

1 Eric J. Benink, Esq., SBN 187434
 2 Krause Kalfayan Benink & Slavens, LLP
 3 625 Broadway, Suite 635
 4 San Diego, CA 92101
 (619) 232-0331 (ph)
 (619) 232-4019 (fax)
 eric@kkbs-law.com

5 Attorneys for Plaintiff

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 8 UNITED STATES DISTRICT COURT
 9 SOUTHERN DISTRICT OF CALIFORNIA

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PERFECT 10, INC., a California corporation,

Plaintiff,

v.

MEGAUPLOAD LIMITED, a Hong Kong corporation; KIM SCHMITZ, an individual; and DOES 1 through 100, inclusive,

Defendants.

CASE NO. '11CV0191 IEG BLM

COMPLAINT FOR:

**(1) COPYRIGHT INFRINGEMENT;
 (2) TRADEMARK INFRINGEMENT (FEDERAL); (3) TRADEMARK DILUTION (FEDERAL); (4) VIOLATION OF 15 U.S.C. § 1125 (5) UNFAIR COMPETITION; AND (6) VIOLATION OF RIGHTS OF PUBLICITY**

DEMAND FOR JURY TRIAL

1 Plaintiff Perfect 10, Inc. (“Perfect 10”) avers:

2 **JURISDICTION AND VENU**

3 1. **Jurisdiction.** This action arises under the Copyright Act, 17 U.S.C.
4 § 101 *et seq.*, and the Lanham Act, 15 U.S.C. § 1051 *et seq.* This Court has
5 jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331,
6 1338(a) and (b) and principles of supplemental jurisdiction.

7 2. **Venue.** Venue is proper in this judicial district pursuant to 28
8 U.S.C. § 1391 (b)(2), (c), and § 1400(a).

9 3. **Personal Jurisdiction.** Personal jurisdiction is proper over the
10 Defendants because the wrongful activity at issue concerns Defendants’
11 operation of commercial businesses through which Defendants knowingly
12 transact business and enter into contracts with individuals in California,
13 including within the County of San Diego. Specifically, Defendants contract
14 with California customers to sell monthly memberships for their services, and
15 receive much of their revenue directly from Paypal, a corporation with
16 headquarters in San Jose, California. One of the primary websites through
17 which Defendants conduct their business, megaupload.com, states that its Terms
18 of Service are to be construed in accordance with the laws of California. Each
19 of the Defendants, therefore, has purposefully availed itself of the privilege of
20 doing business in California and in the United States, and material elements of
21 Defendants’ wrongdoing occurred in this State.

22 **THE PARTIES**

23 4. Plaintiff Perfect 10 is a California corporation. Plaintiff published
24 the popular magazine PERFECT 10 and owns and operates the internet website
25 located at perfect10.com.

26 5. Defendants Megaupload Limited and Kim Schmitz (“Schmitz”)
27 (collectively, “Megaupload”) collectively own, operate, and/or control the
28 internet websites located at megaupload.com, megarotic.com, megaporn.com,

1 megavideo.com, and megaclick.com among others, and have various advertising
2 operations, data storage facilities, and other businesses, which among other
3 things, copy, store, distribute, display, and profit from unauthorized copyrighted
4 materials, and induce and assist others to infringe copyrighted materials.
5 Megaupload Limited was formed in Hong Kong.

6 6. Schmitz is the moving, active, conscious force behind the infringing
7 and illegal activities described herein in that he personally directs, controls,
8 ratifies, and participates in such infringing and illegal activities. According to
9 *Forbes* magazine, Schmitz has served time in prison for computer hacking and
10 insider trading.

11 7. The computer servers that host megaupload.com, megarotic.com,
12 megaporn.com, megavideo.com, and megaclick.com are located in Ashburn,
13 Virginia and are managed and operated by Schmitz. Schmitz was initially listed
14 as the official contact for megaupload.com in Internet Registrar filings but his
15 name was subsequently removed from those filings.

16 8. Does 1 through 100, inclusive, which are businesses owned or
17 controlled by Megaupload or individuals affiliated with Megaupload, which
18 either directly or indirectly profit from and/or directly or indirectly infringe or
19 facilitate the infringement of Perfect 10 intellectual property, are sued herein
20 under fictitious names because their true names and capacities are unknown to
21 Perfect 10.

22 9. When Perfect 10 ascertains the Doe Defendants' true names and
23 capacities, it will seek leave to amend this complaint to insert such true names
24 and capacities. Perfect 10 is informed and believes, and on that basis avers, that
25 each Doe Defendant acted with Defendants and is responsible for the harm and
26 damages to Perfect 10 herein averred. Each of the Defendants and the Doe
27 Defendants are referred to hereinafter collectively as "Defendants."

28 10. Perfect 10 is informed and believes, and on that basis avers, that at

1 all times material herein, each of the Defendants was the agent and/or employee
2 of the other Defendants, and, in doing the things herein averred, was acting
3 within the course and scope of such agency and employment.

4 11. Each of the entity defendants herein is the alter ego of Schmitz in
5 that a unity of interest and ownership exists between he and the corporate
6 entities such that there does not exist a separateness between them and an
7 injustice would result if the acts in question were treated as those of only one of
8 the entities defendants. Schmitz formed Megaupload for the specific purpose of
9 engaging in the business of illegally storing, displaying, and distributing the
10 intellectual property of others. On information and belief, Schmitz alone profits
11 from the revenues derived from these entities and neither Megaupload entity
12 pays any taxes in the United States. Furthermore, neither is registered to
13 conduct business in the United States with any Secretary of State office. The
14 megaupload.com, megaporn.com, megarotic.com, megavideo.com, and
15 megaclck websites fail to identify a telephone number, or the identities of any
16 officers or directors.

17 **THE BUSINESS OF PERFECT 10**

18 12. The business of Perfect 10 consists of the design, creation,
19 production, marketing, promotion, and sale of copyrighted adult entertainment
20 products, including photographs, magazines, video productions, cell phone
21 downloads, and other media.

22 13. Perfect 10 was the publisher of the well-known magazine
23 PERFECT 10, but was forced to close that magazine because of rampant
24 infringement.

25 14. Perfect 10 creates or created, and sells or sold, calendars and other
26 merchandise featuring its images, and was involved in the licensing of
27 downloads of images for cell phones, but is not currently earning revenue from
28 that endeavor because of rampant infringement.

1 15. Perfect 10 owns and operates the internet website perfect10.com.
2 Consumers are provided access to content owned by Perfect 10 and made
3 available by payment of a membership fee of \$25.50 per month.

4 16. Perfect 10's revenues are currently derived predominantly from
5 sales of memberships to its perfect10.com website. Sales of memberships to the
6 perfect10.com website are made by providing the customer with an individual
7 user name and password to access the website.

8 17. The Perfect 10 Copyrighted Works: Perfect 10 owns thousands of
9 valuable and unique copyrighted photographs, as well as video productions and
10 other proprietary materials, some of which are identified in Exhibit 1. As set
11 forth in Exhibit 1, a substantial number of the copyrighted photographs are
12 registered with the U.S. Copyright Office and others are pending registration.
13 Perfect 10 owns the copyrights in and to these works (the "Perfect 10
14 Copyrighted Works"). Perfect 10 has invested, and continues to invest,
15 substantial sums of money, time, effort, and creative talent, to make and produce
16 the Perfect 10 Copyrighted Works. In addition, in order to produce and sell the
17 Perfect 10 Copyrighted Works, Perfect 10 is required to make numerous
18 payments, including but not limited to model fees, photographer fees, location
19 costs, styling costs, make up costs, printing costs, film and processing costs,
20 travel costs, as well as distribution, public relations, legal, and advertising and
21 promotion costs.

22 18. The Perfect 10 Marks: Perfect 10 also is the owner of the valuable
23 and well-known Perfect 10 family of trademarks, including but not limited to
24 PERFECT 10, PERFECT10.COM, and P10 (the "Perfect 10 Marks"). These
25 marks are used in commerce by Perfect 10 on and in connection with the sale of
26 its products and services, including PERFECT 10 magazine and perfect10.com.
27 Perfect 10 has spent millions of dollars advertising and promoting the Perfect 10
28 Marks and Perfect 10 products and services bearing these marks. Perfect 10 has

1 built and owns the valuable goodwill symbolized by the Perfect 10 Marks.
2 Three of Perfect 10's registered trademarks, registration numbers 2235145,
3 2202643, and 2573998, have become incontestable under Section 15 of the
4 Lanham Act, 15 U.S.C. Section 1065.

5 19. Goods and services bearing the Perfect 10 Marks have been
6 featured and/or talked about on numerous television and radio shows (including
7 *The Tonight Show*, *The Sopranos*, *The Amazing Race*, *Entourage*, *The Howard*
8 *Stern Show*, *Dawson's Creek*, *Battledome*, *Fox News*, *Hard Copy*, *Entertainment*
9 *Tonight*, *Extra*, *The Dating Game*, *Temptation Island*, *Monday Night Football*,
10 *Hannity & Colmes*, *The O'Reilly Factor*, *The View*, and *Jenny Jones*), in motion
11 pictures (including *Orphan*, *Superbad*, *Knocked Up*, *Spiderman*, *American Pie*,
12 *Hollow Man*, and *The Way of the Gun*), and in newspapers and periodicals.

13 20. The Perfect 10 Rights of Publicity: Perfect 10 contracts with
14 models in connection with its magazine and website. Perfect 10 secures
15 assignments from some of those models of their rights of publicity (the "Perfect
16 10 Rights of Publicity"). The Perfect 10 Rights of Publicity are valuable
17 because the identities, including the names and likenesses, of these models are
18 well-known and popular and attract/attracted purchasers of PERFECT 10
19 magazine and visitors and subscribers to perfect10.com.

20 21. The success of Perfect 10's business is almost entirely dependent
21 on its intellectual property rights. Therefore, the ongoing and massive
22 infringements of Perfect 10's rights, as herein described, is devastating to, and
23 threatens the existence of, Perfect 10's business.

24 **THE BUSINESS OF MEGAUPLOAD**

25 22. Megaupload operates the internet websites megaupload.com,
26 megaporn.com, megarotic.com, megavideo.com, and megaclick.com, among
27 others, which are accessible throughout the United States and the world.
28 Megaupload.com, megaporn.com, megarotic.com, and megavideo.com are pirate

1 websites that sell access to large amounts of unauthorized intellectual property to
2 the public without paying the rightful owners of that property. Megaupload and
3 its users upload copyrighted and trademarked intellectual property (movies,
4 songs, software, pictures, etc.) to its computer servers. In the case of
5 megaupload.com, after a file is uploaded, Megaupload provides to its users a
6 unique Uniform Resource Locator (“URL”) which allows its users to view or
7 download the file from the website. The URL’s are disseminated throughout the
8 internet by Megaupload and its users, which enable anyone with the URL to
9 access, copy, and download the intellectual property from Megaupload’s servers.
10 In order to view, copy, or download such files from the megaupload websites
11 without waiting, the customer must purchase a membership fee, for as little as
12 €9.99 per month. Megaupload stores billions of dollars of pirated full-length
13 movies, songs, software, and images on its servers. It copies, distributes, and
14 sells such pirated materials to hundreds of thousands of consumers, without
15 permission and without compensating the rightful owners of those materials.

16 23. Megaupload is aware that its websites are being used as a vehicle to
17 illegally copy and distribute large amounts of infringing materials. Indeed,
18 megaupload.com has become among the hundred most popular websites on the
19 Internet, with a reported 45 million unique visitors per day. Because it charges
20 membership fees for immediate access to the copyrighted materials stored on its
21 servers, it is a distributor and seller of pirated materials.

22 24. In addition to its direct infringements as discussed above,
23 Megaupload encourages, facilitates, induces, and materially contributes to the
24 infringements of its users through its Rewards Programs. Megavideo.com and
25 megaporn.com have a rewards program called the “Megaporn Rewards
26 program.” Megaupload.com has a rewards program which it runs in a similar
27 fashion. Megaupload.com states with regard to its Rewards Program:
28 “The more downloads your files get, the more you can earn through our

1 Megaupload Rewards program.” “Every qualifying download of one of your
2 files will earn you a reward point. When you have reached a certain number of
3 points, you can redeem them for premium status or even cash.” “There is no
4 limit! And even better: The more downloads your files get, the more you can
earn through our Megaupload Rewards program.”

5 Megaupload offers \$10,000 USD for 5,000,000 reward points.

6 25. In other words, Megaupload induces its customers to post content
7 that is likely to be massively downloaded, such as high quality infringing nude
8 images and popular full length movies and songs. Such activity very
9 substantially damages copyright holders, as Megaupload does not pay them for
10 their works.

11 26. Numerous affiliate websites operated by Megaupload customers
12 have received substantial payouts from Megaupload for posting URLs of pirated
13 materials stored on Megaupload’s servers. For example, the website,
14 Megaupload.net provides a search engine to search for specific types of files
15 (e.g. Perfect 10 images, Frank Sinatra songs, the movie Avatar, etc.) The search
16 engine provides URLs to Megaupload’s website responsive to the search
17 request. Thus, the person performing the search is directed to Megaupload’s
18 website and is offered an opportunity to purchase a membership. Some of the
19 affiliates display samples of the infringing materials directly from the affiliate
20 website. Megaclick.com places ads on, receives traffic from, and promotes,
21 infringing websites.

22 27. Megaupload is not a legitimate file storage company and has none
23 of the characteristics. Its megaporn.com website is a pornographic website
24 which shows images of sexual intercourse on its tour pages to visitors of any
25 age. A site similar in operation to Megaupload.com was recently characterized
26 by the Congressional anti-piracy caucus as one of the six worst infringing
27 websites in the world. Pirate websites such as megaupload.com, which
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1 obviously infringe massive quantities of movies, songs, images, and other
2 extremely valuable copyrighted works, and directly profit from the infringing
3 activity over which they have complete control, were never meant to be eligible
4 to receive a DMCA safe harbor. Furthermore, none of the five Megaupload
5 websites listed above, including megaupload.com, identify the name, address, or
6 phone number of their respective DMCA agents as required by 17 U.S.C. §
7 512(c)(2).

8 28. Among the materials that Megaupload illegally stores, copies,
9 distributes, sells, and displays, are thousands of Perfect 10 copyrighted images,
10 Perfect 10 videos, and materials that infringe upon Perfect 10 trademarks, and
11 rights of publicity.

12 29. The five Megaupload websites listed above, including
13 megaupload.com, are hosted by Carpathia Hosting, Inc. in Ashburn VA.

14 30. All of the Perfect 10 Copyrighted Works which Megaupload and its
15 affiliates provide to consumers are used without authorization. Megaupload
16 engages in and facilitates the massive and ongoing violations of Perfect 10's
17 rights even though Megaupload is aware that Perfect 10 never authorized or
18 consented to the use by Megaupload of the Perfect 10 Copyrighted Works, the
19 Perfect 10 Marks, or the Perfect 10 Rights of Publicity. Megaupload is aware of
20 the lack of Perfect 10's authorization and consent for the following reasons,
21 among others:

22 (a) *First*, between July 23, 2010 and August 8, 2010, Perfect 10
23 sent to Megaupload 22 notices notifying Megaupload that it was infringing a
24 vast collection of third party copyright works, Perfect 10 rights of publicity, and
25 Perfect 10 copyrighted works. As far as Perfect 10 can determine, most of these
26 identified infringing works have not been removed.

27 (b) *Second*, Megaupload has offered complete electronic copies
28 of Perfect 10 magazine, as well as Perfect 10 Images that contain obvious

1 Perfect 10 copyright notices, along with files that are labeled “Perfect 10” or
2 Perfect-10.

3 (c) *Third*, upon information and belief, Megaupload does not
4 own anything that it sells access to. Whether or not someone else uploaded the
5 copyrighted material to Megaupload servers does not give Megaupload the right
6 to make copies of, distribute, display, or sell access to those works.

7 **FIRST CLAIM FOR RELIEF**

8 **(Copyright Infringement)**

9 **Against All Defendants**

10 31. Perfect 10 re-avers and incorporates herein by reference each and
11 every averment of paragraphs 1 through 30 above as though fully set forth
12 herein.

13 32. Perfect 10 is the owner of all right, title, and interest to each of the
14 Perfect 10 Copyrighted Works. Perfect 10 has registered its works with the
15 United States Copyright Office. Perfect 10 has been issued United States
16 copyright certificates some of which are listed on Exhibit 1, attached hereto.

17 33. Each of the Perfect 10 Copyrighted Works consists of material
18 original with Perfect 10 and each is copyrightable subject matter.

19 34. Defendants have copied, reproduced, distributed, adapted, and/or
20 publicly displayed the Perfect 10 Copyrighted Works without the consent or
21 authority of Perfect 10, thereby directly infringing Perfect 10’s copyrights.

22 35. Defendants’ conduct constitutes infringement of Perfect 10’s
23 copyrights and exclusive rights under copyright in the Perfect 10 Copyrighted
24 Works in violation of Sections 106 and 501, et. seq. of the United States
25 Copyright Act, 17 U.S.C. §§ 106 and 501.

26 36. Defendants have induced, caused, and/or materially contributed to
27 unauthorized copying, reproduction, adaptation, public display, and/or
28 distribution of the Perfect 10 Copyrighted Works.

1 37. Defendants' conduct constitutes contributory infringement of
2 Perfect 10's copyrights and exclusive rights under copyright in the Perfect 10
3 Copyrighted Works.

4 38. Defendants have directly profited from the infringement of Perfect
5 10's copyrighted works, and possess the right and ability to supervise their
6 directly infringing affiliates who provide them with customers by offering their
7 visitors Perfect 10 images, and suggest that the full set is available through the
8 Megaupload websites.

9 39. Defendants' conduct constitutes vicarious infringement of Perfect
10 10's copyrights and exclusive rights under copyright in the Perfect 10
11 Copyrighted Works.

12 40. The infringement of Perfect 10's rights in and to each of the Perfect
13 10 Copyrighted Works constitutes a separate and distinct act of infringement.

14 41. The acts of infringement by Defendants have been willful,
15 intentional, and purposeful, in reckless disregard of and with indifference to the
16 rights of Perfect 10.

17 42. As a direct and proximate result of the infringements by Defendants
18 of Perfect 10's copyrights and exclusive rights under copyright in the Perfect 10
19 Copyrighted Works, Perfect 10 is entitled to its actual damages and Defendants'
20 profits pursuant to 17 U.S.C. § 504(b).

21 43. Alternatively, Perfect 10 is entitled to statutory damages, pursuant
22 to 17 U.S.C. § 504(c).

23 44. Defendants' conduct is causing and, unless enjoined and restrained
24 by this Court, will continue to cause, Perfect 10 great and irreparable injury that
25 cannot fully be compensated in money. Perfect 10 has no adequate remedy at
26 law. Pursuant to 17 U.S.C. § 502, Perfect 10 is entitled to injunctive relief
27 prohibiting further infringements of Perfect 10's copyrights.

28 45. Perfect 10 further is entitled to its attorneys' fees and costs pursuant

1 to 17 U.S.C. § 505.

2 **SECOND CLAIM FOR RELIEF**

3 **(Trademark Infringement)**

4 **Against All Defendants**

5 46. Perfect 10 re-avers and incorporates herein by reference each and
6 every averment of paragraphs 1 through 45 above as though fully set forth
7 herein.

8 47. Perfect 10 is the owner of the Perfect 10 Marks, including the
9 registered trademark/service marks PERFECT 10, PERFECT10.COM, and P10.
10 The United States trademark/service mark registrations for PERFECT 10,
11 PERFECT10.COM, and P10 include Registration Nos. 2,202,643, 2,235,145,
12 2,573,998, 2,709,583, and 3,094,437 for, among other goods and services,
13 entertainment services in the nature of adult entertainment and beauty contests
14 provided via a global computer network; entertainment services in the nature of
15 beauty contests; and magazines featuring adult entertainment, beauty contests,
16 pictures of female models, interviews, fiction, and articles on human relations,
17 sports, entertainment, lifestyles, fitness, and calendars and unmounted
18 photographs.

19 48. The Perfect 10 Marks have been continuously used in commerce by
20 Perfect 10 and its predecessors, and are widely known throughout the United
21 States. Three of Perfect 10's registered trademarks, registration numbers
22 2235145, 2202643, and 2573998 have become incontestable under Section 15 of
23 the Lanham Act, 15 U.S.C. Section 1065.

24 49. Perfect 10 has spent millions of dollars promoting and advertising
25 the Perfect 10 Marks and products and services bearing the Perfect 10 Marks,
26 and has marketed and sold millions of dollars of products and services under the
27 Perfect 10 Marks.

28 50. As a direct result of the aforementioned use, promotion, and

1 advertisement of the Perfect 10 Marks, Perfect 10 has built up and now owns
2 valuable goodwill symbolized by the Perfect 10 Marks.

3 51. As a direct result of the care and skill exercised by Perfect 10 over
4 the nature and quality of goods and services sold under the Perfect 10 Marks and
5 the extensive promotion, advertising, sale, and public acceptance thereof, the
6 Perfect 10 Marks have become known as a symbol of the goodwill that Perfect
7 10 has created throughout the United States and elsewhere by selling products
8 and services of high quality and by fairly and honorably dealing with the trade
9 and public in the sale of these products and services.

10 52. Defendants' conduct, as averred herein, including using and
11 reproducing the Perfect 10 Marks in commerce in connection with the sale,
12 offering for sale, and advertising of goods and services on Megaupload websites
13 and by Affiliated Infringing Websites, for the purpose or with the effect of
14 directing consumers who are searching for authorized Perfect 10 products and
15 services to the Affiliated Infringing Websites and to Megaupload, constitutes
16 infringement of the Perfect 10 Marks in violation of Sections 32 and 43 of the
17 Lanham Act, 15 U.S.C. §§ 1114 and 1125.

18 53. Defendants' conduct constitutes contributory infringement of the
19 Perfect 10 Marks.

20 54. Defendants' conduct constitutes vicarious infringement of the
21 Perfect 10 Marks.

22 55. Defendants' conduct has been and is willful and deliberate.

23 56. Perfect 10 is entitled to recover all damages sustained as a result of
24 Defendants' unlawful conduct, including (a) Defendants' profits, (b) Perfect 10's
25 damages, (c) treble those amounts, (d) costs of suit, and (e) reasonable attorneys'
26 fees.

27 57. Defendants' conduct is causing and, unless enjoined and restrained
28 by this Court, will continue to cause, Perfect 10 great and irreparable injury that

1 cannot fully be compensated in money. Perfect 10 has no adequate remedy at
2 law. Perfect 10 is entitled to injunctive relief prohibiting further infringements
3 of the Perfect 10 Marks.

4 **THIRD CLAIM FOR RELIEF**

5 **(Trademark Dilution)**

6 **Against All Defendants**

7 58. Perfect 10 re-avers and incorporates herein by reference each and
8 every averment of paragraphs 1 through 57 above as though fully set forth
9 herein.

10 59. The Perfect 10 Marks have become and at all relevant times have
11 been “famous” within the meaning of 15 U.S.C. § 1125(c).

12 60. The Affiliated Infringing Websites typically intermingle Perfect
13 10’s high-quality images with images of poor quality or of an offensive or illegal
14 nature. The acts of Defendants averred herein have lessened the capacity of the
15 Perfect 10 Marks to identify and distinguish Perfect 10’s services and products
16 from those of the Affiliated Infringing Websites, have tarnished the valuable
17 image and reputation associated with the Perfect 10 Marks, and have created an
18 undesirable, unwholesome, or unsavory mental association with Perfect 10 and
19 the Perfect 10 Marks, damaging Perfect 10’s goodwill and disparaging Perfect
20 10’s rights in the Perfect 10 Marks. Defendants’ acts and conduct are in
21 violation of 15 U.S.C. § 1125(c). Defendants have willfully intended to trade on
22 Perfect 10’s reputation and/or to cause dilution of the Perfect 10 Marks.

23 Accordingly, Perfect 10 is entitled to recover all damages sustained as a result of
24 Defendants’ unlawful conduct, including (a) Defendants’ profits, (b) Perfect
25 10’s damages, (c) treble those amounts, (d) costs of suit, and (e) reasonable
26 attorneys’ fees.

27 61. Defendants’ conduct is causing and, unless enjoined and restrained
28 by this Court, will continue to cause, Perfect 10 great and irreparable injury that

1 cannot fully be compensated in money. Perfect 10 has no adequate remedy at
2 law. Perfect 10 is entitled to injunctive relief prohibiting further dilution and
3 disparagement of the Perfect 10 Marks.

4 **FOURTH CLAIM FOR RELIEF**
5 **(Violation of 15 U.S.C. § 1125 *et seq.*)**

6 **Against All Defendants**

7 62. Perfect 10 re-avers and incorporates herein by reference each and
8 every averment of paragraphs 1 through 61 as though fully set forth herein.

9 63. Without authorization or license, Defendants have commercially
10 exploited and used millions of marketable adult-oriented photographs and
11 likenesses, which range from the most tame to the most explicit. Through these
12 photographs, which make Defendants content providers for adult photographs of
13 every type and quality, as well as the use of the names of the persons depicted,
14 Defendants are unlawfully exploiting the publicity rights and trademark rights of
15 Perfect 10, as well as the publicity rights, and trademark rights of third-parties.
16 Defendants are also selling without authorization, in competition with Perfect
17 10, billions of dollars in stolen songs, full-length movies, and even computer
18 software. This conduct enables Defendants to compete directly and unfairly
19 with Perfect 10 by, among other things, offering for free millions of valuable
20 photographs and likenesses, and thousands of songs, and full length movies, as
21 well as computer software that are not lawfully available to Perfect 10 or other
22 competitors acting lawfully.

23 64. On information and belief, Defendants further engage in unfair
24 competition by commercially exploiting, through third-party affiliate websites,
25 Perfect 10 and third-party rights, including by placing ads next to Perfect 10
26 images on said websites.

27 65. In connection with their third-party relationships, Defendants direct
28 and/or permit Megaupload download links offering tens of thousands of Perfect

1 10 copyrighted images, as well as Perfect 10 videos, to be juxtaposed on
2 Megaupload affiliated websites, next to photographs and likenesses of Perfect 10
3 models and other models or celebrities.

4 66. Defendants are infringing and diluting Perfect 10's and other
5 parties' trademarks, as alleged herein.

6 67. All of the above is causing direct injury to Perfect 10's business.
7 Perfect 10 has suffered injury in fact and has lost money and property as a result
8 of such unfair competition.

9 68. Perfect 10 is entitled to recover all damages sustained as a result of
10 Megaupload's unlawful conduct, including (a) Defendants' profits, (b) Perfect
11 10's damages, (c) treble those amounts, (d) costs of suit, and (e) reasonable
12 attorneys' fees. In undertaking the conduct alleged above, Defendants acted
13 with oppression, fraud, and malice, with the intent to cause injury to Perfect 10,
14 with the intent to deprive Perfect 10 of its property and legal rights, and with full
15 knowledge of the wrongfulness of Defendants' conduct. Defendants' conduct
16 was undertaken with a willful and conscious disregard of the rights of Perfect 10
17 and subjected Perfect 10 to cruel and unjust hardship. Therefore, Perfect 10 is
18 entitled to an award of punitive damages for the sake of example and to punish
19 Defendants, in an amount to be determined at trial.

20 69. Defendants' conduct is causing and, unless enjoined and restrained
21 by this Court, will continue to cause, Perfect 10 great and irreparable injury that
22 cannot fully be compensated or measured in money. Perfect 10 has no adequate
23 remedy at law. Perfect 10 is entitled to injunctive relief prohibiting further such
24 unfair competition.

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FIFTH CLAIM FOR RELIEF
(Violation of California Unfair Competition Law
– Cal. Bus. & Prof. Code §§ 17200, et seq.)
Against All Defendants

70. Perfect 10 re-avers and incorporates herein by reference each and every averment of paragraphs 1 through 30 and 46 through 69 above as though fully set forth herein.

71. Without authorization or license, Defendants have commercially exploited and used millions of marketable adult-oriented photographs and likenesses, which range from tame to explicit. Through these photographs, which make Defendants content providers for adult photographs of every type and quality, as well as the use of the names of the persons depicted, Defendants are unlawfully exploiting the publicity rights and trademark rights of Perfect 10, as well as the intellectual property rights of third-parties. Defendants are also selling without authorization, in competition with Perfect 10, billions of dollars in stolen songs, full-length movies, and even computer software. This conduct enables Defendants to compete directly and unfairly with Perfect 10 by, among other things, offering for free millions of valuable photographs and likenesses, and thousands of songs, and full length movies, as well as computer software that are not lawfully available to Perfect 10 or other competitors acting lawfully.

72. Defendants further engage in unfair competition by commercially exploiting, through their affiliate programs, Perfect 10 and third-party rights.

73. In connection with its affiliate program, Defendants direct and/or permit Megaupload download links offering thousands of Perfect 10 copyrighted images, as well as Perfect 10 videos, to be juxtaposed on Megaupload affiliated websites, next to photographs and likenesses of Perfect 10 models and other models or celebrities.

74. Megaupload is infringing and diluting Perfect 10's and other

1 parties' trademarks, as alleged herein.

2 75. Defendants' acts and practices alleged herein constitute unfair,
3 unlawful, and fraudulent business acts and practices within the meaning of
4 California Bus. & Prof. Code §§ 17200, et. seq.

5 76. Defendants engaged in unfair business acts and practices in that the
6 harm caused by its conduct outweighs any utility of such conduct and such
7 conduct offends public policy, is immoral, unscrupulous, unethical, deceitful and
8 offensive, and cause substantial injury to Perfect 10.

9 77. All of the above is causing direct injury to Perfect 10's business.
10 Perfect 10 has suffered injury in fact and has lost money and property as a result
11 of such unfair competition.

12 78. Perfect 10 seeks an injunction prohibiting Megaupload from further
13 engaging in such unfair business acts and practices and for an order of restitution
14 and/or disgorgement.

15 **SIXTH CLAIM FOR RELIEF**

16 **(Violation of Rights of Publicity –**

17 **Cal. Civ. Code § 3344 and Common-law Right of Publicity)**

18 **Against All Defendants**

19 79. Perfect 10 re-avers and incorporates herein by reference each and
20 every averment of paragraphs 1 through 30 and 46 through 69 above as though
21 fully set forth herein.

22 80. Perfect 10 is the owner of the Perfect 10 Rights of Publicity, as the
23 assignee of publicity rights, including in the names, photographs, and likenesses,
24 of certain Perfect 10 models ("the Perfect 10 Rights of Publicity"). Largely as a
25 result of the efforts and expenditures of Perfect 10, the names, photographs, and
26 likenesses of these Perfect 10 models have received widespread recognition,
27 particularly among the consumers and potential consumers of adult
28 entertainment products.

1 81. Defendants have infringed the Perfect 10 Rights of Publicity in at
2 least three ways, by selling Perfect 10 images for which Perfect 10 has been
3 assigned rights of publicity, by selling non-Perfect 10 copyrighted images for
4 which Perfect 10 has been assigned rights of publicity, and by partnering with
5 affiliate sites that violate Perfect 10 rights of publicity. Defendants have
6 knowingly used the Perfect 10 Rights of Publicity, without the prior consent of
7 Perfect 10 or any authorized party.

8 82. By reason of Defendants' acts and conduct, Perfect 10 has suffered
9 substantial damage to its business in the form of diversion of trade, loss of
10 profits, injury to goodwill and reputation, and a dilution of the value of its
11 exclusive rights of publicity, all of which are not yet fully ascertainable. Perfect
12 10 is entitled to recover (a) its actual damages, (b) profits of the infringer, (c)
13 statutory damages, (d) punitive damages, and (e) attorneys' fees and costs.

14 83. Defendants' conduct is causing and, unless enjoined and restrained
15 by this Court, will continue to cause Perfect 10 great and irreparable injury that
16 cannot fully be compensated in money. Perfect 10 has no adequate remedy at
17 law. Perfect 10 is entitled to injunctive relief prohibiting further infringements
18 of its rights of publicity.

19 84. Perfect 10 is informed and believes, and on that basis avers, that the
20 aforementioned acts of Defendants were willful, oppressive, fraudulent, or
21 malicious, and Perfect 10 therefore is entitled to punitive damages.

22 85. Perfect 10 further is entitled to its attorneys' fees and statutory
23 damages pursuant to California Civil Code § 3344(a) and other laws.

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1 **PRAYER FOR RELIEF**

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3 WHEREFORE, plaintiff Perfect 10 prays for judgment against
4 Defendants, and each of the Doe Defendants, jointly and severally, as follows:

5 1. That Defendants and their officers, agents, servants, employees,
6 representatives, successors, and assigns, and all persons in active concert or
7 participation with them, be temporarily, preliminarily and permanently enjoined
8 from:

- 9 a. copying, reproducing, distributing, adapting, or publicly
10 displaying the Perfect 10 Copyrighted Works;
11 b. posting Perfect 10 copyrighted photographs on the internet;
12 c. using, authorizing the use of, copying, reproducing or
13 imitating the Perfect 10 Marks, or any confusingly similar or colorable
14 imitation thereof;
15 d. violating the Perfect 10 Rights of Publicity;
16 e. competing unfairly with Perfect 10 by violating the publicity
17 rights of Perfect 10 and others, and by infringing trademark rights; and
18 f. inducing, causing, materially contributing to, and profiting
19 from the foregoing acts committed by others.

20 2. That Defendants be ordered to destroy all photographs, documents,
21 and other items, electronic or otherwise, in its possession, custody, or control,
22 that infringe the copyrights, trademarks, or rights of publicity of Perfect 10.

23 3. That Defendants be ordered to remove all links between its website
24 and all Affiliated Infringing Websites.

25 4. For an order of restitution and/or disgorgement in the amount of the
26 benefit to Defendants by reason of their unlawful conduct, in an amount to be
27 proven at trial, but not less than \$5 million

28 5. For Perfect 10's actual damages, in an amount to be proven at trial,

1 but not less than \$5 million.

2 6. For a full accounting of all profits, income, receipts, or other
3 benefits derived by Defendants as a result of its unlawful conduct.

4 7. For statutory damages under the Copyright Act, in an amount to be
5 proven at trial, but not less than \$5 million.

6 8. For treble damages under the Lanham Act, in an amount to be
7 proven at trial, but not less than \$5 million.

8 9. For statutory damages under California Civil Code Section 3344, in
9 an amount to be proven at trial, but not less than \$5 million.

10 10. For the imposition of a constructive trust.

11 11. For punitive damages.

12 12. For attorneys' fees and full costs.

13

14 13. For such other and further relief as this Court deems just and
15 appropriate.

16

17 Dated: January 31, 2011

KRAUSE KALFAYAN BENINK &
SLAVENS, LLP.

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19 By: /s/ Eric J. Benink

20 Eric J. Benink

21 Attorneys for Plaintiff

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DEMAND FOR JURY TRIAL

Perfect 10 hereby demands a jury trial pursuant to Rule 38(b) of the Federal Rules of Civil Procedure.

Dated: January 31, 2011 KRAUSE KALFAYAN BENINK & SLAVENS, LLP

By: /s/ Eric J. Benink
Eric J. Benink
Attorney for Plaintiff

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Perfect 10, Inc., a California corporation

(b) County of Residence of First Listed Plaintiff Los Angeles
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)
KRAUSE KALFAYAN BENINK & SLAVENS, LLP
625 Broadway, Ste. 635, San Diego, CA 92101; (619) 232-0331

DEFENDANTS

MEGAUPLOAD LIMITED, a Hong Kong Corporation;
KIM SCHMITZ, an individual; and DOES 1 through 100, inclusive,

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known) '11CV0191 IEG BLM

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 3 Federal Question (U.S. Government Not a Party)
- 2 U.S. Government Defendant
- 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input checked="" type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from another district (specify)
- 6 Multidistrict Litigation
- 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
17 U.S.C. § 101, et seq.
Brief description of cause:
Copyright Infringement.

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$ 5,000,000.00

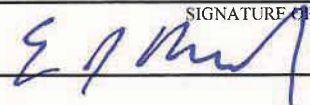
CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE _____ DOCKET NUMBER _____

DATE _____ SIGNATURE OF ATTORNEY OF RECORD _____

January 31, 2011
FOR OFFICE USE ONLY



RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____