

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 09-cv-00636-REM-KLM

VIDEO PROFESSOR, INC. a Colorado corporation,

Plaintiff,

v.

AMAZON.COM, INC., a Delaware corporation,

Defendant.

SCHEDULING ORDER

**1. DATE OF CONFERENCE
AND APPEARANCES OF COUNSEL AND *PRO SE* PARTIES**

The Scheduling Conference will be held on July 9, 2009. Appearing for Plaintiff Video Professor, Inc. ("VPI") will be Gregory C. Smith of Fairfield and Woods, P.C., 1700 Lincoln Street, Suite 2400, Denver, Colorado 80203, (303) 830-2400. Appearing for Defendant Amazon.com, Inc. ("Amazon") will be Marc C. Levy of Faegre & Benson LLP, 1700 Lincoln Street, Suite 3200, Denver, Colorado 80203, (303) 607-3500.

2. STATEMENT OF JURISDICTION

The Court has jurisdiction over this action pursuant to 15 U.S.C. § 1121 (action arising under the Lanham Act); 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1338(a) (any Act of Congress relating to trademarks); 28 U.S.C. § 1338(b) (action asserting a claim of unfair competition joined with a substantial and related claim under the trademark laws); and 28 U.S.C.

§ 1367 (supplemental jurisdiction).

3. STATEMENT OF CLAIMS AND DEFENSES

a. Plaintiff: VPI's claims arise out of Amazon.com, Inc.'s ("Amazon") conduct in purchasing from Google, Inc., and other search engine operators, VPI's *trademarked* name "Video Professor" (the "VP Mark"). As a result, when Internet users conduct a search for the words "Video Professor," the search results include the following ad and link paid for by Amazon:

Save at Amazon
Low prices on popular products.
Qualified orders over \$25 ship free
Amazon.com

By paying to have its ad appear whenever a user conducts a search for "Video Professor," Amazon intends to divert users initially searching for VPI's site, to Amazon's site, which sells other products which directly compete with VPI's products. This conduct constitutes trademark infringement under 15 U.S.C. § 1114(a); false advertising in commerce under 15 U.S.C. § 1125(a); deceptive trade practices under the Colorado Consumer Protection Act, C.R.S. § 6-1-105; unfair competition; tortious interference with VPI's business relationships; and common law trademark infringement.

In addition, VPI seeks an accounting from Amazon to the profits of Amazon attributable to its infringing and other wrongful activity.

b. Defendant: Amazon.com, Inc. ("Amazon") denies any and all liability in this matter. Amazon's use of "video professor" as a keyword to generate a Google sponsored link, as alleged in the Complaint, does not infringe any of Plaintiff's alleged trademark rights as

there is no likelihood of confusion among relevant consumers. In addition, Amazon's use of "video professor" as alleged in the Complaint is a nominative fair use of the term. By using the term to trigger a sponsored link with Google, Amazon assists consumers find Video Professor products available at Amazon.com as well as other products that people who search for Video Professor products also consider for purchase. Plaintiff's claims are also barred under the doctrines of laches, acquiescence and/or estoppel as Plaintiff itself purchases "video professor" as a keyword to generate sponsored links on the Amazon.com search results page for "video professor." Plaintiff cannot claim that this search results page violates its trademark rights while at the same time approving of such page by purchasing advertising on it.

Defendant reserves all other affirmative defenses under Rule 8(c) of the Federal Rules of Civil Procedure, the Lanham Act, and any other defenses at law or in equity, that may now exist or in the future be available based on discovery and/or further factual investigation.

4. UNDISPUTED FACTS

The following facts are undisputed:

1. For some period of time Amazon purchased "video professor" as a keyword from Google.

5. COMPUTATION OF DAMAGES

a. *Plaintiff*: VPI seeks damages that arise from Amazon's diversion of potential VPI sales to Amazon's site whereon it sells competing products. VPI can quantify its damages only after it discovers from Amazon its number of diversions and sales of competing products from the diverted traffic. VPI also seeks its costs and attorneys' fees which will be quantified upon the conclusion of the lawsuit.

b. *Defendant:* Amazon seeks its costs and reasonable attorneys' fees which will be quantified upon the conclusion of the lawsuit.

6. REPORT OF PRECONFERENCE DISCOVERY AND MEETING UNDER FED. R. CIV. P. 26(f)

- a. The Parties conducted a Rule 26(f) conference on June 24, 2009.
- b. Names of each participant and party he/she represented. Gregory C. Smith participated on behalf of Video Professor. Marc C. Levy participated on behalf of Amazon.
- c. Proposed changes, if any, in timing or requirements of disclosures under Fed.R.Civ.P. 26(a)(1): None.
- d. Fed.R.Civ.P. 26(a)(1) disclosures will be made on or before July 2, 2009.
- e. The Parties have not reached an agreement regarding informal discovery.
- f. The Parties do not anticipate that their claims or defenses will involve extensive electronically stored information, or that a substantial amount of disclosure or discovery will involve information or records maintained in electronic form.

7. CONSENT

All parties have not consented to the exercise of jurisdiction of a magistrate judge.

8. CASE PLAN AND SCHEDULE

- a. Deadline for Joinder of Parties and Amendment of Pleadings: September 1, 2009.
- b. Fact Discovery Cut-off: October 1, 2009.
- c. Dispositive Motion Deadline: November 2, 2009.
- d. Expert Witness Disclosure:

(1) VPI anticipates calling experts in the fields of: (1) the likelihood of public confusion, and (2) VPI's damages. Defendant currently anticipates expert testimony in the fields of consumer perception/survey research and damages.

(2) State any limitations proposed on the use or number of expert witnesses: no more than two (2) per side.

(3) The parties shall designate all experts and provide opposing counsel and any *pro se* party with all information specified in Fed. R. Civ. P. 26(a)(2) on or before: October 1, 2009.

(4) The parties shall designate all rebuttal experts and provide opposing counsel and any *pro se* party with all information specified in Fed. R. Civ. P. 26(a)(2) on or before November 2, 2009.

(5) Notwithstanding the provisions of Fed. R. Civ. P. 26(a)(2)(B), no exception to the requirements of the rule will be allowed by stipulation of the parties unless the stipulation is approved by the court.

e. Deposition Schedule: The Parties agree that additional depositions beyond those listed below may be necessary, but this determination awaits the exchange of disclosures and discovery responses.

Name of Deponent	Date of Deposition	Time of Deposition	Expected Length Of Deposition
30(b)(6) deposition of Amazon	TBD	TBD	1 day
30(b)(6) deposition of VPI	TBD	TBD	1 day

f. Interrogatory Schedule: All interrogatories must be submitted no later than: September 1, 2009.

g. Schedule for Request for Production of Documents and/or Admissions: September 1, 2009.

h. Discovery Limitations:

(1) Any limits which any party wishes to propose on the number of depositions: No more than three fact depositions plus two expert depositions.

(2) Depositions shall be limited to 7 hours per deposition unless otherwise agreed to by the Parties, or by further order of the Court.

(3) Modifications which any party proposes on the presumptive numbers of depositions or interrogatories contained in the federal rules: *See* ¶8(h)(2) above.

(4) Limitations which any party proposes on number of requests for production of documents and/or requests for admissions: Parties agree to 20 requests for production of documents and 25 requests for admissions.

(5) Other Planning or Discovery Orders: None.

9. SETTLEMENT

The Parties certify that on June 24, 2009, at the Rule 26(f) conference, they discussed the possibility of a prompt settlement. The Parties feel at this time that settlement is not a possibility, but could become a possibility at a later date after some discovery has been conducted.

10. OTHER SCHEDULING ISSUES

a. A statement of those discovery or scheduling issues, if any, on which counsel, after a good faith effort, were unable to reach an agreement: None.

b. Anticipated length of trial: 2 ½ days.

c. The Parties *do not* request that pretrial proceedings occur at the Court's facility at 212 N. Wahsatch Street, Colorado Springs, Colorado.

11. DATES FOR FURTHER CONFERENCES

[The magistrate judge will complete this section at the scheduling conference if he or she has not already set deadlines by an order filed before the conference.]

a. A settlement conference will be held on _____ at _____ o'clock __.m.

It is hereby ordered that all settlement conferences that take place before the magistrate judge shall be confidential.

- () *Pro se* parties and attorneys only need be present.
- () *Pro se* parties, attorneys, and client representatives with authority to settle must be present. (NOTE: This requirement is not fulfilled by the presence of counsel. If an insurance company is involved, an adjustor authorized to enter into settlement must also be present.)
- () Each party shall submit a Confidential Settlement Statement to the magistrate judge on or before _____ outlining the facts and issues, as well as the strengths and weaknesses of their case.

b. Status conferences will be held in this case at the following dates and times:

c. A final pretrial conference will be held in this case on _____ at _____ o'clock __.m. A Final Pretrial Order shall be prepared by the parties and submitted to the court no later than five days before the final pretrial conference.

12. OTHER MATTERS

In addition to filing an appropriate notice with the clerk's office, counsel must file a copy of any notice of withdrawal, notice of substitution of counsel, or notice of change of counsel's address or telephone number with the clerk of the magistrate judge assigned to this case.

Counsel will be expected to be familiar and to comply with the Pretrial and Trial Procedures established by the judicial officer presiding over the trial of this case.

In addition to filing an appropriate notice with the clerk's office, a *pro se* party must file a copy of a notice of change of his or her address or telephone number with the clerk of the magistrate judge assigned to this case.

With respect to discovery disputes, parties must comply with D.C.COLO.LCivR 7.1A.

The parties filing motions for extension of time or continuances must comply with D.C.COLO.LCivR 6.1D, by submitting proof that a copy of the motion has been served upon the moving attorney's client, all attorneys of record, and all *pro se* parties.

13. AMENDMENTS TO SCHEDULING ORDER

The scheduling order may be altered or amended only upon a showing of good cause.

DATED this _____ day of July 2009.

BY THE COURT:

United States Magistrate Judge

APPROVED:

s/ Gregory C. Smith

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