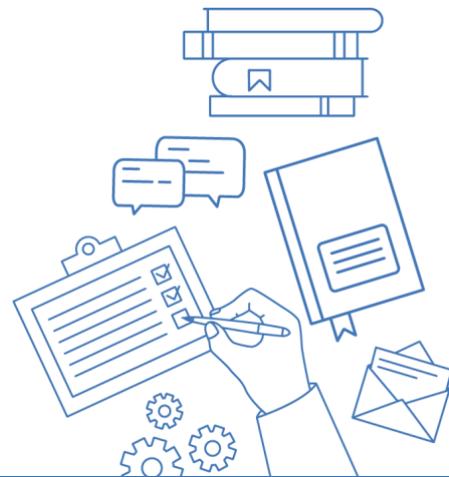


Responding to a Misrepresentation Claim

A claim of **misrepresentation** means that the claimant believes something you said in the takedown notice or counter-notice was false, and that false information caused online content to be taken down or put back up by an online service provider. If a misrepresentation 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 only discusses preparing a response to a misrepresentation 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 a declaration that their activity is not infringing, you can see how to craft your response to that claim in the [Responding to a Claim Requesting a Declaration of Noninfringement chapter](#).

Chapter at a Glance

- **Preparing Your Response**
- **Raising Defenses to an Infringement 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 first opportunity to respond to the allegations the claimant made against you and raise defenses you have to those allegations. This chapter provides the key points you should think through as you're preparing your response, information about common defenses to misrepresentation 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 misrepresentation 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. Because you didn't opt out, the proceeding moved into its **active phase**. The CCB issued an order that required 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 also 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 what the claimant is accusing you of, the facts and arguments they're 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, instruct you to give a brief description of your story, 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 points you should keep in mind when you're preparing to file a response to a misrepresentation claim. First, this section will provide an overview of what a misrepresentation 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 Misrepresentation Claim?

Congress passed the Digital Millennium Copyright Act (DMCA) to establish a fairly simple process to address accusations of online infringement, usually without the need for litigation. A copyright owner can provide a takedown notice to an online service provider, notifying them that someone posted infringing content on the service provider's system or network and demanding it be taken down. Online service providers include websites that host content uploaded by users, such as YouTube and Instagram, and search engines that direct users to particular websites, such as Google and Bing. If an online service provider has followed the requirements of the DMCA by promptly removing or disabling access to the online content the copyright owner identified as infringing, it can't be held responsible for the copyright infringement of others.

Once the content is taken down, the person or company that posted the content may get it reposted by sending a counter-notice to the service provider. Typically, the counter-notice states that the content was removed or disabled by mistake or misidentification and asks that the content be reposted.

If someone makes a false statement—or misrepresentation—in either the original [takedown notice or a counter-notice](#), and the false statement was important enough that it affected the decision to take down or restore the content at issue, a claimant affected by that misrepresentation can bring a misrepresentation claim in the CCB.

If a misrepresentation claim is brought against you, the claimant will need to prove all of the following

- You sent either
 - A **takedown notice** claiming online content or activity was infringing *or*
 - a **counter-notice** denying infringement and claiming that the online content was removed or disabled due to a mistake or a misidentification.
- You made a **misrepresentation** to an online service provider in a takedown notice or counter-notice.
- You **knew** the misrepresentation was false or incorrect.
- Your misrepresentation was **important** to the online service provider's decision to take down or repost the content.
- The online service provider **relied on** your misrepresentation.
- The claimant was **harmed** as a result.

The full text of the portion of the DMCA that discusses the requirements for misrepresentation claims is available in [section 512\(f\)](#) of the Copyright Act. More Copyright Office resources related to section 512 and the notice-and-takedown system are available on [copyright.gov](#).

Questions to Ask Yourself

The first step in preparing your response is to review the claim carefully and think through the points that it makes. As you're doing this, there are some key questions you should keep in mind.

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

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. CAN THE CLAIMANT PROVE EACH FACTOR OF MISREPRESENTATION?

As discussed above, to establish misrepresentation, the claimant needs to prove each of six different factors. If they can't prove any of the factors, then they can't win their misrepresentation claim. For example, if you didn't send a takedown notice or counter-notice, you should mention that in your response. Or if what they're accusing you of misrepresenting is, in fact, true, then you should make that clear in your response.

4. 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 the takedown notice or counter-notice they say you sent, you should take a close look at it to make sure it's actually what you sent.

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.

5. 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 the takedown notice or counter-notice the claimant says includes a misrepresentation, if it is not already attached to the claim.
- In their claim, the claimant will have given your specific words that they allege amounted to a misrepresentation. At this point, you may want to include key documents that show your statements were true.
- Documents that are evidence the claimant suffered no damages.
- Any other key evidence that supports your response.

6. 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 misrepresentation defenses later in this chapter.

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

In some circumstances, you can make 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 in 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.

8. 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 Misrepresentation Claim

In addition to disputing various facts and allegations that the claimant made in their claim, you'll also 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 misrepresentation 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 misrepresentation 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 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 Misrepresentation</u>	Your statements, as identified by claimant, in your takedown notice or counter-notice were not false or incorrect.
<u>No Knowing Misrepresentation</u>	You didn't know a statement you made in the takedown notice or counter-notice was actually a misrepresentation.
<u>No Material Misrepresentation</u>	Your statement amounted to a misrepresentation, but it was unimportant or insignificant to the taking down or restoring of content (for example, you noted your or the claimant's physical address incorrectly in your notice).
<u>No Injury</u>	Your misrepresentation didn't result in any harm to the claimant.
<u>Statute of Limitations</u>	The claimant waited more than three years to bring their claim.

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 Misrepresentation

For the claimant to have a misrepresentation claim, you need to have actually made false or incorrect statements in your notice. If everything you included in the takedown notice or counter-notice alleged by the claimant to be false was, in fact, true, then the claimant doesn't have a misrepresentation claim. If you raise this defense, you should give as much detail as you possibly can as to why the claimant is wrong and your words were actually true.

EXAMPLES

This defense might apply if. . .

- The claimant says you misrepresented that you're the copyright owner of a video that was posted online in your takedown notice, but you actually are the copyright owner.
- The claimant says you misrepresented whether you had the right to use the claimant's song as part of your video in your counter-notice, but the claimant actually gave you permission to use their song.

No Knowing Misrepresentation

Unlike many other claims, misrepresentation has a knowledge requirement. For the claimant to win their misrepresentation claim, they must show you *actually knew* your takedown notice or counter-notice included one or more misrepresentations. If you made the statements in your takedown notice or counter-notice in good faith, believing they were true, then you didn't know you were making a misrepresentation, and the claimant doesn't have a claim. An unknowing mistake is a defense to a misrepresentation claim.

EXAMPLES

This defense might apply if . . .

- The claimant says you misrepresented that you're the copyright owner of a work in your takedown notice, but you sincerely thought, since you paid someone else to create the work, you were the copyright owner.
- The claimant says that in your counter-notice, you misrepresented whether you had the right to use the claimant's work, but you truly believed you had permission or misread your agreement with the claimant.

No Material (Important) Misrepresentation

For the claimant to win their misrepresentation claim, they must show that your misrepresentation was important or significant enough to have caused the work to be removed or reposted by the online service provider. A misrepresentation isn't important or significant if the service provider wouldn't have relied on it or used it as the basis to remove or repost the content in question. If your takedown notice or counter-notice included information that was false, but that false information wasn't important or significant, then the claimant doesn't have a claim.

EXAMPLES

This defense might apply if . . .

- Your takedown notice included an incorrect address.
- Your counter-notice included a typo in the date.

No Harm

For the claimant to win their misrepresentation claim, the misrepresentation must have caused some provable harm or damage to the claimant.

EXAMPLE: If the claimant was selling drawings through an online marketplace and a takedown notice prevented any sales until the marketplace reposted the drawings, the lost sales could be an injury for these purposes.

NOTE: Even if there has been no money lost, the CCB may find that the misrepresentation caused an injury, for example, to the claimant's reputation. If, on the other hand, the misrepresentation didn't result in any injury to the claimant, the claimant doesn't have a claim.

Some federal courts have determined that the misrepresentation itself counts as harm to the claimant, while other courts have required the claimant to show a separate harm from the misrepresentation. The rule the CCB will follow depends on the law of the federal courts in the location with the most connection to the participants and the claim.

EXAMPLES

This defense might apply if . . .

- After being up for a while, with almost no viewership and not associated with any sales or income, the claimant’s content was only taken down for a short period of time. As noted above, whether this defense will apply depends on the law the CCB is required to follow in your case.

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.” In the CCB, the statute of limitations is three years.

NOTE: Different courts have different rules for calculating the statute of limitations. Some courts calculate the three-year period based simply on the date the activities took place. Other courts calculate the three-year period based on the date the claimant discovered, or reasonably should have discovered, the activities. The CCB will follow the rules for calculating the statute of limitations of the courts in the location with the most connection to the parties and the claim.

EXAMPLES

This defense might apply if . . .

- You submitted the takedown notice in question five years ago.
- On May 1, 2019, you submitted a counter-notice that the claimant thinks included a misrepresentation, but the claimant waited until July 2, 2022, to file their misrepresentation claim against you.

Filing Your Response on eCCB

Your response is due on the date 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 a response form available on eCCB which may be found on the [CCB’s website](#). 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 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 misrepresentation 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 a misrepresentation claim, the claimant also may have raised an infringement claim or a claim for a declaration that their activity is not infringing your work (“noninfringement”). If this is the case, please find specific information in the [Responding to an Infringement Claim](#) and [Responding to a Claim Requesting a Declaration of Noninfringement chapters](#).

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. The CCB will issue separate determinations for each proceeding, meaning that the \$30,000 overall cap will apply to each proceeding within the consolidated proceeding, with separate financial awards (if any). You can find more information about consolidation in the [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.
- **Counterclaim:** Similar to a claim, a counterclaim is a set of facts that allows you to enforce your rights against the claimant in the same proceeding as long as it arises out of the same facts and circumstances as the claim.
- **Discovery:** The process by which the parties exchange information and documents relevant to the issues in a case.
- **eCCB:** The CCB's electronic filing and case management system.
- **Material:** Important or significant.
- **Misrepresentation:** A false statement in a takedown notice or counter-notice made with knowledge that it is false and that causes an online service provider to remove or repost the allegedly infringing online content.
- **Pro bono:** Legal services without a charge for the lawyer's or law student's 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.