

EXHIBIT A

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VIA E-MAIL AND U.S. MAIL

Jeffrey N. Mausner
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Re: *Perfect 10, Inc. v. Google Inc.: Multiple Issues Regarding Perfect 10's Confidentiality Designations*

Dear Jeff:

As you know, Magistrate Judge Hillman has set a hearing on September 22, 2009 at 10:00 a.m. on three of Google's pending motions, including Google's Motion to Compel Perfect 10, Inc. to Produce Documents, Comply with the Protective Order, and Affix Document Control Numbers to its Document Productions (Docket No. 407).¹ Among the many issues presented in these three motions are Perfect 10's violations of the Protective Order, including its improper designation of public information and documents as "Confidential."

I write in advance of that hearing in the hopes that Perfect 10 will stipulate to certain of the relief Google requests in that Motion to Compel and thereby limit the concomitant burdens on the Court and the parties.

¹ Also set for hearing are Google's Motion to Compel Further Responses to Interrogatory Nos. 3 and 11 (Docket No. 336) and Google's Motion to Determine the Sufficiency of Perfect 10, Inc.'s Responses to Google Inc.'s Requests for Admission, Sets 1 and 2 (Docket No. 371).

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1. Improper Confidentiality Designations re: Allegedly Infringing URLs

Perfect 10 has designated its DMCA notices, the charts it prepared in apparent response to Google's Interrogatory Nos. 3 and 11, and other allegedly infringing URLs as "Confidential" under the Protective Order.² But the Protective Order provides at Para. 24 that it "shall not be construed to apply to any information that is ... available to the public other than through a breach of this Order or other duty of confidentiality." Because Perfect 10 has publicly filed this information multiple times, it is "available to the public" and thus, by definition, is not Confidential.

a. **Perfect 10 Has Publicly Filed This Information Several Times.**

First, before Google filed its Motion to Compel, Perfect 10 publicly filed charts of allegedly infringing websites in several court documents—for example, in the consolidated case at Docket No. 177 (Declaration of Norman Zada, at Exs. 11, 13, and 14 (summary sheets), Ex. 19, 24, 29, 31, 33, 35 (DMCA notices), Exs. 9, 38, 39 (spreadsheet), and at Docket No. 197 (Declaration of Norman Zada, at Ex. 31 (DMCA notice). Google identified each of these documents in its Motion to Compel, now set for hearing on September 22, 2009.

Second, after Google filed its Motion to Compel, Perfect 10 *electronically filed* its own DMCA notices and documents containing large numbers of allegedly infringing URLs in support of its Motion for Summary Judgment and Summary Adjudication re: Copyright Infringement Against Defendant Google Inc. (Docket No. 436, available on PACER for public viewing). Thus, Perfect 10 has publicly filed a great deal of information specifying the location of alleged infringements of Perfect 10's material. Specifically, Perfect 10's motion lists the following allegedly infringing URLs:

- rapidshare.com
- gadissexybugil.blogspot.com
- rapidlibrary.com
- celebritypictures.com/MayaRubin/maya1.htm
- web.tiscali.it/raskz/donne/giugno.htm
- celebritybattles.com/celeb/Monika-Zsibrita
- monitor.hr/belle/0112/011206.htm

And the Declaration of Norman Zada in support of that motion (Docket No. 438, also available on PACER for public viewing) lists a great many more allegedly infringing URLs, including the following:

² The Protective Order applies only to information and documents that a party "in good faith believes comprise or reflect proprietary information used by it in, or pertaining to, its business, which is not generally known and which the party would normally not reveal to third parties or would cause third parties to maintain in confidence." Protective Order ¶ 1.

- <http://www.celebritypictures.com/MayaRubin/maya1.htm>
- vamp.dk/Vibe_Sorenson-VibeSorenson007.jpg
- http://pix.alronix.net/Photo_Scans/Tits/Monika_Zsibrita/pic00076.htm
- http://beautifulwallpaper.com/monika_zsibrita.shtml
- <http://web.tiscali.it/raskz/donne/giugno.htm>
- http://www.3thehardway.nl/images/spec_galleryvibe_sorenson/pages/vibe_sorenson006.html
- celebstation.org/models/monika_zsibrita.php
- 3thehardway.nl/images/spec_gallery/vibe_sorenson/pages/vibe_sorenson006.html
- web.tiscali.it/raskz/donne/giugno.htm
- celebritybattles.com/celeb/Monika-Zsibrita
- akty.cz/kategorie.asp?id=4
- Giganews.com
- UsenetBinaries.com
- maximumusenet.com
- NewsReader.com
- NewsDemon.com
- Thundernews.com
- powerusenet.com
- NewsRazor.net
- megabitz.net
- alibis.com
- Ngroups.Net
- diiva.com
- rhinonewsgroups.com
- Easynews.com
- news.astraweb.com
- TigerUsenet.com
- supernews.com
- usenet-access.com
- newsgroups-download.com
- newsgroup-binaries.com
- NewsHosting.com
- machpex-photo.blogspot.com
- tabloidrabies.blogspot.com
- af.2i.cz/fotky/597/597_1124101851.jpg
- galerie.albumfotek.cz/597/?page=view&foto=26745
- <http://www.nudecelebforum.com/t1101-perfect-ten-magazine.html>
- <http://www.nudecelebforum.com/t1101-p17-perfect-ten-magazine.html>
- <http://www.humoronline.com/natalia-sirocka-I.html>
- soloevas.com/bu/fotografias/playboy/Caneel_Carswell
- bootsranch.com/memberswextmodels.htm
- gadissexybugil.blogspot.com

- dignow.com

In addition to the URLs it lists in its text, this Zada Declaration includes as exhibits a great many documents that allegedly specify the location of infringements—and in some cases, these publicly filed exhibits *actually bear a Perfect 10 "Confidential" stamp*. For example, Exhibit 8 to the Zada Declaration is a DMCA notice to Yahoo that bears a Perfect 10 "Confidential" stamp. Exhibit 13 is a DMCA notice to Google that is also stamped "Confidential" and contains an Excel chart of allegedly infringing URLs. Exhibit 14 contains another such chart, also designated Confidential. Exhibit 16 contains literally the same information that Perfect 10 maintains is "Confidential" in its responses to Google's Interrogatory Nos. 3 and 11 – namely, the model name and the URL at which infringing images of that model can be found. Exhibit 19 is a DMCA notice to Amazon containing both a long list and a chart of allegedly infringing URLs. Exhibit 21 is a DMCA notice to Google (designated Confidential). Exhibits 22 and 27 and 37 and 41 are additional DMCA notices to Google containing additional charts of allegedly infringing URLs. Exhibit 44 is yet another chart of allegedly infringing URLs, and Exhibit 45 and 46 contain still more. Indeed, though Perfect 10 complains of Google forwarding Perfect 10's purported DMCA notices to chillingeffects.com, Perfect 10 actually e-filed a screenshot of a chillingeffects post at Exhibit 48 pgs 4-7. Exhibit 53 is yet another purported DMCA notice that itself claims to be "CONFIDENTIAL." Again, all of these documents are currently available for public viewing in the court file and on the Internet.

b. Perfect 10 Then Improperly Filed This Same Information Under Seal In Its Oppositions To Google's Motions For Summary Judgment.

After Perfect 10 e-filed these documents in support of its own motion, however, it changed course and filed this *very same information under seal* in opposition to Google's motions for summary judgment. Perfect 10's opposition briefs and the supporting Declaration of Norman Zada contain large numbers of allegedly infringing URLs—including, in some cases, the *very same URLs* that Perfect 10 publicly filed in support of its own motion. Indeed, Dr. Zada's Declaration in opposition includes many of the *exact same allegedly "Confidential" Exhibits as Perfect 10 previously publicly filed*—including the same Exhibit 8 (DMCA notice to Yahoo), the same Exhibit 13 (DMCA notice to Google), the same Exhibit 16 (a chart of allegedly infringing URLs), the same Exhibit 19 (DMCA notice to Amazon), the same Exhibits 21, 22, 27, 37, and 41 (DMCA notices to Google), the same Exhibits 44, 45, and 46 (containing charts of allegedly infringing URLs), and the same Exhibit 48 (which includes a chillingeffects.com screenshot).

At the August 18, 2008 status conference, Perfect 10 represented to the Court that "we don't have a problem with those [locations of infringing websites] being filed in court." August 18, 2008 Transcript, at 41. However, Perfect 10 has now represented to Google (and to the Court) that all of the URLs contained in these various documents (and charts thereof) are "Confidential" under the terms of the Protective Order and should be redacted from Perfect 10's oppositions before

being publicly filed. Indeed, Perfect 10 filed the entire declaration of Dr. Norman Zada in support of these oppositions, and every single exhibit thereto, under seal.³

c. Perfect 10 Has Expressly Instructed Google That It May Freely Share This Information.

In the course of its recent emails regarding public filing of Perfect 10's oppositions to Google's motions for summary judgment, Perfect 10 has made clear that it believes that "[t]he URLs where the infringing material is located are confidential." And yet, you have said the following:

But I said you can show everything, including those URLs, to anyone at Google involved in the litigation and anyone that you want to consult with regarding the litigation. We just don't want Google to publish a roadmap of where Perfect 10's infringing content is located, as it has done in the past.

This is in essence an admission that these URLs are not "Confidential" within the meaning of the Protective Order—if they were, Perfect 10 could not possibly consent to disclosing them to literally anyone in or outside Google who might be at all involved in this litigation. Moreover, Perfect 10's accusations are unfounded, since Perfect 10 itself has “publish[ed] a roadmap of where Perfect 10's infringing content is located” by publicly filing all of these materials. Plainly, all of this information is publicly available and therefore not subject to designation under the Protective Order. See, e.g., In re ULLICO Inc. Litigation, 237 F.R.D. 314, 317-318 (D.D.C. 2006); THK America, Inc. v. NSK Co., Ltd., 157 F.R.D. 637, 646 (N.D. Ill. 1993).

d. Perfect 10 Should Stipulate That This Information Is Not Confidential.

In sum, by publicly filing these documents and these URLs, Perfect 10 itself has made clear that allegedly infringing URLs (and charts thereof) and Perfect 10's purported DMCA notices are not "Confidential" within the meaning of the Protective Order—the information is public to begin with, and in any event, Perfect 10 itself has "made [it] available to the public," under the terms of the Protective Order. Accordingly, Google hereby requests that Perfect 10 agree to de-designate as "Confidential" its DMCA notices, the charts of allegedly infringing URLs it prepared in response to Google's Interrogatory Nos. 3 and 11, and all other allegedly infringing URLs in Perfect 10's pleadings and/or document productions. If Perfect 10 is willing to so agree, Google will prepare a stipulation to that effect informing Judge Hillman that those issues no longer need to be addressed at the September 22, 2009 hearing.

³ In doing so, Perfect 10 has represented to the court that everything in that document (including exhibits) is Confidential—including Dr. Zada's statements about his education and qualifications (Paragraph 3), the Terms of Service for Blogger (Exhibit 1), and Google's published DMCA policy (Exhibit 3). These representations are incorrect.

2. Further Improper Confidentiality Designations in Document Productions

On June 9, 2009, after Google filed its Motion to Compel, Perfect 10 produced another hard drive of documents to Google and designated the entirety of that drive Confidential by placing a single sticker on the outside of the drive containing the word "CONFIDENTIAL." Just like the previous productions, however, this production contains large amounts of public material, including published news articles from the BBC and the Wall Street Journal (and many other sources) and screenshots from public webpages. Once again, Perfect 10 has failed to differentiate between public and non-public information in its document productions and has violated the Protective Order by failing to affix confidentiality legends only to the documents (or pages of documents) that contain confidential material (if any). Please inform us as soon as possible whether Perfect 10 will agree to withdraw these improper designations and reproduce these documents (and all other documents similarly mis-designated) with confidentiality legends affixed only to the documents (or portions of documents) containing "Confidential" material, as required by the Protective Order. Again, if Perfect 10 will so agree, Google will prepare a stipulation to that effect.

3. Confidentiality Issues Arising From the Deposition of On Line Creations

On July 14, 2009, Google deposed third-party On Line Creations via Rule 30(b)(6). Valerie Kincaid of your office represented the deponent and insisted—over Google's objection on the record—that Wendy Augustine, a Perfect 10 employee, attend the deposition and have access to every Exhibit introduced therein. Ms. Kincaid also designated the entire deposition transcript (and each and every document produced by On Line Creations) as Confidential. As we made clear on the record at that deposition and in subsequent meet-and-confer efforts, Ms. Augustine's presence at that deposition was a clear and willful violation of the Protective Order. At this deposition, your offices represented On Line Creations (a third-party), not Perfect 10. On Line Creations designated all of its documents and the entire deposition transcript as Confidential. The Protective Order limits access to Confidential information to outside counsel (and their support staff), in-house counsel (and in-house paralegals), designated experts, "[o]ne officer of each of the parties" (which for Perfect 10 is Dr. Zada) and certain other specified individuals. Protective Order ¶ 5. As an employee of one of the parties, Ms. Augustine is quite clearly not on that list. And to make matters worse, your client at that deposition (On Line Creations) and your other client in this litigation (Perfect 10) are in many respects direct competitors.

This appears to be a clear violation of the Protective Order, and your disregard of the Protective Order vis-à-vis your client On Line Creations gives Google concern that Perfect 10 may be giving employees such as Ms. Augustine access to *Google's* Confidential and Highly Confidential information. Despite Google's repeated efforts to meet-and-confer on this issue, your office has not yet provided any basis or explanation for its insistence that Ms. Augustine attend this (apparently) Confidential deposition. If you have any such basis or explanation, please provide it promptly.

Sincerely,



Rachel Herrick Kassabian

RHK:tdn

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cc: Mark T. Jansen, Esq., Timothy R. Cahn, Esq., Anthony J. Malutta, Esq.