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11 UNITED STATES DISTRICT COURT
 12 NORTHERN DISTRICT OF CALIFORNIA
 13 SAN JOSE DIVISION

14 DIGITAL ENVOY, INC.,

Case No. C 04 01497 RS

15 Plaintiff/Counterdefendant,

**AMENDED COMPLAINT OF DIGITAL
 ENVOY, INC.**

[DEMAND FOR JURY TRIAL]

16
 17 v.

18 GOOGLE, INC.,

19
 20 Defendant/Counterclaimant.
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22 Plaintiff Digital Envoy, Inc. ("Digital Envoy"), for its Amended Complaint against
 23 defendant Google, Inc. ("Google"), respectfully shows to the Court the following:

24 **I. SUMMARY OF COMPLAINT**

25 1. Digital Envoy brings this action because Google is using Digital Envoy's
 26 technology in non-permitted ways. Digital Envoy seeks to recover for Google's wrongful use of
 27 Digital Envoy's technology which helped grow Google's business at a phenomenal rate without
 28 Google properly compensating Digital Envoy. Digital Envoy is the inventor and market leader in

1 IP Intelligence technology which enables the determination of the geographic location of any
2 computer hooked to the Internet by reliably and rapidly tracking protocol addresses.

3 2. In November 2000, Digital Envoy and Google entered into an agreement
4 permitting Google to use Digital Envoy's technology for limited uses. At the beginning of this
5 business relationship, Google properly used the technology on its search site for a variety of
6 purposes, including selling what is referred to by Google as "paid links" (or links directly related
7 to a user search on Google.com which are paid for by third parties who want to highlight their
8 products to users and are highlighted as such on Google.com).

9 3. Later, Google expanded its business model and began to service non-search related
10 advertising on third party sites and sell geographically targeted advertising on those sites — using
11 Digital Envoy's technology outside the scope of the license and without compensating Digital
12 Envoy. From this wrongful conduct, Google has built a vast and profitable online advertising
13 business (which is a \$7.2 billion/year industry and growing), and Digital Envoy has lost
14 substantial income opportunities. Digital Envoy brings this action to recover its lost income, to
15 disgorge Google from its wrongful income, to prevent Google from further wrongful conduct, and
16 to recover additional damages as provided by law.

17 II. JURISDICTION

18 4. Digital Envoy is a Georgia corporation with its principal place of business in
19 Norcross, Georgia. The company was formed in October 1999 by the inventors of the technology
20 which is the subject of this action and others.

21 5. Google is a Delaware corporation with its principal place of business at its
22 "Googleplex" in Mountain View, California.

23 6. The Court has jurisdiction over this dispute under 28 U.S.C. § 1332 in that the
24 matter in controversy exceeds the sum or value of \$75,000 exclusive of interest and costs and is
25 between citizens of different States. Digital Envoy is a citizen of the State of Georgia and Google
26 is a citizen of the State of California.

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1 expressly permitted in an agreement which fairly compensates Digital Envoy. These restrictions
2 are necessary to not foreclose Digital Envoy's business opportunities (either directly or indirectly)
3 to do business with third party web sites directly.

4 14. Digital Envoy's proprietary technology has significant and independent economic
5 value to Digital Envoy because it is unique, and not generally known to, or readily ascertainable
6 by proper means, by other persons who could obtain economic value from the use or disclosure of
7 this technology. Furthermore, since the value of Digital Envoy's IP Intelligence technology is the
8 delivery of information, the company takes reasonable measures to protect the unauthorized
9 distribution of this information. Specifically, without limitation, Digital Envoy restricts its
10 customers for specific licensed uses and transmits the information (known as Digital Envoy's
11 "Database Library") in encrypted binary format.

12 15. One of the most profitable uses of Digital Envoy's IP Intelligence technology is to
13 enable its users to geographically target advertising on their website. By instantaneously
14 obtaining the geographical location of a visitor down to the closest city, the customer can target
15 specific advertising relevant to the visitor.

16 16. The ability to target advertising in this matter is attractive to advertisers reluctant to
17 buy Internet advertising which would otherwise be sent all over the world. Digital Envoy's
18 customers can thus sell more advertising, and the advertising is more successful and thereby more
19 profitable to the customer since Internet advertising is often paid on a click-through basis,
20 meaning the advertiser pays when a computer user actually clicks on the advertisement. Since
21 geographically targeted advertising is more relevant to the customer's visitors, the "click-through
22 rate" (or whatever other measure of success of the ad is employed) is often higher than un-targeted
23 advertising.

24 17. By filling this niche, Digital Envoy has developed into a small but profitable and
25 growing business.

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1 **B. Google Background**

2 18. Google is an Internet search engine company formed in September 1998. Through
3 excellent technological innovations and strong financial backing, Google became the world's
4 largest search engine in mid-2000.

5 19. Google is a play on the word "googol" which refers to the number represented by
6 the number 1 followed by 100 zeros. Google's use of the term reflects the company's mission to
7 organize the immense, seemingly infinite amount of information available on the web.

8 20. Google portrays itself as having started with a couple of students with an
9 innovative idea who opened its door in an office attached to a garage of a friend. The Googleplex,
10 as Google's present world headquarters is known, is (or was) complete with lava lamps, roving
11 large dogs, a chef who is a Dead-head (a fan of the musical group, the Grateful Dead), and room in
12 the parking lot for twice-weekly roller hockey games. Google claims it is working on offering
13 searches in the fictional Klingon language from the television show StarTrek.

14 21. At the same time, Google is backed by funding from two leading venture capital
15 firms and has a management team, board of directors and technical advisory council that rivals any
16 company in the world for business and financial acumen. Its two founders have also just joined
17 *Forbes'* billionaire club. Google also exceeded \$1 billion in revenue in 2003, mostly from
18 advertising, and the company is valued at more than \$15 billion.

19 22. As with many Internet-based companies, Google did not make a profit in its first
20 three years. Google's principal source of income originally came from marketing its search
21 technology to other Internet-based companies. At the same time, Google offered limited "paid
22 link" opportunities on its website. However, as described below, Google soon began to expand
23 its business from pure search into advertising and the company soon thereafter achieved elusive
24 *profitability*.

25 **C. The Agreement Between Google and Digital Envoy**

26 23. Google's "paid link" program began in mid-2000 and was originally centered on
27 the ability to offer paid links or relevant information tied to a user's search request. Thus on its
28 site, through keyword targeting or "paid links", only those users who are actively conducting a

1 web search and requesting information related to a third party's product are shown that third
2 party's message. The third party pays Google for its placement of its "paid link" on Google.com.

3 24. Google recognized that one factor in the relevance of paid links is geography.
4 Accordingly, shortly after it began its paid link program, Google was attracted to Digital Envoy's
5 technology which would permit paid link results which was geographically targeted to its
6 audience.

7 25. In November 2000, Google and Digital Envoy began to negotiate a license
8 agreement whereby Google would have use of Digital Envoy's IP Technology to obtain the
9 geographic location of visitors to its website, presumably to publish Google's site text in the
10 visitor's language without prompt and to sell geographically targeted "paid links" on its website.

11 26. On November 30, 2000, Google and Digital Envoy entered into a Product and
12 Electronic Database Evaluation and License Agreement (the "Agreement").

13 27. Under the Agreement, Google obtained a strictly limited, non-exclusive right to use
14 Digital Envoy's IP Intelligence technology and Database Libraries only in Google's business of
15 producing and maintaining *information search* technology and for no other business purpose
16 (emphasis added). Additionally, Google is expressly prohibited from selling, licensing,
17 distributing, sharing or otherwise giving, *in any form*, the Database Libraries to any other party or
18 using it outside of Google's site.

19 28. Under the Agreement, Digital Envoy retained all ownership of the Database
20 Libraries, including any patents, copyrights or trade secrets associated with the Database Libraries
21 of its IP Intelligence technology. Google is also obligated under this Section to hold all of Digital
22 Envoy's product information in strict confidence and is prohibited from sharing such information
23 with any third parties, and from distributing, disclosing or *otherwise making available* the
24 Database Libraries, or any information contained therein to any other party whatsoever.

25 29. Google is also obligated under the Agreement to promptly notify Digital Envoy of
26 any possible infringement of Digital Envoy's rights in the Database Libraries.

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1 30. For the use of Digital Envoy's IP Intelligence technology, including the Database
2 Libraries, Google pays to Digital Envoy a flat monthly fee, originally \$3,000 during the evaluation
3 period and currently \$8,000 per month.

4 **D. Google's Use of Digital Envoy's Technology**

5 31. Google used Digital Envoy's IP Intelligence technology to enable geographically
6 targeted paid links, solely in conjunction with a user search, on its information search technology
7 website. Such targeting fit well with Google's business program and was incorporated into
8 Google's promotional materials directed to potential third party paid link purchasers on its
9 website.

10 32. Google's paid link program as well as its third party ad network program, as it is
11 directed to outside companies on Google's search site, is called "AdWords" by Google. Google
12 also has a Premium Sponsorship program for large participants to negotiate a specific agreement
13 with Google. Companies signing up to use paid links through the AdWords program pay Google
14 based on cost-per-click such that Google benefits financially when advertisements placed by
15 Google are "clicked" on by the visitor to the site.

16 33. To enhance the "click through rate", companies signing to obtain paid links and to
17 participate in the Google Ad Network through the AdWords program are offered the option to
18 geographically target their link. In fact, the first of the four steps required to sign up for the
19 Google AdWords program requests the advertiser to choose its geographic targets, which, unless
20 "All Countries" and "All Languages" are chosen, requires use of Digital Envoy's technology.

21 34. The Premium Sponsorship paid link and ad network program is also based on the
22 success of the paid link or advertisement, measured by the click through rate or some other
23 measure, and also permits geographic targeting.

24 35. At the time of the Agreement, Google had just begun to sign agreements with other
25 Internet companies to power search services on those companies' sites. However, Google did not
26 supply advertising services to third party web sites at that time, had not contemplated providing
27 such services and did not disclose to Digital Envoy its intention to enter into this business. Instead
28 Google's business at the time was solely related to information search.

1 36. On the strength of Google's targeted paid link program, which included Regional
2 Targeting using Digital Envoy's IP Intelligence, Google had signed up more than 350 Premium
3 Sponsorships and thousands of AdWords participants by mid-2001. Due to Google's targeted
4 paid link program on Google.com, its click through rates at that time were four to five times
5 higher than click through rates for traditional advertisement programs.

6 **E. Google's Misuse of Digital Envoy's Technology**

7 37. By August 2002, Google began to enter into agreements to provide Google
8 advertisements (including advertisements developed under its AdWords program) on third party
9 websites to which it was providing search services.

10 38. In February – March, 2003, Google began to syndicate advertisements to major
11 advertising networks supporting nearly 24,000 websites. Google announced that it entered into
12 this arrangement as part of a test of a new service to place text ads on pages selected for their
13 relevance to a marketer's products or services. Thus, for the first time, Google announced plans to
14 place cost-per-click listings on content-targeted websites, rather than search-related pages. Google
15 advertisers, including the more than 100,000 active advertisers in its Google AdWords program,
16 would thereafter have the option to appear on websites unrelated to search. Google's business
17 thus was expanding outside of information search.

18 39. In May – June 2003, Google launched a new program which it called "Google
19 AdSense" wherein Google would supply advertisements to any content-based website which
20 signed up. Google announced that the program was designed to maximize the revenue potential
21 of a website by serving highly relevant ads specific to the content of the page. Under this
22 program, Google and the AdSense client share in revenue paid by the advertisers, typically on a
23 per click basis or some other measure of the success of the advertisement on the AdSense client's
24 website. Google's initial clients in the AdSense program included ABC.com, HowStuffWorks,
25 Internet Broadcasting Systems, Inc., Lycos Europe, New York Post Online Edition, Reed Business
26 Information and U.S. News & World Report. Google refers to third party web sites in its AdSense
27 program and the delivery of advertisements on such sites, as the "Google Ad Network."
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1 46. Although acquired by lawful means, Google's misuse of Digital Envoy's trade
2 secrets constitutes a misappropriation in that it was acquired under circumstances giving rise to a
3 duty to maintain its secrecy and limit its use and that Google used Digital Envoy's trade secrets
4 through improper means, including failing to limit its use of the trade secrets.

5 47. Google's misappropriation of Digital Envoy's trade secrets have damaged Digital
6 Envoy through lost income, licensing and other business opportunities.

7 48. Google's misappropriation of Digital Envoy's trade secrets have also unjustly
8 enriched Google.

9 49. Digital Envoy is entitled to recover damages against Google in amounts to be
10 proved at trial.

11 50. Google's actions have been willful and malicious. Accordingly, Digital Envoy is
12 entitled to recover punitive or exemplary damages, including those provided for in Cal. Civ. Code
13 § 3426.3(c), against Google in amounts to be determined by the jury.

14 **COUNT II**

15 **(Federal Unfair Competition — 15 U.S.C. § 1125(a))**

16 51. Digital Envoy incorporates its allegations contained in paragraphs 1 through 50 as
17 if fully stated herein.

18 52. Google's actions, as set forth above, made in connection with services and used in
19 commerce, falsely designate the origin of its services, are misleading in their description or
20 representation of fact. Google's actions deceive others (including its AdSense and AdWords
21 customers) as to the origin and approval of its services and its commercial activities and Digital
22 Envoy is damaged by this conduct. Google's actions thus constitute violations of § 43(a) of the
23 Lanham Act, 15 U.S.C. § 1125(a).

24 53. Google acted as set forth above with knowledge and in disregard of Digital
25 Envoy's rights.

26 54. Digital Envoy is entitled to recover its actual damages, Google's profits, treble
27 damages and its attorneys' fees.

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1 (c) the actions of Google are likely to cause, and have caused, confusion,
2 mistake or deception; and

3 (d) the actions of Google will result in the unjust enrichment of Google.

4 63. Google acted as set forth above with knowledge, in bad faith and in willful
5 disregard of Digital Envoy's rights.

6 64. In the manner set forth above, Google has irreparably damaged Digital Envoy and
7 will continue to irreparably damage Digital Envoy unless enjoined by this Court. Digital Envoy is
8 without an adequate remedy at law.

9 65. Digital Envoy is also entitled to an award of damages to be proved at trial, punitive
10 damages and attorneys' fees.

11 **COUNT V**

12 **(Common Law Unjust Enrichment)**

13 66. Digital Envoy incorporates its allegations contained in paragraphs 1 through 66 as
14 if fully stated herein.

15 67. As set forth above, Google has used and continues to use Digital Envoy's
16 technology and information for purposes outside the scope of the Agreement.

17 68. Google and Digital Envoy had no agreement or understanding which would govern
18 the relationship of the parties for the extra-contractual use set forth above.

19 69. In this manner, Google has received distinct and direct benefits from Digital
20 Envoy, but without compensating Digital Envoy. Google has thereby been unjustly enriched.

21 70. Accordingly, Digital Envoy is entitled to recover from Google all monies earned in
22 connection with Google's extra-contractual use of Digital Envoy's proprietary technology and
23 information, in amounts to be proved at trial.

24 **COUNT VI**

25 **(Breach of Contract)**

26 71. Digital Envoy incorporates its allegations contained in paragraphs 1 through 70 as
27 if fully stated herein.

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1 72. As set forth above, the parties have entered into a valid and enforceable contract,
2 the Agreement described above, which requires Google, among other things, to pay a monthly fee
3 to Digital Envoy in exchange for the limited license granted by Digital Envoy.

4 73. Google has breached the Agreement by, among other things, failing to pay the
5 monthly fee as required by the Agreement. As of August 16, 2004, Google has failed to pay to
6 Digital Envoy \$16,000 in monthly fees owing and past due.

7 74. Digital Envoy has fully performed all of its obligations under the Agreement.

8 75. In the manner set forth above, Digital Envoy has been damaged by Google's breach
9 of contract. Digital Envoy is thereby entitled to recover its damages to be proved at trial.

10 WHEREFORE, plaintiff Digital Envoy, Inc. prays for:

- 11 (1) judgment in its favor and against defendant Google, Inc.
- 12 for actual damages,
- 13 (2) disgorgement of profits,
- 14 (3) recovery of monies earned,
- 15 (4) trebling of damages pursuant to 15 U.S.C. § 1125,
- 16 (5) punitive damages on Counts for which such relief is
- 17 available,
- 18 (6) attorneys' fees interest and costs,

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(7) and for an injunction prohibiting Google, Inc. from using Digital Envoy’s proprietary technology and information beyond the scope of the Agreement, specifically including supplying geographically targeted advertisements on third party websites.

DATED: August 27, 2004

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By _____ /s/
P. CRAIG CARDON

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