

Court of Appeals Docket No. 10-56316

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**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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**PLAINTIFF- APPELLANT  
PERFECT 10, INC.'S OPPOSITION  
TO MOTION TO STRIKE;  
DECLARATION OF JEFFREY N.  
MAUSNER IN SUPPORT THEREOF**

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**PUBLICLY FILED, REDACTED VERSION; FULL VERSION FILED  
UNDER SEAL PURSUANT TO PROTECTIVE ORDER**

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## **I. INTRODUCTION AND SUMMARY OF ARGUMENT.**

In an attempt to prevent this Court from understanding the true picture underlying the erroneous rulings of the District Court at issue in this appeal, Defendant-Appellee Google Inc. (“Google”) has filed a Motion to Strike (Docket No. 24) (the “Motion”), seeking to strike three documents included in the Excerpts of Record filed by Plaintiff-Appellant Perfect 10, Inc. (“Perfect 10”):

1) The District Court’s tentative order concerning Google’s three motions for partial summary judgment (the “SJ Motions”) that Google was entitled to safe harbor protection under §512 of the Digital Millennium Copyright Act (the “DMCA”), found at ER10063-87 (the “SJ Tentative Order”);

2) A portion of the District Court’s tentative order in Perfect 10’s related and consolidated case against Amazon, found at ER10097-98 (the “Amazon Tentative Order”);<sup>1</sup> and

3) The District Court’s Order denying Google’s motion to quash the deposition of Google employee Shantal Rands Poovala (“Ms. Poovala”), whose declarations were relied upon by the District Court in granting, in large part, Google’s SJ Motions, found at ER20001-03 (the “Poovala Order”).

This Court should deny Google’s Motion for three separate reasons. First, Circuit Rule 30-1.4 provides that, in all appeals, the excerpts of record shall

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<sup>1</sup> Perfect 10’s cases against Google and Amazon were consolidated before the same judge. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1157 (9th Cir. 2007).

include “**any opinion, findings of fact or conclusions of law relating to the judgment or order appealed from.**” Circuit Rule 30-1.4(iv) (emphasis added).

The three documents Google seeks to strike are each opinions relating to the orders that are the subject of Perfect 10’s appeal.

Second, this Court has held that documents used by a district court in forming its opinion may properly be included in the record on appeal, because their inclusion “reflects what actually occurred in the district court.” *Townsend v. Columbia Operations*, 667 F.2d 844, 849 (9th Cir. 1982). The three documents Google seeks to strike also are properly in the Excerpts of Record because they reflect what actually occurred in the District Court.

Third, the SJ Tentative Order and the Amazon Tentative Order are discussed in detail in a document that was filed in the District Court and is unquestionably part of the record on appeal – Perfect 10’s written response to the SJ Tentative Order, submitted at the May 10, 2010 hearing on the SJ Motions (the “Response”). *See* District Court Docket No. 961, Exh. C. Perfect 10’s Response, a binder consisting of an eleven-page document pointing out numerous errors in the SJ Tentative Order and exhibits from the record demonstrating these errors, is found in its entirety at ER20020-64 and was referred to by the District Court at the May 10, 2010 hearing. *See* Transcript of May 10, 2010 Hearing (“May 10 Transcript”) at 4:23-5:18, 22:4-5 (“Mr. Mausner [Perfect 10’s counsel] came forth with a binder

here, and I'll look at it and it may be very helpful").<sup>2</sup> Under these circumstances, there is neither reason nor basis to strike either tentative order.<sup>3</sup>

A leading treatise explains why the three documents that Google incorrectly seeks to strike are properly in the Excerpts of Record:

**Documents used by the district court in forming its opinion may properly be included in the record on appeal** even though they were neither "filed" by the district court clerk nor entered on the civil docket. In such circumstances, their inclusion in the record is *not* an unauthorized augmentation but, rather, "reflects what actually occurred in the district court."

C. Goelz and M. Watts, *California Practice Guide: Federal Ninth Circuit Civil Appellate Practice* (TRG 2010) §4:19, quoting *Townsend*, 667 F.2d at 844 (italics emphasis in original; bold emphasis added). This Court should apply the above language, as well as its holding in *Townsend*, and deny the Motion in its entirety.

## **II. THE SJ TENTATIVE ORDER IS PROPERLY INCLUDED IN THE RECORD ON APPEAL.**

This Court should not strike the SJ Tentative Order because the District Court clearly relied upon this document in reaching its ruling on Google's SJ

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<sup>2</sup> For the convenience of the Court, portions of the May 10 Transcript, which is District Court Docket No. 881, are attached as Exhibit 1 to the Declaration of Jeffrey N. Mausner, attached hereto (the "Mausner Decl.").

<sup>3</sup> For this same reason, there is also no basis to strike references to the SJ Tentative Order or the Amazon Tentative Order from Perfect 10's Opening Brief ("OB"), even if this Court chooses to strike these two documents from the Excerpts of Record (and it should not, for the reasons discussed herein). These two documents are referred to in the Response, which is clearly part of the record on appeal.

Motions. Moreover, as explained below, inclusion of the SJ Tentative Order is necessary to “reflect[] what actually occurred in the district court,” *Townsend*, 667 F.2d at 844, because it shows that:

1) In issuing its July 26, 2010 final order granting, in large part, Google’s SJ Motions (the “SJ Order”), **the District Court included numerous errors, originally found in the SJ Tentative Order**, which Perfect 10 raised with the court in its Response [*see* Section II.A, below]; and

2) **The new requirements created by the District Court to invalidate Perfect 10’s Group C DMCA notices** [*see* OB at 36-45] **were not included in the SJ Tentative Order** and thus could not have been addressed by Perfect 10 at the hearing on the SJ Motions [*see* Section II.B, below].

**A. The SJ Tentative Order Shows That The District Court Failed To Correct Flagrant Errors Found In The Final SJ Order Of Which It Was Advised By Perfect 10.**

The District Court issued its SJ Tentative Order on May 7, 2010, and invited Perfect 10 and Google to bring any errors in that document to the court’s attention at the May 10, 2010 hearing on the SJ Motions. Accordingly, Perfect 10 submitted its Response at the May 10, 2010 hearing. The Response quoted liberally from the SJ Tentative Order and **identified at least 19 critical errors in that document**. *See* ER20020-20031. Nevertheless, the District Court failed to correct many of these errors, which were included verbatim in the final SJ Order issued by the District Court on July 26, 2010. A discussion of just a sample of these outcome-

altering errors demonstrates why inclusion of the SJ Tentative Order in the Excerpts of Record is necessary to reflect how the District Court reached its final SJ Order.

**1. The District Court Relied On Factual Errors To Impermissibly Strike Four Third-Party Declarations Submitted By Perfect 10.**

In connection with its opposition to Google's SJ Motions and in support of its Motion for Preliminary Injunction, Perfect 10 submitted four uncontroverted third-party declarations from Margaret Jane Eden, Dean Hoffman, C.J Newton, and Les Schwartz, criticizing Google's processing of their DMCA notices.

ER90106-90153. At the very least, these four declarations established a genuine issue of material fact regarding the adequacy of Google's repeat infringer policy, sufficient to deny the SJ Motions. *See* OB at 61-62.<sup>4</sup> Nevertheless, in the SJ Tentative Order, the District Court improperly struck all four declarations, based on the demonstrably incorrect statement that Perfect 10 "has provided **no argument** as to why its failure [to identify these declarants in its Rule 26 disclosures in 2005] was substantially justified or harmless. Thus, the Court will not consider these declarations on this motion for partial summary judgment." SJ Tentative Order at 8, found at ER10070 (emphasis added).

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<sup>4</sup> This Court has held that DMCA notices sent by third parties, as well as by the plaintiff, are relevant in determining whether a service provider has "implemented its repeat infringer policy in an unreasonable manner." *Perfect 10, Inc. v. CCBill, LLC*, 488 F.3d 1102, 1113 (9th Cir.), *cert. denied*, 552 U.S. 1062 (2007).



Perfect 10 addressed this error in the Response submitted at the May 10, 2010 hearing on the SJ Motions. Perfect 10 reminded the court that, in two documents filed on October 12, 2009, it had submitted uncontroverted evidence that **it did not know about the four declarants until only days or weeks before submitting their declarations in 2009**. Response at 8-9 [ER20028-29].<sup>5</sup> Despite being advised of its error, the District Court included the same exact language from the SJ Tentative Order quoted above in its final SJ Order and relied upon that erroneous statement to strike the four declarations. *Compare* SJ Order at 8 [ER10038] *with* SJ Tentative Order at 8 [ER10070].

Had the District Court corrected the erroneous statement in the SJ Tentative Order, it could have relied upon the four declarations to deny Google's SJ Motions. Accordingly, the SJ Tentative Order is appropriately included in the Excerpts of Record, because the District Court relied upon this document in the SJ Order and because it reflects what actually occurred in the District Court – that erroneous language from the SJ Tentative Order was left unchanged in the final SJ Order.

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<sup>5</sup> The two documents were Perfect 10's response to Google's evidentiary objections to the four declarations (District Court Docket No. 566), and a Declaration of Jeffrey N. Mausner in support of Perfect 10's response to the evidentiary objections (District Court Docket No. 571). *See* ER60099-60100. For example, in his declaration, Mr. Mausner explained that he "first knew about and spoke with Margaret Jane Eden on or about July 31, 2009," only nine days before her declaration was provided to Google, and he "first knew about and spoke with Les Schwartz on or about July 27, 2009," only 13 days before his declaration was provided to Google. *See* ER60099.

**2. The District Court Was Repeatedly Advised That Perfect 10 Sent Its Group A Notices To The Correct Email Address Listed on Google’s Website.**

In its SJ Tentative Order, the District Court invalidated all of Perfect 10’s Group A DMCA notices, based on the finding that “Google has offered undisputed evidence that all of the Group A notices were sent by email to ‘webmaster@google.com’ instead of to the address of Google’s designated agent listed at the Copyright Office.” SJ Tentative Order at 12 [ER10075]. In its Response, Perfect 10 reminded the District Court that it had submitted uncontroverted evidence showing that webmaster@google.com was the email address for sending DMCA notices that Google listed on its website in 2001, when Perfect 10 submitted its Group A notices. Response at 6 [ER20026].<sup>6</sup> Nevertheless, the District Court included the exact same language quoted above in its final SJ Order. *Compare* SJ Order at 12 [ER10042] *with* SJ Tentative Order at 12 [ER10075].

**3. Examples of Other Errors In The SJ Tentative Order.**

The District Court made other demonstrable errors in its SJ Tentative Order that it failed to correct in the final SJ Order, even after Perfect 10 pointed out these errors in its Response. These include: (i) the District Court’s failure to discuss Google’s AdSense and AdWords programs and Google’s lack of a repeat infringer

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<sup>6</sup> Pursuant to 17 U.S.C. §512(c)(2), a copyright owner may send DMCA notices to the address listed either on the ISP's website or at the Copyright Office.

policy concerning these programs [*see* Response at 6 (ER20026)]; and (ii) the District Court’s failure to recognize that Google did not process any DMCA notices from anyone in 2001. [*See* Response at 7 (ER20027)]. The District Court’s failure to address these errors and the others described in the Response further demonstrates that inclusion of the SJ Tentative Order in the record on appeal is necessary for this Court to understand what actually occurred in the District Court and how that court failed to address errors raised by Perfect 10.

**B. The SJ Tentative Order Confirms That Perfect 10 Had No Opportunity To Address The District Court’s Newly Created Requirements For DMCA Notices.**

As explained in detail in Perfect 10’s Opening Brief, the District Court invalidated most of Perfect 10’s DMCA notices only by creating two unnecessary and unworkable additional requirements not found in §512(c)(3) of the DMCA – that a compliant notice must be a single document and that it must identify the infringed work by specifying the exact location of an authorized copy. OB at 9-10, 19-20, 36-45. These new “single document” and “exact location” requirements, as well as the District Court’s lengthy analysis of one atypical Snagit notice [*see* OB at 45-47], **are not discussed anywhere in the SJ Tentative Order.** ER10063-87. The SJ Tentative Order thus is properly included in the Excerpts of Record, because it allows this Court to understand what actually happened below: that Perfect 10 never had the opportunity to address the District Court’s newly-created requirements or submit declarations or pleadings explaining why these

requirements are unworkable and contrary to law. *See* OB at 47-48.

**C. It Is Pointless To Strike The SJ Tentative Order Because It Is Cited In Other Documents In The Record.**

Language from the SJ Tentative Order repeatedly appears in the Response, which is in the Excerpts of Record and is clearly part of the record below. *See* Response at 1-11 [ER20020-31]. Moreover, the SJ Tentative Order is discussed extensively in the transcript of the May 10, 2010 hearing, which is also clearly part of the record below. *See, e.g.*, Mausner Decl., Exhibit 1 [May 10 Transcript at 4:14-5:19, 7:24-9:15]; ER20004-20015. Therefore, there is simply no point in striking the SJ Tentative Order. On the contrary, inclusion of the SJ Tentative Order in the record on appeal helps to explain what occurred in the District Court.

**D. Google’s Contentions Are Misleading And Inapposite.**

In support of its request to strike the SJ Tentative Order, Google asserts that the District Court told the parties not to rely on the document. Motion at 1. According to Google, the District Court stated at the May 10, 2010 hearing on the SJ Motions that the SJ Tentative Order was “not to be distributed or used for any purpose.” *Id.*, quoting May 10 Transcript at 4:14-22.

The alleged quotation relied upon by Google is misleading and incomplete. In fact, the District Court specifically told the parties that the SJ Tentative Order “is not to be distributed or used for any purpose **until I issue a final order.**” May 10 Transcript at 4:21-22 (emphasis added). Because the District Court has issued

the final SJ Order, Perfect 10 properly may use the SJ Tentative Order to explain to this Court what actually occurred before the District Court.<sup>7</sup>

The cases cited in the Motion likewise do not support striking the SJ Tentative Order. None of the cases cited by Google stands for the proposition that a District Court's tentative ruling cannot be included in the record on appeal. This is particularly true here, where this Court will lack a complete picture of what occurred below without the opportunity to review the SJ Tentative Order.

**III. THE AMAZON TENTATIVE ORDER IS PROPERLY INCLUDED IN THE RECORD ON APPEAL.**

The excerpt from the Amazon Tentative Order is appropriately included in the record on appeal because it reflects what occurred before the District Court and because it is found in Perfect 10's Response, which is properly part of the Excerpts of Record.<sup>8</sup> In the SJ Tentative Order, the District Court invalidated all of Perfect 10's Group C notices by suggesting that they were similarly deficient to those notices found by this Court to be deficient in *CCBill*. See SJ Tentative Order at 16-17 [ER10078-79]. Perfect 10's Response pointed out that this characterization of the Group C notices was inconsistent with the District Court's description of

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<sup>7</sup> Moreover, because the Excerpts of Record containing the SJ Tentative Order were filed under seal, the SJ Tentative Order has not been distributed to anyone other than this Court. The copy of the SJ Tentative Order included in the Excerpts of Record was emailed by the District Court to the parties.

<sup>8</sup> The District Court never issued a final version of the Amazon Tentative Order because the parties settled the case beforehand.

similar notices in the Amazon Tentative Order, [REDACTED]

[REDACTED]

Response at 6 [ER20026], *quoting* Amazon Tentative Order at 31 [ER10097] (emphasis added).

The District Court ignored this inconsistency in the final SJ Order, where it continued to rely upon *CCBill* to invalidate the Group C notices. SJ Order at 15-16 [ER10045-46]. Furthermore, the District Court’s new requirements for DMCA notices set forth in the SJ Order were **not even mentioned in the Amazon Tentative Order**. Accordingly, the portions of the Amazon Tentative Order included in the Excerpts of Record should not be stricken, because they are found in another document in the record and are necessary for this Court to fully understand what transpired before the District Court.

**IV. THE POOVALA ORDER IS PROPERLY INCLUDED IN THE EXCERPTS OF RECORD.**

In the Poovala Order, Magistrate Judge Hillman noted that “there appears to be some conflict” between the declarations of Ms. Poovala upon which Google

relied in support of its SJ Motions and Ms. Poovala's testimony at a Rule 30(b)(6) deposition. Poovala Order at 2, District Court Docket No. 964 [ER20002]. Perfect 10 raised these very same disparities between these declarations and Ms. Poovala's deposition testimony in detailed objections to Ms. Poovala's declarations. Perfect 10 argued, among other things, that the Rule 30(b)(6) deposition demonstrated that Ms. Poovala lacked personal knowledge and expertise, and that the numerous contradictions between Ms. Poovala's declarations and her deposition testimony compelled the court to strike her declarations in their entirety. ER60013-69.

Nevertheless, the District Court failed to rule upon any of Perfect 10's objections. Instead, the court substantially relied upon Ms. Poovala's declarations in the SJ Order, at a time when it was aware that Perfect 10 was seeking to depose Ms. Poovala in her individual capacity – a deposition upheld in the Poovala Order. Accordingly, the Poovala Order is properly included in the Excerpts of Record, because it allows this Court to understand that the District Court issued the SJ Order without addressing Perfect 10's significant objections to Ms. Poovala's declarations. *See also* OB at 71-73.

## **V. CONCLUSION.**

For all of the above reasons, this Court should deny Google's motion to strike the SJ Tentative Order, the portions of the Amazon Tentative Order, and the Poovala Order from the Excerpts of Record.

Dated: December 21, 2010

Respectfully submitted,  
LAW OFFICES OF JEFFREY N. MAUSNER

By: Jeffrey N. Mausner  
Jeffrey N. Mausner  
David N. Schultz  
Attorneys for Plaintiff Perfect 10, Inc.



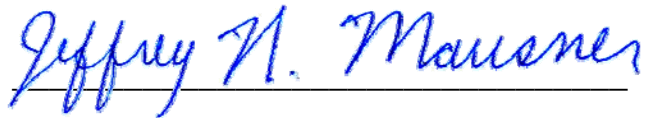
**DECLARATION OF JEFFREY N. MAUSNER**

I, Jeffrey N. Mausner, declare as follows:

1. I am an attorney admitted to practice before the Ninth Circuit Court of Appeals. I am counsel of record for Plaintiff-Appellant Perfect 10, Inc.

2. I attended the hearing on May 10, 2010 in the District Court regarding Defendant-Appellee Google Inc.'s three motions for partial summary judgment. Attached hereto as Exhibit 1 is a true and correct copy of excerpts of the transcript of that hearing.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 21st day of December, 2010 at Los Angeles County, California.



Jeffrey N. Mausner

# Exhibit 1

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION  
HONORABLE A. HOWARD MATZ, U.S. DISTRICT JUDGE

- - -

**COPY**

PERFECT 10, INC., A CALIFORNIA	)	
CORPORATION,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	No. CV04-09484-AHM(SHx)
	)	
GOOGLE, INC., ET AL.,	)	
	)	
DEFENDANTS.	)	
_____	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
LOS ANGELES, CALIFORNIA  
MONDAY, MAY 10, 2010

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1 LOS ANGELES, CALIFORNIA; MONDAY, MAY 10, 2010

2 10:00 A.M.

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4 THE CLERK: Calling Item Number 1, CV04-9484, Perfect  
5 10, Inc. versus Google, Inc., et al.

6 Counsel, state your appearances, please.

7 MR. MAUSNER: Jeff Mausner for the plaintiff Perfect  
8 10. May Melanie Poblete sit at counsel table with me?

9 THE COURT: Yes, she may. Sure.

10 MR. MAUSNER: Thank you.

11 MR. ZELLER: Good morning, Your Honor. Mike Zeller  
12 and Brad Love for Google.

13 THE COURT: Okay. Good morning to both of you.

14 We're here for a hearing on the summary adjudication  
15 motions that Google filed long ago that have already been the  
16 subject of some discussion at previous hearings. I circulated  
17 to the parties last week a 22-page, single-spaced draft order,  
18 very much draft.

19 At the end of this hearing, make sure that you return  
20 that order to Mr. Montes. It is not final, and it is not to be  
21 distributed or used for any purpose until I issue a final  
22 order.

23 As is my practice that I think counsel are familiar  
24 with, I invite you to address any factual errors that may have  
25 crept into this draft or material omissions that reflect or

1 would consist of facts that should have been included, and then  
2 we can talk about the legal analysis.

3 So why don't you start, Mr. Mausner, from the  
4 lectern, please.

5 MR. MAUSNER: Thank you, Your Honor.

6 We prepared a binder for this, which I would like to  
7 hand up to the Court (indicating).

8 THE COURT: Have you given this to Mr. Zeller?

9 MR. MAUSNER: Yes, Your Honor.

10 THE COURT: What's in this binder?

11 MR. MAUSNER: The binder contains -- the first tab is  
12 a narrative of what I would say in case we do not have time to  
13 go through all of that, and I expect that we will not. And  
14 then the second tab contains samples of evidence supporting  
15 what's stated in the first tab, the narrative.

16 There are a number of misstatements in the tentative  
17 that Perfect 10 believes have to be brought to the Court's  
18 attention.

19 THE COURT: All right. So start with those, please.

20 MR. MAUSNER: Okay. As the Court I'm sure is aware,  
21 Perfect 10 has sent Group C notices to Google in various sizes.  
22 For example, some of Perfect 10's Group C notices like the  
23 October 16th, 2009 contain just one image.

24 THE COURT: Okay. Here's what you should do. If you  
25 want to be as effective as ideal, then you tell me what page

1 notebook.

2 THE COURT: Yes.

3 MR. MAUSNER: This is an image, an infringing image  
4 that was on Blogger. As you can see from the bottom of the  
5 page there, it contains the URL Blogger.

6 Some of the notices that Perfect 10 submitted consist  
7 of a copy of the infringing Blogger web page like this showing  
8 the full URL and a cover page stating, "This is the infringing  
9 image." The URL is on there.

10 And one of the things we would like to know is if it  
11 is a notice like this where it is one page -- you know, there  
12 is a cover page and then there is maybe one, two or three  
13 images like this that have the URL at the bottom, is that a  
14 sufficient notice.

15 We have here both the infringing and infringed image.  
16 It has a copyright notice on there, so Google knows for sure  
17 that it's Perfect 10's copyrighted --

18 THE COURT: Okay. Mr. Mausner, this hearing is not  
19 going to be a tutorial for me to you. This hearing is about  
20 errors or omissions or mistakes in a draft order.

21 Now, if you are asking me to look at Page 1 of your  
22 handout, too, because it relates to something that was  
23 erroneous on Page 4, then please make that clear.

24 MR. MAUSNER: Okay. Well, what's erroneous on Page 4  
25 is the statement, "And only after the motion papers were filed

1 did Google begin to process any Group C notices," and there is  
2 a statement on Page 4 as to, you know, which notices were sent  
3 prior to the motion papers.

4 THE COURT: Okay. It seems to me that in principle,  
5 in the abstract, you would have been benefited if there were a  
6 delay that extended into only after the motion was filed, but  
7 now you want to correct that by pointing to the Zada  
8 declaration Exhibit 45, Pages 7 through 9 and 11?

9 MR. MAUSNER: Right. And for one of those notices  
10 there was a 200-day delay.

11 THE COURT: Okay.

12 MR. MAUSNER: And then the others were after, and  
13 there were delays for those as well.

14 THE COURT: Please continue.

15 MR. MAUSNER: Okay. Number 2 on Page 4. This is  
16 from tentative Pages 22 to 23. "Instead, P10 expected Google  
17 to search through a separate electronic folder" --

18 THE COURT: Wait a minute. You are on Page 22?

19 MR. MAUSNER: Well, yeah. It's the tentative Page  
20 22.

21 THE COURT: Oh, we have a problem that I encountered  
22 before, and I had hoped it would be avoided, because my pages  
23 are on Word Perfect. Can you give me the section number?

24 MR. MAUSNER: 4-B3.

25 THE COURT: Okay. Hold on a minute. I have it.



1 Section 4-B3?

2 MR. MAUSNER: Right. And it's in the first paragraph  
3 near the end. It says, "Instead, P10 expected Google to search  
4 through a separate electronic folder containing all of the more  
5 than 15,000 images from P10's website that were already  
6 infringed."

7 THE COURT: You say that's -- okay. I see. And  
8 what's erroneous about that?

9 MR. MAUSNER: Well, they didn't have to really do any  
10 searching at all.

11 First of all, the images were provided. Most of the  
12 images had the copyright notices on them, and if they wanted to  
13 see it, they could simply go to Perfect 10's website, type in  
14 the model's name and the images -- you know, five or six images  
15 of that model would pop up and it was right there.

16 THE COURT: What is erroneous about the  
17 characterization of what was available or required of Google  
18 based on the notices themselves?

19 MR. MAUSNER: Well, the notices provided a picture  
20 which is both the infringing and infringed picture to them.  
21 That was the purpose -- or one of the main purposes of going to  
22 the Group C notices so that the infringed/infringing image  
23 would be provided to them right there with the notice and they  
24 would be able to see it.

25 THE COURT: Well, the infringing image was provided,

1 Mausner and the factual --

2 THE COURT: And also what I sent out for your  
3 analysis as well.

4 Mr. Mausner came forth with a binder here, and I'll  
5 look at it and it may be very helpful. What would you say?  
6 You don't come in with a binder and I understand why, and  
7 that's fine. I don't necessarily invite those, but if you wish  
8 to respond, now is your chance.

9 MR. ZELLER: Well, I would respond to a couple of  
10 points, and in particular this notion here where Mr. Mausner  
11 was attempting to resuscitate the Group C notices by saying  
12 that essentially one could go and look at Perfect 10's website  
13 to see the work that is protected.

14 That is by definition the very kind of improper  
15 process that CCBill and other decisions say is not what the  
16 DMCA requires. And, moreover, this notion that somehow you can  
17 collapse the idea of, "I show you the infringing image and,  
18 therefore, I show you what it is that's owned," by the  
19 copyright owner, I think would render language in the DMCA  
20 superfluous.

21 The DMCA under Paragraph 3, Elements of Notification,  
22 requires identification of the copyrighted work, and it  
23 requires identification of the material that is claimed to be  
24 infringed.

25 THE COURT: But he pointed out a photo which I

1 THE COURT: Well, I gave him a chance, so I'll give  
2 you a chance.

3 MR. ZELLER: Just briefly.

4 As to the remaining Group B notice URLs, those are  
5 moot for purposes of the second preliminary injunction motion  
6 that was filed. I don't think there's any dispute that they  
7 were eventually processed.

8 I mean, I recognize the Court has found a factual  
9 dispute as to whether or not it was expeditious or not,  
10 however, there are no unprocessed Group B notice URLs, so,  
11 accordingly, there would be no basis for an injunction. It's  
12 just simply moot on that ground.

13 The post MSJ filing notices are all the kinds of  
14 notices that fail for the reasons that the Court has already  
15 explained in its tentative, so we don't think that there is any  
16 new issues with respect to those. They obviously are -- they  
17 would fail for the same reasons that the Group A and the Group  
18 C notices fail under the Court's tentative.

19 THE COURT: Okay. Thank you, counsel. Please give  
20 the draft orders to Mr. Montes.

21 MR. MAUSNER: May I clarify something, Your Honor?

22 THE COURT: Yes.

23 MR. MAUSNER: And this is included in our list of --  
24 in the booklet, incorrect statements in the tentative.

25 THE COURT: Well, then I'll look at it in the

1 booklet.

2 MR. MAUSNER: But this actually deals with what he  
3 said, which is the statement in there is -- this is on  
4 Tentative Page 4.

5 THE COURT: Yes.

6 MR. MAUSNER: "Google has processed all of the Group  
7 B notices, though not immediately on receiving them." It is  
8 not correct that Google has processed all of the Group B  
9 notices, and we are basing that in large part upon the  
10 spreadsheet that Mr. MacGillivray submitted. This is number  
11 Paragraph 9 on Page 7 of the narrative in the notebook.

12 THE COURT: Okay. Thank you, Mr. Mausner.

13 The matter is under submission. Please give your  
14 draft orders to Mr. Montes.

15 MR. ZELLER: Thank you.

16 MR. MAUSNER: Thank you.

17 THE COURT: I'm ordering the parties to split the  
18 cost of a transcript and to order one not on a daily basis, but  
19 on an expedited basis.

20 *(Proceedings concluded.)*

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CERTIFICATE

I hereby certify that pursuant to Section 753,  
Title 28, United States Code, the foregoing is a true and  
correct transcript of the stenographically reported  
proceedings held in the above-entitled matter and that the  
transcript page format is in conformance with the  
regulations of the Judicial Conference of the United States.

Date: MAY 13, 2010

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Cindy L. Nirenberg, CSR No. 5059

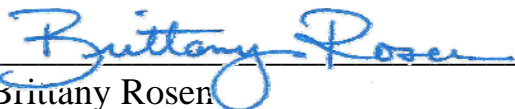
**CERTIFICATE OF SERVICE**

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 21, 2010:

**PLAINTIFF- APPELLANT PERFECT 10, INC.'S OPPOSITION TO MOTION TO STRIKE; DECLARATION OF JEFFREY N. MAUSNER IN SUPPORT THEREOF [PUBLICLY FILED, REDACTED VERSION; FULL VERSION FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER]**

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 21, 2010

By:   
Brittany Rosen