

The New Enforcement Paradigm: Using Amazon to Defend Your
Invention Rights
by Brian Platt

It can be challenging for a new business to innovate and sell products online. Copycats troll Kickstarter, Indiegogo, and Amazon looking for products to knockoff. And successful product launches are frequently met with a slew of copycats, some of which list before the genuine product even reaches the marketplace. In many instances, copycats have zero respect for the intellectual property (IP) rights of others. One client recently counted more than two-hundred infringing product listings on Amazon, and more than a thousand on Alibaba. These listings knocked-off the client's innovative and patented products, misappropriated their trademarks, and stole their copyrighted images. In one particularly outrageous example, the copycats took images of the business owner himself, demonstrating use of his products on YouTube, and used those images for their copycat advertising of knockoff products on Amazon and Alibaba.

To the frustration of rights holders and sellers, online IP enforcement can frequently resemble "whack-a-mole," rather than an orderly process for resolving claims. You probably don't know name of the infringing party, because Amazon and other online marketplaces allow for arbitrary or fanciful seller names. And even if a product advertises "FREE One-Day prime Shipping," the third-party seller may not be in the United States. So even if you learn their identity through a subpoena, the litigation that follows can be an expensive, international affair.

Fortunately for Amazon sellers, Amazon offers some enforcement alternatives for trademarks, designs, and copyrights, including Brand Registry, which allows for proactive brand registration, and Infringement Reporting, which helps brand owners to bring trademark, copyright, design, and other issues to Amazon's attention. Both provide tools for companies seeking to protect against infringers. However, when trademark, design, and copyright issues are resolved, sellers often continue to lose sales because of utility patent infringements by third-party sellers. Until this year, the owner of a patented invention ripped-off by a third-party seller on Amazon had little recourse. Possible enforcement options were only effective for a short period of time, economically unattainable for most sellers, and unpredictable.

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In early-2019, Amazon introduced the Utility Patent Neutral Evaluation Procedure (“Neutral Patent Evaluation.”) The purpose of the program is to “efficiently resolve claims that third-party product listings infringe utility patents [through a] simple, low-cost procedure called Neutral Patent Evaluation.” Our experience indicates that this innovative new program delivers, and has incredible potential for patent owners. Traditionally, patent litigation has been expensive and slow. Taking place in federal court, and following complicated rules and procedures, the process can take years.

Amazon’s Neutral Patent Evaluation promises the opposite: it is inexpensive, fast, and provides near-immediate results. Our clients that have used the Utility Patent Neutral Evaluation Procedure have experienced uniformly good results, and we recommend the process without reservation. Here is an overview of the process:

What you need for Neutral Patent Evaluation. You need a utility patent. Neutral Patent Evaluation allows a patent owner to assert one claim from one unexpired U.S. utility patent.

What Neutral Patent Evaluation does. In Neutral Patent Evaluation, the neutral evaluator—an expert attorney skilled in patent law—reviews a patent infringement claim against a third-party product listing on Amazon. The neutral evaluator makes a yes/no decision on whether the patent covers the product listing. In reaching this decision, the neutral evaluator may consider arguments that the accused products (1) do not infringe, (2) that a Court has found the patent invalid or unenforceable, or (3) that the accused products were on sale more than one year before the earliest effective filing date of the patent. In short, the Neutral Patent Evaluation procedure provides an efficient framework for a third-party neutral evaluator to consider patent infringement claims.

How Neutral Patent Evaluation begins. To request Neutral Patent Evaluation, a patent owner submits their request to Amazon. The patent owner identifies one claim from one unexpired U.S. utility patent (proof of infringement is not required at this stage). The patent owner may identify up to 50 infringing products or sellers. Amazon sends the request to each identified seller, providing the option to (1) execute the Agreement and pay the fee to

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participate in the Neutral Patent Evaluation, or (2) have their product listing removed. If a seller does not participate, his or her product listing is removed.

What Neutral Patent Evaluation costs. The cost is \$4,000. If a patent owner names multiple parties, the cost is still \$4,000. The cost for each responding listing or seller is also \$4,000. Importantly, however, only the loser pays. And in a nice touch, any fees collected in excess of \$4,000 are donated to a charity of the patent owner's choosing.

What the neutral evaluator considers. After the parties have submitted their \$4,000 fee, the neutral evaluator considers written arguments regarding infringement. Just one claim is considered. At this point in the process, the patent owner benefits from a good lawyer that understands patent law, and it is recommended that the patent owner provide excellent, well-considered arguments on infringement. Of course, the neutral evaluator is an expert in patent law and patent owners should expect to prove each and every element in order to prevail. Similarly, a responding seller needs good counsel familiar with the Neutral Patent Evaluation procedures if they expect to prevail. Many arguments available to a responding seller in traditional court proceedings are unavailable, as the neutral evaluator may only consider a seller's arguments regarding (1) non-infringement; (2) that a Court has found the patent invalid; or (3) that the accused products were on sale more than one year before the earliest effective date of the patent. And this simplified process does not allow for discovery or depositions.

In the United States, patent litigation is uniformly regarded as an expensive and time-consuming endeavor. Amazon's Neutral Patent Evaluation procedure dramatically changes that. In the same way Amazon re-invented online shopping, Amazon is offering patent owners an efficient and economical way to enforce patent rights. The process is neutral and staffed by experts, and the results are quick and effective against infringers. And the online dominance of Amazon promises to make results effective across much of the online marketplace.

If you are seeking assistance with Amazon's Neutral Patent Evaluation, please contact [Tim](#)

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