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12 Attorneys for Plaintiff

13
14 UNITED STATES DISTRICT COURT
15 CENTRAL DISTRICT OF CALIFORNIA
16

17 PERFECT 10, a California corporation,
18 Plaintiff,
19 v.
20 GOOGLE, INC., a corporation; and
DOES 1 through 100, inclusive,
21 Defendants.
22

CASE NO. CV 04-09484 AHM (SHx)

**DECLARATION OF NORMAN
ZADA IN SUPPORT OF MOTION
OF PLAINTIFF PERFECT 10, INC.,
FOR PRELIMINARY INJUNCTION**

Date: September 19, 2005
Time: 10:00 a.m.
Ctm: The Honorable A. Howard
Matz

23
24 I, Norman Zada, declare as follows:

25 1. I make this declaration in support of the motion of Perfect 10, Inc.
26 (“Perfect 10”) for preliminary injunction. Except where otherwise stated, I have
27 direct and personal knowledge of the facts set forth herein and, if called as a witness,
28 could and would competently testify thereto.

1 **Structure of Declaration.**

2 This declaration initially provides background information and then details
3 Google's ongoing infringement of Perfect 10's copyrighted images, as summarized
4 below:

- 5 • Google's Image Search copies and displays infringing Perfect 10
6 copyrighted images (¶¶ 27 to 47).
- 7 • Google's cache is a "snapshot" of infringing images that Google
8 continues to display even after the images have been removed from the
9 original websites (¶¶ 49 to 51).
- 10 • Google promotes and instructs users on the downloading of Perfect 10
11 images onto cell phones and reformats those images to fit the cell
12 phone screen (¶¶ 55 to 58).
- 13 • Many of the infringing websites to which Google links Perfect 10
14 images are advertising partners of Google, and Google derives revenue
15 from the traffic it directs to these infringing websites (¶¶ 61 to 75 and
16 116 to 118).
- 17 • Google has failed to respond to 34 specific notices of infringement
18 (¶¶ 77 to 108).
- 19 • Google continues to display over 1,000 of the best Perfect 10
20 copyrighted images (¶¶ 91 to 115, 150 to 151).
- 21 • Google also links the infringing Perfect 10 images that it copies and
22 displays to infringing websites that themselves display hundreds of
23 additional Perfect 10 copyrighted images (¶¶ 110 to 115).
- 24 • Google continues to publish unique and confidential passwords which
25 provide unauthorized access to Perfect 10's website, perfect10.com,
26 and to Perfect 10's copyrighted images (¶¶ 119 to 126).

1 **General Background**

2 2. I formed Perfect 10 in 1996, and have continuously since that time
3 functioned as its Chief Executive Officer. I am in charge of the day to day
4 operations of Perfect 10. I have personal knowledge of all aspects of Perfect 10's
5 business.

6 3. I received my Ph.D. in Operations Research from the University of
7 California at Berkeley in 1972. From 1972 to 1973, I worked in the main computer
8 science research department of IBM. While I was at IBM, I did research on search
9 algorithms and studied various aspects of computer science. Since that time, I have
10 written thousands of lines of computer code to solve a variety of applied
11 mathematical problems.

12 4. I have also taught applied mathematics as a visiting professor at
13 Stanford University, UCLA, U.C. Irvine, and Columbia University.

14 **Work and Support for this Declaration**

15 5. In the course of my duties as Chief Executive Officer of Perfect 10, I
16 routinely explore the Internet, in part to detect infringements of Perfect 10's
17 intellectual property. In the course of this process, I have spent well over 800 hours
18 reviewing images and text links displayed by Google. Based on this review, I have
19 become very familiar with the Perfect 10 copyrighted images that have been made
20 available by Google for viewing and downloading without authorization from
21 Perfect 10.

22 6. During my review, I either printed out copies of the Internet pages
23 containing Perfect 10 infringements I observed, or downloaded them using Adobe 6.0
24 Professional, and maintained them in Perfect 10's files. The Exhibits attached hereto,
25 except where otherwise noted, fall into one of two categories: (a) true and correct
26 copies of documents that have been printed by me, in many cases *reduced* to leave
27 space to bind the exhibits; or (b) true and correct copies of documents that I have
28 downloaded and archived from the Internet using Adobe 6.0 Professional which I

1 then had printed and which were, in many cases, reduced to put into exhibit form. In
2 some cases, as described below, the images I downloaded using Adobe were broken
3 into two pages when they were printed, even though they appeared as being on one
4 page on my computer screen. When this happened, the image was the same, it was
5 just printed on two pages.

6 7. Exhibits attached hereto, unless stated otherwise, were printed or
7 downloaded by me using an Internet browser or Adobe 6.0 that was set to record: (a)
8 the URL (*i.e.*, the Internet address) of the webpage that was viewed and printed; and
9 (b) the date and time the page was printed or downloaded. In a number of instances,
10 I have highlighted sections of exhibits in yellow for the convenience of the Court.

11 *Exhibits were typically reduced by about 25% to leave a 1 ½ to 2 inch space for the*
12 *binding at the top and a 1 inch space at the bottom, except for Exhibits 9, 26, 78,*
13 *80, 85, pages 542, 549, 550, 551, and Exhibits 87-90, which were not reduced.*

14 8. In this declaration, I will use the term “website” to refer to a collection
15 of web pages, each sharing the same base URL. A base URL typically corresponds
16 to a website’s home page—e.g., perfect10.com or google.com. Each web page
17 within a website also has a URL that uniquely describes it, consisting of the home
18 page or base URL followed by additional characters to describe the particular web
19 page—e.g., perfect10.com/join.html, which uniquely identifies the join page within
20 the perfect10.com website.

21 **Perfect 10’s Business and Intellectual Property Documentation**

22 9. Perfect 10 is the publisher of the magazine “PERFECT 10” and owner
23 of the subscription website perfect10.com. Perfect 10 is the owner of registered
24 trademarks in “Perfect 10” and “Perfect10.com” and the domain name
25 “perfect10.com.”

26 10. Perfect 10 was formed in 1996 in an effort to create the highest quality
27 men’s magazine. To differentiate itself from other men’s magazines, Perfect 10
28 made special efforts to offer less nudity and to photograph the world’s most

1 beautiful "natural" models, which required paying substantial rates equivalent to
2 what is paid for models obtained through the best model agencies (typically in the
3 range of \$4,800 - \$9,600 a day). (In contrast, Playboy has paid models \$700 a day
4 in many cases.) As a result of its effort and investment, Perfect 10 owns the only
5 topless images of which I am aware of more than one hundred top natural models,
6 including Victoria Secret and Sports Illustrated Swimwear model Marisa Miller,
7 Madison Model Isabelle Funaro, Nataskia Maren, former Miss Michigan Natasha
8 Bell, Masha Vasileva, Monika Zsibrita, Sasha Brinkova, Emmanuelle Teixidor,
9 Karolina Runosson and others.

10 11. During the last 9 years, in an attempt to become the world's highest
11 quality men's magazine, Perfect 10 has invested over \$36 million to develop a
12 respected brand and international goodwill in its magazine, website, and video
13 products. Perfect 10's \$36 million investment includes approximately \$12 million
14 to photograph over 800 models and create approximately 2,700 high quality images
15 that have appeared in Perfect 10 Magazine along with an additional approximately
16 3,300 images that have appeared on perfect10.com. The \$12 million expenditure
17 included modeling fees, styling, makeup, photographer fees, video, support fees,
18 film and film developing, insurance, location fees, transportation, and other costs.
19 Additionally, Perfect 10 has spent millions of dollars on promotions and marketing
20 to develop its brand. Perfect 10 has carefully selected its best images to appear in
21 Perfect 10 Magazine and it is primarily these images that have been
22 misappropriated. Perfect 10 has developed a unique niche in the adult industry.
23 There is no comparable magazine featuring models of the same quality.

24 12. Perfect 10 has been asked by motion picture studios and television
25 shows for permission to use Perfect 10 Magazine in films such as "The Longest
26 Yard," "American Pie," "Spiderman," "Men in Black II," "Spiderman II," "Hollow
27 Man," and "The Way of the Gun," and in television shows such as "The Sopranos,"
28 "Dawson's Creek," and "Entourage," among others.

1 13. Perfect 10 has also produced and sold video presentations featuring
2 Perfect 10 models to In-Demand and Showtime.

3 14. Perfect 10 Magazine and its models have been featured on more than
4 100 TV and/or radio show segments, including "Extra," "Entertainment Tonight,"
5 "Hard Copy," "Talk Soup," "Monday Night Football," "Penn and Teller," "Dog Eat
6 Dog," "The View," "Wild On," "Battle Dome," "Shipmates," "Temptation Island,"
7 "The Dating Game," "Blind Date," "Living Large," and "The Howard Stern Show."

8 15. Perfect 10 has registered copyrights for its photographs with the United
9 States Copyright Office. Attached hereto as Exhibit 1 are Perfect 10's copyright
10 registration certificates in the collective work embodied in each issue of Perfect 10
11 Magazine and the Perfect 10 website, perfect10.com, as well as each individual
12 photograph that appears in these compilations. As a regular part of its business,
13 Perfect 10 obtains work for hire/assignments of copyright from the photographers it
14 hires. Attached hereto as Exhibit 2 are several such examples.

15 16. Perfect 10 derives virtually all of its revenue from the sale of its
16 copyrighted works. First, it sells magazines, which consist predominantly of
17 photographs, at both newsstands and via subscriptions. A copy of Perfect 10
18 Magazine costs \$7.99. Second, it sells memberships to its password protected
19 website, perfect10.com, for \$25.50 per month. Only members of perfect10.com
20 may view images of Perfect 10 models in the perfect10.com "members' area."
21 Third, in early 2005, Perfect 10 entered into a licensing agreement with Fonestarz
22 Media Limited for the worldwide sale and distribution of Perfect 10 reduced size
23 copyrighted images on cell phones. These reduced size images are sold individually
24 for downloading to cell phones. Since this arrangement began, Perfect 10 has sold
25 an average of approximately 6,000 reduced size Perfect 10 images per month, in the
26 United Kingdom alone. These images are comparable in size and quality to the
27 reduced size Perfect 10 images that are being offered for free by Google for

1 downloading onto cell phones. *See* Declaration of Dave Moreau and Exhibits 23
2 and 24 of this declaration.

3 17. Aside from its agreement with Fonestarz Media Limited for the
4 downloading and display of reduced size images via cell phones, Perfect 10 has not
5 authorized any third party website to copy, display, or distribute any of the
6 copyrighted images which Perfect 10 has created.

7 **The Business of Google**

8 **A. Google's Web Search, Image Search, and Cache Link**

9 18. Google describes itself as a "software, technology, Internet,
10 advertising, and media company, all rolled into one." Google, Inc., Annual Report
11 (Form 10-K) [Request for Judicial Notice, Exh. A] ("Google 10-K"), page 9.
12 Google operates a search engine from the base URL google.com. From the traffic it
13 obtains from consumers visiting its website and the websites of its advertising
14 partners, Google generates advertising revenue (through its AdSense program
15 described in ¶¶ 24-26). Google.com is one of the most widely visited websites in
16 the world. Attached hereto as Exhibit 3 is a page that I printed on July 6, 2005,
17 from the website alexa.com, reflecting that google.com is the third most visited
18 website on the Internet.

19 19. Attached hereto as Exhibit 4 is a print-out of the homepage of Google's
20 website. As the homepage indicates, Google permits users to search the Internet
21 through "Web Search" and "Image Search."

22 20. Google Web Search returns to users text listings from web pages that
23 Google determines are related to the search terms used. For most text listings,
24 Google also provides a "cached" link described as a "snapshot" of the identified
25 web page, taken in the past and stored by Google. In almost all cases, when an
26 infringing third party website displays a full size infringing Perfect 10 image,
27 Google also displays that full size image via its "cache link." *See*, ¶ 49, Exhibit 19.

1 21. Google Image Search returns pages of reduced sized images, displayed
2 by Google, that Google determines are related to the search terms used. These
3 images are gathered and copied from third party websites throughout the Internet,
4 but are displayed on google.com. (See paragraphs 109 and 144). In addition to
5 displaying the images, Google also links the images to the websites where Google
6 obtained those images. Attached hereto as Exhibit 5 is a printout of the FAQ
7 (“Frequently Asked Questions”) section from google.com regarding Image Search
8 which I printed out on July 17, 2005:

9 (a) In answer to the question, “How do I use image search?” Google
10 replies: “To use image search, simply type your query in the image search box and
11 click the ‘Search’ button or hit ‘Enter’ on your keyboard. When you see the results
12 page, click on the thumbnail version of the picture you want to view. *This displays*
13 *a larger version of the image*, as well as the page on which the original image is
14 located.” (emphasis added).

15 (b) In response to the question, “Are there any copyright restrictions
16 associated with the images?” Google’s FAQ section replies: “The images identified
17 by the Google Image Search service may be protected by copyrights. we cannot
18 grant you any rights to use them for any purpose other than viewing them on the
19 web.”

20 (c) In response to the question, “How does Image Search work?”
21 Google replies: “Google analyzes the text on the page adjacent to the image, the
22 image caption and dozens of other factors to determine the image content. Google
23 also uses sophisticated algorithms to remove duplicates and ensure that the highest
24 quality images are presented first in your results.”

25 22. For a visual demonstration of how Image Search and the Google
26 “cache link” work, including a sample of infringing Perfect 10 images displayed by
27 Google, *see*, Exhibit 8, which is a CD. Please turn on the sound on your computer
28 when viewing this CD. **The CD may take 30 seconds to load.** This CD is

1 described later in this declaration under the heading "The Experience of a Google
2 User," ¶¶ 27-35 infra.

3 23. As discussed in detail in ¶¶ 38-41, 95-101, 104-108, 55-56, Google
4 retrieves from the internet and then displays over 1,000 different reduced size
5 Perfect 10 copyrighted images through Image Search, and reformats them for
6 display on cell phones. Most of these reduced size images displayed by Google may
7 be viewed full size without the user ever having to leave google.com. *See*, ¶¶ 38-41,
8 45-47, 114, Exhibits 10-12, 16-18, 96. The images displayed by Google include
9 many of the best images from Perfect 10 Magazine.

10 **B. Google's AdSense Advertising Program.**

11 24. Google does not charge users to use either Web Search or Image
12 Search. It receives some of its revenues by providing image search and web search
13 results to other companies who provide image search and web search results.
14 (Google 10-K, pages 21-23.) The vast preponderance of Google's income is derived
15 through advertisements. Attached hereto as Exhibit 6 is a Google press release that
16 I printed on August 4, 2005, that describes Google's income and revenues, and
17 shows that for the quarter ending June 30, 2005, Google had revenues of \$1.384
18 billion. The press release states that "The Google Network – Revenues generated on
19 Google's partner sites, through AdSense programs, contributed \$630 million, or
20 46% of total revenues...TAC – Traffic Acquisition Costs, the portion of revenues
21 shared with Google's partners, increased to \$494 million...." Also attached as part
22 of Exhibit 6 is a page that I printed on July 4, 2005 from google.com which states
23 "We make most of our money from the sale of advertising, which appears adjacent
24 to our own search results and on sites maintained by a large network of publishers
25 across the web who participate in our AdSense program."

26 25. Attached hereto as Exhibit 7 are documents that I printed from Google
27 on September 14, 2004, and April 11, 2005, that describe Google's advertising
28 program it calls AdSense:

