

JUDGE COTE

12 CIV 3552

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK-----X
PERFECT 10, INC.,

Plaintiff,

-against-

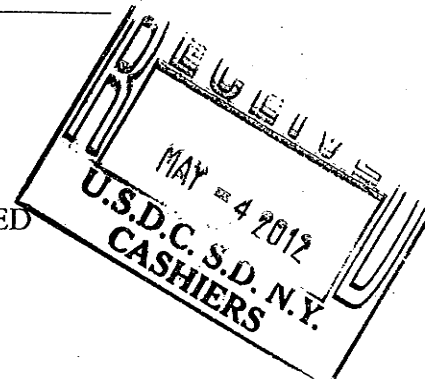
TUMBLR, INC.,

Defendant.
-----X

: Case No. _____

: COMPLAINT

: JURY TRIAL DEMANDED



Plaintiff Perfect 10, Inc. ("Perfect 10"), by its attorneys, Cowan, DeBaets, Abrahams & Sheppard LLP, for its Complaint against defendant Tumblr, Inc. ("Tumblr"), alleges as follows:

INTRODUCTION

1. This is an action by Perfect 10 for copyright infringement arising from the rampant and unremedied uploading, display and distribution of Perfect 10's copyrighted photographs on the photograph-sharing website Tumblr without Perfect 10's approval and over Perfect 10's repeated objections. During September, October and December 2011, Perfect 10 sent six (6) compliant DMCA Notices to Tumblr requesting that the infringing content be taken down. Tumblr has ignored its obligations under the DMCA. As of the date of this filing, Tumblr has failed to completely process any of Perfect 10's DMCA notices, taking down at most only a handful of the over 200 infringing images identified by Perfect 10, many of which had Perfect 10 copyright notices or watermarks conspicuously placed on the images. Accordingly, Tumblr should be held liable for its failure to abide by its obligations under the DMCA and for willfully ignoring the widespread and uncontrolled copyright infringement pervading its website.

JURISDICTION AND VENUE

2. This action arises under the Copyright Act, 17 U.S.C. § 101, *et seq.* This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1338(a).

3. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b) & (c) and 1400(a).

4. Personal jurisdiction is proper over Tumblr because it has purposefully availed itself of the privilege of doing business in New York City and this District and material elements of Tumblr's wrongdoing occurred in this State.

THE PARTIES

5. Plaintiff Perfect 10 is a California corporation with its principal place of business in San Diego, California. Plaintiff published the popular magazine PERFECT 10 and owns and operates the Internet website located at URL www.perfect10.com (the "Website"), which domain name Perfect 10 owns.

6. Defendant Tumblr is a Delaware Corporation that owns and operates the Internet website located at URL www.tumblr.com. It is headquartered in New York City, New York County.

THE BUSINESS OF PERFECT 10

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

8. Perfect 10 was the publisher of the well-known print magazine *PERFECT 10*, but was forced to cease publication of that magazine because of widespread and rampant infringement of its copyrighted photographs on the Internet.

9. Perfect 10 creates or created, and sells or sold, calendars and other merchandise

featuring its images, and was involved in the licensing of downloads of images for cellphones. However, Perfect 10 is not currently earning revenue from these endeavors because of rampant infringement.

10. Perfect 10 presently owns and operates its Website, which provides consumers access to Perfect 10's copyrighted content for a membership fee of \$25.50 per month.

11. Perfect 10's revenues are currently derived predominantly from sales of memberships to the Website. Sales of memberships to the Website are made by providing the customer with an individual user name and password to access the Website.

12. Perfect 10 owns thousands of valuable and unique copyrighted photographs, as well as video productions and other proprietary materials. Perfect 10 owns the copyrights in and to these works (the "Perfect 10 Copyrighted Works"). A list of some of Perfect 10's copyright registrations covering a substantial portion of Perfect 10's Copyrighted Works is attached as Exhibit 1.

13. Perfect 10 has invested, and continues to invest, substantial sums of money, time, effort, and creative talent, to make and produce the Perfect 10 Copyrighted Works and to operate, update and maintain the Website on which the Perfect 10 Copyrighted Works are displayed.

14. In addition, in order to produce the Perfect 10 Copyrighted Works for publication on the Website, Perfect 10 is required to make numerous payments, including but not limited to model fees, photographer fees, location costs, styling costs, makeup costs, printing costs, film and processing costs, travel costs, as well as distribution, public relations, legal, and advertising and promotion costs.

THE BUSINESS OF TUMBLR

15. Tumblr operates the internet website at URL www.tumblr.com, which is accessible in the United States and throughout the world.

16. Tumblr allows its subscribers to post images, music, and videos on Tumblr servers. Tumblr copies and stores such materials, and displays and distributes them to the general public.

17. Moreover, Tumblr's services feature the ability to "re-blog" content displayed on one subscriber's Tumblr page directly onto another subscriber's Tumblr page. In other words, Tumblr services allow subscribers to copy and distribute infringing content at the touch of a button.

18. Upon information and belief, Tumblr employees have posted infringing content to Tumblr servers, to help start the business, including content which infringes upon Perfect 10's Copyrighted Works.

19. An example of a Tumblr subscriber's page on which a copy of an infringing Perfect 10 Copyrighted Work is published is attached hereto as Exhibit 2.

20. Tumblr's services also permit its subscribers to search for images. An example of the search results of a Tumblr search for model Luba Shumeyko, which includes infringing copies of Perfect 10 Copyrighted Works on the second page, is attached hereto as Exhibit 3.

TUMBLR'S INFRINGING ACTIVITIES

21. While Tumblr's current Community Guidelines state that it is Tumblr's "policy to respond to notices of alleged copyright infringement as per our Terms of Service and the Digital Millennium Copyright Act," in reality, Tumblr turns a blind eye to the extensive copyright infringement taking place through its services.

22. Tumblr has actual knowledge that specific infringing copies of Perfect 10 Copyrighted Works are available to its subscribers from Tumblr servers and that Perfect 10 has not authorized its Copyrighted Works to be uploaded to, displayed on, or distributed by Tumblr, its employees and/or its subscribers.

23. Specifically, between September and December 2011, Perfect 10 sent via e-mail six (6) DMCA notices to Tumblr identifying over 200 specific examples of infringing copies of Perfect 10's Copyrighted Works that have been made available for viewing and copying through Tumblr (collectively, the "DMCA Notices").

24. All six DMCA Notices were sent via e-mail to John Maloney, Tumblr's President, who at that time was Tumblr's Designated Agent with the Copyright Office to receive notice of claimed infringements under the DMCA. A copy of a screenshot taken December 25, 2011 of the August 25, 2009 Interim Designation of Agent to Receive Notification of Claimed Infringement Form filed with the Copyright Office is attached hereto as Exhibit 4.

25. Each of the aforementioned Perfect 10 DMCA Notices was sufficient to satisfy the DMCA's notice requirements set forth in 17 U.S.C. § 512(c)(3)(A).

26. On September 28, 2011, Norman Zada, on behalf of Perfect 10, sent one (1) DMCA Notice to Tumblr via e-mail to its Designated Agent, John Maloney. A copy of the complete DMCA Notice sent by Mr. Zada to Tumblr on September 28, 2011 is attached hereto as Exhibit 5.

27. On October 8, 2011, Mr. Zada, on behalf of Perfect 10, sent three (3) DMCA Notices to Tumblr via e-mail to its Designated Agent, John Maloney. Copies of the three (3) DMCA Notices sent by Mr. Zada to Tumblr on October 8, 2011 are attached hereto as Exhibits 6 (first ten pages of the DMCA Notice, time sent 10:19 p.m.), 7 (complete DMCA Notice, time

sent 10:34 p.m.), and 8 (first ten pages of the DMCA Notice, time sent 10:51 p.m.).

28. On December 25, 2011, Mr. Zada, on behalf of Perfect 10, sent two (2) DMCA Notices to Tumblr via e-mail to its Designated Agent, John Maloney. Copies of the first ten pages of the two (2) DMCA Notices sent by Mr. Zada to Tumblr on December 25, 2011 are attached hereto as Exhibits 9 (time sent 10:07 a.m.) and 10 (time sent 12:03 p.m.).

29. Upon information and belief, Tumblr has not acted expeditiously to remove or disable access to the infringing content identified in the DMCA Notices. Indeed, as of the date of the filing of this Complaint, at most only a handful of the over 200 infringing images set forth in the DMCA Notices has been taken down by Tumblr.

30. Furthermore, Tumblr has and had actual and/or constructive knowledge of specific infringements and has either intentionally ignored or been willfully blind to such infringements. For example, many of the Perfect 10 Copyrighted Works found in Tumblr's search results usually contain visible and prominent copyright notices or watermarks bearing Perfect 10's name and/or trademark, despite repeated notices to Tumblr that Perfect 10 Copyrighted Works are not authorized for display or other use by others.

31. Based on Perfect 10's DMCA notices, Tumblr is aware that a number of the subscribers identified in the DMCA Notices are repeat offenders who Tumblr has allowed to continue displaying and distributing infringing content. Thus, if Tumblr has a policy that provides for the termination of repeat offenders as required by the DMCA, it has not implemented it.

32. Moreover, Tumblr could take simple measures to prevent further access to the infringing images by deleting them from its servers and/or the pages of the subscribers who have posted the images, or by taking other reasonable technical measures (such as image recognition

software) to filter such content from being posted, but Tumblr has not done so.

FIRST CLAIM FOR RELIEF
(Direct Copyright Infringement Against Tumblr)

33. Perfect 10 realleges and incorporates herein by reference each and every allegation of paragraphs 1 through 32 above as though fully set forth herein.

34. Perfect 10 is the owner of all right, title, and interest in and to each of the Perfect 10 Copyrighted Works. Perfect 10 has registered its works with the United States Copyright Office. Perfect 10 has been issued United States copyright registration certificates listed on Exhibit 1, attached hereto.

35. Each of the Perfect 10 Copyrighted Works is an original work owned by Perfect 10, and each consists of copyrightable subject matter.

36. Tumblr has copied, reproduced, distributed, adapted, and/or publicly displayed the Perfect 10 Copyrighted Works without the consent or authority of Perfect 10, thereby directly infringing Perfect 10's copyrights.

37. Tumblr's conduct constitutes direct infringement of Perfect 10's copyrights and exclusive rights under copyright in the Perfect 10 Copyrighted Works in violation of Sections 106 and 501 of the United States Copyright Act, 17 U.S.C. §§ 106 and 501.

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

39. The acts of infringement by Tumblr have been willful, intentional, and purposeful, in reckless disregard of and with indifference to the rights of Perfect 10.

40. As a direct result of the infringements by Tumblr of Perfect 10's exclusive rights under copyright in the Perfect 10 Copyrighted Works, Perfect 10 has suffered damages in an

amount to be determined at trial. Tumblr's conduct is further causing and, unless enjoined and restrained by this Court, will continue to cause, Perfect 10 great and irreparable injury for which it has no adequate remedy at law.

SECOND CLAIM FOR RELIEF
(Contributory Copyright Infringement Against Tumblr)

41. Perfect 10 realleges and incorporates herein by reference each and every allegation of paragraphs 1 through 40 above as though fully set forth herein.

42. Perfect 10 is owner of the copyrights in the Perfect 10 Copyrighted Works.

43. Upon information and belief, Tumblr knew or had reason to know that one or more of its subscribers have posted infringing copies of Perfect 10 Copyrighted Works through its services and on its website. Indeed, Tumblr's President John Maloney served as Tumblr's Designated Agent to receive DMCA notifications of claimed infringement. *See* Exhibit 4.

44. Despite Tumblr's express policy "to respond to notices of alleged copyright infringement as per our Terms of Service and the Digital Millennium Copyright Act," Tumblr failed to completely process any of Perfect 10's DMCA Notices and only took down at most a handful of infringing images identified in the DMCA Notices.

45. Upon information and belief, Tumblr further took no action to control the continuing infringing activities of its subscribers (especially those subscribers who are repeat offenders), even though they were aware of such activities or were aware of facts and circumstances sufficient to give Tumblr such knowledge.

46. By not following the requirements of the DMCA, and permitting the unfettered distribution of infringing copyrighted works, Tumblr has induced, caused and materially contributed to the infringing activities of its subscribers.

47. The acts of Tumblr complained of herein constitute contributory copyright infringement of Perfect 10's registered copyrights and of its exclusive rights under copyright in violation of 17 U.S.C. §§ 106 and 501.

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

49. The foregoing acts of contributory infringement by Tumblr have been willful, intentional and purposeful, in disregard of and with indifference to the rights of Perfect 10.

50. As a direct result of the conduct described above, Perfect 10 has suffered damages in an amount to be determined at trial. Tumblr's conduct is further causing and, unless enjoined and restrained by this Court, will continue to cause, Perfect 10 great and irreparable injury for which it has no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, plaintiff Perfect 10 prays for judgment against Tumblr as follows:

1. That Tumblr, and its officers, agents, servants, employees, representatives, successors, and assigns, and all persons in active concert or participation with it, have violated the Copyright Act and that they be enjoined from copying, reproducing, distributing, adapting, or publicly displaying the Perfect 10 Copyrighted Works pursuant to Section 502 of the Copyright Act;
2. That Tumblr be ordered to destroy all photographs, documents, digital image files and other items, electronic or otherwise, in their possession, custody, or control, that infringe the copyrights in the Perfect 10 Copyright Works, pursuant to Section 503 of the Copyright Act;
3. For an order that Tumblr be required to pay to Perfect 10 either (a) all such actual damages and profits attributable to the infringements of the Perfect 10 Copyrighted Works by

Tumblr and those acting in concert with it in an amount to be proven at trial, but not less than \$5 million; or (b) in the alternative, statutory damages of up to \$150,000 per Copyrighted Work infringed as provided by Section 504(c) of the Copyright Act for Tumblr's willful infringement;

4. For a full accounting of all profits, income, receipts, or other benefits derived by Tumblr as a result of its unlawful conduct;

5. For attorneys' fees and full costs pursuant to Section 505 of the Copyright Act;
and

6. For such other and further relief as this Court deems just and appropriate.

Respectfully submitted,

Dated: May 3, 2012
New York, New York

COWAN, DeBAETS, ABRAHAM &
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DEMAND FOR TRIAL BY JURY

PLEASE TAKE NOTICE that Plaintiff, pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, hereby demands trial by jury for all issues so triable.

Respectfully submitted,

Dated: May 3, 2012
New York, New York

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