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9
 10 IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 (SAN JOSE DIVISION)

11 ALBERTO R. GONZALES, in his official)
 12 capacity as ATTORNEY GENERAL OF THE)
 UNITED STATES,

13 Movant,

14 v.

15 GOOGLE INC.,

16 Respondent.

Case No. _____-MISC

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 18 **Notice of Motion, and Motion to
 19 Compel Compliance with
 20 Subpoena Duces Tecum**

Hearing: To Be Set
 Time: To Be Set

21 NOTICE is hereby given of the filing of this motion pursuant to Rule 45(c)(2)(B)
 22 of the Federal Rules of Civil Procedure by Alberto R. Gonzales, acting in his official
 23 capacity as the Attorney General of the United States. This motion seeks compel the
 24 Respondent, Google Inc. ("Google"), to comply with the subpoena that the Attorney
 25 General has issued to it, and to produce and permit for inspection and copying the
 26 materials specified in that subpoena. Pursuant to Local Civil Rule 37-1(a), the
 27 undersigned counsel for the Attorney General represents that he has attempted to confer
 28 with counsel for Google with respect to this motion, but that, after conferring, Google has
 chosen to refuse to comply with the subpoena. In support of this motion, the Attorney

Gonzales v. Google Inc.
 No. _____-MISC
 Motion to Compel

1 General is also filing the Declaration of Joel McElvain, with exhibits attached, and the
2 Declaration of Philip B. Stark, Ph.D.

3 This motion seeks an order from this Court directing Google to comply with the
4 subpoena, and to produce the materials described therein. As will be explained in greater
5 detail below, those materials would be of assistance to the government in its preparation
6 of its defense in the case *ACLU, et al. v. Gonzales*, Civil Action No 98-CV-5591 (E.D.
7 Pa.).

8 BACKGROUND

9 In 1998, Congress enacted, and the President signed into law, the Child Online
10 Protection Act (COPA), which is now codified as 47 U.S.C. § 231. Congress was
11 concerned with protecting the physical and psychological well-being of minors from the
12 harmful effects of their exposure to sexually explicit material on the Internet. In
13 furtherance of this important goal, COPA prohibits the knowing making of a
14 communication, by means of the World Wide Web, “for commercial purposes that is
15 available to any minor and that includes material that is harmful to minors,” subject to
16 certain affirmative defenses. 47 U.S.C. § 231(a)(1). For this purpose, the statute defines
17 the phrase “material that is harmful to minors” as a term of art to mean material either that
18 is obscene or that “(A) the average person, applying contemporary community standards,
19 would find, taking the material as a whole and with respect to minors, is designed to
20 appeal to, or is designed to pander to, the prurient interest; (B) depicts, describes, or
21 represents, in a manner patently offensive with respect to minors, an actual or simulated
22 sexual act or sexual conduct, an actual or simulated normal or perverted sexual act, or a
23 lewd exhibition of the genitals or post-pubescent female breast; and (C) taken as a whole,
24 lacks serious literary, artistic, political, or scientific value for minors.” 47 U.S.C.
25 § 231(e)(6).

26
27 Upon the enactment of COPA, the American Civil Liberties Union and several
28 other plaintiffs filed an action in the United States District Court for the Eastern District

1 of Pennsylvania, seeking a declaration that COPA violates the First Amendment, and also
2 seeking corresponding injunctive relief. The district court (the Hon. Lowell A. Reed, Jr.)
3 granted the plaintiffs' motion for a preliminary injunction. *ACLU v. Reno*, 31 F. Supp. 2d
4 473 (E.D. Pa. 1998). The United States Court of Appeals for the Third Circuit affirmed
5 the grant of the preliminary injunction. *ACLU v. Reno*, 217 F.3d 162 (3d Cir. 2000).
6 After granting certiorari, the Supreme Court of the United States vacated the judgment of
7 the court of appeals, and remanded the case to that court for further consideration.
8 *Ashcroft v. ACLU*, 535 U.S. 564 (2002). After the court of appeals again affirmed the
9 grant of the preliminary injunction, *ACLU v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003), the
10 Supreme Court again granted certiorari.

11 A five-member majority of the Court affirmed the judgment of the court of
12 appeals, and thus affirmed the grant of the preliminary injunction. *Ashcroft v. ACLU*, 124
13 S. Ct. 2783 (2004). The Court noted that, given Congress's careful regard when it
14 enacted COPA for the proper standard of regulation of harmful-to-minors materials, "the
15 Judiciary must proceed with caution and . . . with care before invalidating the Act." *Id.* at
16 2788 (internal quotation omitted; ellipses in original). The Court concluded, however,
17 that the district court had not abused its discretion in entering the preliminary injunction.
18 It held that there was an insufficient record, at that stage in the proceedings, by which the
19 Government could carry its burden of proof that existing technologies, namely filtering
20 software, are less effective than the statutory restrictions in protecting minors from
21 harmful, sexually explicit material. *Id.* at 2793. Because "there are substantial factual
22 disputes remaining the case," the Court remanded the matter for trial on the merits. *Id.* at
23 2794.

24 As directed by the Supreme Court, the Government is now developing its defense
25 of the constitutionality of COPA, and, specifically, its development of a factual record in
26 support of its contention that COPA is more effective than filtering software in protecting
27 minors from exposure to harmful materials on the Internet. As part of its development of
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1 this defense, the Government has issued subpoenas to Google, and to other entities that
2 operate search engines on the Internet, asking those entities to produce two sets of
3 materials. (McElvain Decl., Ex. A (“Subpoena”).) First, the subpoena asks Google to
4 produce an electronic file containing “[a]ll URL’s that are available to be located through
5 a query on your company’ search engine as of July 31, 2005.” (Subpoena, Request No.
6 1.) After lengthy negotiations, the Government has narrowed this request to seek the
7 production of “a multi-stage random sample of one million URL’s” from Google’s
8 database, *i.e.*, a random selection of the various databases in which those URL’s are
9 stored, and a random sample of the URL’s held within those selected databases.
10 (McElvain Decl., Ex. C (“DOJ Letter”) at 1.) Second, the subpoena also asks Google to
11 produce an electronic file containing “[a]ll queries that have been entered on your
12 company’ search engine between June 1, 2005, and July 31, 2005, inclusive.” (Subpoena,
13 Request No. 2.) Again, after lengthy negotiations, the Government has narrowed this
14 request to seek the production of an electronic file containing “the text of each search
15 string entered onto Google’s search engine over a one-week period (absent any
16 information identifying the person who entered such query).” (DOJ Letter at 1.) Despite
17 these narrowing constructions, Google has refused to comply with these requests in any
18 way. (McElvain Decl., Ex. B (“Ramani Letter”).)

19
20 The production of those materials would be of significant assistance to the
21 Government’s preparation of its defense of the constitutionality of this important statute.
22 The production of a set of queries entered onto Google’s search engine would assist the
23 Government in its efforts to understand the behavior of current web users, to estimate
24 how often web users encounter harmful-to-minors material in the course of their searches,
25 and to measure the effectiveness of filtering software in screening that material. (Stark
26 Decl., ¶ 4.) Similarly, the production of a sample of the URL’s that are available to be
27 recovered from a search of Google’s search engine would assist the Government in its
28 efforts to understand the web sites that users of search engines can find through the use of

1 search engines, to determine the character of those web sites, to estimate the prevalence
2 of harmful-to-minors material on those web sites, and to measure the effectiveness of
3 filtering software in screening that harmful-to-minors material. (Stark Decl., ¶ 3.)

4 DISCUSSION

5 The Supreme Court has mandated, in the remand of *Aschcroft v. ACLU* to the
6 district court, that the parties develop a factual record regarding the relative effectiveness
7 of COPA and of filtering software in restricting the access of minors to harmful-to-minors
8 material on the Internet. The production of the materials sought in the Government's
9 subpoena to Google would be of assistance to the Government in its efforts to comply
10 with this mandate. Google, nonetheless, has refused to comply in any way with the
11 subpoena. It has asserted objections of relevance, of privilege, and of burden to both of
12 the requests in the subpoena. None of its objections, however, suffices to excuse Google
13 from its discovery obligations.

14 I. Google Is Obligated under the Subpoena to Produce a Set of Queries 15 Entered on to Its Search Engine

16 The subpoena requires Google to produce an electronic file containing "[a]ll
17 queries that have been entered on your company's search engine between June 1, 2005,
18 and July 31, 2005, inclusive." (Subpoena, Request No. 2.) The Government has
19 narrowed that request to seek the production of an electronic file containing "the text of
20 each search string entered onto Google's search engine over a one-week period (absent
21 any information identifying the person who entered such query)." (DOJ Letter at 1.)
22 Google first objects to this request on grounds of relevancy. (Ramani Letter at 4.)
23 However, "[t]he non-party witness is subject to the same scope of discovery under [Rule
24 45] as that person would be as a party to whom a request is addressed pursuant to Rule
25 34." Fed. R. Civ. P. 45, advisory committee's notes to 1991 amendment. Thus, a request
26 for production submitted to a non-party meets the standard of relevance so long as it is
27 reasonably calculated to lead to the discovery of admissible evidence. *See United States*
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1 *ex rel. Schwartz v. TRW, Inc.*, 211 F.R.D. 388, 392 (C.D. Cal. 2002). This request easily
2 meets that standard. As discussed above, the production of this sample would permit the
3 Government to evaluate whether COPA or filtering software is more effective in
4 restricting access to harmful-to-minors materials in response to searches as they are
5 actually performed by present-day users of the Internet. (Stark Decl., ¶ 4.)

6 Google next objects that its compliance with the request would require it to
7 produce information identifying the users of its search engines. (Ramani Letter at 4.)
8 This concern is illusory. The subpoena specifically directs Google to produce only the
9 text of the random sample of search strings, without any additional information that
10 would identify the person who entered any individual search string. (Subpoena, Request
11 No. 2.) The Government has issued subpoenas to, and has received compliance from,
12 other entities who operate search engines, and each of those entities has produced
13 electronic files to the Government that contain the texts of the search strings, but that do
14 not contain any additional personal identifying information. (Stark Decl., ¶ 9.) Google
15 thus should have no difficulty in complying in the same way as its competitors have.

16 Google also contends that the material sought in this request is redundant, given
17 the fact that the Government has issued similar subpoenas to other search engine
18 operators. (Ramani Letter at 5.) This objection misunderstands the nature of the
19 Government's request. The production of a set of queries from Google's database, in
20 combination with similar productions from other search engine operators, will assist the
21 Government in developing a sample of the overall universe of search engine queries,
22 while accounting for the potential of any variations in the types of queries that are entered
23 into different search engines. (Stark Decl., ¶¶ 5-6.) Because Google has the largest share
24 of the web search market, its response to the subpoena would be of value to the
25 Government in its development of its overall sample of queries. (Stark Decl., ¶¶ 5-7.)

26 Google next argues that the subpoena asks it to produce privileged trade secrets.
27 (Ramani Letter at 5.) We do not understand Google to claim that the actual texts of a
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1 random sample of the searches entered on its search engine are trade secrets (nor would
2 such a claim be plausible). Instead, Google asserts that the total number of queries that it
3 receives within a given day is itself a trade secret. It identifies no reason to conclude that
4 it would suffer any competitive harm from the disclosure of this figure, however. In any
5 event, to the extent that such a figure would constitute a trade secret, the district court
6 overseeing the underlying litigation has entered a comprehensive protective order that
7 protects such privileged material from disclosure. (McElvain Decl., Ex. D (“Protective
8 Order”).) Google does not argue that this protective order is inadequate in any way, but
9 argues instead only that the Government might inadvertently fail to comply with that
10 order. This argument does not excuse Google from complying with the subpoena, subject
11 to the protections it has already received through the entry of the protective order. *See,*
12 *e.g., Truswal Sys. Corp. v. Hydro-Air Eng’g, Inc.*, 813 F.2d 1207, 1211 (Fed. Cir. 1987)
13 (court will not presume that terms of protective order will be violated).

14 Lastly with respect to the request for the production of queries, Google contends
15 that it will be subject to an undue burden in complying with this request. (Ramani Letter
16 at 5.) To the contrary, any burden that Google will face will be minimal. The request
17 seeks only the production of the queries that were entered on to Google’s search engine
18 over a seven-day period in an electronic text file. The process of producing this text file
19 is not complicated; other operators of search engines have complied with this request, and
20 have not reported that they encountered any difficulty or burden in doing so. (Stark Decl.,
21 ¶ 8.) Moreover, the Government is willing to work with Google to specify a multi-stage
22 sample of the queries; the use of that approach would reduce any burden faced by Google
23 well below that of its competitors. (Stark Decl., ¶ 8.) (Of course, the Government is
24 willing to compensate Google for its reasonable expenses in complying with both
25 requests in this subpoena.) The minimal burden that Google faces in complying with this
26 request must be balanced against the clear relevance of the material to the Government’s
27 preparation of its defense of the constitutionality of COPA. *See Compaq Computer Corp.*

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1 v. *Packard Bell Electronics, Inc.*, 163 F.R.D. 329, 335 (N.D. Cal. 1995). Given the
2 Supreme Court's explicit mandate for the development of a factual record regarding the
3 relative effectiveness of COPA and filtering software, the relevance of this request easily
4 outweighs the small burden faced by Google.

5 **II. Google Is Obligated under the Subpoena to Produce a Sample of**
6 **URL's Available to be Retrieved from Its Search Engine**

7 The subpoena further requires Google to produce an electronic file containing
8 "[a]ll URL's that are available to be located through a query on your company' search
9 engine as of July 31, 2005." (Subpoena, Request No. 1.) The Government has also
10 narrowed this request to seek the production of "a multi-stage random sample of one
11 million URL's" from Google's database, *i.e.*, a random selection of the various databases
12 in which those URL's are stored, and a random sample of the URL's held within those
13 selected databases. (DOJ Letter at 1.) As with the first request, Google objects to this
14 request on relevance grounds. (Ramani Letter at 3.) This request, however, easily meets
15 the minimal standard of relevance under Rules 26 and 45. The production of these
16 materials will permit the Government to review a sample set of Internet addresses
17 available to be retrieved from the search engines operated by Google and by other
18 entities. From that set, the Government will be able to review the sample to draw
19 conclusions as to the prevalence of harmful-to-minors material on the portion of the
20 Internet that is retrievable through search engines. (Stark Decl., ¶ 3.) Thus, the request is
21 plainly reasonably calculated to lead to the discovery of admissible evidence.

22 Google also objects that its compliance with this request would imply that its
23 search-engine database is reflective of the entire world-wide web. (Ramani Letter at 3.)
24 The Government is unaware of any privilege or burden claim to which this objection
25 could possibly relate. In any event, there is no basis for this objection. The subpoena
26 seeks the production of a sample of URL's available on Google's search engine, not to
27 draw conclusions or to make representations as to the entire nature of the Internet, but
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1 instead to evaluate the portion of the Internet that is searchable through the search engines
2 operated by Google and by other entities. (Stark Decl., ¶ 10.)

3 Next, Google asserts that the Government could obtain this sample set of URL's
4 from other sources. (Ramani Letter at 3.) As Google itself acknowledges, however, the
5 Government has attempted to gather similar data from other sources, but has found those
6 sources to be incomplete. (*Id.*) In any event, as a matter of simple logic, given the
7 Government's stated purpose of evaluating a sample set of URL's available to be
8 retrieved from searches on the various search engines presently available, the most readily
9 available source for those materials are the operators of search engines themselves.
10 (Stark Decl., ¶ 5.)

11 Google also objects, as it did with the request discussed above, that this request
12 seeks redundant information, given the fact that the Government has issued similar
13 subpoenas to other search engine operators. (Ramani Letter at 4.) As discussed above,
14 this objection misunderstands the purpose of the request. The production of a sample set
15 of URL's from more than one search engine operator will permit the Government to draw
16 conclusions regarding the total universe of URL's available to be retrieved through the
17 use of a search engine, and to verify those conclusions against possible variations in the
18 scope of URL's available in the databases of differing search engines. (Stark Decl.,
19 ¶¶ 5-6.) This request thus is in no sense redundant.

20 Google further asserts that it would be unduly burdened if required to respond to
21 this request. (Ramani Letter at 4.) To the contrary, the process of selecting a random
22 sample among the various sources in which Google maintains its database of URL's,
23 selecting a random sample of URL's from those sources, and producing a text file of the
24 results, is straight-forward; other search engine operators have complied with this request,
25 as they have with the request for queries discussed above, and they have not reported any
26 difficulty in performing this task. (Stark Decl., ¶ 8.) Again, the specification of a multi-
27 stage sample to be used in drawing the URL's from Google's database would reduce any
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1 instead to evaluate the portion of the Internet that is searchable through the search engines
2 operated by Google and by other entities. (Stark Decl., ¶ 10.)

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4 from other sources. (Ramani Letter at 3.) As Google itself acknowledges, however, the
5 Government has attempted to gather similar data from other sources, but has found those
6 sources to be incomplete. (*Id.*) In any event, as a matter of simple logic, given the
7 Government's stated purpose of evaluating a sample set of URL's available to be
8 retrieved from searches on the various search engines presently available, the most readily
9 available source for those materials are the operators of search engines themselves.
10 (Stark Decl., ¶ 5.)

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12 seeks redundant information, given the fact that the Government has issued similar
13 subpoenas to other search engine operators. (Ramani Letter at 4.) As discussed above,
14 this objection misunderstands the purpose of the request. The production of a sample set
15 of URL's from more than one search engine operator will permit the Government to draw
16 conclusions regarding the total universe of URL's available to be retrieved through the
17 use of a search engine, and to verify those conclusions against possible variations in the
18 scope of URL's available in the databases of differing search engines. (Stark Decl.,
19 ¶¶ 5-6.) This request thus is in no sense redundant.

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21 this request. (Ramani Letter at 4.) To the contrary, the process of selecting a random
22 sample among the various sources in which Google maintains its database of URL's,
23 selecting a random sample of URL's from those sources, and producing a text file of the
24 results, is straight-forward; other search engine operators have complied with this request,
25 as they have with the request for queries discussed above, and they have not reported any
26 difficulty in performing this task. (Stark Decl., ¶ 8.) Again, the specification of a multi-
27 stage sample to be used in drawing the URL's from Google's database would reduce any
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1 burden faced by Google below that faced by the other search engine operators. (Stark
2 Decl., ¶ 8.) Google should not be excused from the same, reasonable discovery
3 obligations as those of its competitors.

4 Finally, Google contends that this request, like the request above, would require it
5 to disclose its trade secrets, namely, the number of URL's in its database and the number
6 of servers it uses to maintain that database. (Ramani Letter at 4.) (Google, rightly, does
7 not contend that the actual resulting random sample of URL's that it would produce could
8 in any sense be considered to be a trade secret.) Again, Google identifies no defect in the
9 protective order that has been entered in this litigation, and it may not rely purely on
10 speculation that the order might be violated to justify its refusal to comply with the
11 subpoena. In any event, Google fails to identify any competitive harm that could befall it
12 if it were to disclose these facts to the Government for the expressly limited purpose of
13 the drawing of a random sample of URL's from the Google database.

14 Given the explicit mandate from the Supreme Court for the development of a
15 factual record regarding the effectiveness of COPA and of filtering software, and given
16 the demonstrated usefulness that the subpoenaed materials would have for the
17 Government in its development of that record, the Government has demonstrated its
18 entitlement to Google's compliance with the subpoena. This Court should require Google
19 to comply with the subpoena on the same terms that its competitors have.
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CONCLUSION


For the foregoing reasons, the Movant, Alberto R. Gonzales, in his official capacity as Attorney General of the United States, respectfully requests that this motion be granted and that the Respondent, Google, Inc., be compelled to comply with the subpoena issued to it. A proposed order is attached for the Court's convenience.

Dated: January 18, 2006

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
(SAN JOSE DIVISION)

**ALBERTO R. GONZALES, in his official)
capacity as ATTORNEY GENERAL OF THE)
UNITED STATES,**

Movant,

v.

GOOGLE INC.,

Respondent.

Case No. _____-MISC

[Proposed] Order

THIS MATTER having come before the Court on the Motion to Compel
Compliance with Subpoena Duces Tecum filed by Alberto R. Gonzales, in his official
capacity as Attorney General of the United States, and good cause having been shown, it
is hereby

ORDERED that the Motion is GRANTED; and it is further

ORDERED that the Respondent, Google Inc., is compelled to comply with the
subpoena issued to it by the Movant within 21 days of the date of this Order.

IT IS SO ORDERED.

Dated: _____

JUDGE OF THE DISTRICT COURT