

APPEAL NO. 11-2558

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CURTIS J. NEELEY, JR.

APPELLANT–PLAINTIFF

v.

NAMEMEDIA INC. AND
GOOGLE, INC.

APPELLEE–DEFENDANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS

THE HONORABLE JIMM LARRY HENDREN
CHIEF JUDGE

BRIEF OF APPELLEE GOOGLE INC.

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RESPONSE TO REQUEST FOR ORAL ARGUMENT

The district court ruled correctly on each issue appealed. Appellee Google respectfully submits that this case can be affirmed on the record and brief alone. If, however, the Court decides that oral arguments would be helpful, Appellee Google wishes to participate.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Rule of Appellate Procedure 26.1, Appellee Google Inc., makes the following disclosures:

- (1) Appellee Google is a publicly held entity;
- (2) Appellee Google does not have a parent corporation, nor does any publicly held corporation own 10% of its stock.

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JURISDICTIONAL STATEMENT

A. District Court Jurisdiction

Jurisdiction of this case is based upon federal question 28 U.S.C. § 1331, 1338, 1367 and diversity, 28 U.S.C. § 1332. Mr. Neeley is an Arkansas resident. Google, Inc. is a Delaware corporation with its principal place of business in Mountain View, California. The amount in controversy exceeds \$75,000.

B. Appellate Court Jurisdiction

Jurisdiction of the appeal of this case is proper in this Court pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 41 because it is an appeal from the United States District Court for the Western District of Arkansas.

STATEMENT OF THE ISSUE

I. Whether the district court correctly found that Mr. Neeley cannot state a copyright claim.

- *Action Tapes, Inc. v. Mattson*, 462 F.3d 1010, 1013 (8th Cir. 2006)
- *Dodd v. Fort Smith Special School District*, 666 F. Supp. 1278, 1281 (W.D. Ark. 1991)

II. Whether the district court correctly found that Mr. Neeley cannot state a claim under the Visual Artists Rights Act of 1990 (“VARA”).

- 17 U.S.C. § 106A
- *Lilley v. Stout*, 384 F. Supp. 2d 83 (D.D.C. 2005)

STATEMENT OF THE CASE

On July 22, 2009, Mr. Neeley first filed suit against Network Solutions, Inc., NameMedia, Inc. and Google Inc. in the Western District of Arkansas. Mr. Neeley's complaint purported to contain claims of cybersquatting as well as copyright infringement, trademark infringement, and outrage. On February 8, 2010, Google filed a Rule 12(b)(6) motion to dismiss Mr. Neeley's complaint as to it, asserting that Mr. Neeley's claims of copyright infringement were not viable due to the absence of any copyright registration. In its Order dated March 1, 2010, the district court granted Google's motion to dismiss Mr. Neeley's copyright claim without prejudice, noting that, although he had not yet registered his copyrights, he might do so in the future. In turn, Mr. Neeley repeatedly attempted to amend his complaint to state a copyright claim, however, the district court correctly denied those efforts, explaining that the amendment served no purpose because Mr. Neeley refused to register his copyright. On June 7, 2011, the district court granted Google's motion for summary judgment dismissing the remainder of Mr. Neeley's claims with prejudice. This appeal ensued.

STATEMENT OF THE FACTS

Mr. Neeley has never registered a copyright for any of his works, and affirmatively refuses to do so. Dkt. No. 97 at 9. Prior to a serious automobile accident in 2004 that left him brain damaged and wheelchair-bound, Mr. Neeley had been a professional photographer and had posted many of his works to various internet sites without reserve. Because Mr. Neeley placed his works on the internet, a Google search for his name finds those works. Mr. Neeley sued Google for copyright infringement, based on the electronic thumbnail versions of his works Google includes in its search results.

SUMMARY OF THE ARGUMENT

After more than two years, and a district court docket approaching *three hundred* entries, *pro se* litigant Curtis Neeley returns to this Court for the third time, appealing the district court's grant of summary judgment, as well as an assortment of orders denying Mr. Neeley's oft-repeated attempts to amend his complaints. Mr. Neeley identifies no error, and his appeal should be summarily denied.

Although Mr. Neeley purports to appeal an assortment of prior orders, his appeal advances only two arguments.¹ One has nothing to do with Google: Mr. Neeley repeatedly asked the district court for leave to amend his complaint to include the Federal Communications Commission ("FCC") as a party, and to then order the FCC to regulate the internet by banning the display of nudes to minors and Muslims. The district court denied leave to amend the FCC as futile no fewer than four times (Dkt. Nos. 125, 186, 209, and 269).

The second argument concerns Mr. Neeley's purported claims against Google: it asks this Court to reverse the district court's dismissal of—and

¹ Mr. Neeley's notice of appeal identifies three orders: Dkt. Nos. 209, 267, and 268. Appellant's Brief, however, addresses only Dkt. No. 267 (other than listing the other two orders, along with Dkt. No. 269, at page 17).

subsequent refusal to reinstate—Mr. Neeley’s copyright claims. One of Mr. Neeley’s ever-shifting complaints below was that Google, in response to searches for “Curtis Neeley,” returned search results that included thumbnail images of nude photographs taken by Mr. Neeley himself. Prior to a serious automobile accident in 2004 that left him brain damaged and wheelchair-bound, Mr. Neeley had been a professional photographer, and had posted many of his works to various internet sites without reserve.

Mr. Neeley apparently now regrets having publicly posted copies of his own works to the internet and is embarrassed that his now-estranged children (and Muslims, for unexplained reasons) can view them. And of course, because Mr. Neeley placed his works on the internet, Google searches return those works. Mr. Neeley sued Google for copyright infringement, based on the thumbnail versions of his works Google includes in its search results.²

² Mr. Neeley has at various times (both before and after the district court dismissed his copyright claims) recast his claim as one for “defamation” or “outrage.” The district court, recognizing that one can claim neither defamation for truthfully identifying Mr. Neeley as the author of his own works, nor outrage for allegedly republishing the same photographs the plaintiff himself originally took and published, correctly dismissed these alternate theories as well. Dkt. No. 268 at 15-17. Mr. Neeley does not challenge that holding here.

ARGUMENT

I. Mr. Neeley's Copyright Claims Are Barred By His Refusal to Register His Works With the Copyright Office Prior to Suit

The district court properly dismissed Mr. Neeley's copyright claims. Although there are myriad problems with those claims, the simplest problem was dispositive: Mr. Neeley has never registered a copyright for any of his works, and he affirmatively refuses to do so. A "copyright owner may not sue for infringement under the federal Copyright Act until the owner has delivered the deposit, application, and fee required for registration to the United States Copyright Office" *Action Tapes, Inc. v. Mattson*, 462 F.3d 1010, 1013 (8th Cir. 2006).

The district court originally dismissed Mr. Neeley's copyright claim without prejudice (Dkt. No. 97 at 9-10), noting that, although he had not yet registered his copyrights, he might do so in the future. However, Mr. Neeley then repeatedly sought to amend his complaint to restate his copyright claims, each time explaining that he affirmatively *refused* to register his copyright because the "Copy-right" Act's registration requirement is an unconstitutional "hoax":

Plaintiff refuses to purchase copyright registrations or "licenses to sue" to protect the fundamental rights Plaintiff believes are granted by the creator and

inadequately recognized and introduced originally by a career lawyer and licensed to benefit the legal professions primarily.

Second Amended Complaint, Dkt. No. 53, at 3; *see also* Appellant's Brief at 25-27. The district court correctly denied those efforts, explaining that "[g]iven that Mr. Neeley refuses to register his copyright, there would be no purpose served by allowing any amendment to allege copyright violations." Dkt. No. 125 at 9. This Court reviews *de novo* the grant of a motion to dismiss, using the same standards as the district court. *Aurora Dairy Corp. Organic Milk Mktg. & Sales Practices Litig. v. Aurora Organic Dairy*, 621 F.3d 781 (8th Cir. 2010).

On appeal, Mr. Neeley does not argue that he has registered copyrights in any of his works. He has not, and refuses to do so based on some notion of principle. Instead, he argues (as best one can discern) that the Copyright Act's registration requirement "*should not bar Title 17 claims.*" Appellant's Brief at 25. Mr. Neeley takes issue with the fact that he must "purchase" "registered licenses to sue" before bringing suit, and that the Copyright Act "is deceptive and unconstitutional since enacted in 1790" because of that requirement. He, however, offers no analysis to support that claim of "unconstitutionality," and does not identify what part of the Constitution he feels is offended by registration. Neither does he address the unbroken line of cases for over a hundred years upholding the

registration requirement. *See, e.g.*, 5 Patry on Copyright §17:78 and cases cited therein (“Every court of appeals to have addressed the issue, as well as over 100 district courts, has held that actual registration . . . is required to satisfy section 411(a)”³; *Action Tapes*, 462 F.3d at 1013; *Dodd v. Fort Smith Special School District*, 666 F. Supp. 1278, 1281 (W.D. Ark. 1991) (registration a prerequisite to suit). As such, the Court should affirm the district court’s reasoned decision dismissing Mr. Neeley’s copyright claim.

II. Mr. Neeley Cannot State a Claim Under VARA (17 U.S.C. § 106A)

Having repeatedly failed to state a copyright claim due to his failure to register his copyrights, Mr. Neeley then concocted a variation on his theme, recasting his copyright claim as one brought under the Visual Artists Rights Act of 1990 (“VARA”), codified at 17 U.S.C. § 106A. Apparently having learned that certain claims under that section of the Copyright Act do not require registration, Mr. Neeley claimed to bring claims for “the exclusive rights of the Plaintiff for attribution and integrity enumerated by US Title 17 § 106A.” Second Amended Complaint, Dkt. No. 53, at 3.

³ Patry notes that the Fifth and Ninth Circuits differ slightly, in holding that the Copyright Office need merely have received an application rather than having acted on it. *Id.* The difference is irrelevant here, where Mr. Neeley outright refuses to file copyright applications.

Mr. Neeley misunderstands Section 106A. Section 106A implemented the Berne Convention's *droit moral* provisions by providing that, for a narrow set of original visual works, the author has the right to have the work identified as his, and to prevent the visual works of others from being identified as his. Thus the purchaser of an oil painting cannot remove the artist's signature, or put the artist's name on another's work, even though he owns the painting.⁴ Section 106A also gives the author of a work of visual art the right "to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation," and to prevent such distortion or mutilation. 17 U.S.C. 106A(a)(2-3).

The problem, however, is that Section 106A applies only to a very narrow set of "works of visual art": individual original paintings and sculptures, consecutively numbered and signed prints in runs of 200 or fewer, and "a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author." 17 U.S.C. § 101. "Works of visual art" *expressly* excludes "electronic publications" such as Mr. Neeley's

⁴ For this reason, registration cannot be a prerequisite to some Section 106A claims, as someone claiming that his name was improperly applied to the work of another *a fortiori* cannot have registered that work.

photographs. *Id.* Put aside the facts that (1) Mr. Neeley does not allege either that his name was removed from his photographs or that the work of others was identified as his, (2) Mr. Neeley makes no allegation that Google did anything concerning his photographs other than accurately locate them in response to search requests, and (3) Mr. Neeley does not allege that *anyone* has distorted or mutilated the images in any way. The district court had no need to reach those issues, because an electronic copy of a photograph on a website is simply not subject to Section 106A. Section 106A is expressly limited to single and limited-edition original works of visual art.

The district court therefore repeatedly and correctly rejected Mr. Neeley's Section 106A claims. *See e.g.* Dkt. No. 233 (overruling objections to Magistrate Judge's Report and Recommendation); Dkt. No. 267 at 2 (denying motion to reconsider, holding that Section 106A "would not apply to copies of Neeley's photographs on the internet."); *see also Lilley v. Stout*, 384 F. Supp. 2d 83 (D.D.C. 2005) (VARA applies *only* to individual photographic limited prints signed by artist and produced for exhibition purposes only).

Mr. Neeley's appellate argument against Section 106A fares no better than his registration argument. He does not—and cannot—argue that any of his works

at issue here are “works of visual art” under VARA. Instead, he quotes the relevant statutory text in full, including *both* the limitation to signed exhibition copies *and* the *express* exception from Section 106A’s scope for any “electronic information service, electronic publication, or similar publication,” and then notes that the internet has evolved since VARA was enacted in 1990. Appellant’s Brief at 28-30. He then simply asserts that Congress “could not have created an *exception* for wire communications of visual art” that are “otherwise protected by 106A(2).” *Id.* at 31. But of course, Congress *did* create precisely that exception, in clear and unambiguous terms, not once but twice. VARA is by its express terms inapplicable to any but a very small subset of museum-quality signed photographic prints. 17 U.S.C. § 106A. And lest there were any ambiguity to that requirement, Congress in addition made it doubly clear that VARA had no application to a wide range of works, including any electronic publication. 17 U.S.C. § 101, defining “work of visual art.” On both grounds, there is no room for dispute: VARA simply does not reach photographs on the internet. As such, this Court should affirm the district court’s dismissal.

CONCLUSION

The district court, with extraordinary patience, has dealt with Mr. Neeley's frivolous claims for over two years, through nearly three hundred docket entries, redundant requests to amend and reconsider, and even a full evidentiary hearing. This Court now has Mr. Neeley's case before it for the third—and hopefully last—time. The district court's grant of summary adjudication in Google's favor was based on long-established, noncontroversial provisions of the Copyright Act. Mr. Neeley can identify no error in that result. Therefore, it should be affirmed by this Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Joshua R. Thane, do hereby certify: (1) Brief of Appellee complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3038 words, per the word count of the word-processor system used to prepare the Brief; (2) Appellee's Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman; and (3) the accompanying CD-ROM has been scanned for viruses and is virus free.

/s/ Joshua R. Thane
Joshua R. Thane

CERTIFICATE OF SERVICE

I hereby certify that, on this 12th day of September, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF System, which will send immediate notification of such filing to all participants in this case.

/s/ Joshua R. Thane
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