

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
SELLIFY LLC,

Plaintiff,

v.

09 CV 10268 (JSR)
(ECF CASE)

AMAZON.COM INC.,

Defendant.

**DECLARATION OF
CHRISTOPHER MAKI**

-----X

CHRISTOPHER MAKI, under penalty of perjury, declares as follows:

1. I am the sole member and the president of Sellify LLC (“Sellify”), the plaintiff in this action. I make this Declaration in opposition to the motion of plaintiff Amazon, com Inc. (“Amazon”) for summary judgment.

2. Sellify is a Connecticut-based small online discount retailer of high-end electronic goods, particularly videocameras (also known as “camcorders”), still digital cameras and professional-quality audio equipment, all of which it sells under the brand name OneQuality.com. Sellify’s ONEQUALITY.COM service mark is registered on the Principal Register of the U.S. Patent & Trademark Office (Reg. No. 3812814).

3. Of course, Sellify is dwarfed in size by defendant Amazon, which is perhaps the world’s best-known online retailer and has annual sales of approximately \$20 billion.

4. I had previously been running a business under the OneQuality brand with a partner until the last quarter of 2007. After a partnership dispute, I formed Sellify LLC, and in the settlement of the dispute obtained the rights to the ONEQUALITY.COM service mark and the URL www.onequality.com and immediately

resumed doing business via OneQuality.com and the One-Quality store. The high level of customer satisfaction among the business's customers are reflected in the OneQuality-store's 100% positive rating on eBay, and feedback from customers of the OneQuality.com website has been positive as well.

5. Amazon, too, obviously understands the need for any business, and particularly one operating in the online sphere, to maintain a high reputation. It has built a massive online business in just 15 years, largely by cultivating a reputation for excellent customer service.

6. As a result, I was greatly distressed to discover, just days after I had resumed doing business under the OneQuality.com brand, that Sellify had just acquired, that if a person were to use the Google search engine (by far the most widely used search engine) and enter the term "onequality.com," then opposite the search results (which were almost all related to the OneQuality.com web site and its product offerings), a single "sponsored link" (that is, a paid advertisement linking to another web site) would appear. While there were several versions of the ad, one of the most common versions read as follows:

Sponsored Links

Beware the SCAM Artists

Camcorders at the Best Price
From the Trusted Source.
amazon.com

See Exhibit C to Declaration of Jeffrey Wang, Amazon's counsel ("Wang Dec.").

7. A user who clicked on this sponsored link would in fact be directed to the Amazon.com web page featuring camcorders – which were in many cases

identical to the items offered for sale on the OneQuality Website. To all appearances, such ads were placed by Amazon and expressed the view of Amazon. There was no indication at any point in this process that users clicking on such ads were dealing with anyone but Amazon.

8. Virtually the same thing happened if an Internet user typed “onequality” or even the misspelled term “onequalaity.com” into the Google search engine. The user would again receive a number of predictable search results, but on the opposite side of the results page would get another single sponsored link, such as the following:

Sponsored Links

Don't Buy from Scammers

Camcorders at the Best Price
From the Trusted Source.
amazon.com

See Wang Dec., Exhibit C.

9. Upon making this discovery, I promptly made an online complaint to Amazon, and around the same time I also spoke by telephone to an Amazon representative about the matter. The representative curtly told me that there was nothing that could be done about the ads. The online complaint prompted two non-responsive form emails from Amazon, but no substantive response. I was not only confused by the representative’s reaction, but also horrified that a company of Amazon’s size would falsely target a much smaller online business such as Sellify.

10. I was also upset at the thought that the ads were likely to turn away customers who had all but decided to make their purchases by the time they were performing a Google search for the term “onequality.com,” or something like it. After all, if someone simply wanted to buy a camcorder, the most likely thing to do would be to do a simple search for the term “camcorder.” Conversely, if the customer already had heard about onequality.com, he could simply enter “onequality.com” into his browser’s URL space, and immediately be directed to the OneQuality web site.

11. Thus, people performing a Google search for the term “onequality” or “onequality.com” were likely to be looking not for the web site itself *but for information about it*. If they were contemplating a purchase of a high-end used camcorder, costing \$2,000 or more, they were likely interested in knowing something about the web site’s track record: could it be trusted? *See* Yahoo query from potential customer “Emmanuel O,” attached hereto as Exhibit A.

12. I also enough about the Internet to know that the only way that the “sponsored links” could appear on the Google search results page was if someone were purchasing specific search terms (like “onequality.com”) as “keywords” through the Google AdWords program. This program works as follows: advertisers pay Google for certain words; when these words are input by a user into the Google search engine, they trigger the appearance of “sponsored links” created by the advertiser. I was shocked and outraged that Amazon would libel Sellify’s business as a “scam” without any factual basis. It was extremely troubling to me that since these ads seemed to originate from Amazon, they would have instantaneous credibility with the public.

13. Since the ads were not going away despite my complaints, Sellify retained counsel, who on or about May 8, 2009 communicated in writing with Amazon's general counsel. No reply was ever received.

14. Then, on or about July 13, 2009, Sellify's counsel wrote to two other Amazon in-house lawyers, enclosing a draft complaint. This brought a response from an in-house litigator, who (I was told by my counsel) placed the blame on one of Amazon's 3,000,000 advertising affiliates, a company called Cutting Edge Designs. Amazon claimed that the ads were beyond its control, but that Cutting Edge's affiliate account had been suspended and that Amazon would demand that Cutting Edge remove the infringing ads.

15. This was Sellify's first indication that the ads had been created by someone other than Amazon itself. I have since learned that Amazon has acknowledged that the company's affiliate program (known officially as the Amazon Associates Program) is a major component of Amazon's overall advertising strategy, costing the company hundreds of millions of dollars a year. According to an Amazon web page, "Amazon Associates is one of the first online affiliate marketing programs and was launched in 1996." See Amazon web page ("What is the Amazon Associates Program?"), attached hereto as Exhibit B.

16. Amazon's own web site shows how Amazon's affiliates serve Amazon by creating web advertisements and other links to Amazon's web pages. One common way of doing this is for the Associates to place such ads or links on their own web sites. Affiliates could also purchase Google keywords and thereby create "sponsored links." When Internet users *clicked* on such links, they were redirected to

Amazon's web site, and if they made purchases as a result, the Associates received commissions.¹

17. Amazon appears to be intimately involved in the recruitment and training of its affiliates. It also provides detailed training on how to integrate affiliate's web sites with Amazon's logo and web content, to direct web traffic to Amazon's web site generally, and to particular Amazon sub-pages deemed by the affiliates to be of particular interest to the people who view the Associates' ads. It will even create ready-made ads, complete with all the necessary computer code, on the Associates' behalf.

18. Amazon also creates electronic "widgets" for its affiliates' web sites ("Leave it up to us! Automatically feature ideal products based on Amazon's unique knowledge about what works for your site, for your users and for the content"). See Amazon webpage, attached as Exhibit C hereto. Amazon even offers to build customized "shopping carts" on its Associates' web sites. One of its more interesting innovations, according to one of its web pages, is the custom-designed "astore" that Amazon offers to create for affiliates' web sites ("gives you the power to create a professional web store, in minutes and without the need for programming skills, that can be embedded within or linked to from your website") (attached as Exhibit D hereto).

19. The manner in which Amazon touts the value to its affiliates of this extraordinary close sort of relationship is revealing: "Provide customers the convenience of referring them to a *trusted site* where they can immediately purchase the products you advertise on your site." (Emphasis added.) (Exhibit B hereto.)

¹ I have since learned that effective May 1, 2009, Amazon changed the rules of its Associates Program to stop paying commissions on purchases generated via links from Google's "sponsored links," though this certainly did not stop the appearance of the "scam" ads at issue here.

20. Yet, I have learned during the discovery process that despite these intimately close links with the Associates – which belie Amazon’s contention that the members of the Associates Program are mere arm’s-length independent contractors – Amazon has instructed the Associates never to refer to themselves as “affiliates,”² even though that term is commonly used in the industry to describe this kind of relationship, and even though the very URL created by Amazon for the web site of the Associates Program is <https://affiliate-program.amazon.com>!

21. According to information obtained in discovery by Amazon from Google and cited by Amazon in its summary judgment papers, more than 1,000 people saw the ads. *See* Exhibit A to Declaration of Suzanne Abbott of Google. Amazon’s argument is that the only possible damage to Sellify resulted from the relatively small number of purchases made by people who actually clicked on the ads and bought products from Amazon. This, of course, is entirely irrelevant to the damage done to my company. Sellify’s trademark was infringed, and its reputation injured, when the ads appeared and people saw them, with Amazon’s name on them. Whether or not people then *proceeded to click on the ads and buy merchandise is beside the point.*

22. That said, we now know that many people who had demonstrated their interest in making purchases from OneQuality.com by “googling” the OneQuality name had been told that they were at risk of dealing with “scam artists.” If Sellify lost 1,000 customers who otherwise would have purchased camcorders for \$2,000, that would mean Sellify lost out on \$2,000,000 in revenue.

² *See* Amazon document AMZ000066, attached hereto as Exhibit E. I note, however, that in the most recent Amazon Associates Program Operating Agreement, Amazon finally acknowledges that the Associates are in fact participants in “an affiliate advertising program.” Tarpey Dec., Exhibit A.

23. While I will never know exactly how many customers Sellify lost because of these outrageous ads, I do know that far less business was done via the onequality.com web site in 2009 than in 2007, its prior year of full activity. Profits fell from \$CONFIDENTIAL in 2007 to about \$CONFIDENTIAL in 2009. While 2009 was undeniably a poor economic year for the country relative to 2007, I would have expected the market for used goods to *increase* as the market for new goods suffered. (eBay, for example, increased its revenues from the sale of used items by 13%, from \$7.7 billion to \$8.7 billion, between 2007 and 2009.)

24. Moreover, the business was not run in a manner appreciably different from the way it had been run in 2007.

25. One thing I do know was that those ads certainly made it look to anyone who saw them that Amazon had apparently decided that Sellify was a “scam” and had chosen to bring the public this message.

26. It is outrageous for Amazon to claim that its passive response to my complaints, and to the damage done to my company, was somehow satisfactory. Amazon created an affiliate program it did not properly monitor, and took a “wait-and-see” attitude (more like a “wait” attitude,” in fact) in the face of my demands that it get the ads promptly taken down.

27. Neither did Amazon take any steps to, at the very least, inform the public that the ads were not connected to Amazon.

28. To this day, Amazon’s entire response to my allegations has been to contend that it was not “reasonable” for Amazon to have done anything before months

had gone by, and that it is my fault for not having gotten someone else to remove the ads – even though it was Amazon that was directly benefiting from the ads.

29. Accordingly, I respectfully ask the Court to deny Amazon's motion for summary judgment..

 /Chris Maki/
CHRISTOPHER MAKI

Dated: August 9, 2010
Stamford, Connecticut