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 11 GOOGLE INC.

[Faint handwritten notes and a signature]

8 UNITED STATES DISTRICT COURT
 9 CENTRAL DISTRICT OF CALIFORNIA

Winston & Strawn LLP
 101 California Street
 San Francisco, CA 94111-5894

10 PERFECT 10, INC., a California
 11 corporation,

12 Plaintiff,

13 vs.

14 GOOGLE INC., a corporation; and
 15 DOES 1 through 100, inclusive,

16 Defendant.

Case No. CV04-9484 AHM (SHx)

**DECLARATION OF ALEXANDER
 MACGILLIVRAY IN SUPPORT OF
 GOOGLE'S OPPOSITION TO
 PLAINTIFF'S MOTION FOR
 PRELIMINARY INJUNCTION**

Date: November 7, 2005
 Time: 10:00 a.m.
 Location: Courtroom 14

17 GOOGLE INC., a corporation,

18 Counterclaimant,

19 vs.

20 PERFECT 10, INC., a California
 21 corporation,

22 Counter-defendant.
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1 I, Alexander Macgillivray, declare as follows:

2 1. I am Senior Product and Intellectual Property Counsel for
3 Defendant Google Inc. ("Google"). I have been employed by Google since May 12,
4 2003. During my time at Google I have been the lawyer primarily responsible for the
5 processing of intellectual property complaints regarding Google's services. I am
6 intimately familiar with our policies and procedures for suppression of results from
7 Web Search and Image Search. I am also familiar with our processes and policies for
8 account termination for AdSense. I am the lawyer primarily responsible for Web
9 Search and Image Search and am thoroughly familiar with how the products work.
10 The statements contained herein are based on my own personal knowledge and I could
11 and would be competent to testify to them if called as a witness in this matter.

12 **GOOGLE SEARCH**

13 2. When the Google Web Search engine receives a query, it searches
14 its index for pages relevant to the query. It then returns Web page links with snippets
15 of relevant text. It also provides a link to Google's "cached" copy of the text portion
16 of the Web page. By clicking on the "cached" link, the user will cause the cached
17 page to appear. While it may seem that the cached page contains images, in fact the
18 images are not from the Web Search cache; in fact, a user's web browser fetches any
19 images from their original location and not from Google's servers. Google also
20 provides a link for a version of the cached page that will disable this browser function.

21 3. The Image Search engine returns results consisting of a page of
22 "thumbnail" images – small low-resolution extracts of original images that aid the
23 user in identifying and locating the image most relevant to the research. The browser
24 obtains "thumbnail" images from Google's server, together with information about the
25 Web page associated with the image. The user then can choose to click on the image
26 thumbnail and show more information about the image and cause the user's browser
27 (typically Internet Explorer, Netscape, Mozilla Firefox, or Opera) to open a "window"
28 on the screen that will display the underlying Web page in a process called "framing."

1 4. Google delivers search results at no charge to either users or
2 providers of information. Google does not require accounts or subscriptions for its
3 general public search engine use that is at issue in this litigation.

4 5. Google does not copy Perfect 10's magazine or Web site (Google
5 respects robot exclusion practices that are customary on the Web), although it may
6 copy a few pages of the Web site that Perfect 10 apparently wishes to have indexed.
7 Plaintiff is not suing Google for those things. Plaintiff is suing for copies allegedly
8 made, and search results delivered, in the course of Google's broad Web search
9 functions. Those copies of individual images are allegedly from third-party Web
10 pages and files that have been copied and indexed as an integral part of the Google
11 search engine's functions.

12 6. Google's thumbnail images in Image Search results are necessary
13 to describe the results, as there is no satisfactory verbal alternative. No verbal index
14 of the *content* of images is feasible; Google has only a verbal index of their *context*.

15 7. Google does not have the ability to affect or control infringing
16 conduct by third parties. Google does not have any editorial or other control rights
17 over the design, hosting or transmission of any graphical materials, or any ability to
18 dictate content.

19 8. Google acts expeditiously to remove or disable access to infringing
20 material upon gaining such awareness of such material. Upon notification of a
21 claimed infringement Google expeditiously removes or disables access to material
22 identified by its reference or link. Google can only exclude Web pages and files from
23 search results; it cannot exclude third parties from the Web.

24 **GOOGLE'S ADVERTISING PROGRAMS**

25 9. Google has two web advertising programs, AdWords for
26 advertisers and AdSense for web publishers. Attached hereto as Exhibit A is a true
27 and correct copy of print-outs from google.com describing these programs. Through
28 Google's AdWords program, advertisers purchase advertising placement on Google's

1 pages, including its search engine, Gmail web-based email service and other services,
2 or on third party Web sites.

3 10. Google's AdSense program is available to third-party Web
4 publishers. AdSense allows third-party sites to carry Google-sponsored advertising
5 and share revenue that flows from the advertising displays and click-throughs
6 (advertising derived from the "clickthrough" referral from one site to another).
7 AdSense advertising is related to text in the AdSense participant's Web site. To
8 participate, a Web site publisher places code on its site that asks Google's servers to
9 algorithmically select relevant advertisements when a user loads the Web page. A
10 Web site publisher identifies its site and receives a token and javascript from Google
11 that the Web site publisher can then use on a page to receive targeted advertising.
12 Google does not control the location of javascript placement.

13 11. The Google AdSense Program Policies specifically exclude sites
14 with Image Results from participating in the AdSense program. The Policy states:
15 "Copyrighted Material: In order to avoid associations with copyright claims, website
16 publishers may not display Google ads on web pages with MP3, Video, News Groups,
17 and Image Results." In addition, it is Google's intention to exclude sites with
18 pornography, adult, or mature content, along with certain other categories of content,
19 such as gambling and profanity, from its AdSense program. Attached hereto as
20 Exhibit B is a true and correct copy of the current Google AdSense Program Policies.

21 12. The Google AdSense Terms and Conditions, execution of which is
22 a prerequisite to participating in the AdSense program, state that "You represent and
23 warrant that . . . each Site and any material displayed therein: (i) comply with all
24 applicable laws, statutes, ordinances and regulations; (ii) do not breach and have not
25 breached any duty toward or rights of any person or entity including, without
26 limitation, rights of intellectual property, publicity or privacy . . . (iii) are not
27 pornographic, hate-related or otherwise violent in content." Attached hereto as
28

1 Exhibit C is a true and correct copy of the current Google AdSense Online Standard
2 Terms and Conditions.

3 13. Google reserves the right to terminate third parties from AdSense
4 when it becomes aware that they are violating the AdSense Policies or Terms and
5 Conditions, and is in the process of reviewing Perfect 10 notices and will terminate
6 sites from participation in AdSense that are in violation.

7 **GOOGLE'S INTELLECTUAL PROPERTY POLICY AND RESPONSE TO**
8 **NOTICES OF ALLEGED INFRINGEMENT**

9 14. It is Google's policy diligently to respond to notices of alleged
10 copyright infringement that comply with the Digital Millennium Copyright Act.
11 Google provides a detailed explanation of its policy in response to notices of alleged
12 infringement at its google.com Web site. Attached hereto as Exhibit D is a true and
13 correct copy of Google's Terms of Service and Google's Digital Millennium Copyright
14 Act policy.

15 15. Google receives thousands of inquiries daily concerning search
16 results, including notices about search results that link to allegedly improper content.
17 Those notices concern various issues, including claims that third-party Web sites have
18 infringed the senders' copyright, trademark or other rights. Google has several
19 departments involved in handling notices of alleged infringement. Trained individuals
20 process notices of alleged infringement that refer to copyright. If a notice does not
21 contain enough information for Google to process, or if it otherwise fails the
22 requirements of 17 U.S.C. § 512(c)(3), but contains contact information for the
23 sender, Google's staff will typically email the sender requesting additional
24 information.

25 16. Upon receiving a notice of alleged infringement that substantially
26 conforms with the requirements of Section 512(c)(3), Google expeditiously removes
27 or disables access to the material. Google does this by flagging the URL or URL
28 pattern for which Google has received notice so that page or file will no longer appear

1 in Search results. For Web Search, the page URL is suppressed; for Image Search, the
2 image file URL is suppressed.

3 17. Google does not review entire domains, as requested by Perfect 10.
4 Many domains contain many "sites" and many pages sponsored or authorized by
5 different parties. Geocities, for example, has one domain at geocities.com that hosts
6 numerous sites. Suppression of an entire domain would be vastly overbroad. Nor can
7 Google take on the duty of investigating how many sites are at a single domain and of
8 determining which pages constitute a single "site." Google's search focus is on Web
9 pages and files, and that is where it applies its suppression efforts.

10 18. Google accommodates standard technical measures by respecting
11 robot exclusion protocols on the Web and by not altering protection measures that
12 may be embedded in Web pages or files.

13 **COMMUNICATIONS FROM PERFECT 10 AND GOOGLE'S RESPONSE**

14 19. Since May 2004, Google has received more than forty
15 communications from Dr. Zada regarding a plethora of alleged infringements and
16 publicity violations by various Web sites. The notices listed thousands of URLs and
17 Web sites which Dr. Zada claimed violated the rights of Perfect 10 and unrelated third
18 parties. Google diligently and promptly responded to Dr. Zada's notices with respect
19 to Perfect 10's alleged rights.

20 20. Dr. Zada's communications were impossible to process
21 completely, for a number of reasons. Perfect 10's notices were vastly overbroad,
22 dealing often with unrelated third parties and non-copyright issues; they were
23 incomplete and shoddy in light of the Section 512(c)(3) requirements; and they were
24 presented in a manner that impeded efficient handling by Google. Frequently Dr.
25 Zada's communications did not provide enough information to process. For example,
26 notices beginning on May 31, 2004 through July 2004, simply listed URLs, without
27 sufficiently identifying the copyrighted work claimed to have been infringed or the
28 nature of the infringement. Attached hereto as Exhibit E are true and correct copies of

1 notices Google received from Dr. Zada from May 31, 2004 through July 11, 2004.
2 Google promptly responded to Dr. Zada's notices, explaining that he needed to specify
3 the material protected by copyright. Attached hereto as Exhibit F are true and correct
4 copies of e-mails from Google to Dr. Zada.

5 21. On October 11, 2004 (a month before this lawsuit was filed), in
6 response to Google's requests, Dr. Zada finally provided notices in a format that
7 identified Perfect 10 magazine issue and page numbers of images whose copyright Dr.
8 Zada claimed to have been infringed, at least for some of the listed URLs. Attached
9 hereto as Exhibit G are true and correct copies of notices Google received from Dr.
10 Zada from October 11, 2004 through June 19, 2005. Beginning on October 11, 2004,
11 Google promptly processed Dr. Zada's notices that Google could confirm identified
12 URLs that did in fact contain images of semi-naked or naked women that looked like
13 they might have been Perfect 10 images and were indexed by Google, and suppressed
14 those showing up in response to user queries in Web Search. Although Google
15 processed Dr. Zada's notifications, they did not comply with the DMCA's
16 requirements that a notice must identify "the copyrighted work claimed to have been
17 infringed, or, if multiple copyrighted works at a single online site are covered by a
18 single notification, a representative list of such works at that site" and "identification
19 of the material that is claimed to be infringing or to be the subject of infringing
20 activity and that is to be removed or access to which is to be disabled, and information
21 reasonably sufficient to permit the service provider to locate the material. Moreover,
22 many of Dr. Zada's notices did not comply with Section 512(c)(3)'s requirement that
23 notifications must be "provided to the designated agent of a service provider."

24 22. Despite the difficulties with, and size of, Dr. Zada's notices, with
25 only four exceptions Google processed Dr. Zada's October 11, 2004 notice and later
26 notices within two weeks of receipt, often within one week. The four exceptions
27 involve Exs. 58, 66, 67, and 68 of Dr. Zada's Declaration. Google processed the
28 notice attached as Ex. 68 in 19 days. Google has not, to its knowledge, received the

1 notices attached as Exs. 66 and 67. Through their inclusion as exhibits, Google now
2 has them and Exs. 66 and 67 are now being processed. Due to miscommunication,
3 Google did not complete processing of Ex. 58. Once the mistake was discovered,
4 Google restarted processing this "notice," which will be reflected in Google search
5 results shortly.

6 23. Processing termination notices, particularly those that list hundreds
7 or thousands of URLs, like Dr. Zada's, is an involved process. First, the notice is
8 routed to the proper person for handling (a process that is delayed when the sender
9 does not include recipient information, as was the case with a number of Dr. Zada's
10 notices), then the data from the notice must be hand entered and checked, then the
11 allegedly infringing URLs must be reviewed, and questionable URLs re-reviewed,
12 then a list is made and submitted for a check against the URLs in Google's index.
13 Only at that point can a removal happen, which must then be carried out on Google's
14 numerous servers.

15 24. Dr. Zada claims that "Google, via its Image Search, is continuing
16 to display at least 1,043 Perfect 10 images from, and link at least 1,043 Perfect 10
17 images to, web pages that Perfect 10 specifically notified Google were infringing
18 Perfect 10 copyrights." Zada Decl. ¶ 96, Ex. 81 (spreadsheet reflecting URLs of web
19 pages from which Dr. Zada claims Google continued to display infringing images
20 after notice.) This characterization is entirely misleading. First, none of the URLs
21 identified in Exhibit 81 identify jpg. or image file locations, but rather link to Web
22 pages that may contain hundreds of separate images, for many of which Dr. Zada did
23 not allege and has not alleged ownership of copyright. When Dr. Zada simply
24 identified a Web page containing numerous images, Google would be able to process
25 the Web page to block it from appearing in response to a Google Web Search (which
26 Google did), but would not be able to prevent a specific image from appearing in
27 response to a search on Image Search, because no image file would have been
28 identified and Google did not have the necessary information to block the image.

1 Google continues to promptly process new notices from Dr. Zada that substantially
2 conform with Section 512(c) of the DMCA.

3 25. Google analyzed the 470 URLs identified by Dr. Zada in his
4 Exhibit 81. Of those 470 URLs, before Perfect 10 filed this motion, Google had
5 already processed 414 of them to block them from appearing in response to a Google
6 Web Search. Of the 56 remaining URLs, 21 are not true URLs, but rather contain
7 ellipses and are not fully qualified URLs. The 35 remaining URLs are further
8 addressed in the declaration of Susan E. Lee filed concurrently herewith. Any small
9 number of remaining URLs identified in Ex.81 that may not have been processed,
10 may well be attributable to pages that did not contain relevant images, could not be
11 loaded, were not in the Google Web Search index at the time of notice, or due to
12 inevitable errors in transcribing Dr. Zada's notices, which often identified hundreds of
13 URLs, and were at times only faxed to Google.

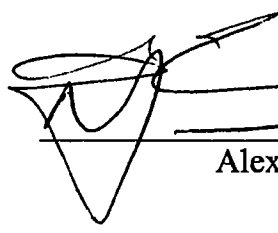
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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed in Mountain View, California, this 26th day of September 2005.



Alexander Macgillivray

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