No. 11-2558

IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NameMedia Inc.,
Google Inc.

Appellees

v

Curtis J Neeley Jr., MFA

Appellant.

**AN APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
THE HONORABLE JIMM LARRY HENDREN, DISTRICT JUDGE,
UNITED STATES DISTRICT COURT**

PETITION FOR EN BANC REVIEW

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INTRODUCTION

This is a petition for review of the *Per Curium* decision by the panel of this court seeking re-hearing by that panel as well as review by the court sitting *en banc* since this appeal should be the most impactful case in the history of the United States. The errors of law in the panel affirmation are described herein and these mistakes reflect not considering the amended complaint presented to the District Court numerous times in the least.

ARGUMENT

I. THE ENTIRE COURT SHOULD CONSIDER WHETHER COPY[RITE] CLAIMS NOT BEING ALLOWED TO BE BROUGHT IN UNITED STATES COURTS DUE TO CONTINUED REFUSAL TO COMPLETE THE UNCONSTITUTIONAL FORMALITIES OF LICENSING IS FUTILE OR NOT.

1. "Copyright purchases" STILL fail to recognize or protect visual artist's personal rights to exclusively control visual art expressions. Distortions of visual art expression and disparagements of the manner of presentation are protected by the First Amendment and the international Berne Convention, cited to be the controlling "copyright regime" for the United States since 1994 in the recent Supreme Court ruling of *Golan v Holder*[1], as well as simple common natural law.

[1] "*The United States became party to Berne's multilateral, formality-free copyright regime in 1989. Initially, Congress adopted a "minimalist approach" to compliance with the Convention*", quoting Justice Ginsburg

2. "The Copyright Clause"[2] of the Constitution alleges to provide individual authors or inventors exclusive RIGHTS for limited periods of time. This alleged right is not protected in any manner by United States Title 17 except as was tacked *improperly and marginally* into 17 USC §106A in 1990 and this right is now being denied the Appellant. This right has not been considered for protection of photographs in the twenty-one intervening years. This is the first consideration of 17 USC §106A for photography and this warrants *en banc* review.

II. THE ENTIRE COURT SHOULD CONSIDER WHETHER AMENDING AND ADDING THE ISSUE OF ORIGINAL NUDE ART EXHIBITED TO MINORS BY WIRE COMMUNICATIONS AGAINST THE ARTIST'S WISHES AND THEREBY SHAMING THE ARTIST AND HARMING THE REPUTATION OF THE ARTIST IS FUTILE IN SPITE OF GOLAN V HOLDER.

1. Because of the world-wide importance of this issue, the entire Court should consider whether exhibit nude photographs are expressions protected by the First Amendment right to not be forced to speak.

2. Due to the immediate international impact of this issue, the entire Court should consider whether exclusive control of the display of original nude art photographs via "wire communications"[3]to minors or anonymous is the individual right recognized by Congress in 1994 now being violated by Google Inc and Microsoft Corporation in image searches after advised this manner of display is improper and caused harm.

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[2] *To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;*

[3] See the 47 USC .§153 definition of "wire communications"

3. The Berne Convention Article 6*bis* individual right to prevent display of nude art to minors or the anonymous in **any manner** was selected by Congress repeatedly and affirmed judicially when Berne Convention Articles 1-21 were cited as the controlling "copyright regime" for the United States since 1994 in *Golan v Holder*, (10-545)[4].

4. Berne Convention Article 9 (1, 3) cited as the controlling "copyright regime" for the United States in *Golan v Holder* (10-545), removes the need to recognize the proper nomenclature for the manner of display described as an excluded collectible "electronic publication" ITEM in error by the District Court before this error was repeated by the three-judge panel.

5. The inappropriate display of nude art to minors due to personal name searches is defamation and privacy violation allowing the honor and reputation of Mr. Neeley to be damaged. *See* "ONLINE DEFAMATION: BRINGING THE COMMUNICATIONS DECENCY ACT OF 1996 IN LINE WITH SOUND PUBLIC POLICY", 2003 Duke L. & Tech. Rev. 0024.

[4] Historical practice corroborates our reading of the Copyright Clause to permit **full** U. S. compliance with Berne. Quoting Justice Ginsburg from Golan v Holder (10-545) p15 with emphasis added.

III. THE ENTIRE COURT SHOULD CONSIDER THE ISSUE OF THE DISTRICT COURT AND PANEL MISINTERPRETING USC 17 §101(A) AND CALLING "THE INTERNET" A PHYSICALLY COLLECTABLE ELECTRONIC PUBLICATION ITEM IN SPITE OF THE FACT THAT "THE INTERNET" IS NOT A PHYSICAL ITEM AND NO PUBLIC LIBRARIES CONSIDER THE INTERNET TO BE A COLLECTABLE PUBLICATION.

1. Subparagraph USC 17 §101(A) is a list of excluded items of art that range from posters, maps, globes, charts, technical drawings, diagrams, and models to books, magazines, newspapers, and periodicals. Every single item described in USC 17 §101(A) is a physical art item that may be collected by a library that was written in a comma separated list of items.

2. Electronic Publication is a term that accurately describes data stored in portable physical media such as discs that were often mailed as "covermounts" on the face of magazines in 1990. "Electronic publications" are still commonly used to distribute movies and music via CD or DVD.

3. "The Internet" is simply a commonly used BUT undefined slang term used for the myriad of computers connected by wires using the same electronic binary protocol to enable bi-directional wire communications.

IV. THE ENTIRE COURT SHOULD CONSIDER THE DISTRICT COURT FAILING TO ALLOW AMENDING TO INCLUDE DIGITAL REPUBLICATION OF NUDE VISUAL ART SCANNED FROM BOOKS BY GOOGLE INC IN NEW YORK DURING THIS ACTION AS IS NOT A FUTILE CLAIM.

1. *The Authors Guild et al v Google Inc*, (1:2005cv08136) was discussed in the *Golan v Holder*, (10-545) opinion four times making it apparent the Supreme Court has already read even *amici* in that case.

2. Google Inc attempted to settle in this case for roughly 145 million dollars but the United States attorney objected as well as numerous countries and this Appellant.

2. Google Inc has a pending motion to dismiss the class-action complaint in New York and argues there that "copy[rite]" is much too individual an issue to be adequately settled by class-actions. The Supreme Court has already begun considering the "malicious copy[rite] violation" in New York and there is no support whatsoever for the contention that adding this individual claim is futile as is required to allow "*Dennis Factors*" to begin to apply. *See Dennis v Dillard Dep't Stores, Inc.*, (8th Cir. 2000)

V. THE FULL COURT SHOULD CONSIDER WHY THE APPELLANT WAS NOT ALLOWED TO ADD THE CLAIM OF MALFEASANCE DUE TO THE FCC REFUSING TO REGULATE WIRE COMMUNICATIONS AS CREATED TO DO SINCE ADDING THIS CLAIM IS IN NO MANNER FUTILE.

1. The Federal Communications Commission was created in 1934 and given the duty of regulating communications by wire and radio.

2. The Supreme Court is considering whether "broadcast" television communications should remain regulated by the FCC or should be regulated only by the "free market". "Broadcast television" was alleged to once use a scarce public spectrum of radio frequencies. *See Red Lion Broadcasting v FCC*, 395 U.S. 367 (1969)

3. The "*Red Lion Fairness Doctrine*" based on the scarcity of public radio spectrum fails to address the ample statutory rational for protection of citizen safety listed in 47 USC §151 where the plain common language of the law describes sufficient statutory rational for regulation of interstate and world-wide "broadcasts" by wire or radio energy communications. The manner of executing this 47 USC §151 duty is now being considered by the Supreme Court without even considering 47 USC §151 due to lacking a properly done *amicus* brief.

4. Energy transmitted by wire communications was not mentioned in a single *amicus* brief filed in FCC v Fox, (10-1293) and the rational for even the existence of the FCC was questioned during oral arguments.

5. The "*unique and wholly new medium*" description of internet wire communications used in *Reno v ACLU et al*, (96-511) by Justice Stevens was written by the oldest member of the Court and the third-longest serving justice in the Court's history. The common failure of the Court to recognize "communications by wire" caused partial invalidation of the Communications Decency Act in 1996. Justice Stevens and four concurring justices failed to recognize 47 USC §153 "wire communications" but have since retired. The current ruling justices are more familiar with wire communications even though still being called "the Internet" for disguise.

6. It will be about 25 years before the Supreme Court consists of judges for whom "the Internet" is no longer a mysterious "*unique and wholly new medium*" but simply a distributed manner of communication with energy transmitted by wires. The *en banc* review should shorten this.

7. Computers simply became the mechanisms or apparatus on either end of wires used in interstate and international communications and are required regulated by the FCC for the rational of "*promoting safety of life and property through the use of wire and radio communications*"[5] as may be recognized by the younger Supreme Court while addressing the pending *FCC v Fox*, (10-1293) or this particular action addressing both the issues of copy[rite] protections and decency enforcement by the FCC. The *en banc* review is sought in order to permit the ruling now appealed to be more than a ruling of three judges.

[5] Quoted from 47 USC §151

CONCLUSION

1. The three-judge panel followed the District Court's error by confusing the common historical language usage of "electronic publication" listed in 17 USC §101(A) for "the Internet" and describing a process rather than a physical item that was in the comma separated list of physical items exempted the "moral rights" or "visual artists rights" protections described in the *inadequate and unconstitutional* 17 USC §106A.

2. The Visual Artists Rights Act was a Band-Aid placed on the mortal wound of US Title 17 in 1990, though offering *marginal* protection for an individual author's Berne Convention Article 6*bis* rights. Publication used as a verb to describe a process is commonly mistaken for a publication item like a book or magazine like was done in each Appellee Brief as well as by the three-judge panel and should now motivate reconsideration *en banc*.

2. The Court should review the three-judge panel's failure to consider the Communications Act of 1934 as revised and now consider, *en banc*, that amending the complaint to seek execution of the statutory FCC mission of regulating communications by wire to protect the honor of the Appellant and the safety of billions of minors using wire communications worldwide is nowhere near futile or addressed in the least by the cited "Dennis Factors" rational for prevention of amending a complaint based on judicial discretion.

3. The three-judge panel failed to recognize the international significance of Google Inc scanning and digitally republishing millions of books as well as three nudes by the Appellant during this action and attempting to pay 145 million to revise the United States' copy[rite] regime in New York via class-action litigation. Amending this action to add this violation of Appellant's individual author's rights, anchored solidly in the Constitution in 1787, is the furthest thing from a futile claim there ever could be as warrants consideration by the Court sitting *en banc.*

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4. The decision of the three-judge panel should be reviewed by this court sitting *en banc* and the District Court's dismissals and denials should be overruled and an amended complaint should be allowed filed with injunctions requiring the Federal Communications Commission begin regulating ALL wire communications.

Whereas the Appellant has contacted many parties for years encouraging *amici curiae* in this action, the fact that Appellant continues producing original 'figurenude' art causes all contacted to desire no association whatsoever with the Appellant. Morality in the Media Inc filed *amici* in *FCC v Fox*, (10-1293) but the Appellant's continued production of original 'figurenude' art causes the misperception that the Appellant is another pornographer as demonstrates the severe reach of the harm to the Appellant's reputation and honor that has already occurred and begs for the Rule of Law as well as *en banc* reconsideration.

Respectfully and humbly submitted,

/s/ Curtis J Neeley Jr .

Curtis J Neeley Jr., MFA