

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

Civil Action No. 1:09-CV-00636-REB-KLM

**VIDEO PROFESSOR, INC.**  
Plaintiff,

v.

**AMAZON.COM, INC.**  
Defendant.

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**UNOPPOSED MOTION TO SEAL EXHIBIT A-10 TO DEFENDANT’S MOTION FOR  
SUMMARY JUDGMENT AND SELECT PORTIONS OF THE MOTION AND THE  
DECLARATION OF ERIC HERRMANN FILED IN SUPPORT THEREOF**

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Defendant Amazon.com, Inc. (“Amazon”), pursuant to D.C. Colo. L. Civ. R. 7.2 respectfully moves the Court for an order that Exhibit A-10 to Defendant’s Motion for Summary Judgment (“Motion”) be sealed and that select portions of that Motion and the Declaration of Eric Herrmann (“Herrmann Declaration”) filed in support thereof be sealed. In support of this motion, Amazon states as follows:

**CERTIFICATE OF CONSULTATION**

Pursuant to D.C.COLO.LCivR 7.1(A), undersigned counsel certifies that counsel for Amazon notified counsel for Video Professor, Inc. (“VPI”), of Amazon’s intention to seek permission for the above-referenced documents, or portions thereof, to be sealed and that counsel for VPI indicated that it did not oppose the relief requested herein.

## **GROUNDNS FOR MOTION**

Pursuant to D.C.COLO.LCivR 7.2, upon motion and compelling reasons, the Court may issue an order that all or a portion of papers and documents filed in a case be sealed or closed to the public, upon a showing of (1) the nature of the materials or proceedings at issue; (2) the legitimate private or public interests that warrant the relief sought; (3) the clearly defined and serious injury that would result if the relief sought is not granted; and (4) why a less restrictive alternative to the relief sought is not available.

As set forth below, Exhibit A-10, the Motion, and the Herrmann Declaration contain confidential trade secrets belonging to the parties in this case. As such there are compelling reasons for sealing Exhibit A-10 in its entirety and portions of the Motion and Herrmann Declaration. To ensure that only the relevant information is sealed, Amazon has filed a public version of the Motion and the Herrmann Declaration including redactions of the information Amazon seeks to file under seal.

### **I. Exhibit A-10, the Motion, and the Herrmann Declaration Contain the Parties' Confidential Trade Secrets.**

Amazon seeks to protect from public disclosure two pieces of information: First, Amazon seeks to protect from disclosure a description of the system it uses to bid on keywords offered by search engines to generate advertising. This description is found at Paragraph 6 of the Herrmann Declaration and at Page 3 of the Motion. This information constitute an Amazon trade secret, the public disclosure of which would harm Amazon's ability to compete in the market. *See Mineral Deposits Ltd. v. Zigan*, 773 P.2d 606, 608 (Colo. App. 1988) ("A trade secret may consist of any formula, pattern, device, or compilation of information which is used in one's business and which

gives the owner of the trade secret an opportunity to obtain an advantage over competitors who do not know of or use the trade secret.” (citing Restatement of Torts § 757, comment b (1939))).

Second, Amazon seeks to protect from disclosure the rate at which VPI converts hits on the www.videoprofessor.com website to sales of VPI-brand products. This rate, expressed as a percentage, is disclosed in Exhibit A-10 and at Pages 17, 19, and 20 of the Motion. VPI designed this information as “Confidential” pursuant to the Stipulated Protective Order Magistrate Judge Mix entered on September 9, 2009 (Dkt. No. 28). Based on its conference with counsel for VPI, counsel for Amazon understands that VPI maintains that this information is a VPI trade secret.

**II. Legitimate Public and Private Interests Warrant Submission of Exhibit A-10, the Motion, and the Herrmann Declaration Under Seal.**

Legitimate and compelling interests support sealing Exhibit A-10 and portions of the Motion and the Herrmann Declaration that disclose the parties’ trade secrets. “[T]he purpose of trade secret law is to encourage innovation and development.” *3M v. Pribyl*, 259 F.3d 587, 595 n.2 (7th Cir. 2001). It “provides protection for ‘commercial intangibles,’ seeking to prevent exploitation of those intangibles, to encourage innovation, and to maintain standards of commercial ethics.” *Salsbury Labs., Inc. v. Merieux Labs., Inc.*, 908 F.2d 706, 710 (11th Cir. 1990) (citing, inter alia, *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 481 (1974)); see also *CVD, Inc. v. Raytheon Co.*, 769 F.2d 842, 850 (1st Cir. 1985) (“[T]he rationale behind state trade secret law is to encourage invention, and to provide innovators with protection for the fruits of their labors.” (citing *Kewanee*, 416 U.S. at 481–85)). Trade secret law is “designed to protect

the labor—the so-called ‘sweat equity’—that goes into creating a work.” *Alcatel USA, Inc. v. DGI Technologies, Inc.*, 166 F.3d 772, 788 (5th Cir. 1999).

“Although there is no absolute protection for trade secrets, because of the threat of economic injury resulting from disclosure to competitors, courts have consistently afforded greater protection to technical or trade information than to ordinary business information.” *Digital Equipment Corp. v. Micro Technology, Inc.*, 142 F.R.D. 488, 490 (D. Colo. 1992). Indeed, the appropriation of trade secrets “inherently contemplate[s] the possibility of economic loss.” *Vanderbeek v. Vernon Corp.*, 25 P.3d 1242, 1245 (Colo. App. 2000).

**III. Disclosure of Amazon’s Keyword Advertising Methods to the Public Would Result in Serious Injury to Amazon.**

Amazon has a significant competitive interest in not revealing to the public or its competitors the manner in which it bids on keywords.<sup>1</sup> Keyword advertising is an important part of Amazon’s advertising strategy. Its methods for selecting keywords are confidential within the company and provide it with a competitive advantage in the marketplace. If Amazon’s competitors became aware of these methods, these competitors could use these methods themselves or develop ways to undermine their effectiveness, all to the disadvantage of Amazon.

**IV. A Less Restrictive Alternative for Maintaining Confidentiality is not Available.**

Sealing Exhibit A-10 in its entirety and portions of the Motion and the Herrmann Declaration is the least restrictive means available to Amazon to prevent disclosure of

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<sup>1</sup> Amazon does not purport to know how VPI would be injured by public disclosure of its conversion rate and assumes that VPI will file a brief in support of this Motion if it believes such explanation is necessary.

information relating to the parties' confidential trade secrets. In total, Amazon seeks to seal a two-page exhibit; one paragraph, plus three references to a percentage range, in the Motion; and one paragraph in the Herrmann Declaration. Except for this information, the Motion and supporting declarations will all be available to the public in Amazon's public filing.

WHEREFORE, Amazon respectfully requests that, pursuant to D.C.COLO.LCivR 7.2, the Court enter an order sealing Exhibit A-10 to Defendant's Motion for Summary Judgment as well as portions of the Motion and the Herrmann Declaration.

Respectfully submitted this 27th day of October 2009.

s/ Marc C. Levy  
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Attorneys for Defendant Amazon.com, Inc.

**CERTIFICATE OF SERVICE (CM/ECF)**

I hereby certify that on October 27, 2009, I electronically filed the foregoing **UNOPPOSED MOTION TO SEAL EXHIBIT A-10 TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND SELECT PORTIONS OF THE MOTION AND THE DECLARATION OF ERIC HERRMANN FILED IN SUPPORT THEREOF** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following persons at the given email addresses:

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/s/ Lori E. True  
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