

No. 10-56316

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IN THE  
**United States Court of Appeals**

FOR THE NINTH CIRCUIT

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PERFECT 10, INC.,

*Plaintiff-Appellant,*

v.

GOOGLE INC.,

*Defendant-Appellee.*

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*On Appeal from the United States District Court  
For the Central District of California  
Hon. A. Howard Matz, District Judge*

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**DEFENDANT-APPELLEE'S MOTION TO STRIKE**

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Attorneys for Defendant GOOGLE INC.

Pursuant to Federal Rules of Appellate Procedure 10 and 30 and Circuit Rules 10-2, 30-1, and 30-2, Defendant-Appellee Google Inc. (“Google”) moves to strike portions of Plaintiff-Appellant Perfect 10, Inc.’s (“P10”) Excerpts of the Record (“Excerpts”). P10’s Excerpts include materials that are not part of the record in the proceeding below, and thus are inappropriate for inclusion with the record on appeal. Google requests that this Court strike any and all portions of P10’s Opening Brief that rely on or refer to the inappropriate Excerpts. Pursuant to Circuit Rule 27-1(2) and the Circuit Advisory Committee Note thereto, Google informs the Court that P10 stated it would oppose Google’s motion.

**P10’s Excerpts Improperly Include Materials Not of the Record**

P10’s Excerpts contain three separate items that do not belong in any excerpt of the record, as they were not part of the record in the matter below.

First, P10 included a tentative order of the district court that is not part of the record. ER10063-87. The district court expressly told the parties not to rely on the tentative order, noting that it was “very much draft” and that it was “not to be distributed or used for any purpose.” SER 61 (5/10/10 Hearing Transcript at 4:14-22). In fact, the district court instructed the parties to return their copies of the tentative order at the conclusion of the hearing. *Id.*

Second, P10 included an unpublished excerpt of a tentative order of the district court in P10’s litigation against Amazon.com that was (1) not part of the

record below in P10's litigation against Google, (2) not published in the *Amazon.com* litigation, and (3) not made public or otherwise provided to Google. *See* ER10097-98.

Finally, P10 included an order of the district court on a discovery matter, which issued on August 10, 2010, eleven days after the July 30, 2010 preliminary injunction order at issue in P10's appeal. ER20001-03; *see also* SER1-23 (Order Denying Second PI Motion). Thus, the discovery order could not be part of the record below, as it did not even exist at the time the order was issued.

None of these three items is part of the "record on appeal" as defined by either the Federal Rules of Appellate Procedure or this Court's rules. Fed. R. App. Proc. 10(a) (the "record on appeal" consists solely of "the original papers and exhibits filed in the district court," "the transcript of proceedings," and "a certified copy of the docket entries prepared by the district clerk."); 9th Cir. R. 10-2 (limiting the record on appeal to "the official transcript of oral proceedings," and "the district court clerk's record of original pleadings, exhibits and other papers filed with the district court."). The record on appeal is limited to "the record before the trial judge when his decision was made." *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077 (9th Cir. 1988). The district court's own unpublished tentative orders—which the parties were instructed not to use—are not appropriately part of the "record on appeal." *See Thomas v. Housing Authority of*

*Los Angeles*, 2005 WL 6133692, \*1 (C.D. Cal. June 3, 2005) (a “tentative order binds neither the court nor the parties”).

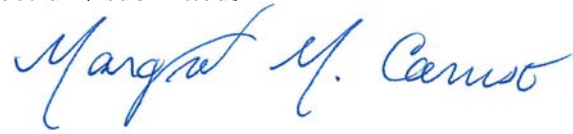
Accordingly, neither the two tentative orders, nor the discovery order are appropriate materials for inclusion in the excerpts of the record, or an appropriate basis for argument. P10 has sought to “unilateral[ly] supplement[] of the record,” which is unfair to both Google, this Court, and the court below. *Lowry v. Barnhart*, 329 F.3d 1019, 1024-25 (9th Cir. 2003) (striking improper supplemental materials and awarding monetary sanctions because “merely striking appellees’ supplemental excerpts seems insufficient to deter abuse.”). As such, these unauthorized documents and matters not part of the district court record should be stricken, along with all references to the offending material in P10’s Opening Brief. 9th Cir. R. 30-2; *Barcamerica Intern. v. Tyfield Importers, Inc.*, 289 F.3d 589, 595 (9th Cir. 2002).

### **Conclusion**

For the foregoing reasons, Google respectfully moves this Court to strike ER10063-87, ER10097-98, and ER20001-03 from P10’s Excerpts and all references thereto within P10’s Opening Brief.

Dated: December 14, 2010

Respectfully submitted.



By \_\_\_\_\_

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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 December 14, 2010.

**DEFENDANT-APPELLEE'S MOTION TO STRIKE**

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: December 14, 2010

By  \_\_\_\_\_

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