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10
 11 UNITED STATES DISTRICT COURT
 12 CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiff,

15 vs.

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

18 Defendants.

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

ANSWER TO SECOND AMENDED
 COMPLAINT AND
 COUNTERCLAIMS

DEMAND FOR JURY TRIAL

19 AND COUNTERCLAIM

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

Plaintiff,

22 vs.

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

26 Defendants.

1 Google Inc. ("Google") hereby answers the second amended complaint
2 of Perfect 10, Inc. ("Perfect 10") as follows:

3 **JURISDICTION AND VENUE**

4 1. Google admits that Perfect 10 has brought claims in its second
5 amended complaint under the Copyright Act, 17 U.S.C. § 101, et. seq., and under
6 the Lanham Act, 15 U.S.C. § 1051, et. seq. Google states that the remaining
7 allegations of paragraph 1 of the second amended complaint constitute legal
8 conclusions for which no response is necessary.

9 2. Google admits that venue is proper in this District pursuant to 28
10 U.S.C. § 1391(c).

11 3. Google admits that personal jurisdiction is proper over it.
12 Google denies that there has been any wrongful activity at issue. Google denies the
13 remaining allegations of paragraph 3 of the second amended complaint.

14 **THE PARTIES**

15 4. Google lacks information or belief to admit or deny the
16 allegations of paragraph 4 of the second amended complaint and on that basis it
17 denies the allegations.

18 5. Google admits that it is a California corporation which owns and
19 operates an Internet website located at the URL google.com and denies the
20 remaining allegations of paragraph 5 of the second amended complaint.

21 6. Google lacks information or belief to admit or deny the
22 allegations of paragraph 6 of the second amended complaint and on that basis it
23 denies the allegations.

24 7. Google lacks information or belief to admit or deny the
25 allegations of paragraph 7 of the second amended complaint and on that basis it
26 denies the allegations.

27 **THE BUSINESS OF PERFECT 10**

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1 8. Google lacks information or belief to admit or deny the
2 allegations of paragraph 8 of the second amended complaint and on that basis it
3 denies the allegations.

4 9. Google denies that PERFECT 10 was a well-known magazine.
5 Google lacks information or belief to admit or deny the remaining allegations of
6 paragraph 9 of the second amended complaint and on that basis it denies the
7 allegations.

8 10. Google lacks information or belief to admit or deny the
9 allegations of paragraph 10 of the second amended complaint and on that basis it
10 denies the allegations.

11 11. Google lacks information or belief to admit or deny the
12 allegations of paragraph 11 of the second amended complaint and on that basis it
13 denies the allegations.

14 12. Google lacks information or belief to admit or deny the
15 allegations of paragraph 12 of the second amended complaint and on that basis it
16 denies the allegations.

17 13. Google lacks information or belief to admit or deny the
18 allegations of paragraph 13 of the second amended complaint and on that basis it
19 denies the allegations.

20 14. Google lacks information or belief to admit or deny the
21 allegations of paragraph 14 of the second amended complaint and on that basis it
22 denies the allegations.

23 15. Google lacks information or belief to admit or deny the
24 allegations of paragraph 15 of the second amended complaint and on that basis it
25 denies the allegations.

26 16. Google lacks information or belief to admit or deny the
27 allegations of paragraph 16 of the second amended complaint and on that basis it
28 denies the allegations.

1 sometimes provides a link to "cached" content that resides on Google's servers,
2 which is a snapshot that Google takes of a web page as Google's search engine
3 software crawls the Internet. Google denies that it has infringed copyrights, or that
4 it has assisted others in infringing copyrights.

5 Google lacks information or belief to admit or deny the remaining
6 allegations of paragraph 18 of the second amended complaint and on that basis it
7 denies the allegations.

8 19. Google admits that it offers an image search feature to provide
9 users with images related to whatever search term or terms users input. Google
10 admits that searches performed using the Image Search feature of the search engine
11 return reduced-size images from websites throughout the Internet, and that Google
12 creates those reduced-size images. Google admits that, as part of the current
13 automated crawl process that generates Google's Image Search index, copies of the
14 crawled images are saved to Google servers. Google denies that Image Search
15 results return high-quality copies of images that reside on Google's own servers.
16 Google admits that Huch Medien GmbH filed a lawsuit against Google. Google
17 lacks information or belief to admit or deny the remaining allegations of paragraph
18 19 of the second amended complaint and on that basis it denies the allegations.

19 20. Google admits that Image Search locates images available on the
20 Internet by analyzing the text on the page adjacent to the image, the image caption
21 and dozens of other factors to determine the image content. Google admits that
22 Image Search also uses sophisticated algorithms to remove duplicates and ensure
23 that quality images are presented first in search results. Google denies that it
24 commits copyright infringement or defamation. Google lacks information or belief
25 to admit or deny the remaining allegations of paragraph 20 of the second amended
26 complaint, and on that basis it denies the allegations.

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1 21. Google admits that it sells millions of dollars of advertising each
2 year to advertisers wishing to have their websites seen by Google users. Google
3 denies the remaining allegations of paragraph 21 of the second amended complaint.

4 22. Google denies the allegations of paragraph 22 of the second
5 amended complaint.

6 23. Google lacks information or belief to admit or deny the
7 allegations of paragraph 23 of the second amended complaint, and on that basis it
8 denies the allegations.

9 24. Google denies that it would be virtually impossible for
10 consumers to locate websites, allegedly infringing or otherwise, if they were not
11 directed to them by Google. Google lacks information or belief to admit or deny the
12 remaining allegations of paragraph 24 of the second amended complaint, and on that
13 basis it denies the allegations.

14 25. Google lacks information or belief to admit or deny the
15 allegations of paragraph 25 of the second amended complaint, and on that basis it
16 denies the allegations.

17 26. Google denies the allegations of paragraph 26 of the second
18 amended complaint.

19 27. Google denies the allegations of paragraph 27 of the second
20 amended complaint.

21 28. Google denies the allegations of paragraph 28 of the second
22 amended complaint.

23 29. Google admits that it has implemented an advertising program it
24 refers to as "AdWords," and that under that program customers pay Google a fee
25 corresponding to occasions when a user of Google's search engine clicks on an
26 advertisement for the websites. Google admits that under the AdWords program
27 customers agree to abide by Google's Terms and Conditions which include
28 prohibitions of illegal conduct, including copyright infringement, and which permit

1 Google to terminate accounts of customers who violate these terms. Google admits
2 that to place an advertisement, an advertiser must, among other things, submit to
3 Google the text of the ad, the relevant URL, and a keyword. Google denies the
4 remaining allegations of paragraph 29 of the second amended complaint.

5 30. Google denies the allegations of the first sentence of paragraph
6 30 of the second amended complaint. Google lacks information or belief to admit or
7 deny the remaining allegations of paragraph 30 of the second amended complaint
8 and on that basis denies the allegations.

9 31. Google lacks information or belief to admit or deny the
10 allegations of paragraph 31 of the second amended complaint and on that basis
11 denies the allegations.

12 32. Google lacks information or belief to admit or deny the first two
13 sentences of paragraph 32 of the second amended complaint, and on that basis
14 denies the allegations. Google denies the remaining allegations of paragraph 32 of
15 the second amended complaint.

16 33. Google admits that it has implemented an advertising program
17 known as "AdSense," from which Google generates revenues and under which
18 website publishers agree to abide by Google's Terms and Conditions that include
19 prohibitions of illegal conduct, including copyright infringement, and which permit
20 Google to terminate accounts of website publishers who violate these terms. Google
21 lacks information or belief to admit or deny the allegations of paragraph 33 of the
22 second amended complaint that Google advertisements have appeared next to more
23 than 10,000 Perfect 10 copyrighted works, and that there are currently hundreds of
24 Perfect 10 reduced-size images on Google's servers which, when clicked on,
25 promote websites that are Google advertising partners, and on that basis denies the
26 allegations. Google denies the remaining allegations of paragraph 33 of the second
27 amended complaint.

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1 the advertisement in "Sponsored Links." Google admits that the ranking of pages in
2 Google search results is determined by Google's patented PageRank technology,
3 which relies on the uniquely democratic nature of the web by using its vast link
4 structure as an indicator of an individual page's value. Google denies that Google
5 search results and "Sponsored Links" are one and the same. Google denies the
6 remaining allegations in paragraph 76 of the second amended complaint.

7 77. Google denies the allegations in the first sentence of paragraph
8 77 of the second amended complaint. Google lacks information or belief to admit or
9 deny the remaining allegations of paragraph 77 of the second amended complaint,
10 and on that basis it denies the allegations.

11 78. Google denies the allegations of paragraph 78 of the second
12 amended complaint.

13 79. Google denies the allegations of paragraph 79 of the second
14 amended complaint.

15 80. Google admits that Image Search locates images available on the
16 Internet by analyzing the text on the page adjacent to the image, the image caption
17 and dozens of other factors to determine the image content. Google admits that
18 Image Search also uses sophisticated algorithms to remove duplicates and ensure
19 that quality images are presented first in search results. Google lacks information or
20 belief to admit or deny the remaining allegations of paragraph 80 of the second
21 amended complaint, and on that basis it denies the allegations.

22 81. Google lacks information or belief to admit or deny the
23 allegations of paragraph 81 of the second amended complaint, and on that basis it
24 denies the allegations.

25 82. Google denies the allegations of paragraph 82 of the second
26 amended complaint.

27 83. Google denies the allegations of paragraph 83 of the second
28 amended complaint.

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FIFTH CLAIM FOR RELIEF

84. Google hereby incorporates and re-alleges its responses to paragraphs 1 thorough 37 and 54 through 71, above.

85. Google lacks information or belief to admit or deny the allegations of paragraph 85 of the second amended complaint, and on that basis it denies the allegations.

86. Google denies the allegations of paragraph 86 of the second amended complaint.

87. Google denies the allegations of paragraph 87 of the second amended complaint.

88. Google admits that one or more advertisers has purchased the name of one or more models in Exhibit 8 of the second amended complaint as a keyword in Google's AdWords program. Google denies the remaining allegations of paragraph 88 of the second amended complaint.

89. Google denies the allegations of paragraph 89 of the second amended complaint.

90. Google denies the allegations of paragraph 90 of the second amended complaint.

91. Google denies the allegations of paragraph 91 of the second amended complaint.

92. Google denies the allegations of paragraph 92 of the second amended complaint.

SIXTH CLAIM FOR RELIEF

93. Google hereby incorporates and re-alleges its responses to paragraphs 1 thorough 37 and 54 through 92, above.

94. Google denies the allegations of paragraph 94 of the second amended complaint.

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AFFIRMATIVE DEFENSES

By alleging the Affirmative Defenses set forth below, Google does not agree or concede that it bears the burden of proof or the burden of persuasion on any of these issues, whether in whole or in part.

FIRST AFFIRMATIVE DEFENSE

Plaintiff's second amended complaint, and each cause of action within it, in whole or in part, fails to state a cause of action.

SECOND AFFIRMATIVE DEFENSE

This Court lacks subject matter jurisdiction over claims to enforce copyrights for which Plaintiff has not obtained, or has not pleaded ownership of, validly issued copyright registrations.

THIRD AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, by the doctrine of copyright fair use.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, by relevant statutes of limitations.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, by the doctrine of laches.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, by its failure to mitigate damages.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff lacks standing, in whole or in part, to assert claims pertaining to the publicity or intellectual property rights of others, or to assert unfair competition claims based on alleged harm to third parties.

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EIGHTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, by its failure to join indispensable parties.

NINTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, by free speech rights guaranteed by the First Amendment to the United States Constitution and by the Constitution of California and other states.

TENTH AFFIRMATIVE DEFENSE

Plaintiff's state-law claims are barred, in whole or in part, by the Communications Decency Act, 47 U.S.C. § 230(c).

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are pre-empted, in whole or in part, by the Copyright Act, 17 U.S.C. § 301.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiff's copyright claims are barred, in whole or in part, by the Online Copyright Infringement Liability Limitation Act, 17 U.S.C. § 512.

THIRTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, by estoppel.

FOURTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, by consent, acquiescence, and actual and/or implied license.

FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, by unclean hands.

SIXTEENTH AFFIRMATIVE DEFENSE

Plaintiff's remedies are barred, in whole or in part, by 15 U.S.C. § 1114(2) and Cal. Bus. & Prof. Code § 17200, et. seq.

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SEVENTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims for damages, including but not limited to statutory and/or punitive damages, are barred, in whole or in part, by Google's right to due process under the United States Constitution and/or the Constitution of California and other states.

EIGHTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims for statutory damages and attorney's fees are barred, in whole or in part, by the Copyright Act, 17 U.S.C. § 412.

NINETEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims for damages, including for disgorgement of Google's alleged profits, attributable to sales or other activities outside the United States are barred by reason of the Copyright Act's territorial limitations and by the lack of subject matter jurisdiction over such extra-territorial claims in proceedings under the U.S. Copyright Act.

TWENTIETH AFFIRMATIVE DEFENSE

Plaintiff's claims for damages, including for disgorgement of Google's alleged profits, attributable to sales or other activities outside the United States are barred by reason of the Lanham Act's territorial limitations and by the lack of subject matter jurisdiction over such extra-territorial claims in proceedings under the Lanham Act.

TWENTY-FIRST AFFIRMATIVE DEFENSE

Plaintiff's second amended complaint is barred, in whole or in part, because plaintiff's alleged marks are generic, unprotectable, and lack secondary meaning with respect to services provided by Google.

TWENTY-SECOND AFFIRMATIVE DEFENSE

Plaintiff's claimed rights in the purported marks and the registrations thereon are invalid.

TWENTY-THIRD AFFIRMATIVE DEFENSE

1 Plaintiff's claims are barred, in whole or in part, because the alleged use
2 of Perfect 10's trademarks has created no likelihood of confusion.

3 TWENTY-FOURTH AFFIRMATIVE DEFENSE

4 Plaintiff's claims are barred, in whole or in part, by the doctrine of
5 trademark fair use and nominative fair use.

6 TWENTY-FIFTH AFFIRMATIVE DEFENSE

7 Plaintiff is barred from obtaining any relief from Google in this action
8 because plaintiff has suffered no injury or damage as a result of any act or conduct
9 by Google, and none of Google's revenues or profits is attributable to its allegedly
10 infringing conduct.

11 **COUNTERCLAIMS**

12 INTRODUCTION

13 **Google and Its Search and Reporting Technology**

14 1. This case is fundamentally about the legality of web search
15 engines. In challenging Google in this case, Perfect 10 attempts to create a vast new
16 set of liabilities and burdens that are incompatible with the technological and
17 business necessities of the search industry and contrary to basic principles of free
18 speech.

19 2. Google is a global technology leader focused on improving the
20 ways people connect with information. Google's innovations in web search and
21 advertising have made its website a top Internet destination and its brand one of the
22 most recognized in the world. Google is the world's most popular tool for accessing
23 information on the Internet.

24 3. The Internet is a massive, interconnected network of networks of
25 computing devices that offer a vast array of resources to users of the network. The
26 Internet operates by digital technologies that operate through extensive conversion,
27 reproduction, transmission, and display or other output of many types of data.

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1 4. Google maintains the world's largest online index of websites
2 and of content stored on web pages, and Google makes this information freely
3 available to anyone with an Internet connection. Google's automated search
4 technology helps people obtain nearly instant access to relevant information from
5 our vast online index. Google relies upon thousands and thousands of computer
6 network servers containing indices of over 10 billion documents and extraordinarily
7 sophisticated software technology that can handle thousands of queries per second
8 from around the world and deliver results in under a second in over 40 languages.

9 5. In addition to its search services, Google operates and maintains
10 numerous other services. One such service is Blogger, a web publishing service and
11 optional hosting service, whereby third-party users may create a personal website
12 and post content on the Internet.

13 6. At a basic level, Google's search engine operates in four phases.
14 Google (1) uses an automated process to "crawl" the web to find websites, (2)
15 indexes the content found on those websites, (3) responds to search queries by
16 presenting results that are relevant to the search terms, and (4) provides links to the
17 web location where the content resides.

18 7. Google has accomplished what it has because its processes and
19 systems are highly automated and scalable. Exhibit A to the Answer and
20 Counterclaims is a true copy of the Technology Overview of the Google system
21 found at www.google.com/corporate/tech.html.

22 8. While Google indexes a massive number of pages on the web
23 through automated processes, it refrains from indexing pages for which the sponsor
24 of the page has used standard technical means, such as called a "robot exclusion
25 header," a metatag, or a robots.txt file that indicates a website publisher's desire to
26 be passed over by automated indexing tools.

27 9. Google seeks to be comprehensive in describing relevant content
28 on the web and to provide relevant and useful search results that enable users to

1 locate and identify web content that matches what they seek. Google's automated
2 search and reporting process provides results neutrally according to its formulas,
3 independently of financial incentives. Google does not accept payment for inclusion
4 or ranking in search results, and it identifies and distinguishes sponsored links that
5 appear separately on search result pages.

6 10. Google uses a proprietary and objective system for ranking the
7 display of search results in response to queries entered by a user. Its PageRank
8 technology performs an objective measurement of the importance of web pages by
9 solving an equation of more than 500 million variables and 2 billion terms.

10 PageRank relies on the uniquely democratic nature of the web by using its vast link
11 structure as an indicator of an individual page's value. Important, high-quality sites
12 receive a higher PageRank, which Google remembers each time it conducts a
13 search. Google combines PageRank with sophisticated text-matching techniques to
14 find pages that are both important and relevant to user searches.

15 11. Google has revolutionized the way people around the world
16 search for information. It has changed the lives of students, journalists,
17 genealogists, scholars, lawyers, doctors, politicians, medical patients, and virtually
18 everyone else who interacts with the Internet on a regular basis. There are countless
19 purposes for which persons use Google.

20 12. Google is not the only information location tool for the Internet.
21 There are numerous other tools for searching for information and content on the
22 Internet, including other search engines, directories, recommendation sites, and the
23 like. Without Google, users could use other search engines and other information
24 location tools to find information, including infringing or other unlawful content, on
25 the Internet. Many persons prefer Google to other search engines, however, because
26 of the size of Google's index and because of their satisfaction with Google's ordering
27 of search results.

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1 13. Google's search engine indexes textual content of web pages,
2 information in source code of web pages but not displayed to the viewer, and links
3 information among pages. Google does not create a human-edited index by
4 evaluating or describing the content of pages; it relies upon the verbal content of
5 web pages, with certain automated tools applied to improve the quality of indexing
6 and search results. This process is contrasted with web directories, which make
7 human-based editorial determinations and judgments about the classification and
8 characterization of websites.

9 14. When a user enters a search term or phrase into its web search
10 engine, Google returns search results that identify web pages that contain that term
11 or phrase or pages that were linked to by other pages that contain the term or phrase.
12 While the presentation of search results may vary according to the nature of the
13 source and the results, Google often furnishes (1) a page title taken from the code
14 for the origin website, (2) a short excerpt from the text on the site, (3) the URL (or
15 an excerpt of the URL), (4) the size of the indexed page, (5) the date when the page
16 was last indexed by Google, (6) a link to Google's cache of the original page, which
17 is particularly useful in case the original site has been changed or is down, and (7) a
18 link to "similar pages" as identified through an automated tool that is influenced by
19 the number of common words among the pages. In addition to search results, in the
20 case of word searches Google may also display sponsored links in a separate area of
21 the search results page.

22 15. Upon clicking on the title of a word search result delivered by
23 Google, a user is taken to the corresponding indexed page on the original website.
24 If it is down or changed from what Google indexed, by clicking on Google's cache
25 link a user is taken to a copy of the page in Google's index, with the searched terms
26 highlighted, information about the date and time the cached copy was retrieved from
27 the original website, a link to the current page, and the complete original URL of the
28 page cached by Google.

1 16. Google's image search engine allows users to search for images
2 stored on the web using keywords.

3 17. Google's image search engine indexes images based on text that
4 accompanies the images at their locations on the web, including text contained in
5 file names of the images' locations. Google does not itself generate verbal
6 descriptions of the content of the images.

7 18. Google's image search engine delivers results to users by
8 displaying (1) "thumbnails" of the indexed images, typically scaled down versions
9 of the images (thumbnails are generally approximately 100 by 100 pixels in size,
10 whereas original size full-screen images on a modern high-resolution monitor may
11 be approximately 700 by 1000 pixels, meaning that the thumbnails may contain less
12 than two percent of the data of the original image), (2) some label (file) information
13 of the indexed image, (3) size information regarding the image, and (4) part or all
14 (depending on the length of the web "Uniform Resource Locator" ("URL")) of the
15 full web URL of the image.

16 19. Google's image search engine returns search results using the
17 most descriptive tool available to assist the user in determining whether the
18 displayed items match the desired image: an extract from the image itself. As the
19 maxim says, "a picture is worth a thousand words," and text descriptions (such as
20 "high school football player with red jersey in air catching ball, facing left, before
21 crowd") are likely to be too vague to be valuable to a search user. There is no
22 practical way to create verbal descriptions for all indexed images on the web instead
23 of using extracts of the images in the search results. The images presented in the
24 search results are degraded from the originals because of the extraction used in
25 presenting them, but they are essential to an efficient identification of the image
26 content.

27 20. When a Google user clicks on an image listed in image search
28 results, Google responds by (1) displaying a "thumbnail" of the indexed image, (2)

1 providing information (either a full or a partial web address) about the file location
2 of the image file on the site of origin, (3) providing a hypertext link to the site of
3 origin, and (4) causing the site of origin to appear in a separate section of the
4 browser window that can be enlarged or reduced by the user in size in the browser
5 window. Google's Search products do not transmit to users any images other than
6 thumbnails; the "full size" displays are initiated by the user's browser and
7 transmitted from the website of origin.

8 21. Google's web search and image search engines have utterly
9 transformed the way persons search for text-based information and images. Google
10 is able, through its sophisticated and powerful technology, automated systems, and
11 vast storage capacity, to deliver relevant information in under a second from a
12 massive amount of source material. By automated means, Google adds source
13 material to its indices at a prodigious rate so that it is available immediately to
14 search users.

15 22. Google is so powerful that complex searches can effectively
16 search for needles in the web haystack. Google's effectiveness depends in large part
17 upon its automated processes, the comprehensive scope of the nature of its index,
18 the power of its technologies, and its efficiency in delivering search results that most
19 closely match user expectations and desires. The more that Google indexes, the
20 more powerful and useful its search becomes.

21 23. Google continually updates its indexes of over 8 billion pages of
22 web content. New pages are continually added, and previously crawled pages are
23 regularly re-crawled in order to determine whether their content has changed.
24 Frequently updated sites may be crawled every day. This process is automated and
25 highly dynamic.

26 24. When Google processes a search request, it lacks knowledge
27 about the personal identity, business affiliation, intentions, activities, and purposes
28 of the user making the search request. Google lacks knowledge of whether, for

1 example, the user is making an authorized or other fair use of any copyrighted
2 material accessed as a consequence of the search request. Similarly, for example,
3 Google lacks knowledge whether the user copies the material in some concrete or
4 permanent form, alters it in some concrete or permanent form, distributes copies of
5 it to the public, or displays copies of it to the public.

6 25. Google's search transforms the original content available on the
7 web and fills an entirely different function from that of the original content. Google
8 uses that content in its context as part of the vast web, analyzing the relationship of
9 that content to other content on the web, and revealing correspondences between
10 that content and concepts or terms in the mind of the search user. For example,
11 teachers may use Google as a tool to look for telltale similarities in student papers
12 that may disclose plagiarism. Scholars may use Google to study language patterns.
13 Prospective employees may use Google to learn about potential employers, and vice
14 versa. Fans of a celebrity may look for information or resources about that
15 celebrity. The potential uses of Google are innumerable.

16 26. Google's web and image search functions do not provide the user
17 with an equivalent to the original source material that substitutes for the original.
18 Google furnishes users only thumbnail images in its search results. For original
19 images, the user must call upon the website of origin with his or her Internet
20 browser. In its Web Search results, Google delivers only short excerpts; the user
21 must follow a link to reach the original site directly.

22 27. Google's web and image search functions do not impair the
23 market value of original works. To the contrary, many website sponsors go to great
24 lengths to increase the likelihood that Google will index, and will display prominent
25 search results from, their sites. Google is informed and believes, and therefore
26 alleges, that Google's web and image search functions add to the market value of
27 original works by making the public more aware of them and causing the public to
28 seek them out more frequently.

1 28. There is no reliable and efficient way to determine copyright
2 status of any material on the web. There is no reliable way to determine authorship,
3 ownership of copyright, the presence, absence, or scope of licenses associated with
4 any copyrights, or even what law applies to works that may have been created in any
5 country in the world.

6 29. Google devotes substantial resources to complaints including
7 notifications of copyright infringement pursuant to 17 U.S.C. § 512(c)(3) and
8 complaints regarding third-party trademark infringement. Google has a dedicated
9 staff and a regular process to handle and respond to those complaints or notices,
10 which may require repeated correspondence with the claimant to obtain necessary
11 information, and which require evaluation in light of the applicable laws and
12 Google's policies. Many Google Services do not have account holders or
13 subscribers. For Services that do, Google has adopted and reasonably implemented
14 a policy that provides for the termination in appropriate circumstances of any
15 subscribers and account holders of Google's system who are repeat infringers.

16 **Other Tools To Access Content On The Internet**

17 30. There are many ways for persons to find free pornography,
18 including infringing or otherwise illegal pornography, on the web without using
19 Google's search engine. There are other search engines and web directories that
20 fulfill similar functions. Moreover, many persons search for content on the web
21 simply by guessing at domain names that may be relevant to the content sought. For
22 example, a user can find pornography simply by pointing a web browser to the web
23 addresses "www.porn.com," "www.sex.com," "www.xxx.com," and
24 "www.nudemodels.com." Many of these sites automatically prompt the display of
25 many more sites containing pornography, without being sought by the user.

26 31. A user may also easily find, without using Google's search
27 engine, pornographic websites that advertise that they provide unauthorized content.

28

1 36. Plaintiff Perfect 10 is hardly the only "Perfect 10" on the
2 Internet. As a Google search reveals, "Perfect 10" is also a major Singapore radio
3 station; a tag line for a Miami radio station; a "men's club" in Austin, Texas; scores
4 for gymnastics, beauty (as popularized by Bo Derek), surfing, and other endeavors;
5 a gymnastics-themed web log; a book title unrelated to Plaintiff; a satellite
6 technology provider; an energy bar company; a line of hair products; a winery; and
7 the name for a nail salon.

8 37. PERFECT 10 is a weak trademark at best, and more likely
9 generic. "Perfect 10," when applied to women, means the highest standard of
10 beauty, as popularized by Bo Derek in the film "10." As applied in many other
11 contexts as well, it is a generic term referring to the highest score attainable.

12 38. Image searches of the words "Perfect 10" using Google yield
13 links to photos of Perfect 10 magazine covers from subscription advertisements; a
14 book cover for an unrelated book entitled "Perfect 10: The Blessings of Following
15 God's Commandments in a Postmodern World"; advertisements for Perfect 10 hair
16 products; a bass guitar amplifier; snapshots of women from different walks of life;
17 photos of gymnastic performances; and several snapshots of men jumping into
18 water.

19 39. Google is informed and believes, and therefore alleges, that users
20 can find Perfect 10's website, learn about Perfect locate new and used Perfect 10
21 magazines and merchandise, and find out about Perfect 10-sponsored events through
22 Google.

23 40. Google is informed and believes, and therefore alleges, that
24 Perfect 10 enjoys substantial benefits from the ability of Google users to locate
25 information about Perfect 10 including Perfect 10's website and sites carrying
26 advertisements for Perfect 10 magazines, merchandise, and events, by using Google.

27 41. Google is informed and believes, and therefore alleges, that
28 Perfect 10 is aware of a practice common among website owners, of using "robot

1 exclusion headers," which are signals included in the software code of websites that
2 indicate that the website owner does not wish the site to be indexed by search robots
3 that survey the Internet. Despite Perfect 10's knowledge of the industry practice of
4 using robot exclusion headers from time to time, Perfect 10 has not used such robot
5 exclusion headers or otherwise informed Google that it does not wish its website to
6 be indexed for the Google search engine.

7 42. Google indexes websites sponsored by Perfect 10, including
8 perfect10.com, perfectten.com, and modelboxing.com.

9 43. Google does not index pages on websites published by Perfect 10
10 that require a password.

11 44. Perfect 10 has never complained to Google about its website
12 pages being indexed by Google and being included in search results delivered to
13 users.

14 45. Google is informed and believes, and therefore alleges, Perfect
15 10 has gained a great deal of traffic to its websites as a consequence of those
16 websites' inclusion in the Google index and search results.

17 46. Google is informed and believes, and therefore alleges, that
18 Perfect 10 has engaged in optimization techniques to increase the likelihood that
19 Perfect 10's websites will be indexed against key words used by users in Google
20 searches.

21 47. Google is informed and believes, and therefore alleges, that
22 Perfect 10 has derived substantial revenues resulting from searches on Google.

23 48. Google provides, among many other uses, an ability of copyright
24 and trademark owners to freely self-police a large portion of the Internet for
25 potential infringements of their rights. Google is informed and believes, and
26 therefore alleges, that Perfect 10 uses Google to search for content offered by
27 competitors, including content that may pertain to Perfect 10's models and may
28 infringe upon Perfect 10's purported rights. Google is informed and believes, and

1 therefore alleges, that Google and other search engines make Perfect 10's detection
2 of alleged online infringements much easier than the Perfect 10's detection of offline
3 infringements, i.e., infringements in print media. Google is informed and believes,
4 and therefore alleges, that Perfect 10 has used Google to gain evidence to use
5 against other defendants in other copyright infringement cases, and Perfect 10 has
6 used printouts of sites found through Google to support its claims against third
7 parties in other cases. Google thus functions as a handy and effective means of
8 Perfect 10's own policing of alleged infringements and violations by others.

9 49. Perfect 10 claims to have sent Google a number of notices of
10 alleged infringements and of alleged violations of other rights in 2001. Perfect 10
11 claims that, at the time, Google explained that it was unable to do anything about the
12 alleged infringements. For approximately three years thereafter, Perfect 10 admits
13 that it did not communicate with Google regarding any alleged infringements of
14 Perfect 10's alleged rights. Instead, Perfect 10 conducted a public campaign
15 beginning at least as early as 2001 accusing Google of participating in an "Internet
16 Conspiracy." Perfect 10's "Internet Conspiracy" campaign, while discussing
17 Google, was directed heavily at Yahoo!—on the same page that Perfect 10
18 advertised its Yahoo! Club forum. A copy of a page that Perfect 10 published in
19 2001 is attached to the Answer and Counterclaims as Exhibit B.

20 50. In 2004, Perfect 10 faxed pages of correspondence and
21 attachments, purporting to be notices of a variety of violations of Perfect 10's and
22 others' alleged rights, to Google's general fax number with no addressee shown and
23 with no heading to allow Google to direct the faxes appropriately. These purported
24 "notices" suffered from a variety of deficiencies. For example, the notices failed to
25 properly identify the copyrighted work claimed to be infringed, failed to properly
26 identify the allegedly infringing material, listed allegedly infringing URLs that had
27 not been located using Google's Search service (and thus there was nothing to
28 remove or take down), listed partial and/or incomplete URLs, listed alleged

1 infringing material that did not appear to be owned by Perfect 10, and contained
2 duplicative references to allegedly infringing URLs identified in previous purported
3 notices. Google corresponded with Perfect 10, explained what was most effective in
4 expediting Google's assistance, explained that the purported notices were defective,
5 processed the purported notices of alleged infringement to the best of its ability,
6 removed links to allegedly infringing content, and entered alleged Perfect 10 marks
7 into its trademark complaint procedures in order to avoid advertising containing
8 Perfect 10 marks. Perfect 10 accused Google of failing to handle its purported
9 notices expeditiously, but Perfect 10 refused to take steps to assist Google in more
10 expeditious handling of Perfect 10's notices. Instead, Perfect 10 began sending its
11 purported notices in formats that were increasingly difficult, if not impossible, to
12 process, and which lacked the information necessary to constitute valid notices
13 under governing law—despite Google's clear requests and instructions. These
14 deficiencies only worsened in 2007, when Perfect 10 began sending purported
15 "notices" in the form of multiple DVDs and an entire hard drive, many of which
16 contained thousands of pages of allegedly infringing material, but none of which
17 properly identified the copyrighted work claimed to be infringed or the allegedly
18 infringing material. For example, one DVD submitted by Perfect 10 contained 35
19 folders comprising more than 25,000 pages of printouts of alleged infringing
20 material. The hard drive Perfect 10 submitted claimed to have contained over 1
21 million infringements of alleged Perfect 10 copyrighted images. A single subfolder
22 of that hard drive contained over 16,000 electronic files of allegedly infringing
23 material. And further, at least one of Perfect 10's purported notices was improperly
24 directed to Google's Board of Directors, contained a variety of litigation-based
25 threats, and expressed a desire for quick settlement of Perfect 10's pending claims.

26 51. Perfect 10 has stated or asserted that it owns the publicity rights
27 of models appearing in its magazine or on its website. Perfect 10 has also stated or
28 asserted that it owns the publicity rights pertaining to nude images of models

1 appearing in its magazine or on its website. Google is informed and believes, and
2 therefore alleges, that in fact a number of Perfect 10 models, including models for
3 whom Perfect 10 has claimed publicity rights in suing for violations of those
4 publicity rights, have not granted to Perfect 10 complete and exclusive assignments
5 of all their publicity rights. Google is informed and believes, and therefore alleges,
6 that Perfect 10 does not own exclusive publicity rights in all Perfect 10 models for
7 which it claims publicity rights. Google is informed and believes, and therefore
8 alleges, that some Perfect 10 models have appeared in other magazines, such as
9 Penthouse or Hustler, or have appeared on their own websites, without Perfect 10
10 controlling their rights to appear in those other publications. Google is informed
11 and believes, and therefore alleges, that a number of Perfect 10 models are young
12 women from foreign countries, who may lack fluency in the English language, and
13 who may not have made a knowing and intelligent assignment of publicity rights to
14 Perfect 10; on that account any alleged assignments of publicity rights drafted in the
15 English language and executed by persons who lacked fluency in English are void.

16 52. Perfect 10 is a frequent plaintiff and claims to have spent over \$8
17 million in approximately a 2-1/2 year period to enforce its purported rights. Perfect
18 10 has accused other companies of engaging in conduct alleged to harm Perfect 10
19 by contributing to or being responsible for infringements or other unlawful activities
20 of others in distributing pornography on the Internet. Perfect 10 sued Visa
21 International Service Association, MasterCard International Incorporated, and other
22 companies for copyright infringement, trademark infringement, violation of rights of
23 publicity, and other claims on the ground that those companies provided "critical
24 business support" to allegedly infringing websites. Perfect 10 alleged that Visa and
25 MasterCard bore responsibility for massive harms for allowing alleged infringers to
26 process payments for subscription fees with Visa's and MasterCard's payment
27 systems. In its amended complaint against Visa and MasterCard, Perfect 10
28 specifically alleged that "Stolen Content Websites cannot exist without the

1 58. Google is a service provider under the Online Copyright
2 Liability Limitation Act ("OCILLA"), 17 U.S.C. § 512.

3 59. Google provides connections for material through a system or
4 network controlled or operated by or for Google. Google provides connections by
5 which persons other than Google may initiate transmission of the material. Google
6 carries out the provision of connections through an automatic technical process
7 without selection of the material. Google does not select the recipients of the
8 material except as an automatic response to the request of another person.

9 60. Google stores at the direction of its users material that resides on
10 Google's system or network.

11 61. Google refers and links its users to online locations containing
12 material by using information location tools including a directory, index, reference,
13 pointer, and hypertext links.

14 62. Since 1999, Google has duly filed a designation of an agent for
15 copyright notices under OCILLA. Attached to the Answer and Counterclaims as
16 Exhibit C is a copy of Google's Amended Interim Designation of Agent to Receive
17 Notification of Claimed Copyright Infringement, as maintained by the Copyright
18 Office of the United States at <http://www.copyright.gov/onlinesp/agents/google.pdf>.

19 63. When Google receives notification of claimed infringements
20 pursuant to 17 U.S.C. § 512(c)(3), or otherwise becomes aware of facts or
21 circumstances from which infringing activity is apparent, Google responds
22 expeditiously to remove, or disable access to, the material that is claimed to be
23 infringing or to be the subject of infringing activity.

24 64. To the extent Google has any subscribers or account holders,
25 Google has adopted and reasonably implemented, and informs any such subscribers
26 and account holders of Google's system or network of, a policy that provides for the
27 termination in appropriate circumstances of any subscribers and account holders of
28 Google's system who are repeat infringers.

1 65. Google's web search and image search engines have no
2 subscribers. Its search engines are available to anyone and they search sites of third
3 parties with which Google has no business relationship.

4 66. Google accommodates and does not interfere with standard
5 technical measures.

6 67. Google does not receive a financial benefit directly attributable
7 to any infringing activity of third parties claimed by Perfect 10.

8 68. Google does not have the right and ability to control infringing
9 activity of third parties alleged by Perfect 10 to have infringed Perfect 10's rights.

10 69. Perfect 10 lacks evidence that Google has the right and ability to
11 control infringing activity of third parties alleged by Perfect 10 to have infringed
12 Perfect 10's rights.

13 70. Perfect 10 claims that it sent to Google notices under OCILLA
14 during 2001 (the "Alleged 2001 Notices"), more than three years before this action
15 was commenced.

16 71. Perfect 10 claims that Google failed to act expeditiously to
17 remove, or to disable access to, the material allegedly claimed by Perfect 10 as
18 infringing in the Alleged 2001 Notices.

19 72. The Alleged 2001 Notices failed materially to meet the
20 requirements of 17 U.S.C. § 512(c)(3).

21 73. Perfect 10 failed to deliver the Alleged 2001 Notices as required
22 by 17 U.S.C. §512(c)(3).

23 74. Google acted expeditiously to remove, or to disable access to,
24 allegedly infringing material in response to all valid and effective Alleged 2001
25 Notices.

26 75. Perfect 10 delivered no notices of infringement under OCILLA
27 during the years 2002 and 2003.

28

1 87. Google lacks knowledge of any copyright infringements by
2 others particularly claimed by Perfect 10 in this action.

3 88. Google lacks knowledge of infringements by others generally
4 claimed by Perfect 10 in this action.

5 89. Google does not derive a direct financial benefit from any
6 copyright infringements by others particularly claimed by Perfect 10 in this action.

7 90. Google does not derive a direct financial benefit from any
8 copyright infringements by others generally claimed by Perfect 10 in this action.

9 91. Google has not materially contributed to, nor does it have the
10 right and ability to supervise, any third party's violation of Perfect 10's exclusive
11 right to reproduce works in copies under 17 U.S.C. § 106(1).

12 92. Perfect 10 has no evidence that Google has materially
13 contributed to, or has the right and ability to supervise, any third party's violation of
14 Perfect 10's exclusive right to reproduce works in copies under 17 U.S.C. § 106(1).

15 93. Google has not materially contributed to, nor does it have the
16 right and ability to supervise, any third party's violation of Perfect 10's exclusive
17 right to prepare derivative works based on Perfect 10's copyrighted works under 17
18 U.S.C. § 106(2).

19 94. Perfect 10 has no evidence that Google has materially
20 contributed to, or has the right and ability to supervise, any third party's violation of
21 Perfect 10's exclusive right to prepare derivative works based on Perfect 10's
22 copyrighted works under 17 U.S.C. § 106(2).

23 95. Google has not materially contributed to, nor does it have the
24 right and ability to supervise, any third party's violation of Perfect 10's exclusive
25 rights to distribute copies of Perfect 10's copyrighted works to the public by sale or
26 other transfer of ownership, or by rental, lease, or lending under 17 U.S.C. § 106(3).

27 96. Perfect 10 has no evidence that Google has materially
28 contributed to, or has the right and ability to supervise, any third party's violation of

1 Perfect 10's exclusive rights to distribute copies of Perfect 10's copyrighted works to
2 the public by sale or other transfer of ownership, or by rental, lease, or lending under
3 17 U.S.C. § 106(3).

4 97. Google has not materially contributed to, nor does it have the
5 right and ability to supervise, any third-party's violation of Perfect 10's exclusive
6 rights to display Perfect 10's copyrighted works to the public under 17 U.S.C. §
7 106(5).

8 98. Perfect 10 has no evidence that Google has materially
9 contributed to, or has the right and ability to supervise, any third party's violation of
10 Perfect 10's exclusive rights to display Perfect 10's copyrighted works to the public
11 under 17 U.S.C. § 106(5).

12 99. Perfect 10 has not been harmed by or suffered any cognizable
13 injury from any alleged conduct by Google.

14 100. Google is entitled to a declaration that it is not liable to Perfect
15 10 on account of copyright infringement by others.

16 **FOURTH CAUSE OF ACTION**

17 **DECLARATION OF NONINFRINGEMENT OF**
18 **TRADEMARK/NONVIOLATION OF LANHAM ACT**

19 101. Google incorporates and re-alleges paragraphs 1 through 100 of
20 the counterclaims above.

21 102. Perfect 10 claims that Google's AdWords and AdSense programs
22 cause it to engage in trademark infringement, false designation of origin, and unfair
23 competition in violation of sections 32 and 43(a) of the Lanham Act, 15 U.S.C. §§
24 1114 and 1125.

25 103. Under the AdWords and AdSense programs, Google offers
26 advertisers and users an opportunity to deliver and receive targeted advertising that
27 reflects interests of the search user. Google offers advertisers the opportunity to
28 purchase advertising that is delivered in response to words that the search user

1 enters in a search field of Google's search engine or in response to words associated
2 with content that is returned by the search. Thus, for example, Disney may wish to
3 direct an advertisement to persons searching the web for "Aladdin," or Toyota may
4 wish to direct an advertisement to persons searching for "hybrid car." Similarly,
5 advertisers may wish to direct advertising to persons interested in their competitors,
6 or their suppliers' products or services, such as Hickory Farms advertising to persons
7 interested in Pepperidge Farms and AutoBarn advertising to persons interested in
8 Techron fuel additive.

9 104. Advertisers select the search terms that they wish to serve as
10 advertising keywords. Google furnishes advertisers an automated keyword selection
11 tool that offers a list of keywords based on their association, in web pages by
12 Google, with other words suggested by the advertiser. For example, an advertiser
13 that indicates an interest in "hybrid car" as a search phrase can use Google's
14 automated keyword tool to obtain a list of many other search terms or phrases, such
15 as "suv hybrid," "electric car," "for sale," "used car," "fuel economy," and so forth.

16 105. For years, advertisers have targeted advertising to persons who
17 had expressed an interest that qualified them as prospects. For example,
18 supermarkets position coupons for one product at the shelf location of a competing
19 product; they deliver checkout coupons for a product to customers when the
20 checkout scanner determined that customers purchased a rival product. Magazine
21 stands display competitive magazines right next to each other: if one wants to find
22 U.S. News and World Report, one may look for Time or Newsweek expecting it to
23 be nearby. Explicit advertising that attracts customers of one product for
24 comparison with another product (If you like ..., you'll love ...) is lawful in the
25 United States. Media such as broadcasters and newspapers frequently sell
26 advertising based on its being associated with particular content where the targets of
27 the advertising are likely to be interested in the content, even when the advertiser is
28 a rival of a company or person associated with the content.

1 106. Google's sale to third parties of advertising space for
2 advertisements targeted to persons using particular search terms or viewing
3 particular search results does not constitute Google's "trademark use," "use in
4 commerce," or "commercial use in commerce" of those search terms.

5 107. Google's sale to third parties of advertising space for
6 advertisements targeted to persons using particular search terms or viewing
7 particular search results is related to Google's participation in news reporting and
8 news commentary, specifically regarding the reporting of and commentary on
9 material that is currently being made available on the web.

10 108. The First Amendment to the U.S. Constitution protects Google's
11 sale to third parties of advertising space for advertisements targeted to persons using
12 particular search terms or viewing particular search results.

13 109. Advertising that targets users based on search terms is set apart
14 from Google's search results, either shaded above those results or to the side and
15 separated by a vertical divider, and is identified as "sponsored links."

16 110. Google users are not likely to be confused as to the source,
17 sponsorship, or affiliation of sponsored links.

18 111. Google users who follow sponsored links to other websites are
19 not likely to be confused by Google as to the source, sponsorship, or affiliation of
20 the other websites.

21 112. Google and Perfect 10 are not competitors.

22 113. "Sponsored link" advertisements carried by Google are part of
23 electronic communications.

24 114. Google has a well-established program for handling trademark-
25 related disputes and claims relating to advertising furnished by Google. It publishes
26 its trademark complaint procedures at www.google.com/tm_complaint.html, a copy
27 of which is attached to the Answer and Counterclaims as Exhibit D. Google is not
28 in a position to arbitrate trademark disputes. Its exercise of control over advertising

1 is limited to ensuring that, upon a substantiated complaint, advertisements carried by
2 Google will not use the trademarked term in their content.

3 115. Perfect 10 has not been harmed by or suffered any cognizable
4 injury from any alleged conduct by Google.

5 116. Google is entitled to a declaration that it is not liable to Perfect
6 10 on account of a violation of any trademark or related unfair competition rights of
7 Perfect 10.

8 **FIFTH CAUSE OF ACTION**

9 **DECLARATION OF NO CONTRIBUTORY OR VICARIOUS LIABILITY**
10 **FOR TRADEMARK INFRINGEMENT BY OTHERS**

11 117. Google incorporates and re-alleges paragraphs 1 through 116 of
12 the counterclaims above.

13 118. Google does not furnish to any person instruments of
14 infringement of Perfect 10's alleged trademark rights.

15 119. Google does not have actual knowledge of any infringements by
16 third parties of Perfect 10's alleged trademark rights.

17 120. Google does not direct or control any person's infringement of
18 Perfect 10's alleged trademark rights.

19 121. Google does not act in a partnership with third parties in the
20 infringement of Perfect 10's trademark rights.

21 122. Google has not induced third parties to infringe upon Perfect 10's
22 trademark rights.

23 123. Perfect 10 has not been harmed by or suffered any cognizable
24 injury from any alleged conduct by Google.

25 124. Google is entitled to a declaration that it is not contributorily or
26 vicariously liable to Perfect 10 on account of any violation by others of any
27 trademark or related unfair competition rights of Perfect 10.

28 **SIXTH CAUSE OF ACTION**

1 **DECLARATION OF NONVIOLATION OF THE TRADEMARK DILUTION**
2 **PROVISIONS OF THE LANHAM ACT**

3 125. Google incorporates and re-alleges paragraphs 1 through 124 of
4 the counterclaims above.

5 126. Perfect 10 claims that Google's conduct constitutes trademark
6 dilution under section 43(c) of the Lanham Act, 15 U.S.C. § 1125(c).

7 127. None of Perfect 10's alleged marks is, or ever has been, "famous"
8 within the meaning of 15 U.S.C. § 1125(c). "Perfect 10" is also the name of
9 multiple radio stations, multiple adult-oriented businesses, an energy bar company, a
10 winery, a line of hair products, a satellite technology provider, among others. It is
11 also a generic expression of the highest standard of female beauty, and a generic
12 term referring to the highest possible score attainable. PERFECT 10 is not
13 sufficiently "distinctive" to be "famous" within the meaning of 15 U.S.C. § 1125.

14 128. Google's activities do not constitute commercial use of Perfect
15 10's marks.

16 129. Google's activities are not likely to cause dilution of the
17 distinctive quality of Perfect 10's marks—if any—by diminishing the capacity of the
18 marks to identify and distinguish goods and services.

19 130. Perfect 10 has not been harmed by or suffered any cognizable
20 injury from any alleged conduct by Google.

21 131. Google is entitled to a declaration that it is not liable to Perfect
22 10 for trademark dilution under 15 U.S.C. § 1125(c).

23 **SEVENTH CAUSE OF ACTION**

24 **DECLARATION OF NONVIOLATION OF THE UNFAIR COMPETITION**
25 **PROVISIONS OF THE LANHAM ACT, CALIFORNIA BUSINESS AND**
26 **PROFESSIONS CODE § 17200, AND THE COMMON LAW OF UNFAIR**
27 **COMPETITION**

1 132. Google incorporates and re-alleges paragraphs 1 through 131 of
2 the counterclaims above.

3 133. Perfect 10 claims that Google's AdWords and AdSense programs
4 cause it to engage in unfair competition under the Lanham Act, Cal. Bus. & Prof.
5 Code § 17200, and the common law of unfair competition.

6 134. Under the AdWords and AdSense programs, Google offers
7 advertisers and users an opportunity to deliver and receive targeted advertising that
8 reflects interests of the search user. Google offers advertisers the opportunity to
9 purchase advertising that may be delivered in response to words that the search user
10 enters into the Google search engine or in response to words associated with content
11 that is returned by the search. Advertisers then select the search terms that they
12 wish to serve as advertising keywords.

13 135. Google's sale to third parties of advertising space for
14 advertisements targeted to persons using particular search terms or viewing
15 particular search results does not constitute Google's "trademark use," "use in
16 commerce," or "commercial use in commerce" of those search terms.

17 136. Google's sale to third parties of advertising space for
18 advertisements targeted to persons using particular search terms or viewing
19 particular search results is related to Google's participation in news reporting and
20 news commentary, specifically regarding the reporting of and commentary on
21 material that is currently being made available on the web, and is protected by the
22 First Amendment to the U.S. Constitution.

23 137. Advertising that targets users based on search terms is set apart
24 from Google's search results, either shaded above those results or to the side and
25 separated by a vertical divider, and is identified as "sponsored links." Accordingly,
26 Google users are not likely to be confused as to the source, sponsorship, or
27 affiliation of sponsored links or the websites that are linked to.

28

1 138. Google and Perfect 10 are not competitors in the adult content
2 business.

3 139. Perfect 10 lacks standing to assert any unfair competition rights
4 of third parties, including celebrities.

5 140. Perfect 10's state law unfair competition claims are pre-empted
6 by the Copyright Act, 17 U.S.C. § 301.

7 141. Perfect 10's state law unfair competition claims are pre-empted
8 or otherwise barred by the Communications Decency Act, 47 U.S.C. § 230(c).

9 142. Google has not engaged in any unlawful, unfair or fraudulent
10 business act or practice, any unfair, deceptive, untrue or misleading advertising, or
11 any other act or practice that violated California Business & Professions Code §
12 17200, et. seq.

13 143. Perfect 10 has not suffered injury in fact and loss of money and
14 property as a result of Google's alleged conduct.

15 144. Perfect 10 has not suffered commercial injury as a result of
16 Google's alleged conduct.

17 145. Perfect 10 has not suffered competitive injury as a result of
18 Google's alleged conduct.

19 146. On information and belief, Perfect 10 has not made a substantial
20 investment of time, skill or money in developing its property.

21 147. Google has not appropriated or used Perfect 10's property, at
22 little or no cost, or otherwise.

23 148. Any appropriation or use of Perfect 10's property by Google was
24 with the express or implied authorization and/or consent of Perfect 10.

25 149. Google does not personally participate in any alleged unlawful
26 practices of third-party websites, nor does it exercise unbridled control over those
27 alleged activities.

28

1 150. Perfect 10 has not been harmed by or suffered any cognizable
2 injury from any alleged conduct by Google.

3 151. Google is entitled to a declaration that it is not liable to Perfect
4 10 on account of a violation of any unfair competition rights of Perfect 10 under the
5 Lanham Act, Cal. Bus. & Prof. Code § 17200, or the common law.

6 **EIGHTH CAUSE OF ACTION**

7 **DECLARATION OF NONVIOLATION OF RIGHTS OF PUBLICITY**

8 152. Google incorporates and re-alleges paragraphs 1 through 151 of
9 the counterclaims above.

10 153. Perfect 10 has claimed that it asserts publicity rights in the names
11 and likenesses of certain Perfect 10 models.

12 154. Google is informed and believes, and therefore alleges, that
13 Perfect 10 lacks enforceable publicity rights in the names and likenesses of its
14 alleged models.

15 155. Perfect 10's lack of ownership of enforceable publicity rights in
16 the names and likenesses of its alleged models is apparent from the following facts.
17 Google is informed and believes, and therefore alleges, that certain of Perfect 10's
18 alleged models have authorized other magazines or websites that compete with
19 Perfect 10 to display their names and likenesses or have exploited their own names
20 and likenesses in their own websites, without authorization from Perfect 10. Google
21 is informed and believes, and therefore alleges, that Perfect 10 has falsely claimed to
22 own enforceable publicity rights of models.

23 156. Perfect 10 has retreated from some of its earlier broad claims to
24 own enforceable publicity rights. In a letter from Perfect 10's counsel to Google's
25 counsel, Perfect 10 recasts its claim as follows:

26 [I]t is Perfect 10's position that entities that have legitimate rights to
27 specific photographs of models can use the names or images of those
28 models in connection with those authorized photographs. (However,

1 it is also true that generally Perfect 10 is the only entity that has
2 photographed its models topless and thus would be the only entity
3 with the rights to advertise nude images of such models.) What
4 Perfect 10 clearly alleges, and I reiterate, is that neither the "Stolen
5 Content websites" nor your client has the right to use the names or
6 likenesses of models in connection with unauthorized content, and
7 their use (either directly by your client or as facilitated by your client)
8 infringes Perfect 10's rights.

9 A copy of that communication is attached to the Answer and Counterclaims as
10 Exhibit E.

11 157. Google is informed and believes, and therefore alleges, that
12 Perfect 10 claims rights of publicity of models who have been photographed in
13 works for which Perfect 10 claims to own the copyright.

14 158. Google is informed and believes, and therefore alleges, that
15 Perfect 10 does not own all publicity rights for models whose publicity rights
16 Perfect 10 has claimed to own.

17 159. Google is informed and believes, and therefore alleges, that
18 Perfect 10 has asserted claims based on publicity rights of persons who have not
19 assigned Perfect 10 the right to enforce their publicity rights against others.

20 160. Google has not engaged in, or aided and abetted, any violations
21 of publicity rights owned by Perfect 10, nor has Google directed or controlled any
22 violations of publicity rights owned by Perfect 10.

23 161. Perfect 10 seeks to enforce publicity rights in connection with
24 the unauthorized use of copyrighted works featuring the persons whose publicity
25 rights Perfect 10 asserts.

26 162. Perfect 10's publicity claim involves the subject matter of
27 copyright.
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DATED: July 31, 2008

QUINN EMANUEL URQUHART OLIVER &
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By /s/ Michael T. Zeller
Michael T. Zeller
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