

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

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

VIDEO PROFESSOR, INC. a Colorado corporation,

Plaintiff,

v.

AMAZON.COM, INC., a Delaware corporation,

Defendant.

**PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR LEAVE
TO FILE AMENDED RESPONSE *NUNC PRO TUNC***

Plaintiff Video Professor, Inc. ("Plaintiff" or "VPI"), by and through its counsel, hereby replies in support of its Motion for Leave to File Amended Response *Nunc Pro Tunc* [Doc. No. 41] ("Motion"), and states:

On November 24, 2009, Amazon filed a response in opposition to the Motion, and stated that Plaintiff did not refer to an exhibit which evidenced that Amazon used VPI's marks in their advertisements in its response brief as originally filed. See Amazon's Response to Plaintiff's Motion for Leave to File Amended Response *Nunc Pro Tunc* [Docket No. 41, filed November 23, 2009] [Doc. No. 42, filed November 24, 2009], at p. 2. ("Plaintiff's response includes no references to any such exhibit. . .").

In fact, in at least two places in Plaintiff's response brief, Plaintiff specifically referenced Amazon's use of VPI's marks in its Sponsored Link ads. See, e.g., Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment [Doc. No. 39] at

pp. 1-2 ("One such sponsored link uses VPI's trademark to promise savings on VPI products at Amazon.com."); *see also id.* at p. 11 ("To wit: (1) diversion of consumers by using VPI's trademarks in its sponsored links; . . ."). As these references make plain, VPI specifically referred to the Sponsored Link ad contained in Exhibit 11 (and the use of VPI's trademark therein), and clearly intended to attach same. Plaintiff's failure to attach the exhibit was an oversight. Amazon, of course, has been aware of its own ad at all times, and cannot claim to be surprised or prejudiced thereby.

WHEREFORE, Plaintiff respectfully requests that the Court grant its Motion, and for such other and further relief as the Court deems just and proper.

Respectfully submitted this 24th day of November, 2009.

FAIRFIELD AND WOODS, P.C.

s/ Gregory C. Smith

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of November 2009, a true and correct copy of the foregoing was sent via CM/ECF as follows:

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s/Julie Boling
Julie Boling