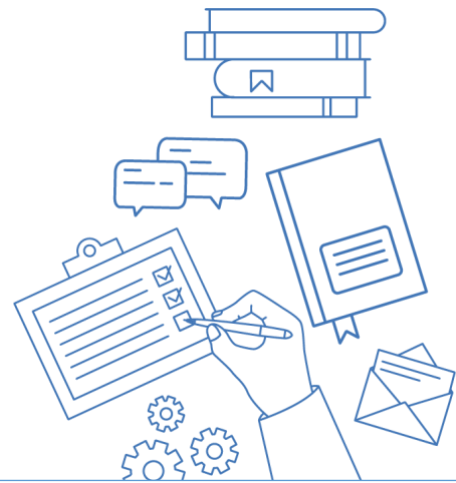


# CCB HANDBOOK

## Damages

A CCB determination of infringement or misrepresentation may include an award of money that the respondent or counterclaim respondent has to pay to the claimant or counterclaimant. This chapter describes the limits on these awards, called “damages,” and some issues you may want to raise when the CCB is deciding whether to and how much to award as damages.



## Chapter at a Glance

- Damages for Infringement
- Damages for Misrepresentation
- Other Forms of Relief

## Why You Need This Information

Most claims before the CCB include a claim for damages. Parties in a CCB proceeding need to know how much money is at stake in their claim and how to present a case for or against a damages award. This chapter will explain the limits on the amount and kinds of damages the CCB can award and the types of evidence that may support a bigger or smaller award.

## Quick Summary of Damages before the CCB

- Damages are available for a claim of copyright infringement or misrepresentation but not for a declaration of noninfringement.
- The most the CCB can order a respondent to pay in damages is \$30,000. In a “smaller claims” track proceeding, the damages are capped at \$5,000. **If you are in a “smaller claims” proceeding, all caps discussed in this chapter automatically change to \$5,000.** See the [Smaller Claims](#) chapter in this Handbook for other differences between standard CCB proceedings and smaller claims track proceedings.

### WHERE YOU ARE IN A CCB PROCEEDING:

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

- A claimant bringing an infringement claim can seek an award of **actual damages** and the infringer’s profits, **statutory damages**, or no damages. The claimant must choose which type of awards they are seeking before the Board makes its final determination, and they should do this no later than when the claimant submits their written testimony in the proceeding. Statutory damages are capped at \$15,000 per infringed work (not per infringement) or \$7,500 if the work wasn’t timely registered (as described below under “Statutory Damages”).
- Actual damages are based on the loss or harm caused by the infringement or misrepresentation. In infringement cases, profits the infringer gained because of the infringement may be added to actual damages as long as there is no double counting of the same amounts. For example, a claimant’s lost profits may be included in a damages award, but to the extent that the respondent sold infringing copies to purchasers who otherwise would have purchased copies from the claimant, the claimant may not recover both those lost profits and the respondent’s profits.
- For an infringement claim, the CCB may award statutory damages up to \$15,000 per work if timely registered or up to \$7,500 per work if not, in an amount that the CCB considers just. Statutory damages do not require proof of harm, but they generally have some relationship to actual damages. If you are a claimant, you will want to provide evidence regarding actual damages even if statutory damages are chosen. If you are a respondent, you will want to provide evidence showing why claimant is not entitled to any or less damages.
- The kinds of damages the CCB can award are limited to the ones described above. Monetary awards are *not* granted for things like, for example, punitive damages, interest, claims of physical or mental harm, lost wages, or harm to a brand.

## Damages for Infringement

If you are a claimant or counterclaimant in an infringement claim, *you have to* elect the kind of damages - an award of actual damages and profits, an award of statutory damages, or not to recover damages - that you want at any point before the final determination, but you *should* (i.e., you don’t really have to, but it’s strongly recommended) do so no later than when you submit your written testimony.

### Choosing Actual Damages and Infringer’s Profits

A claimant or counterclaimant who proves infringement may be awarded their actual damages and the profits of the infringer attributable to the infringement.

Actual damages are awarded based on the proven harm or loss suffered. Examples of actual damages include the amount of lost sales or licensing revenue the copyright owner experienced. The simplest and most common example is a claimant who typically charges a specific amount to license the work in question—or very similar works—to be used similarly to how the infringer used the work. Because the infringer did not pay the standard license fee, the claimant lost that specific amount of dollars.

An award can also include any profits the infringing respondent made from the infringement, to the extent that they are not taken into account in calculating the actual damages (for example, by awarding a claimant both damages based on the claimant’s lost profits and the respondents’ profits based on sales to the claimant’s customers). To prove the respondent’s profits resulting from the infringement, the copyright owner only needs to present evidence showing the infringer’s gross revenue from the infringement. Evidence may include money the respondent received for selling or distributing a work that uses the infringed work to the public. Or, if the respondent advertised a product using the infringed

work, evidence could include the respondent's revenues for the sale of the product, depending on how directly related the sales were to the advertisement.

The respondent then must present evidence to prove any deductions that would reduce the profits the respondent made from the infringement. Examples of this may include the respondent's expenses related to the infringement or factors that contributed to the respondent's revenues other than the infringement.

***Example:** Joe makes a movie using Mary's screenplay without permission and is found liable for infringement. If Mary is seeking Joe's profits, she can show how much Joe made in ticket sales for the movie. Joe can then show how much it cost him to make the movie and can present reasons why someone might have bought tickets to the movie for reasons not related to the infringement (for instance, that the movie had a famous director or cast member with a strong following).*

**It is important that you present all of the relevant evidence you can to show damages or lack of damages.** The CCB can only make a determination based on the information provided to it by the parties. In certain circumstances, the CCB might order a party or parties to submit additional information or might hold a hearing giving you additional opportunities to submit information, **but you should not count on this.**

Therefore, if you are a claimant or counterclaimant, you should submit a witness statement from yourself and anyone else who has relevant information to explain how you were harmed, what license fees or other money you have lost, and any information you have about what the alleged infringer earned as a result of the infringement. You should also submit the evidence of such harm, such as actual licenses you've entered into regarding similar uses of the work or similar works.

If you are a respondent or counterclaim respondent, you should submit a witness statement from yourself and anyone else who has relevant information to explain why the claimant did not suffer losses or suffered fewer losses than they assert, what your expenses were, and in what ways any revenues you received were the result of factors other than the infringement. You should also submit any evidence supporting that statement.

***Example:** The sponsor of a marathon hired Eleanor to photograph female runners in the race for use on the sponsor's website. Several years after she took the photographs, Eleanor adds them to her database of stock photography, where anyone can license any of the photos. Eleanor learns that a well-known manufacturer of sneakers is using two of Eleanor's marathon photos to promote the sale of its sneakers. To prove her damages, Eleanor should submit the license fees she usually charges for the marathon pictures or other similar pictures. She should also submit a witness statement that explains how her license fees work. The sneaker manufacturer will need to provide its gross revenues for the shoe sales while using Eleanor's work but may also submit evidence showing that the sales of its sneakers are driven by the fact that they are endorsed by a celebrity athlete and the quality of the sneaker rather than the use of the infringing photos.*

If you are a respondent or counterclaim respondent, you should also consider whether to agree that, if the CCB determines you are liable for infringement, you will stop—or **"mitigate"**—the infringing activity. You will need to make such a statement no later than when you submit your written response testimony. The CCB will not consider this statement in determining if there is liability. But if liability is found, the CCB may, in its discretion, reduce damages based on a respondent's agreement to stop or mitigate infringing activity. More information about gathering and submitting evidence of damages and profits can be found in the [Presenting Your Case](#) chapter.

## Statutory Damages

Statutory damages—money damages awarded to a successful claimant in an amount that the CCB considers just based upon the evidence and the limits set by law—are an alternative to actual damages and infringer profits. They are awarded *instead* of actual damages and infringer profits if the claimant chooses statutory damages before the final determination is issued. Statutory damages are not necessarily higher than actual damages, but they are available and can be especially useful when the amount of actual damages or profits caused by the infringement is hard to prove.

While statutory damages do not require proof of the actual amount of harm or loss, the amount of statutory damages is often related to actual damages or infringer profits. **The parties should present any evidence they have of actual damages or infringer profits (or the lack thereof), even if the claimant or counterclaimant seeks statutory damages.** Because the CCB is prohibited from considering willfulness in a damage determination, the CCB award may be closer to the statutory damages floor (typically \$750) than the upper limit (cap) if there is no evidence of actual damages or infringer profits.

The upper limit (cap) of statutory damages available depends on when the work in question was registered.

If the copyright was registered within three months of first publication of your work or before the infringement started . . .	If the copyright was registered more than three months after publication and after the infringement started . . .
<ul style="list-style-type: none"><li>• \$15,000 per infringed work</li><li>• \$30,000 per proceeding</li></ul>	<ul style="list-style-type: none"><li>• \$7,500 per infringed work</li><li>• \$15,000 per proceeding</li></ul>

The CCB cannot consider whether the infringement was committed willfully or intentionally when determining the amount of damages. That means a copyright owner does not need to prove what the infringer knew or believed about the infringement to get an appropriate award of damages from the CCB. It also means the CCB will not increase the award based on the infringer’s state of mind. Similarly, the CCB cannot award punitive damages.

The lower limit for a statutory damages award is \$750 per work in most cases. However, the award may be as low as \$200 per work if the CCB finds that the infringer was not aware and had no reason to believe their acts were an infringement of copyright. This is sometimes referred to as “innocent infringement.” The alleged infringer has the burden of proving innocent infringement. This is not an easy burden to meet, as the innocent infringer standard requires more than stating that you didn’t know the law or showing that the work was available online without a copyright symbol or the copyright owner’s name.

Just as for actual damages and infringer profits, the CCB can consider an agreement by the respondent to stop the infringing activity or to change or mitigate it.

## Damages for Misrepresentation

Misrepresentation claimants or counterclaimants must prove they were actually harmed as a result of a service provider taking down or reposting material based on the misrepresentation in a takedown notice or counter notification. The damages awarded for misrepresentation are always actual damages—statutory

damages are not available in a misrepresentation claim. The most the CCB can award for section 512(f) misrepresentation is \$30,000.

The CCB can order a respondent or counterclaim respondent who is found liable for a misrepresentation under section 512(f) to pay the damages actually suffered as a result of a misrepresentation by

- an alleged infringer,
- a copyright owner, or
- a copyright owner's authorized licensee.

Parties may present evidence of the harm suffered, including any loss in actual or expected revenue. The amount of that harm suffered is not always easy to calculate or quantify. The parties may also present evidence that can indirectly indicate the amount of damages, such as any commercial advantage gained or sought by the person making the misrepresentation or the size of the audience for the online material taken down or restored based on the misrepresentation.

***Example:** Elizabeth sells shirts with a unique turtle design she created on her Etsy storefront. She had been selling about seventy shirts with the turtle design per month. Several months later, she discovers that Victor is selling shirts with the same design on his Etsy store and sends a takedown notice to Etsy. Etsy disables Victor's store where he is selling the infringing shirts and notifies Victor of the complaint. Victor then sends a counter-notice to Etsy, which contains the misrepresentation that Victor independently created the design on the shirts. Relying on Victor's misrepresentation, Etsy reinstates Victor's store, and Victor continues to sell the infringing shirts.*

*Elizabeth's sales have since dropped to forty shirts per month. Elizabeth brings a claim against Victor for misrepresentation before the CCB. To prove damages, Elizabeth should submit evidence of her sales of the turtle shirts before and after Victor's infringement. Elizabeth should submit a witness statement explaining the submitted sales information and how her sales have dropped as a result of Victor's infringement. Victor should submit evidence showing Elizabeth's sales have dropped not because of his actions but for some other reason, like the fact that Elizabeth changed the color or sizes of her shirts.*

## Other Forms of Relief

Other than damages, three types of relief are available from the CCB: (1) a declaration of noninfringement, (2) an order that the respondent (or counterclaim respondent) must stop certain activities when the alleged infringer agrees, or (3) in cases of "bad faith," a limited award of attorneys' fees and costs.

### Declaration of Noninfringement

The CCB cannot award damages on a noninfringement claim or counterclaim. Instead, the Board may issue a declaration that certain material or activity was not an infringement. More information is available in the [Starting a Noninfringement Claim](#) chapter.

### Agreement to Stop Certain Activity

The Board cannot order a party to cease or modify its wrongful activity unless the party has agreed to it.

- A party may agree to stop allegedly infringing activity in the event that the party is found to be an infringer. That could include an agreement to remove, disable access to, or destroy the infringing materials.

- A party may agree to stop sending notices or counter-notices about the allegedly infringing materials in the event that the party is found to have made a misrepresentation in a takedown notice or counter-notice.

The CCB may then include in its final determination a requirement that the party cease or modify its activity accordingly. A party may decide to agree to cease or modify infringing activity in part because the CCB can consider that agreement when deciding the amount of damages to award in an infringement proceeding. Respondents should let the CCB know they would agree to cease or modify their activity *if* found liable for infringement no later than when they submit their written response testimony.

## Attorneys' Fees and Costs

As a general rule, a party is responsible for its own attorneys' fees and costs related to a CCB proceeding. But a party that the CCB determines acted in "**bad faith**" may be required to cover the other party's attorneys' fees and costs up to a certain amount. Bad-faith conduct includes making a claim, counterclaim, or defense or taking any actions in support of a claim, counterclaim, or defense

- for some inappropriate purpose, such as to harass someone; or
- without a reasonable factual or legal basis.

If a party harmed by the bad-faith conduct has an attorney, then the attorneys' fees and costs that can be recovered by that party are typically capped at \$5,000. Costs can include fees paid other than attorneys' fees, such as the cost of filing the CCB claim or costs associated with hiring a process server. Parties who did not have an attorney representing them can only receive costs, and they are typically capped at \$2,500. The CCB may raise these caps in extraordinary circumstances, such as when it finds a party has engaged in a pattern of bad faith.

A bad-faith finding is not likely just because a party lost its claim or defense before the CCB. The CCB must make a specific finding that a party has acted in bad faith after giving that party an opportunity to respond to an allegation by another party that there has been bad faith or an order from the CCB that raises the possibility of bad faith. More information about bad-faith conduct is available in the [Participant Conduct](#) and [Representative Conduct](#) chapters.

## Other Monetary Harm

You should be aware that the CCB is not only limited by the amount of damages it is permitted to award but also by the kinds of damages it can award. The CCB is authorized to award damages for copyright infringement and misrepresentation. It cannot, for example, make an award based on trademark claims like harm to your brand or as a result of confusion between your work and the alleged infringer's work. The CCB also is not authorized to award damages for emotional distress or physical harm. Similarly, the CCB cannot grant damages based on lost wages or other employment-related harms.

Finally, the CCB cannot award interest on the amount you are awarded, and it cannot award attorneys' fees or costs unless a finding of bad faith has been made against the opposing party.

***Example:** Anthony creates a video and posts it on his YouTube channel. He earns revenue based on the number of views and comments on his video. He learns that Ann has made an identical copy of his video, which she posts on her YouTube channel. Anthony sends a takedown notice to YouTube, and Ann's video is temporarily taken down. Subsequently, Ann sends a counter-notice to YouTube, and they repost her video. Ann also starts criticizing Anthony for his takedown notice on her YouTube channel, which results in Anthony getting nasty comments on YouTube and his other social media accounts.*

*Anthony brings a claim for infringement against Ann and seeks compensation for the time he lost trying to remove Ann’s video from YouTube. He also seeks damages for the emotional distress and reputational harm he suffered from the nasty comments he is receiving on his social media accounts as well as his concern that Ann had combined his video with videos of lesser quality.*

*Anthony cannot recover damages for either his lost time or the emotional distress he suffered. He would potentially be able to recover the lost revenues that were caused by Ann’s infringement, which resulted in fewer viewers and comments on his YouTube channel and any profits Ann may have earned due to her use of Anthony’s video on her channel.*

## Glossary

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- **Actual damages:** Money awarded based on the harm the claimant or counterclaimant suffered.
- **Bad faith:** A finding that a party has made a claim, counterclaim, or defense or taken any actions in support of a claim, counterclaim, or defense for some inappropriate purpose, such as to harass someone, or without a reasonable factual or legal basis.
- **Mitigate:** To lessen the extent or impact of the infringing activity.
- **Statutory damages:** An alternative to actual damages, allowing a successful claimant or counterclaimant to receive an award in an amount within a set range that the court or the CCB considers just.