UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SELLIFY INC., Plaintiff, -v- AMAZON.COM, INC., Defendant.	09 Civ. 10268 (JSR) MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

Plaintiff Sellify LLC ("Sellify") brings this action against defendant Amazon.com, Inc. ("Amazon") for violations of the Lanham Act and for false advertising, unfair competition, and unfair trade practices in violation of Connecticut law. On June 23, 2010, Amazon moved for summary judgment. Following full briefing by the parties, the Court heard oral argument on September 2, 2010.

The relevant facts, either undisputed or, where disputed, taken most favorably to plaintiff, are as follows.[1] Christopher Maki,

[1] Sellify's responding statement of undisputed facts, purportedly made pursuant to Local Rule 56.1, does not comport with that rule in material respects. It enumerates the paragraphs of Amazon's 56.1 statement that it does not dispute, and then asserts that "All of Amazon's other Facts are disputed," with no citation to record evidence that forms the basis on which these facts are disputed. Pl. 56.1. at ¶ 1. It then sets forth a number of additional facts. Accordingly, this Memorandum Order assumes that all assertions in Amazon's 56.1 statement are undisputed unless specifically contradicted by such of the "additional facts" in Sellify's 56.1 statement that are substantiated by references to the evidence of record.

Sellify's sole proprietor, created OneQuality LLC ("OneQuality") with two partners, Adrian Meli and Jennifer O'Connor. Def's' Local Civ. Rule 56.1 Statement ("Def. 56.1") ¶ 1. OneQuality purchases used electronics and resells them either on eBay or its website "onequality.com". Id. ¶¶ 1-3. The company earned profits of $638,935 in 2006 and $317,181 in 2007. Id. ¶ 4. In late 2007, Meli, who was in control of OneQuality at the time, decided to shut down the company. Id. ¶ 5. At that time, OneQuality stopped restocking inventory, and in 2008, its website and eBay store operated only minimally. Id. ¶¶ 5-6. Pursuant to the settlement of a dispute among the company's members, Maki (through Sellify) acquired the rights to the OneQuality brand and began operating the website and eBay store in early 2009. Id. ¶ 8. With a reduced inventory and no staff, Maki estimates that Sellify's profits dropped to approximately $50,000 in 2009. Id. ¶ 11; Maki Dep. 45:22-46:8, 120:22-121:3; 129:13-17.

Through its Associates Program, Amazon allows more than three million individuals and businesses ("Associates") to link to Amazon's website. Def. 56.1 ¶ 12. If a customer comes to Amazon's website by clicking on an Associates' link, that Associate earns an advertising fee (usually around 4%) on items placed in the customer's Amazon online "shopping cart" within 24 hours. Id. ¶ 12. Amazon provides the Associates with detailed training and assistance in designing ads. Maki Decl. ¶¶ 16-18. Amazon also allows Associates to use the Amazon trademark and logo in their ads. Id. at ¶17. However, Amazon does not monitor or control the content of Associates' ads, nor does Amazon authorize Associates to act as its agents. Def. 56.1 ¶¶ 13-14. Rather, the Associates Program Operating Agreement ("Operating Agreement") provides that Associates are responsible for the content of their own ads and simply bars Associates from disparaging or infringing the intellectual property of third parties. Id. ¶ 15. If Amazon learns that an Associate is violating the Operating Agreement, its usual practice is to issue a warning to the Associate threatening to terminate the Associate's account and withhold accrued advertising fees if the Associate persists in the offending conduct. Id. ¶ 16. If Amazon learns the Associate has not subsequently complied with the Operating Agreement, it terminates the account and withholds accrued advertising fees. Id. ¶ 16.

Until May 1, 2009, Associates could purchase "keywords" from search engines that would display a sponsored ad alongside search results. Id. ¶ 20. In March 2009, an Amazon Associate called Cutting Edge Designs ("Cutting Edge") bought the keyword "onequality.com" and several close variants from Google, Inc ("Google"). Id. ¶ 25. When a Google user searched for these keywords, the search results would be accompanied by an ad stating "Don't Buy from Scammers" or "Beware the SCAM Artists" and linking to the Amazon website. Id. ¶ 26. While there was no indication on the face of the ads that they originated from an entity other than Amazon, Maki Decl. ¶ 7, Cutting Edge purchased the ads from Google without the knowledge or consent of Amazon. Def. 56.1 ¶ 27.

When he saw the ads in March 2009, Maki contacted Amazon's "Seller Central" department, which is devoted to matters concerning companies that sell their products on Amazon's website.[2] Id. ¶¶ 33-34. The Amazon representative told Maki that there was nothing that could be done about the ads. Maki Decl. ¶ 9. On May 8, Sellify's counsel sent a demand letter to Amazon accusing Amazon of placing the ads and threatening a lawsuit for $5 million unless Amazon made a settlement proposal. See Wang Decl. Ex. C. After receiving this letter, Amazon wrote to Cutting Edge informing them of Sellify's complaint and threatening to close Cutting Edge's Associates account and withhold its accrued advertising fees if it did not stop running the ads. Def. 56.1 ¶ 39. Amazon had no ability to remove the ads from the internet on its own accord. Id. ¶ 38. Receiving no response to its May 8 letter, on July 13, Sellify's counsel sent Amazon a second demand letter. Id. ¶ 40; Pl. 56.1 ¶ 19. Upon learning from this letter that Cutting Edge had not stopped running the ads, Amazon terminated Cutting Edge's account and withheld all of

[2] At no point did Sellify contact either Cutting Edge or Google about the ads. Def. 56.1 ¶ 30-31.

its unpaid advertising fees. Def. 56.1 ¶ 42. The Cutting Edge ads ceased appearing in August 2009. Id. ¶ 44.

Sellify alleges damages amounting to $2,404,629, which it calculated by subtracting its 2009 estimated profits from OneQuality's 2007 profits and multiplying by nine. Maki Decl. at ¶ 23. Between March and August 2009, the period in which the Cutting Ads were active, the ads were viewed a total of 1069 times and clicked on a total of 61 times. Abbott Decl. Ex. A.

The Court turns first to Amazon's contention that there are no facts in the record that would support holding Amazon liable under the Lanham Act. Direct liability exists under the Lanham Act only when the defendant itself unlawfully uses in commerce another's trademark -- here, "onequality.com." 11 U.S.C. § 1125(a). The undisputed evidence shows that Cutting Edge, not Amazon, designed and purchased the ads at issue. As such, Amazon cannot be subject to direct liability under the Lanham Act.

Next, the Court considers whether Amazon may be held vicariously liable under the Lanham Act. While no decision binding on this Court has expressly recognized vicarious liability under the Lanham Act, this is "not because it has been rejected, but because the [relevant] Court[s] appear[] to not have had the occasion to consider it."). Banff Ltd. V. Limited , Inc., 869 F.Supp. 1103, 1111 (S.D.N.Y. 1994); accord Gucci America, Inc. v. Frontline Processing

Corp., 2010 WL 2541367, *11 (S.D.N.Y. June 23, 2010). The Court notes, however, that -- contrary to the representations of Amazon's counsel at oral argument, see Transcript, 9/2/2010, at 29 -- courts in other Circuits have recognized vicarious liability under the Lanham Act under theories of both actual and apparent authority. See Perfect 10, Inc. v. Visa Int'l Serv., Ass'n, 494 F.3d 788, 807 (9th Cir. 2007); Proctor & Gamble v. Haugen, 317 F.3d 1121, 1127-28 (10th Cir. 2003); AT&T v. Winback and Conserve Program, 42 F.3d 1421, 1440 (3d Cir. 1994); Hard Rock Cafe Licensing Corp. v. Concession Servs., Inc., 955 F.2d 1143 (7th Cir. 1992). Here, however, the Court concludes that it need not decide whether and in what form vicarious liability is available under the Lanham Act, as Sellify has alleged insufficient facts to support a finding that Cutting Edge acted under either the actual or apparent authority of Amazon in placing the ads disparaging OneQuality.

An agent acts with actual authority when, inter alia, a principal has manifested its intent for the agent to act on the principal's behalf, the agent has the authority to legally bind the principal, and the agent is subject to the principal's actual control. See, e.g., Ahn v. Roone, Pace Inc., 624 F. Supp. 368, 370-71 (S.D.N.Y. 1985); Mouawad Natl'l Co. v. Lazare Kaplan Int'l Inc., 476 F.Supp.2d 414, 422-23 (S.D.N.Y. 2007). Here, the undisputed evidence demonstrates that Cutting Edge was not acting under Amazon's actual authority. The Operating Agreement specifically disclaimed any agency relationship between Amazon and Cutting Edge. See Tarpey Dec. Ex. A ¶ 5 (Associates are "solely responsible for [their] site, including its development, operation, and maintenance and all materials that appear on or within it"). The Operating Agreement also expressly provided that Cutting Edge did not have the power to bind Amazon contractually. Id. at ¶ 16 (Associates have "no authority to make or accept any offers or representations on our or our affiliates' behalf."). Further, Amazon did not control the form or substance of Cutting Edge's ads, and it is undisputed that Amazon had no authority to remove the Cutting Edge ads from the Internet. After being informed of the ads' existence in July 2009, Amazon exercised the only possible influence it had over them: breaking off contractual relations with Cutting Edge and withholding Cutting Edge's accrued advertising fees under the Operating Agreement. While these actions eventually led Cutting Edge to cease running the ads the following month, there is a wide chasm between such indirect contractual influence and the direct authority and control necessary for a finding of actual authority under agency law.

The Court now turns to whether there are sufficient facts in the record to support Sellify's allegation that Cutting Edge acted under Amazon's apparent authority. Apparent authority exists when "a principal, either intentionally or by lack of ordinary care, induces [a third party] to believe that an individual has been authorized to act on its behalf." Highland Capital Mgmt. v. Schneider, 607 F.3d 322, 328 (2d Cir. 2010); see also Restatement (Third) of Agency § 2.03. Sellify has proffered no evidence showing that Amazon induced others to believe that Cutting Edge had been acting as its authorized agent. The only possible manner in which Amazon could be characterized as having induced third parties into reasonably believing Cutting Edge had been acting as its agent is by pointing to the fact that Amazon contractually allowed Cutting Edge to link to Amazon's website in its ads. See Tarpey Dec. Ex. A ¶ 3. But the Court concludes that, standing alone, the mere act of allowing another to link to one's website, even if undertaken for commercial gain, cannot support a finding of apparent authority. Contrary to Sellify's contentions, a reasonable user of the internet would not interpret such a tenuous "link" between entities as firmly indicative of an agency relationship. See Fare Deals Ltd v. World Choice Travel.Com, Inc., 180 F.Supp.2d 678, 695 (D. Md. 2001). Furthermore, Sellify's requested interpretation would broaden the range of situations susceptible to a finding of apparent authority, and thus vicarious liability, to unreasonable bounds given the realities of the internet context.

The Court now addresses whether Amazon may be held liable for contributory infringement pursuant to the Supreme Court's ruling in

Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 884 (1982), and if so, whether there are sufficient facts in the record to support a such a finding. In Inwood, the Supreme Court held that a plaintiff alleging contributory infringement must prove either that the "manufacturer or distributor intentionally induce[d] another to infringe a trademark" or that it "continue[d] to supply its product to one whom it kn[ew] or ha[d] reason to know [was] engaging in trademark infringement." Id. at 854. As to the first form of contributory infringement under Inwood, Sellify has proffered no evidence that Amazon "intentionally induced" Cutting Edge to infringe its trademark. By contrast, the undisputed record demonstrates that Amazon specifically sought to bar Cutting Edge from infringing on the trademarks of third parties.

As to the second form of contributory infringement, the Court first notes that Amazon did not "supply a product" to Cutting Edge, as occurred in Inwood, but provided a service: participation in the Associates Program. Confronting an analogous situation in Tiffany (NJ) Inc. v. eBay Inc., 600 F.3d 93 (2d Cir. 2010), the Second Circuit -- "assum[ing] without deciding" that Inwood applies to online service providers -- ruled that, in order to be liable for contributory infringement, an online "service provider must have more than a general knowledge or reason to know that its service is being used" as a platform for trademark infringement. Id. at 106-07.

Instead, the service provider must have "[s]ome contemporary knowledge" of particular instances of infringement. Id. at 107. The Court proceeded to rule that -- despite the fact that eBay had been repeatedly informed that its services were being used to facilitate trademark infringement -- eBay's knowledge of the infringement was insufficiently particularized to support a finding of contributory liability under Inwood. Id. at 106. The Second Circuit in eBay also spoke favorably of the Ninth's Circuit's ruling that a service provider may be liable for contributory infringement only when it has "[d]irect control ... of the instrumentality used by a third party to infringe" on the plaintiff's trademark. Id. at 104-05 quoting Lockheed Martin Corp. v. Network Solutions, Inc., 194 F.3d 980, 984 (9th Cir. 1999).

In this case, there is no evidence that Amazon had particularized knowledge of, or direct control over, Cutting Edge's disparaging ads. Although plaintiff had informed Amazon of Cutting Edge's infringing activity by calling their "Seller Central" department and speaking with an unknown Amazon representative, these contacts pale in comparison to those found insufficient to satisfy the knowledge requirement in eBay -- where the plaintiff had sent eBay two general demand letters and literally thousands of "Notice of Claimed Infringement" submissions with respect to specific instances of infringement. eBay, 600 F.3d at 106. Here, by contrast, upon receipt of Sellify's May 2009 demand letter, Amazon promptly initiated enforcement action against Cutting Edge, and eventually terminated its contractual relationship with the company in large part because it continued to infringe on plaintiff's mark. As such, the Court concludes that Amazon did not, as proscribed by Inwood, "continue to supply" its services to Cutting Edge after it knew that Cutting Edge was engaging in trademark infringement against Sellify.

The Court now moves to examination of Sellify's claims arising under Connecticut law, which allege violations of the Connecticut Unfair Trade Practices Act ("CUTPA), unfair competition, and defamation/trade libel. The Court notes that each of these state law claims requires proof that either Amazon itself placed the Cutting Edge ads or that Cutting Edge acted as Amazon's agent in placing the ads. See Conaway v. 84 Forest, LLC, Nos. CVH 6091, H-1180, 1999 WL 1076141, at *4 (Conn. Super. Nov. 22, 1999) (vicarious liability under CUTPA requires that wrongdoer was defendant's agent, acting with actual authority); Larsen Chelsey Realty Co. v. Larsen, 656 A.2d 1009, 1022, 1024 (Conn. 1995) (vicarious liability for unfair competition predicated on an agency relationship between the defendant and the wrongdoer); Oparaji v. Atl. Container Line, No. 07 Civ. 2134, 2008 WL 4054412, at *11 (S.D.N.Y. 2008) (vicarious liability for defamation requires an agency relationship between the defendant and the author of the defamatory statement). Given the

Courts findings, supra, that Amazon did not directly infringe Sellify's trademark and that no agency relationship existed between Amazon and the entity that did, namely, Cutting Edge, Sellify's state law claims necessarily fail as a matter of law.

Finally, the Court observes that, even if any of its liability claims were otherwise viable, Sellify's asserted damages are far too speculative to survive a motion for summary judgment. Sellify crudely calculated its damages by subtracting its estimated 2009 profits from OneQuality's 2007 profits and multiplying by nine. Beyond the fact that Sellify has failed to put forth any evidence that the ads caused any potential customer to choose not to purchase its products, the evidence flatly contradicts Sellify's apparent contention that the entirety of its drop in sales from 2007 to 2009 is attributable to Cutting Edge's disparaging ads. First, OneQuality's profits fell 50% from 2006 to 2007, long before the ads appeared. Moreover, OneQuality was virtually shuttered from late 2007 until early 2009, at which point Maki re-started the company as Sellify with no staff and less inventory than the company had in 2007. Only then did the ads appear, and they appeared only 1,069 times, and were clicked-on a total of only 61 times. In short, the record finds no support for Sellify's assumption that, but for Cutting Edge's ads, its 2009 profits would have matched or exceeded its 2007 profits. Moreover, Sellify offers no satisfactory rationale for its assertion that the ads will affect its future profitability at all, not to mention by a magnitude of nine times its alleged actual lost sales. There is no evidence of any enduring damage to the company's reputation stemming from the ads, and given the paucity of views the ads received, it is highly unlikely that any such damage did, in fact, occur.

Sellify's failure to adduce a non-speculative basis for its alleged damages is therefore an independent and adequate ground for granting the motion. See 24/7 Records, Inc. v. Sony Music Entm't, Inc., 566 F.Supp.2d 305, 316 (S.D.N.Y. 2008) ("[d]amages may not be merely speculative ... but must be reasonably certain and directly traceable to the breach").

For the foregoing reasons, the Court hereby grants defendant's motion for summary judgment. The Clerk of the Court is hereby directed to enter final judgment for defendants, dismissing the complaint in its entirety with prejudice.

SO ORDERED.

Dated: New York, NY
November 3, 2010

JED S. RAKOFF, U.S.D.J.