

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF ARKANSAS  
FAYETTEVILLE DIVISION**

<b>CURTIS J. NEELEY JR.,</b>	§	
	§	
<b>PLAINTIFF</b>	§	
	§	
<b>VS.</b>	§	<b>CIVIL ACTION NO. 09-5151</b>
	§	
<b>NAMEMEDIA, INC., NETWORK SOLUTIONS, INC., GOOGLE INC.</b>	§	
	§	
<b>DEFENDANT</b>	§	

**GOOGLE INC.’S BRIEF IN SUPPORT OF ITS  
MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

Defendant Google Inc. (“Google”) submits this brief in support of its motion to dismiss. Mr. Neeley’s Second Amended Complaint, even presumed true, fails to state a claim against Google upon which relief can be granted and, therefore, should be dismissed.

**I. INTRODUCTION**

Mr. Neeley without a doubt has had a difficult time, for which he has our sympathy. As best as can be pieced together from his current Complaint and other pleadings,<sup>1</sup> Mr. Neeley was a successful photographer and entrepreneur. He had registered one internet domain name<sup>2</sup>, eartheye.com, at which he displayed his photographs, and a second domain name, sleepspot.com, at which he hoped to operate “the next great Internet place to find a ‘Spot to Sleep’ . . . .” Mr. Neeley did not, however, register any trademarks in either name, or any other, and does not claim to have registered any copyrights in any of his works. Neither does he claim to be selling

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<sup>1</sup> For purposes of Rule 12(b)(6), averments in the Complaint are presumed true; to the extent facts herein are drawn from other pleadings, they are offered as background only and are neither asserted nor conceded to be true.

<sup>2</sup> Mr. Neeley does not and cannot allege that Google had any involvement with the registration of his domains, or with the lapsing of those registrations.

any goods, or transacting any business, under either name. Mr. Neeley also posted an unspecified number of his photographs to a photography website named photo.net, which he alleges is owned and operated by Defendant NameMedia and purports to state claims against NameMedia for refusing to delete those photographs at Mr. Neeley's request.

In 2002 Mr. Neeley suffered a near-fatal automobile accident, which left him wheelchair-bound and brain damaged. The registrations for his two domain names lapsed, and the names once again became available to anyone for registration. Eartheye.com was registered by an aerial mapping and remote sensing company named Eartheye. It is unclear from the Complaint who currently owns and operates sleepspot.com.<sup>3</sup> The Complaint alleges that Defendant NameMedia previously offered to sell that domain to Mr. Neeley for \$2,300.00, but it does not indicate whether NameMedia purported to own the domain or was acting as a broker.

The gravamen of Mr. Neeley's Second Amended Complaint (Doc. No. 53) appears to be that, although his registrations had lapsed and he had no registered trademark rights to either domain name, NameMedia and/or Network Solutions should not have sold or assigned either eartheye.com or sleepspot.com to their current owners and should pay Mr. Neeley damages for the emotional distress he suffered as a result of those domains being registered to someone else. Mr. Neeley also seeks damages from NameMedia for continuing to show Mr. Neeley's own photographs, posted by Mr. Neeley, on the photo.net website after Mr. Neeley asked that they be removed.<sup>4</sup> As a result, he claims photo.net is violating his copyrights. In response to motion pleading by NameMedia, pointing out that Mr. Neeley cannot bring suit for violation of an unregistered copyright, Mr. Neeley has amended his complaint to change his copyright claim to

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<sup>3</sup> A "WhoIs" search shows that the sleepspot.com domain is hosted by BuyDomains.com, a service of NameMedia. The owner is not identified.

<sup>4</sup> It appears from the Complaint that photo.net's terms of use include a license to the website to keep and display any works posted to it, but that Neeley disputes the validity of that license.

one for false attribution under 17 U.S.C. 106(a), presumably because there are circumstances in which Section 106(a) does not require registration.

At best, there is substantial doubt whether Mr. Neeley can state a claim against NameMedia or Network Solutions, for a host of reasons. There is no doubt, however, that none of this has anything to do with Google. Mr. Neeley's Complaint is devoid of any allegation that Google did anything that could possibly give rise to a cause of action against it for copyright infringement, invasion of privacy, or trademark infringement. Accordingly, the alleged claims should be dismissed as to Google. And as this is Mr. Neeley's Second Amended Complaint, the Court should dismiss it with prejudice.

## **II. LEGAL STANDARD**

Federal Rule of Civil Procedure 8(a) requires that a complaint include "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a). Accordingly, Federal Rule of Civil Procedure 12(b)(6) provides that a party may move to dismiss a complaint that fails "to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). Dismissal under Rule 12(b)(6) "is proper when the plaintiff's complaint fails to state a claim upon which relief can be granted." *Northstar Indus., Inc. v. Merrill Lynch & Co.*, 576 F.3d 827, 831-832 (8th Cir. 2009).

A motion to dismiss should be granted if the plaintiff's factual allegations are not sufficient "to raise the right to relief above the speculative level." *Parkhurst v. Tabor*, No. 07-2068, 2007 U.S. Dist. LEXIS 80725, at \*7 (W.D. Ark. Oct. 30, 2007); *Mattes v. ABC Plastics, Inc.*, 323 F.3d 695 (8th Cir. 2003) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Although the Court must accept allegations of fact as true, the "court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions in

the form of factual allegations.” *Wiles v. Capitol Indem. Corp.*, 280 F.3d 868, 870 (8th Cir. 2002). “Courts are required to dismiss legal claims that are destined to fail regardless of whether they are nearly viable.” *Parkhurst*, No. 07-2068, 2007 U.S. Dist. LEXIS 80725, at \*7. And although “leave to amend should be granted freely ‘when justice so requires,’” it may be denied if an amendment would be futile. *Stricker v. Union Planters Bank, N.A.*, 436 F.3d 875, 878 (8th Cir. 2006) (citing *Migliaccio v. K-tel Int’l, Inc. (In re K-tel Int’l, Inc. Sec. Litig.)*, 300 F.3d 881, 899 (8th Cir. 2002)).

Mr. Neeley’s Second Amended Complaint fails to state a claim against Google for which relief can be granted. Mr. Neeley does not have a registered copyright, Google is not a governmental agency subject to Title 5, and Mr. Neeley does not and cannot plead facts to support a claim of either direct or indirect trademark infringement. As established in more detail below, these undisputed facts preclude Mr. Neeley from stating a claim against Google; therefore, Mr. Neeley’s alleged claims against Google should be dismissed.

### **III. ARGUMENT**

#### **A. Mr. Neeley Cannot State a Copyright Claim**

Mr. Neeley’s copyright claims appear to arise out of NameMedia’s alleged refusal to remove electronic copies of Mr. Neeley’s own photographs from the photo.net website, which NameMedia operates. Although Mr. Neeley claims that NameMedia “and Google Inc.” are displaying his photographs at the photo.net website, he does not explain how Google is involved in the content of NameMedia’s website. Google has no ownership of, control over, or other involvement in that website, and Mr. Neeley alleges none.

But the Court need not reach that question, because it is black letter law that Mr. Neeley cannot state a copyright claim against anyone. In order to bring a copyright claim, one must first

register one's copyright, and failure to do so is an absolute bar. *Action Tapes v. Mattson*, 462 F.3d 1010, 1013 (8th Cir. 2006). Mr. Neeley has not alleged registration. In fact, he affirmatively avers that he refuses to register any copyrights:

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 Am. Compl. (Doc. No. 53) at 3 (emphasis added). NameMedia's prior motion for summary adjudication (Doc. No. 19) was based in part on this fatal defect. In response, Mr. Neeley has amended his Complaint, now claiming that his copyright claims are for “the exclusive rights of the Plaintiff for attribution and integrity enumerated by US Title 17 § 106A.” *Id.*

Mr. Neeley misunderstands Section 106A. Section 106A implements 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.<sup>5</sup>

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 does not include “electronic publications” such as Mr. Neeley's

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<sup>5</sup> 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, and (2) Mr. Neeley makes no allegation that Google did *anything* concerning his photographs. A copy of a photograph on a website is simply not subject to Section 106A to begin with. And as any other copyright claim Mr. Neeley might try to state would require registration before filing suit, as a matter of law Mr. Neeley's copyright claims fail.

**B. Mr. Neeley Cannot State a Title 5 Privacy Claim**

Mr. Neeley also purports to state a claim, again based on NameMedia's alleged failure to delete Mr. Neeley's photographs from photo.net, for violating "the Right to Personal Privacy as enumerated in US Title § 552a(b)." Second Am. Compl. (Doc. No. 53) at 9. Once again, Mr. Neeley makes no allegation that Google has anything to do with photo.net – it does not. Neither does he allege that anyone disclosed his personal information, but rather only that photo.net failed to delete photographs Mr. Neeley had himself published to the world.

But more fundamentally, Title 5, titled "Government Organization and Employees," covers government agencies only. Section 552(a) sets forth, in great detail, the obligations of federal agencies to report their activities to the public, and Section 552(b) sets limits on the types of personal information those agencies can disclose in such reports. Section 552(f) identifies the "agencies" to which Section 552 applies: "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency."

Google is not a governmental agency, and there is no allegation that it is.

### C. Mr. Neeley Cannot State a Trademark Claim Against Google

Mr. Neeley's final claim is for alleged trademark infringement. Again, it is difficult to discern what acts by Google, if any, Mr. Neeley alleges in support of that claim. To begin with, Mr. Neeley does not allege that he owns any registered trademarks: he does not. Nonetheless, he apparently claims common-law rights to the marks "eartheye" and "sleepspot." But he makes no allegation that Google has ever used either of those purported marks in any way, anywhere, at any time. He alleges that NameMedia improperly refused to make those names available to him (instead apparently selling one to Eartheye and keeping the other). Whether NameMedia had any obligation to refrain from selling those domains is between Mr. Neeley and NameMedia; however, it has nothing to do with Google.

The only allegation Mr. Neeley makes regarding Google is the repeated statement that NameMedia somehow "licensed" those domains to Google. It is unclear what Mr. Neeley means by "licensed." He certainly is not using it to mean that NameMedia transferred ownership or control of those domains to Google, or sublicensed either the domains or their names, or that Google is operating those websites. Rather, from his references to the Vulcan Golf litigation and AdSense for Domains (Second Am. Compl. (Doc. No. 53) at 6), it appears that Mr. Neeley means to allege that the owners of those domains have displayed Google ads on their websites.<sup>6</sup>

By way of background, Google's AdSense for Domains is an advertising program whereby domain owners can sign up to have Google provide contextually-relevant ads on their websites. When a user clicks on such an ad, the advertiser pays Google a few cents, which Google shares with the domain owner. Thus, for example, the owner of a domain named "cheapautoinsurance.com" could sign up for AdSense. Then each time someone visited that

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<sup>6</sup> In the case of eartheye.com, this is self-evidently false. See [www.eartheye.com](http://www.eartheye.com).

website, he or she might see Google-provided ads for car insurance, selected because they are relevant to the name of the website.

Of course, there is nothing wrong with the owner of sleepspot.com or eartheye.com signing up for Google AdSense, or with Google, sending ads to that website. If the owner violated Mr. Neeley's alleged trademark by choosing that website name in the first place, that is between Mr. Neeley and the owner. But there is no allegation that *Google* was involved in that choice or bears any responsibility for it. Neither is there any allegation that Google has used either "sleepspot" or "eartheye" in the text of any advertisement (or in any other way), anywhere, ever. Nor is there any allegation that there is any actual or likely confusion caused by any such nonexistent use. Finally, there is no allegation of any trademark damages. Indeed, because Mr. Neeley is not in fact using either mark in commerce, he has no customers under either mark that could possibly be confused, and thus no business to lose. In short, there are no factual allegations in the Second Amended Complaint that could possibly support a claim of trademark infringement by Google.

Neither can Mr. Neeley state a claim for contributory trademark infringement against Google (a claim he does not appear to state in the Second Amended Complaint in any event). "Contributory trademark infringement occurs when a manufacturer or distributor (1) intentionally induces another to infringe a trademark or (2) continues to supply a product to one whom it knows or has reason to know is engaging in trademark infringement." *Watts v. Network Solutions, Inc.*, 1999 WL 994012, \*2 (7th Cir. 1999); accord *Inwood Labs. v. Ives Labs.*, 456 U.S. 844, 853-54 (1982). Mr. Neeley alleges no facts that could conceivably lead to the conclusion that Google intentionally induced or contributed to infringement – an act that requires knowledge of the infringing nature of the act induced. See, e.g., *Manville Sales Corp. v.*



*Paramount Sys., Inc.*, 917 F.2d 544, 553 (Fed. Cir. 1990) (“The plaintiff has the burden of showing that the alleged infringer’s actions induced infringing acts and that he knew or should have known his actions would induce actual infringements.”). In order to plead a claim for contributory trademark infringement, Mr. Neeley must allege that Google knew or had reason to know that certain domains were infringing and, nonetheless, continued to induce or contribute to that alleged infringement. Moreover, “the mere assertion by a trademark owner that a domain name infringes its mark is not sufficient to impute knowledge of infringement . . . .” *Lockheed Martin Corp. v. Network Solutions, Inc.*, 985 F. Supp. 949, 963 (C.D. Cal. 1997). Mr. Neeley’s naked assertion that he has some unspecified common-law trademark rights over domain names owned by others, and that Google should have known of and respected those rights, cannot meet this standard.

Because Mr. Neeley has presented no evidence of either ownership of the trademarks at issue or any direct infringement, Google could not be contributorily liable even if it simply ignored Mr. Neeley’s Complaint and continued to provide advertisements to sleepspot.com. But as Mr. Neeley has affirmatively pled in subsequent pleadings in this case, Google has already blocked the domains at issue in response to Mr. Neeley’s Complaint.<sup>7</sup> Google has an expansive trademark complaint policy, pursuant to which any owner of a registered trademark can ask Google to block any domain the trademark owner contends infringes its rights. That policy, and the process for invoking it, is publicly available at How Do I File A Trademark Complaint?, <http://adwords.google.com/support/aw/bin/answer.py?hl=en&answer=50003>.

Similarly, Google’s policy is to remove from the Google AdSense system any domain that is the subject of litigation. Pursuant to that policy, Google has placed the sleepspot.com

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<sup>7</sup> See, e.g., Statement of Undisputed Facts (Doc. No. 59) at 14, ¶74; Doc. No. 58 at 3, ¶3.

domain on its “fail list,” and no longer serves ads to that domain. It appears that the owner of that domain is now displaying advertisements from another source. Accordingly, even if Mr. Neeley were inclined to amend his complaint yet again to attempt to state a claim for contributory infringement against Google, that amendment would be futile and should be denied. *See Stricker v. Union Planters Bank, N.A.*, 436 F.3d 875, 878 (8th Cir. 2006).

#### IV. CONCLUSION

Mr. Neeley’s alleged claims appear heartfelt, and his sense of injury sincere. But that zeal cannot create a cause of action where none exists. Mr. Neeley has no basis to bring Google before this Court, and this Court should relieve Google of the ongoing burden of responding to Mr. Neeley’s frequent filings. As the Second Amended Complaint states no cognizable claim against Google, and as further amendment would be futile, Google asks that it be dismissed without further leave to amend.

Respectfully submitted,

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**ATTORNEYS FOR DEFENDANT  
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**CERTIFICATE OF SERVICE**

I, Joshua R. Thane, hereby certify that on February 8, 2010, I electronically filed the foregoing GOOGLE INC.'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following list:

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and I hereby certify that I have mailed the document by the United States Postal Service to the following non-CM/ECF participants:

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\s\ Joshua R. Thane  
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