allegedly infringed. The amended claim does not clearly describe the allegedly infringed works or clearly include them as supplemental documents. You include dozens of images that are not labeled to identify how they relate to your works. As a result, the claim does not provide enough information to enable the Board to understand the similarity of the works.

If you submit a second amended claim, then as stated in the February 7 Order:

[I]t must include more factual 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 of your works or portions of works were taken by the respondent[s] in the allegedly infringing works, or documents that are sufficient to show the similarities.

## **Online Service Provider**

In response to questions in the claim form, you indicate that the respondents include an online service provider (OSP), and that your infringement claim against the OSP is based on its “storage of or referral or linking to infringing material posted by others,” but that you did not send it the “takedown notice” required by Section 512 of the Copyright Act. If that is correct, then your claim cannot move forward, because you can only bring your infringement claim against the OSP if it failed to take down third-party material in response to a takedown notice.

As the February 7 Order stated:

An infringement claim against an OSP eligible for a section 512 safe harbor cannot be compliant unless you affirm that you sent the OSP a section 512 notice of infringement, and that it “failed to remove or disable access to the material expeditiously upon the provision of such notice.” 17 U.S.C. § 1506(f)(1)(C)(i); 37 C.F.R. § 222.2(c)(7)(iii)(G).

... Your claim also does not include any facts that support your allegations that [any] respondent is an OSP notified about third-party material; instead, your allegations relate to [their] own use of allegedly infringing photographs. Because you have not stated facts that suggest [a] respondent is an OSP, you may want to reconsider whether your answer should be “yes” to the question, “Are any of the respondents online service providers?” Your infringement claim cannot proceed unless you file an amended claim that either (1) removes the allegation that [a] respondent is an OSP, or (2) alleges that it is an OSP that did not comply with a takedown notice you sent, and states facts in support of those allegations that would make it liable as an OSP, despite the Section 512 safe harbor.

## **Supplemental Documents**

Your amended claim includes 59 files uploaded as supplemental documents. The last 22 of those files are duplicates. You should remove the 22 duplicate files before you submit a second amended claim.

## Final Amendment

Your amended claim does not resolve any of the compliance issues raised in the February 7 Order, and it raises further issues, discussed above, that also must be resolved for the claim to go forward. **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](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