

22-198

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

AYSE SEN,

Petitioner,

v.

AMAZON.COM, INC.

Respondent.

On Petition for a Writ of Certiorari to the

United States Court of Appeals

for the Ninth Circuit

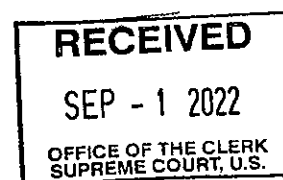
PETITION FOR A WRIT OF CERTIORARI

Ayse Sen

P.O. Box 2279 Idyllwild, CA 9259

Email:ishay_shen@yahoo.com

Phone Number: 619-777-0670



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QUESTIONS PRESENTED

15 U.S.C.A. § 1115(a) provides that the certificate of a registered mark shall be "prima facie" evidence of the right of exclusive use and 15 U.S.C.A. § 1115(b) provides that if the mark has become incontestable, see 15 U.S.C.A. § 1065, the certificate shall be "conclusive" evidence of the right. That there are certain natural rights of which men, when they form a social compact, cannot deprive or divest their posterity, among which are the enjoyment of life, and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety Declaration of Rights US Constitution. "The right to exclude [is] universally held to be a fundamental element of the property

right." See *Kaiser Aetna v. United States*, 444 U.S. 164, 178-80 (1979).

1) Under the US Constitutional property rights and Lanham Act provisions to "exclusive use", does Amazon.com, Inc or any other third parties have the right commercially exploit and appropriate goodwill of Ayse Sen's Baiden Trademark ("Baiden Mark") without her consent?

2) District Court dismissed Sen's two cases regarding the same repeating violations including continual new violations. Should Sen be denied Due Process instead of the dispute being fully and completely litigated before the jury?

PARTIES TO THE PROCEEDING

Petitioner, who is plaintiff in the district court and appellant in the court of appeals, is Ayse Sen ("Sen"). Respondent, which was the defendant in the district court and appellee in the court of appeals, is Amazon.com, Inc. ("Amazon"),

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ayse Sen respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States District Court Southern District of California (App. B, *infra*, 2a-13a). The opinion of the United States Court of Appeals for the Ninth Circuit (App. C, *infra*, 14a-16a) The order denying rehearing *en banc* (App. D, *infra*, 21a).

JURISDICTION

The court of appeals entered its judgment on December 21, 2021 (App. C, *infra*, 14a-16a) confirming United States District Court Southern District of California. The appellate court denied a

timely Petition for Rehearing and For Rehearing En Banc on March 30, 2022 (App. D, *infra*, 21a). On July 6, 2022, this Court entered a standing order, the effect of which extends the time within which to file a petition for a writ of certiorari in this case to August 27, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VII:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

United States Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Introduction

This appeal arises from over a decade of advertising campaigns where Amazon has been appropriating goodwill of Sen's 'Baiden' Trademark by diverting her online users to Amazon's website where free traffic and attention is brought to her competitors' products. As larger goodwill is generated around Sen's products and Baiden Mark using her limited resources, the intensity of her online users being diverted to the competitors' products using targeted online searches increases, leading to grave commercial exploitation of her mark by third parties.

While Sen has viable exfoliating products as a result of her business presence through over a decade of hard work; the revenue earned does not even cover

her costs, let alone the availability of funds needed for business expansion. This predicament solely arises from her investments to her business being redirected to promote Amazon's website, where currently over 200 other exfoliating products are listed under the same search tag of 'Baiden Mitten' and her listing with most reviews is not even in the results. It is like trying to hold water with a bucket that has holes in the bottom. The higher the investment undertaken by the Petitioner to expand her business, the graver the appropriation of her market shared by Amazon and competitors' products, the more holes appear. No small business can sustain its activity or grow even if they had the most innovative products, since their investment will be stolen in commercial exploitation of their intellectual property by legal resource-rich conglomerates like Amazon. As a result, the Petitioner had to stop

investing and halted her regular business activities; with the exception of her old clients that have been acquainted to her products.

In Addition, selling and buying another person's intellectual properties, without the owner's consent, overrides and conflicts with the tenets of Trademark Law and the property rights preserved by the US Constitution. This unsustainable practice of having a small business pay the cost, but Amazon or other third parties reaping the benefits is detrimental to small businesses; harms the economy; and has serious national economic consequences considering the role and overall size of the small businesses in US.

B. Procedural Background

In 2008, Sen noticed that Amazon.com, Inc. ("Amazon") is using her registered (PTO Registration Number: trademark ("Baiden Mark") in PPC Advertising Campaigns ("PPC Campaigns"); diverting her online users, that are searching for her products to purchase, to Amazon's Website; and appropriating her highly targeted online traffic - people that are ready to purchase exfoliating products - to her competitor's products.

After many attempts starting from 2008 to cease Amazon from using Baiden Mark and not receiving any response on December 4, 2012, Sen initiated a lawsuit against Amazon in the United States District Court for the Southern District of California (the "Initial Lawsuit"). See *Sen v. Amazon. Com, Inc.*, Case No.12cv2878 AJB (BGS). The

District Court prematurely entered judgment on December 19, 2013 (See *Sen v. Amazon. Com, Inc.*, Case No.12cv2878 AJB (BGS) (S.D. Cal. Dec. 19, 2013)) notwithstanding Sen's repeated objections that the agreement that was designed and written by Amazon's Lawyer during the Early Neutral Evaluation Conference (See App. A, *infra*, 1a) will not prevent repetition of the same offence in the future and does not include the points discussed during the meetings; and is hence incomplete. See Transcript of Motion Hearing at 4-7, *Sen v. Amazon. Com, Inc.*, Case No.: 3:16-CV-01486-JAH-JLB (S.D. Cal. June 8, 2021) (No. 91). Upon Amazon's repetitions of the same offense, right after the District Court's one-year jurisdiction period ended, Sen filed the Current Lawsuit on June 15, 2016, since Amazon did not respond to her requests to cease. See *Sen v. Amazon.com, Inc.*, Case No.: 3:16-

CV-01486-JAH-JLB. On September 28, 2018, the District Court dismissed the lawsuit granting Amazon Summary Judgment. See *Sen v. Amazon.com, Inc.*, Case No.: 3:16-CV-01486-JAH-JLB (S.D. Cal. Sep. 27, 2018).

Sen filed Notice of Appeal timely with the United States Ninth Circuit Appellate Court. The Appellate Court affirmed in part; vacated in part, and remanded the case to the District Court on February 12, 2020. See *Sen v. Amazon.com, Inc.*, No. 18-56413 (9th Cir. Feb. 12, 2020). On August 10, 2020, the District Court, for the second time granted Amazon's Summary Judgment and dismissed the lawsuit again. See *Sen v. Amazon.com, Inc.*, Case No.: 16cv1486-JAH (JLB) (S.D. Cal. Aug. 10, 2020). Sen filed Notice of Appeal on August 20, 2020, and the Ninth Circuit Appellate Court affirmed the District Court's Decision in the second appeal on

December 21, 2021. See App. C, *infra*, 14a-16a. Sen filed a petition for panel rehearing on and petition for rehearing en banc on February 3rd and the petition was denied on March 30, 2022. See App. D, *infra*, 21a.

**C. The District Court's Confirmed Opinion conflicts
with the Provisions of the Lanham Act**

The District Court dismisses Sen's Lanham Act claims as "there is no confusion" and "the labels are clear" in Amazon's use of Biden Mark. Thus, in the opinion of the District Court, there is no genuine issue by using four factor analysis in depth. The appellate Court confirmed the decision "summary judgment is appropriate if there is clear labeling that avoids likely confusion". See App. C, *infra*, 24a.

Assuming that the analysis is fully correct, it would result in granting Amazon an unfettered right to commercially exploit any trademark as long as it can hide behind the veil of an elusive "clear label, no confusion analysis" and commercially exploit any brand's goodwill. This would dilute the right to "exclusive use" granted to trademark owners under the Lanham Act as investments in intellectual property will be appropriated and used to promote another entity's website/ competitor's products listed there. The Lanham Act may well contain provisions that protect constitutionally cognizable property interests notably, its provisions dealing with infringement of trademarks, which are the 'property' of the owner because he can exclude others from using them. See, e.g., *K mart Corp. v. Cartier, Inc.*, 485 U. S. 176, 185-186 (1988) "Exclusive use" gives the functionalities and meaning to trademarks where they encourage investment in quality and innovation, increasing the living standards of the nation with a prospering economy.

Search Engines such as Google, Yahoo etc., selling Baiden Marks goodwill (which belongs to Sen)

without her consent while Amazon or other ecommerce websites consuming it to promote their website and all the products listed there. While lower courts painfully analyze factors to determine appropriation between two similar trademarks under the Lanham Act, when there is clear appropriation of goodwill from directly buying and selling the Mark itself –not similar one– such as the respondent is ignored with a statement – as succinctly put by Carlos T. Bea, J. – that there is “no genuine issue”. See *Multi Time Mach., Inc. v. Amazon.com, Inc.* 804 F.3d 930, 943 (9th Cir. 2015) (Bea, J., dissenting). The issues small business faces do not even make it before the jury and dismissed with a summary judgment. The factors that render “no confusion” and the case law are transcending to an extent that it results in virtually overwriting the provisions of the Lanham Act which culminates in Trademarks undergoing a loss of their functionalities.

**D. The Confirmed Opinion Violates the Petitioner's
Constitutional Property Rights**

Amazon has been ignoring Sen's requests to cease commercially exploiting and abusing her Baiden Mark since 2008. By not allowing her "The right to exclude", Amazon is violating her property rights given by United States Constitution Fourteenth Amendment over a decade. This is not Amazon specific. It is a common practice which stems from this precedent where an entity, search engines like google, impermissibly sells the goodwill the small businesses' intellectual properties without owning the assets and Ecommerce websites such as Amazon impermissibly appropriate intellectual properties' goodwill without owning the assets to promote their ecommerce websites and the owners' competitors' products listed there. Such practice completely circumvents property rights with no

respect for the small businesses' work. The Constitutional property rights are also legally desecrated when Sen cannot possess her property which is sold and bought without her consent by the third parties who do not own her trademark and have no rights over it. Both the common law and statutory law have long punished those who exceed the scope of consent when using property that belongs to others. See *Van Buren v. United States* 141 S. Ct. 1648 (2021). Yet the lower courts dismiss the case because of the confusion analysis case law.

**E. The District Court Fails to Provide Due Process
to the Petitioner by Dismissing Her Both
Cases without Letting the Claims Being
Fully Litigated Before Jury**

Sen dropped the Initial Lawsuit because Amazon was bringing her online traffic directly to her listing during the Memorandum of Understanding ("MOU") meetings and they had the mutual understanding that it was an accidental mistake that her online traffic was diverted to other products and Amazon would not repeat the same offense. Instead of reflecting what is discussed in the legal form, Amazon designed the agreement to perpetually repeat the same offense by inserting waiving C.C.P. 1542 Waiver See App. A, *infra*, 2a. which legally naïve Sen did not know anything about during MOU meetings and trusted the judge's presence during the meetings. "Procedural

unconscionability addresses the manner in which agreement to the disputed term was sought or obtained, such as unequal bargaining power between the parties and hidden terms included in contracts of adhesion.” (*24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1212-1213.) Yet the District Court not only ignored her objections and dismissed the Initial Lawsuit but also stated the same agreement as another reason to dismiss the current lawsuit regarding the new violations besides the Lanham Act claims. See Transcript of Motion Hearing at 4-7, 9-10, 12-13, 16, 21, Sen v. Amazon. Com, Inc., Case No.: 3:16-CV-01486-JAH-JLB (S.D. Cal. June 8, 2021) (No. 91). "The district court found Amazon's use of MTM's trademark created no likelihood of confusion as a matter of law. But we think a jury could find that Amazon has created a likelihood of confusion. We therefore reverse the

district court's grant of summary judgment in favor of Amazon." *Multi Time Mach., Inc. v. Amazon.com, Inc.* - 804 F.3d 930 (9th Cir. 2015) It is submitted that the 'likelihood of confusion' in trademark cases can only be determined by a Jury and not a Court of Law. See *Fortune Dynamic v. Victoria's Secret*, 618 F.3d 1025, 1031 (9th Cir. 2010). Thus, the district court's dismissal of the current lawsuit without granting the right of a jury to the Petitioner is in conflict with the jurisprudence of the 9th Circuit and dismissal of the case because of Lanham Act is also is also a misapplication of the rule of law. Thus; the confirmed opinion prevents Sen to enforce her constitutional rights given by U.S. Constitution Vth and VIIth Amendments and litigate the issue before the Jury. This is also common issue with the set case law as it may happen to any other small business with very limited financial and legal resources.

REASONS FOR GRANTING THE WRIT

A. This Case Addresses a Common Issue in an Online Economy

Sen's legal stand is not a special one, neither is Amazon's legal defense. 'Online economy' brought importance to intellectual properties the most, as compared to any other period in the past. Online traffic is the life of any business in this modern economy. To gain competitive advantage, it is a common practice that corporations such as – Amazon, Walmart, or other entities engage in by bringing online attention and buyers to their website using small businesses' highly targeted and relatively inexpensive intellectual properties as keywords even though there are no relevant goods listed on their website. This "bait and switch" causes detrimental harm to the small businesses – like that

of the Petitioner; while big business conglomerates – like the Respondent, are reaping the benefits of trademark owners' work. The solution to end this conflict is an enforcement of which lies within this Court's jurisdiction.

B. The Matter Should Be Evaluated and Harmonized Within the Cohesive Framework of Constitutional Rights and Trademark Law, Instead of the Narrow Frame of the Existing Case Law

As it is discussed above the confirmed opinion perpetuates a precedent that conflicts within the Lanham Act and Property Rights guaranteed under

the U.S. Constitution. The lower Courts following the case law that is set, leads to a scenario where the plaintiff is not even allowed to litigate before the jury by concluding that "there is no genuine issue as to any material fact..." while the legally defenseless small businesses face a detrimental loss because of their brands' abused at the hands corporations that have unlimited legal resources against. "The assets of a business (including its good will) unquestionably are property." See *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board* 527 U. S. 666, 675 (1999). "The hallmark of a constitutionally protected property interest is the right to exclude others." See *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board* 527 U. S. 666, 673 (1999). The lower courts' confirmed opinions violate Sen's constitutional rights by forcing her to comply with an unconstitutional

taking of her property without compensation. In addition, the opinions are also ignoring her trademark right to "exclusive use" of Baiden Mark for own goods and are abusing her goodwill by promoting and bringing attention to third parties' websites and her competitors' products.

The lower courts narrowly interpret statutes and the existing case law is not comprehensive and does not undertake an overall evaluation leading to a just conclusion. It is within the jurisdiction of this court to consider harmonizing the Constitutional Rights and evaluating the conflict within the Lanham Act.

C. This Incorrect Precedent Induces
Disastrous Social and Economic
Consequences

The precedent effectuated by the opinions affects a large population in US. According to the Small Business Administration's (SBA) Office of Advocacy, in 2021 there were 32.5 million small businesses in the United States, comprising 99.9 percent of all U.S. businesses. Nearly half of all Americans (46.8 percent) are employed by small businesses. This means that 61.2 million employees in the United States work at a small business.¹ Harming small businesses by the abuse of their

¹ See U.S. Small Business Administration Office of Advocacy, *2021 Small Business Profile*, SBA (Aug. 30, 2021), <https://cdn.advocacy.sba.gov/wp-content/uploads/2021/08/30144808/2021-Small-Business-Profiles-For-The-States.pdf>.

intellectual properties will take away the fresh breath of innovation leading to an economic slowdown since, in addition to loss of employment, investments of small business owners are wasted by third parties by diverting and scattering their resources instead of their business growth – which would otherwise provide value to a larger part of society and increase living standards, besides adding prosperity to the nation's economy.

Furthermore, this set case law causes a few corporations with unlimited legal resources to practically own anyone's brand as long as "labels are clear" and cause shrinking middle class with the wealth transfer. The American social characteristic – where anyone can prosper and avail themselves of the fluent transition between social classes, if they bring value to society – gets diminished when small

businesses are not protected and their issues are neglected.

“The protection of property rights, central to the functioning of our society ...” City of Dallas v. Stewart, 361 S.W.3d 562, 580 (Tex. 2012). Intellectual Properties have a very important role in the Market Economy and the success of the American dream. Not protecting them and overriding the constitutional rights and related important laws will damage the economy and as a result, the nation in its entirety. The issues discussed here have profound consequences that would benefit from an authoritative Supreme Court decision. Thus, this court should grant the writ and resolve the entrenched exploitation of the intellectual properties of small businesses.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari
should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Ayse Sen', written over a horizontal line.

Ayse Sen

P.O. Box 2279

Idyllwild, CA 9259

Email: ishay_shen@yahoo.com

Phone Number: 619-777-0670