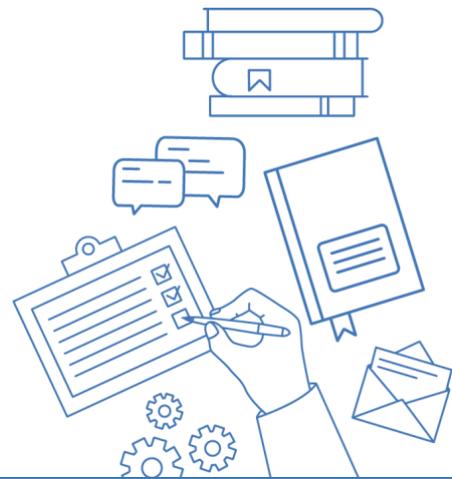


Responding to a Claim Requesting a Declaration of Noninfringement

A claim requesting a declaration of noninfringement (a “noninfringement claim”) means the claimant is asking the CCB to decide that their actions do not amount to **infringement** of your copyright. If a noninfringement claim was filed against you before the CCB and you did not opt out, you’ll need to file a response to the claim. This is your first opportunity to give the CCB your side of the story.



NOTE: This chapter discusses preparing a response to a noninfringement claim. If the claimant brought a claim that you are infringing their work, you can see how to craft your response to that claim in the [Responding to an Infringement Claim](#) chapter. If the claimant brought a claim for misrepresentation in connection with a takedown notice or counter-notice, you can see how to craft your response to that claim in the [Responding to a Misrepresentation Claim](#) chapter.

Chapter at a Glance

- **Preparing Your Response**
- **Raising Defenses to a Noninfringement Claim**
- **Filing Your Responses on eCCB**
- **Less Common Situations**
 - **There’s More Than One Type of Claim Against You**
 - **You’re Involved in Multiple Proceedings Against This Claimant**

Why You Need This Information

Filing your response is the first thing you’ll do in your proceeding. It’s your opportunity to respond to the points the claimant made against you and raise defenses you have to those points. This chapter provides the key points you should think through as you’re preparing your response, information on common defenses to noninfringement claims you can raise in your response, and an overview of the logistics of filing your response through **eCCB**.

WHERE YOU ARE IN A CCB PROCEEDING:

1. Filing a Claim
2. Compliance Review
3. Service
4. Opt-Out Period
5. Proceeding Becomes Active
- 6. Response**
7. Discovery
8. Settlement
9. Written Testimony
10. Determination
11. Post-Determination

How did you get here?

A claimant brought a noninfringement claim against you before the CCB. After they formally delivered that claim to you, you were given sixty days to decide whether you wanted to participate in the CCB proceeding or opt out of the proceeding. Since you didn't opt out, the claim moved forward, and the proceeding moved into its **active phase**. The CCB issued an order requiring you to register for eCCB and link your eCCB account to the case. You must do that before you can file a response. The CCB issued a schedule that provides key dates and deadlines for the proceeding. The first deadline in that schedule is for you to file your response to the claim against you.

When did you file your response?

You'll need to file your response through eCCB by the deadline in the schedule, which will usually be thirty days from the date the schedule was issued. The exception to this is if the claimant asked you to waive formal **service** and you accepted, then the scheduling order will give you sixty days to respond instead of thirty. You cannot file your response before the scheduling order is issued. But once the schedule has been issued, you may file your response before the deadline. It's a good idea to start thinking through and working on your response well before the deadline. Your response is important, and you shouldn't leave it until the last minute.

How do you prepare and file your response?

Before you file your response, you should review the claim carefully and think through the facts and the arguments the claimant is making, the evidence they included (if any), and whether you would describe the events differently from the claimant's version of events. Beyond considering whether you disagree with the claimant's version of the facts, you should think about whether you have any defenses to the claim against you. Once you've thought this through and gathered the information you need, you can submit your response through eCCB.

What happens next?

Once you submit your response, the CCB will hold a virtual **conference**. This virtual conference will be attended by the other participants in your proceeding and a Copyright Claims Officer. During the conference, the Copyright Claims Officer will explain what to expect in the proceeding and ask whether you and the other participants are interested in a separate **settlement** conference to discuss the possibility of voluntarily resolving your dispute. If there is no interest in a settlement conference, you and the other participants will begin the **discovery** phase, which will involve exchanging key information and documents to learn more about the claims and defenses in the proceeding.

Preparing Your Response

This section walks through the points you should keep in mind when you're preparing to file a response to a noninfringement claim. First, this section will provide an overview of what a noninfringement claim is and what it means. Next, this section will cover some key questions you should ask yourself when you're reviewing the claim and thinking about your response. Finally, the section provides some information on specific defenses.

What's a Noninfringement Claim?

A noninfringement claim is brought when someone is taking actions or about to take actions related to your work and they are worried that you will bring a copyright infringement lawsuit against them. A noninfringement claim is a request that the CCB issue a determination that the claimant's actions or potential actions *do not* infringe your rights in your work. If you've accused someone of infringing your copyright (or that their future plans would do so), they can file a noninfringement claim with the CCB, asking the CCB to determine that their actions *aren't* copyright infringement.

To bring a noninfringement claim, the claimant **must show that there is a genuine dispute** between you and the claimant over whether the claimant's use of your work was an infringement of copyright

- A claimant can show that a genuine dispute exists if you told them that they have committed copyright infringement of your work.
- A claimant can show that a genuine dispute exists if you made accusations that have interfered with the way they're using or plan to use their work.
 - **EXAMPLE:** You told the claimant that because what they are planning to do infringes your work, they should not move forward with their plans, or you told a third party not to deal with the claimant because of the alleged infringement.
- If you didn't know about their plans or activity and they are just worried that you might find out and bring a claim against them, they cannot ask for a declaration of noninfringement, because there isn't yet a dispute between you and the claimant about whether their use is or isn't copyright infringement.

A Few Points to Keep in Mind

- Someone bringing a claim has the burden to prove their case, so the claimant will need to show that their activity is not infringing. However, to defend against this claim, you'll still want to show, throughout the proceeding, that the claimant *did* infringe your work. This is especially true if the claimant's activity already started or is in the past, because you may want to bring an infringement counterclaim. It would be a good idea to read more about infringement claims and how you prove infringement in the [Starting an Infringement Claim](#) chapter.
- A claimant can bring a noninfringement claim against you for their past, current, or planned future actions.
- A claimant can bring a noninfringement claim against you even if you accused the claimant of infringement when you were talking to or communicating with someone other than the claimant.
- A claimant can't get any financial awards from a noninfringement claim with the CCB. If the claimant wins their noninfringement claim, what they'll get is a determination saying their specific actions at issue in the case aren't copyright infringement.
- Neither you nor the claimant need a copyright registration for the claimant to bring a noninfringement claim before the CCB.

In many cases, when a claimant brings a noninfringement claim based on their own past or current actions, the respondent will bring their own claim for infringement if they believe that the claimant's actions are or were infringing. You have the choice whether to bring a counterclaim for infringement before the CCB or whether to just respond to the noninfringement claim and, if the claimant fails, bring a separate claim for infringement later in federal court or before the CCB. If you're interested in learning

more about bringing your own claim for infringement against the respondent before the CCB (called a counterclaim), you can find more information on counterclaims in the [Counterclaims](#) chapter.

Questions to Ask Yourself

After you review the claim carefully and think through the points it makes, you should keep some key questions in mind.

1. DO YOU DISAGREE WITH ANY OF THE POINTS THE CLAIM ALLEGES?

If the claim presents certain details as fact that you think are wrong or includes arguments that you disagree with, your response should identify those details and arguments and explain why you think they're wrong or why you disagree. You may want to go through the claim and make a list of everything you think is wrong before you begin to file your response.

2. DOES THE CLAIM LEAVE OUT ANY IMPORTANT FACTS?

If you think the claim leaves out important facts, you should include those facts in your response and, if appropriate, describe why those missing facts may change or alter the overall picture of the events described in the claim.

3. DOES THE CLAIM INCLUDE ANY EVIDENCE?

If the claimant included any evidence as attachments to the claim, you should review that evidence carefully. As a first step, make sure the evidence is what the claimant says it is. For example, if it's an agreement that the claimant says is in effect, make sure it's the final, signed version of the agreement.

Next, take a look at how the claimant uses the evidence in their claim and make sure they aren't misrepresenting it in any way. If you notice any issues with the claimant's evidence or how they're using it in their claim, you should include that information in your response.

NOTE: Attaching evidence is optional. If the claimant didn't attach any documents to the claim, it doesn't necessarily mean they don't have evidence to support it. If the claimant didn't attach documents, you'll have an opportunity to learn what kind of evidence the claimant has during the discovery phase of your proceeding, during which each participant will exchange information and documents related to the claims and defenses.

4. DO YOU HAVE ANY EVIDENCE YOU WILL WANT TO INCLUDE WITH YOUR RESPONSE?

You can attach documents or other evidence to your response when you file. If there's a key document or set of documents you think are helpful to your response, you should consider including them. You're not required to attach any documents or other evidence at the response phase. You will, however, have to give that evidence to the claimant during the discovery phase of your proceeding.

The following are examples of documents you may wish to consider including with your response

- A copy of any of the works that are mentioned in the claim or response, if not already attached to the claim.
- A copyright registration certificate for your work(s) that are part of the claim. You will also need this if you want to file a counterclaim for copyright infringement.
- Communications or agreements that relate to the claimant's use or knowledge of your work.

- Material showing your work was created before the claimant’s work or that the claimant had access to your work before creating their work.
- Any other key material that supports your response.

5. DO YOU HAVE ANY DEFENSES?

In your response, you’ll have the opportunity to raise defenses to the claim. A defense goes beyond simply disagreeing with the claimant’s version of the facts. Instead, a defense is a separate reason why the claimant shouldn’t win their claim.

You’ll find information on common [noninfringement defenses](#) later in this chapter.

6. DO YOU HAVE ANY CLAIMS YOU WANT TO MAKE AGAINST THE CLAIMANT?

In some circumstances, you can make your own claims against the claimant, called counterclaims. Only certain types of counterclaims may be raised in the CCB. If you want to make a counterclaim against the claimant, *you must do so with your response*.

NOTE: eCCB will walk you through this process as part of the online response form. You can find more information about counterclaims in the [Counterclaims](#) chapter. If you believe you may have a counterclaim, please read the section of this Handbook on counterclaims carefully, as the counterclaims available at the CCB are limited.

7. DO YOU WANT LEGAL REPRESENTATION?

You’re able to represent yourself in your CCB proceeding whether you are an individual or a business. You’re not required to hire a lawyer, but you’re allowed to hire one if you want. Some lawyers or law students may be willing to represent you for free or for a reduced fee. The CCB provides a [directory](#) for **pro bono** law student legal representation on its website. If you want to learn more about your options for representing yourself or getting a lawyer, you can find more information in the [Representation](#) chapter.

Raising Defenses to a Noninfringement Claim

In addition to disputing various facts and allegations that the claimant made in their claim or adding facts that the claimant may not have included, you’ll have the opportunity to raise defenses to the claim. A defense doesn’t necessarily dispute the claimant’s facts; instead, these separate defenses to a noninfringement claim may provide legal reasons that prevent the claimant from succeeding in proving their claim.

This table provides a list of the most common defenses to noninfringement claims, which also appear in the response form on eCCB. On eCCB, you can check as many of these as you think may apply to you, although you will have to give specific details about why you think each one applies. This chart gives a quick overview of defenses. More information on each defense follows.

This defense on eCCB. . .	May apply if. . .
<u>No Case or Controversy</u>	There isn't really a dispute between you and the claimant. You haven't done anything to give the claimant reason to believe you think their actions infringe your copyright and that you are likely to take action against them.
<u>Use Beyond the Scope of a License or Agreement</u>	The claimant says you gave them permission to use your work, but the way they're using it goes beyond what you gave them permission to do.
<u>Statute of Limitations</u>	The claimant waited more than three years to bring their claim.
Other Defenses	You believe you have another defense that isn't mentioned above. This will be uncommon for noninfringement claims.

When you're preparing your response, you should only raise defenses that you have a legitimate reason to believe apply to your situation, because you'll need to explain why they apply.

The Defenses

The following defenses appear as options to select in the response form on eCCB.

No Case or Controversy: There is No Dispute Between You and the Claimant

To bring a noninfringement claim before the CCB, there must be a genuine dispute for the CCB to decide. In other words, if you have not done anything to make the claimant believe you think their past, current, or planned actions amount to infringement and you are likely to take action to stop them, then there is no dispute for the CCB to decide and the claimant can't bring a noninfringement claim.

EXAMPLE: If you have never told anyone that the claimant has infringed or is about to infringe your copyright, and you have not interfered with the claimant's use or planned use of your work in any way, but the claimant just thinks you might, there is no dispute between you that would allow the CCB to decide the claim.

NOTE: For the claimant's claim to pass compliance review and get to this point, the claimant must have given reasons why there is an actual dispute between you and them, so you should review what they wrote in their claim carefully.

Unless the claimant's statements regarding there being a dispute between you and them were false or omitted key facts, it may be difficult to prevail on this defense in a CCB proceeding. For example, sending a letter or email accusing the claimant of copyright infringement or threatening to bring a CCB claim or a federal lawsuit is almost always enough to establish that there's a legitimate dispute. On the other hand,

if you didn't know anything about the claimant's activities or never expressed to them or anyone else that you thought what they were doing was copyright infringement, there may not be a genuine dispute.

NOTE: If you receive a noninfringement claim about activities you weren't aware of or hadn't yet complained about, but now that you know about them, you *do* think the claimant's activities are infringing, you aren't required to raise this defense, although you may. Instead, you can choose to move forward with the CCB so the CCB reaches a determination that the actions are or aren't infringing. You can also bring your own counterclaim for infringement. You can learn more about bringing an infringement counterclaim in the [Counterclaims](#) chapter.

EXAMPLES

This defense might apply if . . .

- You didn't know about the claimant's use or planned use before their noninfringement claim was filed.
- You knew about the claimant's use or planned use, but you never expressed your opinions about it to the claimant or anyone else.

Use Beyond the Scope of a License or Agreement

If you give someone permission to use your copyrighted work, they can only use your work in the ways you agreed to. If they go beyond what you agree to, then that may be copyright infringement. This sometimes comes up in a noninfringement claim. The claimant brings the claim saying you gave them permission to use your work. But you believe, for example, that you gave them the right to use your work to make print copies in Rhode Island, but they made digital copies and distributed them nationwide. If you gave the claimant permission to use your work, but the way they're using your work goes beyond what you agreed to, you can raise this as a defense to their noninfringement claim.

EXAMPLES

This defense might apply if . . .

- You gave a record company the rights to use one of your songs on albums for a period of ten years, but the record company continued to make and distribute new copies of your song on albums after the ten-year period ended without your permission.
- You gave a publisher permission to publish a physical hardcover copy of your book, and the publisher starts publishing an e-book version as well.
- You gave an art gallery the right to publicly display your work in New York only, but they decided to also publicly display it in Arizona.

Statute of Limitations

Under the law, claimants have a certain period of time during which they can bring a claim. Once this time limit expires, the claimant can no longer bring the claim. This time limit is called the "statute of limitations." Before the CCB, the statute of limitations is three years. For a noninfringement claim, the claim will likely fit within the statute of limitations as long as you have done something in the past three years to make the claimant reasonably believe that their current or future actions risk your bringing a copyright infringement claim against them.

EXAMPLES

This defense might apply if . . .

- Ten years ago, you accused the claimant of photocopying your novel, but you haven't said anything since.
- On May 1, 2019, the claimant staged a public performance of your play, and you accused the claimant of infringement the following day, but did nothing, and they waited until July 1, 2022, to file their noninfringement claim against you. Note that whether this defense applies could depend on whether the claimant has plans to start publicly performing your play again.

Filing Your Response on eCCB

Your response is due by the date provided in the schedule. This date will typically be thirty days from the date the CCB issues the schedule; although, it will be sixty days if the claimant asked you to waive service and you did so. You must wait until the schedule comes out before filing your response. Once it comes out, you may file your response before the deadline. Your response is important, and you should be thoughtful about preparing it. Don't wait until the last minute to get started.

You'll file your response to the claims by using the CCB's electronic filing and docket management system, [eCCB](#). This section provides guidance on filling out the response form through eCCB.

A few things to keep in mind before you get started

- **You must use eCCB for all filings in your CCB proceeding.** If you truly can't use eCCB, for example, because you don't have access to the internet, you can request an accommodation. It's up to CCB whether to grant your request, and use of the electronic system is *strongly recommended*. Using mail for your filings instead of eCCB will be costlier, increase the chances that your filings could get lost, and likely will cause delays.
- **You may file your response yourself, or your lawyer or other representative can file it for you, if you have one.** If you are a business representing itself, you can file through an in-house attorney, an owner, officer, member, or partner, or another authorized employee if that employee has the permission of an owner, officer, member, or partner in writing. You can find more information about representation in CCB proceedings in the [Representation](#) chapter.
- If there are multiple respondents in your proceeding, **each respondent must submit a separate response**, unless the respondents are represented by the same lawyer, law student, or other representative. If you are not a legal representative, you cannot file a response on behalf of another respondent.
- **eCCB will walk you through the filing by asking you questions or giving you instructions.** You should keep this Handbook nearby so you can refer to it if you need to, but eCCB will also have "tooltips," marked with a lower case "i" in a circle, which also give more information, including links to resources.
- **You don't need to complete your response in one sitting.** You always have the option to save your response form and return to complete it later by selecting "Save & Exit" at the bottom of the screen. As the response is broken up into easy-to-digest pages, it is recommended that you complete the page you are on before trying to save and exit.

Once you're ready to begin working on your response, follow the steps below

1. To begin working on your response, log in to your eCCB account. You can find more information about creating an eCCB account, accessing eCCB, and linking your account to your case in the [eCCB](#) chapter.
2. Click the "Submit a Response" link at the top of your dashboard. If you are the respondent in more than one case, you'll see a few different proceedings. Select the proceeding that you want to work on.
3. The response form asks you to provide basic contact information
 - a. Your name
 - b. Your address
 - c. Your phone number
 - d. Your email address

If you have a lawyer, law student, or other authorized representative representing you in the proceeding, your representative's phone number and email address can be provided instead of your own.

4. You will be asked to give a detailed statement explaining why you believe the claims are not valid. You should give specific reasons why facts presented by the claimant are incorrect or why the CCB shouldn't side with the claimant.
5. The response form includes the most common defenses to the claim against you. You can click on as many of them as you wish, but for each reason or defense you check, you will need to describe why that defense applies to you. You should not check any defense box unless you have good reason to believe that it applies to you.
6. The response form also lets you raise your own claims, called counterclaims, if you have any. You must raise any counterclaims at this time, so you should gather any information you need for your counterclaims before you submit your response form. More information about counterclaims allowed before the CCB is available in the [Counterclaims](#) chapter.
7. You, or your representative submitting the response, must certify that it is accurate and truthful to the best of your/their knowledge. If your representative is submitting your response, the representative must also certify that you confirmed to them the accuracy and truth of the information in the response.

Less Common Situations

The following situations are less common and are unlikely to apply for most responses.

There's More Than One Type of Claim Against You

This chapter addresses responding to a noninfringement claim. Although infrequent, in some proceedings there may be more than one type of CCB claim that the claimant brought against you. In addition to just a noninfringement claim, the claimant also may have raised an infringement claim, saying you infringed their work, or a misrepresentation claim against you related to a takedown notice or counter-notice. If this is the case, please find specific information in the [Responding to an Infringement Claim chapter](#) and [Responding to a Misrepresentation Claim chapter](#).

You're Involved in Multiple Proceedings Against This Claimant

If a claimant has started multiple proceedings against you related to similar facts and circumstances, you can ask the CCB to combine (or consolidate) the proceedings. If the proceedings are consolidated, they'll be treated as one proceeding for purposes of exchanging documents and information during discovery, submitting evidence to the CCB, and any hearings that the CCB decides to hold. You can find more information about consolidation in [regulations](#).

Glossary

- **Active phase:** When the respondent has not opted out, the portion of the proceeding starting from the end of the sixty-day opt-out period and continuing until the CCB's final determination of your case.
- **Conference:** A virtual meeting between the parties and the CCB to discuss issues related to the case.
- **Discovery:** The process by which the parties exchange information and documents relevant to the issues in a case.
- **eCCB:** The CCB's electronic case filing system, where all filings are made.
- **Infringement:** Copyright infringement occurs when a copyrighted work is reproduced, distributed, publicly performed or displayed, or made into a derivative work without permission of the copyright owner, if the use does not qualify for an exception, such as fair use.
- **Pro bono:** Legal services without a charge for the lawyers' or law students' time or work.
- **Service:** The process of having the claim, initial notice, and opt-out formally delivered to the respondent.
- **Settlement:** An agreement between parties containing the terms by which they agree to resolve their dispute.