

1 QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP
 Michael T. Zeller (Bar No. 196417)
 2 michaelzeller@quinnemanuel.com
 865 South Figueroa Street, 10th Floor
 3 Los Angeles, California 90017-2543
 Telephone: (213) 443-3000
 4 Facsimile: (213) 443-3100
 Charles K. Verhoeven (Bar No. 170151)
 5 charlesverhoeven@quinnemanuel.com
 50 California Street, 22nd Floor
 6 San Francisco, California 94111
 Rachel M. Herrick (Bar No. 191060)
 7 rachelherrick@quinnemanuel.com
 555 Twin Dolphin Drive, Suite 560
 8 Redwood Shores, California 94065-213
 9 Attorneys for Defendant Google Inc.

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)]

**NOTICE OF MOTION AND
 MOTION FOR ISSUANCE OF A
 REQUEST FOR JUDICIAL
 ASSISTANCE (LETTER OF
 REQUEST) UNDER THE HAGUE
 CONVENTION ON THE TAKING
 OF EVIDENCE ABROAD IN CIVIL
 OR COMMERCIAL MATTERS**

19 AND COUNTERCLAIM

Hon. A. Howard Matz

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

Courtroom: 14
 Hearing Date: August 25, 2008
 Hearing Time: 10:00 am

22 vs.

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

Discovery Cutoff: None Set
 Pretrial Conference Date: None Set
 Trial Date: None Set

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

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on August 25, 2008, at 10:00 a.m., or as soon
3 thereafter as the matter may be heard, in the courtroom of the Honorable A. Howard
4 Matz, located at 312 North Spring Street, Los Angeles, CA, 90016, Courtroom 14,
5 Google Inc. ("Google") will, and hereby does, move the Court pursuant to the
6 Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or
7 Commercial Matters, 28 U.S.C. § 1781 (and Fed. R. Civ. P. 28), and the Evidence
8 (Proceedings in Other Jurisdictions) Act 1975 c.34 (the "1975 Act"), for the
9 issuance of a Letter of Request for International Judicial Assistance ("Letter of
10 Request") to compel the production of documents by FoneStarz Media Limited
11 ("FoneStarz"), a company incorporated in the United Kingdom and having its
12 principal place of business in St. Ives, Cambridgeshire, and to compel the oral
13 examination of Dave Moreau, Chief Executive Officer of FoneStarz. A proposed
14 the Letter of Request for International Judicial Assistance, following the model form
15 set out in the Hague Evidence Convention, is filed concurrently herewith. The
16 documents requested by Google are set forth in Schedule A to that proposed Letter
17 of Request. The topics of oral testimony sought from Dave Moreau are set forth in
18 Schedule B to the proposed Letter of Request.

19 Google makes this motion on the ground that FoneStarz has the evidence
20 sought in the Letter of Request, which evidence is highly relevant to the claims and
21 defenses of the case, and may not be obtained by other means. Accordingly, it is
22 necessary for this Court to issue the accompanying Letter of Request for
23 International Judicial Assistance to obtain the requested evidence.

24 This motion is based on this Notice of Motion, the accompanying
25 Memorandum of Points and Authorities, the accompanying Declaration of Rachel
26 M. Herrick and Exhibits thereto, all other pleadings and papers on file in this action,
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1 any matters of which this Court may take judicial notice, and such further evidence
2 and argument as may be presented at or before the hearing on this matter.

3 Pursuant to Local Rule 7-3, the parties met and conferred on the matters in
4 this Motion on April 9 and 17, 2008, and thereafter.

5

6 DATED: August 5, 2008

QUINN EMANUEL URQUHART OLIVER &
HEDGES, LLP

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By /s/ Rachel M. Herrick
Rachel M. Herrick
Attorneys for Defendant Google Inc.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **Preliminary Statement**

3 Google Inc. (“Google”) requests that this Court issue the accompanying
4 Letter of Request for International Judicial Assistance to obtain documents from
5 FoneStarz Media Limited (“FoneStarz”) and oral testimony from Dave Moreau,
6 Chief Executive Officer of FoneStarz, regarding the alleged business relationship
7 between FoneStarz and Perfect 10, Inc. (“Perfect 10”). The reasons for issuance of
8 the Letter of Request are simple and straightforward. Plaintiff Perfect 10, Inc.
9 claims, among other things, that it once had a profitable business of licensing
10 reduced-size versions of its copyrighted images to FoneStarz for downloads to
11 mobile phones. Perfect 10 contends that Google’s Image Search has harmed that
12 business by making thumbnail images available free of charge. FoneStarz has
13 submitted a Declaration from its Chief Executive Officer, Dave Moreau, in support
14 of that argument. Accordingly, Perfect 10 and FoneStarz have put their alleged
15 business relationship at issue in this case.

16 This evidence is relevant to the analysis of potentially all of Perfect 10’s
17 claims (including its alleged damages claims), and to Google’s defenses, especially
18 its defense of fair use under the Copyright Act, 17 U.S.C. § 107. Google expects
19 that evidence on these issues will be presented at trial. There is no means of
20 obtaining this evidence other than seeking it directly from FoneStarz by Letter of
21 Request. Google’s requests for evidence are narrowly tailored and will not impose
22 an undue burden on FoneStarz or Mr. Moreau. Accordingly, Google respectfully
23 requests that its motion be granted.

24 **Statement of Facts and Procedural History**

25 Perfect 10 has placed at issue its alleged business of selling reduced size
26 images for downloads to mobile phones. At the preliminary injunction stage, Dr.
27 Norman Zada declared that “in early 2005, Perfect 10 entered into a licensing
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1 agreement with Fonestarz [sic] Media Limited for the worldwide sale and
2 distribution of Perfect 10 reduced size copyrighted images on cell phones.”
3 Declaration of Rachel M. Herrick, dated August 1, 2008 (“Herrick Decl.”), at Ex. A.
4 (Declaration of Norman Zada in Support of Motion of Plaintiff Perfect 10, Inc. for
5 Preliminary Injunction (“Zada Decl.”), dated August 19, 2005, at ¶ 16). Perfect 10
6 has claimed that Google interferes with its mobile phone download business by
7 offering thumbnail images in Image Search results that “are the same size and
8 clarity as versions currently sold by Perfect 10 for download and display on cell
9 phones.” Herrick Decl., at Ex. B (Notice of Motion and Motion of Plaintiff Perfect
10 10, Inc. for Preliminary Injunction, at 4). Perfect 10 claims the “market for cell
11 phone downloads of adult images, in which Perfect 10 participates, is estimated to
12 be \$500 million a year and is projected to grow to \$5 billion a year.” *Id.* at 16
13 (citing Zada Decl. ¶ 57, Ex. 25). This Court previously credited these arguments in
14 its fair use analysis, finding possible superseding use and a likely adverse effect on
15 the potential market for downloads of Perfect 10’s images to cell phones. Perfect
16 10, Inc. v. Google Inc., 416 F.Supp.2d 828, 849-51 (C.D. Cal. 2006).¹

17 Indeed, FoneStarz has put *itself* at issue in this case by submitting a
18 declaration from Dave Moreau, the CEO of FoneStarz, in support of Perfect 10’s
19 motion for preliminary injunction. In that declaration, Mr. Moreau stated that
20 “FoneStarz manages collections of digital content (including ... still images ...) on a
21 number of platforms including ... mobile phone networks,” and that “[i]n early
22 2005, FoneStarz entered into a worldwide, exclusive license agreement ... with
23 Perfect 10 for the sale and distribution of Perfect 10 copyrighted images and video
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25 ¹ On appeal, the Ninth Circuit also addressed these claims, noting that “Perfect
26 10 has ... licensed FoneStarz Media Limited to sell and distribute Perfect 10's
27 reduced-size copyrighted images for download and use on cell phones.” Perfect 10,
28 Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1157 (9th Cir. 2007).

1 ... for use on mobile phones.” Herrick Decl., at Ex. C (Declaration of Dave Moreau
2 in Support of Motion of Plaintiff Perfect 10, Inc. for Preliminary Injunction, dated
3 July 27, 2005 (“Moreau Decl.”), at ¶¶ 2-3). Moreau further stated that Perfect 10
4 images were indeed downloaded for sale in the United Kingdom, and that FoneStarz
5 “intends to expand its distribution of Perfect 10 images to mobile phone customers
6 in other territories, including the United States.” Id. (Moreau Decl. ¶ 4). Finally,
7 Moreau made specific claims regarding the alleged damage that Google has done to
8 Perfect 10, stating that “reduced-sized Perfect 10 images are being made available
9 through Google Image Search, for free,” that “Google promotes the downloading of
10 reduced-size images it displays onto mobile phones,” that Perfect 10 is “losing sales
11 because of the unauthorized images offered by Google,” and that this “degrades the
12 exclusive nature of [FoneStarz’s] commercial relationship with Perfect 10.” Id.
13 (Moreau Decl. ¶¶ 6-7).

14 Google now seeks discovery from Perfect 10’s alleged business partner
15 FoneStarz regarding Perfect 10’s alleged business for cell phone downloads, and the
16 effect, if any, Google’s alleged acts have had on that alleged business.

17 Argument

18 **I. THIS COURT HAS AUTHORITY TO ISSUE THE LETTER OF** 19 **REQUEST**

20 Both the United States and the United Kingdom are signatories to the Hague
21 Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or
22 Commercial Matters (the “Hague Evidence Convention”), 23 U.S.T. 2555. See also
23 28 U.S.C. § 1781 (permitting “the transmittal of a letter rogatory or request directly
24 from a tribunal in the United States to the foreign or international tribunal, officer,
25 or agency to whom it is addressed and its return in the same manner” and
26 reproducing the Hague Evidence Convention); Fed. R. Civ. P. 28(b)(1) (“A
27 deposition may be taken in a foreign country ... under an applicable treaty or
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1 convention [or] under a letter of request”); Restatement (Third) of Foreign Relations
2 Law of the United States § 474(2) (“A United States district court, in order to obtain
3 evidence for use in a proceeding before it, may ... issue a letter rogatory requesting
4 a court or other appropriate authority in a foreign state to direct the taking of
5 evidence in that state ... provided the procedure is not inconsistent with the law of
6 the state where the evidence is to be taken.”). “The Convention, as a treaty ratified
7 by and acceded to the United States, is the ‘law of this land’ with the same force and
8 effect as a federal statute.” Nursing Home Pension Fund v. Oracle Corp., 2007 WL
9 1880381, at *5 (N.D. Cal. 2007) (citing Societe Nationale Industrielle Aerospatiale
10 v. United States District Court, 482 U.S. 522, 524 & n. 1 (1987), and El Al Israel
11 Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 167 (1999)). As a general matter,
12 therefore, transmittal of a Letter of Request by the Central District of California is
13 entirely proper under United States law.

14 Issuance of a Letter of Request is warranted here, because Perfect 10 and
15 FoneStarz have put their business relationship at issue. The Chief Executive Officer
16 of FoneStarz has declared under oath that FoneStarz “entered into a worldwide,
17 exclusive license agreement ... with Perfect 10 for the sale and distribution of
18 Perfect 10 copyrighted images and video ... for use on mobile phones.” Herrick
19 Decl., at Ex. C (Moreau Decl. ¶ 3). The analyses of this Court and the Ninth Circuit
20 have recognized the relevance of that alleged business relationship, and the alleged
21 market for cell phone downloads of reduced size Perfect 10 images, to the claims
22 and defenses of the case (particularly Google’s defense of fair use regarding
23 thumbnail images). The Proposed Letter of Request, filed concurrently herewith,
24 seeks evidence on this subject from Perfect 10's alleged exclusive business partner
25 FoneStarz, by asking the High Court of England to compel: (1) the production of
26 documents set forth in Schedule A and (2) the oral examination under oath of Dave
27 Moreau, CEO of FoneStarz, on the topics set forth in Schedule B.

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1 **II. GOOGLE’S REQUEST FOR INFORMATION IS CONSISTENT**
2 **WITH THE LAW OF THE UNITED KINGDOM**

3 **A. The High Court of England Has The Authority To Issue A Letter**
4 **Of Request For Documents and Testimony In The Present Case**

5 As noted above, the United Kingdom is a signatory to the Hague Evidence
6 Convention and English Courts have the power to compel the production of
7 documents and the giving of oral testimony for purposes of foreign proceedings in
8 appropriate circumstances. Pursuant to the Evidence (Proceedings in Other
9 Jurisdictions) Act 1975 c.34 (the “1975 Act”), if the High Court of England receives
10 an application ... for an order for evidence to be obtained in the part of the
11 United Kingdom in which it exercises jurisdiction, and the court is satisfied

- 12 (a) that the application is made in pursuance of a request issued by
13 or on behalf of a court or tribunal (“the requesting court”) exercising jurisdiction ... in a country or territory outside the
14 United Kingdom; and
15 (b) that the evidence to which the application relates is to be
16 obtained for purposes of civil proceedings which ... have been
17 instituted before the requesting court,

18 the High Court has the power to carry out the application. Herrick Decl., at Ex. D
19 (1975 Act 1).² This may include issuance of an order “for the examination of
20 witnesses, either orally or in writing” or “for the production of documents.” Id.
21 (1975 Act 2(2)(a) and (2)(b)). See also Rio Tinto Zinc Corp. v. Westinghouse
22 Electric Corp., [1978] A.C. 547, 2 W.L.R. 81. These prerequisites are clearly
23 present here: this Court is presently exercising jurisdiction over this dispute, and the

24 ² Reflecting principles of judicial and international comity, “[t]he general principle
25 which is followed in England in relation to a request from a foreign Court for
26 assistance in obtaining evidence for the purpose of proceedings in that Court is that
27 the English Court will ordinarily give effect to a request so far as is proper and
28 practicable and to the extent that it is permissible under English law.” Section A
Civil Procedure Rules 1998 c.34.21.2 (citing Seyfang v. G. D. Searle & Co. [1973]
Q.B. 148 at 151; [1973] 1 All E.R. 290 at 293).

1 evidence Google seeks relates directly to the ongoing civil proceeding, and consists
2 of requests for documents and oral testimony.

3 **B. The Requests For Documents in Schedule A Conform To The**
4 **United Kingdom’s Requirements**

5 Google’s document requests conform to governing law. Under the Hague
6 Evidence Convention, English Courts will not require a person “to produce any
7 documents other than particular documents specified in the order as being
8 documents appearing to the court making the order to be, or to be likely to be, in his
9 possession, custody or power.” Herrick Decl., at Ex. D (1975 Act 2(4)(b)). This
10 limitation is meant to preclude the broad requests for documents permissible under
11 the Federal Rules of Civil Procedure. Consistent with this provision, the document
12 requests in Schedule A are narrowly tailored and seek only particular documents on
13 particular subjects which either are, or are likely to be, in FoneStarz’s possession,
14 custody or power, based upon the sworn statements FoneStarz CEO Dave Moreau
15 has made to this Court in this action.

16 **C. The Letter Of Request Does Not Seek Evidence That Is Privileged**
17 **Or Would Be Prejudicial to the Security of the United Kingdom**

18 Google’s document requests are consistent with United Kingdom privilege
19 law. The 1975 Act preserves the right to withhold evidence on the basis of
20 privilege, as provided by either the law of the England or of the requesting party
21 (here, the United States). Herrick Decl., at Ex. D (1975 Act 3(1)(a) and (b)).
22 Further, the 1975 Act does not require a person to “give any evidence if his doing so
23 would be prejudicial to the security of the United Kingdom.” Id. (1975 Act at 3(3)).
24 Google does not seek information that is privileged under the laws of the United
25 States or England, nor does Google seek information the disclosure of which would
26 compromise the United Kingdom’s security. Google does not believe its requests
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1 for documents or testimony include such information, but to the extent that they do,
2 Google does not object to withholding on that basis.

3 **D. The Proposed Deposition Procedures Are Consistent With**
4 **Governing Law**

5 Google's request for oral examination of Dave Moreau on the subjects set out
6 in Schedule B is proper under the laws and practices of the United Kingdom. As a
7 general matter, the 1975 Act gives the High Court of England the "power ... by
8 order to make such provision for obtaining evidence in ... the United Kingdom
9 [including by] the examination of witnesses, either orally or in writing." Herrick
10 Decl, at Ex. D (1975 Act 2(1) and (2)(a)). See also Apple Computers Inc. v. Doe,
11 2002 WL 31476324 (QBD), [2002] EWHC 2064, at 8 ("Under the procedure of the
12 High Court of England depositions of witnesses ... may be taken before examiners
13 for use at the trial [so long as] the subject matter of such deposition is restricted to
14 the evidence admissible at trial."). Because Google intends to use Mr. Moreau's
15 testimony at trial, and because the subjects in Schedule B will produce evidence
16 admissible at trial, Google's proposed Letter of Request precisely follows these
17 guidelines.

18 Moreover, the request is proper for the additional reason that the Hague
19 Evidence Convention itself provides that the receiving court "will follow a request
20 of the requesting authority that a special method or procedure be followed, unless
21 this is incompatible with the internal law of the State of execution or is impossible
22 of performance by reason of its internal practice and procedure or by reason of
23 practical difficulties." Hague Evidence Convention, Article 9, 23 U.S.T. 2555. The
24 1975 Act further provides that the High Court has the power

25 by order to make such provision for obtaining evidence in the part of the
26 United Kingdom in which it exercises jurisdiction as may appear to the court
27 to be appropriate for the purpose of giving effect to the request in pursuance
28 of which the application is made; and any such order may require a person
specified therein to take such steps as the court may consider appropriate for
that purpose.

1 Herrick Decl, at Ex. D (1975 Act 2(1)). Accordingly, the High Court has the power
2 to carry out Google's request by compelling Dave Moreau to appear for oral
3 examination on the subjects set out in Schedule B.

4 **Conclusion**

5 For the foregoing reasons, Google respectfully requests that this Court
6 issue a Letter of Request under the Hague Evidence Convention to the High Court
7 of England to compel FoneStarz Media Limited to produce the documents specified
8 in Schedule A thereto, and to compel Dave Moreau to give sworn deposition
9 testimony on the topics specified in Schedule B thereto.

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11 DATED: August 5, 2008

QUINN EMANUEL URQUHART OLIVER &
HEDGES, LLP

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13 By /s/ Rachel M. Herrick
14 Rachel M. Herrick
15 Attorneys for Defendant Google Inc.

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