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11 UNITED STATES DISTRICT COURT

12 CENTRAL DISTRICT OF CALIFORNIA

13 PERFECT 10, INC., a California  
14 corporation,

15 Plaintiff,

16 vs.

17 GOOGLE INC., a corporation; and  
DOES 1 through 100, inclusive,

18 Defendants.

CASE NO. CV 04-9484 AHM (SHx)  
[Consolidated with Case No. CV 05-  
4753 AHM (SHx)]

GOOGLE INC.'S OPPOSITION TO  
PERFECT 10, INC.'S MOTION FOR  
ORDER GRANTING LEAVE TO  
FILE [PROPOSED] SECOND  
AMENDED COMPLAINT

Date: July 14, 2008

Time: 10:00 am

Crtrm.: 14

19 AND COUNTERCLAIM

Hon. A. Howard Matz

20 PERFECT 10, INC., a California  
21 corporation,

22 Plaintiff,

23 vs.

24 AMAZON.COM, INC., a corporation;  
A9.COM, INC., a corporation; and  
25 DOES 1 through 100, inclusive,

26 Defendants.

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1                                    **MEMORANDUM OF POINTS AND AUTHORITIES**

2                                    **Preliminary Statement**

3            After more than three and a half years of litigation, including a motion for  
4 preliminary injunction, an appeal to and remand from the Ninth Circuit, and extensive  
5 discovery, and with literally no reasoned explanation for its delay, Plaintiff Perfect 10  
6 has moved for leave to amend its complaint again. This is no ordinary request for  
7 leave to make ministerial amendments to its complaint. Perfect 10 seeks to add  
8 entirely new claims regarding Google's Blogger service—claims Perfect 10's own  
9 document production shows it has known about for nearly *six years*, yet inexplicably  
10 failed to raise until now. Perfect 10 also seeks to add four brand-new causes of action  
11 under California law regarding Google's Web and Image Search services—claims that  
12 Perfect 10 unquestionably could and should have brought in 2004 when it first filed  
13 this action. Lastly, Perfect 10 seeks to add **951** alleged copyright registrations to this  
14 case, the vast majority of which have not even yet issued.

15           Perfect 10 pled a case based on Google Search. Perhaps displeased with the  
16 Ninth Circuit's decision, Perfect 10 seeks to change gears and add new claims based  
17 on facts that it should have known—indeed, demonstrably *did* know—years ago.  
18 Perfect 10's motion is untimely, the claims it seeks to add are futile, and Google would  
19 be unduly prejudiced if Perfect 10 is permitted to amend its complaint in these  
20 circumstances. The motion should be denied.

21                                    **Factual Background**

22           Perfect 10 served its Complaint on November 19, 2004, alleging copyright and  
23 trademark infringement and related state law claims, against Google regarding  
24 Google's Web and Image Search services. Perfect 10 served an Amended Complaint  
25 (the operative Complaint) on January 14, 2005. On January 26, 2007—over two years  
26 later—Perfect 10 initiated meet and confer efforts regarding (and sent a copy of) its  
27 proposed Second Amended Complaint ("proposed SAC"), adding state law claims for  
28 unfair competition. Perfect 10 never moved for leave to file that proposed complaint.

1 More than fourteen months later, on March 2, 2008, Perfect 10 again initiated  
2 meet-and-confer efforts regarding its intent to file a proposed SAC. This draft  
3 included the state law claims for unfair competition in Perfect 10's January 2007 draft,  
4 a new unjust enrichment claim, plus a new set of claims against Google's Blogger  
5 service.<sup>1</sup> Meet-and-confer efforts continued through April. On May 21, 2008, Perfect  
6 10 circulated yet another revised draft, adding a misappropriation claim. On June 12,  
7 2008, Perfect 10 filed the present motion. The proposed SAC makes the following  
8 (proposed) additions to the case:

- 9 • New claims under federal and state law against Google's "Blogger"  
10 weblog hosting service, alleging that hosting of third party blogging  
11 websites infringed Perfect 10's copyrights and trademarks;
- 12 • New state law claims regarding Google's Web and Image Search services  
13 for (1) unfair competition under Cal. Bus. & Prof. Code § 17200, (2)  
14 common law unfair competition, (3) unjust enrichment, and (4)  
15 misappropriation;
- 16 • Additional factual allegations regarding Perfect 10's federal claim for  
17 unfair competition under the Lanham Act;
- 18 • Additional factual allegations regarding Perfect 10's publicity claims, and  
19 • The addition of 951 alleged copyright registrations (in addition to the 113  
20 registrations included in the operative Complaint), each containing an  
21 unknown number of images, and many of which have not yet issued and  
22 are still pending with the Copyright Office.<sup>2</sup>

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23  
24 <sup>1</sup> Google operates a web log hosting service at [www.Blogger.com](http://www.Blogger.com) and  
25 Blogspot.com (the latter of which automatically re-directs users to Blogger.com).  
26 Generally speaking, Blogger.com is where bloggers create, edit, and administer their  
27 blogs, while Blogspot.com is where blogs are actually hosted. This Opposition will  
28 refer to Google's web log hosting service as "Blogger" or the "Blogger service."

<sup>2</sup> Google has no objection to certain of Perfect 10's proposed amendments which  
are ministerial and/or add further background allegations to preexisting claims, as  
listed in Google's [Proposed] Order (filed herewith). Google's objections are to the  
proposed amendments enumerated above.

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1       **Futility.** Courts will deny leave to amend where the claim as amended would  
2 be futile. Platt Elec. Supply, Inc. v. EOFF Elec., Inc., 522 F.3d 1049, 1054 (9th Cir.  
3 2008). Futility "includes the inevitability of a claim's defeat on summary judgment."  
4 California v. Neville Chem. Co., 358 F.3d 661, 673 (9th Cir. 2004); see also Roth v.  
5 Garcia Marquez, 942 F.2d 617, 628 (9th Cir. 1991). Futility is also found when the  
6 amendments do not adequately plead a cause of action and could not survive  
7 dismissal, Moore v. Kayport Package Exp., Inc., 885 F.2d 531, 537 (9th Cir. 1989),  
8 and when the claim would be preempted by federal law. Forsyth v. Humana, Inc., 114  
9 F.3d 1467, 1482 (9th Cir. 1997), aff'd, 525 U.S. 299 (1999).

10       **Bad Faith.** Courts will not permit amendment if made in bad faith, including  
11 where plaintiffs were attempting to have the court "entertain 'theories seriatim' which  
12 would permit them to fulfill their apparent wish of conducting open-ended discovery."  
13 Koch v. Koch Industries, 127 F.R.D. 206, 211 (D. Kan. 1989). Similarly, courts reject  
14 proposed amendments where the real (but unstated) purpose behind the amendment is  
15 to avoid a dispositive ruling. See Wimm v. Jack Eckerd Corp., 3 F.3d 137, 139-40  
16 (5th Cir. 1993) (finding bad faith and denying leave where plaintiffs sought to amend  
17 to avoid summary judgment); Janicki, 42 F.3d at 566-67 (9th Cir. 1994) (finding bad  
18 faith where plaintiff sought to seek an amendment to the complaint that would have  
19 deprived the court of jurisdiction).

20       **Prejudice.** Courts have recognized that allowing a plaintiff to amend to alter  
21 the theory of or acts underlying its case at a late stage of the litigation is  
22 impermissible, because the threat of continued litigation and additional discovery  
23 would cause undue prejudice. Ascon Properties Inc. v. Mobil Oil Co., 866 F.2d 1149,  
24 1161 (9th Cir. 1989). The cost, expense, delay, and "wear and tear" that further  
25 discovery requires are elements of prejudice justifying denial of leave to amend.  
26 Kaplan, 49 F.3d at 1370. Where amendment will require additional discovery on new  
27 issues of which the plaintiff was aware at the outset of the litigation, it should be  
28 rejected. See EEOC v. Boeing Co., 843 F.2d 1213, 1222 (9th Cir. 1988).

**Argument**

**I. PERFECT 10'S MOTION FOR LEAVE TO FILE CLAIMS BASED ON  
GOOGLE'S BLOGGER SERVICE SHOULD BE DENIED.**

**A. Perfect 10's Motion to Add Claims Regarding Blogger Is Untimely.**

Perfect 10's delay in bringing these new Blogger claims is inexcusable. Perfect 10's moving papers effectively concede (as they must) that Perfect 10 has known of its alleged infringement claims against Blogger for at least three years. See Zada Decl., ¶ 8 ("I print-screened in 2005 ... the reduced-size [infringing] image at the top of the page [that] has a URL in green next to it which includes blogger.com"). In truth, Perfect 10 was well-aware of alleged infringement by Blogger websites as early as **2002—six years ago**—as the following sampling of documents from Perfect 10's own production demonstrates: (1) **August 30, 2002** printout of allegedly infringing Web Search results listing the URL j\_cuttheshit.blogspot.com; (2) **June 3, 2003** printout containing the URL page3girls.blogspot.com in allegedly infringing Web Search results; and (3) **June 5, 2004** printout of an allegedly infringing image from onions-outpost.blogspot.com in an Image Search result. See Herrick Decl., Ex. A.<sup>4</sup>

Perfect 10 cannot dispute its actual knowledge dating back to 2002 regarding the facts underlying its Blogger claims. Perfect 10 instead attempts to excuse its delay by claiming that it "was not aware that the domain names blogspot.com and blogger.com were owned and controlled by Google" until "our appeal was pending at

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<sup>4</sup> Perfect 10 also referenced several Blogger sites as alleged infringers in its defective DMCA notices sent to Google as early as **February 7, 2005**—over three years ago, well before the Preliminary Injunction proceedings, and nearly contemporaneous with Perfect 10's service of its Amended Complaint in mid-January 2005. See Herrick Decl., Ex. B. In total, Perfect 10 referenced Blogger websites in at least thirteen defective alleged DMCA notices sent between 2005 and 2007. See id. at ¶ 21. These Perfect 10 documents belie its claim that it was "not aware" of the new "facts" it seeks to allege regarding Blogger. See Zada Decl. ¶ 6.

This is just one example of the time-barred nature of Perfect 10's claims in this action. Following the Court's disposition of the pending motion, Google intends to move for partial summary judgment regarding those of Perfect 10's infringement claims that are barred by the applicable statutes of limitations.

1 the Ninth Circuit." See Zada Decl., ¶ 6. Perfect 10's documents confirm that this  
2 sworn representation is demonstrably incorrect. Specifically, Perfect 10 produced a  
3 Blogger.com home page it printed out on **March 4, 2006**—more than two years ago  
4 and even before its appeal was pending—which clearly states "Copyright ©1999 -  
5 2006 Google." See Herrick Decl., Ex. C. Worse, these printouts show that Perfect 10  
6 purposefully navigated to the "Blogger Help" portion of the Blogger.com website, and  
7 printed out the page answering the question: "How do I put AdSense on my blog?"  
8 See Herrick Decl., Ex. C at C15-21. Of course, as of March 4, 2006, Perfect 10 was  
9 well-aware of the fact that AdSense was a Google service.

10 Nor was this a single isolated document lost in the shuffle; Perfect 10 produced  
11 yet another screenshot of Blogger.com it captured several months later on **June 18,**  
12 **2006**—again, over *two years ago*—and again expressly referencing Google's  
13 relationship with Blogger. See id., Ex. D ("The news about Blogger from the Blogger  
14 team at Google"). Perfect 10 produced still more documents it created on **June 22,**  
15 **2007** stating that "Google Analytics is powered by Blogger." Id., Ex. E. Perfect 10  
16 created additional screenshots on **December 4, 2007**, showing Blogger.com's Terms  
17 of Service and DMCA policies, the latter of which identifies this service by the name  
18 "Google Blogger." Id., Ex. F. Thus, Perfect 10 cannot plausibly claim that it was  
19 unaware of Google's ownership of Blogger.com until recently.

20 Regardless, any such ignorance would be inexcusable, because Perfect 10  
21 *should have known* of this relationship long ago. Google's ownership of Blogger has  
22 been a matter of public record for more than five years. Google acquired Blogger in  
23 February 2003, as was widely reported in the press. See, e.g., Herrick Decl., at Exs.  
24 G-J. Further, *the very first result* of a Google Web Search for the word "Blogger"  
25 shows that Blogger is a "[f]ree weblog publishing tool from Google." See Herrick  
26 Decl., at Ex. K. Moreover, Blogger.com itself is replete with references to Google's  
27 ownership of the site, listing "Copyright © 1999 –2008 Google" on its public  
28

1 homepage<sup>5</sup> and directing users to sign in with their "Google account." See Herrick  
2 Decl., Ex. L. Indeed, the document production Google made to Perfect 10 *in this* case  
3 on April 19, 2005 (over three years ago) showed that Blogger is a Google service.  
4 Herrick Decl., at Ex. M. On these facts, Perfect 10 must be charged with constructive  
5 knowledge of Google's ownership dating back to at least 2004 (before it filed the  
6 original complaint), if not earlier. See, e.g. Frank v. U.S. West, Inc., 3 F.3d 1357,  
7 1366 (10th Cir. 1993) (denying leave when plaintiffs "knew or should have known" of  
8 a potential party long before they sought to add it); Williams v. HeathReach Network,  
9 2000 WL 760742, at \*2 (D. Me. 2000) (affirming denial of leave when plaintiff was  
10 on notice of the relevant facts and did not make timely use of them).

11 Perfect 10 next charges that Google somehow "concealed" its ownership of  
12 Blogger from Perfect 10. This is a non-starter. Again, Google produced documents to  
13 Perfect 10 in April 2005 showing that Blogger is a Google service. Herrick Decl., at  
14 Ex. M. Google's ownership of Blogger is also public information. Google's  
15 acquisition of Blogger was widely reported. Its website lists Blogger as a Google  
16 service (<http://www.google.com/intl/en/options/>), and sets out a separate DMCA  
17 policy for Blogger—a policy Perfect 10 has *never* followed. See Herrick Decl., at Ex.  
18 O. Google's Annual Reports have referenced Blogger since at least as early as 2004.  
19 See Herrick Decl., at Ex. P. Google's ownership of Blogger has been clear as day to  
20 all the world—and to Perfect 10—for over five years.<sup>6</sup>

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21  
22 <sup>5</sup> Blogger.com and Blogspot.com's home pages listed Google's copyright notices  
23 at least as early as June and September 2004, respectively—well before Perfect 10  
24 filed its original complaint in November 2004. Herrick Decl., at Ex. N. Anyone  
25 visiting these sites would be hard-pressed to miss this information—especially  
26 someone like Norman Zada, who routinely looks for websites' registered owners. See  
27 Zada Decl., ¶ 5 (describing Zada's efforts to "determine the registered owner" of sites  
28 such as mafiadacova.blogspot.com). Indeed, every Blogger website (including  
29 mafiadacova.blogspot.com) displays a prominent logo on the upper left corner of the  
30 site, linking it to Blogger.com's home page.

31 Moreover, the identity of Blogger's owner is irrelevant to the timeliness of  
32 Perfect 10's proposed amendment, because it is well-settled that once a party is on  
33 notice of the alleged wrongful conduct, its claim accrues, regardless of whether the  
34 party knows the identity of the alleged tortfeasor. See Rotella v. Wood, 528 U.S. 549,  
35 (footnote continued)

1 Similarly baseless is Perfect 10's next argument that Google deliberately misled  
2 the District Court and the Ninth Circuit regarding the fundamental facts of this case.  
3 See Motion at 1. The very documents Perfect 10 cites belie its argument. The lawsuit  
4 that Perfect 10 filed, all of the discovery Perfect 10 has sought, the motion for  
5 preliminary injunction that Perfect 10 filed, and the arguments Perfect 10 presented on  
6 appeal to the Ninth Circuit, were all expressly focused on Google's *search functions*.  
7 Naturally it followed that all of Google's answers, briefing and arguments have  
8 concerned the very claims Perfect 10 brought—regarding Google Search. Those  
9 answers, briefs and arguments contain accurate descriptions regarding the logistics  
10 and mechanics of Google's search functions. For instance, as Google stated in its  
11 Answer to Amended Complaint and Counterclaims, Image Search does indeed inline-  
12 link to full-size images that are hosted on third party websites. See Mausner Decl.,  
13 Ex. 20, at 5 (Google's response to allegations regarding Image Search). Similarly,  
14 Google does *not* store images on its servers via its Web Search cache links. See  
15 Mausner Decl., at Exs. 18-19, 21-22.<sup>7</sup> At no time during the pendency of this case has  
16 Perfect 10 *ever* served discovery, filed briefs or pleaded claims regarding Google's

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23 555 (U.S. 2000); Western Ctr. For Journalism v. Cederquist, 235 F.3d 1153, 1157 (9th  
24 Cir. 2000). Thus, Perfect 10's Blogger claims accrued in August 2002 (see Herrick  
Decl., Ex. A), and its June 2008 attempt to add them is untimely by a wide margin.  
25 Perfect 10 also implies that Google creates content posted on individual Blogger  
26 websites. Perfect 10 is wrong. The Blogger services Google provides are strictly  
27 limited to hosting. Third-party users, not Google, post images on Blogger. As such,  
28 Blogger is entitled to broad immunity pursuant to the DMCA and, as discussed in  
greater detail in Part I.B.2, below, the Communications Decency Act. See 17 U.S.C.  
§ 512; 47 U.S.C. § 230; Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102 (9th Cir.  
2007).

1 Blogger service.<sup>8</sup> Perfect 10's attempt to mischaracterize Google's briefs and  
2 discovery responses, prepared regarding and in response to Perfect 10's claims about  
3 Google Search, are groundless and cannot excuse Perfect 10's tardiness in bringing  
4 this Motion.

5 **B. Perfect 10's Proposed New Claims Regarding Blogger Are Futile.**

6 **1. Perfect 10's Proposed State Law Claims Are Preempted By the**  
7 **Copyright Act.**

8 The Federal Copyright Act completely preempts equivalent state law claims.  
9 Metrano v. Fox Broadcasting Co., Inc., 2000 WL 979664, \*3 (C.D. Cal. 2000); Worth  
10 v. Universal Pictures, Inc., 5 F. Supp. 2d 816 (C.D. Cal. 1997); ; 17 U.S.C. § 301(a).  
11 Here, Perfect 10's new state law claims for unfair competition, right of publicity,  
12 unjust enrichment, and misappropriation are preempted by the Copyright Act because  
13 (1) the works involved fall within the "subject matter" of copyright and (2) the rights  
14 that Perfect 10 asserts under state law are "equivalent" to those protected by the  
15 Copyright Act. Laws v. Sony Music Entertainment, Inc., 448 F.3d 1134, 1137-38 (9th  
16 Cir. 2006); Kodadek v. MTV Networks, Inc., 152 F.3d 1209, 1212 (9th Cir. 1998).

17 Regarding the first prong, to the extent Perfect 10 seeks to exercise control over  
18 the works themselves—and it does here—its claims fall within the subject matter of  
19 copyright. Laws, 448 F.3d at 1139-43. The Copyright Act protects "pictorial,  
20 graphic, and sculptural works" fixed in a tangible medium of expression. 17 U.S.C. §  
21 102(a)(5). Here, Perfect 10 claims:

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22 <sup>8</sup> For example, Perfect 10's first set of Requests for Admissions were focused on  
23 seeking admissions related to the claims at issue—regarding Web and Image Search—  
24 and Google's answers were similarly focused. See Mausner Decl., at Ex. 23; see also  
25 Herrick Decl., at Ex. Q (attaching additional representative Requests for Admission).  
26 Moreover, Perfect 10 failed to define the term "server" in its Requests for Admission,  
27 but did provide the following definition related to that term: "Images will be said to  
28 be 'DISPLAYED ON GOOGLE'S SERVERS' when such images are available for  
display on images.google.com as a result of a Google image search." See Herrick  
Decl., Ex. Q (Perfect 10's Requests for Admission (Set One), Definitions, ¶ 13).  
Thus, not only did these Requests and this Definition *not* refer to Blogger, they  
specifically referred to thumbnails on Image Search.

1 (1) The domain names blogspot.com and blogger.com are both registered to and  
2 controlled by Google. Google hosts, via its blogspot.com hosting program,  
3 hundreds of websites that offer, in total, tens of thousands of *infringing Perfect 10 copyrighted images*. (2) Google also stores thousands of full-size *Perfect 10 copyrighted images* on its servers, under the domain name blogger.com, which  
4 is owned and controlled by Google.

5 (Motion, at 5)(emphasis added). “Perfect 10 copyrighted images” clearly are pictorial  
6 works fixed in a tangible medium of expression. 17 U.S.C. § 102(a)(5). Indeed,  
7 Perfect 10’s new copyright claim is based upon the very same conduct as its new state  
8 law claims: the alleged storage of “Perfect 10 copyrighted images” on Google servers.  
9 These allegations place Perfect 10’s works squarely within the subject matter of  
10 copyright. See 17 U.S.C. § 301(a); Kodadek, 152 F.3d at 1213 (section 17200 unfair  
11 competition preempted because plaintiff alleged defendants published and placed on  
12 the market for sale products bearing images subject to plaintiff’s copyright); Sinatra v.  
13 Goodyear Tire & Rubber Co., 435 F.2d 711 (9th Cir. 1970) (same).

14 As for the second prong of the preemption test, preemption is mandated when a  
15 plaintiff asserts rights “equivalent” to those protected by the Copyright Act, and there  
16 is no extra element to take the claim outside of its umbrella. Kodadek, 152 F.3d at  
17 1212. “To survive preemption, the state cause of action must protect rights which are  
18 qualitatively different from the copyright rights.” Laws, 448 F.3d at 1143. “The extra  
19 element must transform the nature of the action.” Id. at 1144.

20 The Copyright Act covers the right to reproduction, preparation of derivative  
21 works, and public distribution. Kodadek, 152 F.3d at 1213 (*citing* 17 U.S.C. § 106).  
22 Perfect 10 claims Google “stores hundreds of thousands of *unauthorized copyrighted*  
23 *images* on its servers,” and that “Google is *hosting* websites that *infringe Perfect 10*  
24 *copyrights*.” (Motion, at 1-2; Proposed SAC ¶¶ 18, 28, 37) (emphasis added).  
25 Regardless of whether Perfect 10’s claim is that these images are displayed on  
26 Google-hosted sites, placed next to ads, or that Google is hosting blogs that distribute  
27 passwords to perfect10.com (thereby expanding the distribution of Perfect 10 images),  
28 the essence of its claims is that Google displays, distributes, and/or copies

1 copyrightable works. These are copyright allegations. See Kodadek, 152 F.3d at  
2 1212-13 (Section 17200 claim preempted by Copyright Act).

3 To the extent Perfect 10 has attempted to distinguish its state law claims from  
4 those routinely preempted by the Copyright Act, Perfect 10 has failed. For example,  
5 in its unfair competition claim, Perfect 10 seemingly adds allegations about Google's  
6 intent or awareness of the allegedly wrongful activity. Mausner Dec., Ex. 10, ¶¶ 75-  
7 77. However, "additional elements of awareness and intentional interference, not part  
8 of a copyright claim, goes merely to the scope of the right; it does not establish  
9 qualitatively different conduct on the part of the infringing party, nor a fundamental  
10 nonequivalence between the state and federal rights implicated." Motown Record  
11 Corp. v. George A. Hormel & Co., 657 F. Supp. 1236, 1240 (C.D. Cal. 1987)  
12 (intentional interference claim preempted despite additional element of intent).

13 Additionally, that Perfect 10's publicity claim includes an additional element of  
14 commercial use not present in a copyright infringement claim does not qualitatively  
15 distinguish the claims. Laws, 448 F.3d at 1144 ("the underlying nature of Laws's  
16 state law [publicity] claims is part and parcel of a copyright claim"); Fleet v. CBS  
17 Inc., 50 Cal. App. 4th 1911, 1920 (1996) (publicity claim equivalent to copyright  
18 claim because plaintiffs were seeking to prevent exhibition of a copyrighted work).  
19 Similarly here, the additional element of "commercial purpose" does not alter the  
20 underlying nature of the action—to prevent exhibition of a copyrighted work.

21 Similarly, where an unjust enrichment or misappropriation claim is based upon  
22 the taking of a copyrighted work, such claims are preempted by the Copyright Act.  
23 Firoozye v. Earthlink Network, 153 F. Supp. 2d 1115, 1126 (N.D. Cal. 2001) (unjust  
24 enrichment claim preempted); Ticketmaster Corp. v. Tickets.Com, Inc., 2000 WL  
25 525390, at \*4 (C.D. Cal. 2000) (unjust enrichment and misappropriation claims based  
26  
27  
28

1 on the taking of factual data compiled by plaintiff were preempted).<sup>9</sup>

2 Perfect 10 alleges that Google stores infringing *copies* of Perfect 10 copyrighted  
3 works uploaded by Blogger users, and has not alleged an extra element to take its  
4 claims outside the Copyright Act. Its state claims for unfair competition, right of  
5 publicity, unjust enrichment and misappropriation reegarding Blogger are preempted.

6 **2. Perfect 10's Proposed State Law Claims are Preempted by the**  
7 **CDA.**

8 Perfect 10's new state law claims regarding Blogger are also preempted by the  
9 Communications Decency Act ("CDA"). The CDA provides "broad 'federal  
10 immunity to any cause of action that would make service providers liable for  
11 information originating with a third-party user of the service.'" CCBill, 488 F.3d at  
12 1118 (quoting Almeida v. Amazon.com, Inc., 456 F.3d 1316 (11th Cir. 2006)). The  
13 CDA states: "No provider or user of an interactive computer service shall be treated  
14 as the publisher or speaker of any information provided by another information  
15 content provider." 47 U.S.C. § 230(c)(1) (emphasis added). Further, "[n]o cause of  
16 action may be brought and no liability may be imposed under any State or local law  
17 that is inconsistent with this section." 47 U.S.C. § 230(e)(3).

18 Perfect 10's new state law claims with respect to Blogger are precisely the kind  
19 that are forbidden by the CDA. Google is immune from liability under these claims  
20 because it is an "interactive computer service" giving access to "information provided  
21 by another information content provider." 47 U.S.C. § 230(c)(1).<sup>10</sup>

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22  
23 <sup>9</sup> Perfect 10 includes in the Mausner Declaration a citation to Stewart Title of  
24 Calif., Inc. v. Fidelity Nat'l Title Co., 2008 WL 2094617, \*2 (9th Cir. 2008), finding  
25 that a plaintiff's state law misappropriation claim was not preempted by the Copyright  
26 Act. In addition to being uncitable—and thus improperly brought to the Court's  
27 attention—Stewart Title is distinguishable. Perfect 10's proposed misappropriation  
28 claim makes no allegation that any of Perfect 10's copyrighted works are (1) validly  
obtained and (2) *then* misused in some way other than copyright infringement.

<sup>10</sup> An "interactive computer service" is "any information service, system, or  
access software provider that provides or enables computer access by multiple users to  
a computer service, including specifically a service or system that provides access to  
the Internet." 47 U.S.C. § 230(f)(2). An "information content provider" is "any  
(footnote continued)

1 Courts have found a wide variety of Internet service providers immune under  
2 the CDA. For example, in Fair Housing Council of San Fernando Valley v.  
3 Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008), the Ninth Circuit held that  
4 Roommates.com was immune from liability under the CDA for displaying statements  
5 included in users' "Additional Comments" because Roommates.com published the  
6 comments as they were written by the users, and does not encourage or enhance any  
7 discriminatory content created by users. Id. at 1173; see also Carafano v.  
8 Metrosplash.com, Inc., 339 F.3d 1119, 1124-25 (9th Cir. 2003) (Matchmaker.com  
9 was not an "information content provider" when users inputted information on  
10 questionnaires formulated by Matchmaker.com). Similarly, in Universal  
11 Communication Systems, Inc. v. Lycos, Inc., 478 F.3d 413 (1st Cir. 2007), web site  
12 operator Lycos was immune from state law claims based on users posting defamatory  
13 statements on Internet message boards. Id. at 419. In Corbis Corp. v. Amazon.com  
14 Inc., 351 F. Supp. 2d 1090 (W.D. Wash. 2004), Amazon was held not to be an  
15 "information content provider," even though it published images on its IMDb.com  
16 site, because Amazon did not create or develop the posted images. Id. at 1118.<sup>11</sup>

17 Perfect 10 alleges here that Google stores infringing copies of Perfect 10  
18 copyrighted works on its servers in connection with its service allowing third-party  
19 users to create their own blogs hosted by Google. Perfect 10 does not allege Google  
20 creates or develops *any* of the allegedly unauthorized content on Blogger websites,  
21 nor could it. Zada Dec., Ex. 2.<sup>12</sup> Accordingly, Perfect 10's proposed state law claims

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23 \_\_\_\_\_  
24 person or entity that is responsible, in whole or in part, for the creation or  
development of information provided through the Internet or any other interactive  
computer service." 47 U.S.C. § 230(f)(3).

25 The CDA's exception that it shall not "be construed to limit or expand any law  
26 pertaining to intellectual property" does not apply to Perfect 10's state law intellectual  
property claims because this exception applies only to *federal* intellectual property  
claims. See 47 U.S.C. § 230(e)(2); CCBill, 488 F.3d at 1119 (construing the term  
27 "intellectual property" to mean "federal intellectual property").

28 <sup>12</sup> Blogger's Terms of Service state that "the contents of specific postings – is  
provided by and is the responsibility of the person or people who made such postings.  
(footnote continued)

1 relating to Blogger are preempted by the CDA, and thus, amendment would be futile.

2       **C. Perfect 10's Motion for Leave To Amend Regarding the Blogger**  
3       **Claims Should Be Denied Because It Is Made In Bad Faith.**

4       Perfect 10's motion for leave to add Blogger claims should be denied for the  
5 additional reason that it has been brought in bad faith. Janicki, 42 F.3d at 566-67;  
6 Thornton v. McClatchy Newspapers, Inc., 261 F.3d 789, 793 (9th Cir. 2001). Courts  
7 have concluded that amendments were proposed in bad faith where the plaintiffs were  
8 attempting to have the court "entertain 'theories seriatim' which would permit them to  
9 fulfill their apparent wish of conducting open-ended discovery" of the defendant's  
10 business practices over the preceding twenty years. See Koch, 127 F.R.D. at 211.  
11 Courts have also found bad faith where the amendment was sought in anticipation of a  
12 response to a dispositive order of the court. See Wimm, 3 F.3d at 139-40 (proposed  
13 amendment sought to avoid summary judgment).

14       The circumstances surrounding Perfect 10's prosecution of this case and the  
15 timing of its motion for leave in particular suggest an intent to sandbag both Google  
16 and the Court. Again, Google's ownership of Blogger is public information that  
17 Perfect 10 knew or should have known when it filed its original complaint. Further,  
18 Perfect 10 has produced screenshots of alleged infringement from Blogger sites from  
19 as early as 2002, yet Perfect 10 has never pursued discovery related to (nor made any  
20 claim regarding) Blogger. Had Perfect 10 made such allegations from the beginning,  
21 Google could have responded with contrary evidence and with appropriate legal  
22 defenses, and this Court and the Ninth Circuit could have passed judgment on those  
23 claims and defenses. But Perfect 10 chose to withhold these claims until now.

24       The intervening event, of course, is Perfect 10's loss before the Ninth Circuit,  
25 which unambiguously embraced the "server test" for infringement. The Ninth  
26 Circuit's amended opinion was published December 3, 2007. *On the very next day*,

27 \_\_\_\_\_  
28 Google does not monitor the content of Blogger.com and Blogspot.com, and takes no  
(footnote continued)

1 December 4, 2007, Perfect 10 searched for and saved the Blogger.com Terms of  
2 Service—the same Terms of Service filed in support of the present motion for leave as  
3 Exhibit 2 to the Declaration of Norman Zada—and other webpages related to  
4 Blogger.com.<sup>13</sup> See Herrick Decl., at Exs. C, F. The reason behind this timing is  
5 unmistakable—having lost on appeal, Perfect 10 was resorting to "Plan B," in order to  
6 re-make its case. Perfect 10 may not try out its theories and claims against Google, in  
7 piecemeal, seriatim fashion in order to extend this litigation out indefinitely, to  
8 Google's and this Court's detriment. See Koch, 127 F.R.D. at 211. Such tactics are  
9 an affront to judicial efficiency and basic notions of fair play, and should be rejected.

10 **D. Granting Leave To Amend Regarding the Blogger Claims Will**  
11 **Prejudice Google.**

12 Perfect 10's motion should be denied for the additional reason that Google will  
13 suffer prejudice if amendment is permitted, and this Court will have to expend  
14 significant additional judicial resources that could have been conserved had Perfect 10  
15 exercised diligence in pleading these new Blogger claims.

16 A great deal of time has passed since Perfect 10 initially filed its case, and even  
17 more time has elapsed since the events underlying many of Perfect 10's claims  
18 transpired. Google has devoted substantial resources to investigating and defending  
19 this case. The parties have also engaged in extensive discovery efforts, including  
20 voluminous document productions, responses to hundreds of Requests for Admission  
21 and dozens of Interrogatories, and several motions to compel. All of that work  
22 specifically focuses on Google's *search* functions. Perfect 10's new Blogger claims, if  
23 permitted, would force Google to engage in all of that work again, from scratch, on a  
24 parallel track to the existing litigation—to Google's prejudice.

25 \_\_\_\_\_  
26 responsibility for such content.” Zada Decl., Ex. 2, at 2.  
27  
28

1 Similarly, Google will suffer further prejudice in that much time has passed  
2 since the initiation of this lawsuit, and it is undoubtedly true that more information  
3 would have been available to Google regarding the Blogger claims had Perfect 10  
4 timely brought them in the first instance. Google employees have come and gone.  
5 Relevant documents may be more difficult—or even impossible—to locate. In short,  
6 Perfect 10's proposed amendments will require significant new discovery, which  
7 Google will have a more difficult time obtaining nearly four years after Perfect 10  
8 could have brought these claims. Courts have found that the prejudice that will be  
9 suffered by defendants like Google in these circumstances warrants denying leave to  
10 amend, even under Rule 15's liberal standards. See Lang v. State of Cal., 1994 WL  
11 28042, at \*1 (N.D. Cal. 1994) (denying leave to amend where "[i]n the more than two  
12 years that passed between the date plaintiff knew of Goodman and the date he moved  
13 to bring Goodman into the case as a defendant, memories have faded, documents may  
14 have been lost, and witnesses may have disappeared—all to Goodman's detriment");  
15 Adolph Coors Co. v. Sickler, 608 F.Supp. 1417, 1431 (C.D. Cal. 1985); Kaplan, 49  
16 F.3d at 1370; Jordan, 669 F.2d at 1324 ; EEOC, 843 F.2d at 1222.

17 Even worse, if Perfect 10's belated amendments are permitted, both this Court  
18 and the Ninth Circuit will be forced to endure largely unnecessary drains on their  
19 judicial resources—drains Perfect 10 could have avoided by timely filing its Blogger  
20 claims. Perfect 10 moved for, and obtained, a preliminary injunction from this Court,  
21 following extensive briefing and hearings. Subsequently, after another full briefing  
22 schedule, the Ninth Circuit heard the appeal from that Order in December of 2006,  
23 filed its opinion six months thereafter (on May 16, 2007), and filed an amended  
24 opinion seven months after that (on December 3, 2007). This represented a massive

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25 <sup>13</sup> To the extent Zada's Declaration is meant to imply that Perfect 10 only  
26 discovered these terms of service on April 29, 2008, Perfect 10's document production  
27 makes clear that Perfect 10 has seen and reviewed these Terms of Use on a number of  
28 occasions dating back to March 4, 2006. See Herrick Decl., at Exs. C and F.

1 investment of judicial resources, the goal of which was to give the parties clear  
2 guidance on the scope of the remand regarding Perfect 10's copyright claims.

3       Apparently unhappy with the Ninth Circuit's ruling, Perfect 10 now seeks to  
4 allege claims Perfect 10 has never made before, implicating brand-new defenses  
5 Google could have and would have presented to this Court and to the Ninth Circuit,  
6 had Perfect 10 timely put it on notice of those claims.<sup>14</sup> Perfect 10's proposed  
7 amendments regarding Blogger, if permitted, would force Google to engage in  
8 litigation regarding new theories and claims on which neither this Court nor the Ninth  
9 Circuit had the opportunity to give *any* guidance whatsoever. The prejudice to Google  
10 alone warrants denial of Perfect 10's motion. Ascon Properties, Inc. v. Mobil Oil Co.,  
11 866 F.2d 1149, 1161 (9th Cir. 1989) (prejudice where defendant "has already incurred  
12 substantial litigation costs"); M/V American Queen v. San Diego Marine Const.  
13 Corp., 708 F.2d 1483, 1492 (9th Cir. 1983) (finding prejudice when, among other  
14 things, "new allegations would totally alter the basis of the action").

15 **II. PERFECT 10'S MOTION FOR LEAVE TO AMEND ITS CLAIMS**  
16 **AGAINST GOOGLE RELATING TO GOOGLE'S WEB AND IMAGE**  
17 **SEARCH SERVICES SHOULD BE DENIED.**

18 **A. Perfect 10's Motion is Untimely.**

19       Contrary to Perfect 10's arguments, its proposed amendments are *not* limited to  
20 its claimed new discovery of Google's ownership of Blogger. Rather, Perfect 10  
21 includes new allegations regarding Google's Search services with respect to Perfect  
22 10's federal unfair competition claim and right of publicity claim, as well as an  
23 assortment of new state law causes of action regarding Google Search—including

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24  
25 <sup>14</sup> For example, blogs are most commonly used for commentary and parody—  
26 paradigmatic fair uses. See 17 U.S.C. § 107; Perfect 10, Inc. v. Amazon.com, Inc.,  
27 508 F.3d 1146, 1163 (9th Cir. 2007) (discussing the fair use doctrine). Blog hosts are  
also eligible for safe harbors from copyright liability under the DMCA, 17 U.S.C. §  
512(c), and for broad immunity from state law causes of action under the  
Communications Decency Act, 47 U.S.C. § 230.

1 Business & Professions Code § 17200, common law unfair competition, unjust  
2 enrichment, and misappropriation. See Mausner Dec., Ex. 11. Because these  
3 proposed new claims are directed to Google Search, Perfect 10's explanation for its  
4 delay in seeking amendment—that it just learned that Google owns Blogger—simply  
5 does not extend to these proposed amendments. Perfect 10 does not even suggest that  
6 these facts and claims were recently discovered—and they weren't. Yet Perfect 10  
7 failed to plead them in its original complaint, as it could and should have done.

8 Perfect 10's failure to assert these facts and causes of action at the outset of this  
9 litigation is inexcusable.<sup>15</sup> Courts reject such untimely amendments that could have  
10 been brought in the initial operative pleading. Ferguson v. Maita, 162 F. Supp. 2d 433  
11 (W.D.N.C. 2000) (denying leave to amend where new claims were known to the  
12 plaintiffs when the action was first filed); GSS Properties, Inc. v. Kendale Shopping  
13 Ctr., Inc., 119 F.R.D. 379 (M.D.N.C. 1988) (denying leave to amend). Particularly  
14 troubling are Perfect 10's two new unfair competition claims (under state statutory and  
15 common law), given that Perfect 10 *did* plead a *federal* unfair competition claim in its  
16 original complaint, and thus, cannot plausibly claim it was unaware it had an unfair  
17 competition claim against Google. See McGlinchy v. Shell Chem. Co.,  
18 845 F.2d 802, 809 (9th Cir. 1988) ("Appellants should have been aware of a [proposed  
19 amended] claim for *negligent* interference when they filed their original complaint,  
20 which included a claim for *tortious* interference." (emph. added)).

21 Moreover, even assuming Perfect 10 was neither actually nor constructively  
22 aware of these new allegations and causes of action at the time it filed its original  
23 complaint in November 2004, Perfect 10 was indisputably aware of them **18 months**  
24 **ago**. In January 2007, Perfect 10 sent Google a proposed Second Amended  
25 Complaint, alleging many of the same new allegations and causes of action set forth in

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26  
27 <sup>15</sup> The one exception is the claim that Google's Image Search changed in March of  
28 2007, which could have been made 15 months ago. (Proposed SAC, ¶ 80).

1 Perfect 10's current proposed Second Amended Complaint. (Compare Proposed  
2 SAC; Herrick Decl., Ex. R). For example, the January 2007 version added new  
3 allegations to Perfect 10's federal unfair competition claim which are nearly identical  
4 to those included in Perfect 10's current version. Id. The January 2007 version also  
5 added causes of action for violation of Business & Professions Code § 17200 and  
6 common law unfair competition, as does the current proposed SAC. Id. Yet, Perfect  
7 10 delayed for *18 months* before seeking leave to amend to assert these claims.

8 Courts have found far shorter delays than that presented here to be undue for  
9 purposes of denying leave to amend. See AmerisourceBergen, 465 F.3d at 953 (15  
10 month delay); Jackson, 902 F.2d at 1388 (seven-month delay); Cordon Holding B.V.  
11 v. Northwest Publ'g Corp., 2002 WL 530991, at \*11 (S.D.N.Y.) (undue delay where  
12 motion to amend was brought "[n]early three and a half years after the Complaint was  
13 filed"); Thornton v. McClatchy Newspapers, Inc., 261 F.3d 789, 793-94 (9th Cir.  
14 2001) (nine month delay). Perfect 10's proposed amendments regarding Web and  
15 Image Search should be rejected as untimely.

16 **B. Perfect 10's Proposed Amendments Regarding Search Are Futile.**

17 **1. Perfect 10's Proposed Amendments are Preempted by the**  
18 **CDA.**

19 Perfect 10's proposed amendments with respect to Google's state law claims  
20 regarding Google Search are futile because they are preempted by the CDA. Perfect  
21 10's operative complaint is limited to claims that Google maintains archived copies of  
22 Stolen Content Websites on its servers, displays images from the Stolen Content  
23 Websites in its search results, and links users to Stolen Content Websites – on which  
24 they can view unauthorized copies of Perfect 10 Copyrighted Works and obtain free  
25 passwords to perfect10.com. (Amended Complaint, ¶ 25.) State law claims based  
26 upon such conduct are preempted by the CDA. Parker v. Google Inc., 422 F. Supp.  
27 2d 492, 501 (E.D. Pa. 2006) (Google immune from liability for archiving, caching, or  
28 providing access to content created by third party).

1 Perfect 10's proposed amendments are a clear and improper attempt to plead  
2 around CDA preemption of these claims. Specifically, Perfect 10 now seeks to allege  
3 that Google somehow "creates" content when it returns search results to users' queries,  
4 by "selecting" the order in which the links are displayed and placing advertisements  
5 next to alleged infringing images. (See e.g., Mausner Dec., Ex. 10, ¶¶ 75, 77, 80, 87.)  
6 This newly conjured-up theory of liability defies common knowledge and common  
7 sense. Google does not "create" content. Google indexes content on websites created  
8 by *third parties*, and then helps users locate that *third-party content* in response to  
9 search queries. Indeed, Perfect 10 alleged this very conduct in its original complaint:

10 "[c]onsumers primarily visit [google.com] to locate text, images, and  
11 other material. . . . When []search terms are input into a box on Google's  
12 website, computer programs created by Google generate a list of links  
13 related to the search terms which appear on google.com along with a  
short description of the content in each of those websites. The content on  
these websites purportedly relates to the search terms."

14 (Complaint, ¶ 18.) The Ninth Circuit also recognizes that Google is a "generic search  
15 engine," and has explained that Google and other "generic search engines" "involve a  
16 generic text prompt with no direct encouragement to perform illegal searches or to  
17 publish illegal content." Roommates.com, 521 F.3d at 1167; see also Novak v.  
18 Overture Services, Inc., 309 F.Supp.2d 446, 452 (E.D.N.Y. 2004) ("No interpretation  
19 of the complaint ... could suggest that Google was the "information content provider"  
20 for the relevant statements"); Maughan v. Google Technology, Inc., 143 Cal.App.4th  
21 1242, 1258, (2006) (concurring opinion) ("Every aspect of Google's search process,  
22 from the time a query is sent by a user's web browser to the time the results are  
23 displayed on the user's screen, is performed by computer hardware and software and is  
24 completely automated. No human at Google ranks web pages, finds query terms,  
25 summarizes documents, or manipulates search timers. The query terms are selected  
26 by the user. The web pages in Goggle's database are created by the developers of  
27 those sites, stored without substantive alteration in Google's database, and made  
28 available to Google users for searching via Google's search engine technology.").

1 Perfect 10's proposed amendments suggesting Google's search functions create  
2 or develop the content displayed in Google search results contradict Perfect 10's prior  
3 pleadings and ignore reality. This Court is not required to accept Perfect 10's  
4 conclusory (and counterfactual) allegations as true. Vasquez v. Los Angeles County,  
5 487 F.3d 1246, 1249 (9th Cir. 2007); Warren v. Fox Family Worldwide, Inc., 328  
6 F.3d 1136, 1139 (9th Cir. 2003). Such "sham pleading" is generally disregarded for  
7 purposes of a motion testing the pleadings. Jackson v. So. Calif. Gas Co., 881 F.3d  
8 638, 646 (9th Cir. 1989) (affirming motion to dismiss based on preemption where  
9 pleading was a sham). This Court should disregard Perfect 10's sham allegation that  
10 Google is a content provider by virtue of its search function, and deny as preempted  
11 Perfect 10's proposed amendments as to Perfect 10's state law claims based upon  
12 Google Search.

13 **2. Perfect 10's Proposed Amendments are Preempted by the**  
14 **Copyright Act.**

15 Several of Perfect 10's proposed amendments with respect to its state law  
16 claims regarding Google's Web and Image Search are also futile because they are  
17 preempted by the Copyright Act. Perfect 10's new allegations—that Google offers  
18 free copyrighted images, permits advertisements to be juxtaposed next to copyrighted  
19 images of Perfect 10 models, provides links to and places advertisements on password  
20 hacking websites distributing passwords to perfect10.com (thus providing access to  
21 copyrighted images), and arranges copyrighted images in search results—fall squarely  
22 within the subject matter of copyright.<sup>16</sup> Each of these allegations is premised on  
23 works which are “fixed in a tangible medium of expression” and can be “perceived,  
24 reproduced or otherwise communicated” through “the aid of a machine or device.”  
25 These allegations accordingly fall within the subject matter of copyright. See

26 \_\_\_\_\_  
27 <sup>16</sup> Paragraphs 73, 75, 77, 79, 80, and 87 in the Proposed Second Amended  
28 Complaint contain allegations falling within the subject matter of copyright because  
they seek to control copyrightable works.

1 Kodadek, 152 F.3d at 1212-13. This is true even for works which are *not* owned by  
2 Perfect 10.<sup>17</sup> See e.g., Laws, 448 F.3d at 1136; Fleet, 50 Cal. App. 4th at 1914-15.

3 These new allegations also assert rights equivalent to copyrights. Perfect 10's  
4 new allegations complain that Google displays, distributes, and/or copies  
5 copyrightable works. (Proposed SAC, ¶¶ 73, 75, 77, 79, 80, 87.) Whether Perfect  
6 10's claim is that Google is offering photographs, placing advertisements next to  
7 photographs, distributing passwords to perfect10.com expanding the distribution of  
8 Perfect 10 photographs, or selecting the organization of photographs and which  
9 photographs to include on its website, Perfect 10's claims boil down to allegations  
10 that Google displays, distributes, and/or copies copyrightable works.

11 Nor do Perfect 10's new allegations include an extra element making them  
12 qualitatively different than a copyright claim. As explained above, Perfect 10's  
13 attempt to add allegations about Google's intent or awareness of the allegedly  
14 wrongful activity does not qualitatively distinguish its claim from a copyright claim.  
15 Motown, 657 F. Supp. at 1240. Similarly, the additional element of commercial use  
16 in Perfect 10's right of publicity claim does not distinguish it from a copyright claim.  
17 Laws, 448 F.3d at 1144; Fleet, 50 Cal. App. 4th at 1920. And, where Perfect 10's new  
18 allegations of unjust enrichment and misappropriation are based upon the taking of  
19 copyrightable material, they too are equivalent to a copyright claim. Firoozye, 153 F.  
20 Supp. 2d at 1126; Ticketmaster, 2000 WL 525390.

21 Because many of Perfect 10's new allegations in its state law claims relating to  
22 Google Search fall within the subject matter of copyright and fail to allege an "extra  
23 element," its proposed state law claims are futile as preempted by the Copyright Act.

24  
25  
26  
27 <sup>17</sup> Perfect 10's state law claims reference third party works. (Proposed SAC, ¶  
28 73) ("Google is unlawfully exploiting the . . . copyrights of third-parties"). Such  
works fall within the subject matter of copyright.

1                   **3. Perfect 10's Celebrity Unfair Competition Claims are Futile**  
2                   **Because Perfect 10 Does Not Have Standing to Assert Them.**

3           To the extent Perfect 10's unfair competition claims are based on the display  
4 and distribution of images of celebrities and the use of celebrities' names, these claims  
5 are futile because Perfect 10 does not have standing to assert them. Perfect 10 alleges  
6 that Google displays "fake" images of celebrities such as Hillary Clinton, places  
7 advertisements next to unauthorized images of celebrities like Angelina Jolie, and  
8 permits AdWords websites to use celebrities' names as key words. (Proposed SAC, ¶¶  
9 75-76.) To assert each of Perfect 10's unfair competition claims, however, Perfect 10  
10 ***must*** have suffered injury as a result of Google's alleged conduct. See Bus. & Prof.  
11 Code § 17204 (injury in fact and loss of money and property as a result of unfair  
12 competition required to assert § 17200 claim); Jack Russell Terrier Network of  
13 Northern Ca. v. American Kennel Club, Inc., 407 F.3d 1027, 1037 (9th Cir. 2005)  
14 (commercial injury required to assert Lanham Act claim); Bank of the West v. Sup.  
15 Ct., 2 Cal. 4th 1254, 1263 (1992) (competitive injury required to assert common law  
16 unfair competition claim).

17           Here, Perfect 10's proposed new unfair competition claims based upon  
18 celebrities' rights would not survive a dispositive motion, because Perfect 10 has not  
19 alleged (nor could it allege) that it owns the celebrities' rights purportedly being  
20 asserted (including rights of publicity and copyrights to images). Perfect 10's  
21 celebrity unfair competition claims are futile and amendment should not be permitted.

22                   **4. Perfect 10's Proposed Addition of Unregistered Works is**  
23                   **Futile.**

24           Perfect 10 seeks to add **951** new copyright registrations to this case, **653** of  
25 which are still pending with the Copyright Office, and thus, have not yet issued. See  
26 (Proposed) SAC, Ex. 7. Perfect 10's Motion is silent regarding this massive proposed  
27 addition to its case, presumably because it raises significant jurisdictional issues.  
28 Perfect 10's failure to obtain issued registrations for these copyrights before filing suit

1 or seeking amendment runs afoul of the clear directive of 17 U.S.C. § 411(a),  
2 requiring that "no action for infringement of the copyright in any United States work  
3 shall be instituted until preregistration<sup>18</sup> or registration of the copyright claim has been  
4 made in accordance with this title."

5 As this Court has recently held, subject matter jurisdiction over an infringement  
6 suit is lacking when that suit concerns pending but undecided copyright registrations.  
7 See Loree Rodkin Mngt. Corp. v. Ross-Simons, Inc., 315 F.Supp.2d 1053, 1054-55  
8 (C.D. Cal. 2004). See also Corbis, 351 F.Supp.2d at 1111 (retaining jurisdiction over  
9 *issued* registrations, and dismissing *pending* registrations, observing that "[t]his Court  
10 will not expand the meaning of [§ 411(a)] to include those whose applications are  
11 pending but undecided. As a result, the copyright claims relating to Corbis Images for  
12 which Corbis does not have a certificate of registration are dismissed for lack of  
13 subject matter jurisdiction."). Perfect 10's proposed amendment to add 653 works for  
14 which its registrations are pending but undecided should be denied.

15 C. **Google Will Suffer Prejudice if Perfect 10 is Permitted to Amend its**  
16 **Claims Regarding Web and Image Search.**

17 Google will suffer prejudice if Perfect 10 is permitted to add allegations and  
18 claims with regard to Google Search this late in the game. Perfect 10 filed its original  
19 complaint over three and a half years ago, and could have asserted virtually all of its  
20 proposed amendments at that time. See McGlinchy, 845 F.2d at 809. With no  
21 reasoned explanation for its delay, Perfect 10 proposes to add a cause of action for  
22 unfair competition under the common law, which could expose Google to punitive  
23 damages. Google was entitled to know at a much earlier date this potential exposure  
24 in this lawsuit, as such information typically impacts a defendant's approach to  
25 litigating a case against it. Perfect 10's needless delay deprived Google of the  
26 opportunity to make such strategic decisions at an earlier date.

27 \_\_\_\_\_  
28 <sup>18</sup> Preregistration is not available for still images. See 37 CFR 202.16,

1 Courts have denied leave to amend in similar cases involving untimely and  
2 tenuous claims that would unfairly expand the scope of litigation. See Morongo Band  
3 of Mission Indians, 893 F.2d 1074 (denying leave to amend because (1) plaintiff  
4 waited nearly two years before requesting leave to amend, (2) the added claims would  
5 prejudice defendants by greatly altering the nature of the litigation and requiring them  
6 to undertake an entirely new course of defense at a late hour, and (3) the new claims  
7 were tenuous); Texaco, Inc. v. Ponsoldt, 939 F.2d 794, 798-99 (9th Cir. 1991)  
8 (denying leave to amend based on prejudice where the amendments raised money  
9 damages for the first time). The prejudice Google will suffer if amendment is  
10 permitted weighs in favor of denying Perfect 10's motion.

11 **Conclusion**

12 For the foregoing reasons, Google respectfully requests that this Court deny  
13 Perfect 10's motion for leave to file a Second Amended Complaint.

14  
15 DATED: June 30, 2008

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17 By /s/ Rachel M. Herrick  
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