

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

KARIM ELSAMMAK,

Plaintiff,

v.

ATP FLIGHT ACADEMY, LLC d/b/a ATP  
FLIGHT SCHOOL, ATP HOLDINGS, INC., AND  
DOES 1-10

Defendants.

Case No. 1:24-cv-07946

**MOTION TO DISMISS AND TO STRIKE DEMAND  
FOR STATUTORY DAMAGES AND ATTORNEY’S FEES**

Defendants, ATP FLIGHT ACADEMY, LLC d/b/a ATP FLIGHT SCHOOL, and ATP HOLDINGS, INC., by its attorneys Peter Brown & Associates PLLC and Conwell Business Law LLLC, pursuant to Rules 12(b)(6) and 12(f) Fed. R. Civ. P., move to dismiss the Complaint. The Complaint fails to state a claim upon which relief can be granted and seeks statutory damages and attorney’s fees that are not available to the Plaintiff under the Copyright Act.

**I. THE ALLEGATIONS OF THE COMPLAINT**

Defendants and their affiliated entities are collectively the largest private flight training company in the United States, with over 80 flight training locations. Defendants are the leading private supplier of professionally trained pilots in the U.S., and they are the top supplier of trained pilots to U.S. regional airlines. The Complaint (“Cmp.”) alleges that the Plaintiff graduated from the Defendants’ flight school in 2015 and became a commercial airline pilot. (Cmp. ¶¶’s 2 and 23) In 2018 he took a photograph of himself in a pilot uniform sitting in the pilot’s seat of an airplane. (Cmp. ¶24) On October 1, 2018, he published the photograph. (Cmp. Exh. 1) On September 4, 2019, Plaintiff sent the photograph to ATP to be displayed at an event

of the ATP Alumni Association recognizing the accomplishments of ATP alumni. (Cmp. ¶28) The event was to be held on September 25, 2019, at the American Airlines Museum (Cmp. ¶28) Plaintiff does not state or make any legal claim that he placed any restrictions on the use of the photograph during or after the alumni event. At some time after that (the Complaint does not allege when) Defendants reproduced, publicly displayed, and distributed the photograph on social media sites, including Youtube.com. (Cmp. ¶32) At some time after that (the Complaint does not allege when) Plaintiff provided notice to ATP of its infringement but Defendants continued to infringe. (Cmp. ¶37). Plaintiff alleges that the photograph was used in “marketing materials” but fails to identify when or where this alleged infringement occurred. (Cmp. ¶38). In addition, Plaintiff alleges “damage to his reputation by falsely suggesting that he endorses Defendant’s services...” (Cmp. ¶38). On October 11, 2024, Plaintiff registered his copyright in the photograph. (Cmp. Exh. 1) On November 14, 2024, Plaintiff filed this suit.

Plaintiff purports to allege two causes of action. The first, entitled “Declaration of Copyright Infringement Under 28 U.S.C. §2201 et. seq.; 17 U.S.C. §101 et. seq.” seeks “a declaration that Defendants have infringed his exclusive rights in the Subject Photo and the Asserted Registration under the Copyright Act, and that such infringement was willful.” (Cmp. ¶¶’s 3, 52; Prayer for Relief, ¶A). Plaintiff demands an award of “statutory damages ... up to \$150,000” and his attorneys fees under 17 U.S.C. §505. (Cmp. ¶¶’s 50 and 53; Prayer for Relief, ¶¶’s D and I) and “his lost profits.” (Cmp.¶51) ¶Plaintiff also demands a permanent injunction enjoining the Defendants from “using the Subject Photo in any of their advertising or marketing materials.” (Cmp. Prayer for Relief, ¶E)

The second count, entitled, “Invasion of Privacy Under New York Civil Rights Law §51,” alleges, inter alia, that Defendants “invaded Plaintiff’s privacy by appropriating his name,

image and likeness for their own commercial benefit” and “used Plaintiff’s name, portrait, picture, likeness or voice for the purpose of trade without written consent from him by using the Subject Photo in their online advertisements.” (Cmp. ¶¶’s 56-57) Plaintiff seeks a “judgment declaring that Defendants’ use of the Subject Photo in its advertising has invaded and continues to invade his privacy.”(Cmp. ¶¶’s 3, 64) Plaintiff further requests an award of compensatory and exemplary damages. (Cmp. ¶¶65; Prayer for Relief, ¶H)

## **II. ARGUMENT**

### **A. The Standard on a Motion to Dismiss and to Strike.**

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’ Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Twombly*, 550 U.S. at 555; 127 S. Ct. 1955.

The allegations made in a complaint must be both “sufficiently detailed to give fair notice to the opposing party of the nature of the claim so that the party may effectively defend against it” and “sufficiently plausible” such that “it is not unfair to require the opposing party to be subjected to the expense of discovery.” *Twombly*, 550 U.S. at 556-58. “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. at 678, 129 S. Ct. at 1937; *Hayden v. Patterson*, 594 F. 3d 150, 161(2d Cir. 2010).

Under Federal Rule of Civil Procedure 12(f) a court “may strike from a pleading ... any

redundant, immaterial, impertinent, or scandalous matter.” “Although motions to strike under Rule 12(f) are generally disfavored and granted only if there is strong reason to do so, ample authority permits striking prayers for [ ] damages when such relief is unavailable as a matter of law.” *Berkley v. City of New Rochelle*, No. 21-cv-578, 2022 WL 784018, at \*6, 2022 U.S. Dist. LEXIS 46069 (S.D.N.Y. Mar. 15, 2022).

**B. Count I fails to state a claim upon which relief can be granted under the Declaratory Judgment Act.**

Count I fails to state a claim upon which relief can be granted. “A properly plead[ed] copyright infringement claim must allege (1) which specific original works are the subject of the copyright claim, (2) that plaintiff owns the copyrights in those works, (3) that the copyrights have been registered in accordance with the statute, and (4) by what acts during what time the defendant infringed the copyright.” *Warren v. John Wiley & Sons, Inc.*, 952 F. Supp. 2d 610, 616 (S.D.N.Y. 2013) (quoting *Kelly v. L.L. Cool J.*, 145 F.R.D. 32, 36 (S.D.N.Y. 1992)) (emphasis added). *Accord Kuklachev v. Gelfman*, 600 F. Supp. 2d 437, 473 (E.D.N.Y. 2009). The Complaint fails to allege specifically when the defendants infringed his copyright other than its implication that it was sometime after Elsammak voluntarily provided the photograph to the Defendants in 2019. That is not sufficient under *Warren*.

Count I also fails to state a claim upon which relief can be granted to the extent it relies on an infringement of the “Asserted Registration,” rather than the photograph at issue. (Cmp. ¶48). The “Asserted Registration” is alleged to be a U.S. Copyright Registration. (Cmp. ¶26) The Registration is embodied in a registration certificate created by the United States Copyright Office. Plaintiff did not author the Copyright Registration nor allege that he did so. Count I, therefore, fails to state a claim for copyright infringement of the “Asserted Registration” or a declaration of infringement. *See, Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340

(1991); *Jorgensen v. Epic/Sony Recs.*, 351 F.3d 46, 51 (2d Cir. 2003) (To state a claim of copyright infringement a plaintiff must establish ownership of a valid copyright and that the defendant violated an exclusive right conferred by the ownership.)

Count I also purports to state a claim for a declaration of infringement of copyright in the subject picture under the Declaratory Judgment Act. This Court has recognized causes of action for a declaration of non-infringement of copyright and for a declaration that threatened future conduct would infringe copyright. *Prudent Pub. Co., Inc. v. Myron Mfg. Corp.*, 722 F. Supp 17, 21-22 (S.D.N.Y. 1989) (“The Declaratory Judgment Act is frequently applied in ...copyright infringement actions by the party threatened by an infringement suit seeks a declaration that he is not infringing or as to the validity of the registration.”); *Southern Music Pub. Co. v. C & C Films, Inc.*, 171 F. Supp. 832, 833 (S.D. New York 1959) (recognizing cause of action to enjoin a threatened infringement of copyright under the Declaratory Judgment Act) A claim seeking a declaration of *past* infringement of copyright under the Declaratory Judgment Act, however, does not state a cause of action but merely seeks a type of remedy for copyright infringement. *Gentile v. Crededio*, 2023 WL 2744413, Case No. 1:21-cv-08528-LTS, \*3, N. 2 (S.D. N.Y. March 31, 2023).

Count I also seeks to recover Plaintiff’s “damages based on his lost profits.” (Cmp. ¶51). No facts are pled to support a claim of lost profits, in violation of the pleading requirements of *Iqbal*. The Complaint is devoid of any allegation that the photograph at issue has any commercial value, that the commercial value was impaired or that the Plaintiff ever used the photograph to make a profit. Plaintiff’s claim for “his lost profits” should be dismissed under *Iqbal*.

**C. Plaintiff does not have a right to recover statutory damages or attorneys' fees under the Copyright Act.**

17 U.S.C. §412 provides that “no award of statutory damages or of attorney’s fees, as provided by sections 504 and 505, shall be made for ... any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.” Plaintiff, therefore, does not have a right to statutory damages or attorney’s fees under the Copyright Act because infringement of the photograph at issue is alleged to have occurred after the date of first publication of the photograph on October 1, 2018, and before the effective date of the registration on October 11, 2024. Plaintiff’s demands for statutory damages and attorney’s fees, therefore, must be stricken.

**D. Count II brought under New York Civil Rights Law Section 51 fails to allege that Plaintiff sustained injuries by reason of the use of his picture.**

The plausibility standard for pleading a cause of action “does not require ‘detailed factual allegations,’ but it demands more than ... unadorned, the-defendant-unlawfully-harmed-me accusation[s].” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)(quoting *Twombly*, 550 U.S. at 555). This, however, is what Elsammak has done in Count II of the Complaint wherein he requests compensatory damages under New York Civil Rights §51 for the use of his picture online. Section 51 provides that the claimant “may also sue and recover damages for any injuries sustained by such use.” Plaintiff, however, failed to allege that he in fact sustained any injuries, thereby failing the *Iqbal* test.

Nor could Plaintiff make that allegation consistent with Rule 11 Fed. R. Civ. P because his privacy has not been invaded and he has not suffered any damage. Elsammak has previously created a significant online presence, including pictures and videos of himself making favorable

statements regarding the quality of the training he received at Defendants' flight school. One of Elsammak's earlier efforts to do so was a blog that he posted online in February 2015, chronicling his entry into aviation and containing pictures of him in a cockpit: [Adventures of Cap'n AuxFFF: Karim Elsammak! — Adventures of Cap'n Aux](#), attached as Exhibit A. His blog includes a boast by Elsammak that he is enrolled in ATP flight school.

On August 24, 2015, Plaintiff submitted a review to the ATP website which was an enthusiastic testimonial endorsing the quality of ATP's training, where he stated:

“The ISP [ATP Training Center] training team is absolutely phenomenal, you can really see how dedicated they are to ensuring my success. My specific instructor Freddy [Freddy Cabrera, ATP Flight Instructor] has been more than attentive to my success and I never felt like he wasn't there ready to help me when needed.”  
<https://secure.atpflightschool.com/Testimonials/read/2156><sup>1</sup>

Plaintiff's ringing endorsement of Defendant's services has been posted continuously since 2015 without objection. Indeed, it is the first item which appears on a Google search of Mr. Elsammak's name.

On another website Elsammak recently posted a video of himself as a young voice for Arab Americans publicly endorsing Donald Trump for president:

[https://x.com/CollinRugg/status/1853524400072741107?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1853524400072741107%7Ctwgr%5Ed1485f69e7078d9eb343d581a4a14f9387291dce%7Ctwcon%5Es1\\_c10&ref\\_url=https%3A%2F%2Ftjvnews.com%2F2024%2F11%2Fyoung-muslim-leader-endorses-trump-as-candidate-of-peace-over-kamala-harris-and-liz-cheney-s-endless-baseless-wars%2F](https://x.com/CollinRugg/status/1853524400072741107?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1853524400072741107%7Ctwgr%5Ed1485f69e7078d9eb343d581a4a14f9387291dce%7Ctwcon%5Es1_c10&ref_url=https%3A%2F%2Ftjvnews.com%2F2024%2F11%2Fyoung-muslim-leader-endorses-trump-as-candidate-of-peace-over-kamala-harris-and-liz-cheney-s-endless-baseless-wars%2F) [Young Muslim Leader Endorses Trump as 'Candidate of Peace' over Kamala Harris and Liz Cheney's 'Endless Baseless Wars' - The Jewish Voice](#), attached as Exhibit B.

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<sup>1</sup> A true and correct copy of the page from the website is attached as Exhibit A. Rule 12(b) gives district courts the option to consider matters outside the Complaint and its attached exhibits by converting the motion to dismiss to one for summary judgment under Fed.R.Civ.P. 56 and afford all parties the opportunity to present supporting material. *Kopec v. Coughlin*, 922 F.2d 152, 154 (2d Cir.1991)

On March 12, 2022, Elsammak announced his candidacy for New York State Senate District 22, and he is pictured and quoted in a plethora of websites covering his campaign for political office. *See*, for example: [Pilot charts new course as State Senate candidate - The Brooklyn Home Reporter](#), attached as Exhibit C. Elsammak has sought the public spotlight and, therefore, cannot in good faith allege that the posting of his picture on a website invaded his privacy or caused him to suffer any injury.

Nor can Elsammak allege commercial injury from the use of his picture. He does not allege that in the seven years since he photographed himself in a cockpit, he made any commercial use of the picture. Nor does he allege that he was earning income from the picture and that the Defendants caused him to stop earning income. This appears to be nothing more than a photograph that Elsammak made on his cell phone and sent to the Defendants knowing and intending it to be publicly displayed without restrictions. In the absence of any specific, non-conclusory allegation of actual injury, Elsammak has not stated a claim under Section 51 for compensatory damages.

### **III. CONCLUSION**

Counts I and II should be dismissed and/or Plaintiff's demands for statutory damages and attorney's fees under the Copyright Act should be stricken. In the event Plaintiff's copyright cause of action is dismissed, Defendants request that they be awarded attorney fees as the prevailing party pursuant to 17 U.S. Code § 505 and be awarded such other and further

relief as the Court deems just and proper.

Dated: New York, New York  
February 7, 2025

Respectfully submitted,

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*s/ Peter Brown*  
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(*Pro hac vice* application pending)

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 7<sup>th</sup> day of February 2025, I electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using CM/ECF, which will send an Electronic Mail notification of same to all counsel of record.

*/s/ Peter Brown* \_\_\_\_\_