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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

PERFECT 10, INC., a California corporation

Plaintiff,

vs.

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

Defendants.

**AND COUNTERCLAIM**

PERFECT 10, INC., a California corporation,

Plaintiff,

vs.

AMAZON.COM, INC., a corporation;  
A9.COM, INC., a corporation; and  
DOES 1 through 10, inclusive,

Defendants.

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

**JOINT STIPULATION RE.  
GOOGLE INC.'S MOTION TO  
COMPEL FURTHER RESPONSES  
TO GOOGLE'S  
INTERROGATORY NOS. 3 AND  
11; PERFECT 10'S REQUEST FOR  
SANCTIONS AGAINST GOOGLE**

Hon. Stephen J. Hillman

Courtroom.: 550  
Hearing Date: September 8, 2008  
Hearing Time: 2:00 pm

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

**[PUBLIC REDACTED]:  
PORTIONS FILED UNDER SEAL  
PURSUANT TO PROTECTIVE  
ORDER**

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1 **INTRODUCTION**

2 Pursuant to Fed. R. Civ. P. 37(a) and Local Rule 37-2.1, Defendant and  
3 Counterclaimant Google Inc. ("Google") and Plaintiff Perfect 10, Inc. ("Perfect 10")  
4 submit the following joint stipulation regarding Google's Motion to Compel  
5 responses to Google's Interrogatory Nos. 3 and 11. Google's Interrogatories and  
6 Perfect 10's responses are attached to the accompanying Declaration of Rachel M.  
7 Herrick in Support of Google's Motion to Compel ("Herrick Decl."), at Exhs. A-D.  
8 Pursuant to Local Rule 37-1, the parties conducted a pre-filing conference of counsel  
9 on January 11, 2008 (by letter), April 9, 2008 (telephonically), and on various dates  
10 thereafter.

11 **A. GOOGLE'S PRELIMINARY STATEMENT**

12 For over three years, Perfect 10 has failed to respond to routine  
13 Interrogatories seeking identification of the basic operative facts underlying Perfect  
14 10's copyright infringement case. Google is entitled to this information under the  
15 Federal Rules and all applicable precedent. Perfect 10 should be ordered to identify  
16 these basic facts without further delay.

17 To succeed on its copyright infringement claim, Perfect 10 must prove,  
18 *inter alia*, that (1) it holds valid copyright registrations in protected works and (2)  
19 those works were in fact infringed by the defendant. See, e.g., Entertainment  
20 Research Group, Inc. v. Genesis Creative Group, Inc., 122 F.3d 1211, 1217 (9th Cir.  
21 1997). Because Google has asserted safe harbors from liability for alleged  
22 infringement under the Digital Millennium Copyright Act, the existence, form and  
23 content of Perfect 10's alleged notices of infringement are highly relevant here. See  
24 Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1111-12 (9th Cir. 2007). Lastly,  
25 Perfect 10 (like any copyright plaintiff) must prove actual damages flowing from the  
26 alleged infringement, see Polar Bear Prods., Inc. v. Timex Corp., 384 F.3d 700, 708  
27 (9th Cir. 2004), or, in the event it seeks statutory damages, show that it registered the

1 works in question within three months of publication to recover damages for any  
2 infringements commenced after that publication and before the registration date. 17  
3 U.S.C. § 412(2).

4           Accordingly, on March 3, 2005—more than *three years ago*—Google  
5 served Perfect 10 with Interrogatory No. 3, asking Perfect 10 to identify all alleged  
6 infringements of all of the copyrighted works Perfect 10 is asserting against Google  
7 in this action. Despite the clear and obvious relevance of the information sought, *and*  
8 *despite having understood its discovery obligations and voluntarily produced*  
9 *precisely this sort of information in prior litigation*, see Herrick Decl., at Ex. F,  
10 Perfect 10 flatly refused to respond to Google's Interrogatory. Perfect 10 sought to  
11 excuse its failure by claiming that there are "millions of infringements of Perfect 10  
12 copyrighted works for which Google is liable" without specifically identifying even a  
13 single one. Perfect 10 further stated that it would instead produce documents  
14 reflecting this information—but Perfect 10 *never* did in a manner consistent with  
15 Rule 33(d). See Herrick Decl., at Ex. B. Google moved to compel an adequate  
16 response to Interrogatory No. 3 on February 13, 2006—more than two years ago.  
17 This Court deferred a final ruling on Google's motion, holding that for the time being,  
18 "Plaintiff shall continue producing printouts of infringements by Google of which it  
19 becomes aware in the future." May 22, 2006 Order, at 5-6.

20           Following the February 2006 hearing on Google's first motion to compel  
21 (and in an apparent attempt to address the Court's concerns at that hearing), Perfect  
22 10 served a supplemental response to Interrogatory No. 3 that did *not* cure the  
23 deficiencies in Perfect 10's initial response. Instead, it provided spreadsheets listing  
24 an assortment of non-responsive and incomplete information, including (1) the names  
25 of models depicted in various alleged infringing images and (2) the "total number of  
26 .. distinct images" of various models allegedly infringed. See Herrick Decl., at Ex.  
27 B. Still lacking this information, on November 13, 2007 Google served Interrogatory

1 No. 11, seeking information similar to Interrogatory No. 3—namely, the  
2 identification of each copyrighted work Perfect 10 is asserting in this case, and the  
3 registration numbers, alleged infringements of, DMCA notices regarding, and  
4 damages relating to each such work. Herrick Decl., at Exh. C. Once again, Perfect  
5 10 refused to provide any substantive response, repeating many of the same  
6 boilerplate objections on which it improperly relied in resisting Interrogatory No. 3.  
7 Herrick Decl., at Exh. D.

8           Perfect 10's efforts to avoid its discovery obligations are as predictable  
9 as they are incorrect. Contrary to Perfect 10's posturing, Google is not seeking to "re-  
10 litigate" anything here; neither Google's February 2006 motion nor this Court's prior  
11 deferred ruling addressed Perfect 10's Supplemental Response to Interrogatory No. 3  
12 (served April 17, 2006), or its deficient response to Interrogatory No. 11 (served  
13 December 7, 2007). **Both of these matters are being presented to this Court for**  
14 **the first time in this Joint Stipulation.** Similarly, Perfect 10 self-servingly labels  
15 this interrogatory as a "mega-request" in hopes of blurring the clear distinction  
16 between "burden" generally and "inaccessibility" under Rule 26(b)(2). Of course, the  
17 answer to this interrogatory is *not* inaccessible—it is not in archives or on backup  
18 tapes. At best, it presents a routine litigation burden to Perfect 10. Of course, burden  
19 alone is *not* a proper basis for refusing to answer an interrogatory—the burden must  
20 be undue. *There can be no undue burden where, as here, the interrogatory merely*  
21 *asks for infringement contentions regarding each registration being asserted in a*  
22 *case.*<sup>1</sup>

---

23  
24  
25 <sup>1</sup> Even worse, Perfect 10 has taken the preposterous position that because Google  
26 has greater resources and more employees, *Google* should have to undertake the  
27 burden of responding to Google's *own* Interrogatories. Herrick Decl., at Exh. E. And  
28 still worse, Perfect 10 has gone so far as to threaten Google with sanctions if Google  
(footnote continued)

1           These interrogatories implicate two of the most fundamental principles  
2 of adversarial litigation: first, that the plaintiff is the master of its claim, and second,  
3 that the defendant is entitled to be on notice of the claims against it. Here, Perfect 10  
4 has chosen to bring an extraordinarily broad claim, alleging that it holds  
5 approximately 1,000 copyright registrations covering approximately 30,000 distinct  
6 images, and that Google is allegedly responsible for approximately 2,000,000 distinct  
7 infringements thereof. See Herrick Decl., Exh. E. If Perfect 10 believes the case it  
8 has brought is unmanageable, it could certainly elect to narrow its copyright claims to  
9 a smaller number of copyrighted images (as it already has with respect to its right of  
10 publicity claim by narrowing it to nine models). But if Perfect 10 wants to press  
11 forward with a case of this scope, it must respond to legitimately propounded  
12 infringement interrogatories embracing the full scope of that case. Google's motion  
13 should be granted.

14           **B. PERFECT 10'S PRELIMINARY STATEMENT**

15           Google's interrogatories are similar to A9.com's. Answering them in the  
16 manner proposed by Google would, similarly, take over a hundred years. Just as with  
17 A9, Perfect 10 has provided all of the information sought by Google in the form of  
18 documents produced; Google wants Perfect 10 to assemble that information into  
19 charts with millions of entries. Perfect 10 suggested that Google await the outcome  
20 of the hearing on A9's motion before filing its motion. Perfect 10 wrote:

21           It does not make sense for Google and Amazon to schedule their  
22 motions for a concurrent hearing. Google should await the outcome of  
the hearing on Amazon's motion prior to filing a motion.

23           Judge Hillman already ruled that an interrogatory request made by  
24 Google that is very similar to the interrogatory requests made by  
Amazon was an impermissible mega request. Perfect 10 informed

25 \_\_\_\_\_  
26 insisted on seeking responses to these foundational Interrogatories via motion  
27 practice. Google is undeterred by Perfect 10's frivolous threats.

1 Amazon of the same prior to Amazon bringing a motion to compel  
2 regarding its interrogatory requests and asked Amazon not to bring the  
3 motion on that basis. However, Amazon brought the motion anyway  
4 and Judge Hillman indicated that the interrogatory requests made by  
5 Amazon were impermissible, and, inter alia, directed Amazon to craft  
6 new interrogatories. Amazon did not do so and instead is persisting in  
7 scheduling a second hearing on its motion regarding its original  
8 interrogatory requests.

9  
10 If Google brings its motion concurrently it will require the court  
11 and Perfect 10 to engage in duplicative work for the third time. You  
12 state in your e-mail that "I understand that Amazon has filed a similar  
13 motion to compel regarding similar interrogatories it served on Perfect  
14 10 .... Since Google's motion concerns very similar interrogatories and  
15 raises very similar issues, we think it makes sense to have both motions  
16 heard by Judge Hillman at the same time."

17  
18 This is precisely why the motions should not be heard  
19 concurrently. As you know, Judge Matz has directed the parties not to  
20 keep relitigating the same issues. Therefore, Google should not bring its  
21 contemplated discovery motion until Judge Hillman hears and rules on  
22 Amazon's discovery motion. Amazon is more than capable of aptly  
23 briefing the very similar issues about very similar interrogatories. If  
24 Google files its motion prior to Magistrate Judge Hillman making final  
25 rulings on the Amazon motion, Perfect 10 will request sanctions.

26  
27 It is clear that the defendants are working together to inundate me  
28 with busy work so that Perfect 10 cannot litigate the merits of these  
cases.

16 But Google refused and filed its motion. (See e-mails attached as Exhibit 1 to  
17 Mausner declaration.)

18 In order to save both the Court's and counsel's time, Perfect 10 refers to and  
19 incorporates its portions of the Joint Stipulation in the A9.com motion.

20 This Court has already indicated that requests like nos. 3 and 11 are mega  
21 requests. (See Exhibit 3, p. 59, lines 5-9, to Declaration of Jeffrey N. Mausner In  
22 Support of Plaintiff Perfect 10, Inc.'s Portion Of The Joint Stipulation Re: Defendant  
23 A9.com's Motion To Compel, which Perfect 10 filed on 06/23/08.) Even Google's  
24 prior counsel recognized that a less burdensome request is at least a mini-mega task  
25 to respond to. At the hearing on Google's prior attempt to compel a response to a  
26 similar but less burdensome interrogatory, Google's counsel stated "[n]ow, I will  
27 concede, Your Honor, I think it is a mega task. It's what I would call 'mini-mega.'"

1 (Id., Exh. 3, p. 59 lines 5-9.) Google's current counsel ignores this seminal issue  
2 altogether and either acts as though the issue does not exist (for example, when it  
3 complains that Perfect 10 created a 22-page chart in another litigation years ago,  
4 when a vastly smaller number of infringements and copyright registrations were  
5 involved, so why can't it create one here), or suggests that the ideal resolution is for  
6 Perfect 10 to litigate a handful of infringements and forgive the thousands of others.  
7 Google should not be allowed to escape liability for millions of infringements by  
8 requiring the victim to create an impossible-to-create spreadsheet of Google's  
9 selection.

10 Google's motion represents another brazen attempt to bury Perfect 10 with  
11 busywork that Google knows is impossible for Perfect 10 to complete. Nowhere does  
12 Google dispute that it would take over a hundred years to create the chart that Google  
13 wants. All of the information that Google wants included on that chart is available  
14 from the documents that have already been produced. Google should be sanctioned  
15 for wasting everyone's time by attempting to litigate the same motion that Amazon  
16 has before the Court, without providing any evidence whatsoever to counter Perfect  
17 10's contention that the interrogatories simply cannot be answered within anyone's  
18 lifetime.

19 Google also makes a number of statements that are patently untrue to support  
20 its motion. Google's whole analysis regarding the charts that Perfect 10 has already  
21 produced is simply wrong, for two reasons: First and foremost, Perfect 10's charts  
22 were not meant to be DMCA notices. They were meant to summarize a portion of  
23 the infringements that Perfect 10 was aware of at the time they were created. Had  
24 Google inputted the actual URLs specified in Perfect 10's DMCA notices in 2004  
25 and 2005, when it received them, it would have seen the infringements Perfect 10 was  
26 referring to. Instead, Google has incorrectly inputted the base URL, without the rest  
27 of the URL that Perfect 10 specified, three years after the fact. For example, Google

1 inputted the URL bodyweb.it instead of the actual URL that was specified in the  
2 DMCA notice, namely, bodyweb.it/Carla%20Alapont03.jpg. Of course Google will  
3 get garbage results by doing this, because it is inputting the wrong URL, three years  
4 after the fact.

5 Perfect 10 has provided Google with at least 70 DMCA notices since  
6 2001, in which Perfect 10 has sent to Google over 1,200,000 images that Perfect 10  
7 claims Google has liability for. Since June 28, 2007, Perfect 10 has been providing to  
8 Google copies of actual infringing web pages containing Perfect 10 images. When  
9 there have been some images on these web pages that did not belong to Perfect 10,  
10 Perfect 10 either crossed off the images that did not belong to Perfect 10 or checked  
11 some of the ones that did.<sup>2</sup> So Perfect 10 has identified the infringements for which it  
12 intends to hold Google liable, by virtue of its DMCA notices. As well as sending  
13 those notices to Google in the first place, Perfect 10 has produced those notices  
14 (including the print-outs of the infringements), in its document productions.<sup>3</sup>

### 15 SPECIFIC INTERROGATORIES IN DISPUTE

#### 16 GOOGLE'S INTERROGATORY NO. 3:

17 Identify all copyright infringements of your copyrights for which you  
18 claim Google is liable.

#### 19 PERFECT 10'S RESPONSE TO GOOGLE'S INTERROGATORY NO. 3:

20 Perfect 10 objects to this Interrogatory on the grounds that the  
21 interrogatory is unduely [sic] burdensome, as well as vague and ambiguous. There  
22

23 <sup>2</sup> Furthermore, to the extent that Google has been dispensing unauthorized  
24 passwords and usernames to perfect10.com, Google would be liable for the  
25 infringement of all images that appear on that website.

26 <sup>3</sup> If Google is telling the truth, it should already have this information assembled  
27 itself. Google has claimed that it has a DMCA log. However, it has not produced it,  
28 even though it has been ordered to do so by Judge Matz.

1 are millions of infringements of Perfect 10 copyrighted works for which Google is  
2 liable on hundreds of thousands of links that Google has not disabled, despite notice.  
3 Perfect 10 has already provided to Google more than 5,000 URLs on Google's servers  
4 relating to infringements of Perfect 10's copyrights. Furthermore, Google has yet to  
5 identify infringements on its servers that Perfect 10 has requested in its discovery.  
6 Subject to these objections, Perfect 10 responds as follows: Because of Google's  
7 continued unauthorized publication of usernames and passwords to Perfect10.com,  
8 amyweber.net, ambersmith.net, ariagiovanni.com, and ddgirls.com, despite repeated  
9 notice from Perfect 10, Perfect 10 alleges that Google is liable for copyright  
10 infringement for all images that have appeared on Perfect10.com; all images on  
11 amyweber.net that Amy Weber as assigned to Perfect 10; all images of Amber Smith  
12 for which the copyrights have been assigned to Perfect 10; all images of Aria  
13 Giovanni for which the copyrights have been assigned to Perfect 10; and all images  
14 for which the copyrights have been assigned to Perfect 10 by J. Stephen Hicks  
15 Photography, Inc./J. Stephen Hick/Earlyman Productions [sic], as well as all images  
16 that have appeared in Perfect 10 magazine. The copyright registrations for these  
17 works are set forth in the response to Interrogatory 2.

18 In addition, Perfect 10 will make available to Google electronic copies  
19 and/or paper print-outs of infringements which appear on Google's servers and/or on  
20 websites that Google links to. Each of those electronic copies or print-outs contains  
21 the exact URL where the infringement appeared, as well as the date on which the  
22 infringing copy was printed.

23 Perfect 10 will augment this response as it becomes aware of additional  
24 images for which it holds Google liable.

25 **SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 3:**

26 Perfect 10 objects to this Interrogatory on the grounds that the  
27 interrogatory is unduely [sic] burdensome, as well as vague and ambiguous. There

1 are millions of infringements of Perfect 10 copyrighted works for which Google is  
2 liable on hundreds of thousands of links that Google has not disabled, despite notice.  
3 Perfect 10 has already provided to Google more than 5,000 URLs identifying Perfect  
4 10 copyrighted images infringed on Google's servers. Furthermore, Google has yet to  
5 identify infringements on its servers that Perfect 10 has requested in its discovery.  
6 Subject to those objections, Perfect 10 responds as follows: Because of Google's  
7 continued acceptance of advertising from, and linking to, websites that sell virtually  
8 every one of Perfect 10's copyrighted images; because of Google's continued display,  
9 via in-line linking and/or framing, of virtually every one of Perfect 10's copyrighted  
10 images; because of Google's display of infringing reduced size images from Google's  
11 own servers; because of the material assistance that Google knowingly provides to  
12 infringing websites and its contributory infringement; because of the direct financial  
13 benefit it receives from those websites along with its right and ability to control  
14 infringing conduct and its vicarious infringement; and because of Google's  
15 unauthorized publication of usernames and passwords to Perfect10.com,  
16 amyweber.net, ambersmith.net, ariagiovanni.com, and ddgirls.com, despite repeated  
17 notice from Perfect 10, Perfect 10 alleges that Google is liable for copyright  
18 infringement for all images that have appeared on Perfect10.com; all images on  
19 amyweber.net that Amy Weber has assigned to Perfect 10; all images of Amber  
20 Smith for which the copyrights have been assigned to Perfect 10; all images of Aria  
21 Giovanni for which the copyrights have been assigned to Perfect 10; and all images  
22 for which the copyrights have been assigned to Perfect 10 by J. Stephen Hicks  
23 Photography, Inc./J. Stephen Hick/Earlyman Productions, as well as all images that  
24 have appeared in Perfect 10 Magazine. The copyright registrations for these works  
25 are set forth in the response to Interrogatory 2.

26 In addition, Perfect 10 has made available to Google, and will continue  
27 to make available to Google, electronic copies and/or paper print-outs of





1 Exhibit 5, another work in progress, currently lists over 8,000 Perfect 10  
2 copyrighted images offered, often for sale, by the Google AdWords or AdSense  
3 affiliates usenext.com, thundernews.com, rapidshare.de, and newsdemon.com listed  
4 in columns 2 through 5 of the exhibit. Typically, these websites provide the images  
5 without URLs that correspond to the particular image. The first column gives the  
6 name of the model who appears in the Perfect 10 copyrighted image which was  
7 infringed. The subsequent columns list the number of infringements of the models  
8 offered by each infringing website. Typically, almost all of the images sold by these  
9 websites display Perfect 10 copyright notices.

10 Finally, Exhibit 6, another work in progress, currently lists 580 models  
11 who are depicted in Perfect 10 copyrighted images which are infringed by the website  
12 xuset.net, to which Google links, and from which Google displays images via in-  
13 line linking and framing. The first column lists the name of the model. The second  
14 column gives the number of distinct images of that model whose copyrights are being  
15 infringed. A blank in that column means that Perfect 10 will be producing such  
16 infringements in its document production but has not yet counted up the number of  
17 distinct infringements. The third column gives the number of infringed images which  
18 contain a Perfect 10 trademark and/or copyright notice.

19 These spreadsheets are designated CONFIDENTIAL, because they give  
20 a listing of where infringing copies of Perfect 10 copyrighted photographs can be  
21 found on the internet. Despite complaints by Perfect 10, Google has continued to  
22 publish Perfect 10's confidential DMCA notices on the internet, even though Google  
23 knows that the DMCA notices provide a list of where infringing copies of  
24 copyrighted Perfect 10 photos can be located.

25 Perfect 10 is continuing to add entries to Exhibits 1-6 as it finds them.  
26 As stated above, these are works in progress, and Perfect 10 reserves the right to  
27 make changes, corrections, and additions to these spreadsheets.

1 Perfect 10 reserves the right to augment this response as it becomes  
2 aware of additional images for which it holds Google liable.

3 **PREVIOUS COURT ORDER RE. INTERROGATORY NO. 3:**

4 "Plaintiff shall continue producing printouts of infringements by Google  
5 of which it becomes aware in the future. The Court otherwise defers ruling on  
6 Google's motion concerning the interrogatories [Nos. 3 and 5] at this time." Order  
7 Regarding Google Inc.'s Motion to Compel Production of Documents and Responses  
8 to Interrogatories, dated May 22, 2006, at 5-6.

9 **GOOGLE'S POSITION ON INTERROGATORY NO. 3:**

10 Perfect 10 has categorically failed to provide a responsive answer to  
11 Interrogatory No. 3. A party may properly respond to an interrogatory either with a  
12 full narrative response under oath from the party (Fed. R. Civ. P. 33(b)(3)), with valid  
13 written objections from the party's counsel (Fed. R. Civ. P. 33(b)(4)), or, in certain  
14 situations, by producing business records (Fed. R. Civ. P. 33(d)). Perfect 10 purports  
15 to have responded to Interrogatory No. 3 with an undifferentiated hodgepodge of all  
16 three, making some written objections, giving some narrative (though non-  
17 responsive) answers, and making vague reference to an unadulterated mass of  
18 hundreds of thousands of screenshots and printouts in its document production. This  
19 is wholly inadequate. *After 3 1/2 years of litigation and a prior motion to compel,*  
20 *Perfect 10 still has not identified the most basic information upon which its case*  
21 *against Google is founded (and which this interrogatory seeks)—the infringements*  
22 *of Perfect 10's copyrighted works for which it claims Google is liable.* Perfect 10  
23 should be ordered to do so without further delay.

1 **I. PERFECT 10 SHOULD BE ORDERED TO RESPOND TO GOOGLE'S**  
2 **INTERROGATORY SEEKING IDENTIFICATION OF THE BASIC**  
3 **FACTS UNDERLYING PERFECT 10'S INFRINGEMENT CLAIM.**

4 As discussed briefly above, to succeed on its infringement claim, Perfect  
5 10 must establish, among other things, that (1) it holds valid copyright registrations in  
6 protected works and (2) those works were in fact infringed by the defendant. See,  
7 e.g., Entertainment Research Group, Inc. v. Genesis Creative Group, Inc., 122 F.3d  
8 1211, 1217 (9th Cir. 1997); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1013  
9 (9th Cir. 2001).

10 Perfect 10's burden of proof aside, Google is unquestionably entitled to  
11 a specification of which copyright registration pertains to which alleged infringed  
12 image, because as previously discussed, Perfect 10 is only entitled to sue to enforce  
13 copyrights it has properly registered with the Copyright Office. See 17 U.S.C. §  
14 411(a) ("no action for infringement of the copyright in any United States work shall  
15 be instituted until preregistration or registration of the copyright claim has been made  
16 in accordance with this title."); Loree Rodkin Mngt. Corp. v. Ross-Simons, Inc., 315  
17 F.Supp.2d 1053, 1054-55 (C.D. Cal. 2004); see also Corbis Corp. v. Amazon.com,  
18 Inc., 351 F. Supp. 2d 1090, 1111 (W.D. Wash. 2004). Moreover, if Perfect 10  
19 registered any of its works *after* the publication of those works, Perfect 10 is *not*  
20 eligible for statutory damages or attorney's fees under the Copyright Act for any  
21 infringements "commenced after first publication of the work and before the effective  
22 date of its registration, unless such registration is made within three months after the  
23 first publication of the work." 17 U.S.C. § 412(2). This limitation on the availability  
24 of statutory damages will substantially reduce the scope of Perfect 10's case in the  
25 event Perfect 10 is able to demonstrate infringement (and assuming further that no  
26 safe harbor applies).

1 Consistent with Perfect 10's burdens of proof, Google's defenses, and  
2 the material issues presented by this action, Google served Perfect 10 with  
3 Interrogatory No. 3 seeking the core alleged facts comprising the basis of Perfect 10's  
4 copyright infringement claim—namely, identification of the copyrights Perfect 10  
5 owns, and the alleged infringements thereof. See Herrick Decl., at Ex. A (Defendant  
6 Google Inc.'s First Set of Interrogatories to Plaintiff Perfect 10, Inc., dated March 3,  
7 2005, Interrogatory No. 3). For more than three years, Perfect 10 has adamantly  
8 refused to provide a substantive response.

9 Perfect 10's position regarding this routine copyright interrogatory is  
10 untenable. Under the Federal Rules, parties have the right to discover "any  
11 nonprivileged matter that is relevant to any ... claim or defense," Fed. R. Civ. P.  
12 26(b)(1), and of course, a defendant has the right to obtain answers to relevant  
13 interrogatories. Fed. R. Civ. P. 33(b)(3) ("Each interrogatory *must*, to the extent it is  
14 not objected to, be answered ....") (emphasis added). Though this issue is not often  
15 presented to federal courts because plaintiffs in these types of cases typically *want* to  
16 establish the basic information supporting their infringement claims, courts have  
17 indeed granted motions to compel responses to this type of infringement interrogatory  
18 in a wide variety of contexts. See, e.g., Kelley v. Crate & Barrel, Inc., 2008 WL  
19 2233568, at \*1 (E.D. Cal. 2008) (copyright infringement plaintiff compelled to  
20 respond to an interrogatory seeking identification of the claims, bases, and methods  
21 of calculation of its claims to actual damages); Phillip M Adams & Assoc., L.L.C. v.  
22 Dell, Inc., 2006 WL 2666408, at \*4 (D. Utah, Sept. 15, 2006) (granting motion to  
23 compel a response to interrogatories seeking basic information on alleged  
24 infringement of the plaintiff's patents); Carver v. Velodyne Acoustics, Inc., 202  
25 F.R.D. 273, 274-75 (W.D. Wash. 2001) (compelling response to an interrogatory for  
26 a chart "specifying how each element of each claim of the patents-in-suit is infringed  
27 by each [of Defendant's] product[s]"). See also Great Lakes Higher Educ. Guar.

1 Corp. v. Edfund, Inc., 2000 WL 34230091, at \*5 (W.D. Wis. 2000) ("Plaintiff's  
2 request for a bill of particulars from defendant, identifying the bases for defendant's  
3 claim of copyright infringement will be denied. Plaintiff should be able to obtain the  
4 same information through contention interrogatories. **If plaintiff encounters**  
5 **resistance, it should file a prompt motion to compel.**") (emphasis added).

6 This Court can and should order Perfect 10 to respond to this  
7 Interrogatory. Perfect 10 has objected to doing so primarily on the basis that it will  
8 take Perfect 10 "years," that it will be expensive, and that Google should just do it for  
9 them.<sup>4</sup> Not only is this response disingenuous, it defies the Federal Rules, the likely  
10 time limits Perfect 10 will be allotted at trial, and basic common sense. Google  
11 agrees that this Interrogatory presents a burden to Perfect 10, as all discovery requests  
12 do. But that burden is *not* undue—it is defined by the scope of the very case Perfect  
13

14  
15 <sup>4</sup> **Perfect 10 has never based its burden objection on Rule 26(b)(2).** To the  
16 extent it did, however, the objection is clearly improper. Rule 26(b)(2) applies to  
17 discovery of "electronically stored information from sources that the party identifies  
18 as not reasonably accessible because of undue burden or cost." See e.g., Zubulake v.  
19 UBS Warburg LLC, 217 F.R.D. 309, 318 (S.D.N.Y. 2003). Rule 26(b)(2) was  
20 designed for document requests, not interrogatory responses. But even assuming  
21 Rule 26(b)(2) could be invoked here, and even assuming Perfect 10 had timely done  
22 so in its written responses, Perfect 10 claims that responsive information can be found  
23 in its own document production—which most certainly is *not* "inaccessible" as  
24 contemplated by Rule 26(b)(2). Zubulake itself confronted documents that had been  
25 deleted, and were only accessible on backup disks. 217 F.R.D. at 317; followed by  
26 OpenTV v. Liberate Technologies, 219 F.R.D. 474, 476 (N.D. Cal. 2003) ("In the  
27 context of discovery of electronic documents, whether production of [such]  
28 documents is unduly burdensome or expensive turns primarily on whether it is kept in  
an accessible or inaccessible *format* (a distinction that corresponds closely to the  
expense of *production*)." ) (emphasis added). Perfect 10's document production is not  
archived, nor on backup tapes, nor "inaccessible" to Perfect 10 in any way. Perfect  
10 has recently gathered, reviewed, electronically marked up, and produced these  
documents. Burden-shifting under Rule 26(b)(2) is simply inapplicable here.

1 10 has elected to bring against Google, and by the way in which it has conducted the  
2 litigation thus far. It is Perfect 10—not Google or anyone else—who has chosen to  
3 file a lawsuit involving tens of thousands of copyrighted images, and who has chosen  
4 to keep records in the way it has done. If Perfect 10 believes the case it has brought  
5 is unmanageable, it could certainly agree to narrow its copyright claims to a smaller  
6 number of copyrighted images—as it already has with respect to its right of publicity  
7 claim by narrowing it to nine models—or it could keep records of alleged  
8 infringement in a way that would actually identify alleged infringements of specific  
9 copyrighted images. That choice lies with Perfect 10 and with no one else, and its  
10 failure to do so does not excuse it from responding to a properly issued interrogatory.<sup>5</sup>

11 Nor can Perfect 10 claim that Google's request is unprecedented, or that  
12 Perfect 10 is simply incapable of preparing a responsive answer—because **Perfect 10**  
13 **has provided such interrogatory responses in prior litigations before this very**  
14 **Court.** Specifically, in Perfect 10, Inc. v. Net Management Services, Inc., Case No.  
15 02-CV-3735-LGB (SHx), in order to head off a motion to compel, Perfect 10  
16 confirmed that it had "prepared and served ... a Supplemental Response to ...  
17 Interrogatories including a 22-page chart of infringing images, stating the Bates  
18 number of the printout of the image ... the URL of the website containing the  
19 image, the issue of Perfect 10 Magazine in which the image appears, [and] the  
20 relevant copyright registration," among other things. Herrick Decl., at Exh. F  
21

22  
23 <sup>5</sup> Indeed, Perfect 10's claims of burden with respect to the 113 copyright  
24 registrations currently in the case are belied by its recently-granted motion for leave  
25 to file a second amended complaint adding an additional **951** copyright registrations  
26 to its complaint. Having elected to dramatically expand the scope of its case, Perfect  
27 10 may not be heard to complain of any associated and necessary burden in  
28 conducting discovery on that expanded case. Perfect 10 owes Google supplemental  
interrogatory responses regarding all of these newly-added copyright registrations.

1 (Joint Stipulation Regarding Defendant Virtual World Holdings, AVV's First Set of  
2 Interrogatories to Perfect 10, Inc., dated June 13, 2003, at 13-14). Perfect 10 must do  
3 so here as well.

4 Perfect 10 certainly may press on with the case as-filed, but it must  
5 respond to this basic interrogatory if it intends to proffer such evidence at trial. In our  
6 system of adversarial litigation, "a party normally must be expected to bear the  
7 expense incident to litigation which it has commenced," Life Music, Inc. v. Broadcast  
8 Music, Inc., 41 F.R.D. 16, 26 (S.D.N.Y. 1966), and an interrogatory simply is not  
9 unduly burdensome when—as here—the responding party will have to gather the  
10 requested information in preparation for its own case. L.H. et. al. v. Schwarzenegger,  
11 2007 U.S. Dist. LEXIS 73752, at \*9-10 (E.D. Cal. Sept. 21, 2007). See also Life  
12 Music, 41 F.R.D. at 22, 26 (overruling the copyright plaintiff's objection that "further  
13 information pertaining to these copyrights or assignments thereof are only available  
14 to [the plaintiff] by a prohibitively expensive search in the U.S. Copyright Office");  
15 8A Wright, Miller & Marcus, Fed. Prac. and Proc., § 2174 at 309 (2d ed. 1994)  
16 ("[A]n interrogatory will not be held objectionable as calling for research if it related  
17 to details alleged in the pleading of the interrogated party, or if the interrogated party  
18 would gather the information in the preparation of its own case.").

19 In short, Perfect 10 may not refuse to respond to this basic interrogatory  
20 with claims of burden, when it was Perfect 10 who delineated that burden in crafting  
21 this lawsuit and putting more than 1,000 copyright registrations (and tens of  
22 thousands of images) at issue here.

1 **II. PERFECT 10'S ANSWER TO INTERROGATORY NO. 3, TO THE**  
2 **EXTENT IT IS NARRATIVE, IS INSUFFICIENT AND NON-**  
3 **RESPONSIVE.**

4 **A. The Text of Perfect 10's Response and Supplemental Response Fails**  
5 **To Identify A Single Alleged Infringement.**

6 In its initial and Supplemental Response to Interrogatory 3, Perfect 10  
7 failed to identify even a *single* infringement of a *single* registered work, instead  
8 responding in circular fashion that:

9 Google is liable for copyright infringement for all images  
10 that have appeared in Perfect10.com; all images on  
11 amyweber.net that Amy Weber has assigned to Perfect 10;  
12 all images of Amber Smith for which the copyrights have  
13 been assigned to Perfect 10; all images of Aria Giovanni for  
14 which the copyrights have been assigned to Perfect 10; and  
all images for which the copyrights have been assigned to  
Perfect 10 by J. Stephen Hicks Photography, Inc./J. Stephen  
Hick/Earlyman Productions, as well as all images that have  
appeared in Perfect 10 Magazine.

15 Herrick Decl., at Ex. B (Perfect 10's Response to First Set of Interrogatories From  
16 Defendant Google, Inc. to Plaintiff Perfect 10, Inc., dated April 18, 2005, at 10-11  
17 ("Initial Response"); Perfect 10's Amended/Supplemental/Updated Responses to First  
18 Set of Interrogatories from Defendant Google, Inc. [sic] to Plaintiff Perfect 10, Inc.,  
19 dated April 17, 2006, at 23-24 ("Supplemental Response:")). In essence, Perfect 10  
20 merely parroted back Google's request to "identify all infringements you are asserting  
21 Google is liable for," by answering that "there are infringements, and Google is liable  
22 for them." This "response" is no response at all. Perfect 10 also referred Google to  
23 its response to Interrogatory No. 2 , which merely lists the copyrights Perfect 10  
24 owns—not the copyrights being asserted in this litigation, nor any specific alleged  
25 infringements thereof. See Herrick Decl., at Ex. B (Initial Response, at 11;  
26 Supplemental Response, at 23). Finally, Perfect 10 blithely stated that Google is  
27 responsible for "millions of infringements ... on hundreds of thousands of links," that

1 it "has already provided to Google more than 5,000 URLs identifying Perfect 10  
2 copyrighted images infringed on Google's servers," and that it was "ma[king]  
3 available to Google ... electronic copies and/or paper print-outs of infringements."  
4 As a narrative response, this is meaningless—stating that there are infringements is  
5 not the same thing as identifying them, and Perfect 10 cannot avoid answering an  
6 Interrogatory by claiming (falsely) that it has answered it elsewhere.<sup>6</sup> Perfect 10's  
7 narrative response failed to identify **any** alleged infringements of any copyrighted  
8 works being asserted in this case--let alone of all of them.

9 **B. The Charts Attached to Perfect 10's Supplemental Response Are**  
10 **Also Insufficient and Non-Responsive**

11 In its Supplemental Response, Perfect 10 repeated the same non-  
12 responsive answer discussed in Part II.A, above, and attached six charts that Perfect  
13 10 claimed "summarize[ed] *some* of the information" requested by Interrogatory No.  
14 3. Herrick Decl, at Ex. B (Supplemental Response at 24 (emphasis added)). In truth,  
15 these six charts are completely non-responsive, and again fail to identify even a single  
16 specific infringement of any specific Perfect 10 copyrighted image.

17 **1. Chart at Exhibit 1: Alleged Distinct Perfect 10 Infringements**  
18 **on Google Image Search**

19 Perfect 10 describes the contents of its first chart, attached to its  
20 Supplemental Response to Interrogatory No. 3 as Exhibit 1, as follows:

21 Exhibit 1 is a work in progress which currently lists approximately  
22 2,000 distinct Perfect 10 copyrighted images copied, displayed and  
23 distributed via Google Image Search. The first column lists the name of  
24 the model who appears in the Perfect 10 copyrighted image that Google  
25 infringed. The second and third columns identify the exact page of  
26 Perfect 10 magazine or web page from perfect10.com where the  
27 infringed image originates. The fourth and fifth columns give one or

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26 <sup>6</sup> To the extent this is an attempt to respond via Rule 33(d), Google addresses the  
27 deficiencies in that response below.

1 two dates when Google infringed that image. Perfect 10 will provide  
2 Google with model folders containing such infringements on those  
3 dates. The sixth column has a "1" if there is a copyright notice or a  
4 "Perfect 10" mark on the image, denoting that a trademark  
infringements is involved. The seventh column contains in some cases  
the website URL from which Google copied the image.

5 Herrick Decl., at Ex. B (Supplemental Response, at 24).<sup>7</sup> Even the most cursory  
6 examination of this chart demonstrates that it does not identify any actual  
7 infringements of any specific copyrighted images. Though the chart purports to list  
8 copyrighted images found both on Perfect 10's website and in Perfect 10's print  
9 magazine, *no specific images are identified in either case*. For the online images,  
10 the chart lists only a model name and identifies "website" as the location.<sup>8</sup> Perfect 10  
11 does not disclose which specific website image it is referring to (of the thousands of  
12 images on its website), nor which copyright registration number, if any, correlates to  
13 that image (of the 1,000+ copyright registrations at issue in this case).<sup>9</sup> See  
14 www.perfect10.com; Herrick Decl., at Ex. G (Perfect 10's (Proposed) Second  
15

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16 <sup>7</sup> Though Perfect 10 stated that its charts were a "work in progress," Google has  
17 received no updates to them whatsoever.

18 <sup>8</sup> This chart lists a 2-digit number as the "page" on which the image may be  
19 found, but there is no such nomenclature on Perfect 10's public-facing website.

20 <sup>9</sup> What's worse, Perfect 10 has organized this chart—and every other chart in its  
21 Supplemental Response—by *model name* rather than by copyright registration  
22 number. In many cases Perfect 10's registration numbers (and any description) give  
23 no indication whatsoever of the models included within that registration number (see,  
24 e.g. registrations for particular issues of "Perfect 10 Magazine," "Perfect 10 Website,"  
25 or "Boxing Beauties Website.") Google has no way of knowing which models  
26 correspond to which registration number. Even the registration descriptions  
27 containing model names are insufficient for this purpose. For example, at least 78  
separate copyright registrations claimed by Perfect 10 in this case have descriptions  
including the name "Marketa," and 23 more contain the name "Amy Weber." Google  
has no way of knowing which registration number corresponds to which alleged  
infringement. See Herrick Decl., at Exh. G.

1 Amended Complaint, Exh. 7 (lodged June 12, 2008)). Moreover, the column  
2 supposedly identifying specific infringements of these unspecified images, entitled  
3 "IMAGE COPIED FROM," is *left entirely blank* in approximately 2/3 of the rows  
4 (*thus not even attempting to identify an infringement*). Even when this column *does*  
5 contain some text, the text provided is merely a domain name, and is thus insufficient  
6 to identify the existence or location of any specific infringement.<sup>10</sup>

7 To take an illustrative example, consider the seventh line of the very first page of the  
8 chart. The headings and line 7 of that chart are as follows:

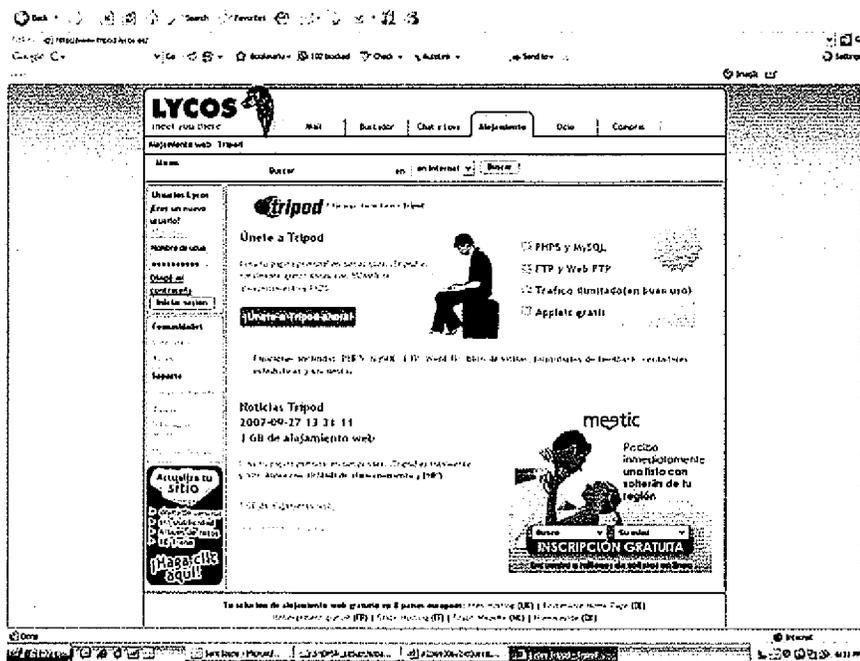
9 [REDACTED]

10 [REDACTED]

11 In column 1, Perfect 10 claims infringement of some unspecified image of a model  
12 named "Abby Essien." It claims this unspecified image can be viewed on the  
13 perfect10.com website, at "page 4," but does not explain what "page 4" refers to, nor  
14 does it give an image or webpage URL for this alleged copyrighted image (the  
15 information needed to actually locate a specific image on a website). This chart also  
16 fails to identify the copyright registration (if any) pertaining to this unspecified  
17 image. As for identification of alleged infringements of this unspecified image,  
18 column 7 of the chart lists the website [REDACTED] Typing this URL into a  
19 web browser yields the following:

20  
21 \_\_\_\_\_

22 <sup>10</sup> Moreover, even for the columns that do contain a URL, and even assuming  
23 those URLs direct the user to images that infringe Perfect 10's copyrights, that  
24 information is wholly insufficient to identify any infringement *by Google*. The mere  
25 fact that a third-party webpage infringes an alleged copyright of Perfect 10 does not  
26 show that Google is somehow liable for it. Rather, to properly answer this  
27 interrogatory propounded by *Google*, Perfect 10's response must identify how *Google*  
28 has infringed the registrations at issue. Perfect 10's chart fails to provide this  
responsive information.



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10 The listed URL is not a free-standing URL at all, but instead automatically redirects  
11 the user to the above-pictured page: [www.tripodlycos.es](http://www.tripodlycos.es). The redirected page  
12 displays a handful of images, none of which appears to be a Perfect 10 image (i.e. an  
13 image depicting a young woman in a state of partial or complete undress). As far as  
14 Google is aware, none of Perfect 10's images asserted in this litigation depict a  
15 woman *and* a man together, and thus, the single image of a female on this page  
16 (depicting a fully clothed man and woman holding hands) cannot be a Perfect 10  
17 image. To eliminate any doubt, an Internet search for "Abby Eissen" yields the  
18 following picture, apparently from her current modeling agency:



1 Profile of "Abby Eissen," *available at*  
2 <http://www.impactmodelsagency.co.uk/FemaleModel.aspx?modelID=39>. Quite  
3 clearly, no infringing photograph of Ms. Eissen appears on the webpage associated  
4 with the URL listed on Perfect 10's chart.

5 To take another example, on page 14 of the chart, at line, Perfect 10 lists the  
6 model name Carla Alapont, and claims ownership of copyrighted images  
7 displayed on perfect10.com on "page 8." This chart entry appears as follows:

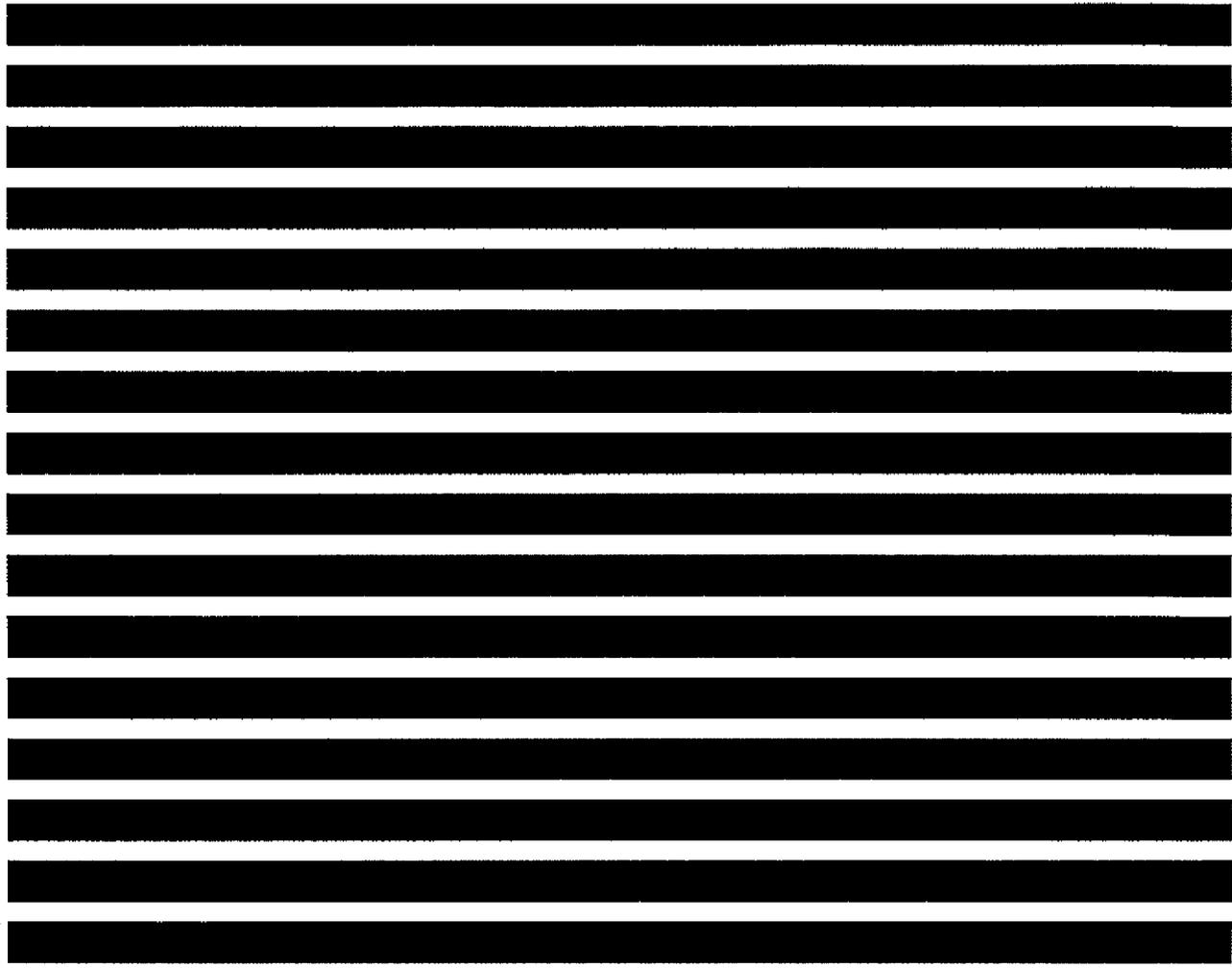
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]

11  
12  
13 Again, the chart does not identify which specific photograph of Carla Alapont Perfect  
14 10 claims it owns, nor which copyright registration(s) (if any) correspond to this  
15 photograph, nor any information—such as an image or webpage URL—that would  
16 allow Google to locate and view the image on Perfect 10's website.

17 Similarly again, Perfect 10 also fails to identify any specific  
18 infringement(s) of this unspecified image. The chart lists only the website  
19 [REDACTED] which, when entered into a web browser yields the following:

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The only images found on this webpage are of male bodybuilders. It contains no images of women, much less Perfect 10 models, nor does it even reference Carla Alapont.

As for chart entries referencing images from Perfect 10's print magazine, which do identify magazine page numbers, the information is still insufficient to answer the interrogatory because the print magazine often contains several pictures on a single page. For example, on page 8, line 10 of the chart at Exhibit 1, Perfect 10 claims ownership and infringement of an image of a model named Anita Kelli, found in the Perfect 10 print magazine, vol. 2, no. 4, at page "11c." That chart entry is as follows:

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[REDACTED]

Page 11 of that magazine issue, in turn, contains four images:



While Perfect 10's nomenclature certainly narrows down the choices (presumably, "page 11c" refers to the image either at the top right or the bottom left), Google is still left to guess at which one Perfect 10 believes was infringed. And further, for this entry (as for the majority of entries on the chart), Perfect 10 gives literally *no information* regarding when, where, or by whom it believes one of these images has been infringed. Specifically, Column 7 of the chart, which is titled "Image Copied From," is again left entirely blank, meaning that Perfect 10 has identified no infringement of any kind with respect to this (unspecified) image of Ms. Kelli.

In sum, the chart provided as Exhibit 1 to Perfect 10's Supplemental Response to Interrogatory No. 3 fails to identify any specific infringements of any specific copyrighted images owned by Perfect 10 and asserted in this action.

1                   2.     **Chart at Exhibit 2: Alleged Number of P10 Infringing Images**  
2                                   **Linked Via Google Image Search to Infringing Websites**

3                   Perfect 10 describes the contents of its second chart as follows:

4                   Exhibit 2, another work in progress, currently lists over 11,700 Perfect  
5                   10 copyrighted images (*not necessarily distinct*) that have been  
6                   infringed by Google via its Image Search, and linked to various  
7                   infringing websites. The first column lists the name of the model who  
8                   appears in the Perfect 10 copyrighted image that Google displayed  
9                   without authorization. The second column gives an infringing website  
10                  from which Google copied that image, and to which Google links that  
11                  image. The third and fourth columns give the total number of images,  
12                  and the number of distinct images of that model which Google  
13                  displayed, copied, and linked in that fashion. The fifth and sixth  
14                  columns give one or two dates when such infringements were  
15                  committed by Google. The seventh column has a number which shows  
16                  the number of images which have a Perfect 10 copyright notice or a  
17                  "Perfect 10" on the image, denoting that a trademark infringement is  
18                  involved. The eighth column has a number which shows the number of  
19                  images which have a "p10" (another Perfect 10 trademark) in part of the  
20                  image description provided by Google.

21                  Herrick Decl., at Ex. B (Supplemental Response, at 24-25 (emphasis added)).

22                  This chart suffers from many of the same defects as the chart at Exhibit  
23                  1—and several more. This chart does not even bother to attempt to identify any  
24                  specific Perfect 10 copyrighted images, nor does it list an image or web page URL  
25                  where the unspecified images can be viewed. Similarly, this chart fails to identify  
26                  any specific alleged infringements, nor any information sufficient to locate such  
27                  alleged infringements (such as an image or web page URL where the alleged  
28                  infringing image might be found).

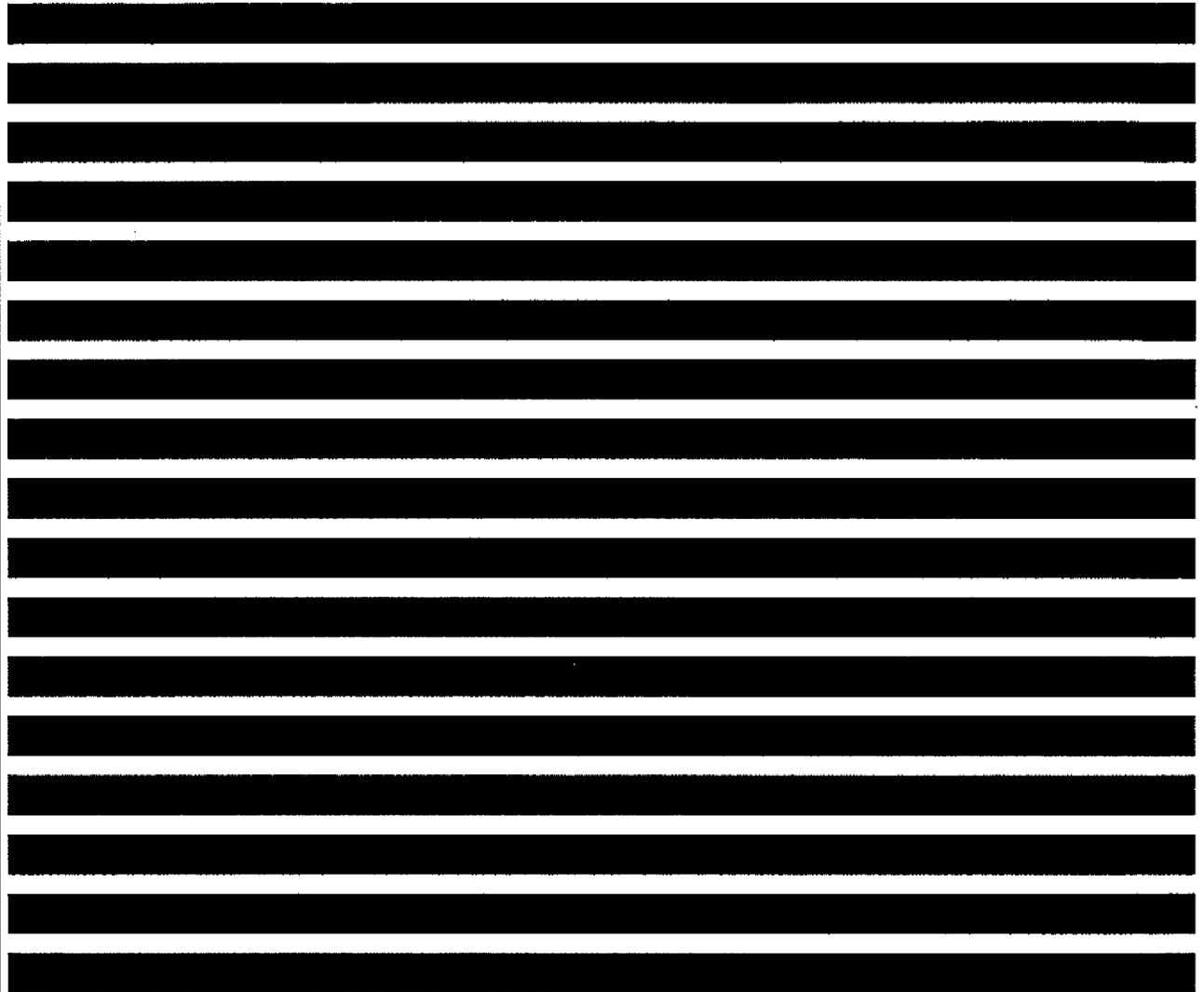
                  For example, the very first entry on the chart lists just a model name,  
"abby essien" (with no identification of any specific image, let alone a copyrighted  
image), and claims infringement by the website [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1 Entering [REDACTED] into a web browser, however, yields only the  
2 following:



20 This site appears to be a discussion board whose only image is of a muscular man  
21 doing a bicep curl. Google presumes this is not Ms. Essien. As with the chart at  
22 Exhibit 1, this chart fails to identify any specific infringements of Perfect 10  
23 copyrighted images.

24 **3. Chart at Exhibit 3: Alleged Google Cached Infringements**

25 Perfect 10 describes the contents of this chart as follows:

26 Exhibit 3, also a work in progress, currently lists over 9,000 Perfect 10  
27 infringements displayed without authorization by Google via its cached  
28 link. The first column lists the name of the model who appears in the

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Perfect 10 copyrighted image which is being infringed. The second column gives the infringing website from which Google displayed the image. The third column gives the number of distinct images of that model which Google displayed from that infringing website via Google's cached links. The fourth column gives a date that Google infringed the image. The fifth column gives the number of Perfect 10 copyright notices or instances of the "Perfect 10" mark appearing on the images being infringed by Google. There are over 4,400 such copyright notices in Exhibit 3. Perfect 10 will produce to Google folders of infringements for infringing websites and/or models listed in Exhibit 3.

Supplemental Response, at 25.

This chart suffers from similar infirmities as those discussed above. It lists a model name, but does not associate that model name with any specific image in which Perfect 10 claims to hold a copyright. It identifies the allegedly infringing site by domain name only, without identifying by image URL (or even webpage URL) the location of any alleged infringement.

As an example, the very first entry on the chart is again for a model identified as "Abby Eissen," and the allegedly infringing site is listed as

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Again, no specific copyrighted image depicting Ms. Eissen is identified. As for any alleged infringement, entering the listed URL into a web browser yields the following:

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[REDACTED]

This webpage displays multiple images, none of which appear to be of Abby Eissen. As mentioned above, an Internet search for "Abby Eissen" yields the following picture:



1 Profile of "Abby Eissen," *available at*  
2 <http://www.impactmodelsagency.co.uk/FemaleModel.aspx?modelID=39>.

3 To take another example, the first entry on page 20 of the chart lists the  
4 model name "irina voronina" and identifies the infringing site as [REDACTED]:

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8  
9 Again, no specific copyrighted image is identified here. As for any alleged  
10 infringement, entering the listed URL into a web browser yields only the following  
11 confirmation that the website does not exist or is not available:

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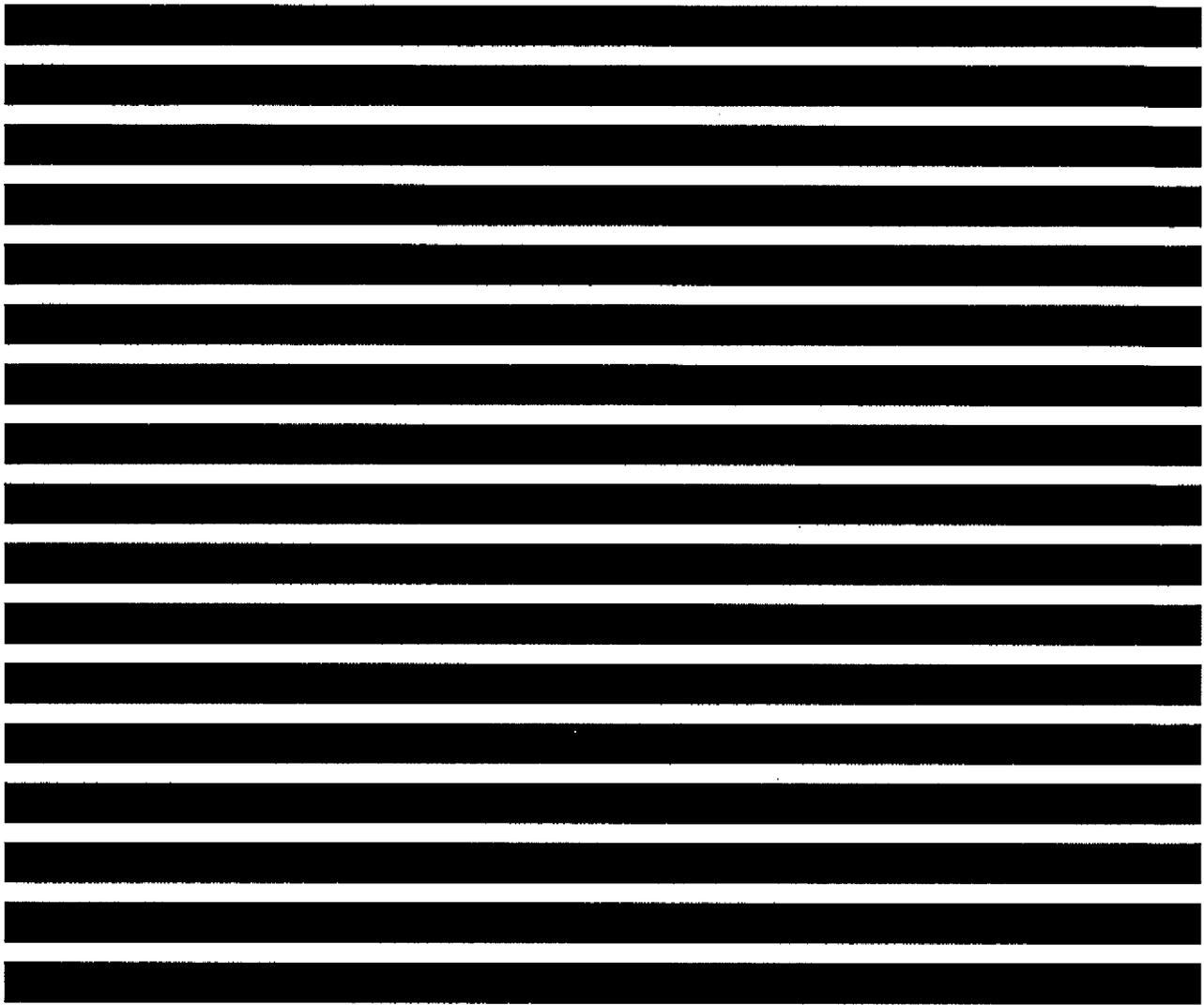
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18 Thus, this chart is utterly devoid of the basic information sought by Interrogatory No.  
19 3.

20 **4. Chart at Exhibit 4: Alleged Google Ads Next To Perfect 10**  
21 **Copyrighted Images**

22 Perfect 10 describes the contents of this chart as follows:

23 Exhibit 4, another work in progress, currently lists over 2,300 Perfect 10  
24 copyrighted images, next to which Google has placed Google  
25 advertisements, on infringing third party websites. The first column  
26 lists the name of the model who appears in the Perfect 10 copyrighted  
27 image which was infringed. The second column lists the infringing  
28 website on which Google has placed ads next to Perfect 10 copyrighted  
images. The third column gives the number of distinct images of that  
model around which Google has placed ads on that infringing website.  
The fourth column gives a date on which at least one such ad appeared

1 alongside the image. Perfect 10 will provide to Google folders of  
2 infringements for websites and/or models listed in Exhibit 4.

3 Herrick Decl., at Ex. B (Supplemental Response, at 25-26).

4 Again, as with the prior chart, no specific copyrighted Perfect 10 images  
5 are identified, nor are any specific infringements thereof identified. For example, the  
6 first entry on page two of the chart gives the model name "Aline Matos," and lists the  
7 infringing website as [REDACTED]:

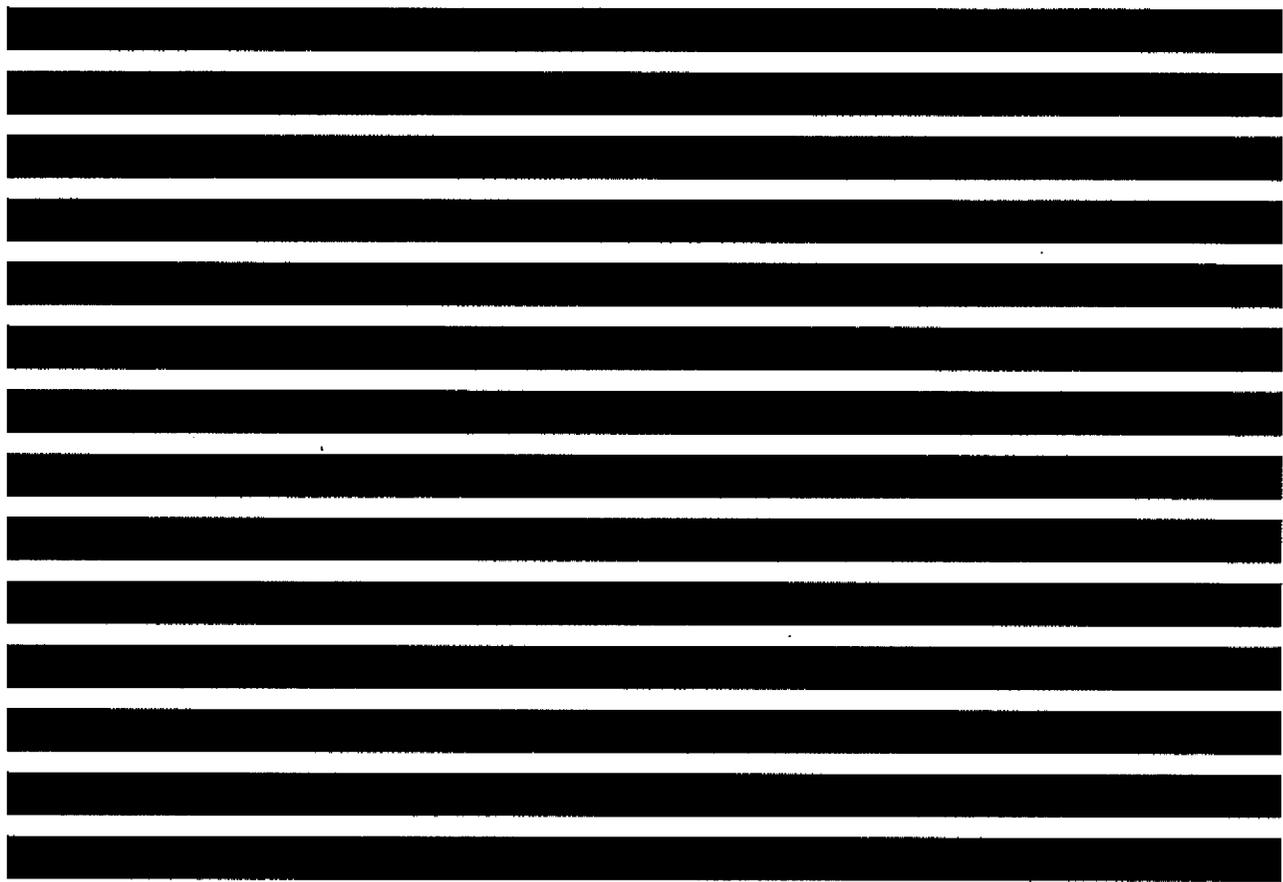
8 [REDACTED]

9 [REDACTED]

10 Like the previous examples, no specific copyrighted image of Ms. Matos is  
11 identified. As for alleged infringements, entering the listed URL into a web browser  
12 yields the following:

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None of these images appear to be of Ms. Matos, as confirmed by comparing these images to the following image of Ms. Matos as she appears in Perfect 10 Magazine:



1 Perfect 10 Magazine, Vol. 3 No. 2, at 8 (partial image). Nor is there any other  
2 indication that any of the images displayed on [REDACTED] is a Perfect 10  
3 copyrighted image.

4 Similarly, the first entry on page 15 of the chart gives the model name  
5 "shannon hobbs" and the allegedly infringing site of [REDACTED]:

6 [REDACTED]  
7 [REDACTED]  
8 Again, no specific copyrighted image of Ms. Hobbs is identified. As for alleged  
9 infringements, entering the listed URL into a web browser yields just a single image,  
10 of a black female:

11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]

23  
24  
25 Shannon Hobbs, however, is a Caucasian female, as reflected in this partial image  
26 from Perfect 10 Magazine:



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4 Perfect 10 Magazine, Vol. 3 No. 2, at 47 (partial image). Again, this chart does not  
5 identify *any* specific infringement of *any* specific copyright in *any* specific Perfect 10  
6 image.

7  
8 **5. Chart at Exhibit 5: Alleged Infringements on Google**  
9 **Sponsored Links**

10 Perfect 10 describes the contents of this chart as follows:

11 Exhibit 5, another work in progress, currently lists over 8,000 Perfect 10  
12 copyrighted images offered, often for sale, by the Google AdWords or  
13 AdSense affiliates usenext.com, thundernews.com, rapidshare.de, and  
14 newsdemon.com listed in columns 2 through 5 of the exhibit.  
15 Typically, these websites provide the images without URLs that  
16 correspond to the particular image. The first column gives the name of  
17 the model who appears in the Perfect 10 copyrighted image which was  
18 infringed. The subsequent columns list the number of infringements of  
19 the models offered by each infringing website. Typically, almost all of  
20 the images sold by these websites display Perfect 10 copyright notices.

21  
22 Herrick Decl, at Ex. B (Supplemental Response, at 26). This chart too utterly fails to  
23 provide the information called for by Interrogatory No. 3. The first four lines of the  
24 chart appear as follows:

25  
26  
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28

[REDACTED]

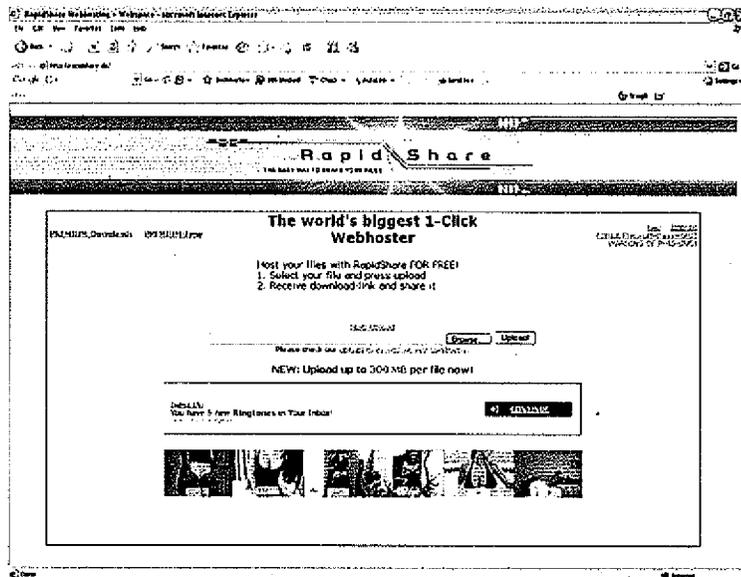
[REDACTED]

[REDACTED]

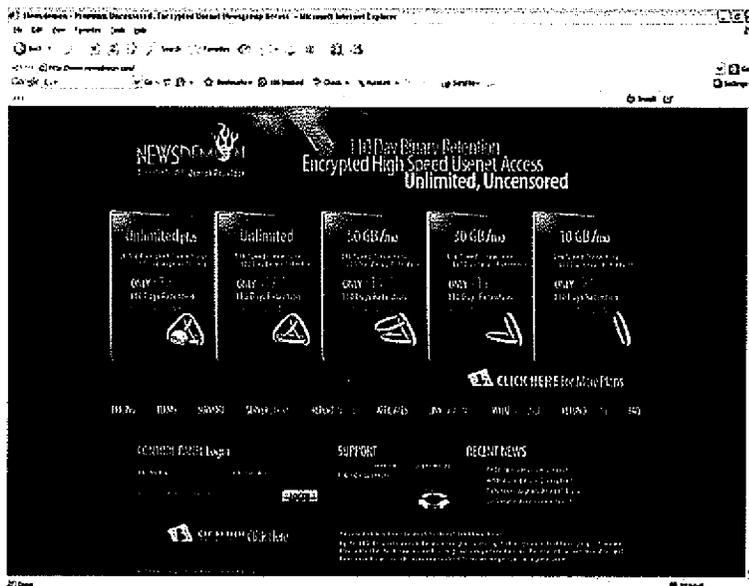
[REDACTED]



1 Rapidshare.de, listed in column 4, appears as follows:



13 And finally, newsdemon.com, listed in column 5, appears as follows:



1 Again, this chart does not identify even a single particular Perfect 10 copyrighted  
2 image, nor a single alleged infringement thereof.

3 **6. Chart at Exhibit 6: Alleged Perfect 10 Copyright**  
4 **Infringements on Xuset.com**

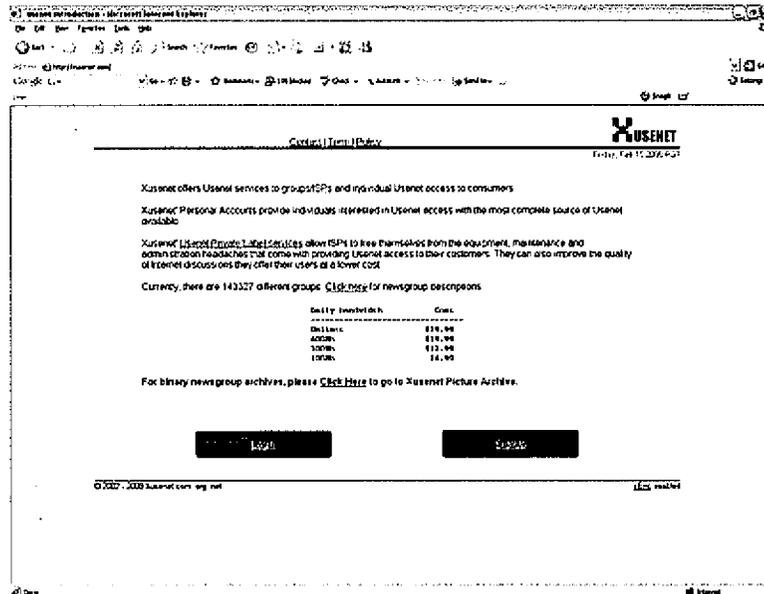
5 Perfect 10 describes the contents of this chart as follows:

6 Finally, Exhibit 6, another work in progress, currently lists 580 models  
7 who are depicted in Perfect 10 copyrighted images which are infringed  
8 by the website xuset.com, to which Google links, and from which  
9 Google displays images via in-line linking and framing. The first  
10 column lists the name of the model. The second column gives the  
11 number of distinct images of that model whose copyrights are being  
infringed. A blank in that column means that Perfect 10 will be  
producing such infringements in its document production but has not  
yet counted up the number of distinct infringements. The third column  
gives the number of infringed images which contain a Perfect 10  
trademark and/or copyright notice.

12 Herrick Decl., at Ex. B (Supplemental Response, at 26). This chart's deficiencies are  
13 identical to those discussed above for Exhibit 5. The first four entries of the chart are  
14 as follows:



19 Again, no specific Perfect 10 copyrighted images are listed in this chart. The URL  
20 provided, xuset.com, appears as follows, and is devoid of even a single image:



As with the others, this chart does not identify even a single particular Perfect 10 copyrighted image, nor a single alleged infringement thereof.

**III. PERFECT 10'S ANSWER TO INTERROGATORY NO. 3, TO THE EXTENT IT REFERENCES BUSINESS RECORDS, IS ALSO INSUFFICIENT AND NON-RESPONSIVE.**

Perfect 10's reference to unspecified documents it has produced in this case (presumably pursuant to Rule 33(d), though Perfect 10's response does not reference the governing Rule) is as deficient as its narrative response.

Rule 33 permits a party to respond to an interrogatory by producing business records rather than giving a narrative response, but only where the answer "may be determined by examining, auditing, compiling, abstracting, or summarizing" those business records, and only "if the burden of deriving or ascertaining the answer [from those documents] will be substantially the same for either party." Fed. R. Civ. P. 33(d). Further, under this option, the responding party must specify the particular business records from where the answer to the interrogatory may be obtained "in

1 sufficient detail to enable the interrogating party to locate and identify them as readily  
2 as the responding party could." Id.

3 Ninth Circuit and Central District authorities applying Rule 33(d) have  
4 held consistently that the wholesale reference to a voluminous document production  
5 is inadequate. Instead, a party wishing to invoke Rule 33(d) "has the duty to specify,  
6 by category and location, the records from which answers to interrogatories can be  
7 derived." O'Connor v. Boeing N. Am., Inc., 185 F.R.D. 272, 277 (C.D. Cal. 1999)  
8 (quoting Rainbow Pioneer No. 44-18-04A v. Hawaii-Nevada Investment Corp., 711  
9 F.2d 902, 906 (9th Cir. 1983)). This means that "when voluminous documents are  
10 produced under Rule 33(d), they must be accompanied by indices designed to guide  
11 the searcher to the documents responsive to the interrogatories." Id. at 278.<sup>11</sup> See  
12 also Cambridge Electronics Corp. v. MGA Electronics, 227 F.R.D. 313, 323 (C.D.  
13 Cal. 2004) (an answer is inadequate if "the party fail[s] to specify **precisely where** in  
14 the records the requested information [can] be found") (emphasis added); Bowoto v.  
15 Chevron Corp., 2006 WL 2507454, at \*3 (N.D. Cal. Aug. 29, 2006) (quoting the  
16 Advisory Committee Notes to Rule 33 for the proposition that "[a] respondent may  
17 not impose on an interrogating party a mass of records as to which research is  
18 feasible only for one familiar with the records," and finding that the responding party  
19 "abused Rule 33(d) by referring [the propounding party] to thousands of pages of  
20 technical documents").

21  
22  
23 <sup>11</sup> Cf. Wagner v. Dryvit Systems, Inc., 208 F.R.D. 606, 610-11 (D. Neb. 2001)  
24 ("Dryvit asserts that directing plaintiffs to find the discovery among volumes of  
25 irrelevant information complies with the Federal Rules of Civil Procedure. To the  
26 contrary, producing large amounts of documents in no apparent order does not  
27 comply with a party's obligation under Rule 34.") (citing Stiller v. Arnold, 167 F.R.D.  
28 68, 70-71 (N.D. Ind. 1996)); T.N. Taube Corp. v. Marine Midland Mort. Corp., 136  
F.R.D. 449, 456 (W.D.N.C. 1991).

1 Here, Perfect 10 has categorically failed to satisfy Rule 33(d). First, the  
2 answer to Interrogatory No. 3 may **not** be found in Perfect 10's document production.  
3 The copyright registrations Perfect 10 has produced frequently are not accompanied  
4 by deposit materials, and therefore do not identify any particular images, nor do they  
5 list any infringements of any of those (unspecified) images. Further, in most  
6 instances, the printouts and screenshots Perfect 10 claims identify "infringements" of  
7 Perfect 10's copyrights do not identify which particular image therein Perfect 10  
8 claims is infringing, and in no instance do they list the copyright registration number  
9 or the deposit material containing the copyrighted images. The answer to this  
10 interrogatory plainly cannot be gleaned from the face of these documents.

11 Second, even assuming the answers could be found in the documents,  
12 Perfect 10 has **not** specified the particular business records from where the answer to  
13 the interrogatory may be obtained. Specifically, Perfect 10 has failed to make a  
14 connection between registration certificate, copyrighted image, and infringing  
15 screenshot—though it could have, by affixing control numbers to these documents  
16 and creating an index.<sup>12</sup>

17  
18  
19 <sup>12</sup> Perfect 10 could easily affix control numbers to its document production.  
20 Parties in commercial litigation do this routinely, as a matter of course. Indeed,  
21 Perfect 10 has done so in prior litigations, and has demonstrated its ability to affix  
22 such markings to documents in this very case. See Exhibit 6 to the Declaration of Dr.  
23 Norman Zada in Support of Motion of Plaintiff Perfect 10, Inc. for Order Granting  
24 Leave to File Second Amended Complaint, filed June 16, 2008 (Docket Number 298)  
25 (containing a screenshot affixing "check-marks" to flag certain aspects of the  
26 document). Clearly, Perfect 10 is reviewing alleged infringements one-by-one, and  
27 modifying the files to mark the alleged infringements. There is no reason why  
28 Perfect 10 could not also mark these pages with control numbers, and/or with  
copyright registration numbers—as it has previously done in the Net Management  
Case. See Herrick Decl., at Ex. F.

1 Third, it is not just as easy for Google to identify infringements from  
2 Perfect 10's production as it would be for Perfect 10. Whereas it may be "obvious" to  
3 Perfect 10 that a particular image in its document production (allegedly) infringes a  
4 particular Perfect 10 copyrighted image, Google lacks Perfect 10's familiarity with its  
5 models, images, magazines and copyright registrations, so such alleged infringements  
6 are not at all "obvious" to Google (or to anyone else). As such, the burden of  
7 deriving or ascertaining the answer from Perfect 10's documents will not be  
8 substantially the same for either party. See Fed. R. Civ. P. 33(d).

9 Though Perfect 10 claims that it has effectively provided copyright  
10 registration information in its answer to Google's Interrogatory No. 2<sup>13</sup> and in its  
11 production, and has effectively identified infringements via its production of printouts  
12 and screenshots, Perfect 10 is wrong on both counts.

13 Regarding registrations, Perfect 10's document production does not  
14 provide the copyright registration information Google has requested. Perfect 10 has  
15 produced over 200 registration certificates in a sub-folder of a hard drive it produced  
16 on April 18, 2006, several hundred on a DVD also produced on April 18, 2006, and  
17 several hundred more in various sub-folders of a hard drive it produced on May 20,  
18 2008. For many of these registration certificates, Perfect 10 has not produced any  
19 deposit materials at all, giving Google no way to know what images correspond to  
20 which registrations.<sup>14</sup> And even when Perfect 10 has produced deposit materials,  
21

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22  
23 <sup>13</sup> Again, Perfect 10's response to Interrogatory No. 2 is just a bare list of all  
24 registrations Perfect 10 claims to own, including registrations not being asserted, and  
25 does not connect the copyright registration number with either (1) a particular image  
26 of the many registered thereunder, or (2) any of the alleged infringements pertaining  
27 thereto (via either a narrative or Rule 33(d)-compliant response).

28 <sup>14</sup> A registration certificate is simply a form where the registrant identifies his  
name, address, the title of the work, date of creation, and the like. It contains no  
(footnote continued)

1 rather than save the certificates and deposit materials together in the same file, or at  
2 least in the same subfolder, it has saved the materials as separate files in separate  
3 locations. Accordingly, to identify the registration number corresponding to any  
4 particular (allegedly) copyrighted image, Google must manually review each and  
5 every image in each and every one of the files containing deposit materials—and  
6 there are hundreds of such files, each containing anywhere from one image to  
7 hundreds of images.<sup>15</sup> Once Google finds the image in question, it must refer to the  
8 registration number in the file name (which may be as many as four levels of  
9 "nesting" away from the actual image file), and then search for another separate file  
10 somewhere else in Perfect 10's production containing the registration certificate  
11 corresponding to those deposit materials.<sup>16</sup> Since Perfect 10 claims ownership of  
12 approximately 30,000 distinct copyrighted images, Perfect 10 apparently expects  
13 Google to repeat this process *30,000 times* in order to answer its *own* interrogatory,  
14 without the benefit of any index of any kind—as Rule 33(d) clearly requires.

15 \_\_\_\_\_  
16 images itself. When an applicant registers an image, he provides that image  
17 separately, as deposit. Accordingly, if Google is to know what images are registered  
18 to Perfect 10, the registration certificates alone are not enough; Google needs to see  
19 the deposit materials.

20 <sup>15</sup> For example, Perfect 10 registered each issue of Perfect 10 Magazine as one  
21 work with one registration number. Each issue is over 100 pages long, and contains  
22 well over 100 separate images.

23 <sup>16</sup> It must be noted that Perfect 10 need not have organized its document  
24 production this way. Perfect 10 just as easily could have made a subfolder for each  
25 registration number and saved the registration certificate *and* the corresponding  
26 deposit materials *together* in that subfolder. Perfect 10's failure to do so is baffling,  
27 since it presumably submitted the registration certificate and the deposit materials to  
28 the Copyright Office together (likely in the same envelope). Either Perfect 10 has  
been woefully disorganized in its record-keeping, or it has purposefully separated the  
certificates and deposits in its production to make things difficult for Google and the  
other defendants it is currently pursuing. Either way, Perfect 10 must bear the burden  
caused by its faulty recordkeeping.

1 As for identifying infringements of its copyrights, Perfect 10 claimed  
2 that it would supply certain unspecified "electronic copies and/or paper printouts" of  
3 alleged infringements of Perfect 10's copyrighted works. Supplemental Response at  
4 24. Perfect 10 has indeed produced such paper printouts and screenshots of alleged  
5 infringements—hundreds of thousands of them, to be more precise—scattered  
6 amongst over *600 Gigabytes* of data, constituting *millions* of pages of documents, that  
7 comprise Perfect 10's document production to date. In direct contravention of Rule  
8 33(d), however, Perfect 10's response to Interrogatory No. 3 fails to identify or  
9 reference even a single specific page of Perfect 10's document production, let alone  
10 direct Google to just where amongst the millions of pages of documents Google  
11 might find the complete answer to Interrogatory No. 3. Further, because Perfect 10  
12 did not index, Bates stamp or catalogue its production of screenshots and printouts in  
13 any way—nor did it associate any of them, by spreadsheet, chart or otherwise, with  
14 *any* Perfect 10 registered copyright—it is apparent that the answer to Interrogatory  
15 No. 3 most certainly *cannot* be readily ascertained from this unadulterated mass of  
16 thousands of printouts and screenshots.

17 As described above, Perfect 10's wholesale reference in its Supplemental  
18 Response to unspecified "printouts" in its document production is facially inadequate  
19 under Rule 33(d) and governing case law. Nevertheless, a concrete example from  
20 Perfect 10's document production drives the point home. One of the many hundreds  
21 of thousands of such pages in Perfect 10's document production appears as follows:  
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menu: [actresses a - i](#) | [actresses l - m](#) | [actresses n - z](#) | [models](#) | [singers](#)



also check out these REAL FREE picture sites



link to Holly celebs

This printout contains at least 15 distinct images, and provides no indication whatsoever as to whether one or more of these images is owned by Perfect 10 or has been registered with the Copyright Office (and under what registration number). Thus, even had Perfect 10's Rule 33(d) response directed Google to this specific page of its massive production (which it did not), the information called for by Interrogatory No. 3 *simply is not ascertainable* from this printout (and the many others like it).

1 As another example, the following screenshot contains the name "Irina  
2 Voronina," a model who is claimed to have appeared in Perfect 10's magazine and/or  
3 website:

4  
5 Irina Voronina free nude pictures

Page 1 of 2

6 IRINA VORONINA

7 **CLICCA PER**  
8 **INGRANDIRE** 



16 Galleria 1

Galleria 2

17 <http://spazioinwind.libero.it/ironste/irina.html>

4/1/2003

18 Again, this screenshot printout fails to identify *which* of these images (if any) Perfect  
19 10 owns copyright registrations to, and which of these images (if any) are allegedly  
20 infringing.

21 In order to identify which of these images might be infringing, Google  
22 would first have to manually click through roughly 30,000 distinct image files  
23 contained in various folders scattered throughout Perfect 10's production to attempt to  
24 identify a Perfect 10 image that looks like one or more of the images on this  
25 screenshot (and since Perfect 10 has failed to produce deposit materials for all of its  
26 registrations, Google may be searching for an image that doesn't even exist in Perfect  
27 10's production). Second, if Google does locate an image in the deposit materials



1 Stipulation Regarding Defendant Virtual World Holdings, AVV's First Set of  
2 Interrogatories to Perfect 10, Inc., dated June 13, 2003, at 13).

3 Accordingly, Perfect 10 should be ordered to provide Google with either  
4 (1) a narrative response identifying "all copyright infringements of [Perfect 10's]  
5 copyrights for which [Perfect 10] claim[s] Google is liable," or (2) a Rule 33(d)  
6 response which sets forth indices or other guidance directing Google to which  
7 specific portions of which specific pages of which specific documents in Perfect 10's  
8 document production the complete answer to Interrogatory No. 3 may be found. See,  
9 e.g., Cambridge Electronics Corp. v. MGA Electronics, 227 F.R.D. 313, 323 (C.D.  
10 Cal. 2004); O'Connor v. Boeing N. Am., Inc., 185 F.R.D. 272, 277 (C.D. Cal. 1999)  
11 (quoting Rainbow Pioneer No. 44-18-04A v. Hawaii-Nevada Investment Corp., 711  
12 F.2d 902, 906 (9th Cir. 1983)).

### 13 **PERFECT 10, INC.'S POSITION ON INTERROGATORY 3**

#### 14 **I. Perfect 10 Incorporates Its Introductory Statement And Its Portions Of** 15 **the Joint Stipulation In The Amazon Motion.**

16 Perfect 10 incorporates its previous statement and portions because the  
17 interrogatories which are the subject of Amazon and Google's respective motions are  
18 similar, and the issues presented by those motions are virtually identical.

19 Instead of waiting to hear the outcome on Amazon's motion, Google  
20 insisted on having its motion heard concurrently with Amazon's motion even though  
21 Google filed its motion several months after Amazon filed its motion. Why would  
22 Google do this when the interrogatory requests are similar and the issues presented by  
23 the Amazon and Google motions are virtually identical? Google simply will not  
24 follow Judge Matz's directive to stop relitigating issues because it interferes with its  
25 litigation strategy of burying Perfect 10 in busywork.

#### 26 **II. Google's Characterization Of Perfect 10's Previously Produced Charts Is** 27 **Incorrect.**

1 Google makes a number of statements that are patently untrue to support  
2 its motion. Google's whole analysis regarding the charts that Perfect 10 has already  
3 produced is simply wrong, for two reasons: First and foremost, Perfect 10's charts  
4 were not meant to be DMCA notices. They were meant to summarize a portion of  
5 the infringements that Perfect 10 was aware of at the time they were created. Had  
6 Google inputted the actual URLs specified in Perfect 10's DMCA notices in 2004  
7 and 2005, when it received them, it would have seen the infringements Perfect 10 was  
8 referring to. Instead, Google has incorrectly inputted the base URL, without the rest  
9 of the URL that Perfect 10 specified, three years after the fact. For example, Google  
10 inputted the URL bodyweb.it instead of the actual URL that was specified in the  
11 DMCA notice, namely, bodyweb.it/Carla%20Alapont03.jpg. Of course Google will  
12 get garbage results by doing this.

13 Perfect 10 has provided Google with at least 70 DMCA notices since  
14 2001, in which Perfect 10 has sent to Google over 1,200,000 images that Perfect 10  
15 claims Google has liability for. Since June 28, 2007, Perfect 10 has been providing to  
16 Google copies of actual infringing web pages containing Perfect 10 images. When  
17 there have been some images on these web pages that did not belong to Perfect 10,  
18 Perfect 10 either crossed off the images that did not belong to Perfect 10 or checked  
19 some of the ones that did. See Exhibit 2 to the Zada declaration for some examples.  
20 So Perfect 10 has identified the infringements for which it intends to hold Google  
21 liable, by virtue of its DMCA notices. As well as sending those notices to Google in  
22 the first place, Perfect 10 has produced those notices in its document productions.  
23 Perfect 10 is continuing to work on excel spreadsheets for some of the more  
24 significant infringing websites. These spreadsheets will list by infringing website,  
25 and by model, the number of infringements of Perfect 10 copyrighted images of that  
26 model on that website. Perfect 10 believes that this will be the most efficient way to  
27 prove its case at trial, not the impossible-to-answer interrogatory which Google is

1 propounding. Perfect 10 has spent months creating these charts and will be providing  
2 them as they become available, to Google, Amazon, and Microsoft.

3 **III. Google, Like Amazon, Incorrectly Claims Perfect 10's Production Is Not**  
4 **Sufficiently Organized For It To Compile The Information Requested Itself.**

5 Google's narrative explanation of why it can't put together the  
6 information sought from the documents produced is simply incorrect. (Joint  
7 Stipulation, pp. 41 – 47.) The only reason Google can't assemble the very  
8 information it requests in its interrogatories is because the task is too massive – even  
9 for Google – because it chose not to put a stop to the infringements. In the Amazon  
10 Joint Stipulation, Perfect 10 addressed Amazon's same complaint, that it couldn't  
11 figure out how to assemble the information sought by its similar interrogatories, in  
12 detail at pages 31 –33, yet in 59 pages Google never addresses Perfect 10's refutation  
13 of its claims of disorganization.

14 **IV. Google's Reliance On Discovery Matters In Another Perfect 10 Litigation**  
15 **Is Misplaced.**

16 Google attempts to show that Perfect 10 undertook a similar task in the  
17 Perfect 10 v. Net Management litigation. That is completely incorrect. In the Perfect  
18 10 v. Net Management litigation, there were less than 1/1000 the number of  
19 infringements involved, very few copyright registrations involved, and at most a few  
20 DMCA notices that dealt with vastly fewer infringements. The amount of work  
21 undertaken in the Perfect 10 v. Net Management litigation to make a written  
22 compilation was completely miniscule compared to the amount of work necessary to  
23 make a written compilation here. Surely, Google itself must recognize this fact, since  
24 Google states that Perfect 10 prepared “a 22-page chart of infringing images....”  
25 (See Joint Stipulation, p. 16, line 17.) Google is fully aware that the chart it  
26 contemplates Perfect 10 preparing in this case would contain millions of entries.  
27 Similarly, Google complains that Perfect 10 did not adequately identify the pages of

1 its production in this litigation and “[t]here is no reason why Perfect 10 could not also  
2 make these pages with control numbers, and/or with copyright registration numbers –  
3 as it has previously done in the Net Management Case.” (Id., p. 41, fn. no. 10.) Once  
4 again, Google intentionally overlooks the obvious – in that litigation, the universe of  
5 infringements was in the hundreds, not in the millions.

6 If assembling the information sought by Google’s interrogatories is as  
7 important to Google as it claims, it can call upon its legions of attorneys and staff,  
8 and its unlimited computing power, and undertake the task itself. Or, more probably,  
9 Google knows full well that this would be a gargantuan task even for its unlimited  
10 resources. Surely, if Google thought that all the information it seeks could be  
11 condensed into a 22-page chart, it would undertake the task itself rather than spend its  
12 own counsel’s time bringing this premature motion.

13  
14 **GOOGLE'S INTERROGATORY NO. 11:**

15 For each work for which you seek copyright law remedies against  
16 Google in this case, please specify (a) the name or other unique identifier of the work,  
17 (b) the registration number of every copyright registration pertaining to the work, (c)  
18 each page of the documents you have produced that constitute or contain the work,  
19 (d) the full Uniform Resource Locators of all materials or activities allegedly  
20 infringing the work for which you claim Google bears liability, (e) the DMCA notices  
21 (identified by date) that you claim to have sent to Google pertaining to alleged  
22 infringements of that work, and (f) the damages you claim Google is responsible for  
23 as a consequence of the alleged infringement of the work.

24 **PERFECT 10'S RESPONSE TO GOOGLE'S INTERROGATORY NO. 11:**

25 Perfect 10 objects to this interrogatory on the basis that it is enormously  
26 burdensome, to the point where it would take Perfect 10 years to answer it. Perfect  
27 10 has provided, and will continue to provide, Google will all the documents



1 **GOOGLE, INC.'S POSITION ON INTERROGATORY 11**

2 **A. Perfect 10's Response Completely Fails To Provide Any Of The**  
3 **Requested Information.**

4 Google's Interrogatory No. 11, like Interrogatory No. 3, seeks basic  
5 information that is routinely asked of all copyright plaintiffs. Indeed, sections (a)  
6 through (d) of Interrogatory No. 11 are essentially restated requests for the  
7 information requested by Interrogatory No. 3: identification of Perfect 10's  
8 copyrighted works, and identification of particular infringements of those works.  
9 Interrogatory No. 11 contains two additional subsections, each of which is routinely  
10 asked of copyright plaintiffs: section (e) asks for identification of any DMCA notices  
11 associated with each Perfect 10 copyrighted work, and section (f) asks Perfect 10 to  
12 identify damages resulting from alleged infringements. Nevertheless, as with  
13 Interrogatory No. 3, Perfect 10 has refused to provide either (1) a narrative response  
14 or (2) a Rule 33(d)-compliant reference to specific business records that contain the  
15 complete answer to Interrogatory No. 11.

16 The entirety of Perfect 10's response (objections aside) is comprised of  
17 just a single sentence, reading as follows:

18 Perfect 10 responds that it seeks actual damages, profits of the infringer,  
19 and/or statutory damages, and will make an election of such remedies  
20 pursuant to Section 504 of the Copyright Act prior to final judgment, as  
21 well as attorneys [sic] fees and costs.

22 Herrick Decl., at Ex. D (Perfect 10's Response to Third Set of Interrogatories From  
23 Defendant Google Inc. to Plaintiff Perfect 10, Inc. ("Response to Interrogatory 11"),  
24 dated December 7, 2007, at 4). The deficiencies in this "response" are both obvious  
25 and myriad.

26 First, subsections (a) through (d) of Interrogatory No. 11 seek the same  
27 basic information as Interrogatory No. 3—specifically, an identification of the  
28 copyright registrations and infringements pertaining to each specific image being



1 Subsection (f) calls for "the damages [Perfect 10] claim[s] Google is  
2 responsible for as a consequence of the alleged infringement of the work." Herrick  
3 Decl., at Ex. C (Interrogatory No. 11). Perfect 10's response gave no more  
4 information than is apparent from the face of Perfect 10's complaint—that "Perfect 10  
5 ... seeks actual damages, profits of the infringer, and/or statutory damages ... as well  
6 as attorneys [sic] fees and costs." This is no answer at all.

7 Perfect 10, as with any copyright plaintiff, must prove actual damages  
8 flowing from the alleged infringement, or, in the event it seeks statutory damages,  
9 demonstrate that it registered the works in question within three months of  
10 publication of those works. See Polar Bear Productions, Inc. v. Timex Corp., 384  
11 F.3d 700, 708 (9th Cir. 2004) (affirming that "a causal link between the infringement  
12 and the monetary remedy sought is a predicate to recovery of both actual damages  
13 and profits" under 17 U.S.C. § 504); Derek Andrew, Inc. v. Poof Apparel Corp., 2008  
14 WL 2357378, at \*2 (9th Cir. June 11, 2008) ("Section 412(2) [of Title 17] *mandates*  
15 that, in order to recover statutory damages, the copyrighted work must have been  
16 registered prior to commencement of the infringement, unless the registration is made  
17 within three months after first publication of the work") (emphasis added). It is  
18 beyond dispute that every defendant in every case is entitled to such basic  
19 information regarding the case against it. See, e.g., Kelley, 2008 WL 2233568, at \*1  
20 (copyright plaintiff compelled to respond to an interrogatory seeking identification of  
21 the claims, bases, and methods of calculation of its claims to actual damages);  
22 Convolve, Inc. v. Compaq Computer Corp., 223 F.R.D. 162, 174 (S.D.N.Y. 2004)  
23 (ordering a party, in response to damages interrogatories, to "set forth the amount of  
24 damages alleged with respect to each claim ... the amounts attributable to each  
25 category of damages (lost profits, etc.), the methodology and calculations for arriving  
26 at those figures, and the general types of evidence that support the calculations");  
27 U.S. ex rel. Pogue v. Diabetes Treatment Centers of America, 2004 WL 2009413, at

1 \*6 (D.D.C. 2004) (upbraiding parties for *not* using interrogatories to identify damages  
2 claims). Nor can Perfect 10 claim this request is premature; this case has been  
3 pending for 3 1/2 years, and Perfect 10 has had ample time to identify and quantify  
4 the alleged damages it is seeking in this action.

5 In sum, this Court should order Perfect 10 to respond fully and  
6 completely to Interrogatory No. 11 without further delay.

7 **B. Perfect 10's Objection that the Subparts of Interrogatory No. 11**  
8 **Constitute Separate Interrogatories is Baseless and Improper.**

9 Perfect 10 bases its refusal to answer Interrogatory No. 11 in part on the  
10 ground that it, along with Google's other interrogatories, exceeds the 25 allowed  
11 under Rule 33. Perfect 10 is wrong. A single interrogatory may contain subparts but  
12 still count as only one interrogatory under Rule 33 when the subparts are "logically or  
13 factually subsumed within and necessarily related to the primary [interrogatory]  
14 question." Dang v. Cross, 2002 WL 432197, at \*3 (C.D. Cal. March 18, 2002)  
15 (citation omitted); Kendall v. GES Exposition Services, Inc., 174 F.R.D. 684, 685 (D.  
16 Nev. 1997) (same). See also Advisory Committee Notes to Fed. R. Civ. P. 33(a)  
17 ("[A] question asking about communications of a particular type should be treated as  
18 a single interrogatory even though it requests that the time, place, persons present,  
19 and contents be separately stated for each such communication."). In making this  
20 determination, the Court must decide whether the first question is primary and  
21 subsequent subparts secondary, or whether the subsequent subparts can stand alone as  
22 independent questions. Dang, 2002 WL 432197, at \*3.

23 Google's Interrogatory No. 11 seeks identification of the copyrighted  
24 works Perfect 10 is asserting in this infringement action. The remaining subparts are  
25 all secondary to this main question—namely, identification of any copyright  
26 registrations corresponding thereto, infringements thereof, DMCA notices relating  
27 thereto, and damages relating thereto. Standing alone, none of these subparts would



1 doctrine, which provides an exception to the otherwise liberal discovery rules, does  
2 not protect factual information that a lawyer obtains when investigating a case ...."),  
3 citing Board of Edu. of Evanston, Twmsp. High Sch. Dist. No. 202 v. Admiral  
4 Heating and Ventilating, Inc., et al., 104 F.R.D. 23, 32 (N.D. Ill. 1984) ("It is settled  
5 law... that the work product concept furnishe[s] no shield against discovery ... by  
6 interrogatories ... of the facts that the adverse party's lawyer has learned ....").

7 Further, even construing Interrogatory 11 as a contention interrogatory,  
8 this type of information is routinely ordered disclosed in intellectual property cases.  
9 See Dell, Inc., 2006 WL 2666408, at \*4; Carver v. Velodyne Acoustics, Inc., 202  
10 F.R.D. 273, 274 (W.D. Wash. 2001) (compelling response to an interrogatory for a  
11 chart "specifying how each element of each claim of the patents-in-suit is infringed  
12 by each [of defendant's] product[s]," and finding that plaintiff's "objections on the  
13 grounds of attorney-client and work-product privilege are meritless. The claim charts  
14 are relevant and discoverable. [Defendant] is entitled to know what led the  
15 [plaintiffs] to file their patent infringement suit.").

16 Finally, Perfect 10 did not object on privilege or work product grounds  
17 to Interrogatory No. 3, which seeks much of the same information. Any such  
18 objection (even were it meritorious, which it is not) therefore has been waived.

19 **D. Perfect 10's Objection on Possession Grounds is Improper.**

20 Finally, Perfect 10 objects on the ground that the Interrogatory seeks  
21 information in Google's possession. Even were Plaintiff 10 factually correct (which it  
22 is not), this objection does not excuse Perfect 10 from responding. A plaintiff's legal  
23 duty to provide information within its possession is *not* excused merely because the  
24 defendant might also possess some responsive information on the subject. See The  
25 Walt Disney Co. v. DeFabiis, 168 F.R.D. 281, 284 (C.D. Cal. 1996) (in a Rule 33(d)  
26 context, "merely referr[ing] to documents [defendant] claims to be in the possession  
27 of plaintiff ... [is] insufficient; defendant DeFabiis is required to produce documents

1 he has in his possession, custody or control, *regardless of whether he believes*  
2 *plaintiff already has those documents.*") (emphasis added). Perfect 10 must answer  
3 this Interrogatory with all responsive information in its possession, custody or  
4 control.

5 **PERFECT 10, INC.'S POSITION ON INTERROGATORY 11**

6 The chart that Google wants Perfect 10 to create has 6 columns. For 1,200,000  
7 infringing images, that comes to 7,200,000 entries. It would take well over 100 years  
8 to create such a chart.

9 Perfect 10 has provided Google with at least 70 DMCA notices since 2001, in  
10 which Perfect 10 has sent to Google over 1,200,000 images that Perfect 10 claims  
11 Google has liability for. Since June 28, 2007, Perfect 10 has been providing to  
12 Google copies of actual infringing web pages containing Perfect 10 images. When  
13 there have been some images on these web pages that did not belong to Perfect 10,  
14 Perfect 10 either crossed off the images that did not belong to Perfect 10 or checked  
15 some of the ones that did.<sup>18</sup> So Perfect 10 has identified the infringements for which  
16 it intends to hold Google liable, by virtue of its DMCA notices. As well as sending  
17 those notices to Google in the first place, Perfect 10 has produced those notices  
18 (including the print-outs of the infringements), in its document productions.<sup>19</sup> See  
19 Exhibit 2 to the Zada declaration for an example of what Perfect 10 has sent to  
20 Google in its recent DMCA notices. The green check marks completely identify the  
21 images that are copyrighted by Perfect 10. The URL at the bottom of the page  
22

23 <sup>18</sup> Furthermore, to the extent that Google has been dispensing unauthorized  
24 passwords and usernames to perfect10.com, Google would be liable for the  
25 infringement of all images that appear on that website.

26 <sup>19</sup> If Google is telling the truth, it should already have this information assembled  
27 itself. Google has claimed that it has a DMCA log. However, it has not produced it,  
28 even though it has been ordered to do so by Judge Matz.

1 identifies the location of the images, and the date the infringing image was viewed  
2 and downloaded is also shown at the bottom. Google has all of the information that it  
3 has asked Perfect 10 to compile in the chart on page 58 of its Joint Stipulation.  
4 Google has copies of Perfect 10 Magazines and the perfect10.com website, so it can  
5 determine where the image was published by Perfect 10 (column one of Google's  
6 chart). Google has Perfect 10's copyright registrations, so it can figure out what  
7 copyright registration covers each picture (column 2 of Google's chart). The print-  
8 out of the infringing image gives the location of the infringement, the URL at the  
9 bottom of the page (column 3 of Google's chart), and the date that Perfect 10  
10 accessed the infringing image is shown on the print-out (column 4 of Google's chart).  
11 Google has the DMCA notices, so it can find the notices that list the specific URL  
12 that is shown on the print-out. Google is asking Perfect 10 to do an impossible  
13 compilation – to fill in this information on Google's chart for 1.2 million images.  
14

## 15 **GOOGLE'S FINAL STATEMENT AND REQUESTED RELIEF**

16           Despite having several years to do so, Perfect 10 has flouted Rule 33 by  
17 completely failing to provide Google with basic discovery regarding alleged  
18 infringements of the copyrighted works it is asserting in this case, under pleas of  
19 burden—while simultaneously (and successfully) seeking leave of this court to  
20 *further expand* the number of registrations at issue in this case by nearly nine-fold.  
21 These contrary positions cannot stand. If Perfect 10 wants to bring a case regarding  
22 more than 1,000 copyright registrations, then it *must* respond to legitimately  
23 propounded discovery requests inquiring about those registrations.

24           Accordingly, Google requests that Perfect 10 be ordered to respond in  
25 full to Interrogatory Nos. 3 and 11, either in narrative form or in a manner compliant  
26 with Rule 33(d). To assist the Court in fashioning its Order, Google proposes that  
27 Perfect 10 be ordered to do what Perfect 10 did in the Net Management case—that is,

1 generate a spreadsheet responsive to Interrogatory Nos. 3 and 11, containing the  
2 following information pertaining to each copyrighted image Perfect 10 is asserting in  
3 this action:

4 **In column 1:** The registration number of the copyright pertaining to that  
5 image.

6 **In column 2:** Information sufficient for Google to identify the particular  
7 copyrighted image. For print magazines, this will consist of the magazine volume  
8 and number, and the page number of the infringing image. For pages containing  
9 multiple images, Perfect must further specify which of those images it believes was  
10 infringed. For images on perfect10.com, Perfect 10 must provide the image URL at  
11 which the specific image may be located.

12 **In column 3:** Information sufficient for Google to identify the particular  
13 infringement of that image by Google. If Perfect 10 wishes to use a screenshot or a  
14 web printout to identify an infringement, it must produce it to Google with a control  
15 number or equivalent indexing number, and reference that control number (or  
16 equivalent) in column 3 (and of course, if there are multiple images on the document,  
17 Perfect 10 must specifically identify the infringing image).

18 **In column 4:** The date or dates on which Perfect 10 discovered the  
19 alleged infringement. For image URLs, Perfect 10 should state the date it accessed  
20 the image. For screenshots or web printouts, Perfect 10 should state the date it  
21 captured the screenshot and/or made the web printout. Alternatively, if the  
22 screenshot or printout reflects the date on its face, Perfect 10 may simply reference  
23 the control number or equivalent indexing number for that document.

24 **In column 5:** The date of the DMCA notice(s), if any, Perfect 10 claims  
25 to have sent to Google pertaining to alleged infringements of the image (or the  
26 control number or equivalent indexing number for the relevant DMCA notice).

1 **In column 6:** The damages, if any, Perfect 10 claims Google is  
 2 responsible for as a consequence of the alleged infringement of the image.

3 To the extent Perfect 10 believes additional columns with additional  
 4 information will be helpful, Perfect 10 is free to include those additional columns.

5 For illustrative purposes, the chart Google has proposed would look  
 6 similar to the following:

Perfect 10 Image	Copyright registration number (if any)	Location of infringement(s)	Date(s) of Alleged Infringement	DMCA Notice (if any) identifying infringement(s)	Damages claimed for infringement(s)
[Image URL or magazine volume and page number], produced to Google at Control Number Page [XYZ]	XXX-1234-XXX	[Web URL, image URL or control numbered page in Perfect 10's document production]  OR  [Image URL from third-party website], produced to Google at Bates Number Page [XYZ]	[Date]  OR  [Control Number of document listing date]	[Date of Notice]  OR  [Control Number of Notice]	\$X

23 Finally, Google requests an in-person hearing on this motion. Google  
 24 believes the Federal Rules and all applicable precedent clearly require Perfect 10 to  
 25 respond to Google's basic infringement interrogatories. An in-person hearing will  
 26 allow Google to further demonstrate for the Court the clear inadequacy of Perfect 10's  
 27 responses.

1 **PERFECT 10'S FINAL STATEMENT**

2 Google should be sanctioned for filing duplicative motions, against Judge  
3 Matz's instructions; for requesting impossible-to-answer interrogatories without  
4 providing any evidence whatsoever that they can be answered; and for presenting  
5 nonsense as purported evidence. Perfect 10 incorporates its opposition to the  
6 Amazon motion to compel here, and elsewhere in this Joint Stipulation.

7  
8 DATED: August 15, 2008

QUINN EMANUEL URQUHART OLIVER &  
HEDGES, LLP

9  
10  
11 By /s/ Rachel M. Herrick  
12 Rachel M. Herrick  
Attorneys for Defendant Google Inc.

13 DATED: August 15, 2008

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