UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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MEDIATION QUESTIONNAIRE

The purpose of this questionnaire is to help the court's mediators provide the best possible mediation service in this case; it serves no other function. Responses to this questionnaire are ***not*** confidential. Appellants/Petitioners must electronically file this document within 7 days of the docketing of the case. 9th Cir. R. 3-4 and 15-2. Appellees/Respondents may file the questionnaire, but are not required to do so.

Any party may provide additional information ***in confidence*** directly to the Circuit Mediation Office at ca09_mediation@ca9.uscourts.gov. Please provide the case name and Ninth Circuit case number in your message. Additional information might include interest in including this case in the mediation program, the case's settlement history, issues beyond the litigation that the parties might address in a settlement context, or future events that might affect the parties' willingness or ability to mediate the case.

9th Circuit Case Number(s): 10–56316

District Court/Agency Case Number(s): 04-CV-9484

District Court/Agency Location: District Court, Central District of California

Case Name: Perfect 10, Inc. v. Google Inc.

Please briefly describe the dispute that gave rise to this lawsuit.

This case involves Google's liability for copyright infringement, violation of rights of publicity, and other claims. Google's search engine links to infringing material, and Google has refused to remove most of that material from its search results. Google also hosts infringing materials on its own servers, and refuses to remove most of it. Google also provides advertising services, and makes money from Google ads placed next to infringing material.

This appeal presents critical issues regarding a) what constitutes a compliant DMCA notice, b) what the responsibilities of Internet Service Providers (ISPs) are to prevent the same repeatedly identified infringing works from endlessly appearing on their systems, and c) the degree to which major corporations, such as Google, are allowed to commercially exploit the intellectual property of others while they destroy rights-holders' businesses. In this regard, the District Court's rulings vastly expand the extent to which ISPs can profit from others' works, as well as the allowable damage they can cause to those works. At the same time, the District Court has, to a large extent, ended rights-holders' ability to provide compliant DMCA notices, leaving copyright holders with next to no protection at all.

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Briefly describe the procedural history, the result below, and the main issues on appeal.

Perfect 10 filed this lawsuit in 2004. The case has been before the 9th Circuit before, in 2006. The Court of Appeals issued a ruling in Perfect 10, Inc. v. Amazon.com, Inc., Google, Inc., 508 F.3d 1146 (9th Cir. 2007). At that time, the Court of Appeals set the following standard for determining contributory liability:

> "Here, the district court held that even assuming Google had actual knowledge of infringing material available on its system, Google did not materially contribute to infringing conduct because it did not undertake any substantial promotional or advertising efforts to encourage visits to infringing websites, nor provide a significant revenue stream to the infringing websites. Perfect 10, 416 F.Supp. 2d at 854-56. This analysis is erroneous. There is no dispute that Google substantially assists websites to distribute their infringing copies to a worldwide market and assists a worldwide audience of users to access infringing materials. We cannot discount the effect of such a service on copyright owners, even though Google's assistance is available to all websites, not just infringing ones. Applying our test, Google could be held contributorily liable if it had knowledge that infringing Perfect 10 images were available using its search engine, could take simple measures to prevent further damage to Perfect 10's copyrighted works, and failed to take such steps." 508 F.3d at 1172.

The Court of Appeals remanded to the District Court, for determination on issues... [continued on Attachment 1.]

Describe any proceedings remaining below or any related proceedings in other tribunals.

This is an appeal from an order denying a preliminary injunction, which incorporates by reference an order granting in part motions for partial summary judgment. The parties have stipulated, and the District Court has ordered, as follows:

> "WHEREAS, this Court, by its July 30, 2010 Order denied plaintiff Perfect 10, Inc.'s second motion for preliminary injunction against defendant Google Inc., which incorporates by reference the Court's July 26, 2010 Order on Google's DMCA Motions; WHEREAS, on August 20, 2010 Perfect 10 confirmed to Google that it would file an appeal of the Court's orders; WHEREAS, Perfect 10's planned appeal of the Court's rulings on Perfect 10's preliminary injunction motion and Google's DMCA motions will address important, foundational legal issues in the case; WHEREAS, it is in the best interests of judicial economy to stay discovery, motion practice, and all other proceedings in the District Court in the above captioned action, except for those matters directly related to the appeal, until the Ninth Circuit rules on Perfect 10's appeal to determine the governing legal standards and what further discovery and motion practice, if any, will be necessary to resolve Perfect 10's claims; ...
>
> ACCORDINGLY, PURSUANT TO THE PARTIES' STIPULATION, IT IS HEREBY ORDERED AS FOLLOWS:
> 1. Discovery and all other proceedings in the District Court in the above captioned action between Perfect 10 and Google, except for those matters directly related to the appeal, are stayed until the Ninth Circuit Court of Appeals issues a decision on Perfect 10's appeal of the Court's July 30, 2010 Order, which incorporates by reference the Court's July 26, 2010 Order. ..."

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Provide any other information that might affect the suitability of this case for mediation.

CERTIFICATION OF COUNSEL

I certify that:

☒ a current service list with telephone and fax numbers and email addresses is attached (see 9th Circuit Rule 3-2).

☒ I understand that failure to provide the Court with a completed form and service list may result in sanctions, including dismissal of the appeal.

Signature s/ Jeffrey N. Mausner

("s/" plus attorney name may be used in lieu of a manual signature on electronically-filed documents.)

Counsel for Plaintiff/Appellant Perfect 10, Inc.

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ATTACHMENT 1

such as DMCA safe harbor. Perfect 10 filed a second motion for preliminary injunction, and Google filed motions for partial summary judgment. The District Court denied Perfect 10's motion for preliminary injunction and granted in part and denied in part Google's motions for partial summary judgment. The current appeal is from the District Court's denial of Perfect 10's motion for preliminary injunction (the "Preliminary Injunction Order"). Perfect 10 has also appealed, and the Court of Appeals has pendent jurisdiction over, the order granting in part Google's motions for partial summary judgment (the "Summary Judgment Order"), for the following reasons, among others:

1) The Summary Judgment Order is inextricably intertwined or bound up with the Preliminary Injunction Order;

2) Review of the Summary Judgment Order is necessary to ensure meaningful review of the Preliminary Injunction Order; and

3) The Summary Judgment Order provides the legal authority upon which the District Court denied Perfect 10's Motion for a Preliminary Injunction, as set forth in the Preliminary Injunction Order.

Among the issues on appeal are issues regarding what constitutes a compliant DMCA notice, what are the responsibilities of ISPs when they become aware of infringing materials on their system, and what constitutes a sufficient policy of terminating repeat infringers.

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