US Amazon antitrust suit challenges exclusion of some online sellers by e-commerce giant

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- Plaintiff calls into question alleged IP-protection defense for grey goods
- Legal observers predict uphill battle to prove claims of refusal to deal and collusion
- Preliminary hearing scheduled before New York City judge on 6 October 2017

A new lawsuit launched against Amazon will test the waters for claims the e-commerce behemoth violates antitrust laws by taking concerted action to restrict competition among online sellers, according to plaintiff attorney Mark Schlachet.

The legal action filed against defendant Amazon Services, owner and operator of the Amazon.com marketplace, does not concern use of the platform, but “who wins the struggle between competitors” vying to sell on the site, a focus that has been largely unexplored before US courts up to now, Schlachet said.

“The main thrust of the case is that it is illegal when you have the type of market power that Amazon does to get together with other parties and exclude the small businessman from the market,” said Schlachet, calling out such behavior as a violation of the US Sherman Act.

As previously reported, the complaint alleges that Amazon jointly colludes with favored brands and sellers in anticompetitive arrangements that restrain some third-party sellers from listing on the Amazon marketplace.

The lawsuit particularly takes issue with marketplace restrictions such as boycotts or orders to third-party sellers to delist so-called grey market goods -- discounted products purchased lawfully and then marked up and sold at a profit -- through an alleged selective enforcement of intellectual property rights.

Those and other marketplace restrictions “are practiced routinely and in plain view, adversely affecting hundreds or thousands of individual sellers,” the lawsuit states.

Complainant Mordy’s Appliance Repair Service of New Jersey also faults Amazon for violating its own policies regarding the assertion and protection of IP rights and for not providing the company with assurances beforehand that listings for its treasure of goods including appliance parts and consumer electronics would not be ordered taken down on unfounded IP grounds.
Legal observers told PaRR the Mordy’s antitrust suit could capture more extra attention at this time because of Amazon’s growing online market dominance and increased scrutiny following its proposed USD 13.7bn acquisition of the supermarket company Whole Foods Market.

But the attorneys said this particular antitrust complaint is likely to face an uphill battle to prove its claims of exclusionary practices like refusal to deal, or the elimination of competition through collusion.

Michael Carrier, an antitrust and intellectual property law authority at New Jersey’s Rutgers Law School, said on the boycott claim, “the question is whether there is any legitimate reason Amazon would treat the two sets of retailers differently.”

“If it has a legitimate reason based on, for example, IP, that would be fine. But if it’s a made-up excuse for first-party sellers to harm third-party sellers though Amazon, that could be an antitrust violation,” said Carrier.

“Boycott claims are difficult to prove, particularly where there is a justification based on IP,” Carrier added.

Tom Cotter, Briggs Morgan Professor of Law at the University of Minnesota Law School, pointed out that the Mordy’s complaint might find some principal support as a matter of legal theory from the 1959 Klor’s US Supreme Court decision (Klor’s, Inc. v. Broadway-Hale Stores, Inc.).

The SCOTUS Klor’s ruling held that a chain of department stores, acting in concert with a number of national manufacturers and their distributors, had effected an illegal group boycott in violation of the Sherman Act against a San Francisco-based competitor retailer.

“Whether or not you can prove that there is such a conspiracy is another matter,” said Cotter, whose research focuses on antitrust, and domestic and international intellectual property law.

“Just because a firm is harmed by the conduct of another firm, doesn’t necessarily amount to a violation of the antitrust laws,” said Cotter.

Even if the facts of the case are as alleged and an individual firm is conspiring with Amazon to exclude another firm “it is going to be very difficult to prove that that amounts to an antitrust offense,” the attorney said.

One main reason is that for the last 30 to 40 years, US antitrust law “is all about protecting the competitive process, protecting consumers…not about protecting individual competitors, at least not of an end in and of itself,” said Cotter.

The burden would then be showing “an end result in which consumers are worse off.”
As well, “Amazon may have a legitimate business justification for wanting to have an exclusive distribution agreement with a particular manufacturer, and those types of agreements in some circumstances can violate the antitrust law, but they would normally be scrutinized under what is called the rule of reason and you would actually have to demonstrate that in some quantifiable sense consumers have been harmed.”

Amazon declined to comment on the litigation.

An initial pretrial conference hearing is set for 6 October in a New York City courtroom before Judge P. Kevin Castel.

The case is Mordy’s Appliance Repair Service LLC v. Amazon Services LLC, 17-cv-05376 in US District Court for the Southern District of New York.

by Kathryn Leger in San Francisco