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8                  UNITED STATES DISTRICT COURT

9                CENTRAL DISTRICT OF CALIFORNIA

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11 PERFECT 10, INC., a California            CASE NO. CV 04-9484 AHM (SHx)
   corporation,
                                             **PERFECT 10'S STATEMENT FOR**
12          Plaintiff,                       **OCTOBER 6, 2008 CASE**
                                             **MANAGEMENT CONFERENCE**
13      v.                                   **BEFORE JUDGE MATZ**

14 GOOGLE, INC., a corporation,              Date: October 6, 2008
                                             Time: 1:30 P.M.
15 _____          Place: Courtroom 14, Courtroom of the
                                                    Honorable A. Howard Matz
16 PERFECT 10, INC., a California
   corporation,                              Consolidated with CV 05-4753
17          Plaintiff,                       AHM (SHx)

18      v.

19 AMAZON.COM, INC., a corporation,

20 _____

21 PERFECT 10, INC., a California
   corporation,
22                                           CASE NO. CV 07-5156 AHM (SHx)
            Plaintiff,
23      v.

24 MICROSOFT, INC., a corporation.

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        Perfect 10's Statement for October 6, 2008 Case Management Conference

## A. **SIMPLIFICATION OF THE CASE.**

Perfect 10 agrees with the Court's view that the case should be simplified as much as possible to minimize unnecessary effort by all parties, and thanks the Court for its efforts in this regard. Perfect 10 would like to make some observations that, in conjunction with the Court's suggestions (which Perfect 10 will address below), should allow for a very substantial simplification of the case.

1. There are approximately 120 massive infringing websites that are responsible for approximately 98% of the infringements in these cases. The remaining approximately 3,000 infringing websites are responsible for about 2% of the infringements. Of the 120 massive infringing websites, approximately 75 are pay sites, and approximately 45 are free sites. The 75 pay sites, by and large, offer the same stolen images, approximately 19,000 P10 images each, for a total of approximately 1.4 million copies of Perfect 10's images. These infringing pay sites also offer thousands of infringing full-length movies, TV shows, and songs, for $10 to $20 per month in membership fees. The massive free sites have offered approximately 60,000 infringing copies of P10 images. So the vast preponderance of the infringement in these cases is due to pay sites, which by and large, have stolen and sell access to the same 19,000 P10 images each. As well as providing links to these websites in their search results, Defendants have business dealings with many of the webmasters for these pay sites. Defendants share in the revenues of such infringers by accepting payments to place links to and ads for such websites in their sponsored link section.

2. Perfect 10 has sent to Defendants, in its DMCA notices, more than 1,000,000 copies of infringing P10 images from massive infringing websites.

3. In response to Perfect 10's notices regarding massive infringing websites, Defendants have either taken no action, or virtually no action, to reduce further damage to Perfect 10's copyrighted works.

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1     **B.     PERFECT 10 WILL BE FILING A MOTION FOR PARTIAL**

2     **SUMMARY JUDGMENT AGAINST AMAZON AND ALEXA WITHIN**

3     **THE NEXT 10 DAYS.**

4            Before the parties spend substantial resources on discovery related to

5     damages, a determination should first be made by the Court as to which issues can

6     be resolved by summary adjudication.  That determination can be made based on a

7     sample of copyrighted works, as suggested by the Court.  To that end, Perfect 10

8     will be filing a motion for partial summary judgment against Amazon and Alexa

9     for contributory copyright infringement, within the next ten days.  The motion will

10    be based on a limited number of Perfect 10 copyrighted images, as suggested by

11    the Court.  The outcome of this motion is likely to substantially simplify current

12    discovery disputes.  Specifically, in its motion, Perfect 10 will provide proof that it

13    owns the copyrights to a few hundred images, by attaching copyright certificates

14    and deposit materials, which have previously been produced to the Defendants.

15    Perfect 10's evidence of copyright ownership will address a number of the issues

16    raised by the Court in its Order.  Perfect 10's motion will also address the issues

17    raised by the Court with regards to contributory liability (paragraph 2.A on page 3

18    of the Order).  Specifically, Perfect 10's motion will go over several of its DMCA

19    notices, which provide examples of infringing material that Defendants learned

20    was accessible through their search engines.  These notices contain print-outs of

21    infringing web pages, identify infringing URLs, and provide the date when

22    Defendants learned of such infringing material, as discussed in paragraph 2.A of

23    the Court's Order.  Perfect 10 explains why its notices were compliant, and sets

24    forth a number of simple measures that Defendants could have taken, but did not

25    take, to prevent further damage to Perfect 10's copyrighted works.

26           Perfect 10 respectfully suggests that large scale discovery relating to

27    requests made by various Defendants be postponed until the Court rules on

28    whether the evidence presented by Perfect 10 in its motion is sufficient for

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1  summary adjudication.  The Court's ruling on Perfect 10's motion may well make

2  most of the disputed discovery unnecessary and lead to the resolution of all cases.

3  **C.    OTHER ISSUES RAISED BY THE COURT**.

4       With respect to some of the other issues raised by the Court:

5       1.    Identification of Perfect 10's Copyrighted Works.  Perfect 10 agrees

6  with a cut-off date for registrations of Perfect 10's copyrights, to be set based upon

7  the trial date.  Perfect 10 has already identified most of the copyrighted works at

8  issue in the case, by sending to Defendants at least 1,000,000 copies of Perfect 10

9  images in its DMCA notices.  To the extent that a DMCA notice did not include all

10 infringing works, or Perfect 10 discovers additional works, it will provide those

11 works to Defendants in a folder labeled with the infringing website's name, prior

12 to the cutoff date set by the Court.

13      2.    Vicarious liability.  Depending on the outcome of Perfect 10's

14 impending motion, the issue of vicarious liability may never come up.  If it does,

15 Perfect 10 agrees that such issues can be resolved based on a sampling of images.

16 However, Perfect 10 does believe that certain commercial functions of Defendants,

17 such as partnering with infringing websites to earn money by placing ads around,

18 and thereby exploiting, copyrighted works, should be subject to vicarious liability.

19 Otherwise, if the copyright holder is only able to proceed on the basis of

20 contributory liability, it could end up sending a never-ending stream of DMCA

21 notices, while the search engine simply places its ads next to the copyright holder's

22 work on a different infringing URL.  This will depend on the ultimate ruling by the

23 Court as to what constitutes contributory liability for an advertising agency.

24      3.    Copyright Spreadsheet.  In the event that the Court wishes for Perfect

25 10 to begin now to prepare a chart, Perfect 10 suggests the following, assuming

26 that the chart will be based on between 50 and 100 images, selected by Perfect 10,

27 based on some form of agreed upon sampling criteria.  The following discussion

28 contains elements of both what the Court thought was the minimum requirements

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(set forth on page 5, paragraph 3(b) of the Order), and the chart which contains additional compilations of information sought by the Defendants.

Unique identifier of the work:. This would be the URL of the image on perfect10.com.

Copyright Registration number. This would be the earliest copyright registration number that covers the image.

Chain of title information. Perfect 10 would identify the photographer and identify the work for hire agreement or assignment of rights agreement.

URL(s) of infringing websites or web pages. Massive infringing pay sites, such as giganews.com, which are causing enormous damage to Perfect 10, typically do not have web pages. The images are simply downloaded into the user's computer. For a site like giganews.com, Perfect 10, in its DMCA notices, provided the URL of the infringing website (giganews.com), along with copies of approximately 15,000 Perfect 10 images from that website, as well as instructions as to how to download those images.

*Free* web sites do have web pages, so Perfect 10 provided the URLs of the infringing web pages in its DMCA notices, along with, in many cases, copies of the infringing web pages themselves. Perfect 10 can identify several infringing web pages on *free* sites for each of up to 100 images, as long as Perfect 10 selects the images. It would be extremely burdensome for Perfect 10 to have to do this for *all* infringing web pages, as that would require that Perfect 10 search through as many as 2,000,000 document pages in its productions to locate each of 100 different images.

DMCA Notices Covering Each Image. This is manageable if Perfect 10 can identify one DMCA notice for each of the 100 selected images. There is no requirement under the DMCA that Perfect 10 provide multiple DMCA notices for each alleged infringed image, although Perfect 10 did so in many cases.

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1      Other issues. Perfect 10 believes that its motion for partial summary

2 judgment against Amazon and Alexa will demonstrate that a number of the other

3 items requested by Defendants are apparent from the evidence presented and do

4 not need to be listed in a spreadsheet. These would include the date (which

5 appears on the Adobe document as well as the DMCA notice), the search term

6 (which either appears on the DMCA notice or is irrelevant), whether the image is a

7 thumbnail (this is apparent from the printout of the web page), the name of the

8 person depicted (this appears in the image URL or on the webpage), etc. Perfect

9 10 believes that a description of the damages claimed for each image should be

10 postponed until after its motion for summary judgment is decided.

11      Questions posed by the Court: For one copyrighted work, how much time

12 would it take to enter all the allegedly infringing URLs onto a spreadsheet?

13 Answer: The critical term is "all." Perfect 10 has produced to Defendants

14 somewhere in the order of 2,000,000 pages of documents, most of which contain

15 infringements. To identify which of 2,000,000 documents contains a particular

16 image would require examining all of the 2,000,000 documents (unless Perfect 10

17 could somehow rule out a significant portion of the documents). Furthermore, the

18 URLs on many of these web pages are extremely long, and may involve over 100

19 characters each.

20      The original spreadsheet proposed by Defendants would have required

21 placing URLs in certain entries of a spreadsheet 2,000,000 x 30,000 in size

22 (2,000,000 documents and 30,000 images). Perfect 10 does not have the resources

23 to do this. However, Perfect 10 could provide several infringing URLs for each of

24 100 images.

25      In response to the Court's second question, Perfect 10 is always in favor of

26 settling legal disputes. Although Perfect 10 will create a chart if the Court so

27 requests, this will take time, and some aspects of the chart may prove to be

28 unnecessary, depending on the Court's ruling on Perfect 10's motion for partial

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summary judgment. Perfect 10 also believes that the discovery disputes may be reduced substantially if the primary focus is on what Defendants did in response to notices related to massive infringing websites, which are few in number, and are causing almost all of the damage to Perfect 10 in this case.

Dated: October 5, 2008          LAW OFFICES OF JEFFREY N. MAUSNER

By: _____
                                 Jeffrey N. Mausner
                                 Attorney for Plaintiff Perfect 10, Inc.