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11 UNITED STATES DISTRICT COURT
 12 CENTRAL DISTRICT OF CALIFORNIA

13 PERFECT 10, INC., a California
 corporation,
 14
 15 *Plaintiff,*
 16 vs.
 17 GOOGLE INC., a corporation; and
 DOES 1 through 100, inclusive,
 18
 19 *Defendants.*

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

DISCOVERY MATTER

**GOOGLE INC.'S SUPPLEMENTAL
 MEMORANDUM IN SUPPORT OF
 ITS JOINDER IN DEFENDANTS
 AMAZON.COM, INC. AND ALEXA
 INTERNET'S EX PARTE
 APPLICATION AND
 RESPONSE TO PERFECT 10'S
 OPPOSITION THERETO**

19 AND COUNTERCLAIM

**[Supplemental Declaration of Thomas
 Nolan filed concurrently herewith]**

21 PERFECT 10, INC., a California
 corporation,
 22
 23 *Plaintiff,*
 24 vs.
 25 AMAZON.COM, INC., a corporation;
 A9.COM, INC., a corporation; and
 DOES 1 through 100, inclusive,
 26
 27 *Defendants.*

Hon. Stephen J. Hillman
 Date: November 3, 2009
 Time: 10:00 A.M.
 Crtrm.: 550

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

1 As Defendants have shown, although Perfect 10's October 22, 2009
2 production was purportedly in response to the Court's October 6, 2009 Order
3 Compelling Documents (Docket No. 560), the documents in that production were
4 spread over a variety of folders and subfolders, were not produced as kept in the
5 ordinary course of business, and were not labeled in a manner that identified which
6 documents were being produced in response to the October 6 Order.¹ Google
7 submits this supplemental brief to further explain the deficiencies in Perfect 10's
8 recent and past productions, and to request that the Court adopt the Defendants'
9 (Proposed) Order granting the Amazon *Ex Parte* Application (and Google's Joinder
10 Therein).

11 **I. PERFECT 10 SHOULD BE ORDERED TO IDENTIFY THE LOWEST-**
12 **LEVEL SUB-FOLDER IN WHICH RESPONSIVE DOCUMENTS**
13 **MAY BE FOUND.**

14 **A. Perfect 10's October 22, 2009 Hard Drive Production**

15 As previously explained, the 18.2 Gigabyte hard drive Perfect 10 produced on
16 October 22, 2009 gives Defendants and the Court no meaningful way to evaluate
17 Perfect 10's compliance with the October 6, 2009 Order. The documents in that
18 production are spread over sixteen separate first-level folders, most of which contain
19 numerous sub-folders and sub-sub-folders, and none of which is labeled with any
20 clear connection to the October 6 Order, or the 27 Requests for Production that were
21 compelled therein. *See* Declaration of Thomas Nolan in Support of Google's
22 Joinder in the Amazon *Ex Parte* Application (Docket No. 596-2) at ¶ 7. To provide
23 further detail, the folder titled "google" contains 1,070 separate sub-folders and
24

25 ¹ *See* Amazon and Alexa Internet's *Ex Parte* Application for an Order
26 Compelling Perfect 10, Inc. to Affix Production Numbers to its Production and to
27 Reimburse Defendants for Costs and Request for a Telephonic Conference (the
28 "Amazon *Ex Parte*") at 3; Google's Joinder therein ("Google Joinder") at 3-4.

1 8,307 separate files, and the folder titled “usenet” contains a total of 27,342 files.
2 Supplemental Declaration of Thomas Nolan (“Supp. Nolan Decl.”) filed
3 concurrently herewith, at Ex. A (screenshot showing the “usenet” folder’s
4 properties) and Ex. B (screenshot showing the “google” folder’s properties). Many
5 of the files on this hard drive are not text-searchable, and must be reviewed
6 manually, one file at a time. Supp. Nolan Decl. ¶ 3. And if responsive documents
7 are buried within multiple layers of subfolders, Defendants may never find them.
8 This is why Perfect 10 needs to identify the lowest-level subfolder in which
9 documents responsive to the October 6 Order may be found.

10 The hard drive also contains voluminous materials that appear to have little (if
11 any) relevance to the October 6 Order (or this case, for that matter), making the task
12 of locating responsive documents all the more difficult. *See id.* at ¶ 3. For example,
13 within the hard drive’s “whois” folder (which itself contains 36 separate subfolders)
14 is a 1,429 page .pdf file containing what appears to be the U.S. Copyright Office’s
15 *entire directory* of agents designated by service providers to receive notifications of
16 claimed infringement pursuant to Section 512(c) of the Copyright Act. *Id.* These
17 are just examples of why Perfect 10’s productions are so voluminous and difficult to
18 review.

19 Moreover, the file structure confirms that Perfect 10 did not produce these
20 documents as it maintains them in the ordinary course of business. For example, the
21 October 22 hard drive contains an entire folder entitled “articles after production”
22 (presumably a reference to Perfect 10’s last document production to Google), which
23 contains various recent newspaper articles and similar documents. *Id.* at ¶ 3.
24 Plainly, these are not documents created or maintained by Perfect 10 in the ordinary
25 course of its adult entertainment business. These are litigation documents collected
26 from the Internet after Perfect 10’s last document production, gathered for the
27 purpose of producing them to Google. Because Perfect 10 did not produce its
28 responsive documents as they are kept in the ordinary course of business, but rather,

1 produced them in myriad folders, sub-folders and sub-subfolders intermingled with
2 other voluminous non-responsive documents, Perfect 10 should be ordered to
3 provide Defendants with a declaration identifying the lowest-level subfolder in
4 which documents responsive to the October 6 Order may be found.

5 **B. Prior Perfect 10 Productions**

6 Perfect 10 has represented that its prior document productions contain certain
7 unidentified documents that are also responsive to certain unidentified Requests
8 compelled by the October 6 Order. Perfect 10 should be ordered to identify the
9 location of these documents as well, by lowest-level subfolder, because these prior
10 productions are organized in a fashion similar to the October 22 production. For
11 example, Perfect 10's November 25, 2008 document production contains 49
12 separate first-level folders. Supp. Nolan Decl. ¶ 6. For the Court's reference,
13 attached is a screenshot of these 49 first-level folders. *Id.* at Ex. C. As the
14 screenshot shows, none of these folders has any reference to any of Google's
15 Requests for Production (or the subject matter of those requests). *Id.* at ¶ 6 & Ex. C.
16 And most of these first-level subfolders have a large number of subfolders—for
17 example, the folder "0 0 0 for next production" alone contains 302 separate
18 subfolders and 12,152 separate files. *Id.* at Ex. D. As with the October 22 hard
19 drive, many files on this drive are not text-searchable, and must be reviewed
20 manually, one file at a time. *Id.* at ¶ 3. Again, if a responsive document was buried
21 many layers deep in one of the hundreds or thousands of subfolders, Defendants
22 might never find it. Further, as the title of this particular folder makes clear ("0 0 0
23 for next production"), these are documents Perfect 10 compiled purely for purposes
24 of a litigation-related document production, and are not documents kept in the
25 ordinary course of business. *See id.* at Exs. C & D.

1 **II. CONCLUSION**

2 For the foregoing reasons, Google requests that the Court adopt the
3 Defendants' (Proposed) Order granting the Amazon *Ex Parte* Application (and
4 Google's Joinder Therein).

5
6 DATED: November 6, 2009

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By Rachel Herrick Kassabian
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