

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

PAUL MARTINKA,

Plaintiff,

v.

NEW TANG DYNASTY TELEVISION INC.

Defendant.

Docket No. 1:19-cv-05170-JMF

**DEFENDANT NEW TANG DYNASTY  
TELEVISION, INC.'S ANSWER TO  
AMENDED COMPLAINT**

**JURY TRIAL DEMANDED**

Defendant New Tang Dynasty Television Inc. (“Defendant”) submits its Answer to Plaintiff’s First Amended Complaint as follows:

**NATURE OF THE ACTION**

1. This is an action for copyright infringement under Section 501 of the Copyright Act. This action arises out of Defendant’s unauthorized reproduction and public display of copyrighted photographs of a hawk in Brooklyn, owned and registered by Martinka, a New York based professional photographer. Accordingly, Martinka seeks monetary relief under the Copyright Act of the United States, as amended, 17 U.S.C. § 101 *et seq.*

**Answer:** Admits that Plaintiff has couched this lawsuit as an action for copyright infringement under Section 501 of the Copyright Act and that Plaintiff seeks monetary relief under 17 U.S.C. § 101 *et seq.* Denies the validity of Plaintiff’s allegations and that Plaintiff is entitled to any monetary relief. Denies the remaining allegations.

**JURISDICTION AND VENUE**

2. This claim arises under the Copyright Act, 17 U.S.C. § 101 *et seq.*, and this Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1338(a).

**Answer:** Admits that Plaintiff purports to bring a claim under the Copyright act and that there is federal jurisdiction. Deny that the claims are valid.

3. Upon information and belief, this Court has personal jurisdiction over Defendant because Defendant resides and/or transacts business in New York.

**Answer:** Admits that named Defendant is listed with the New York Department of State Division of Corporations as residing in New York. Denies the remaining allegations.

4. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b).

**Answer:** Admits that venue is proper because named Defendant is listed as residing in this District with the New York Department of State Division of Corporations.

### **PARTIES**

5. Martinka is a professional photographer in the business of licensing his photographs to print and online media for a fee having a usual place of business at 593 Vanderbilt Avenue, Suite 151, Brooklyn, New York 11238.

**Answer:** Admits that Plaintiff purports to be a professional photographer having a usual place of business in Brooklyn. Without sufficient information as to the remaining allegations, so denies.

6. Upon information and belief, New Tang is a domestic business corporation duly organized and existing under the laws of the State of New York, with a place of business at 229 W. 28th Street, 7th Floor, New York, New York 10001.

**Answer:** Admits that named Defendant was registered as a domestic business corporation with the New York Department of State Division of Corporations with a place of business at the above listed address. Denies the remaining allegations.

7. Upon information and belief, Dynasty is registered with the New York Department of State Division of Corporation to do business in the State of New York.

**Answer:** Admits that named Defendant is registered to do business in the State of New York with the New York Department of State Division of Corporations. Denies that named Defendant actually does any business in the State of New York.

8. At all times material hereto, New Tang has owned and operated a website at the URL: www.NTD.com (the “Website”).

**Answer:** Denies.

9. New Tang is a for-profit entity.

**Answer:** Denies.

10. New Tang is in the business of publishing news content.

**Answer:** Denies.

### **STATEMENT OF FACTS**

#### **A. Background and Plaintiff’s Ownership of the Photographs**

11. Martinka photographed a hawk in Brooklyn (the “Photographs”). A true and correct copy of the Photographs is attached hereto as Exhibit A.

**Answer:** Admits that Exhibit A purports to be photographs of a hawk, without sufficient information as to the authorship of the Photographs, so denies.

12. Martinka then licensed the Photographs to the New York Post.

**Answer:** Without sufficient information as to the foregoing, so denies.

13. On January 23, 2019, the New York Post published the Photographs in an article entitled “NYPD cops rescue hawk stuck in middle of Brooklyn intersection.” *See* URL <https://nypost.com/2019/01/23/nypd-cops-rescue-hawk-stuck-in-middle-of-brooklyn-intersection/>,

Attached as Exhibit B, a true and correct copy of the New York Post article (the “New York Post Article”).

**Answer:** Admits that Exhibit B purports to be an article published by the New York Post, and that the photographs in Exhibit B appear to be similar to the photographs in Exhibit A. Without sufficient information as to the remaining allegations, so denies.

14. Martinka is the author of the Photographs and has at all times been the sole owner of all right, title and interest in and to the Photographs, including the copyright thereto.

**Answer:** Without sufficient information as to the foregoing, so denies.

15. The Photographs were registered with United States Copyright Office and were given Copyright Registration Number VA 2-144-517. Attached as Exhibit C is a true and correct copy of the registration, as it appears on the U.S. Copyright Office’s website.

**Answer:** Admits that Exhibit C shows the Public Catalog for Copyright Registration Number VA0002144517. Without sufficient information as to the validity of the registration and ownership, so denies.

**B. Defendant’s Alleged Infringing Activities**

16. On January 28, 2019, New Tang ran an article on the website entitled *NYPD Saves Injured Hawk Struck in the Middle of Brooklyn Traffic*. See: [https://www.ntd.com/nypd-saves-injured-hawk-struck-in-the-middle-of-brooklyn-traffic\\_282249.html](https://www.ntd.com/nypd-saves-injured-hawk-struck-in-the-middle-of-brooklyn-traffic_282249.html). (the “Infringing Article”). The Infringing Article prominently displayed the Photographs. Screenshots of the Photographs on the Website are attached hereto as Exhibit D.

**Answer:** Admits that the URL linked above directs the user to an article titled “NYPD Saves Injured Hawk Struck in the Middle of Brooklyn Traffic” and that Exhibit D contains screenshots that show a portion of the foregoing article. Denies the remaining allegations.

17. New Tang also displayed the Photographs in a video on its Website.

**Answer:** Admits that a video is embedded in the article featured at the URL linked in paragraph 16 above, and that the video includes several still frames showing the red-shouldered hawk discussed in the body of the article. Denies the remaining allegations.

18. New Tang did not license the Photographs from Plaintiff for its article, nor did New Tang have Plaintiff's permission or consent to publish the Photographs on its Website.

**Answer:** Admits that named Defendant did not secure a license or seek permission from Plaintiff in order to publish the Article featured at the URL linked in paragraph 16 above. Denies the remaining allegations.

19. On New Tang's Website, commercial advertisements were featured adjacent to the display of the Photographs.

**Answer:** Denies.

20. Defendant's Infringing Article does nothing more than use the Photographs to illustrate the same subject matter reported in the New York Post Article.

**Answer:** Denies.

21. Defendant used the Photographs for the exact same purpose they were created: commercial news reporting.

**Answer:** Denies.

**CLAIM FOR RELIEF**  
**(COPYRIGHT INFRINGEMENT AGAINST DEFENDANT)**  
**(17 U.S.C. §§ 106, 501)**

22. Plaintiff incorporates by reference each and every allegation contained in Paragraphs 1-21 above.

**Answer:** Defendant restates its answers to paragraphs 1 through 21 above.

23. New Tang infringed Plaintiff's copyright in the Photographs by reproducing and publicly displaying the Photographs on the Website.

**Answer:** Denies.

24. New Tang is not, and has never been, licensed or otherwise authorized to reproduce, publicly display, distribute and/or use the Photographs.

**Answer:** Admits that Defendant has not sought or received a license or authorization from Plaintiff, but Denies that such a license or authorization is necessary.

25. The acts of Defendant complained of herein constitute infringement of Plaintiff's copyright and exclusive rights under copyright in violation of Sections 106 and 501 of the Copyright Act, 17 U.S.C. §§ 106 and 501.

**Answer:** Denies.

26. Upon information and belief, the foregoing acts of infringement by New Tang have been willful, intentional, and purposeful, in disregard of and indifference to Plaintiff's rights.

**Answer:** Denies.

27. As a direct and proximate cause of the infringement by the Defendant of Plaintiff's copyright and exclusive rights under copyright, Plaintiff is entitled to damages and Defendant's profits pursuant to 17 U.S.C. § 504(b) for the infringement.

**Answer:** Denies.

28. Alternatively, Plaintiff is entitled to statutory damages up to \$150,000 per work infringed for Defendant's willful infringement of the Photographs, pursuant to 17 U.S.C. § 504(c).

**Answer:** Denies.

29. Plaintiff further is entitled to his attorney's fees and full costs pursuant to 17 U.S.C. § 505.

**Answer:** Denies.

**RESPONSE TO PRAYER FOR RELIEF**

30. Defendant denies that Plaintiff is entitled to any of the relief set forth in its “Prayer for Relief.”

**RESPONSE TO PLAINTIFF’S DEMAND FOR JURY TRIAL**

31. Defendant admits that Plaintiff demands a trial by jury. Denies that any of the claims contained in the First Amended Complaint are valid, so denies that there is any triable issue.

**AFFIRMATIVE DEFENSES**

Without any admission as to burden of proof and expressly reserving their right to assert any additional defense or counterclaims that discovery may reveal, Defendant states the following defenses:

1. Although Plaintiff has named New Tang Dynasty Television, Inc. (NTD TV, Inc.) as Defendant in this lawsuit, NTD TV, Inc. is not the correct Defendant because NTD TV, Inc. is a defunct entity. NTD TV, Inc. does no business, it transmits no content, and publishes no material online or in print. NTD TV, Inc. did not publish the article hosted at the following URL: [https://www.ntd.com/nypd-saves-injured-hawk-struck-in-the-middle-of-brooklyn-traffic\\_282249.html](https://www.ntd.com/nypd-saves-injured-hawk-struck-in-the-middle-of-brooklyn-traffic_282249.html). Accordingly, NTD TV, Inc. was improperly named as a defendant in this lawsuit.

2. Defendant’s alleged use of Plaintiff’s allegedly copyrighted works is non-infringing fair use under 17 U.S.C. §107 because the allegedly copyrighted works were used for the purposes of news reporting, the use was transformative, and the entity that did publish the article at the URL listed above is a non-profit entity. The allegedly copyrighted works in question are factual in nature and were published prior to any use by Defendant. Defendant used an appropriate amount of the

allegedly copyrighted work for the purpose of news reporting, and Defendant's use caused no harm to the market for the copyrighted work.

3. Plaintiff's allegedly copyrighted works lack the modicum of originality necessary for copyright protection and consequently they are not sufficiently original or creative to constitute copyrightable works, and/or the photographs shown in Exhibit A were placed in the public domain when they were published without notice on January 24, 2019.

4. Plaintiff does not have standing to bring a copyright infringement claim because he is not the author, an owner, or an exclusive licensee of Copyright Registration No. VA0002144517.

5. Plaintiff's copyright infringement claims are barred because one or more of Plaintiff's copyright registrations are invalid as a result of Plaintiff's knowing failure to disclose material facts to the U.S. Copyright Office. But for Plaintiff's omission of these material facts from its copyright application, the Copyright Office would have rejected Plaintiff's application for lack of copyrightability and/or because Plaintiff is not the author and/or owner of Copyright Registration No. VA0002144517.

6. Plaintiff failed to advise the Copyright Office of facts that might have occasioned a rejection of the application, and as such, Plaintiff's claims and requested remedies are barred by the doctrine of unclean hands.

7. Plaintiff has failed to obtain a valid copyright registration prior to filing the Complaint, and consequently, Plaintiff is not entitled to recover statutory damages and/or attorneys' fees because Plaintiff failed to satisfy the requirements of 17 U.S.C. § 412.

8. Should Defendant be found to have infringed any copyrighted work and should this Court find that statutory damages are awardable, Plaintiff is not entitled to recover enhanced or



punitive damages because any such infringing conduct was not willful, in that Defendant did not know that its conduct constituted copyright infringement.

9. Should Defendant be found to have infringed any copyrighted work and should this Court find that statutory damages are awardable, this Court should reduce the award of statutory damages to \$200 because any infringement was innocent in that Defendant conducted itself under a good faith belief at all times that its conduct was innocent and this belief was reasonable under the circumstances.

10. Plaintiff is not entitled to injunctive relief, as Plaintiff has no irreparable injuries.

11. Defendant reserves any and all additional defenses available to it in law or equity, now existing or later arising, as may be discovered.

#### **DEMAND FOR JURY TRIAL**

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Defendant demands a trial by jury on all affirmative defenses and any issues triable to a jury.

#### **PRAYER FOR RELIEF**

Defendant prays for relief and requests that the Court:

1. Dismiss Plaintiff's First Amended Complaint in its entirety, with prejudice;
2. Enter judgment in Defendants' favor on all counts of the First Amended Complaint;
3. Declare that Plaintiff's asserted copyright in the Photographs is invalid;
4. Order Plaintiff to cancel Copyright Reg. No. VA0002144517 by submitting a written voluntary cancellation request to the U.S. Copyright Office using the procedure described in Section 1807.4(E) of the Compendium of U.S. Copyright Office Practices;
5. Deny Plaintiff's request for injunctive relief;
6. Deny Plaintiff's request for monetary relief;

7. Award Defendants their reasonable attorneys' fees and costs, under 17 U.S.C. § 505 or otherwise; and

8. Any further relief as the Court deems just and equitable.

DATED: July 30, 2019

Respectfully submitted,

LEWIS BRISBOIS BISGAARD & SMITH LLP

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*Attorneys for Defendant*

**CERTIFICATE OF SERVICE**

I certify that on July 30, 2019, the foregoing **DEFENDANT NEW TANG DYNASTY TELEVISION, INC.'S ANSWER TO AMENDED COMPLAINT** was filed with the Court, using the CM/ECF system, which action caused automatic electronic notice of such filing to be served upon the following:

*Attorneys for Plaintiff Paul Martinka:*

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