

**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.

FINAL PRETRIAL ORDER

1. DATE AND APPEARANCES

The pretrial conference in this matter was conducted April 16, 2010. Appearing for the parties were:

Gregory C. Smith
Kieran A. Lasater
FAIRFIELD AND WOODS, P.C.
1700 Lincoln Street, Suite 2400
Denver, Colorado 80203
Telephone: (303) 830-2400
Attorneys for Plaintiff
Video Professor, Inc.

Marc C. Levy
Jared B. Briant
FAEGRE & BENSON LLP
1700 Lincoln Street, Suite 3200
Denver, Colorado 80203
Telephone: (303) 607-3500
Attorneys for Defendant
Amazon.com, Inc.

2. 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. CLAIMS AND DEFENSES

(a). **Plaintiff:** Video Professor, Inc. ("VPI") is a Colorado corporation. Since 1987, VPI has developed, marketed, and distributed for sale to retailers and the general public, computer learning products including video tapes and CD-ROMs. Since 1987, VPI has continuously used the name VIDEO PROFESSOR in connection with the marketing and promotion of its business and products. VPI is the sole and exclusive owner of, *inter alia*, at least three trademarks for "VIDEO PROFESSOR" ("VPI's Marks").

VPI has a long-established presence as an Internet retailer. Through its Web site, VPI provides important information to its customers and potential customers regarding VPI's products, as well as a means to order VPI's products online. VPI's Web site advertising and sales are a significant and rapidly expanding portion of its business.

Defendant Amazon.com, Inc. ("Amazon") is the nation's leading Internet retailer. In 2003, VPI and Amazon entered into a contract whereby Amazon would purchase VPI's products for resale on its Web site. VPI terminated the agreement effective September 19, 2008, based upon Amazon's infringing use of VPI's Marks by its bidding on VPI's Marks as keywords with third-party search engine operators to divert Internet users searching for VPI to Amazon's Web site, as well the minimal resulting sales of VPI products. In February and March 2009, VPI sent Amazon two cease and desist demands. Those demands went unanswered. Thereafter, VPI commenced this action

seeking, *inter alia*: (1) an injunction precluding Amazon from infringing VPI's Marks by bidding on the keywords "video professor" or "video proffessor" or by displaying Amazon's or other companies' competing products in the Amazon search results for VPI's Marks; (2) its costs and attorney's fees; and (3) damages.

VPI has asserted eight separate claims for relief against Amazon and has the burden of proof as to each. VPI withdraws its seventh and eighth claims for an accounting and for imposition of a constructive trust, and will not proceed on a theory of contributory infringement under 15 U.S.C. § 1114(1)(a). With regard to the four claims asserted under state law, the law of the state of Colorado applies to each.

First Claim for Relief—False Designation of Origin and False Representation (15 U.S.C. § 1125(a)):¹ To satisfy Section 1125(a), VPI must establish that: (1) in connection with a good; (2) Amazon used in commerce; (3) a word, name or any combination thereof; (4) which is likely to cause confusion, mistake or deceive; (5) as to the affiliation, connection or association of Amazon with VPI, or as to the products offered by Amazon and VPI; (6) that has or is likely to cause damage to VPI. 15 U.S.C. § 1125(a)(1)(A).

Second Claim for Relief—Violation of Lanham Act (15 U.S.C. § 1114(1)(a)): To prevail under 15 U.S.C. § 1114(1)(a), VPI must establish that: (1) without VPI's authorization; (2) Amazon used in commerce VPI's Marks or a colorable imitation; (3) in a manner likely to cause confusion, mistake or to deceive. 15 U.S.C. § 1114(1)(a).

¹ To the extent Amazon attempts to blend VPI's First, Second, Fourth and Sixth Claims for relief into three elements, VPI disputes and objects to Amazon's characterization of the four claims, as each claim

With respect to the Lanham Act claims, VPI asserts that Amazon has used VPI's Marks in commerce to promote and sell products other than VPI's products, including products that Amazon purchases indirectly from VPI's direct competitor, Individual Software, Inc. ("ISI"), which sells computer learning software under the brand name "Professor Teaches."

VPI seeks a permanent injunction prohibiting Amazon from: (1) bidding on the terms "video professor" (or any confusingly similar terms), with internet search engine operators; and (2) displaying products other than VPI products on Amazon's search results web pages in response to a consumer's search for "video professor," or any confusingly similar terms. VPI also seeks damages, including treble damages, and its costs and attorneys' fees under 15 U.S.C. § 1117(a). The Court has discretion to award a greater damages figure under Section 1117(a). Attorney's fees are available under the Lanham Act in "exceptional" cases, see *id.*, which are defined as cases where the infringement of the mark was malicious, fraudulent, deliberate or willful. See, e.g., *W. Diversified Servs., Inc. v. Hyundai Motor Am., Inc.*, 427 F.3d 1269, 1273 (10th Cir. 2005) (defining typical "willful" infringement so as to allow award of attorney's fees even where no damages proven as "the intent to benefit from the goodwill or reputation of another.>").

VPI asserts both direct and initial interest confusion in this case. Direct confusion exists under the Lanham Act where the manner of a defendant's unauthorized use in commerce of any reproduction, counterfeit, copy, or colorable imitation of a plaintiff's

is a separate and distinct legal cause of action, with unique elements that can be established with unique

registered trademark is likely to cause confusion in the marketplace that the plaintiff is the source of defendant's products. *Australian Gold, Inc. v. Hatfield*, 436 F.3d 1228, 1238 (10th Cir. 2006). Initial interest confusion under the Lanham Act is where a "consumer seeks a particular trademark holder's product and instead is lured to the product of a competitor by the competitor's use of the same or a similar mark." *Id.* These claims encompass Amazon's keyword advertising using the name "video professor" (or confusingly similar terms), as well as its display of non-VPI products in the search results field on its Web site landing page for the search terms "video professor" (or confusingly similar terms), and based upon similar results for internal searches.

Third Claim for Relief—Colorado Consumer Protection Act (C.R.S. § 6-1-105): VPI's third claim for relief relates to Amazon's commission of deceptive trade practices in violation of the Colorado Consumer Protection Act, C.R.S. § 6-1-105 ("CCPA"), and specifically subsections 105(a), (b), (c), and (e). The gravamen of this claim relates to Amazon's bidding on VPI's Marks to generate Sponsored Link ads, and, thereafter, the displaying of products of companies other than VPI in Amazon's search results for consumers looking for VPI's products. In this way, Amazon thereby falsely suggests a relationship, sponsorship, approval, affiliation or connection between VPI and the non-VPI products displayed. Under its CCPA claim, VPI seeks an injunction similar to its requested Lanham Act injunction, in addition to treble damages under

facts.

C.R.S. § 6-1-113(2)(a)(III), and its costs and reasonable attorney's fees under C.R.S. § 6-1-113(2)(b).

The elements of a claim of deceptive trade practice under the CCPA are: (1) the defendant engaged in an unfair or deceptive trade practice; (2) the challenged practice occurred in the course of defendant's business, vocation, or occupation; (3) it significantly impacts² the public as actual or potential consumers of the defendant's goods, services, or property; (4) the plaintiff suffered injury in fact to a legally protected interest; and (5) the challenged practice caused the plaintiff's injury. *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 146-47 (Colo. 2003).

Fourth Claim for Relief—Common Law Unfair Competition: Plaintiff's fourth claim is for common law unfair competition under both state and federal law.

Under Colorado law, the elements have been expressed as the: (1) unauthorized interference; (2) with the normal operation of a legitimate business precisely at the point where the profit is to be reaped; (3) in order to divert a material portion of the profit from those who have earned it to those who have not; (4) with special advantage to defendant in the competition because of the fact that it is not burdened with any part of

² VPI disputes Amazon's characterization of the third element of CCPA claim. Evidence of actual deception is not a required element. See, e.g., *Crowe v. Tull*, 126 P.3d 196, 208 (Colo. 2006) (setting forth three factors to be considered in determining if a challenged practice has requisite public impact, i.e., "(1) the number of consumers directly affected by the challenged practice, (2) the relative sophistication and bargaining power of the consumers affected by the challenged practice, and (3) evidence that the challenged practice has previously impacted other consumers or has the significant potential to do so in the future.") (emphasis added).

the expense of creating the good will that it attempts to usurp. See *Am. Tel. and Commns. Corp. v. Manning*, 651 P.2d 440 (Colo. App. 1982).

The tort of unfair competition is not limited to a single definition, and, in the case of improper use of trade names so as to constitute unfair competition, courts have required that the plaintiff prove: (1) the mark has acquired secondary meaning or significance that identifies the plaintiff; and (2) that the defendant unfairly used the plaintiff's mark or a simulation thereof against the plaintiff. *Swart v. Mid-Continent Refrigerator Co.*, 360 P.2d 440, 442 (Colo. 1961).

"A secondary meaning is acquired where by prior and continuous use of a name for a long period of time[,] the public mind identifies the user of the name with the particular service or goods furnished by him, and thereby identifies the product by the name." *Wood v. Wood's Homes, Inc.*, 519 P.2d 1212, 1214 (1974). Additionally, by the placement of the mark on the Principal Register, *prima facie* evidence of secondary meaning exists. 3 McCarthy on Trademarks and Unfair Competition § 19.9 (4th ed.). Secondary meaning can also be established through, *inter alia*, circumstantial evidence of (1) the length and manner of the use of the mark; (2) the nature and extent of the advertising and promotion of the mark; and (3) the efforts made to promote a connection in the public's mind between the mark and a particular product. *Donchez v. Coors Brewing Co.*, 392 F.3d 1211, 1218 (10th Cir. 2004). The facts supporting this claim are largely the same as those supporting VPI's claims one through three.

Fifth Claim for Relief—Tortious Interference with Business Relationships:

The elements of this claim are: (1) the intentional and improper interference; (2) with

another's prospective contractual relation; (3) by inducing or otherwise causing a third person; (4) not to enter into or continue the prospective relation. *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 500 (Colo. 1995).³ The facts that support this claim are similar to those supporting the Lanham Act claims, *supra*.

Sixth Claim for Relief—Common Law Trademark and Trade Name Infringement: VPI's sixth claim for relief against Amazon is for common law trademark and trade name infringement. To establish common law trademark infringement, VPI must prove: (1) a protectable interest in its marks; (2) Amazon's use of those marks in commerce; and (3) likelihood of consumer confusion. See *Donchez v. Coors Brewing Co.*, 392 F. 1211, 1219 (10th Cir. 2004).

The facts that support this claim are similar to those supporting the Lanham Act claims, *supra*.

Amazon's First Affirmative Defense (Nominative Fair Use):

A. Burden of Proof:

The nominative fair use doctrine, if considered by the court, see *infra*, is not an affirmative defense and Amazon would not have the burden of proof. See *Health Grades, Inc. v. Robert Wood Univ. Hosp., Inc.*, 634 F. Supp. 2d 1226, 1241-42 (D. Colo. 2009).

B. Elements:

The nominative fair use concept has not been adopted or addressed by the Tenth Circuit. *Id.* at 1241. The concept "has not been widely adopted. In fact, all the

³ VPI disputes Amazon's recitation and characterization of the elements of this claim as they are either

circuit courts that have considered it to date have either rejected the Ninth Circuit's approach outright . . . or modified it in some fashion to allow likelihood of confusion to be determined based largely on the traditional multi-factor analysis of this element,” *Id.* (internal citations omitted).

In *Health Grades*, Judge Kane decided that if the doctrine applied to that case, the three elements of the defense would supplement and serve as additional factors for the court to consider in addition to the traditional non-exhaustive six-factor test for likelihood of confusion. *Id.*

Even if considered by the Court, the doctrine cannot apply where, *inter alia*: (1) there is any likelihood of confusion; (2) where the defendant capitalizes on consumer confusion; or (3) uses the plaintiff's mark in order to appropriate the cachet of one product for another product. *Id.*

Amazon's Third Affirmative Defense (Estoppel Based on Unclean Hands):

B. Elements:

This affirmative defense applies only to claims based in equity. *See Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 245 (1933). The complained of conduct must be related to the plaintiff's cause of action, *i.e.*, “the plaintiff [must have] acted inequitably toward the defendant in relation to the trademark [at issue].” *Worthington v. Anderson*, 386 F.3d 1314, 1320 (10th Cir. 2004).

assumed by the elements set forth by VPI, or do not expressly appear in the authorities cited by Amazon.

"A trademark plaintiff with unclean hands is one whose conduct relative to his mark has been so illegal or unconscionable that the court will refuse to hear him." *Big O Tires, Inc. v. Bigfoot 4X4, Inc.*, 167 F. Supp. 2d 1216, 1230 (D. Colo. 2001)

Amazon's Alleged Fifth Affirmative Defense (Jus Tertii):

On April 14, 2010, Amazon first made clear to VPI in a telephone conversation between Mr. Briant and Mr. Lasater that Amazon intended to defend against the initial interest confusion and direct confusion claims under the Lanham Act based upon the alleged senior trademark rights of ISI, regardless if a claim for contributory infringement was raised by VPI. VPI had previously agreed not to argue contributory infringement, based in part, on Judge Mix's order denying additional discovery.

Amazon has not amended its Answer to include the affirmative defense of Jus Tertii, which deadline expired on September 1, 2009. At the time of this filing, VPI and Amazon have begun a conferral on a possible motion, which conferral has not been completed. VPI reserves the right to challenge the inclusion of the alleged Fifth Affirmative Defense in the trail in the event the parties cannot reach an agreement.

(b). Defendant: From December, 2003 through March, 2009 (when it filed this lawsuit), VPI sold Video Professor computer learning software products to Amazon for Amazon to resell on its website. Under its vendor agreement with Amazon, VPI granted Amazon an unrestricted license to use its VIDEO PROFESSOR trademark. In this case, VPI argues that Amazon cannot use that VIDEO PROFESSOR trademark to advertise to consumers that it carries those VIDEO PROFESSOR-marked products

because Amazon also carries competing products and Amazon displays such competing products in the same "aisle" as VPI's products.

If Amazon were a brick and mortar merchant, VPI would not have even tried to make this claim. Even without a license, a reseller may fairly use a trademark to truthfully tell consumers that it carries that trademarked product, regardless whether it also carries competing products. To hold otherwise would empower trademark owners to impose unconscionable restraints of trade – barring resellers from using trademarks to identify their goods unless they refused to carry or promote competing goods. The fact that the reseller in this case operates on the internet, and that the "aisle" where the products are shown is a search results page produced by the reseller's search function changes nothing about the lawfulness of this activity.

Amazon seeks judgment dismissing VPI's complaint with prejudice and awarding Amazon its costs. In addition, because this is an exceptional case and VPI's claims are baseless, Amazon seeks an award of reasonable attorney's fees under 15 U.S.C. § 1117 and C.R.S. § 13-17-102. The elements of VPI's claims and Amazon's affirmative defenses are set forth below.

I. Plaintiff's First, Second, Fourth and Sixth Claims for Relief (Trademark Infringement/Unfair Competition):

A. Burden of Proof: VPI has the burden of proof. *See Frontrange Solutions USA, Inc. v. Newroad Software, Inc.*, 505 F. Supp. 2d 821, 834 (D. Colo. 2007).

B. Elements: VPI alleges false designation of origin and false representation under 15 U.S.C. § 1125(a), trademark infringement under 15 U.S.C. § 1114(a), unfair competition under Colorado and federal common law, and common law trademark and

trade name infringement. (Compl. (Dkt. #1) Cts. 1, 2, 4, 6.) To prevail on these claims, VPI must show that: (1) Amazon used VPI's mark in commerce without authorization,¹ (2) Amazon's use was likely to cause confusion in the marketplace, and (3) that VPI was injured as a result. *Universal Money Ctrs., Inc. v. Am. Tel. & Tel. Co.*, 22 F.3d 1527, 1529 (10th Cir. 1994) (lack of consent, confusion elements); *Harvey Barnett, Inc. v. Shidler*, 338 F.3d 1125, 1135 (10th Cir. 2003) (injury element); *Amoco Oil Co. v. Rainbow Snow*, 748 F.2d 556, 558 (10th Cir. 1984) ("likelihood of confusion" test applies to trademark infringement claims as well as claim for "false designation of origin, its state claims of infringement, and its common law claims of unfair competition").

Where the same alleged conduct forms the basis for Lanham Act and state unfair competition and trademark infringement claims, those claims essentially require proof of the same elements. *Donchez v. Coors Brewing Co.*, 392 F.3d 1211, 1219 (10th Cir. 2004) ("The elements of common law trademark or service mark infringement are similar to those required to prove unfair competition under § 43(a) of the Lanham Act."); *MDM Group Assocs., Inc. v. ResortQuest Intern., Inc.*, No. 06-cv-1518, 2007 WL 2909408, at *8 (D. Colo. Oct. 1, 2007) ("To the extent plaintiff's state law unfair competition claims are based on allegations of false designation of origin . . . those

¹ Under both 15 U.S.C. § 1114(1)(a) and 15 U.S.C. § 1125(a), VPI must prove that Amazon used VPI's VIDEO PROFESSOR trademark without authorization. Accordingly, Amazon disputes VPI's statement of the material elements of the § 1125(a) claim that omits this element.

claims are dismissed for the same reasons the Court dismissed plaintiff's Lanham Act claims that are based on such allegations.").²

II. Plaintiff's Third Claim for Relief (Violation of the Colorado Consumer Protection Act ("CCPA")):

A. Burden of Proof: VPI has the burden of proof. *Rhino Linings United States v. Rocky Mt. Rhino Lining*, 62 P.3d 142, 146–47 (Colo. 2003).

B. Elements: To prevail on its CCPA claim, VPI must show: "(1) that the defendant engaged in an unfair or deceptive trade practice [as defined in the CCPA]; (2) that the challenged practice occurred in the course of defendant's business, vocation, or occupation; (3) that it significantly impacts the public as actual or potential consumers of the defendant's goods, services, or property; (4) that the plaintiff suffered injury in fact to a legally protected interest; and (5) that the challenged practice caused the plaintiff's injury." *Rhino Linings United States v. Rocky Mt. Rhino Lining*, 62 P.3d 142, 146–47 (Colo. 2003).

Regarding the first required element, VPI must prove that Amazon engaged in one of the following four statutorily enumerated deceptive trade practices which it has alleged: (1) "knowingly passes off goods, services, or property as those of another;" (2) "knowingly makes a false representation as to the source, sponsorship, approval, or certification of goods, services, or property;" (3) "knowingly makes a false representation as to affiliation, connection, or association with or certification by another;" or (4) "knowingly makes a false representation as to the characteristics,

² Because VPI's First, Second, Fourth and Sixth Claims for Relief each relate to Amazon's use of the VIDEO PROFESSOR trademark to generate Sponsored Links, Amazon disputes Plaintiff's

ingredients, uses, benefits, alterations, or quantities of goods, food, services, or property or false representation as to the sponsorship, approval, status, affiliation, or connection of a person therewith.” C.R.S. § 6-1-105; *see also* Compl. ¶ 44

Regarding the third “significantly impacts the public” element, proof of likelihood of confusion is not sufficient. VPI must prove that consumers were actually deceived by Amazon's alleged infringing use of the VIDEO PROFESSOR trademark. *See Registry Sys. Intern., Ltd. v. Hamm*, No. 08-cv-495, 2010 WL 326327, at *15 (D. Colo. Jan. 20, 2010) (granting summary judgment dismissing CCPA claim because plaintiff failed to identify any relevant consumers who were actually deceived by the alleged deceptive practice).

III. Plaintiff's Fifth Claim for Relief (Tortious Interference with Business Relationship):

A. Burden of Proof: VPI has the burden of proof. *Klein v. Grynberg*, 44 F.3d 1497, 1506 (10th Cir. 1995).

B. Elements: VPI must prove: (1) It had a business relationship or reasonable expectancy; (2) Amazon knew or should have known of the relationship or expectancy; (3) Amazon acted intentionally to either discontinue the relationship or prevent the expectancy; (4) Amazon's conduct was improper; (5) Amazon's conduct caused the loss of the relationship or expectancy; and (6) Amazon's conduct proximately caused Plaintiffs' damages. *Klein*, 44 F.3d at 1506; *Dolton v. Capitol Fed.*

characterization that each of these claims requires proof of different sets of elements.

Sav. and Loan Ass'n, 642 P.2d 21, 23 (Colo. Ct. App. 1981) (citing Restatement (Second) of Torts § 766B).

IV. Defendant's First Affirmative Defense (Nominative Fair Use):

A. Burden of Proof: If the Court were to treat nominative fair use as an affirmative defense, Amazon would have the burden of proof.

B. Elements: Should the Court treat nominative fair use as an affirmative defense, Amazon would have to prove: (1) the products in question are not readily identifiable without use of the trademark, (2) the defendant uses only so much of the mark as is necessary to identify the product, and (3) the defendant does nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder. *Frontrange Solutions USA, Inc. v. Newroad Software, Inc.*, 505 F. Supp. 2d 821, 834 (D. Colo. 2007) (citing *New Kids on the Block v. News Am. Publ'g, Inc.*, 971 F.2d 302, 308 (9th Cir. 1992)).

V. Defendant's Second Affirmative Defense (First Amendment):

A. Burden of Proof: Amazon has the burden of proof.

B. Elements: Amazon must prove that granting relief on VPI's claims in this suit would infringe Amazon's freedom of speech under the First Amendment of the United States Constitution. In particular, Amazon must establish that it has a constitutional right to use the VIDEO PROFESSOR trademark in commerce to truthfully inform consumers that Video Professor products are available for sale at amazon.com. See, e.g. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (recognizing First Amendment protection of commercial speech);

Prestonettes, Inc. v. Coty, 264 U.S. 359, 368 (1924) (when a “mark is used in a way that does not deceive the public,” there is “no such sanctity in the word as to prevent its being used to tell the truth.”).

VI. Defendant’s Third Affirmative Defense (Estoppel based on unclean hands):

A. Burden of Proof: Amazon has the burden of proof. See Fed. R. Civ. P. 8(c).

B. Elements: This defense relates to VPI’s use of third-party trademarks without authorization in the names of VPI’s products (e.g. “Learn Excel,” “Learn Windows” and “Learn eBay”) and VPI’s bidding on those trademarks to generate sponsored advertisements for VPI’s products on major search engines, like Google. Amazon maintains that given VPI’s own nominative use of third party trademarks to identify its products and in keyword advertising, VPI is estopped from arguing that Amazon is liable for using VPI’s marks in a similar nominative way to identify VPI products for sale at amazon.com.

To establish this defense, Amazon must prove: (1) VPI engaged in an inequitable or unconscionable act that has (2) immediate and necessary relation to the relief VPI seeks in the litigation. *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 245 (1933); *Worthington v. Anderson*, 386 F.3d 1314, 1320-21 (10th Cir. 2004); *Big O Tires, Inc. v. Bigfoot 4X4, Inc.*, 167 F.Supp.2d 1216, 1230 (D. Colo. 2001). *Procter & Gamble Co. v. Ultreo, Inc.*, 574 F. Supp. 2d 339, 356 (S.D.N.Y. 2008) (having availed itself of making advertising claims based on laboratory studies “at a time when it was in

[plaintiff's] commercial interests to do so, [plaintiff] may not now claim to be irreparably harmed when a new market entrant takes the same position it once did.").

VII. Defendant's Fourth Affirmative Defense (Laches):

A. Burden of Proof: Amazon has the burden of proof. See Fed. R. Civ. P. 8(c).

B. Elements: This defense relates to VPI's inexcusable delay in bringing its claims. Amazon has bid on "video professor" as a keyword since at least as early as 2004. And during this entire time, Amazon has sold other brands of computer learning software, including Professor Teaches. VPI did not bring this suit until March, 2009. For its laches defense, Amazon must prove: (1) VPI inexcusably delayed in instituting suit; and (2) resulting prejudice to defendant from such delay. *Prince Lionheart, Inc. v. Halo Innovations, Inc.*, No. 06-cv-324, 2008 WL 878985, at *3 (D. Colo. Mar. 28, 2008) (citing *Brunswick Corp. v. Spinit Reel Co.*, 832 F.2d 513, 523 (10th Cir.1987)). Prejudice may relate both to the evidence or the conduct of trial and to defendant's business and expectations. See, e.g., *Pro Football, Inc. v. Harjo*, 565 F.3d 880 (2009); *Danjaq LLC v. Sony Corp.*, 263 F.3d 942 (9th Cir. 2001). Proof that defendant expanded its business concerning the relevant trademark(s) during the time that plaintiff delayed the exercise of its rights satisfies the prejudice element. See *Grupo Gigante SA De CV v. Dallo & Co., Inc.*, 391 F.3d 1088 (9th Cir. 2004).

VIII. Defendant's Fifth Affirmative Defense (Jus Tertii): *

A. Burden of Proof: Amazon has the burden of proof. *Diarama Trading Co. v. J. Walter Thompson U.S.A., Inc.*, No. 01 Civ. 2950, 2005 WL 2148925, at *6, *11 (S.D.N.Y. Sept. 6, 2005).

* This affirmative defense is the subject of (T)'s Motion to Strike (#59). Δ intends to promptly file a Motion to Amend Answer to assert affirmative defense.

B. Elements: In its cross-motion for summary judgment, VPI stated that "Amazon's sale of the confusingly-similar Professor Teaches products (using VPI's mark) likewise constitutes contributory infringement, for which Amazon may be held strictly liable." Dkt. 45, at 15. In its order denying VPI's motion for additional discovery to pursue this claim, the Court held plaintiff had failed to plead this claim in its Complaint. See Mar. 8, 2010 Order (Dkt. 52) at 6-7. VPI states in this Pretrial Order that it "will not proceed on a theory of contributory infringement under 15 U.S.C. § 1114(1)(a)." See *supra*, at 3.

Amazon's understanding, therefore, is that there is no claim in this case that Amazon's use of the PROFESSOR TEACHES trademark in selling or advertising Professor Teaches products infringes VPI's VIDEO PROFESSOR mark. To the extent VPI contends otherwise, such a claim is not in the case because it was not well-pleaded. See *Ashcroft v. Iqbal*, 556 U.S. ____; 129 S. Ct. 1937, 1949 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2006). If the Court were to hold otherwise, Amazon would deny any such liability and further assert the senior registered trademark rights of the owner of the PROFESSOR TEACHES mark to defeat such a claim under the defense of Jus Tertii.

Amazon may invoke the superior trademark rights of Individual Software, Inc. ("ISI"), the owner of a family of registered "professor" marks for computer learning software (PROFESSOR, PROFESSOR DOS and PROFESSOR TEACHES) provided that (1) ISI's rights in its "Professor" family of marks are senior to those of VPI and (2) Amazon is in privity with ISI." *Diarama Trading*, 2005 WL 2148925, at *6. A contractual

arrangement between the third party and Amazon, express or implied in fact, under which the third party permits a defendant to use its trademark satisfies the privity requirement. *Diarama Trading*, 2005 WL 2138925, at *9 (citing *Lapinee Trade, Inc. v. Paleewong Trading Co.*, 687 F. Supp. 1262, 1264 (N.D. Ill. 1988)).

4. STIPULATIONS

VPI withdraws its stipulations contained in the Amended Undisputed Facts [Doc. No. 24] based upon facts acquired through discovery, which facts refute certain stipulations previously suggested by opposing counsel and contained therein. Amazon contends that the Amended Undisputed Facts (Dkt. # 24, filed 8/20/09) are stipulated.

1. VPI is the owner of U.S. Trademark Registrations 1,566,793, 1,574,578 and 3,168,757 for "VIDEO PROFESSOR."

2. "Professor Teaches" products are not products of VPI; they are products of Individual Software, Inc., who owns the following registered trademarks: PROFESSOR TEACHES (U.S. Reg. No. 3,492,267), PROFESSOR (U.S. Reg. No. 1,929,093) and PROFESSOR DOS (U.S. Reg. No. 1,902,468).

3. From 2003 to present, Amazon sold Professor Teaches products on the Amazon.com website.

4. Amazon is the registrant and owner of the domain name www.amazon.com.

5. VPI executed the Vendor Manual agreement on December 18, 2003 (VPI019-VPI064).

6. VPI provided to Amazon written notice to terminate the Vendor Manual agreement on or about July 19, 2008.

7. Amazon continued to submit orders to VPI for Video Professor software products and VPI continued to fulfill those orders after VPI sent its written notice to terminate the Vendor Manual, and as late as March, 2009.

5. PENDING MOTIONS

1. Defendant's Motion for Summary Judgment and Memorandum in Support Thereof (File date: 10/27/09; Dkt. # 30); Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment (File date: 11/19/09; Dkt. # 39); Defendant's Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment (File date: 12/4/09; Dkt. # 44).

2. Plaintiff's Motion to File Amended Response *Nunc Pro Tunc* (File date: 11/23/09; Dkt. # 41); Amazon's Response to Plaintiff's Motion for Leave to File Amended Response *Nunc Pro Tunc* (File date: 11/24/09; Dkt. # 42); Plaintiff's Reply in Support of Motion for Leave to File Amended Response *Nunc Pro Tunc* (File date: 11/24/09; Dkt. # 43).

3. Plaintiff's Cross-Motion for Summary Judgment and Memorandum of Law in Support Thereof (File date: 12/04/09; Dkt. # 45); Defendant's Response to Plaintiff's Cross-Motion for Summary Judgment (File date: 12/21/09; Dkt. # 47); Plaintiff's Reply in Support of Cross-Motion for Summary Judgment (File date: 1/7/10; Dkt. # 48).

6. WITNESSES

A. Non-Expert Witnesses to be called by each party:

1. Plaintiff's Witnesses who will be present at trial (VPI has agreed to voluntarily produce the first three witnesses listed below; however, VPI may decline to call one or more, who would nonetheless be available to be called by Amazon):

- a) Betty Harrison, Video Professor, Inc., 12055 West Second Place, Lakewood, Colorado 80228

Ms. Harrison is the President of VPI, and may provide testimony regarding: VPI; its marks, history, organization, operations, business model and products; VPI's sales and marketing channels; the relationship and Vendor Manual with Amazon; Amazon's use of VPI's Marks; her Internet searches for "video professor" and other related searches; and the confusion that results from the conduct complained of in (and the events surrounding) the filing of the complaint; VPI's knowledge of the Professor Teaches brand products; VPI's damages and other information relevant to this action, including the subjects addressed by her in her deposition in this matter.

- b) David M. Laughlin, Video Professor, Inc., 12055 West Second Place, Lakewood, Colorado 80228

Mr. Laughlin is the Senior Vice President at VPI and, if called, may testify regarding: VPI; its marks, history, organization, operations, business model and products; VPI's sales and marketing channels; the relationship and Vendor Manual with Amazon; Amazon's use of VPI's Marks; his Internet searches for "video professor" and other related searches; the confusion that results from the conduct complained of in (and the events surrounding) the filing of the complaint; VPI's knowledge of the

Professor Teaches brand products; VPI's damages and other information relevant to this action, including the subjects addressed by him in his deposition in this matter.

- c) R.J. Schubert, Video Professor, Inc., 12055 West Second Place,
Lakewood, Colorado 80228

Mr. Schubert is the legal contract and compliance manager at VPI. If called, he may testify regarding the claims and defenses alleged in this matter and any other information relevant to this action, including the relationship between VPI and Amazon between 2003 and the present, the reasons for the instant action being commenced, the termination of the agreement between VPI and Amazon, VPI's sales and marketing of its products, the damages suffered by VPI based on the infringing conduct of Amazon, his knowledge of actual customer confusion and the likelihood of confusion, various searches he conducted on the Amazon web site in addition to those for "video professor," and the subjects addressed by him in his deposition in this matter.

- d) Fatima Corral, Video Professor, Inc., 12055 West Second Place,
Lakewood, Colorado 80228, (303) 232-1244.

Ms. Corral is a Senior Call Center Technician at VPI and will testify regarding her position and duties, how calls are handled in VPI's Customer Service Department, how returns are handled, and customer inquiries regarding "Professor Teaches" products and other information relevant to this action.

- e) Norma A. Freeman, Video Professor, Inc., 12055 West Second
Place, Lakewood, Colorado 80228, (303) 232-1244.

Ms. Freeman is a Call Center Technician at VPI and will testify to her position and duties, how calls are handled in VPI's Customer Service Department, how returns are handled, and customer inquiries regarding "Professor Teaches" products and other information relevant to this action.

f) Nathan L. Rucker, Video Professor, Inc., 12055 West Second Place, Lakewood, Colorado 80228, (303) 232-1244.

Mr. Rucker is a Call Center and Tech Support Technician at VPI and will testify to his position and duties, how calls are handled in VPI's Customer Service Department and Tech Support Department, how returns are handled, and customer inquiries regarding "Professor Teaches" products and other information relevant to this action.

g) Carla Linscombe, Video Professor, Inc., 12055 West Second Place, Lakewood, Colorado 80228, (303) 232-1244.

Ms. Linscombe is the Director of Call Center Operations at VPI and will testify regarding her position and duties, the size of the Call Center, how calls are handled in VPI's Customer Service Department, how returns are handled and other information relevant to this action.

h) Michael W. Svoboda, Video Professor, Inc., 12055 West Second Place, Lakewood, Colorado 80228, (303) 232-1244.

Mr. Svoboda is the Data Communications Manager at VPI and will testify regarding his position and duties, customer returns of "Professor Teaches" materials to VPI's warehouse, and other information relevant to this action.

2. Defendant's Witnesses who will be present at trial:

- a) Eric Herrmann, Amazon.com, Inc., 1200 12th Ave. S., Seattle, WA 98144. (206) 266-1000.

Mr. Herrmann is Senior manager of Software Development, Search Traffic. Mr. Herrmann will testify regarding Amazon's systems for bidding on keywords generally, Amazon's bidding on "video professor" in particular, Amazon's internal search function and how it produces search results, Amazon's vendor relationships, including those with VPI and ISI, Amazon's purchasing of Video Professor product from VPI, Amazon's sale of Video Professor products and other information relevant to this action.

- b) Daniel Rose, A9.com., 130 Lytton Ave., Suite 300, Palo Alto, A 94301. (650) 331-2600.

Mr. Rose is Chief Scientist, Search Department with A9.com, an Amazon subsidiary. Mr. Rose will testify regarding Amazon's internal search function, how it produces results, and other information relevant to this action.

[The following three VPI witnesses will be at trial pursuant to Amazon's trial subpoenas. however, Amazon may decline to call one or more in its case depending on whether VPI calls them in its case in chief and the permitted scope of cross-examination].

- c) Betty Harrison, Video Professor, Inc., 12055 West Second Place, Lakewood, Colorado 80228.

Ms. Harrison is the President of VPI. If called, may provide testimony regarding: VPI; its marks, history, organization, operations, business model and products; VPI's sales and marketing channels; VPI's use of third-party trademarks in its advertising; the

relationship and Vendor Manual with Amazon; VPI's damages claim and other information relevant to this action, including the subjects addressed by her in her deposition in this matter.

d) David M. Laughlin, Video Professor, Inc., 12055 West Second Place, Lakewood, Colorado 80228.

Mr. Laughlin is the Senior Vice President at VPI. If called, Mr. Laughlin may testify regarding: VPI; its marks, history, organization, operations, business model and products; VPI's sales and marketing channels; VPI's use of third-party trademarks in its advertising; the relationship and Vendor Manual with Amazon; VPI's damages claim and other information relevant to this action, including the subjects addressed by him in his deposition in this matter.

e) R.J. Schubert, Video Professor, Inc., 12055 West Second Place, Lakewood, Colorado 80228.

Mr. Schubert is the legal contract and compliance manager at VPI. If called, Mr. Schubert may testify regarding VPI's policing efforts to enforce its VIDEO PROFESSOR trademark and stop alleged infringing uses, VPI's use of third-party trademarks in its advertising; the relationship and Vendor Manual with Amazon, the reasons for the instant action being commenced, VPI's notice to terminate the vendor agreement between VPI and Amazon, VPI's damages claim and other information relevant to this action, including the subjects addressed by him in his deposition in this matter.

3. Plaintiff's Witnesses who may be present at trial if need arises: None.
4. Defendant's Witnesses who may be present at trial if need arises:

- a). Eric Ayers, Amazon.com, Inc., 1200 12th Ave. S., Seattle, WA 98144. (206) 266-1000.

Mr. Ayers is Senior Manager, Vendor Management, Software. If called, Mr. Ayers may testify regarding Amazon's vendor relationships, including those with VPI and ISI, Amazon's purchasing of Video Professor product from VPI, Amazon's sale of Video Professor products and other information relevant to this action.

5. Plaintiff's Witnesses whose testimony is expected to be presented by means of a deposition: None.

6. Defendant's Witnesses whose testimony is expected to be presented by means of a deposition:

- a) Mr. Jo-L Hendrickson, Individual Software, Inc., 3413 Deer Ridge Drive, Danville, California 94506. (925) 734-6767.

The designations and counter-designations of Mr. Hendrickson's deposition have been filed with the Court.

B. Expert witnesses to be called by each party: None.

7. EXHIBITS

- a. Plaintiff's List of Trial Exhibits is attached as Appendix A.
- b. Defendant's List of Trial Exhibits is attached as Appendix B.
- c. Other parties: None.
- d. Copies of listed exhibits must be provided to opposing counsel no later than April 20, 2010. The objections contemplated by Fed. R. Civ. P. 26(a)(3) shall be filed with the clerk and served (by hand delivery or facsimile) no later than April 22,

2010, and a Joint Exhibit list will be submitted at the Final Trial Preparation Conference on April 23, 2010.

8. DISCOVERY

Discovery has been completed.

9. SPECIAL ISSUES

None.

10. SETTLEMENT

- a. Counsel for the parties and any pro se party met in person on November 3, 2009, to discuss in good faith the settlement of the case.
- b. The participants in the settlement conference, included counsel, party representatives, and any pro se party.
- c. The parties were promptly informed of all offers of settlement.
- d. Counsel for the parties do not intend to hold future settlement conferences.
- e. It appears from the discussion by all counsel that there is little possibility of settlement.
- f. No further settlement conference is scheduled.
- g. Counsel for the parties considered ADR in accordance with D.C.COLO.LCivR.16.6.

11. OFFER OF JUDGMENT

Counsel acknowledge familiarity with the provision of Rule 68 (Offer of Judgment) of the Federal Rules of Civil Procedure. Counsel have discussed it with the clients against whom claims are made in this case.

12. EFFECT OF FINAL PRETRIAL ORDER

Hereafter, the Final Pretrial Order will control the subsequent course of this action and the trial, and may not be amended except by consent of the parties and approval by the court or by order of the court to prevent manifest injustice. The pleadings will be deemed merged herein. This Final Pretrial Order supersedes the Scheduling Order. In the event of ambiguity in any provision of this Final Pretrial Order, reference may be made to the record of the pretrial conference to the extent reported by stenographic notes and to the pleadings.

Notwithstanding the foregoing, this Final Pretrial Order will control the subsequent course of this action and the trial, and may be amended, modified, or supplemented by the anticipated Trial Preparation Conference Order or any order entered during the trial preparation conference, which subsequent orders are anticipated and incorporated by such reference.

**13. TRIAL AND ESTIMATED TRIAL TIME;
FURTHER TRIAL PREPARATION PROCEEDINGS**

1. The trial is a bench trial.
2. The trial is scheduled for three (3) days.
3. The trial is scheduled to commence at the Alfred A. Arraj U.S. Courthouse, Courtroom A1001, at 9 a.m. on April 26, 2010.

DATED this 16th day of April, 2010.

BY THE COURT:



Kristen L. Mix
United States Magistrate Judge

APPROVED:

s/ Gregory C. Smith
Gregory C. Smith
Kieran A. Lasater
FAIRFIELD & WOODS, P.C.
1700 Lincoln Street, Suite 2400
Denver, Colorado 80203
Telephone: (303) 830-2400
Facsimile: (303) 830-1033
E-mail: gsmith@fwlaw.com
E-mail: klasater@fwlaw.com

**Attorneys for Plaintiff
Video Professor, Inc.**

s/ Marc C. Levy
Marc C. Levy
Jared B. Briant
FAEGRE & BENSON LLP
1700 Lincoln Street, Suite 3200
Denver, Colorado 80203
Telephone: (303) 607-3500
Facsimile: (303) 607-3600
E-mail: mlevy@faegre.com
E-mail: jbriant@faegre.com

**Attorneys for Defendant
Amazon.com, Inc.**

APPENDIX A

PLAINTIFF'S EXHIBIT LIST

CASE NO.: 08-cv-00636-REB-KLM

PAGE NO.: 1

CASE Video Professor, Inc. v. Amazon.com,
 CAPTION: Inc.

NUMBER	OFFERING PARTY	DESCRIPTION	STIP	IN	OUT	COMMENTS
1		Trademark certificate for Video Professor drawing, dated 03/31/10 (VPI597-VPI598)				
2		Trademark certificate for "Video Professor," dated 02/07/05 (VPI578-VPI579; VPI588-VPI589)				
3		Trademark certificate for "Video Professor," dated 04/07/10 (VPI585-VPI587)				
4		Amazon.com Vendor Manual, dated 04/03 (VPI020-VPI064)				
5		Amazon.com Vendor Manual Acknowledgment Letter signed by Amazon representative and VPI representative, dated 12/18/03 (AMZN00020)				
6		Google search of "video professor," dated 03/19/09 (VPI009-VPI010)				
7		Letter from Bettye Harrison to General Counsel for Amazon.com re: termination of vendor manual, dated 07/21/08 (Herrmann Ex. 9; AMZN00035)				
8		Letter from Jean Robertson, Esq. to Amazon.com Legal Department re: cease and desist, dated 02/25/09 (VPI Ex. 12; VPI122-VPI123)				
9		Email from RJ Schubert to vendor: central@amazon.com re: use of Video Professor trademarks, dated 03/05/09 (Harrison Ex. 23; VPI120)				

PLAINTIFF'S EXHIBIT LIST

CASE NO.: 09-cv-00636-REB-KLM

PAGE NO.: 2

CASE Video Professor, Inc. v. Amazon.com,
 CAPTION: Inc.

NUMBER	OFFERING PARTY	DESCRIPTION	STIP	IN	OUT	COMMENTS
10		Google search of "video professor" with Amazon landing page, dated 03/20/09 (Hendrickson Ex. 30; VPI590-VPI596)				
11		VPI spreadsheet-AR customer ledger for period 01/01/07 to 09/30/09, dated 10/01/09 (VPI Ex. 22; VPI076-VPI096)				
12		Table titled, "VPI Gross Revenue Figures for 2004-2009," undated (VPI584)				
13		Packaging from Wayne Crews to Video Professor, Inc. dated 03/27/06 (Hendrickson Ex. 40; VPI474-VPI476)				
14		Packaging from Bob Serrato to Video Professor, Inc. dated 01/23/06 (Hendrickson Ex. 39; VPI472-VPI473)				
15		VPI Dashboard for period 01/01/07 to 12/31/07 (VPI189-VPI197)				
16		VPI Dashboard for period 01/01/08 to 12/31/08 (VPI Ex. 15; VPI198-VPI206)				
17		VPI Dashboard for period 01/01/09 to 04/30/09 (VPI207-VPI215)				
18		Amazon Vendor Central materials regarding Individual Software as an active vendor of Amazon, dated 03/19/10 (AMZN00084-AMZN00096)				

PLAINTIFF'S EXHIBIT LIST

CASE NO.: 09-cv-00636-REB-KLM

PAGE NO.: 3

CASE: Video Professor, Inc. v. Amazon.com,
 CAPTION: Inc.

NUMBER	OFFERING PARTY	DESCRIPTION	STIP	IN	OUT	COMMENTS
19		Spreadsheet responsive to Amazon's Request for Production #5(c), illustrating full vendor, MCB amount, bill amount and refund amount, dated 10/02/09 (VPI216)				
20		Table responsive to Amazon's Request for Production #12 illustrating year, customer type, number of customers, returns and total internet retained, dated 10/05/09 (VPI Ex. 18; VPI445)				
21		Table titled, "E-commerce customer life time value for search customers," undated (VPI Ex. 19; VPI446)				
22		Spreadsheet responsive to Amazon's Request for Production request #12 illustrating year, search visitors, search customers and percentage of conversion, dated 10/07/09 (VPI Ex. 17; VPI443)				
23		Chart responsive to Amazon's Request for Production request #12 illustrating year, type of customer and number of customers, undated (VPI444)				
24		Document titled, "VPI Lost Net Profits Damages Calculation," undated (VPI583)				

PLAINTIFF'S EXHIBIT LIST

CASE NO.: 09-cv-00636-REB-KLM

PAGE NO.: 4

CASE Video Professor, Inc. v. Amazon.com,
 CAPTION: Inc.

NUMBER	OFFERING PARTY	DESCRIPTION	STIP	IN	OUT	COMMENTS
25		Google search of "video professor" dated 05/11/09 (VIP460)				
26		Amazon landing page for "video professor," dated 03/18/09 (VIP004-VPI008)				
27		Google search of "video professor" dated 07/03/09 (VPI461)				
28		Google search of "video professor" dated 07/07/09 (VPI463-VPI465)				
29		Amazon landing page for "video professor" dated 07/07/09 (VPI466-VPI471)				
30		Amazon searches of "professor teaches" products, dated 03/29/10 (VPI538-VPI550)				
31		Amazon searches of "adidas" products, dated 03/29/10 (VPI482-VPI493)				
32		Amazon searches of "bunn coffee maker" products, dated 03/29/10 (VPI494-VPI506)				
33		Amazon searches of "canon" products, dated 03/29/10 (VPI507-VPI521)				

PLAINTIFF'S EXHIBIT LIST

CASE NO.: 09-cv-00636-REB-KLM

PAGE NO.: 5

CASE CAPTION: Video Professor, Inc. v. Amazon.com, Inc.

NUMBER	OFFERING PARTY	DESCRIPTION	STIP	IN	OUT	COMMENTS
34		Amazon searches of "Mr. Coffee coffee maker" products, dated 03/29/10 (VPI522-VPI537)				
35		Amazon searches of "samsung" products, dated 03/29/10 (VPI551-VPI563)				
36		Amazon searches of "sony" products, dated 03/29/10 (VPI564-VPI577)				
37		Document titled, "titles sold in connection with bids on "video professor" as a keyword," undated (Herrmann Ex. 3; AMZN000002)				
38		Chart illustrating keyword, system, vendor, match type, session, etc., undated (Herrmann Ex. 4; AMZN000008)				
39		Document titled, "Search Engine Advertising Copy," undated (Herrmann Ex. 5; AMZN00010)				
40		Market Development Funds Agreement between Individual Software and Amazon, dated 01/01/04 (Hendrickson Ex. 16; ISI001-ISI002)				
41		Email from Casey Borchers to Jo-L Hendrickson re: wrong review placed on our products-please help, dated 02/09/10 (Hendrickson Ex. 27; ISI026-ISI026)				

PLAINTIFF'S EXHIBIT LIST

CASE NO.: 09-cv-00636-REB-KLM

PAGE NO.: 6

CASE Video Professor, Inc. v. Amazon.com,
 CAPTION: Inc.

NUMBER	OFFERING PARTY	DESCRIPTION	STIP	IN	OUT	COMMENTS
42		Response of Individual Software, Inc. to subpoena, dated 02/18/10 (Response and documents labeled ISI001-ISI0026)				
43		Declaration of Eric Herrmann [filed under seal], dated 10/21/09				
44		Responses of Amazon.com to Plaintiff's First Set of Discovery Requests, dated 08/27/09				
45		Supplemental Responses of Amazon.com, Inc., to Plaintiff's First Set of Discovery Requests, dated 09/21/09				
46		Any exhibits listed by Defendant				
47		Any document identified in discovery				
48		Any document necessary for authentication, impeachment or rebuttal purposes				

APPENDIX B

DEFENDANT'S EXHIBIT LIST

CASE NO.: 09-cv-00836-REB-KLM

PAGE NO.: 1

CASE CAPTION: VIDEO PROFESSOR, INC. v. AMAZON.COM, INC.

NUMBER	OFFERING PARTY	DESCRIPTION	STP	IN	OUT	COMMENTS
1.		Amended Undisputed Facts				
2.		Video Professor Order Page; Laughlin Depo. Ex. 2				
3.		How it Works page from VideoProfessor.com; Laughlin Depo. Ex. 3				
4.		Google search results, keywords "learn Microsoft windows"; Laughlin Depo. Ex. 4				
5.		Google search results, keywords "learn Microsoft excel"; Laughlin Depo Ex. 5				
6.		Google search results, keywords "learn ebay"; Laughlin Depo. Ex. 6				
7.		eBay search results, keywords "video professor"; Laughlin Depo. Ex. 7				
8.		JohnWScherer.com Web site printout; Laughlin Depo. Ex. 8				
9.		Google search results, keywords "video professor"; Laughlin Depo. Ex. 9				
10.		Amazon.com Vendor Manual; Laughlin Depo. Ex. 10				
11.		Letter dated 2-25-09 from Robertson to Amazon.com Legal Department; Laughlin Depo. Ex. 12				
12.		Video Professor Invoice, order date 2-3-09; Laughlin Depo. Ex. 13				
13.		Video Professor Keywords; Laughlin Depo. Ex. 16				
14.		Production of Documents No. 12; Laughlin Depo.				

DEFENDANT'S EXHIBIT LIST

CASE NO.: 09-cv-00636-REB-KLM

PAGE NO.: 2

CASE CAPTION: VIDEO PROFESSOR, INC. v. AMAZON.COM, INC.

NUMBER	OFFERING PARTY	DESCRIPTION	STIP	IN	OUT	COMMENTS
		Ex. 18				
15.		Plaintiff's Answers to Defendant's First Set of Requests for Admissions dated 9-8-09; Laughlin Depo. Ex. 20				
16.		Video Professor AR Customer History Ledger, 1-1-07 to 9-30-09; Laughlin Depo. Ex. 21				
17.		Video Professor AR Customer Ledger, 1-1-07 to 9-30-09; Laughlin Depo. Ex. 22				
18.		Affidavit of Bettye Harrison dated 11-19-09; Harrison Depo. Ex. 24				
19.		Supreme Court, State of Colorado, decision regarding disbarment; Schubert Depo. Ex. 25				
20.		Titles sold in connection with bids on "video professor" as a keyword, Bates Nos. AMZN00002 through 00006; Herrmann Depo. Ex. 3				
21.		Keyword Video Professor for both Hydra and Urubamba system, Bates No. AMZN00008; Herrmann Depo. Ex. 4				
22.		Search Engine Advertising Copy, Bates No. AMZN00010; Herrmann Depo. Ex. 5				
23.		Letter from Bettye Harrison, Bates No. AMZN00035; Herrmann Depo. Ex. 9				
24.		Listing of the dates of various individual transactions on the keyword Video Professor going as far back as Hydra was able to do; Herrmann Depo. Ex. 13				
25.		List of Video Professor sales by Amazon that were both classified as retail and third party; Herrmann Depo. Ex. 14				
26.		Document entitled, "Market Development Funds				

DEFENDANT'S EXHIBIT LIST

CASE NO.: 09-cv-00636-REB-KLM

PAGE NO.: 3

CASE CAPTION: VIDEO PROFESSOR, INC. v. AMAZON.COM, INC.

NUMBER	OFFERING PARTY	DESCRIPTION	STP	IN	OUT	COMMENTS
		Agreement," bearing Production Nos. ISI001 - ISI002; Hendrickson Depo. Ex. 16				
27.		Document entitled, "Market Development Funds Agreement," bearing Production Nos. ISI003 - ISI004; Hendrickson Depo. Ex. 17				
28.		Document entitled, "3 - Professor Teaches Sales," bearing Production Nos. ISI018 - ISI022; Hendrickson Depo. Ex. 24				
29.		Document entitled, "Individual Software Inc., Marketing Expenditures Summary by year, Period: 2000 through 2009," bearing Production No. ISI023; Hendrickson Depo. Ex. 25				
30.		Document entitled, "Professor Teaches % of sales," bearing Production No. ISI024; Hendrickson Depo. Ex. 26				
31.		Document entitled, "Amazon Digital Services, Inc., Master Software Distribution Agreement," bearing Production Nos. ISI030 - ISI043; Hendrickson Depo. Ex. 32				
32.		Trademark registration certificate for trademark Professor DOS; Hendrickson Depo. Ex. 41				
33.		Photocopies of Professor DOS box sides; Hendrickson Depo. Ex. 42				
34.		Certificate for Federal registration for the trademark Professor; Hendrickson Depo. Ex. 43				
35.		Copy of Federal registration for ISI trademark Professor Teaches; Hendrickson Depo. Ex. 44				
36.		Vendor Information for ISI; AMZN00084 - AMZN00086				
37.		Vendor Information for ISI;				

DEFENDANT'S EXHIBIT LIST

CASE NO.: 09-cv-00636-REB-KLM

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CASE CAPTION: VIDEO PROFESSOR, INC. v. AMAZON.COM, INC.

NUMBER	OFFERING PARTY	DESCRIPTION	STP	IN	OUT	COMMENTS
		AMZN00087 – AMZN00088				
38.		US Form Vendor Terms and Conditions 2006-03-17 Vendor Central 1.0 (Historic Form); AMZN00089 – AMZN00096				
39.		Amazon web printout; Herrmann Declaration to MSJ exhibit A-1				
40.		Amazon search results, keywords "video professor" on October 15, 2009; Herrmann Declaration to MSJ exhibit A-2				
41.		Amazon web printout; Herrmann Declaration to MSJ exhibit A-3				
42.		Amazon web printout; Herrmann Declaration to MSJ exhibit A-4				
43.		Sample current search results pages from Amazon.com				
44.		Sample current search results pages from Google.com				
45.		USPTO search results for word mark "PROFESSOR DOS," dated 4/13/10; AMZN00097 – AMZN00101				
46.		3/5/09 Email from Schubert to vendor-central@amazon.com re: Use of Video Professor trademarks; VPI120; Harrison Ex. 23				
47.		Amazon.com Vendor Manual Acknowledgment Letter signed by Amazon representative and VPI representative, dated 12/18/03; AMZN00020				