

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SELLIFY LLC,

Plaintiff,

v.

09 CV 10268 (JSR)
(ECF CASE)

AMAZON.COM INC.,

Defendant.

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**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

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Plaintiff Sellify LLC (“Sellify”) respectfully submits this Memorandum of Law in opposition to the motion for summary judgment of defendant Amazon.com, Inc. (“Amazon”).

PRELIMINARY STATEMENT

By its own admission, Amazon spends more than \$CONFIDENTIAL annually on its affiliate advertising program, through which its more than three million affiliates use Internet links to funnel web traffic to the Amazon web site, which in turn yields \$20 billion or more in annual revenue for the company. Amazon will create, complete with all of the necessary computer code and with Amazon’s distinctive logo, web ads which can be uploaded to any affiliate’s web site, where, once installed, an ad can immediately begin generating sales for Amazon and commissions for the affiliate. To that extent, Amazon completely controls the content and distribution of its advertising message.

Alternatively, the affiliate can create its own link, in ways that might include questionable advertising tactics (such as referring to a book as one’s “favorite” so that a link can be created to take people directly to Amazon’s web site to buy it, thus generating a commission for the affiliate) that for a host of reasons Amazon might not want to directly associate itself with.

Thus, the affiliate program serves Amazon’s purposes either way. Either Amazon controls the affiliate’s advertising message (even to the point of suggesting which of Amazon’s product offerings the affiliate should feature on its web site, and then helpfully building an ad that takes the site’s users directly to the Amazon web page on which that product is offered); or, if affiliates choose to build their own links, Amazon can plead complete ignorance about what those affiliates are doing. But in all cases, Amazon seeks

to avoid any responsibility, and especially any liability, for the actions of its affiliates and thus to avoid shouldering the public costs of what its affiliates do in its name.

In this case, Amazon seeks to avoid any liability for the damage that one of its affiliates directly inflicted on plaintiff Sellify, a small online retailer of camcorders and other high-end electronics by using Sellify's own trademark to cause "sponsored links" to appear on Google search results pages that unsubtly referred to Sellify as a "scammer" (as in, "Don't Buy from Scammers" and "Beware the Scam Artists") and appeared to have come directly from Amazon.

Amazon can readily identify each of its affiliates. It certainly knows whom to pay if a customer is transported from an affiliate link to Amazon's web site and makes a purchase there. Amazon claims that it already undertakes 3,000 enforcement actions per year against affiliates for violation of its affiliate policies. Yet, after Sellify brought these infringing and defamatory ads to Amazon's attention, Amazon failed to make even the most cursory effort to monitor whether the ads were still running. It presumably would never have bothered to check at all, but for the repeated complaints of Sellify's counsel.

Confronted with Sellify's allegations, Amazon's arguments in support of summary judgment really boil down to just three: first, that its affiliates are not in fact Amazon's agents, and so Amazon is not responsible for what they do; second, that it would not have been practical or reasonable for Amazon to have actively blunted the impact of the injurious web ads; and third, that it is impossible to pinpoint the extent of the damage to Sellify. All three arguments are disingenuous in the extreme.

In the first place, the "Mad Men" era ended a long time ago. Advertising is no longer just a matter between big companies and their proportionately large ad agencies.

Amazon, a wholly Internet business, is reliant upon affiliate advertising, because it drives traffic to Amazon's web pages from millions of sites simultaneously. Instead of one large advertising agency, Amazon employs millions of affiliate-agents. It simply denies that the affiliates are agents so that it can avoid the consequences of what they do and thus shift the cost to the general public, or to individual businesses such as Sellify that are injured as a result of Amazon's 21st-century advertising strategy. (For the sake of appearances, Amazon even forbade its own affiliates to call themselves "affiliates," out of concern that the public might perceive a close relationship between Amazon and its affiliates!)

Secondly, Amazon could easily have used a "kill switch" to blunt the devastating effect of the "scam" ads on Sellify's business. As even the casual Internet shopper knows, a web business can easily identify the source of links to their sites and thus redirect consumers to particular sub-pages of the company's web site. Indeed, an Amazon employee testified that anyone clicking on the "scam" ad could instantly have been redirected to a sub-page informing the consumer that the "scam" ad was not Amazon's and that there was no connection between the source of the ad and Amazon. Had Amazon chosen to do that, it would have slowed access to its web site *by a mere millisecond*, which, as the employee acknowledged, is completely imperceptible. Alternatively, Amazon could have required its affiliates to label its sponsored links as "affiliate advertising," so it would have been clear that the ads did not originate from Amazon. What Amazon apparently believes is "reasonable" to do is basically what it deems to be worth bothering with. Since the "scam" ads had little effect on Amazon, it turned a blind eye to what was happening to Sellify. Instead, Amazon arrogantly blames

Sellify for not taking its complaints to Google rather than to Amazon, the company that was paying its affiliate to run the “scam” ads!

Indeed, Amazon repeatedly blames Sellify for Amazon’s own unwillingness or inability to operate its affiliate program responsibly. It blames Sellify’s president for supposedly contacting the wrong Amazon department to make his complaint; it claims that it acted responsibly when, after receiving a letter from Sellify’s counsel, it contacted Cutting Edge and warned that its account would be terminated in five days unless it took down the offending ads (although it took no action whatsoever against Cutting Edge until *two months* later, when Sellify’s counsel sent Amazon a draft complaint); it blames Sellify for not bringing its complaint to Google; it blames Sellify for not notifying Cutting Edge. Apparently, nothing is ever Amazon’s fault.

Finally, it is not necessary for Sellify to calculate its damages to the penny. Damage is assumed under Sellify’s state law claims for libel *per se* and for violation of CUTPA. Moreover, since Amazon admits that more than 1,000 people saw the offending ads, it is reasonable to presume for purposes of both the federal and state law claims that Sellify was injured both in terms of lost transactions and in terms of long-term damage to its business reputation.

Sellify respectfully asks the Court to reject Amazon’s circular reasoning, which is essentially that since Amazon does not deem it worthwhile to supervise what its micro-ad agencies are doing, it doesn’t really control them and thus they are not Amazon’s agents. To grant Amazon’s motion would be to leave the victims of Amazon’s sophisticated strategy unable to hold Amazon (and companies like it) accountable for the actions of those who, by Amazon’s deliberate design, act in Amazon’s name and on its behalf.

Like the banks who claim to be “too big to fail,” Amazon argues in essence that having created an affiliate Leviathan, it is simply impractical for Amazon to take the steps necessary to protect the potential victims of its massive program. This Court should not countenance such a defense.

STATEMENT OF FACTS

Plaintiff 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. Declaration of Christopher Maki, Sellify’s president (“Maki Dec.”) ¶2. Sellify’s ONEQUALITY.COM service mark is registered on the Principal Register of the U.S. Patent & Trademark Office (Reg. No. 3812814). 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. Maki Dec. ¶3.

Sellify’s president, Christopher Maki, had been running a similar business under the OneQuality brand with a partner until the last quarter of 2007. After a partnership dispute, Mr. Maki formed Sellify LLC, and in the settlement of that dispute obtained the rights to the OneQuality.com trademark and URL, as well as the OneQuality-store on eBay. Maki Dec. ¶4. Immediately after doing so, he resumed doing business via OneQuality.com and the One-Quality store. *Id.* The high level of customer satisfaction among the business’s customers are reflected in the One-Quality store’s 100% positive rating on eBay, and feedback from customers of the OneQuality.com website has been positive as well. *Id.*

Defendant Amazon 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. Maki Dec. ¶ 5.

As a result, Mr. Maki was greatly distressed to learn, just days after he 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

Maki Dec. ¶6.

A user who clicked on the 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. Maki Dec. ¶7. 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. *Id.*

Virtually the same thing happened if an Internet user typed “onequality” or even the misspelled term “onequailty.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

Maki Dec. ¶8.

Upon making this discovery, Mr. Maki made an online complaint to Amazon, and also spoke by telephone to an Amazon representative about the matter. The representative curtly told Mr. Maki that there was nothing that could be done about the ads. Maki Dec. ¶9. The online complaint prompted two non-responsive form emails from Amazon, but no substantive response. *Id.*; see Exhibit H to Declaration of Anne Tarpey of Amazon (“Tarpey Dec.”). Understandably, Mr. Maki 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. Maki Dec. ¶9.

Mr. Maki 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 would simply enter “onequality.com” into his browser’s URL space, and immediately be directed to the OneQuality web site. Maki Dec. ¶10.

Thus, people who were 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? Maki Dec. ¶11.

Mr. Maki was sufficiently sophisticated about Internet matters to know that the only way that the “sponsored links” could appear 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. Maki Dec. ¶12. Mr. Maki was shocked and outraged that Amazon would libel Sellify’s business as a “scam” without any factual basis. It was extremely troubling that since these ads seemed to originate from Amazon, they would have instantaneous credibility with the public. *Id.*

Since the ads were not going away despite Mr. Maki’s complaints, Sellify retained counsel, who on or about May 8, 2009 communicated in writing with Amazon’s general counsel. Maki Dec. ¶13; Exhibit C to Declaration of Jeffrey Wang (Amazon’s counsel). No reply was ever received. 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 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. Maki Dec. ¶14.

This was Sellify's first indication that the ads had been created by someone other than Amazon itself. Indeed, according to Amazon's own witnesses, the company's affiliate program (known officially as the Amazon Associates Program) is a major and indispensable component of Amazon's overall advertising strategy, costing the company at least \$[CONFIDENTIAL] per year. Declaration of Eric Hermann of Amazon ("Hermann Dep.") at 10, 14-15 (Exhibit A to Declaration of Francis X. Dehn ("Dehn Dec.)).

Amazon's 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. Associates could also purchase Google keywords and thereby create "sponsored links." When Internet users click on such links, they are redirected to Amazon's web site, and if they made purchases as a result, the Associates received commissions. (It was subsequently revealed in discovery that effective May 1, 2009, Amazon changed the rules of its Associates Program to stop paying any commissions on purchases generated via "sponsored links" on Google, though this did not stop the appearance of the "scam" ads at issue here.) Maki Dec. ¶16.

Amazon is intimately involved in the recruitment and training of its Associates. It provides frequent, detailed training on how to design ads – using the Amazon trademark and logo, if the Associates so choose – to direct web traffic to Amazon's web site

generally, and to particular Amazon sub-pages. Maki Dec. ¶17. It will even create ready-made ads, complete with all the necessary computer code, on the Associates' behalf. 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"). Maki Dec. ¶18 and Exhibit C thereto. Amazon even offers to build customized "shopping carts" on its Associates' web sites. *Id.* Moreover, it conducts classroom-like training sessions, demonstrating to its affiliates the benefits of integrating their web site's closely with Amazon, using Amazon-provided tools.

Yet, despite these intimately close links with the affiliates – which belie Amazon's contention that its Associates are mere arm's length independent contractors – Amazon instructed its Associates never to refer to themselves as "affiliates," 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 to the web site of the Associates Program (www.affiliate-program.amazon.com) itself contains the term "affiliates." Maki Dec. ¶20 and Exhibit E thereto.

More than 1,000 people saw the "scam" ads. Maki Dec. ¶21. In the meantime, however, people interested in making purchases from OneQuality.com 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 it thereby lost out on \$2,000,000 in revenue. Maki Dec. ¶22.

While Amazon apparently did not create these ads itself, it also did not do anything to monitor the ads produced in its name (and, in many cases, displayed its name

and trademark). Moreover, by its own admission, Amazon could easily have created a mechanism (or “rule”) so that users clicking on the “scam” ads were not taken to Amazon’s sales pages. In its defense, Amazon claims only that doing so would have slowed its web site by CONFIDENTIAL which it admits would not be significant at all. Deposition of Muneer Mirza of Amazon at 49; Dehn Dec., Exhibit B. Amazon contends, however, that it would not have been reasonable to protect Sellify in this manner because then other people at Amazon might have asked for other rules to be put in place also – as if this should make any difference to injured third parties such as Sellify.

Naturally, it is impossible to know precisely how many customers or transactions Sellify lost as a result of the “scam” ads. Nonetheless, 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, one might well 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.) Maki ¶23. Moreover, the business was not run in a manner appreciably different from the way it had been run by Mr. Maki in 2007. Maki Dec. ¶24.

One thing that had changed, however, was that Amazon had, as far as any Internet user could tell, apparently decided that Sellify was a “scam” and had chosen to bring the public this message. Maki Dec. at ¶25.

Accordingly, Sellify commenced this action against Amazon for violation of the federal Lanham Act, as well as for violation of the Connecticut Unfair Trade Practices

Act (“CUTPA”), for common law unfair competition under the law of Connecticut, and for libel *per se* and trade libel under Connecticut state law.

ARGUMENT

I. AMAZON SHOULD BE HELD LIABLE FOR THE INFRINGING AND DEFAMATORY “SCAM” ADS

A. Sellify’s Trademark Was “Used in Commerce”

The Second Circuit has recently – some might say belatedly – acknowledged that for the purposes of the Lanham Act, transactions involving the purchase of an entity’s trademark as a “keyword” may properly be viewed as a “use in commerce” for the purpose of the Lanham Act Rescuecom Corp. v. Google Inc., 562 F.3d 123 (2d Cir. April 3, 2009). The Court in Rescuecom held that by not only selling plaintiff’s mark as a keyword but by actually recommending and marketing that mark to advertisers via its so-called Keyword Suggestion Tool, it had made a potentially infringing use in commerce.

Moreover, said the court:

[I]t is not by reason of absence of a use of a mark in commerce that a benign product placement escapes liability; it escapes liability because it is a benign practice which does not cause a likelihood of consumer confusion.

In the case at bar, of course, the plaintiff is not suing Google. But the use of that mark by Amazon’s advertising affiliate, Cutting Edge, is a classic attempt to create consumer confusion. This is true in two senses. First, it uses Sellify’s mark in the most brazen way possible to divert sales from Sellify (which it calls a “scammer”). Second, it communicates to the public that the widely-respected company Amazon.com has somehow investigated Sellify and determined it to be a scammer. Clearly, if Google