

Court of Appeals Docket No. 10-56316

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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PERFECT 10, INC.,  
Plaintiff, Appellant  
vs.

GOOGLE, INC.  
Defendant, Appellee

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT, CENTRAL  
DISTRICT OF CALIFORNIA, HON. A. HOWARD MATZ,  
USDC NO. CV 04-9484 AHM (SHx)

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**BRIEF OF *AMICI CURIAE* PICTURE ARCHIVE COUNCIL OF  
AMERICA, INC.; AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS,  
INC.; GRAPHIC ARTISTS GUILD; AMERICAN SOCIETY OF PICTURE  
PROFESSIONALS; AIGA, THE PROFESSIONAL ASSOCIATION FOR  
DESIGN; AND THE NEWSPAPER ASSOCIATION OF AMERICA IN  
SUPPORT OF PLAINTIFF PERFECT 10, INC.'S APPEAL SEEKING  
REVERSAL OF THE DISTRICT COURT'S ORDERS DENYING A  
PRELIMINARY INJUNCTION AND GRANTING IN PART GOOGLE,  
INC.'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* Picture Archive Council of America, Inc.; American Society of Media Photographers, Inc.; Graphic Artists Guild; American Society of Picture Professionals; AIGA, the professional association for design; and the Newspaper Association of America hereby state that none of these entities has a parent corporation, and that no publically held corporation owns 10% or more of their respective stock.

Dated:       New York, New York  
                 October 26, 2010

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**Pursuant to FRAP 29(a), all parties have consented to the filing of this brief by *amici curiae*.**

**IDENTITY AND INTEREST OF THE AMICI CURIAE**

The Picture Archive Council of America, Inc.’s (“PACA”) membership is comprised of over 150 stock image libraries across the world that are engaged in licensing millions of images, illustrations, film clips and other content on behalf of thousands of individual creators. As part of its mission, PACA actively advocates copyright protection and enforcement for its members.

The American Society of Media Photographers, Inc. represents the interests of professional photographers whose photographs are created for publication and has approximately 7,000 members. It is the oldest and largest organization of its kind in the world.

Graphic Artists Guild (the “Guild”) is a national union of graphic artists dedicated to promoting and protecting the social, economic and professional interests of its members. The Guild’s members include graphic designers, Web designers, digital artists, illustrators, cartoonists, animators, art directors, surface designers and various combinations of these disciplines.

The American Society of Picture Professionals is a community of approximately 700 image experts committed to sharing their experience and knowledge throughout the industry. This non-profit association provides

professional networking and educational opportunities for those who create, edit, research, license, manage or publish still and motion imagery.

AIGA, the professional association for design, is the largest and oldest professional association in the world for design professionals and a leader globally in the professional standards and ethics of the communication design profession. AIGA represents 20,000 members and the interests of 350,000 communication designers nationwide, including type designers, book designers, graphic designers, brand and corporate identity designers, interaction designers, publication designers, information designers and design strategists.

The Newspaper Association of America is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. Its members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. One of the key strategic priorities of NAA is to highlight issues that affect newspapers' digital businesses and customers, including the protection of newspapers' intellectual property rights.

Collectively, *amici* represent hundreds of thousands of copyright owners, including photographers, writers, graphic designers, artists, authors, newspapers, and their licensing representatives and publishers of material protected by copyright. The members of the various content associations manage the licensing

of many millions of copyrighted works. To protect their rights, *amici* send takedown notices pursuant to the Digital Millennium Copyright Act (the “DMCA”), 17 U.S.C. § 512, *et seq.*, to Internet Service Providers (“ISPs”) seeking to have infringing works removed and/or bring copyright infringement claims against third parties who make use of or exploit their protected content, whether it be photographs, videos, illustrations, designs, newspapers, books, or other content, without permission or payment. Copyright enforcement is therefore critical to the mission of all *amici*, who are keenly aware of the serious practical and legal ramifications of the District Court’s decision.

The Internet has radically transformed how industries market and sell their products and services, and copyrighted content providers are no exception. Works previously published in physical form are now in digital formats that can be copied, collected, published and distributed around the world without any degradation in quality. However, what has not changed are the mechanisms by which rightsholders protect their intellectual property – *i.e.*, via copyright law. Indeed, content creators depend on a robust copyright enforcement regime to protect their professions’ economic viability and their ability to earn a livelihood.

*Amici* are united in their concern about the District Court’s findings that DMCA notices sent by Perfect 10, Inc. (“P10”) to Defendant Google, Inc. (“Google”) were non-compliant based upon newly-minted requirements, which

would apply to all *amici* if upheld. As explained below, the District Court’s analysis ignores the plain language and the underlying Congressional purpose of the statute, and instead devises new, confusing requirements that permit ISPs to disregard their obligations under the DMCA while severely undermining rightsholders’ ability to enforce and protect their copyrighted works.

Preventing the spread of infringing content on the Internet is essential in order to maintain the value of copyrighted content and to maintain the ability of content creators and those who publish and distribute their works to earn an income from their profession. Accordingly, *amici* respectfully request that this Court reverse the District Court’s rulings.

## **PRELIMINARY STATEMENT**

*“All Perfect 10 has to do is comply with the instructions that Google provides for compliant notices, which is to give a spreadsheet list of the URLs, the actual specific location of where the infringing material is located.”*

Michael T. Zeller, Esq., Counsel for Google, Inc. April 5, 2010 Hearing (17:7 to 10)

*“Google requires a complainant to send a DMCA notice to Google’s designated agent, specifying the copyrighted work infringed (including how to locate it), the complete URL at which the infringing material is located, and the Web Search query that links to the web page.”*

July 26, 2010 District Court Opinion (the “Decision”) at 3-4.

*“Google then verifies that the copyrighted work is, in fact, infringed, and, if so, it blocks the infringing URL from appearing in Google search results.”*

Decision at 4.

The preceding quotes plainly demonstrate why the District Court erred in finding that Google is entitled to safe harbor protection under the DMCA and why permitting Google to self-govern its obligations under the DMCA is akin to letting the fox guard the hen house.

In the Decision, which forms the basis for the July 30, 2010 denial of P10’s motion for a preliminary injunction, the District Court granted in large part Google’s motions for partial summary judgment on the grounds that Google is entitled to DMCA “safe harbor” immunity from P10’s copyright infringement

claims. *Amici* believe the District Court erred by, *inter alia*: 1) ignoring the plain language and purpose of the DMCA, 2) faulting P10 for not satisfying two new requirements that are nowhere in the statute, and 3) allowing Google to distribute DMCA notices to the Chilling Effects Clearinghouse at chillingeffects.org. If the Decision is affirmed, it will obstruct *amici*'s ability to protect their copyrighted works through the DMCA notice and takedown procedure.

The purpose of the DMCA notice and takedown provision is to provide rightsholders with the means to obtain quick removal of infringing copyrighted content from websites by sending notices to ISPs.<sup>1</sup> At the same time, the statute provides ISPs with a safe harbor from liability for processing such notices. As long as an ISP removes or disables the claimed infringing material in “good faith,” it will receive “safe harbor” protection “regardless of whether the material or activity is ultimately determined to be infringing.” 17 U.S.C. § 512(g)(1).

However, the District Court’s ruling has radically altered the delicate balance created by the DMCA and grants ISPs “safe harbor” protection without affording rightsholders an easy means of removing infringing content. Google should not be permitted to avoid processing substantially compliant DMCA takedown notices by relying upon its own standards and its own judgment calls as

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<sup>1</sup> *Amici* do not necessarily agree that Google is a service provider under 17 U.S.C. § 512(k) for all functions it performs. However, for the purposes of this brief, *amici* assume that Google is an ISP for certain functions.

to whether a work identified in a DMCA notice is infringing. It also should not be permitted to redistribute DMCA notices to Chilling Effects and then link to the infringing content in those notices. *Amici* thus urge that the District Court's July 26 and 30, 2010 opinions addressing these issues be reversed.

## **ARGUMENT**

### **I. THE DISTRICT COURT'S DECISION VIOLATES THE PURPOSE BEHIND THE DMCA'S NOTIFICATION PROCESS**

In its Report on the DMCA, the Senate Judiciary Committee explained the overarching reasons for enacting the DMCA:

Due to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy. .... [The DMCA Legislation] will facilitate making available quickly and conveniently via the Internet the movies, music, software and literary works that are the fruit of American creative genius....

At the same time, without clarification of their liability, service providers may hesitate to make the necessary investment in the expansion of the speed and capacity of the Internet.... In short, by limiting the liability of service providers, the DMCA ensures that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand.

S. Rep. No. 105-190, at 8 (1998)

Thus, in enacting the DMCA, Congress struck a delicate balance between rightsholders, who needed protection from the proliferation of infringing content on the Internet, and ISPs, who under the Copyright Act would be considered

infringers *per se*. The DMCA provided rightsholders with a standard procedure to notify ISPs about infringing content so it can be removed quickly, while providing incentives to ISPs in the form of a “safe harbor” from copyright infringement liability to actively participate in the removal procedure.

The decision below fractures the balance created by Congress and radically shifts the burden away from ISPs and onto rightsholders by establishing new requirements that are not in the plain language of the DMCA. The District Court’s Decision also improperly punishes rightsholders who are merely attempting to enforce their rights against infringers by allowing ISPs to publish DMCA notices containing full copies of copyrighted works, and then link to those infringing works, thereby permitting the infringing works to remain available indefinitely.

## **II. THE DISTRICT COURT’S CONFUSING DECISION CREATES AN IMPRACTICAL AND UNWORKABLE PROCEDURE FOR RIGHTSHOLDERS TO FOLLOW TO ENFORCE THEIR RIGHTS.**

The two new requirements the District Court “created” in determining that P10’s DMCA notices were deficient were: 1) the rightsholder must provide the exact location where an authorized copy of the work can be found (*i.e.*, providing a copy of the work is insufficient to identify that work, such that an image-based DMCA notice can never satisfy the statute); and 2) that a DMCA notice is improper if it is not a “single document.”

## A. The Exact Location Requirement

The District Court rejected P10’s image-based notices because it held that P10 did not provide an exact location where the authorized copies can be found.<sup>2</sup> Decision at 16, n.7. In so ruling, the District Court rejected the notion that providing a copy of an image is sufficient to identify the image. However, the DMCA merely requires that the rightsholder “identif[y] the copyrighted work claimed to have been infringed....” 17 U.S.C. § 512(c)(3)(A)(ii). There is nothing in this section of the statute which requires a URL to be provided. *Id.* A copy of the work should certainly be sufficient to satisfy this requirement. In requiring that the rightsholder provide an exact location of an authorized copy, the District Court has replaced Section 512(c)(3)(A)(ii) of the DMCA with a new and unnecessary requirement found nowhere in the statute.

Moreover, the District Court’s requirement that an exact location be included is simply unworkable for many rightsholders. For example, photographers who sell or license images directly to publications or through image libraries, yet maintain the copyrights to those images, may not know where such authorized images have been published or used. And if they do, the burden to look

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<sup>2</sup> Specifically, the District Court found that P10’s notices would have been compliant if they “showed the URL on the P10 website or the volume and page number of *Perfect10* magazine at which the original copyrighted image appears.” Decision at 16, n.7.

up and provide such information for each of thousands of infringed images would be extraordinary.

Furthermore, if the rightsholder's copyrighted work is located behind a "pay wall" or on a password protected site, it will not be possible for the rightsholder to provide a URL that the ISP can use to directly access the authorized copy. Because a rightsholder cannot provide an exact location of the protected work, the ISP will be absolved from its obligations under the DMCA to remove such infringing content. The District Court's new requirement is thus unworkable.

Therefore, the most common sense solution – which plainly complies with the DMCA – is to permit rightsholders to attach copies of the images to their notices. As the rightsholder is required to state under penalty of perjury that the information in the DMCA notice is accurate (including the representation that the rightsholder owns rights in the work at issue), the rightsholder bears the responsibility and faces potential liability if he misrepresents that he owns the image at issue.

The same problem would arise if the *infringing* image is located on a paysite or password protected site. Again, the DMCA does not require rightsholders to provide a URL – Section 512(c)(3)(iii) speaks generally that the DMCA notice must include "[i]dentification of the material that is claimed to be infringed" and does not specify how the material is to be identified, 17 U.S.C. § 512(c)(3)(iii), and

Section 512(d) states that the rightsholder must identify “the reference or link, to material that is claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.” 17 U.S.C. § 512(d)(3) (emphasis added). Congress’ use of the conjunction “or” plainly undermines the holding that a URL is the only allowable way to identify the infringing work. As a practical matter, much of the infringement of *amici*’s works occurs on paysites or password protected sites that offer large quantities of pirated movies, images, designs, and books. On such sites, there are no direct URLs that a rightsholder can provide to the ISP to identify the specific infringing web pages, as Google requires. Consequently, Google’s DMCA policy effectively relieves it from processing any notices regarding such infringers.

If the District Court’s ruling is upheld, rightsholders will not be able to provide compliant notices regarding infringements on such websites. As a result, infringers merely have to post their infringing copyrighted works onto a paysite or password protected site to avoid having the infringing content taken down. This cannot be the outcome Congress envisioned in enacting the DMCA.

## **B. The Single Document Requirement**

The District Court also determined that a group of P10’s notices were deficient because they were not a “single document.” Decision at 17 (citing

*Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1113 (9<sup>th</sup> Cir.), *cert. denied*, 128 S. Ct. 709 (2007) (“CCBill”).<sup>3</sup> The DMCA does not require notices to be a “single document;” instead, the plain language of the statute provides that a notice need only be “a written communication.” 17 U.S.C. § 512(c)(3)(A) (emphasis added).

Even if a “single document” requirement could be read into the DMCA (which it should not), the District Court does not provide clear guidance regarding what the “single document” requirement even means. The District Court initially held that P10’s notices were deficient because they were not a single document. Decision at 17. Yet, just seven pages later, the District Court found that P10 “remains free to include additional supporting evidence, such as screenshots, with the material it submits to a service provider” so long as “the essential elements of notification” are “included in a single written communication.” Decision at 24-25. Given the mixed messages from the District Court, *amici* do not know how to comply with this requirement. Can rightsholders submit DMCA notices covering

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<sup>3</sup> *CCBill* is distinguishable. In that case, this Court found P10’s notices deficient because P10 sent multiple notices at different times and no single notice contained all of the information required by the statute. This Court thus held that an ISP would be unduly burdened by having to “cobble together adequate notice from separately defective notices.” *CCBill*, 488 F.3d at 1113. Conversely, the notices that P10 sent to Google in the instant action apparently contained all of the information required by the statute in attachments. Therefore, Google was not required to piece information together from multiple deficient notices sent at different times.

multiple works? Can rightsholders include an attachment showing a copy of the work in order to identify it, without running afoul of the “single document” rule?<sup>4</sup> Such confusion can only benefit ISPs, who would be able to reject otherwise compliant DMCA notices on these grounds.

If the “single document” requirement is interpreted by ISPs to mean that rightsholders cannot include infringing webpages or infringing images as attachments, or that rightsholders have to file separate DMCA notices for each infringed work, then that would drastically increase the time and expense rightsholders must spend to protect their works, if not completely eliminate their ability to protect such works. The proliferation of infringing works on the Internet can occur within seconds. For example, an infringer may post tens, if not hundreds, of infringing images or videos on a website or blog. Other infringers then download and repost those images and videos on other websites or blogs, and so on.

The DMCA was enacted to provide rightsholders with the ability to respond quickly to infringement on the Internet. If a rightsholder is forced to take the time to prepare and file separate notices for each and every one of potentially hundreds

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<sup>4</sup> The ability to include copies of infringed images as an integral part of a compliant DMCA notice is absolutely essential for some types of infringing websites, such as infringing paysites. For such websites, it is not feasible to provide a list of URLs that lead directly to each infringing image, as the District Court’s ruling appears to require.

or thousands of works on multiple websites, and to further ascertain the exact location of an authorized copy of each such work (if such a location even exists), it will be completely unable to protect its copyrighted works.

Finally, it appears that the District Court determined that many of P10's multiple-work notices were non-compliant because the court asserted that Google had to take multiple steps to process the notices. That an ISP has to perform some work to process DMCA notices does not invalidate those notices. In fact, the DMCA was designed to require ISPs to work with rightsholders to ensure that notices are processed promptly. Section 512(c)(3)(B)(ii) provides that an ISP must promptly attempt to contact the rightsholder to cure deficiencies in a notice (provided that the rightsholder has substantially complied with most of the notice requirements). Indeed, in *Hendrickson v. Amazon.com, Inc.*, 298 F. Supp. 2d 914 (C.D. Cal. 2003), the Central District of California explained Congress' intent that while ISPs are not required to monitor their services for infringing content, ISPs are to take an active role in the takedown procedure:

“The Committee [did] not intend [to] suggest that a provider must ... monitor its service ....” H.R. at 61. The Committee, also, implied that both the copyright owner and the ISP should cooperate with each other to detect and deal with copyright infringement that take place in the digital networked environment. H.R. at 44. Thus, it was not the intention of Congress that a copyright owner could write one blanket notice to all service providers alerting them of infringing material, thus relieving him of any further responsibility and,

thereby, placing the onus forever on the ISP. However, it is, also, against the spirit of the DMCA if the entire responsibility lies with the copyright owner to forever police websites in search of possible infringers.

*Id. at 916-17 (quoting H.R. Rep. No. 105-551, pt. 2 (1998))*

In short, the District Court's reliance on its newly minted requirements, which were the basis of its decision to deny P10's motion for a preliminary injunction, was improper, and the District Court's decisions should be reversed.

### **III. GOOGLE'S AFFIRMATIVE ACTIONS STEP FAR BEYOND MERE COMPLIANCE WITH THE PLAIN LANGUAGE OF THE DMCA AND SHOULD RESULT IN A LOSS OF "SAFE HARBOR" IMMUNITY.**

As is readily apparent from the quotes in the Preliminary Statement, *supra* p. 5, Google has implemented policies that fail to comply with the basic requirements of the DMCA. By insisting that the copyright holder provide "the complete URL at which the infringing work is located," Google has adopted a DMCA policy that effectively relieves it of its obligation to disable access to infringing websites by removing all links to such websites. Rather, Google's policy is to only remove links that lead directly to an infringing work. Such a policy is contrary to the stated principles of the DMCA. Additionally, Google makes its own determination of whether works identified in DMCA notices are infringed, and effectively reinstates infringing content and links to that content

back onto the Internet through the Chilling Effects Clearinghouse. By engaging in such conduct, Google improperly steps into the shoes of Congress and the courts.

It is not for Google to make its own rules for what it considers a “compliant” DMCA notice, because such rules provide Google with the ability to keep infringing content up on and/or available through its website. Indeed, Google has a financial interest in keeping infringing materials accessible because Google often places advertisements around infringing content without paying the rightsholders.<sup>5</sup>

If a notice substantially complies with the DMCA’s requirements, Google’s sole role in the process is to take down the alleged infringing material and to put the material back up if it receives a counter notice. Because it appears that Google refuses to process notices, regardless of whether they meet the DMCA’s requirements, and because it apparently fails to work with copyright holders to make notices compliant, Google should lose its “safe harbor” protection.

Google steps outside of its obligations under the DMCA because it has taken upon itself the responsibility of determining whether a notice is fraudulent or not. On its website, Google states “[i]t is our policy to respond to clear notices of

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<sup>5</sup> This is especially true regarding Google’s Blogger service, which allows subscribers to easily incorporate Google advertisements into their blogs. Google controls what advertisements appear based upon the content of the blog. In other words, a blog with infringing pictures of Angelina Jolie will have Google ads related to Angelina Jolie. Thus, Google earns revenues from valuable copyrighted works and rights of publicity without seeking permission from, and without compensating, the rightsholders.

alleged copyright infringement,” and that its DMCA notice and takedown procedure “is designed to make submitting notices of alleged infringement to Google as straightforward as possible while reducing the number of notices that we receive that are fraudulent or difficult to understand or verify.”

<http://www.google.com/dmca.html> (visited October 26, 2010) (emphasis added).

However, the DMCA does not require Google to determine whether a notice is fraudulent or not; its sole responsibility is to follow the statute. In stating it only responds to “clear notices” (under Google’s own definition), Google intimates that it is free to ignore the DMCA’s requirement that ISPs are supposed to work with rightsholders to obtain all of the information needed to take the infringing materials down. Similarly, by purporting to determine whether a copyright claim is valid or not, Google improperly usurps the exclusive jurisdiction of the Federal Courts.

For example, if Google receives a substantially compliant but fraudulent takedown notice from a rightsholder about a blog on its Blogger service, Google’s sole obligation is to take the blog down expeditiously and to notify the subscriber that his website has been taken down pursuant to the DMCA. If the notice is fraudulent, the subscriber has the right to file a counter notice, for which Google’s sole obligation is then to reinstate access to the allegedly infringing blog and notify the rightsholder that initially filed the notice. Google then must keep the allegedly

infringing blog up unless and until it receives notification that the rightsholder has filed a lawsuit. If a lawsuit is filed, and if the rightsholder in fact presented a fraudulent claim, the court will deal with the rightsholder accordingly.

Indeed, Congress included in the DMCA a significant penalty to deter individuals and entities from filing fraudulent notices or counter notices. Section 512(f) expressly provides that a person who knowingly materially misrepresents that the material is infringing in a notice “shall be liable for damages, including costs and attorneys’ fees incurred.” 17 U.S.C. § 512(f). This provision was applied by the court in *Online Policy Group v. Diebold, Inc.* 337 F. Supp. 2d 1195, 1204-05 (N.D. Cal. 2004) (“*Diebold*”), in which the court found a defendant liable for damages and attorney’s fees under Section 512(f) for sending a DMCA notice containing misrepresentations about plaintiff infringing its copyrights. That matter apparently eventually settled for \$125,000. See [http://www.onlinepolicy.org/action/legpolicy/opg\\_v\\_diebold/](http://www.onlinepolicy.org/action/legpolicy/opg_v_diebold/) (last visited October 26, 2010). This statutory penalty protects Google’s subscribers against fraudulent claims. Thus, Google’s self-initiated determination of whether a DMCA notice is fraudulent is unnecessary.<sup>6</sup>

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<sup>6</sup> In fact, Google prominently cites to the *Diebold* decision on its DMCA policy page to warn rightsholders and others from submitting fraudulent notices. See <http://www.google.com/dmca.html> (last visited October 26, 2010)

Moreover, Google actually perpetuates copyright infringement by sending copies of DMCA notices it receives to the Chilling Effects Clearinghouse website at [chillingeffects.org](http://chillingeffects.org). Chilling Effects, a joint project of the Electronic Frontier Foundation and a number of colleges and law schools, describes its purpose as “support[ing] lawful online activity against the chill of unwarranted legal threats.” <http://www.chillingeffects.org/about> (last visited October 26, 2010) Chilling Effects further “aims to help you understand the protections that the First Amendment and intellectual property laws give to your online activities.” <http://www.chillingeffects.org/index.cgi> (last visited October 26, 2010). To that end, Chilling Effects collects and posts DMCA notices and cease and desist letters received by individuals and businesses such as Google, and created a searchable index of such notices for public viewing. However, merely disagreeing with the legal underpinnings of the DMCA is no excuse to republish copyrighted works for dissemination. Google wants the benefits of the DMCA without any of the burdens.

Google’s dissemination of DMCA notices largely eliminates the ability of rightsholders to protect their works. There is no point in submitting a DMCA notice identifying infringing content and infringing links if that very same material will be reposted on the Internet via Chilling Effects. In effect, by forwarding DMCA notices to Chilling Effects and then providing a link in its search results to

those very same notices, Google never disables access to the infringing material.<sup>7</sup> As explained in depth in P10’s Opening Brief, Google argues that it is permitted to distribute the notices under a fair use/freedom of speech defense. However, the First Amendment right to free speech does not trump claims of copyright infringement and cannot be used as an excuse to encroach on the copyright rights of others. *See generally Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 555-56, 569, 150 S. Ct. 2218 (1975); *BMG Music v. Perez*, 952 F.2d 318, 320 (9<sup>th</sup> Cir. 1991) (rejecting First Amendment defense against copyright infringement); *In re Capital Cities/ABC, Inc.*, 918 F.2d 140, 143 (11th Cir.1990); *Hustler Magazine, Inc.*, 606 F. Supp. 1526, 1536 (C.D. Cal. 1985) (confirming “the first amendment does not provide a defense to copyright infringement”), *aff’d*, 796 F.2d 1148 (9<sup>th</sup> Cir 1986).

In short, nothing in Section 512 grants Google the authority to distribute DMCA notices and then link to the infringing images in those notices, set its own requirements for a compliant DMCA notice, or make its own determination of whether a notice is valid or not. Importantly, the DMCA clearly provides that an ISP will receive “safe harbor” protection as long as it removes the claimed infringing material in “good faith,” and that it will receive this protection

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<sup>7</sup> This action seems even more outrageous because Google apparently sent some of P10’s DMCA notices which included P10 images to Chilling Effects without even processing the notices. Thus, third parties could access active infringing materials by merely viewing these DMCA notices through google.com.

**“regardless of whether the material or activity is ultimately determined to be infringing.”** 17 U.S.C. § 512(g)(1)(emphasis added). Here, Google should lose its safe harbor protection and be found liable for copyright infringement both because it has not followed the plain language of DMCA in processing DMCA notices and because it republished known infringing material onto the Internet.

## **CONCLUSION**

For our copyright laws to have any teeth on the Internet, copyright owners must be able to quickly and easily take infringing content and links down from websites. ISPs who are given notice that copyright infringement is occurring on such websites via DMCA notices are in the unique position to limit such infringement, because they serve as the gatekeepers who have the ability to remove such infringing content and/or links.

Congress created the DMCA notice and takedown procedure under which ISPs would receive “safe harbor” immunity for their assistance in taking down infringing content. However, there is a *quid pro quo* – ISPs actually have to do the work to get immunity. But, the work that ISPs must do is to follow the plain language of the DMCA – not to make their own determinations about the validity of a DMCA notice. The rulings below reward ISPs by giving them additional grounds to keep infringing materials up and penalizes rightsholders by creating confusing standards which are, in practice, extremely difficult if not impossible to

comply with. *Amici* thus respectfully request this Court reverse the District Court's July 26 and 30, 2010 decisions.

Dated:        New York, New York  
                  October 26, 2010

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**CERTIFICATE OF COMPLIANCE PURSUANT TO FRAP32(a)(7)(C)  
AND CIRCUIT RULE 32-1**

**U.S. COURT OF APPEALS CASE NO. 10-56316**

Pursuant to Fed. R. Civ. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionally spaced, has a typeface of 14 points and contains 4,886 words.

Dated:      New York, New York  
October 26, 2010

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## **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 26, 2010.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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