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 8 PERFECT 10, INC.

9 UNITED STATES DISTRICT COURT
 10 CENTRAL DISTRICT OF CALIFORNIA

11 PERFECT 10, INC., a California
 12 corporation,

13 Plaintiff,
 14 vs.

15 GOOGLE, INC.; et al.,
 16 Defendants.

17 AND CONSOLIDATED CASE

Master File No. CV04-9484
 AHM (SHx)

DISCOVERY MOTION

**PERFECT 10'S SUPPLEMENTAL
 MEMORANDUM IN SUPPORT OF ITS
 MOTION TO COMPEL DEFENDANT
 GOOGLE INC. TO PRODUCE
 DOCUMENTS**

Hearing Date: November 19, 2007
 Time: 10 A.M.
 Place: Courtroom of Judge Hillman

Discovery cut-off, pre-trial
 conference, and trial dates have not
 been set by Judge Matz

28 PERFECT 10'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF ITS MOTION TO COMPEL
 DEFENDANT GOOGLE INC. TO PRODUCE DOCUMENTS

1 Google has refused to produce any discovery in response to Perfect 10's
2 5th, 6th, and 7th requests for production, except for one deposition transcript.
3 Google's claim that the parties did not complete the conference of counsel is
4 incorrect; Perfect 10's attorney spent a great deal of time meeting and conferring
5 with Google's attorneys, and was not able to reach agreement on *any* of the
6 discovery requests. After the conference call with the Court on October 23, the
7 parties had an additional conference on October 24, but ***Google still has not***
8 ***proposed providing any discovery at all.***

9 One of the most important areas of discovery involves damages and/or
10 profits of the infringer. Google has not produced any documents at all which
11 allow Perfect 10 to determine its lost sales or Google's profits from infringement.

12 Many of Perfect 10's requests can be answered by the following materials,
13 which Google has available but is simply unwilling to produce:

14 1. Frequency of searches, including searches on the names of Perfect 10
15 models and on the name Perfect 10. (Requests 135-137.) In P10's First Request
16 propounded in March 2005, Request No. 43 asked for the number of searches on
17 the names of 141 P10 models. The Court deferred ruling on P10's motion to
18 compel on this request, finding that it is a mega request. In Request Nos. 135 and
19 137, P10 has now reduced the number of models to nine, so it is clearly not a
20 mega request. This information is essential to one of P10's damage claims, which
21 would use the number of searches done on P10 models to determine the number of
22 customers who were looking for Perfect 10 content but who did not join P10's
23 website because the infringing images were available for free using Google.

24 Google must have information regarding the number of searches done on
25 P10 models. Google has a "Google Trends" program which is available to the
26 public, which provides the relative frequency of searches, but does not publicly
27 provide the actual number of searches. In other words, for example, Google will
28 publicly provide the relative frequency of searches on the name of P10 model Aria

1 Giovanni compared to actress Ashley Judd. (See Ex. 10 to Zada Declaration.) In
2 order to do this, Google Trends must have the actual numbers of searches so that it
3 can compute the relative frequency of the searches.¹ Another search engine,
4 Overture.com, publicly provides this information regarding number of searches,
5 including searches on the names of P10 models. (See Ex. 11 to Zada Decl.)

6 Google opposes producing this information on the grounds that in the meet
7 and confer regarding a motion to dismiss, P10 indicated it would drop its right of
8 publicity claim from an amended complaint if Google agreed not to file the
9 motion to dismiss. First, this is irrelevant because the discovery relates to
10 damages under P10's copyright claim as well as right of publicity claim. Second,
11 Google rejected P10's offer, requiring instead that P10 stipulate to dismiss the
12 right of publicity claim *with prejudice*. P10 cannot do that. For this reason and
13 others, P10 has decided to keep the right of publicity claim in the case and oppose
14 Google's motion to dismiss. See the rest of the e-mail string (Ex. 14) that took
15 place after the portion of the e-mails that was attached to the Golinveaux decl.

16 Furthermore, despite being ordered to state the percentage of all Google Web
17 and Image searches during the years 2002 and 2005 for the 50 most frequently used
18 search terms, Google has not produced this information (or information on the
19 number of searches) for Web and Image Search for 2005 and for Image Search for
20 2002. Google has not stated that it does not have this information, it has just not
21 produced it even though it was ordered to do so. (See Order Re Perfect 10's Motion
22 to Compel Defendant Google, Inc. to Produce Documents, dated May 22, 2006,
23 attached hereto as Exhibit A, page 12 lines 6-18 (Revised Interrogatory No. 24).)

24 2. The number of searches with the safe search filter off. (Request Nos.
25 118, 139-143, 145, 147-149, 184.) This information indicates the extent to which

27 ¹ Google has failed to even produce evidence ordered by the Court, such as the
28 number of searches on Perfect 10 and various sexually explicit search terms
(Request Nos. 47 and 48), or the percentage of searches on the top 50 image
searches and web searches for 2002 and 2005 (Revised interrogatory 24).

1 users are using Google to search for free adult images, which destroys Perfect 10's
2 business. This information is essential to another damage claim, which will be
3 based upon P10's share of the adult market; it is also relevant to profits of the
4 infringer, as well as other important issues in this case. See Joint Stipulation, page
5 16 line 7 to page 17 line 21. Google argues that P10 should be limited to damages
6 discovery relating only to infringement of P10's images. Joint Stip. page 18 lines
7 21-28. But Google has not produced that information.

8 3. Information on the useability of image recognition to locate infringing
9 images in Google's indexes. (Request No. 174.) See Joint Stipulation, page 1 line
10 20 to page 2 line 12; page 81 line 20 to page 82 line 1 and Exhibit 17 to Zada decl.

11 4. Information on how the provision of infringing content helps Google's
12 revenues. (Request Nos. 121-124, 135-137, 139, 146, 150, 164, 165, 168, 175-
13 178, 185-186, 188-189.) This relates to profits of the infringer, which are
14 recoverable under §504 of the Copyright Act. See Joint Stipulation pages 55-56.

15 All of the above information is readily available to Google, but Google has
16 been unwilling to provide it to Perfect 10. Google assists infringing websites by
17 offering them a "Google Analytics" feature by which the infringing website can
18 keep track of a whole slew of information, including which images are
19 downloaded and how often, the primary sources of traffic to that website, and a
20 great deal of other information that would help answer Perfect 10's discovery
21 requests. See Zada declaration and Exhibits 12-13 attached thereto.

22 5. Google's DMCA log or an equivalent document in which Google keeps
23 a listing of all DMCA notices it received and any notes regarding those notices,
24 including the identity of the website owner, any emails to and from that owner,
25 and action taken. (Request No. 196.) Even though the DMCA log was ordered
26 produced, it has not been produced. (See Order, attached as Ex. A, page 2 line 27
27 (Request No. 51).) If Google does not have such a DMCA log or any document
28 which contains that information in a spreadsheet or some other readily usable

1 format, it should so state. See Joint Stip. p. 82 ln 28 to p. 83 line 4; p. 86 ln 4-22.

2 6. The identity of the Google employee(s) who processed each Perfect 10
3 DMCA notice. (Request Nos. 132-133.) The Rule 30(b)(6) witness who was
4 supposed to be most knowledgeable regarding this testified that he did not know
5 the names of the employees that processed any particular notice.

6 7. Emails and other communications with infringing Google advertising
7 partners and websites that were the subject of Perfect 10 infringement notices.
8 (Request Nos. 168.) Once again, Google has this information but is simply
9 unwilling to produce it. This relates to Google's efforts to stop infringement (if it
10 took any) and its ability to control infringement.²

11 8. The identity of the Google employees who knowingly assisted infringing
12 websites, as set forth in the Declaration of Luke Sample, and their deposition
13 transcripts. (Request Nos. 197-198, 200.) See Joint Stip. p. 86 ln 25 to p. 88 ln 14.

14 9. Any agreements that Google or Google advertising affiliates have to use
15 any CELEBRITY images or rights of publicity. (Request Nos. 161-163, 181.) If
16 there aren't any, Google should so state. See Joint Stipulation p. 62 ln. 16 to p. 63
17 ln. 20. Google can very easily determine what constitutes the images of a
18 "CELEBRITY" by comparing the name associated with the image to the list of 73
19 celebrities in the definitions. (See Ex. 1 to Mausner decl., page 3 lines 4-19.)

20 10. Which newsgroups Google owns. (Requests No. 158-159.) See Joint
21 Stipulation page 81 lines 16-19.

22 11. Revenues received from other search engines for which Google

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24 ² That Perfect 10 sent notices of infringement to Google regarding over 2000
25 infringing websites is evidence of Google's knowing contribution to massive
26 infringement by these webmasters. Perfect 10 spent years finding its
27 infringements and sending those notices, and Google should not be excused from
28 producing relevant documents simply because of the massive scale of its
contribution to infringement. Google must produce its records regarding
ownership of the infringing sites that were the subject of Perfect 10's notices.
Google received notices regarding all these websites and Perfect 10 has the right
to find out what communications Google had with those websites, if any.

1 provided search results. (Request Nos. 190-192.) See Joint Stip. p. 82 ln. 14-22.

2 It is very obvious by now that Google is simply trying to stonewall
3 discovery in this case. Although Google will claim to have produced seven or
4 eight thousand pages of documents, many of those documents are simply multiple
5 copies of the same DMCA notices which Perfect 10 sent to Google. Zada decl.
6 Google's 30(b)(6) witnesses, who were supposed to be the most knowledgeable
7 employees on certain topics, did not know who processed Perfect 10's DMCA
8 notices, whether there were more image searches or web searches, how to spot
9 likely infringing material, who the heads of various departments were, and
10 answered "I don't know" as many as over 150 times during a seven hour
11 deposition. Google has produced at most a few hundred emails between itself and
12 infringing advertising affiliates, even though it was ordered to produce
13 communications with many of the infringing websites. (Order attached as Exhibit
14 A, page 5 line 21 to page 6 line 10.) No information has even been produced
15 about how much money Google is making from and paying to these websites.
16 Google has produced next to no meaningful discovery so far, despite enormous
17 resources expended by Perfect 10 and by this Court.

18 Perfect 10 limits its motion regarding Request No. 194 to: All documents
19 relating to John Levine's work for Google.

20 At the minimum, Google should be required to produce existing reports and
21 other internal existing memoranda as requested; there is no excuse for its failure to
22 produce those. Finally, if Google is going to be a \$160 billion market cap
23 company that is infringing so much copyrighted material, it should not be allowed
24 to hide behind its massive infringement and claim that all the information
25 regarding its infringement is a mega request. If Google refuses to produce
26 evidence regarding how much of its business is comprised of adult content,
27 infringing content, or celebrity content, it should not be allowed to make the claim
28 that these are only an incidental part of its business.

1 Dated: November 5, 2007

Respectfully submitted,

2 *Jeffrey N. Mausner*
Jeffrey N. Mausner

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