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9 UNITED STATES DISTRICT COURT  
 10 CENTRAL DISTRICT OF CALIFORNIA

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

13 Plaintiff,

14 v.

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

17 Defendants.

18 \_\_\_\_\_  
19 AND CONSOLIDATED CASE

Master Case No.: 04-9484 AHM (SHx)

REPLY BRIEF IN SUPPORT OF  
PERFECT 10'S MOTION FOR ORDER  
GRANTING LEAVE TO FILE  
SECOND AMENDED COMPLAINT

[REPLY DECLARATIONS OF DR.  
NORMAN ZADA AND JEFFREY N.  
MAUSNER IN SUPPORT THEREOF;  
AND DECLARATION OF IRINA  
VORONINA, SUBMITTED  
CONCURRENTLY HEREWITH]

Date: July 14, 2008  
Time: 10:00 a.m.  
Place: Courtroom 14, Courtroom of the  
Honorable A. Howard Matz

Discovery Cut-Off Date: None Set  
Pretrial Conference Date: None Set  
Trial Date: None Set

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1 **I. INTRODUCTION.**

2 Google's arguments regarding why Perfect 10 should not be allowed to  
3 amend the complaint are tantamount to blaming the victim for the crime. In its  
4 Opposition, Google finally concedes that it does, in fact, store full-size Perfect 10  
5 images on its servers ó even though Google consistently denied that fact both in its  
6 discovery responses and in its opposition to Perfect 10's motion for a preliminary  
7 injunction. Yet Google now argues, in complete disregard of the liberal  
8 amendment standard under Rule 15, that Perfect 10 should not be allowed to  
9 amend its complaint, by suggesting that it was Perfect 10, and not Google, that  
10 misled the Court!

11 As hard as Google tries to divert attention from its own misdeeds, four facts  
12 stand out: 1) Google did not tell the truth in its discovery responses, including  
13 when it denied storing full-sized Perfect 10 images on its servers; 2) Google  
14 misrepresented and concealed the fact that it stored full-size images on its servers  
15 in its opposition to Perfect 10's preliminary injunction motion, both before this  
16 Court and the Ninth Circuit; 3) Google made no attempt to correct the record  
17 before the Ninth Circuit when it became clear that this Court had been misled by  
18 Google into believing that full-size Perfect 10 copyrighted images were not being  
19 stored on Google servers; and 4) Perfect 10 obviously would have brought to the  
20 Court's attention that Google was storing full-size infringing images on its servers  
21 if Perfect 10 had known about it, as that might have led to a different outcome of  
22 the preliminary injunction motion.

23 In any event, Google cannot show ó as is required to defeat a Rule 15  
24 motion ó that Perfect 10's proposed amended complaint will unduly prejudice  
25 Google or somehow adversely affect its ability to defend this action. Google still  
26 has not taken a single deposition in this matter, and a discovery cut-off date and  
27 trial date have not even been set. If anything, because the "server test" is the  
28 governing legal standard for Perfect 10's direct copyright infringement claims, a

1 denial of the Motion would prejudice *Perfect 10*. Indeed, if Perfect 10 is not  
2 allowed to amend its complaint to allege that Google has stored, and is currently  
3 storing, Perfect 10's copyrighted images on Google's servers, Perfect 10 would be  
4 forced to pursue those allegations in a separate action against Google. A denial of  
5 the current motion, therefore, would essentially force Perfect 10 to litigate two  
6 separate cases against Google, one for direct infringement and one for contributory  
7 infringement. Google provides no legitimate reason whatsoever for foisting on  
8 Perfect 10 (and the courts) the burden of two separate lawsuits.

9 Equally baseless is Google's attempt to turn this motion for leave to amend  
10 into a merits-based analysis of Perfect 10's proposed claims. As a threshold matter,  
11 Google's opposition to Perfect 10's proposed state law claims based upon  
12 copyright preemption and immunity under the federal Communications Decency  
13 Act ("CDA") is improper, because Google did not even mention those issues in the  
14 parties' lengthy pre-motion meet and confer process. More importantly, Google's  
15 arguments regarding preemption and immunity are incorrect since, as explained  
16 below, there are additional elements to Perfect 10's state law claims and Google  
17 acts as an information content provider.

18 Perfect 10 respectfully requests that the Court grant its motion for leave to  
19 file a second amended complaint.

20 **II. GOOGLE WILL NOT BE PREJUDICED BY THE AMENDMENT.**

21 Google has failed to demonstrate any prejudice from the proposed  
22 amendment, let alone prejudice sufficient to overcome the presumption under Rule  
23 15 in favor of granting leave to amend. Although Google spends considerable time  
24 reviewing the four factors commonly associated with a motion to amend, it fails to  
25 mention that "prejudice to the opposing party is the most important factor."  
26 *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990).

27 Google attempts to manufacture a prejudice argument by baldly claiming,  
28 without any evidentiary support, that relevant documents "may" be more difficult

1 to locate; that certain nameless Google employees ðhave come and goneö; and that  
2 Perfect 10's proposed amendments ðwill require significant new discovery.ö  
3 Opposition at 16. Such conclusory assertions are not nearly enough to demonstrate  
4 prejudice sufficient to defeat a motion for leave to amend. *DeMalherbe v. Int'l*  
5 *Union of Elevator Constructors*, 449 F.Supp. 1335,1355 (N.D. Cal. 1978)  
6 (ðGeneral and conclusory allegations of prejudice are insufficient.ö).

7 Moreover, Google does not dispute that fact discovery remains ongoing, that  
8 it has not even begun taking depositions, and that a discovery cut-off and trial date  
9 have not been set. Thus, Perfect 10 is not seeking leave to amend on the eve of  
10 trial. Instead, Perfect 10 seeks leave to amend before Google has asked a single  
11 question at a deposition, and does so because it has uncovered critical facts  
12 contradicting the positions Google has put forth in this case. Under these  
13 circumstances, leave to amend should be granted. *See, e.g., Adam v. Hawaii*, 235  
14 F.3d 1160, 1164 (9th Cir. 2001) (district court erred by denying motion to amend  
15 where defendants failed to identify any prejudice they would suffer from the  
16 amendment and ðat this point in the proceedings, there has been no discovery, nor  
17 has a trial date been setö), *overruled on other grounds by Green v. City of Tucson*,  
18 255 F.3d 1086 (9th Cir. 2001) (*en banc*); *A.V. by Versace, Inc. v. Gianni Versace*,  
19 87 F. Supp. 2d 281, 299 (S.D.N.Y. 2000) (permitting leave to amend where  
20 discovery had not yet been completed and no trial date had been set).

21 Therefore, Google has not demonstrated that it will be unduly prejudiced by  
22 the proposed amendment, or that it would be ðunfairly disadvantaged or deprived  
23 of the opportunity to present facts or evidence.ö *Bechtel v. Robinson*, 886 F.2d  
24 644, 652 (3d Cir. 1989). For this reason alone, this Court should grant the Motion.

25 **III. PERFECT 10 HAS NOT DELAYED IN SEEKING LEAVE TO**  
26 **AMEND.**

27 Perhaps realizing that it cannot show that it will be unduly prejudiced by the  
28 Second Amended Complaint, Google resorts to arguing that Perfect 10 has delayed



1 in seeking leave to amend. Opposition pages 5-9. As a threshold matter, the Ninth  
2 Circuit has held that “delay, by itself, is insufficient to justify denial of leave to  
3 amend.” *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1986).

4 But even if mere delay would be sufficient to deny the motion, Perfect 10  
5 has not delayed here. Google falsely claims that Perfect 10 has known since 2002  
6 that blogger websites infringed full-size Perfect 10 images and that Google owned  
7 blogger.com. Opposition at 5-8. That assertion is directly contradicted by the  
8 declarations of both Perfect 10’s president, Dr. Zada, and its counsel, Mr. Mausner.  
9 Furthermore, Google cannot explain why Perfect 10 would intentionally hold back  
10 favorable evidence that would likely establish direct infringement by Google.

11 **A. Google Has No Evidence to Support Its Illogical Contention that**  
12 **Perfect 10 Concealed Knowledge of Google’s Direct Infringement.**

13 Google has no evidence to counter the declarations of Dr. Zada and Mr.  
14 Mausner, in which they state that they were not aware of Google’s storing of  
15 Perfect 10’s full-size images on Google servers until well after this Court had  
16 issued its ruling on the preliminary injunction. (Zada Reply Decl. ¶3; Mausner  
17 Reply Decl. ¶2.)

18 Google claims that “Perfect 10 was well aware of alleged infringement by  
19 Blogger websites as early as *2002 – six years ago*,” and cites as indisputable  
20 evidence two search listings (as opposed to print-outs from the websites  
21 themselves) which contain the word “blogspot.com,” out of hundreds of thousands  
22 of search listings that Perfect 10 printed out in 2002 and 2003 for a different case.  
23 Zada Reply Decl. ¶4. Google has no evidence whatsoever that Perfect 10 ever  
24 looked at the two blogspot.com websites shown in those listings, that the blogspot  
25 websites in question had Perfect 10 images on them in 2002 or 2003, or that  
26 Perfect 10 knew that blogspot.com was owned by Google at the time. In fact, both  
27 of those websites, which Google falsely describes as “allegedly infringing,” consist  
28 almost exclusively of text, and do not have any model images on them at all, let

1 alone Perfect 10 images. *Id.* ¶4, Exh. 24. So Google’s “evidence” proves  
2 nothing. For example, the first printout that Google cites to is an “August 30,  
3 2002 printout of allegedly infringing Web Search results listing the URL  
4 j\_cuttheshit.blogspot.com.” Opposition at 5 lines 11-13. Even though Google  
5 hosted the website j\_cuttheshit.blogspot.com and still hosts it, Google provided  
6 no evidence whatsoever that this website ever had images on it, let alone  
7 infringing Perfect 10 images. It turns out that this piece of “evidence” is  
8 demonstrably false. The website j\_cuttheshit.blogspot.com currently consists  
9 solely of text, with no images. After receiving Google’s Opposition, Perfect 10  
10 went through every 2002 archive of j\_cuttheshit.blogspot.com and found that the  
11 website had no images of any models at all, let alone Perfect 10 images. *Id.* ¶4,  
12 Exh. 24. To top it off, Google states on the very next page of its Opposition  
13 (page 6) that “Google acquired Blogger in February of 2003,” well after the  
14 August 30, 2002 date of the print out for j\_cuttheshit.blogspot.com. Google’s  
15 second example, page3girls.blogspot.com, also currently has no images on it,  
16 let alone Perfect 10 images, (Zada Reply Decl. ¶4, Exh. 24), and Google  
17 presents no evidence that it ever did. Google’s third piece of “evidence”  
18 involving Google Image search results in 2005 also proves nothing, because the  
19 image that Google refers to as “allegedly infringing” is not even a Perfect 10  
20 image. *Id.* ¶5, Exh. 25. There is no way that Perfect 10 could have know that  
21 Google was storing full-size Perfect 10 images on its servers from these  
22 documents.

23        Besides having no evidence to support its outrageous contention that Perfect  
24 10 is guilty of bad faith, Google has no explanation at all for why Perfect 10 would  
25 intentionally hold back evidence favorable to its case. Had Perfect 10 known that  
26 millions of full-size celebrity images and thousands of full-size Perfect 10 images  
27 were being stored on Google’s servers, Perfect 10 certainly would have brought  
28 that up in its preliminary injunction papers.

1           Such evidence, which Google concealed, was significant enough to  
2 potentially change the entire outcome. Under the server test, for example, this  
3 Court and the Court of Appeals might have enjoined Google from inline-linking to  
4 the images that were stored on Google's servers. The Courts might have found  
5 that Google was likely directly infringing thousands of Perfect 10's copyrighted  
6 images. Furthermore, the Ninth Circuit might have completely changed its view of  
7 Google, had it known that Google was directly infringing millions of full-size  
8 copyrighted images and surrounding them with AdSense ads, as well as *hosting*  
9 password hacking websites and thousands of websites offering billions of dollars  
10 of pirated movie and song downloads. The Ninth Circuit might have concluded  
11 that there was something wrong with Google making thumbnails of unauthorized  
12 full-size images that were stored on Google's own servers, and then linking those  
13 thumbnails back to the full-size images stored on Google's servers, while  
14 surrounding them with Google ads. Had the Ninth Circuit been told the truth, it  
15 might have viewed Google as Perfect 10 does, namely, as a company that has  
16 made an enormous amount of money by misusing other people's intellectual  
17 property. Instead of excusing Google's misuse of tens of thousands of Perfect 10's  
18 copyrighted images because Google is "beneficial," the Ninth Circuit might have  
19 determined that Google's use is not fair, on the basis that infringement plays too  
20 large a role in Google's business. These were the reasons for Google to conceal  
21 this information, as it did; there were no reasons for Perfect 10 to do so.

22           **B. Google, Not Perfect 10, Has Acted in Bad Faith.**

23           Regardless of how hard Google attempts to shift the blame to Perfect 10, the  
24 fact remains that Google has made demonstrably false discovery responses in this  
25 case. For example, in the Requests for Admissions to which Google denied that it  
26 stored Perfect 10 images on its servers, GOOGLE was defined as follows: "The  
27 terms "GOOGLE" shall refer to Defendant Google, Inc. and any company  
28 owned or controlled in whole or in part by Google and anyone acting on Google's

1 behalf. See Exhibit 30 to Mausner Reply Decl. This definition of GOOGLE  
2 clearly covers Google's blogger and blogspot.com programs. Nevertheless,  
3 GOOGLE denied that (1) "GOOGLE has copied onto its servers Perfect 10  
4 copyrighted images that are at least 4 x 5 in size;" (2) "GOOGLE has displayed  
5 to consumers Perfect 10 copyrighted images that are at least 4 x 5 in size;" (3)  
6 "full sized copies of Perfect 10's photographs are stored on Google's servers;" and  
7 (4) "full sized copies of Perfect 10's photographs are delivered to Internet users  
8 from Google's servers." (See Google Inc.'s Response To Plaintiff's Corrected  
9 First Set of Requests For Admissions Nos. 26, 27, 213, 214, dated April 18, 2005,  
10 attached as Exhibit 23 to the Mausner Decl. in Support of the Motion, Pacer No.  
11 301.) Google signed these responses on April 18, 2005, *after* it received Perfect  
12 10's February 7, 2005 DMCA notice which, according to Google, "referenced  
13 several Blogger sites as alleged infringers in its defective DMCA notices."  
14 Opposition at 5, n.4.<sup>1</sup> On February 7, 2005, when Perfect 10 sent its notice, Perfect  
15 10 did not know the connection between Google and blogspot/blogger, but Google  
16 did. Zada Reply Decl., ¶6. So Google knew that it was copying full-size Perfect  
17 10 images onto its servers before it signed its April 18, 2005 response to requests  
18 for admissions, and well before Perfect 10 even filed its motion for preliminary  
19 injunction.<sup>2</sup> This makes Google's concealment of the fact that it was linking to full-

20  
21 <sup>1</sup> Google repeatedly refers to Perfect 10's DMCA notices as "defective." They  
22 were not. Perfect 10 learned very well how to do a compliant DMCA notice from  
the *Perfect 10 v. CCBill* case. Google has no legitimate basis to claim that they  
were defective.

23 <sup>2</sup> Google has made a number of other significant false statements to the Court. For  
24 example, Google also misled the Court into believing that image recognition  
25 software was not available to identify Perfect 10 images in Google's image search  
26 index. That has proven to be completely false, and may also have affected this  
27 Court's and the Ninth Circuit's ruling. Google submitted a demonstrably false  
28 declaration by Alexander Macgillivray which falsely contended that Perfect 10's  
DMCA notices were deficient, and that Google expeditiously responded to those  
notices. In fact, when Mr. Macgillivray was deposed, he could not even remember  
the basis on which he made a number of key statements in his declaration.

Although Google's attorneys have repeatedly claimed that Google has a DMCA  
log, and even though both Judge Hillman and Judge Matz ordered Google to

1 size Perfect 10 images on Google's servers, in discovery and before this Court and  
2 the Ninth Circuit, even more egregious.<sup>3</sup>

3 Google's argument that it didn't have to reveal the fact that it was storing  
4 full-size images on its servers through Blogger/Blogspot because the case focused  
5 on Google's *search functions* is completely disingenuous. (Opposition at 8 lines  
6 1-10.)<sup>4</sup> Google avoided a preliminary injunction by falsely asserting that the  
7 images that Google's search engine in-line linked to were not stored on Google's  
8 servers. Google's false assertion led to a finding that Google was not displaying  
9 the images under the server test, and that Google did not have control over the  
10 images for purposes of vicarious liability. Google is displaying those images  
11 through in-line linking because they are on Google's servers, and Google is  
12 vicariously liable for those images because it has the right and ability to delete  
13 those images from the Internet.

14 **IV. PERFECT 10'S CLAIMS FOR DIRECT INFRINGEMENT ARE NOT**  
15 **BARRED BY THE STATUTE OF LIMITATIONS.**

16 Contrary to Google's assertions, the statute of limitations does not bar

17  
18 produce that DMCA log, it has not been produced. Similarly, Google has not  
19 explained why it could not provide the information sought in Perfect 10's  
Document Requests 135-137, as the Court ordered in April:

20 I will say this, Mr. Mausner -- if Google doesn't provide -- and you  
21 should hear this loud and clear, Mr. Zeller -- an absolutely  
22 compelling, close to irrefutable basis very promptly as to why the  
23 information that is encompassed by requests 135 to 137 that Judge  
24 Hillman ordered is inaccessible within the meaning of Rule 26, then  
not only will the information have to be provided, but for having put  
Perfect 10 to the additional expense and consumption of time in  
achieving that ruling, which would initially have to come first from  
Judge Hillman, sanctions should be imposed, possibly including  
partially terminating sanctions. í

25 <sup>3</sup> Google implies that blogger.com is some sort of innocent freedom of speech  
26 vehicle. In fact, Google stores on blogger.com millions of unauthorized celebrity  
27 images of great value, along with thousands of Perfect 10 copyrighted images,  
28 around which Google frequently places AdSense ads. Blogger.com is also  
involved in the unauthorized downloading by Google users of billions of dollars of  
pirated movies and songs.

1 Perfect 10's claims regarding Google's Blogger/Blogspot program (Opposition at 5  
2 lines 26-27; page 8 line 24), for the following reasons: First, Perfect 10 has  
3 already pled a claim for both direct infringement and vicarious infringement of  
4 images that are at issue in the case. Perfect 10 is simply adding a new factual basis  
5 to support its allegations. Now that the truth is known, Google should be held both  
6 directly and vicariously liable for the larger images that it is storing on Google  
7 servers, because it is directly displaying them according to the server test, and  
8 because it has the right and ability to remove them from the internet.

9 Even if Google is correct that Perfect 10 is alleging new claims that do not  
10 relate back for purposes of statute of limitations, Google's assertion that these  
11 claims are time-barred is wrong as a matter of law. In a case of continuing  
12 copyright infringement such as this one, an action may be brought for all acts that  
13 accrued within the three years preceding the filing of the suit. *Kourtis v.*  
14 *Cameron*, 419 F.3d 989, 999 (9th Cir. 2005). Therefore, at the very least, Google  
15 would be liable for any infringements that took place on Blogger/Blogspot during  
16 the past three years.

17 **V. THE CDA DOES NOT IMMUNIZE GOOGLE FROM STATE LAW**  
18 **CLAIMS.**

19 Google's assertion that the CDA immunizes Google from state law claims  
20 [Opposition at 12-13] is improper and premature, because Google failed to raise it  
21 during the meet and confer process. Furthermore, Google's CDA argument is an  
22 affirmative defense which should be presented in a motion for summary judgment,  
23 not in opposition to a motion to amend. Finally, Google is not entitled to CDA  
24 immunity. The Ninth Circuit has expressly held that an entity is not entitled to  
25 immunity when it acts as a content provider or developer. Perfect 10 has  
26 specifically pled that Google is an information content provider. Google selects  
27 which infringing images to display to its users, creates its own thumbnails from  
28 larger images, arranges its search results to favor its advertising affiliates, places

1 AdSense ads on infringing websites, including web pages that it hosts, and  
2 wrongly places the names of Perfect 10 models under images of other people  
3 involved in explicit sexual acts. Moreover, Google is not entitled to immunity  
4 when it engages in activities unrelated to its search engine status, such as placing  
5 ads on, and sharing revenues with, websites that violate Perfect 10's rights of  
6 publicity, or selling the names of Perfect 10 models and celebrities as keywords  
7 without permission.

8 **A. As A Threshold Matter, Google Cannot Raise The CDA In**  
9 **Opposition To The Motion.**

10 Google never raised any argument regarding the CDA during the meet and  
11 confer process, either in its letter or in the oral discussions. Mausner Reply Decl.,  
12 ¶4, Exh. 13. Therefore, it should not be permitted to raise this argument in the  
13 Opposition. Furthermore, *Novak v. Overture Services, Inc.*, 309 F.Supp.2d 446,  
14 452 (E.D.N.Y. 2004), a case cited by Google [*see* Opposition at 20], establishes  
15 that Google has raised its CDA argument prematurely:

16 As an initial matter, the Court notes that invocation of Section 230(c)  
17 immunity constitutes an affirmative defense. As the parties are not  
18 required to plead around affirmative defenses, such an affirmative  
19 defense is generally not fodder for a Rule 12(b)(6) motion.... Instead,  
20 such a defense is generally addressed as Rule 12(c) or Rule 56  
21 motion.... However, Plaintiff [who appeared pro se] does not request  
22 further notice or discovery to prepare for an opposition to this  
23 affirmative defense.

24 Here, unlike in *Novak*, Perfect 10 *does* protest Google's improper attempt to  
25 prematurely dismiss or summarily adjudicate Google's anticipated CDA  
26 affirmative defense in opposition to the motion to amend, and requests that this  
27 Court not entertain such an improper attempt.

28 In addition, the *current* complaint (First Amended Complaint) contains a  
claim for violation of rights of publicity. Therefore, Google's attempt to eliminate  
that claim by opposing Perfect 10's motion for leave to file an amended complaint  
is procedurally improper. The correct procedure is for Google to file a motion for  
summary adjudication.

1           **B. The CDA Does Not Immunize Perfect 10's State Law Claims.**

2           **1. Google Has No Immunity When It Acts As A Content**  
3           **Provider.**

4           Even if this Court chooses to address Google's CDA argument (and it  
5 should not), Google provides no basis to deny the Motion. As the Ninth Circuit  
6 recently noted, "The Communications Decency Act was not meant to create a  
7 lawless no-man's-land on the Internet." *Fair Housing Council of San Fernando*  
8 *Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1164 (9th Cir. 2008). The Ninth  
9 Circuit has thus held that a service provider can also act as a content provider, *and*  
10 *when it does it is not granted CDA immunity. Id.* at 1163.

11           The court in *Novak* drew this same distinction and stated that Google could  
12 not claim CDA immunity when it acts as an information content provider. The pro  
13 se plaintiff in *Novak* did not allege in the complaint that Google was the  
14 information provider for the statements at issue, but had the plaintiff made such  
15 allegations, Google would not have been able to claim CDA immunity. *Novak*,  
16 309 F.Supp.2d at 452-53.

17           The CDA provides that "[n]o provider of an interactive computer service  
18 shall be treated as the publisher or speaker of any information provided by another  
19 information content provider." 47 U.S.C. § 201(c)(1), (e)(3). This immunity only  
20 applies if the interactive computer service provider is not also an "information  
21 content provider," which is defined as someone who is "responsible, in whole or in  
22 part, for the creation or development of" the offending content. *Id.*, § 230(f)(3).  
23 Here, Google is not entitled to immunity under the CDA because Google's Image  
24 Search results, as they relate to the display of celebrity and adult images, represent  
25 content completely determined by Google. Google selects each and every image to  
26 include, in what order, with what accompanying text, creates its own thumbnails  
27 from larger images, and determines what web page that thumbnail is linked to and  
28 what Google advertisements are on that page. No one other than Google is



1 responsible for what Google selects and displays to the public. Zada Reply Decl.,  
2 ¶¶11-13, Exhs. 28-29.

3 In order to avoid liability for its wrongful acts, Google attempts to liken  
4 itself to a file clerk indexing documents in chronological order and locating  
5 requests for them. In fact, Google runs the most sophisticated and profitable  
6 advertising system and search engine, which performs many activities that make it  
7 an information content provider actively involved in maximizing its profit at other  
8 people's expense. These activities include creating its own massive website of  
9 Google-generated thumbnails for Image Search and Google-generated links for  
10 Web Search. Google offers many more supermodel, adult, and extremely explicit  
11 images than other search engines, and not surprisingly, makes substantially more  
12 money than its competitors. Google even goes so far as to place sexually explicit  
13 images having nothing to do with Perfect 10, next to actual images of Perfect 10  
14 models in its Image Search results, apparently to get more traffic. Google stores  
15 millions of unauthorized celebrity images on its servers, places ads around those  
16 images, creates thumbnails from those images, and then links those thumbnails  
17 back to the infringing web pages it hosts, which contain Google ads next to full-  
18 size images from Google's servers. In the process of misusing massive quantities  
19 of other people's property without permission, Google destroys the businesses of  
20 Perfect 10 and others. Google has actively collected the world's largest collection  
21 of misappropriated material, which it uses for its own commercial gain.

22 To defend its massive misappropriation, Google makes the erroneous  
23 Argument that because it generates its content automatically, it has CDA  
24 immunity. See Opposition page 20, citing *Maughan v. Google Technology, Inc.*,  
25 143 Cal.App.4<sup>th</sup> 1242 (2006). Google disingenuously uses a quote on page 20 of  
26 its Opposition as if it is a finding of the court in *Maughan*, when it is merely a  
27 statement of Google's own witness. In *Maughan*, the California state appellate  
28 court never addressed the CDA. The majority opinion focused on the issue of

1 whether the fee request made by Google's counsel, Quinn Emanuel, was excessive,  
2 and affirmed the trial court's ruling that reduced the request. The concurring/  
3 dissenting opinion indicated that Google did a lot of work, including the  
4 submission of a 14 page declaration signed by a Google software engineer. The  
5 quote that Google attributes to the court in its opposition (page 20) is actually the  
6 dissenting judge quoting a portion of the declaration submitted by Google, not the  
7 court's own findings. Google's parenthetical quote does not indicate, as it should,  
8 that it is merely a quote from its own engineer's declaration, made by the  
9 dissenting judge in connection with consideration of the fee application.

10 Google tries to create the erroneous perception that it merely gathers and  
11 distributes information. Google relies on the Ninth Circuit's offhand comment,  
12 referring to it as a "generic search engine." See *Fair Housing Council of San*  
13 *Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1167 (9th Cir. 2008).

14 However, this reference is meaningless since search engine status is not enough to  
15 claim CDA immunity, and Google does much more than just act as a search  
16 engine. In *Roommates.com*, the Ninth Circuit stated that:

17 A website operator can be both a service provider and a content  
18 provider: If it passively displays content that is created entirely by  
19 third parties, then it is only a service provider with respect to that  
20 content. But as to content that it creates itself, or is responsible, in  
21 whole or in part for creating or developing, the website is also a  
22 content provider. Thus, a website may be immune from liability for  
23 some of the content it displays to the public but be subject to liability  
24 for other content.

25 *Id.* at 1162 - 63. The Ninth Circuit also lumped Yahoo! into the "generic search  
26 engine" category. *Id.* at 1167. However, the Ninth Circuit pointed out that the  
27 district court, in *Anthony v. Yahoo! Inc.*, 421 F.Supp.2d 1257, 1262-63 (N.D. Cal.  
28 2006), held Yahoo! was not immune under the CDA for allegedly creating fake  
profiles on its own dating website. *Id.* at 1163. The Ninth Circuit placed the CDA  
into its proper, and *narrowly limited*, context by underscoring that the section is  
titled "Protection for 'good samaritan' blocking and screening of offensive  
material" and the substance of section 230(c) can and should be interpreted in

1 accordance with this caption. *Id.* Google's inclusion of animal sex pictures in its  
2 search results next to images of Perfect 10 models, creating the false appearance  
3 that Perfect 10 models engage in such acts, is the antithesis of blocking and  
4 screening of offensive material. The Ninth Circuit found a number of bases for  
5 finding that the defendant in *Roommates.com* was not entitled to CDA immunity,  
6 including a finding that Roommate is not entitled to CDA immunity for the  
7 operation of its search system, which filters listings .... *Id.* 1167. The Ninth  
8 Circuit clarified the scope of its ruling by stating that Roommates was properly  
9 sued for the predictable consequences of creating a website designed to solicit and  
10 enforce housing preferences that are alleged to be illegal. *Id.* at 1170.

11 Finally, Google relies on *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119  
12 (9th Cir. 2003). Opposition at 13.. In its subsequent opinion in *Roommates.com*,  
13 the Ninth Circuit clarified its ruling in *Carafano* and stated that [w]e correctly  
14 held that the website was immune, but incorrectly suggested that it could never be  
15 liable because "[n]o dating profile has any content until a user actively creates it  
16 .... [E]ven if the data are supplied by third parties, a website operator may still  
17 contribute to the content's illegality and thus be liable as a developer. *Roommates.*  
18 *com*, 521 F.3d at 1171. Accordingly, *Carafano* is of no help to Google

## 19 **2. Many Of Google's Activities Are Not Entitled To CDA** 20 **Immunity.**

21 Many of Google's activities, including its commercial exploitation of  
22 intellectual property belonging to others, do not qualify for CDA immunity.  
23 Google does not have immunity for knowingly monetizing other people's  
24 intellectual property without their permission. Google is involved in a number of  
25 advertising activities in which it is either not acting as an interactive computer  
26 service and/or is acting as an information content provider, and thus has no CDA  
27 immunity. Here are some examples: a) Google sells the names of celebrities and  
28 Perfect 10 models as key words, to earn income from the names of famous

1 celebrities and models without their permission; b) Google places ads that contain  
2 text which violates the rights of publicity of celebrities and Perfect 10 models  
3 without their permission, on infringing websites; c) Google places ads next to  
4 likenesses which it does not own rights to, without the permission of the rights  
5 holder; and d) Google uses the names of Perfect 10 models and celebrities to drive  
6 traffic to its advertising affiliates. Zada Reply Decl., ¶¶9-10, Exhs. 26-27. In all  
7 these instances, Google is acting as a commercial advertising operation that uses  
8 massive quantities of intellectual property without permission to generate revenue.  
9 In this role, Google cannot claim it is simply a qualifying interactive computer  
10 service ó it is just misusing intellectual property for its own commercial gain.

11 The CDA also does not protect Google's information content provider  
12 activities, which include its Image Search and Web search results. Google's Image  
13 Search function is essentially a gigantic collection of infringing thumbnails created  
14 and selected by Google, which include more adult images than any other search  
15 engine. Google selects which images to include, what order they appear, what text  
16 appears next to each image, what web page each image links to, and what ads  
17 appear on that web page. It is Google alone that creates and determines every  
18 aspect of the massive website that makes up its Image Search results. As  
19 explained in the Reply Declaration of Dr. Zada and the Declaration of Irina  
20 Voronina submitted herewith, Google has been placing the names of Perfect 10  
21 models under images of others persons engaged in explicit sexual activity, causing  
22 substantial damage to the reputations of those models. Google has also been  
23 placing images of humans having sex with animals next to images of Perfect 10  
24 models. Zada Reply Decl., ¶12, Exh. 29. Google is solely responsible for this  
25 conduct. Google's web search results are also a collection of links that Google  
26 *alone* decides to make available to its users. In many cases, Google dramatically  
27 biases its search results to substantially favor its infringing advertising affiliates.  
28 For these reasons, Google is an information content provider that should not

1 receive CDA immunity.

2 **VI. PERFECT 10'S STATE LAW CLAIMS ARE NOT PREEMPTED BY**  
3 **THE COPYRIGHT ACT.**

4 Google wrongly contends that Perfect 10's state law claims are preempted  
5 by the Copyright Act. Google then asserts that the Court should deny the Motion,  
6 because the proposed state law claims are futile. Opposition at 9-12, 21-22.

7 **A. Google Cannot Raise the Preemption Argument in Opposition To**  
8 **This Motion to Amend.**

9 Google never raised this contention during the meet-and-confer process.  
10 Mausner Reply Decl. ¶4; Exh. 13. For this reason alone, this Court should reject  
11 Google's contention. Furthermore, Google's contention that Perfect 10's proposed  
12 state law claims are futile has no relevance whatsoever to Perfect 10's right of  
13 publicity claim, which was alleged in almost identical form in the Amended  
14 Complaint, the currently operative pleading in this action. *See* Exh. 11 to first  
15 Mausner Decl., at 29-31 [redlined version of Fifth Claim for Relief for Violation of  
16 Rights of Publicity in proposed Second Amended Complaint].

17 Moreover, Google's assertion that Perfect 10's proposed amendments are  
18 futile because the Copyright Act preempts Perfect 10's state law claims is contrary  
19 to law, the leading treatises, and the allegations of the proposed Second Amended  
20 Complaint. Google ignores the Ninth Circuit's holding that "a proposed  
21 amendment is futile only if no set of facts can be proved under the amendment to  
22 the pleadings that would constitute a valid and sufficient claim or defense." *Miller*  
23 *v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988). As explained below,  
24 Perfect 10 has alleged valid and sufficient claims for violation of the rights of  
25 publicity, unfair competition, misappropriation, and unjust enrichment that are not  
26 preempted by the Copyright Act.

27 **B. The Test For Preemption Under The Copyright Act.**

28 Section 301(a) of the Copyright Act preempts "legal or equitable rights that

1 are equivalent to any of the exclusive rights within the general scope of copyright  
2 as specified by section 106. . . . 17 U.S.C. § 301(a). The Ninth Circuit has held  
3 that a defendant must satisfy two separate conditions in order to establish that a  
4 plaintiff's state law claim is preempted by the Copyright Act:

5 First, the content of the protected right must fall within the subject  
6 matter of copyright described in 17 U.S.C. §§ 102 and 103. Second,  
7 the right asserted under state law must be equivalent to the exclusive  
8 rights contained in section 106 of the Copyright Act.

9 *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1003 (9th Cir. 2001). "If a state  
10 law claim includes an "extra element" that makes the right asserted qualitatively  
11 different from those protected under the Copyright Act, the state law claim is not  
12 preempted by the Copyright Act." *Altera Corp. v. Clear Logic, Inc.*, 424 F.3d  
13 1079, 1089 (9th Cir. 2005). Google cannot satisfy the two conditions for  
14 preemption with respect to any of Perfect 10's state law claims.

15 **C. The Copyright Act Does Not Preempt Perfect 10's Right Of**  
16 **Publicity Claim.**

17 As noted above, Perfect 10's right of publicity claim was included in the  
18 First Amended Complaint, filed on January 18, 2005, so that claim cannot be  
19 challenged on a motion to amend. The right of publicity claim is brought under  
20 both Section 3344 of the California Civil Code and the common law. Perfect 10  
21 alleges in support of this claim that: (i) Google has infringed the Perfect 10 Rights  
22 of Publicity by using the names and likenesses of Perfect 10 models, without  
23 Perfect 10's prior consent, "in connection with products, merchandise, and goods,  
24 and to advertise, promote, and attract attention to its website and to its pirate  
25 advertising affiliates, to increase advertising revenues" [Proposed Second  
26 Amended Complaint, ¶ 86]; (ii) Google "uses the names of Perfect 10 models to  
27 provide a collection of photographs to Google users, many of which have nothing  
28 to do with the model, and in many cases wrongly portray the Perfect 10 model to  
be engaged in explicit sexual acts" [*id.*, ¶ 87]; and (iii) "Google has sold to  
advertisers, without authorization, the use of the names of Perfect 10 models as key

1 wordsö [*id.*, ¶ 88].

2 The above allegations demonstrate that the rights protected under Perfect  
3 10's right of publicity claim are the names and likenesses of Perfect 10 models,  
4 which have been assigned to Perfect 10. Zada Reply Decl., ¶¶8-12, Exhs. 26-29.  
5 Accordingly, the rights at issue do not fall within the subject matter of copyright.  
6 As the Ninth Circuit has held:

7 The subject matter of Appellants' statutory and common law right of  
8 publicity claims is their names and likenesses. ***A person's name or***  
9 ***likeness is not a work of authorship within the meaning of 17 U.S.C.***  
10 ***§ 102. This is true notwithstanding the fact that Appellants' names***  
***and likenesses are embodied in a copyrightable photograph.***

11 *Downing*, 265 F.3d at 1004 (emphasis added; citation omitted). In *Downing*, the  
12 Ninth Circuit held that plaintiff surfers' right of publicity claim, alleging that  
13 defendant had published a photograph of them without their authorization, for  
14 defendant's commercial benefit, was not preempted by the Copyright Act. *Id.* at  
15 999, 1003-04. In ruling that defendant could not satisfy the first condition of  
16 preemption ó that plaintiffs' claim fell within the subject matter of copyright ó the  
17 Ninth Circuit quoted with approval two leading treatises:

18 [I]t is not the publication of the photograph itself, as a creative work  
19 of authorship, that is the basis for Appellants' claims, but rather, it is  
20 the use of the Appellants' likenesses and their names pictured in the  
published photograph. The Nimmer treatise on copyright law states:

21 ö[T]he "work" that is the subject matter of the right of publicity is the  
22 persona, i.e., the name and likeness of a celebrity or other individual.  
23 A persona can hardly be said to constitute a "writing" of an "author"  
24 within the meaning of the copyright clause of the Constitution. *A*  
25 *fortiori* it is not a "work of authorship" under the Act. Such name or  
likeness does not become a work of authorship simply because it is  
embodied in a copyrightable work such as a photograph.ö

26 *Id.* at 1003-04, quoting 1 *Nimmer on Copyright* § 1.01[B][1][c] at 1-23  
27 (1999). The Ninth Circuit also quoted favorably from McCarthy, *Rights of*  
28 *Publicity and Privacy* § 11.13[C] at 11-72-73 (1997): ö[A]ssertion of

1 infringement of the Right of Publicity because of defendant's unpermitted  
2 commercial use of a picture of plaintiff is not assertion of infringement of  
3 copyrightable subject matter in one photograph of plaintiff.

4 The Ninth Circuit then held that defendant also failed to satisfy the second  
5 requirement for copyright preemption: "Because the subject matter of the  
6 Appellants' statutory and common law right of publicity claims is their names and  
7 likenesses, which are not copyrightable, the claims are not equivalent to the  
8 exclusive rights contained in § 106 [of the Copyright Act]." *Id.* at 1005.

9 The Ninth Circuit's holding in *Downing* compels the rejection of Google's  
10 assertion that Perfect 10's right of publicity claim is preempted. Numerous other  
11 federal courts have reached similar results. *See, e.g., Toney v. L'Oreal USA, Inc.*,  
12 406 F.3d 905, 910 (7th Cir. 2005) ("A person's likeness or her persona is not  
13 authored and it is not fixed. The fact that an image of the person might be fixed in  
14 a copyrightable photograph does not change this."); *Brown v. Ames*, 201 F.3d  
15 654, 658 (5th Cir. 2000) (rejecting claim of copyright preemption; "the tort of  
16 misappropriation of a name or likeness protects a person's *persona*. A *persona*  
17 does not fall within the subject matter of copyright."); *Hoffman v. Capital*  
18 *Cities/ABC, Inc.*, 33 F.Supp.2d 867, 871 (C.D. Cal. 1999), ("Plaintiff's own  
19 likeness and name cannot seriously be argued to constitute a work of authorship  
20 within the meaning of 17 U.S.C. §102. Thus, copyright preemption does not  
21 apply."), *rev'd on other grounds*, 255 F.3d 1180 (9th Cir. 2001).

22 The California Court of Appeals' decision in *KNB Enterprises v. Matthews*,  
23 78 Cal.App. 4th 362 (2000) likewise compels a rejection of Google's contention.  
24 In *KNB Enterprises*, the copyright owner of erotic photographs, which had been  
25 displayed without authorization and for profit on an Internet website, brought suit  
26 against the website's operator asserting a misappropriation claim under California  
27 Civil Code § 3344. *Id.* at 365-66. The court found that neither of the two  
28 conditions for preemption had been met. *Id.* at 374. As the court explained,



1 because a human likeness is not copyrightable, even if captured in a copyrighted  
2 photograph, the models' section 3344 claims against the unauthorized publisher of  
3 their photographs are not the equivalent of a copyright infringement claim and are  
4 not preempted by federal copyright law. *Id.* at 365. Here, as well, the Perfect 10  
5 models' right of publicity claims that have been assigned to Perfect 10 are not  
6 preempted by federal copyright law.

7 *Laws v. Sony Music Entertainment, Inc.*, 448 F.3d 1134 (9th Cir. 2006), and  
8 *Fleet v. CBS, Inc.*, 50 Cal.App.4th 1911, 58 Cal.Rptr.2d 645 (1996), the two cases  
9 upon which Google purports to rely [see Opposition at 11], are not to the contrary.  
10 In *Laws*, plaintiff's right of publicity claim was based exclusively on what she  
11 claims is an unauthorized duplication of her vocal performance . . . *Laws*, 448  
12 F.3d at 1141. Because of the particular nature of plaintiff's claim, the Ninth  
13 Circuit concluded that federal copyright law preempts a claim alleging  
14 misappropriation of one's voice when the entirety of the allegedly misappropriated  
15 vocal performance is contained within a copyrighted medium. *Id.* Similarly, in  
16 *Fleet*, the Court of Appeal held that plaintiff's right of publicity claim was  
17 preempted because they sought only to prevent defendant CBS from reproducing  
18 and distributing their performances in a film. *Fleet*, 50 Cal.App.4th at 1919. In  
19 fact, the *Fleet* court specifically stated that "as a general proposition Civil Code  
20 section 3344 is intended to protect rights which cannot be copyrighted and that  
21 claims made under its provisions are usually not preempted." *Id.*

22 Here, by contrast, Perfect 10's right of publicity claim is based on Google's  
23 use of the names and likenesses of Perfect 10 models, which are not copyrightable.  
24 Google uses the names and likenesses in many ways that are not equivalent to the  
25 rights in Section 106 of the Copyright Act. Google uses the names and likenesses  
26 to draw traffic to its website, to refer users to its AdSense affiliates, and to increase  
27 its advertising revenues. It even sells those names to the highest bidders in its  
28 AdWords program. Thus, Perfect 10's right of publicity claims are not preempted.

1           **D. The Copyright Act Does Not Preempt Perfect 10's Unfair**  
2           **Competition Claim.**

3           Google has failed to establish, and cannot establish, that Perfect 10's  
4 proposed amendments in connection with its unfair competition claim are futile  
5 because they are preempted by the Copyright Act. First, Perfect 10's unfair  
6 competition claim incorporates its claims for relief for trademark infringement and  
7 trademark dilution, which do not fall within the subject matter of copyright. *See*  
8 Exhibit 10 to Mausner Decl. [Proposed Second Amended Complaint], ¶ 72.  
9 Second, Perfect 10 specifically alleges, as part of its unfair competition claim, that  
10 Google is unlawfully exploiting the publicity rights and trademark rights of  
11 Perfect 10 and that Google is infringing and diluting Perfect 10's trademarks.  
12 *Id.*, ¶¶ 73, 78. Third, Perfect 10 alleges that Google is engaging in unfair  
13 competition by advising websites to use the names of Perfect 10 models and  
14 Perfect 10 trademarks as keywords. *Id.*, ¶¶ 76, 77. Such conduct constitutes an  
15 "unfair" business practice under Section 17200 of the California Business and  
16 Professions Code, which does not fall within the subject matter of copyright or the  
17 exclusive rights protected by the Copyright Act. 17 U.S.C. §106. For all of these  
18 reasons, Perfect 10 has alleged a valid unfair competition claim that is not  
19 preempted. *See, e.g., Phillip Morris USA Inc. v. Shalabi*, 352 F.Supp.2d 1067,  
20 1072 (C.D. Cal. 2004) (because misappropriation deemed "unfair" under the  
21 Lanham Act is also proscribed under Section 17200, plaintiff's unfair competition  
22 claim is not preempted by the Copyright Act).

23           **E. The Copyright Act Does Not Preempt Perfect 10's Unjust**  
24           **Enrichment Claim.**

25           Google asserts that where an unjust enrichment claim is based upon the  
26 taking of a copyrighted work, it is preempted by the Copyright Act. Opposition at  
27 11. Perfect 10's unjust enrichment claim is not so limited. Rather, it incorporates  
28 all of the allegations of Perfect 10's claims for relief for trademark infringement,

1 trademark dilution, unfair competition, and violation of the rights of publicity (but  
2 not for copyright infringement). *See* Mausner Decl., Exhibit 10 [Proposed Second  
3 Amended Complaint], ¶ 93. Accordingly, Perfect 10's unjust enrichment claim is  
4 neither futile nor preempted.

5 **F. The Copyright Act Does Not Preempt Perfect 10's**  
6 **Misappropriation Claim.**

7 Google likewise asserts that Perfect 10's proposed state law  
8 misappropriation claim is futile because it is preempted by the Copyright Act.  
9 Opposition at 11-12. Courts repeatedly have held, however, that misappropriation  
10 claims such as that alleged by Perfect 10 are not preempted. *See, e.g., Altera Corp.*,  
11 424 F.3d at 1089-90 (concluding that "[a] state law tort claim concerning the  
12 unauthorized use of the software's end-product is not within the rights protected by  
13 the federal Copyright Act"); *Stewart Title of California, Inc. v. Fidelity Nat'l Title*  
14 *Co.*, 2008 WL 2094617, \*2 (9th Cir. 2008) ("Stewart's California law  
15 misappropriation claim includes an "extra element" because it encompasses  
16 protection against improper *use*, thereby making the rights protected qualitatively  
17 different from those afforded in the Copyright Act.").<sup>5</sup>

18 **VII. PERFECT 10 HAS STANDING TO RAISE THE UNFAIR**  
19 **COMPETITION CLAIM REGARDING CELEBRITIES.**

20 Google asserts that Perfect 10 lacks standing to assert an unfair competition  
21 claim based upon Google's unauthorized use of celebrity names and likenesses,  
22 because "Perfect 10 *must* have suffered injury as a result of Google's alleged  
23 conduct." Opposition at 23:9-10 (emphasis in original.) First, Google never raised  
24 this assertion in connection with the conference of counsel. Mausner Reply Decl.,  
25 ¶ 4; Exh. 13. For this reason alone, the assertion fails.

26 <sup>5</sup> Google complains about Perfect 10's reference to *Stewart*, asserting that it  
27 is "uncitable" and "improperly brought to the Court's attention." Opp. p. 12 n. 9.  
28 However, Federal Rules of Appellate Procedure 32.1 specifically provides that a  
court may not prohibit or restrict the citation of federal judicial opinions, orders, or  
other written dispositions if they are issued after January 1, 2007.

1           Furthermore, Google completely mischaracterizes the basis of Perfect 10's  
2 claim. Perfect 10 properly has alleged that it has suffered an "injury in fact" and  
3 "loss of money and property" so as to state an unfair competition claim. *See*  
4 Cal.Bus. & Prof. Code § 17204. Perfect 10 alleges that it has been directly injured  
5 by Google's unfair conduct, and is unable to compete with Google, because  
6 Google offers virtually all of Perfect 10's model names and likenesses, *as well as*  
7 millions of other celebrity and supermodel names and likenesses, for free. Second  
8 Amended Complaint, ¶¶ 73-75. How can Perfect 10 possibly compete, when it  
9 charges a fee for only a tiny fraction of the content that Google gives away?  
10 Perfect 10's unfair competition claim is analogous to that of a car dealer, who  
11 cannot compete with a thief who opens a car lot across the street and sells stolen  
12 cars for half the price. The car dealer has suffered an "injury in fact," sufficient to  
13 allow him to sue for unfair competition, even though the thief stole the cars from  
14 third parties rather than from the dealer. Here, as well, Perfect 10 has suffered an  
15 "injury in fact," and the situation is far worse, as Google not only offers millions of  
16 comparable stolen likenesses for free, but also offers Perfect 10's stolen likenesses.  
17 *See Perfect 10 v. Cybernet Ventures, Inc.*, 167 F.Supp.2d 1114, 1125-26 (C.D. Cal.  
18 2001) (denying motion to dismiss similar claim under previous version of Section  
19 17204). Google's assertion that Perfect 10's celebrity unfair competition claims  
20 are futile is contrary to law and should be rejected.

21 **VIII. PERFECT 10 WILL ONLY SEEK DAMAGES FOR COPYRIGHTS**  
22 **THAT ARE REGISTERED AT THE TIME OF TRIAL.**

23           Google objects to Exhibit 7 to the Second Amended Complaint, the chart  
24 containing copyrights that are the subject matter of this lawsuit, to the extent that it  
25 lists pending applications that have not yet been issued by the Copyright Office.

26           Perfect 10 applies for new copyrights on a regular basis as new material is  
27 created or acquired. Exhibit 7 to the Second Amended Complaint is an updated  
28 copyright chart showing both new registrations and new applications that have

1 been sent to the Copyright Office

2 It generally takes the Copyright Office 6 to 10 months to process and grant a  
3 copyright registration. Since Perfect 10 submitted Exhibit 7 to Google,  
4 approximately 64 new registrations have been issued. An updated chart showing  
5 these new registration numbers is attached as Exhibit 31 to the Mausner Reply  
6 Decl. Perfect 10 requests that this new exhibit be the operative exhibit to the  
7 Second Amended Complaint. Registrations will issue for the additional copyrights  
8 shown as pending on the current chart within the next few months. In addition,  
9 Perfect 10 will be submitting new applications to the Copyright Office.

10 It makes no sense for Perfect 10 to have to file a new lawsuit every time new  
11 copyright registrations are issued, and then move to consolidate the cases. Perfect  
12 10 should simply be able to submit an updated copyright registration chart showing  
13 the new copyrights that have issued during the past few months. Including the  
14 pending registrations on the chart does not prejudice Google in any way; to the  
15 contrary, it informs Google what new copyright registrations will be issued within  
16 the next few months. Perfect 10 periodically produces to Google all of its new  
17 registrations. The copyrights that will be included in this lawsuit are those that are  
18 actually issued at the time of trial.

19 The Court of Appeals has already determined a very similar issue:

20 Google argues that we lack jurisdiction over the preliminary  
injunction to the extent it enforces unregistered copyrights.  
21 Registration is generally a jurisdictional prerequisite to a suit for  
copyright infringement. See 17 U.S.C. § 411. But section 411 does  
22 not limit the remedies a court can grant. Rather, the Copyright Act  
gives courts broad authority to issue injunctive relief. See 17 U.S.C.  
23 § 502(a). Once a court has jurisdiction over an action for copyright  
infringement under section 411, the court may grant injunctive relief  
24 to restrain infringement of any copyright, whether registered or  
unregistered. See, e.g., *Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d  
25 1345, 1349 (8th Cir.1994); *Pac. & S. Co., Inc. v. Duncan*, 744 F.2d  
1490, 1499 n. 17 (11th Cir.1984). Because at least some of the  
26 Perfect 10 images at issue were registered, the district court did not err  
in determining that it could issue an order that covers unregistered  
27 works. Therefore, we have jurisdiction over the district court's  
decision and order.

28 *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 710 (9th Cir. 2007). Perfect 10

1 does not even ask that it be awarded damages for unregistered copyrights at the  
2 time of trial. It will only seek damages for those copyrights that are actually  
3 registered at the time of trial. Perfect 10 will periodically submit updated  
4 copyright charts showing what copyrights have been registered, and will include a  
5 list of those that have been applied for just to let Google know what new  
6 copyrights will be registered within the next few months.

7 **IX. CONCLUSION.**

8 Perfect 10 respectfully requests that this Court grant its Motion for Leave to  
9 file the proposed Second Amended Complaint.

10 Dated: July 7, 2008

Respectfully submitted,

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12 By: Jeffrey N. Mausner  
13 JEFFREY N. MAUSNER  
14 Attorney for Plaintiff Perfect 10, Inc.

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