

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF ARKANSAS  
FAYETTEVILLE DIVISION**

**CURTIS J. NEELEY, Jr.**

**PLAINTIFF**

**VS.**

**CASE NO. 5:09-cv-05151-JLH**

**NAMEMEDIA, INC.;**  
**and GOOGLE, INC.**

**DEFENDANTS**

**SEPARATE DEFENDANT NAMEMEDIA, INC.'S STATEMENT OF  
UNDISPUTED MATERIAL FACTS IN SUPPORT OF  
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Separate defendant NameMedia, Inc. ("NameMedia"), for its Statement of Undisputed Material Facts In Support of Motion for Partial Summary Judgment, states the following facts.<sup>1</sup> The listing of any particular fact herein should not be construed as a belief or admission by NameMedia that the fact must be undisputed in order for NameMedia to be entitled to summary judgment.

1. Plaintiff Curtis Neeley ("Neeley") first registered the domain eartheye.com on April 17, 1997.
2. NameMedia registered the domain eartheye.com on July 2, 2003.
3. At the time it registered the domain eartheye.com on July 2, 2003, Neeley's registration had expired.

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<sup>1</sup> The listing of any particular fact herein should not be construed as a belief or admission by NameMedia that the fact must be undisputed in order for NameMedia to be entitled to the requested summary judgment.

4. At the time it registered the domain eartheye.com on July 2, 2003, no one at Namemedia knew anything of Neeley's existence.

5. At the time it registered the domain eartheye.com on July 2, 2003, no one at NameMedia knew of any trademarks owned or claimed by Neeley.

6. At the time it registered the domain eartheye.com on July 2, 2003, no one at NameMedia knew of Neeley's past registration or use of the domain.

7. NameMedia first learned of Neeley's existence on or about November 29, 2007, when Neeley called NameMedia about the eartheye.com domain.

8. The phone call from Neeley received by NameMedia on or about November 29, 2007 was the first communication of any kind that NameMedia had ever received from Neeley.

9. NameMedia had never communicated with or to Neeley prior to the phone call on or about November 29, 2007.

10. When he called NameMedia on November 29, 2007, Neeley spoke to Ted Olson, a domain name consultant for NameMedia.

11. In his phone conversation with Mr. Olson, Neeley asserted that he was the rightful owner of the domain name, but told Mr. Olson only that he was the prior registrant and owner of the domain and that his registration of the eartheye.com domain had expired while he was in a coma.

12. In his phone conversation with Mr. Olson, Neeley made no mention of any trademarks he owned or claimed.

13. Mr. Olson followed up this phone conversation with an email dated November 29, 2007.

14. At the time Mr. Olson wrote the November 29, 2007 email, he knew nothing of any trademarks owned or claimed by Neeley which he claimed to be violated by NameMedia with regard to the domain.

15. In the November 29, 2007 email, Mr. Olson requested that Neeley submit documentation substantiating his claim to eartheye.com to NameMedia's legal department.

16. Neeley never complied with Mr. Olson's request for documentation contained in the November 29, 2007 email.

17. At the time Mr. Olson sent the November 29, 2007 email, no one at NameMedia knew about any trademarks owned or claimed by Neeley.

18. After the phone call on or about November 29, 2007, NameMedia received a communication from Neeley via email on January 26, 2009.

19. On January 26, 2009, Neeley emailed NameMedia's advertising department in response to a mass-mailed advertisement email announcing a "Winter Sales Event" being held by NameMedia's advertising department.

20. The mass-mailed advertisement email bore the name and email address of Jason Miner, Vice President of Sales for BuyDomains, the name of NameMedia's domain sales division, but was automatically generated to thousands of recipients in NameMedia's sales database. Neeley received the email because he had on February 7, 2008 registered with NameMedia via its online interface to receive information regarding the eartheye.com domain.

21. At the time the mass-mailed advertisement email was sent, Jason Miner knew nothing of Neeley's existence.

22. At the time the mass-mailed advertisement email was sent, Jason Miner knew nothing of any trademarks owned or claimed by Neeley.

23. At the time the mass-mailed advertisement email was sent, no one at NameMedia knew of any trademarks owned or claimed by Neeley.

24. In his email dated January 26, 2009, Neeley set forth no assertion of fact except that his registration of eartheye.com expired while he was in a coma.

25. In his email dated January 26, 2009, Neeley made no mention of any trademark owned or claimed by him.

26. On January 30, 2009, in response to Neeley's January 26 email, Erik Zilinek sent a letter to Mr. Neeley setting forth the applicable law of cybersquatting under the ACPA, and stating that in evaluating Neeley's claim that NameMedia would consider any evidence of any registration of an "eartheye" trademark by Neeley, or any evidence of a distinctive or famous "eartheye" mark owned by Neeley.

27. On February 3, 2009, Neeley wrote an email to Mr. Zilinek.

28. In the email, Mr. Neeley gave no information regarding any distinctive or famous trademark owned or claimed by him.

29. In the email, Mr. Neeley made no mention of any goods or services as to which he was using a mark identical to or confusingly similar to either domain.

30. On February 13, 2009, Mr. Zilinek wrote a letter to Neeley stating NameMedia's position that according to the evidence before NameMedia, Neeley's claim to the domain was without merit.

31. Mr. Zilinek also stated that if Neeley wanted to negotiate a mutually agreeable price for the domain registration, he should contact NameMedia's sales team.

32. NameMedia sold the eartheye.com domain on April 6, 2009 to a Florida company named "eartheye" which is in the business of, among other things, topography mapping and aerial photography, and which currently uses the domain to advertise its business.

33. In selling the domain to the Florida company, NameMedia did not act with any intent to profit from any trademark owned or claimed by Neeley;

34. At no time has NameMedia taken any action with regard to the eartheye.com domain with the intent to profit from any trademark owned or claimed by Neeley.

35. At no time has NameMedia taken any action with regard to the eartheye.com domain with the bad faith intent to profit from any trademark owned or claimed by Neeley.

36. Neeley first registered sleepspot.com on July 30, 1999.

37. NameMedia registered sleepspot.com on October 15, 2003, at a time when Neeley's registration of the domain had expired.

38. At the time it registered sleepspot.com, NameMedia knew nothing of Neeley, any trademarks of his, or his past registration or prior use of the domain.

39. Neeley did not communicate with NameMedia with regard to the sleepspot.com domain until February 3, 2009, when he sent an email that date to Erik Zilinek.

40. In the February 3, 2009 email, the only content of the email related to sleepspot.com was the following statement: "I was the original registrant of <sleepspot.com> also. NameMedia now owns this also. Is this a coincidence?"

41. At no time has NameMedia taken any action with regard to the sleepspot.com domain with the intent to profit from any trademark owned or claimed by Neeley.

42. At no time has NameMedia taken any action with regard to the sleepspot.com domain with the bad faith intent to profit from any trademark owned or claimed by Neeley.

43. Neeley's only alleged use of "Sleep spot" is for an online hotel reservation service.

44. In Neeley's own words, his use of the name "Sleep spot" was intended to convey the message that the service provided a "spot to sleep."

45. As allegedly used by Neeley, the name "Sleep spot" is descriptive of the service which it was used to identify or advertise.

46. As allegedly used by Neeley, the name "Sleep spot" has no secondary meaning.

47. Neeley is not currently using the name "eartheye" or any related name or logo in connection with the identification, marketing, or advertising of any goods or services.

48. Neeley has no future plans to use the name "eartheye" in commerce in connection with the identification, marketing, or advertising of any goods or services.

49. Neeley has abandoned any trademark rights he may have once had in "eartheye."

50. Neeley has sustained no actual damages as a result of any action taken by NameMedia with regard to either eartheye.com or sleepspot.com.

51. NameMedia never approached Neeley in any manner about eartheye.com prior to Neeley's approaching NameMedia about the domain.

52. NameMedia never approached Neeley in any manner about sleepspot.com prior to Neeley's approaching NameMedia about the domain.

53. NameMedia never offered to sell either eartheye.com or sleepspot.com to Neeley.

Respectfully submitted,

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By: /s/ Brooks C. White  
Brooks C. White

Attorneys for Defendant and  
Counterclaimant NameMedia, Inc.

CERTIFICATE OF SERVICE

I, Brooks C. White, hereby certify that on this 27<sup>th</sup> day of April, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following attorneys of record:

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I further certify that, on this 27<sup>th</sup> day of April, 2011, I mailed a copy of the foregoing to the following *pro se* plaintiff:

Mr. Curtis J. Neeley, Jr.  
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/s/ Brooks C. White  
Brooks C. White