

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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**REPLY BRIEF OF PLAINTIFF-  
APPELLANT PERFECT 10, INC.**

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

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## INTRODUCTION

Google asks this Court to affirm District Court rulings that prevent copyright holders from protecting their works from infringement on the Internet and eviscerate the DMCA's<sup>1</sup> notice-and-takedown provisions. Under the District Court's erroneous rulings:

1) Obviously compliant DMCA notices similar to those shown at ER50001-11, which identify the infringed work and provide the location of the infringing work, are invalid.

2) Virtually all third-party DMCA notices are invalid, because they either do not, or cannot, provide the exact location of the authorized work.

OB10,37-40;ER50102-114;ER80172-175;ER20025;ER30088.

3) Infringing content identified by DMCA notices may be *permanently reinstated* on the Internet, thereby causing massive harm to copyright holders and rendering DMCA notices pointless. OB74-79;ER20194-200¶¶13-15;ER30030-67;ER90136-138¶¶4,7;ER90126¶5.

4) Websites may lawfully offer whatever appears on other infringing websites, including thousands of infringing images, songs and television shows.

*See* Section VI.C below.

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<sup>1</sup> Terms in this brief have the same meaning as in Perfect 10's Opening Brief ("OB").

5) Search engines may lawfully maintain 222 million links to known infringing websites, because they need only remove direct links to infringing content. FER143-145;ER20201(lns3-14);ER30077-78.

6) Search engines may disregard compliant DMCA notices identifying infringements *within* infringing paysites to which they link and from which they receive promotional payments. OB17-18;ER20256¶95;ER40240-41;ER90018.

7) Internet businesses may place ads next to, and earn revenue from, copyrighted images without paying rightsholders, and exploit celebrities' rights of publicity without compensating the celebrities.

8) ISPs need not use image recognition, or take other simple measures, to prevent the same infringing images from endlessly reappearing on their systems, even if such endless infringement destroys the copyright holder's business.

9) ISPs can allow massive infringement on their systems, yet successfully assert that notices identifying such infringement are burdensome and thus invalid.

10) ISPs can successfully argue that notices which follow their DMCA instructions are nevertheless deficient.

11) DMCA notices can be invalidated without being challenged by ISPs or examined by courts.

Google does not refute these consequences. Moreover, as discussed below,

Google's Response Brief ("RB") is filled with numerous factual errors. For the convenience of the Court, Perfect 10's Further Excerpts of Record ("FER") includes pages RB2,5,7,9,10,11,18,21,25,26,32,38,44,46,47,52,53,55,59,60,62, and 64 from Google's Response Brief, with Google's erroneous assertions highlighted in green, followed by evidence (highlighted in blue) showing these assertions are incorrect.

Google also makes two key concessions which compel a reversal of the District Court's rulings. First, Google does not challenge the sufficiency of any of Perfect 10's 95 PI Notices. Accordingly, there was no evidentiary basis for the court to rule these notices were deficient. RB47;ER10016n.7;ER10015;ER10018. Second, Google concedes that notices which follow its DMCA guidelines are compliant. RB8. This admission provides additional grounds to reverse the PI and SJ Orders, because most Perfect 10 notices clearly followed Google's guidelines.

Finally, Google fails to rebut Perfect 10's substantial new evidence showing that Google's conduct is driving Perfect 10 out of business. OB11-12,80-82. Such evidence includes: (i) Google's current display of 22,000 P10 thumbnails, which have been used to view or download tens of millions of full-size P10 Images on websites to which Google links those thumbnails (OB80-81;ER20249¶86;ER40200-210;ER60233¶66;ER80181-185); (ii) Millions of downloads of full-size P10 Images using unauthorized passwords freely available

from Google (FER78-113;OB15;ER20193-194¶12;ER30024-29;ER20247-249¶85;ER40196-199); and (iii) Google’s ongoing republication and display of tens of thousands of P10 Images from Perfect 10’s DMCA notices (OB74-76;ER20082-85¶¶10-11;ER20113-129). Because Perfect 10 is suffering irreparable harm, and is likely to succeed on its copyright infringement claims, this Court should reverse the PI and SJ Orders and remand the case for imposition of the relief sought by Perfect 10 and/or appointment of a Special Master.

### **ARGUMENT**

#### **I. GOOGLE HAS NEVER CHALLENGED THE SUFFICIENCY OF THE PI NOTICES**

Google has never challenged the sufficiency of any of the 95 PI Notices. Google merely asserts that “[t]hese [95 PI] notices must be ignored because they were not part of the summary judgment record.” RB47. It cannot be disputed, however, that these notices were before the District Court on the PI Motion. OB24-26;ER20183(ln26-27);ER50001-101. Google further contends that the PI Notices “were processed as appropriate and are therefore irrelevant to [the] PI Motion because there is no conduct to enjoin.” RB47. Google cites to no evidence to support this mistaken assertion. In fact, numerous PI Notices have never been processed, as Google’s ongoing display and linking of 22,000 P10 thumbnails in Google’s Image Search results to known infringing websites demonstrates.

ER20186-190¶¶6-7;ER30001-16;ER50177-180. Because there is no evidentiary basis for invalidating any of the 95 PI Notices, the PI Order must be reversed on this ground alone.

**II. THE DISTRICT COURT NEVER INDIVIDUALLY ANALYZED PERFECT 10'S NOTICES**

Google does not dispute that neither the District Court, nor Google, individually analyzed the various Group C notices at issue in Google's SJ Motions. In particular, neither the District Court nor Google explained why any of the sample Group C notices submitted by Perfect 10 in opposition to these motions was deficient or what modifications would make them compliant. OB24-26;ER60169-174. The lack of an evidentiary basis for invalidating any of the Group C sample notices, yet alone every Group C notice, compels a reversal of the SJ and PI Orders and a remand to determine whether each particular notice complies with the DMCA.

**III. GOOGLE CONCEDES THAT NOTICES THAT SATISFY ITS DMCA REQUIREMENTS ARE COMPLIANT**

Google states that notices that "follow Google's DMCA guidelines ... *comply with the statute's requirements.*" RB8 (emphasis added). Because Perfect 10's notices followed Google's guidelines, the District Court's rulings that such notices did not comply with the DMCA should be reversed.

## **A. Image Search**

Google cannot refute that its Image Search instructions merely require that the copyright holder provide the *Image URL of the infringing image*.

OB31;ER60167(lns12-14);ER80096. Because the following sample notices each provide that requested URL, they must all be deemed compliant.

### **1. Sample Image Search Group B Notice:**

Perfect 10's July 19, 2004 Group B notice included the following Image URLs: *usuarios.lycos.es/festasotano/Amy\_Caro02.jpg* and *usuarios.lycos.es/festasotano/Amy\_Caro01.jpg*. ER20214-215¶32;ER30170. If Google had put those URLs into its browser bar, it would have seen the infringing images shown at the top left of ER30172. By Google's own admission, such notices are compliant because they exactly followed Google's DMCA guidelines, *even though they identified just the infringing image*. Google's current assertion, that providing a copy of the infringing image does not sufficiently identify the infringed image, even though they are the same image (RB55), is contrary to Google's longstanding DMCA instructions, and should be rejected by this Court.

### **2. Sample Image Search Notice 2 (ER50004-6)**

This notice, the third page of which appears below, provided the Image URL that Google requests in an error-free extractible format (*see* yellow highlighted URL below) and a copy of the infringing/infringed image. ER20234-

235¶67;ER40084-99. Similar notices were at issue in Google’s SJ Motions.  
ER60217(ln26)-60218(ln25);ER80093-94;ER60174;ER20234-235¶67;ER40084-  
99. Because these notices satisfy Google’s DMCA instructions and the statutory  
requirements, and Google has never identified their deficiencies, the District  
Court’s unexplained invalidation of all such notices should be reversed.



Search string: "irina voronina"  
 Image [http://82.208.64.6/dm/eroart/MnnSCP3\\_P10\\_Irina\\_Voronina\\_053.jpg](http://82.208.64.6/dm/eroart/MnnSCP3_P10_Irina_Voronina_053.jpg)  
 Site <http://82.208.64.6/dm/eroart/>  
 Image Info: 720x1024 Size: 182Kb

Thumbnail [http://tbn3.google.com/images?q=tbn:HDwHOFV\\_ZKuL0M:http://82.208.64.6/dm/eroart/MnnSCP3\\_P10\\_Irina\\_Voronina\\_053.jpg](http://tbn3.google.com/images?q=tbn:HDwHOFV_ZKuL0M:http://82.208.64.6/dm/eroart/MnnSCP3_P10_Irina_Voronina_053.jpg)



Search string: "irina voronina"  
 Image [http://www.modelboxing.com/images/Irina\\_main.jpg](http://www.modelboxing.com/images/Irina_main.jpg)  
 Site <http://www.modelboxing.com/ringgirls.html>  
 Image Info: 250x360 Size: 62Kb

Thumbnail [http://tbn2.google.com/images?q=tbn:aRxSM3\\_Eufz8FM:http://www.modelboxing.com/images/Irina\\_main.jpg](http://tbn2.google.com/images?q=tbn:aRxSM3_Eufz8FM:http://www.modelboxing.com/images/Irina_main.jpg)



Search string: "irina voronina"  
 Image [http://www.wscan.org/albums/wscan2-800-1050/WscanII\\_813\\_Irina\\_Voronina\\_P10W01.jpg](http://www.wscan.org/albums/wscan2-800-1050/WscanII_813_Irina_Voronina_P10W01.jpg)  
 Site [http://www.wscan.org/gallery/slideshow.php?set\\_albumName=](http://www.wscan.org/gallery/slideshow.php?set_albumName=)  
 Image Info: 585x768 Size: 101Kb

Thumbnail [http://tbn2.google.com/images?q=tbn:DCxO049BSxOHRM:http://www.wscan.org/albums/wscan2-800-1050/WscanII\\_813\\_Irina\\_Voronina\\_P10W01.jpg](http://tbn2.google.com/images?q=tbn:DCxO049BSxOHRM:http://www.wscan.org/albums/wscan2-800-1050/WscanII_813_Irina_Voronina_P10W01.jpg)



Search string: "irina voronina"  
 Image [http://www.wscan.org/albums/wscan2-800-1050/WscanII\\_812\\_Irina\\_Voronina\\_P10W01.jpg](http://www.wscan.org/albums/wscan2-800-1050/WscanII_812_Irina_Voronina_P10W01.jpg)  
 Site [http://www.wscan.org/gallery/slideshow.php?set\\_albumName=](http://www.wscan.org/gallery/slideshow.php?set_albumName=)  
 Image Info: 580x768 Size: 116Kb

Thumbnail [http://tbn3.google.com/images?q=tbn:PoA\\_qFvN0A-bwM:http://www.wscan.org/albums/wscan2-800-1050/WscanII\\_812\\_Irina\\_Voronina\\_P10W01.jpg](http://tbn3.google.com/images?q=tbn:PoA_qFvN0A-bwM:http://www.wscan.org/albums/wscan2-800-1050/WscanII_812_Irina_Voronina_P10W01.jpg)



Search string: "irina voronina"  
 Image <http://blog.fabricadebani.ro/usercontent/67/67090/IrinaVoronina24.jpg>  
 Site <http://blog.fabricadebani.ro/2009>  
 Image Info: 613x768 Size: 160Kb

Thumbnail <http://tbn0.google.com/images?q=tbn:l07AKYmY54-AcM:http://blog.fabricadebani.ro/usercontent/67/67090/IrinaVoronina24.jpg>



Search string: "irina voronina"  
 Image [http://www.wscan.org/albums/wscan2-200-400/WscanII\\_247\\_Irina\\_Voronina\\_P10\\_Dec99.jpg](http://www.wscan.org/albums/wscan2-200-400/WscanII_247_Irina_Voronina_P10_Dec99.jpg)  
 Site [http://www.wscan.org/gallery/slideshow.php?set\\_albumName=](http://www.wscan.org/gallery/slideshow.php?set_albumName=)  
 Image Info: 570x768 Size: 163Kb

Thumbnail [http://tbn0.google.com/images?q=tbn:GGoQn0RTYkusM:http://www.wscan.org/albums/wscan2-200-400/WscanII\\_247\\_Irina\\_Voronina\\_P10\\_Dec99.jpg](http://tbn0.google.com/images?q=tbn:GGoQn0RTYkusM:http://www.wscan.org/albums/wscan2-200-400/WscanII_247_Irina_Voronina_P10_Dec99.jpg)

7

Search string: "irina voronina"  
 Image [http://img146.imagevenue.com/loc616/th\\_92455\\_Irina\\_Voronina\\_perfect\\_15\\_123\\_616lo.jpg](http://img146.imagevenue.com/loc616/th_92455_Irina_Voronina_perfect_15_123_616lo.jpg)  
 Site <http://sex4share.com/forum/amateur-pictures-26/145327-irina-voronina.html>

Perfect 10 Provided:	Google Requirement:
<div data-bbox="256 279 428 453" style="border: 1px solid black; width: 100px; height: 80px; display: flex; align-items: center; justify-content: center; margin: 0 auto;"> <span data-bbox="277 344 407 375">PHOTO</span> </div> <div data-bbox="477 279 659 310" style="margin-left: 100px;"><u>Image URL</u></div> <div data-bbox="477 342 716 373" style="margin-left: 100px;"><u>Web Page URL</u></div> <div data-bbox="477 405 727 436" style="margin-left: 100px;"><u>Thumbnail URL</u></div>	<div data-bbox="857 279 1036 310" style="margin-left: 100px;"><u>Image URL</u></div>

### 3. Sample Image Search Notice 3 (ER50007-11)

Google never explains why the “check-the-infringing-image” notice below, and similar notices at issue in the SJ Motions, are invalid. These notices, modeled after the District Court’s 2006 Injunction Order, comply with Google’s DMCA guidelines. The Image URL that Google requests is stored by Adobe and can be quickly copied without error. OB31-32;ER90091(Ins13-19);ER90102-103;ER20058. The complete URL of the webpage containing the infringing images is also shown at the bottom of the page. OB32. All the information Google needs is on the page below, presented more clearly than in any form of text-only notice advocated by Google. It thus defies common sense to suggest that copyright holders cannot use this type of notice to identify Image Search infringements. Google has no basis for its contentions that such notices are “burdensome,” “incomprehensible,” or do not identify the allegedly infringing material. FER1-19.



"vibe sorenson"

Search images

[Advanced Image Search](#)  
[Preferences](#)

SafeSearch: [Off](#) ▼

Images

Show:

Any size

Any type

All colors ▼

Results **91 - 108** of about **5,420** (0.08 seconds)



Skandalno.com -  
448 x 336 - 40k  
[skandalnokom.ru](#)



Fotos mixtas - Foro  
534 x 768 - 56k - jpg  
[foro.putalocura.com](#)



MÁS FOTOS DE **Vibe**  
472 x 472 - 19k - jpg  
[defensacentral.com](#)



**Vibe Sorenson.**  
472 x 661 - 27k - jpg  
[defensacentral.com](#)



Veronica Zemanova - **Vibe**  
365 x 327 - 63k - jpg  
[nagie.fajnelaski.pl](#)



**Vibe Sorenson**  
150 x 113 - 11k - jpg  
[iskenderiye.com](#)



**Vibe Sorenson**  
150 x 113 - 5k - jpg  
[iskenderiye.com](#)



Vibe Sorenson - 300 x 425  
80 x 80 - 3k - jpg  
[fanpix.net](#)



Vibe Sorenson - 454 x 302  
80 x 80 - 2k - jpg  
[fanpix.net](#)



Welkeum!  
79 x 100 - 3k - jpg  
[cvstandard.free.fr](#)



**Vibe Sorenson** - další  
155 x 116 - 4k - jpg  
[maxiholky.cz](#)



Herinnert u zich deze nog?  
300 x 425 - 24k - jpg  
[oldskoolbadlog.blogspot.com](#)



**B. Web Search**

Google’s Web Search guidelines require the URL of the webpage to which the Google Web Search result links, the search term, and the title of the book in which the authorized image(s) appears. OB34;ER30116;ER70079. As shown in the table below, Perfect 10’s Group C notices clearly satisfied those guidelines. OB33-35;FER185-186;ER20226-227¶¶47-48;ER30248-261. Google cannot explain why providing the title of a book, which requires Google to buy the book and search through it for authorized image(s), is less burdensome than providing the title of a *readily accessible website* in which the infringed image appears (perfect10.com), which is *organized alphabetically by model name*.

Google does not challenge the sufficiency of the sample Web Search notices shown at ER50015-30 and FER185-186. Nor does Google provide any text-only compliant alternatives, or explain how text-only notices could be used to identify 17,000 infringing P10 Images on a website like nudecelebforum.com. FER184;ER20037.

<b>Google Web Search Requirements:</b>	<b>Perfect 10 Group C notices provided:</b>
<ul style="list-style-type: none"><li>• Web Page URL</li><li>• Search Term</li><li>• Title of Book</li></ul>	<ul style="list-style-type: none"><li>• Web Page URL</li><li>• Search Term</li><li>• Title of perfect10.com</li><li>• Copy of infringing web page with identified infringing image(s)</li></ul>

### C. AdSense

Google's AdSense guidelines simply ask for the webpage URL and a sufficient identification of the copyrighted work. ER70023-24. The page below, taken from a DMCA notice found at ER50015-27, shows that Perfect 10 complied with these guidelines. The required URL is provided at the bottom. The Google ads are clearly visible. The copyrighted work is sufficiently identified by providing a copy. Furthermore, *because the infringed image is not on perfect10.com or in Perfect 10 Magazine, it is not possible to provide the exact location of the authorized work as required by the District Court.*

Google fails to refute Perfect 10's contention that AdSense is not protected by the DMCA because it involves the placement of ads. OB50;RB25n.2. Because DMCA safe harbor provisions do not apply to AdSense, knowledge sufficient to establish contributory liability may be obtained even in the absence of a compliant notice. Perfect 10's AdSense notices, which included the complete URL and identified the infringing and infringed images, provided Google with sufficient knowledge of infringing activity on its system to establish contributory liability.



# WALLPAPER COLOR

## ABCDEFGHIJKLMNOPQRSTUVWXYZ

### **Jennifer Love Hewitt**

You Can Watch Her 5 Nights A Week In Ghost Whisperer On WE tv!

[www.WEtv.com](http://www.WEtv.com)

### **Free Desktop Wallpapers**

Over 8000 Amazing Desktop Wallpaper 1000's to choose from. Have fun!

[wallpapers.smileycentral.com](http://wallpapers.smileycentral.com)

### **Christmas Wallpapers**

Decorate Your Desktop With Free Christmas Wallpaper & Backgrounds

[www.BHG.com](http://www.BHG.com)

Ads by Google

### **100% Free Wallpaper**

Tons of Free Wallpapers. . . Fun for Your Desktop!

[MyWebTattoo.com](http://MyWebTattoo.com)

### **Cool Desktops at Dell.com**

Find Specials on Cool Hi-Def Desktops with Intel Technology.

[www.Dell.com](http://www.Dell.com)

### **The Wallpaper Pirate**

The absolutely lowest prices on Waverly Wallpaper and Border

[TheWallpaperPirate.com](http://TheWallpaperPirate.com)

Ads by Google

### **Celebrity Wallpapers : Luba Shumeyko**

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[Celebrity Wallpapers](#) > [Luba Shumeyko Wallpapers](#) > [Luba Shumeyko 13.JPG](#)



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UNAUTHORIZED COPYING FROM PACER**



ER 50027



#### **IV. PERFECT 10'S NOTICES WERE SUBSTANTIALLY COMPLIANT**

The District Court erroneously invalidated Perfect 10's substantially compliant notices because it lost track of the primary purpose of §512(c)(3)(A) – to provide ISPs with sufficient information to process notices. *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619, 622-625 (4th Cir. 2001); *Arista Records, Inc. v. MP3Board, Inc.*, 2002WL1997918,\*8-9 (S.D.N.Y., Aug. 29, 2002); *Amicus Brief of Photographers, Newspapers, Picture Archives, Artists, and Designers*, filed October 26, 2010 (Docket No. 17)(“Amicus-Brief-Supporting-P10”), pp.7-14;OB27,40-44;ER90281;ER90284-285.

##### **A. Perfect 10's Blogger Notices Were Substantially Compliant**

The page from Perfect 10's July 2, 2007 notice shown below displays the complete URL at which the infringement occurred on Google's Blogger servers, and thus substantially satisfies §512(c)(3)(iii). It identifies the infringed image by providing a copy of it, thus substantially satisfying §512(c)(3)(ii). When looking at this page on May 10, 2010, the District Court stated, “*I don't know what more should be necessary.*” FER21;ER20013(Ins1-5) (emphasis added). Consequently, this and other similar Blogger notices should have been deemed substantially compliant.

marisa\_miller\_23.jpg (image)



**REDACTED TO DISCOURAGE  
UNAUTHORIZED COPYING FROM PACER**



**PERFECT10.COM** Copyright © 2001 Perfect 10, Inc.

Exh. 33, Pg. 2

**ER 20032**

[http://bp0.blogger.com/\\_A228DePAsJQ/RdSh3Z1hgRI/AAAAAAAAAu8/ZfvoV1afaOY/s1600-h/marisa\\_miller\\_23.jpg](http://bp0.blogger.com/_A228DePAsJQ/RdSh3Z1hgRI/AAAAAAAAAu8/ZfvoV1afaOY/s1600-h/marisa_miller_23.jpg) (1 of 2)6/22/2007 12:37:40 PM

Google never addresses these arguments. Its contention that Blogger URLs were “buried in non-Blogger notices” (RB11) disregards that Google could have simply used Adobe’s search function to search for “Blogger” and locate all Blogger images in Perfect 10’s Group C Adobe notices. ER60186(lns12-22);ER70038-39. Instead, *Google failed to suppress any P10 Images* from most of the larger Group C notices. RB11;ER60225(lns11-20).

**B. Perfect 10’s Notices Regarding Passwords Were Substantially Compliant**

Perfect 10’s password notices *were not image-based* like other Group C notices, and should not have been uniformly invalidated by the District Court without explanation. ER50034-36;OB35. Google has never challenged the sufficiency of these notices. Instead, Google incorrectly claims that Perfect 10 showed only two instances of users downloading P10 Images using unauthorized Perfect 10 passwords. In fact, Perfect 10 provided *sixty pages of new evidence*, not previously before this Court, *that users downloaded at least 4.5 million P10 Images using unauthorized passwords disseminated by Google*. FER78-113;ER20193-194¶12;ER30024-29;ER20247-249¶85;ER40196-199. Such new evidence should cause this Court to revisit its prior ruling that Perfect 10 provided no “evidence that Google’s actions led to any direct infringement.” *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1173 n.13 (9th Cir. 2007)(“P10 I”). *See*

*CoStar Realty Information, Inc. v. Field*, 2010 WL 5391463,\*2,6,7 (D.Md., December 21, 2010)(accessing and downloading copyrighted material using unauthorized password constitutes copyright infringement; crediting same type of evidence Perfect 10 provided to establish unauthorized access).

### **C. Google Has Not Challenged A Single Specific Group B Notice**

Google has never demonstrated that even *one specific* Group B notice is deficient or explained how any deficiencies could be corrected using text alone. In particular, Google has not shown that even *one* of the thousands of URLs that identified infringements on Google AdSense websites is deficient,<sup>2</sup> or that the magazine page range Perfect 10 provided failed to identify a representative sample of the P10 Images appearing on that infringing webpage. §512(c)(3)(A)(ii); ER20240-242¶¶75-76;ER40133-148;ER50137-147.

In order to satisfy its affirmative burden, Google would have had to have kept copies of the allegedly infringing webpages identified by each URL at the time Perfect 10 sent each notice. Without that evidence, Google cannot show, and has not shown, that *even one of the more than 8,000 URLs* identified by Perfect 10's Group B notices is deficient. ER20245(Ins6-9).

Instead, Google makes sweeping, unsupported criticisms of the Group B

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<sup>2</sup> Because Google failed to act against these AdSense account holders, who are repeat infringers, Google cannot qualify for a DMCA safe harbor. *See* Section VI.B below.

notices. RB10. These criticisms are baseless; the Group B notices were created by following Google's own instructions. ER20207-211¶¶25-27;ER30112-135.

Google's complaints further support Perfect 10's argument that its Group C Adobe notices, which have all the advantages listed in Section V.B below, are better notices. OB44-45. Google also incorrectly contends that it cannot process incomplete URLs. RB8;FER194-206. Even now, Google's DMCA instructions do not require complete URLs, contrary to Google's assertions. RB8;ER30116-117.

**D. Google Has Not Provided A Single Example Of A Compliant Notice**

Although Google has asserted that every notice Perfect 10 has ever sent is deficient, it refuses to provide any examples of compliant notices, despite over 130 requests by Perfect 10. OB18;ER20253(ln21-23). Such conduct is directly contrary to the cooperative spirit envisioned by the DMCA and should, by itself, disqualify Google from safe harbor under §512(c)(3)(B)(ii).

For example, although Google contends that all of Perfect 10's paysite notices are defective, *it fails to offer any compliant alternatives*, and will not process paysite notices from anyone, compliant or not. OB66-67;ER20256¶95; ER40240-241;ER90018;FER141-149;FER211-218. Google's assertion that Perfect 10's June 2007 notice, which identified 1.1 million infringing P10 Images

on 70 paysites, was too burdensome, ignores that Google only needed to look at a handful of images from each paysite to determine it was a major infringer.

ER20223(lns10-13);RB10. Attempting to identify so many images using text alone, if that were even possible, would require *22,000 pages of text!*

ISPs such as Google cannot allow massive infringement on their systems and then complain that notices are burdensome merely because they identify such infringement.

#### **E. Actions Of Other ISPs Are Relevant**

Google incorrectly asserts that the fact that Yahoo! and other ISPs processed Perfect 10's Group C notices in three days is "irrelevant."<sup>3</sup> RB56. Such evidence creates a genuine issue of material fact as to whether Perfect 10's notices were substantially compliant.

#### **F. Google's Failure To Process Perfect 10's Compliant Notices Establishes Its Contributory Liability**

As explained in Sections III and IV.A-C above, Perfect 10's notices substantially complied with the DMCA's requirements and followed Google's guidelines. Because Google failed to take the simple measure of removing the tens of thousands of P10 Images identified in those notices, Perfect 10 is likely to

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<sup>3</sup> The Yahoo! notice, over 16 megabytes in size, was larger than any of the 95 PI Notices. ER50000, Yahoo! notice folder/August 11 2008 dmca.

succeed on its contributory liability claims. *P10 I*, 508 F.3d at 1172;ER20186-190¶¶6-7;ER30001-16;FER143-145. Furthermore, when Google links to, or displays images from, Perfect 10’s DMCA notices, Google knows it is providing infringing content to its users. ER30038;FER237-242.

V. **GOOGLE CANNOT DEFEND THE DISTRICT COURT’S UNWORKABLE NEW NOTICE REQUIREMENTS**

Google fails to justify the two non-statutory requirements erroneously created by the District Court to invalidate Perfect 10’s Group C notices. Google does not explain how the “exact location” and “single document” requirements are consistent with the DMCA’s language or purpose, provide any examples of notices that would comply with these new requirements, or deny that such requirements *would invalidate virtually all third-party DMCA notices*. OB36-45;Amicus-Brief-Supporting-P10, pp.8-15. Google also fails to explain why Perfect 10’s swearing under penalty of perjury that it owns the copyright to the infringing image is insufficient, particularly if that image displays a Perfect 10 copyright notice or is a Perfect 10 Magazine cover. FER19,158,193,228;ER50080-81.

Google’s assertion that the infringing image cannot identify the infringed image defies logic. FER150-153;FER193;ER50080-81;FER1-19. The infringing image identifies the infringed image because *it is the same image*. ER80063;ER80074. Moreover, Google’s assertion is directly contradicted by its

own Image Search guidelines, which Google states comply with the DMCA's requirements and which require copyright holders to identify only the *URL of the infringing image*. ER80096.

Google's position, and the District Court's newly-created requirements, are undermined by ChillingEffects' *amicus* brief (Docket No. 32), which states that many copyright holders identify the infringed work by *title*, and suggests that such notices are compliant. *Id.* at 22. These notices would be deficient under the District Court's new requirements because they do not provide the exact location of an authorized copy.<sup>4</sup> ChillingEffects does not point to a single Perfect 10 DMCA notice that it asserts is deficient.

#### **A. Google Fails To Distinguish Applicable Case Law**

Google fails to distinguish the *ALS Scan* and *Arista* cases relied upon by Perfect 10, which demonstrate that Perfect 10's Group C notices are compliant and that the District Court's "exact location" and "single document" requirements are contrary to law. OB40-44. Google does not explain why Perfect 10's sample notices (ER50001-36;ER60166,60170-174) are not superior to those upheld in *ALS Scan* and *Arista*. OB40-44. Google also fails to controvert Perfect 10's argument that *Perfect 10, Inc. v. CCBill, LLC*, 488 F.3d 1102 (9th Cir.), *cert. denied*, 552 U.S. 1062 (2007), does not support the District Court's newly-created requirements

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<sup>4</sup> The only other notice mentioned is inapplicable because it does not involve a password-protected website such as perfect10.com.

and merely stands for the propositions that a copyright holder may not “cobble together adequate notice from separately defective notices” and notices lacking the necessary swearing language are deficient. *Id.* at 1112-13;OB42-43. Google provides no evidence that the 2003 notice at issue in *CCBill* is even remotely similar to any notices at issue here. RB54. *Hendrickson v. eBay, Inc.*, 165 F.Supp.2d 1082 (C.D.Cal. 2001), upon which Google relies (RB25), is inapposite. The *Hendrickson* court invalidated plaintiff’s notices because they did not contain the requisite swearing language or identify the location of the infringing material. *Id.* at 1089-91. Perfect 10’s notices satisfy both requirements. ER50001-50011.

**B. Google Does Not Dispute That Perfect 10’s Adobe Notices Are Superior To Text-Only Notices And Easier To Process**

Google does not refute the advantages of Perfect 10’s Group C Adobe notices, discussed at OB44-45 and summarized below.

ADVANTAGES OF PERFECT 10 ADOBE NOTICES	EVIDENCE
PRESERVE COPY OF INFRINGING WEBPAGE	ER50001-101
PRECISELY IDENTIFY INFRINGING/INFRINGED IMAGES BY USING CHECK-MARKS OR BY CROSSING OUT NON-P10 IMAGES	ER50009-11;ER50080-84
ALLOW FOR ERROR-FREE COPYING OF URLS	ER60183(ln15-25);ER70019-20
PRESERVE ALL URLS ON WEBPAGE	ER20196(ln13-19)
PRESERVE LINKS BETWEEN INFRINGING WEBPAGES	ER50015-27
DISPLAY ADS AND COPYRIGHT NOTICES	ER50020-27
SEARCH AND BOOKMARK FUNCTIONS	ER60186(ln12-22);ER70038-39

The poor copy quality of many text-only notices in Google’s SER, which are

far worse than the actual notices sent (*compare* SER293;SER1049 to FER158;FER265) further demonstrates the advantages of Adobe notices.

## **VI. GOOGLE HAS NOT SUITABLY IMPLEMENTED A REPEAT INFRINGER POLICY**

### **A. This Court Has Jurisdiction Over This Issue**

Contrary to Google’s mistaken assertion, this Court properly may review the District Court’s erroneous conclusion in the SJ Order that “Google employs an adequate repeat infringer policy and practice” as a matter of law. ER10039. In the PI Order, the District Court “reiterate[d]” its ruling in the SJ Order that Google was entitled “to a safe harbor defense” and relied upon this ruling to deny the PI Motion. ER10016(n7). A suitable repeat infringer policy is a necessary prerequisite for any DMCA safe harbor. 17 U.S.C. §512(i);FER266. Consequently, this Court has pendent jurisdiction over this issue, because it is inextricably intertwined with the PI Order, and a review of the issue is necessary to ensure meaningful review of the PI Order. OB2 and cases cited therein.

### **B. Google Failed To Reasonably Implement A Repeat Infringer Policy**

The following evidence, which the District Court mistakenly failed to address and Google fails to refute, is sufficient to deny Google a safe harbor because it demonstrates that Google did not comply with §512(i) (*see* OB63-71):

1) An ISP reasonably implements a repeat infringer policy under §512(i) only if it has “a procedure for dealing with DMCA-compliant notifications.” *CCBill*, 488 F.3d at 1109;FER266. Google has no procedure for dealing with DMCA-compliant notices regarding:

a) Google AdWords affiliates. ER20256¶95;ER40240-41;ER90018;FER142-145;149;FER211-218. Google concedes it will not respond to notices regarding infringements *within* AdWords websites. Such websites therefore can pay Google to help them sell thousands of pirated movies and images and Google will neither cut links to such websites nor end its business dealings with them. RB65(lns1-5).

b) Paysites, whether or not they are AdWords affiliates. FER142-145;149.

c) Infringing websites for which users must make one or more keystrokes before reaching infringing content. ER20201(lns3-14);ER30077-78;ER30112;ER90018.

Google’s failure to have a procedure for dealing with DMCA-compliant notices regarding such infringing websites allows it to maintain at least *222 million* links to websites which infringe as many as 26,000 P10 Images each. FER142-145;149;ER20203(lns1-15);ER20201(lns3-14);ER30077-78.

2) Google has not terminated its business relationships with



216¶34;ER90042-44¶¶4-6,11;ER60201(ln15-18).

6) Google admittedly did not remove [REDACTED]  
[REDACTED]. ER20216-  
219¶¶35-36;ER30174-189;ER60201-204¶¶27-28;[ER70127-142]. Accordingly,  
Google's contentions that it processed Group B notices identifying these infringing  
webpages within one to two weeks, and that Perfect 10 concedes this point, are  
wrong. FER172-174;ER20212-215¶¶29-33;ER30136-173.

7) Google did not process any DMCA notices from any copyright holder  
in 2001. ER20205-206¶20;ER30105;[ER70070].

8) Google has provided no [REDACTED]  
[REDACTED]  
[REDACTED] ER20258(ln13)-259(ln24);ER40242-  
262;ER10103.

9) Google did not identify [REDACTED]  
[REDACTED] Therefore, Google's criticism that  
Perfect 10 did not refute evidence Google never provided is specious, and  
improperly reverses the applicable burden of proof. RB62.

10) The District Court improperly struck four third-party declarations  
challenging Google's DMCA policies. OB61-62. Google does not dispute that  
Perfect 10 only learned about these witnesses shortly before using their

declarations to oppose Google's SJ Motions. FER160-171;ER20028-29.<sup>5</sup> Google did not depose any of the declarants, although it had more than 11 months to do so before the SJ Order was issued. Furthermore, these declarants were impeachment witnesses who rebutted the testimony of Google declarant Shantal Rands Poovala. Fed.R.Civ.P. 26(a)(1)(A)(i);FER164n.2.

The District Court improperly overlooked these arguments (FER162-168), mistakenly stating that "***P10 has provided no argument*** as to why its failure [to identify these declarants in its Rule 26 disclosures] was substantially justified..." ER10038 (emphasis added). Google never addresses this incorrect assertion. For these reasons, striking the declarations was clearly erroneous. *Erbe v. Potter*, 2010 WL 1643568,\*2 (M.D.Pa., Apr. 2, 2010)(permitting testimony of witness whom plaintiff was not aware of until receiving defendant's summary judgment motion); *Quinones v. Atlantic Hyundai*, 2010 WL 1705761,\*2 (E.D.N.Y., Apr. 28, 2010)(same).

Google's assertions regarding its repeat infringer policies fundamentally misapprehend the DMCA. RB63. Section 512(i) does not differentiate between an ISP's services. If Google fails to reasonably implement a repeat infringer policy for any subscribers or account holders (such as AdSense, AdWords, or Google

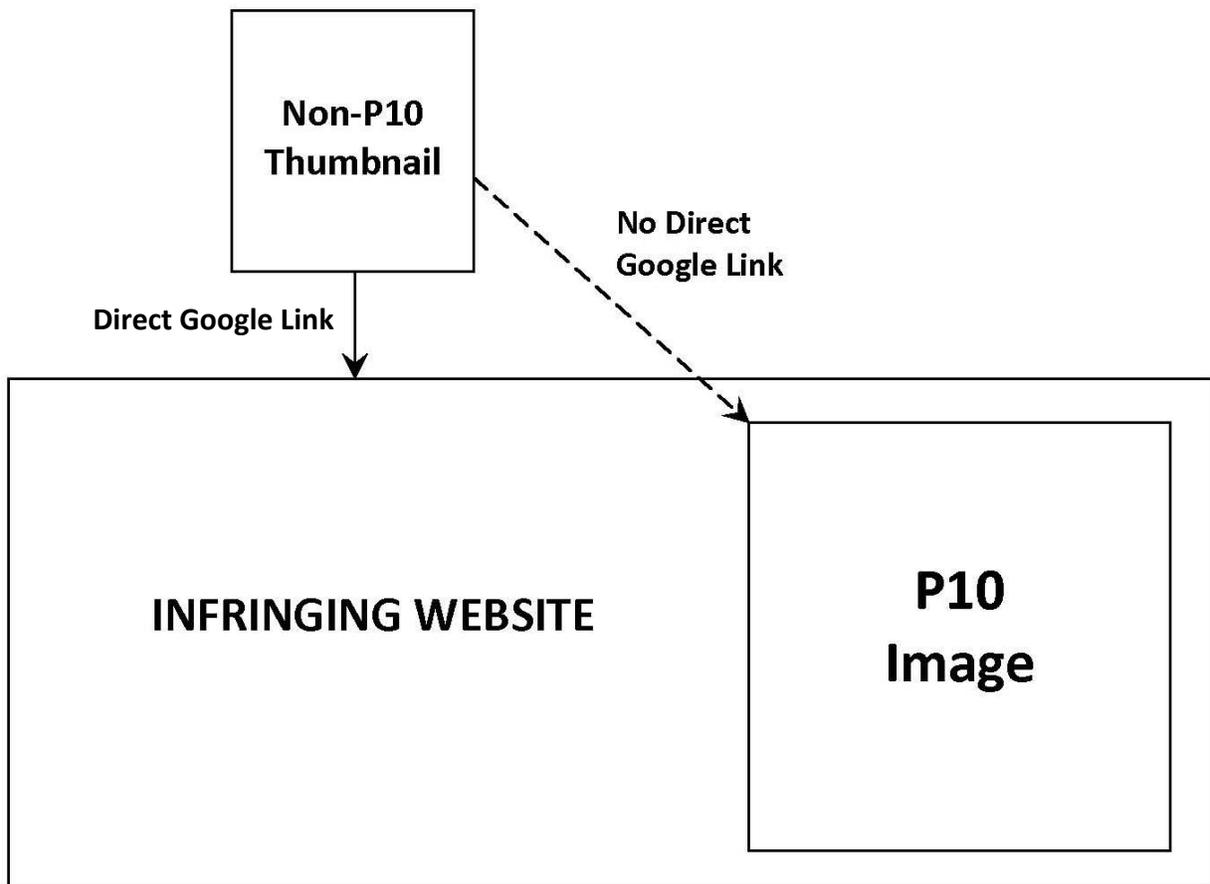
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<sup>5</sup> For example, Perfect 10 first learned of declarants Eden and Schwartz only nine days and thirteen days, respectively, before providing their declarations to Google. FER161;164;ER20028-29.

Groups), it is not entitled to a safe harbor for any of its services, including Web Search or Image Search. FER266;CCBill, 488 F.3d at 1109.

**C. Google Has No Policy To End Its Display Of Known Infringing Full-Size Images**

Google’s in-line linking (also known as “framing”) technology allows it to display to Google users *all of the content on other websites, including infringing content*. See ER10053 (Amy Weber picture). Google confirms that *it has no procedure for dealing with DMCA-compliant notifications* asking it to stop displaying identified full-size infringing images from known infringing websites. ER20189(ln6-16);ER30012;RB52;ER10053. This alone should disqualify Google from DMCA safe harbor. FER266;CCBill, 488 F.3d at 1109. Google will not stop displaying, or offering for download, tens of thousands of full-size P10 Images from thousands of infringing websites, to hundreds of millions of Google users. If the District Court’s rulings are upheld, *every website will be able to use the same framing process to offer and/or display whatever content appears on other infringing websites – including images, songs, and even television shows – without liability.*



**HOW GOOGLE DISPLAYS MILLIONS OF FULL-SIZE INFRINGING IMAGES WITHOUT DIRECTLY LINKING TO THOSE IMAGES**

**D. Google Fails To Address The Inadequate Poovala Declarations**

Both the District Court and Google fail to address the inadequacy of Shantal Rands Poovala’s declarations or explain why her testimony should not have been stricken. OB71-73. Google’s SJ Motions and opposition to the PI Motion were primarily based on these declarations. The District Court’s failure to strike these declarations, or even address Perfect 10’s detailed objections, provides further grounds to reverse the District Court’s rulings.

## **VII. GOOGLE’S CONDUCT CONSTITUTES DIRECT INFRINGEMENT UNDER THE SERVER TEST**

Google’s assertion that Blogger does not directly infringe (RB27) disregards Google’s volitional display of full-size P10 Images from Google’s own Blogger servers. In order to display such images, Google must choose to create a thumbnail from a full-size P10 Image on Google’s Blogger servers and then choose to use that thumbnail to display that full-size P10 Image.<sup>6</sup> FER114-121;OB58-59. Because Google has a copy of the full-size P10 Images it displays, Google’s display constitutes direct infringement under this Court’s server test. *P10 I*, 508 F.3d at 1160-61;FER114-121;OB58-59.

Furthermore, Google is directly liable whenever it terminates a blogspot.com website but *elects* to leave the full-size infringing images on Google’s Blogger servers. FER224(lns14-23);ER20190(ln25)-20191(ln2);ER20230¶61;ER40051;ER60006(lns6-8);ER60003-6¶¶7-9. ***Google is then solely responsible*** for the ongoing infringement of those images.

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<sup>6</sup> Instead, Google mistakenly focuses only on its creation of P10 thumbnails, but not on its subsequent use of those thumbnails to display full-size P10 images from Google’s own servers. RB27. Moreover, Google wrongly asserts that Perfect 10 “concedes that volitional conduct is legally required.” RB28. *See* OB59n.9 (“this Court has never held that a plaintiff must show volitional conduct by a defendant to establish direct copyright infringement”).

**VIII. THIS COURT SHOULD REEXAMINE ITS PRIOR RULINGS**  
**BASED ON UNDISPUTED NEW EVIDENCE**

**A. Server Test**

This Court originally upheld the server test, at least in part, because of Google’s misrepresentations that it did not store full-size P10 Images on Google’s servers. OB59;ER90157-159¶¶12-17;ER90160-170;ER20088¶16;ER20143-150;20158-159. Moreover, Perfect 10 submitted new evidence below, including testimony of Google’s expert, John Levine, that in-line linking sites (such as Google) are just as responsible for the display of images as hosting sites. ER90030(¶9-23). Google incorrectly characterizes this evidence as irrelevant “non-party testimony” (RB21), but does not dispute it. This new evidence, and Google’s prior factual misrepresentations, warrant this Court to reexamine the server test. ER20260¶100;ER40263-268.

**B. Vicarious Infringement**

In prior rulings regarding vicarious infringement, this Court and the District Court focused on Google’s lack of image recognition. *P10 I*, 508 F.3d at 1174; *Perfect 10 v. Google, Inc.*, 416 F.Supp.2d 828, 858 (C.D.Cal. 2006)(citing Levine Declaration). This Court also stressed that Google did not have a “closed system” like Napster. *Id.*

Google does not dispute that it now possesses image-recognition capability.

ER20250-252¶¶87-88;ER40211-232;ER60233-234¶67;ER80186-189;  
ER90058(ln2-7);ER90074(ln5-8). Moreover, Perfect 10 submitted new evidence from Google’s expert, Dr. Levine, that Google has the same control over its index as Napster, because Google’s system is also closed. ER90007¶20;ER90031(ln4-13). Finally, Google has the ability to limit infringing activity by patrolling its own system for infringement. It can use image-recognition to stop: (i) placing ads next to P10 Images, (ii) displaying P10 Images in Image Search results, and (iii) hosting P10 Images on its Blogger servers. ER20250-252¶¶87-88;ER40211-232;ER60233-234¶67;ER80186-189;ER90058(ln2-7);ER90074(ln5-8). Because Google benefits from such infringing material and has complete control over whether this material appears on Google’s system, this Court should reexamine Google’s vicarious liability. OB56-57.

#### **IX. THE DISTRICT COURT’S FAIR USE ANALYSIS IS ERRONEOUS**

Google provides no basis to uphold the District Court’s erroneous ruling that Google’s forwarding of Perfect 10’s Group C notices to chillingeffects.org (“ChillingEffects”), and Google’s subsequent linking to, and placing ads around, unredacted image portions of these notices, likely constitutes fair use. OB73-79.<sup>7</sup>

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<sup>7</sup> Google does not dispute either that the District Court correctly ruled that Google’s forwarding of these notices likely constitutes direct infringement (ER10023), or that ChillingEffects is Google’s “partner.” ER20087¶13.

## **A. Purpose and Character of Use**

Google does not explain why it: (i) forwards notices to ChillingEffects containing full-size, unredacted, infringing images and live links which enable the downloading of tens of thousands of additional infringing full-size P10 Images; (ii) places links to the P10 Images in these notices at the top of its search results; (iii) subsequently links only to the image portions of these notices via Google Image Search; and (iv) places Google ads around such infringing material. OB73-79. The District Court erroneously ignored all such conduct, which has nothing to do with “research,” is not transformative, and significantly damages Perfect 10. ER20084-85¶11;ER20124-127;ER20249-250¶86;ER40200-210.

Sensitive material from DMCA notices of other copyright holders appearing on ChillingEffects is redacted and replaced with the term “[Private]”. FER268;ER50102-114. Google never explains, however, why it did not do the same for Perfect 10, by disabling the live links in Perfect 10’s notices and placing Xs over the P10 Images in these notices to make them commercially unusable. Such redaction would have substantially reduced the harm caused by Google’s forwarding of these images without compromising ChillingEffects’ alleged research.

An example of Google’s display of the same P10 Images it was asked to remove is shown below. The thumbnail is from a Perfect 10 DMCA notice.

Google has reinstated that thumbnail in its Image Search results and linked it to all the other images in the notice. By clicking on that thumbnail, hundreds of millions of Google users can view or download tens of thousands of full-size P10 Images, including the full-size image shown below. ER20194-20200¶¶13-15;ER30030-67;ER20084-85¶11;ER20124-129. Google does not explain why such conduct does not massively damage Perfect 10 or has any research purpose.

Google Image Result for [http://4.bp.blogspot.com/\\_7frfBMx-arw/Si35Z2jml/AAAAAAAAAP0g/\\_k8oveT5a4fs320/bar\\_017\\_P10Sum98\\_Nataskia\\_Maren-729801.jpg](http://4.bp.blogspot.com/_7frfBMx-arw/Si35Z2jml/AAAAAAAAAP0g/_k8oveT5a4fs320/bar_017_P10Sum98_Nataskia_Maren-729801.jpg) - Mozilla Firefox

File Edit View History Bookmarks Tools Help Related Links

Most Visited Getting Started

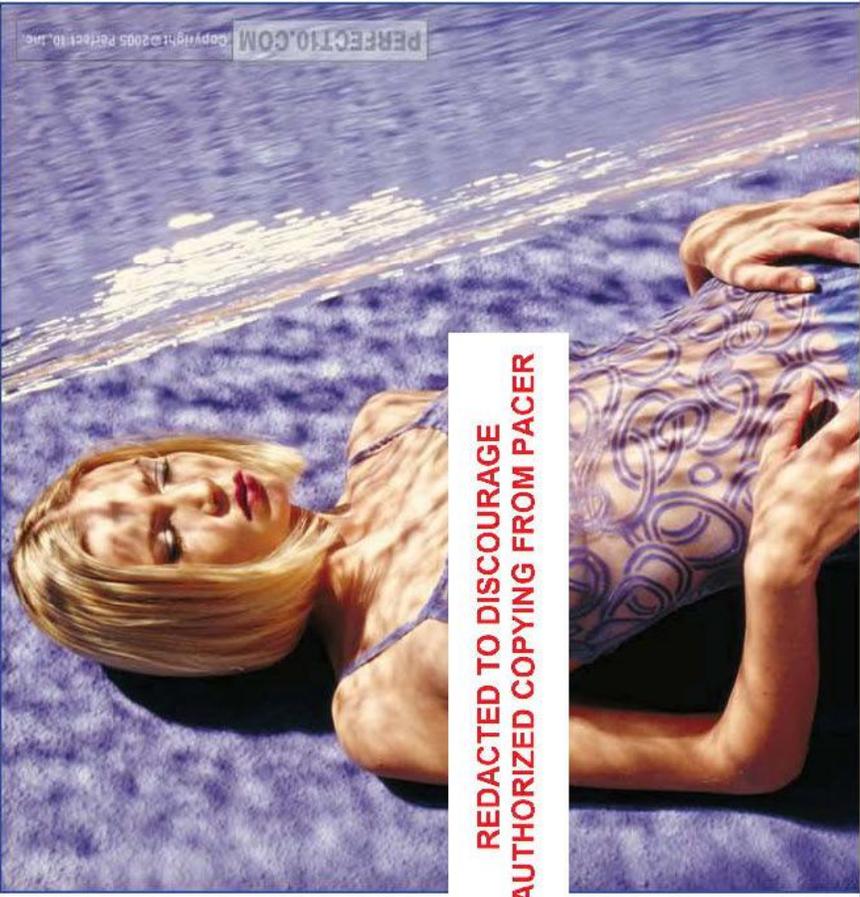
Google Image Result for <http://4.bp...>

Google "Nataskia Maren"

Search images Back to image results

**See full size image**  
226 x 320 - 15k - jpg - 4.bp.blogspot.com/\_7frfBMx-arw/Si35Z2jml/AA...  
Image may be subject to copyright.  
Below is the image at: [images.chillingeffects.org/notices/\\_NataskiaM...](http://images.chillingeffects.org/notices/_NataskiaM...)

Remove frame



February 2010  
S M Tu W Th F S  
1 2 3 4 5 6  
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14 15 16 17 18 19 20  
21 22 23 24 25 26 27  
28

Exh. 5, Pg. 9

start

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ER 30038

Google does not dispute that it: (i) forwards only a fraction of the notices it receives to ChillingEffects; (ii) has forwarded a much higher percentage of notices from Perfect 10 than from other copyright holders; and (iii) ***began forwarding Perfect 10 notices to ChillingEffects only after being sued.*** OB76. Nor does Google identify any evidence in the record that ChillingEffects is conducting research on Perfect 10's notices.<sup>8</sup>

Such undisputed evidence demonstrates that this factor strongly favors Perfect 10, not Google.

#### **B. Amount Used**

Google provides no evidence to support its unfounded assertion that forwarding redacted notices would “limit the effectiveness of Chilling Effects’ work,” particularly when redactions of sensitive material are routinely made to other copyright holders’ notices. FER268;ER50102-114;RB35-36. Nor does Google explain why, since it only forwards a small fraction of the DMCA notices it receives, Google had to forward any Perfect 10 notices containing live links and images, let alone ***all the live links and all the thousands of P10 Images in those notices*** with no redaction of any kind. OB76-77.

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<sup>8</sup> The discussion of ChillingEffects’ activities in its *amicus* brief is irrelevant to this analysis because such evidence was not before the District Court. *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 698 (9th Cir. 2010) (rejecting attempt of *amicus* to submit reports because appellate court will not entertain “new evidentiary submissions on appeal”).

### C. Effect On The Market

Both the District Court and Google erroneously focus only on users viewing Perfect 10's notices at ChillingEffects. ER10025;RB36. Google fails to rebut evidence that, by in-line linking to the image portions of Perfect 10's notices as shown in the example above, Google is forever offering for free, tens of thousands of full-size P10 Images to *hundreds of millions of Google users*, thereby completely destroying "the potential market" for P10 Images. Moreover, Google ignores evidence that it provides links at the very top of its search results to notices that allow Google users to download 36,000 full-size P10 Images. ER20082-85¶¶10-11;ER20113-129. It is hard to imagine any greater harm. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566-67 (1985) ("Fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied.").

Google does not refute Perfect 10's contention that *its conduct causes substantially more damage than the damage originally identified in Perfect 10's notices*. OB78. Other copyright holders have elected not to send DMCA notices because of Google's actions. ER20195(ln5-19);ER30030-32;ER90136-138¶¶4-5,7-9;ER90126¶5. If Google's conduct is permitted to continue, it will be pointless for rightsholders to send notices to Google and the DMCA's notice-and-takedown procedures will be effectively nullified. Amicus-Brief-Supporting-P10, pp.19-20.

Google fails to controvert that its placement of ads around P10 Images from Perfect 10's notices is also not fair use. ER20084-85¶11;ER20126-127. *Sony Computer Entertainment America, Inc. v. Bleem, LLC*, 214 F.3d 1022 (9th Cir. 2000), the only case Google cites (RB34), is inapposite. *Sony* involved defendant's use of screenshots from plaintiff's video games for comparative advertising, where the screenshots constituted only a small amount of plaintiff's games, and defendant's use would not harm plaintiff's market. *Id.* at 1026-29. Here, by contrast, Google is placing ads around thousands of P10 Images constituting Perfect 10's entire business.

Google claims Perfect 10 could "stop the harm it complains about" by not including screenshots in its DMCA notices. RB37. Google does not have the right to force Perfect 10 to use clearly inferior text-only notices, especially when Google contends that all such text-only notices are deficient as well. RB14n.1.

Finally, Google notes that it has not yet forwarded the 1.1 million images from Perfect 10's June 2007 notice to ChillingEffects for publication on the Internet. RB36n.4. The fact that Google has not yet sent every Perfect 10 notice to ChillingEffects, and that the harm to Perfect 10 would significantly increase if the *hundreds of thousands of P10 Images* in these remaining notices were *permanently* made available for viewing or downloading, provides even more reason for this Court to enjoin Google's unlawful conduct.

**X. GOOGLE’S DISPLAY OF 22,000 P10 THUMBNAILS CANNOT BE FAIR USE BECAUSE IT IS DESTROYING PERFECT 10’S BUSINESS**

Google fails to controvert Perfect 10’s substantial new evidence of massive harm to its business from Google’s unauthorized use of thousands of P10 thumbnails since this Court’s prior ruling. This new evidence includes:

1) An increase in the number of P10 thumbnails displayed by Google from 2,500 when this case was previously before this Court to over 22,000 today. ER20186-188¶6;ER30001-6;ER50177-180.

2) The linking of each thumbnail to infringing websites offering, on average, 9,000 full-size P10 Images. ER20186-190¶¶6-7;ER30001-16.

3) *Tens of millions of views and downloads of full-size P10 Images* from websites to which Google links those 22,000 P10 thumbnails. ER20249¶86;ER40200-210;ER60233¶66;ER80181-185;OB80-81.

The effect an infringing use has on the market “is undoubtedly the single most important element of fair use.” *Harper*, 471 U.S. at 566. “If the defendant’s work adversely affects the value of any of the rights in the copyrighted work ... the use is not fair.” *Id.* (quotation omitted).

The *undisputed evidence* is that the 22,000 P10 thumbnails on Google’s system have been used to *view or download tens of millions of infringing full-size*

*P10 Images*, and Perfect 10 is near bankruptcy. This new evidence, which Google fails to refute, establishes that Google has substantially damaged, if not completely destroyed, Perfect 10's business. ER20076-77¶2. Consequently, Google's use of P10 thumbnails cannot be fair. This Court should therefore re-examine its prior ruling regarding Google's display of thumbnails, in light of this new evidence.

**XI. PERFECT 10 SATISFIES THE REMAINING PRELIMINARY INJUNCTION FACTORS**

Google incorrectly suggests that Perfect 10 has provided no new evidence of harm. ER122-129. In fact, Google does not dispute Perfect 10's new evidence, which includes the following:

- 1) Perfect 10 has lost an additional \$20 million since 2005 and closed its magazine and cell-phone downloading business. ER20076-77¶2;ER20186(1n8-19).
- 2) Infringement of P10 Images on Google's system has massively increased. ER20186-204¶¶6-17;ER30001-98.
- 3) As many as 36,000 full-size P10 Images may be downloaded from a single Perfect 10 notice, to which Google is linking at the top of its search results. ER20084-85¶11;ER20124-129.
- 4) Virtually everything Perfect 10 sells is available for free at google.com, which has hundreds of millions of users. ER20186-190¶¶6-

7;ER30001-16;ER20191-201¶¶11-16;ER30017-76.

5) Perfect 10 will suffer substantial additional losses and likely be forced into bankruptcy without injunctive relief. ER20076-77¶2;ER20186-190¶¶6-7;ER30001-16;ER20201-204¶17;ER30077-98;ER20082-85¶¶10-11;ER20113-20129.

6) Other copyright holders claim Google's conduct has seriously harmed their businesses. ER90138¶9;ER90141-142¶8.

Such evidence supports a finding of irreparable harm under *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975), and demonstrates that the District Court's contrary ruling is erroneous. OB82.<sup>9</sup>

Google incorrectly asserts that irreparable harm is no longer presumed upon a finding of likelihood of success on the merits. RB18-19. This Court still applies this presumption. OB82 and cases cited therein. *eBay Inc. v. MercExchange, LLC.*, 547 U.S. 388 (2006), cited by Google (RB18), involved a permanent injunction in a patent infringement case, not a preliminary injunction in a copyright infringement case. Even after *eBay* and

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<sup>9</sup> Google's assertion that Perfect 10 voluntarily elected to stop funding its business (RB18) has no support in the record. Moreover, Google mistakenly relies upon *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597 (9th Cir. 1991). RB18. *Rent-A-Center* held that "intangible injuries, such as damage to ongoing recruitment efforts and goodwill," which Perfect 10 has suffered (ER20076-77¶2), "qualify as irreparable harm." *Id.* at 603. Furthermore, unlike this case or *Doran*, *Rent-A-Center* did not involve possible bankruptcy.

*Winter v. Natural Res. Def. Council, Inc.*, 129 S.Ct. 365 (2008), also cited by Google, this Court has continued to apply the presumption of irreparable harm in the analogous area of preliminary injunctions involving trademark infringement. *See, e.g., Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH&Co.*, 571 F.3d 873, 877 (9th Cir. 2009)(“Because the court found a likelihood of success on the merits, it reasonably presumed irreparable injury”).

Google’s assertion that Perfect 10 improperly delayed in bringing the PI Motion (RB17) is incorrect. Perfect 10 brought the PI Motion shortly after Google started forwarding its Group C notices to ChillingEffects for publication on the Internet, based on seven new developments. FER122-140.

Google mistakenly asserts that the public interest and balance of hardships weigh against Perfect 10. RB19-20. “Since Congress has elected to grant certain exclusive rights to the owner of a copyright in a protected work, it is virtually axiomatic that the public interest can only be served by upholding copyright protections and, correspondingly, preventing the misappropriation of the skills, creative energies, and resources which are invested in the protected work.” *Apple Computer, Inc., v. Franklin Computer Corp.*, 714 F.2d 1240, 1255 (3rd Cir. 1983); *Microsoft Corp. v. Marturano*, 2009 WL 1530040,\*8 (E.D.Cal., May 27, 2009) (same). The public interest factor “normally weighs in favor of the issuance of an

injunction because the public interest is the interest in upholding copyright protections.” *Autoskill Inc. v. National Educ. Support Sys., Inc.*, 994 F.2d 1476, 1499 (10th Cir. 1993). Organizations of photographers, newspapers, designers, graphic artists, and picture archives believe the public interest supports Perfect 10. Amicus-Brief-Supporting-P10, pp.1-22.

## **XII. CONCLUSION**

Perfect 10 has demonstrated that it is likely to succeed on its copyright infringement claims. Perfect 10’s notices clearly comply with the DMCA; Google certainly has not satisfied its affirmative burden of proving otherwise. Perfect 10 has also provided substantial, unrefuted new evidence of irreparable harm. Google and other Internet businesses should not be allowed to commercially exploit intellectual property (including by placing their ads next to copyrighted works), without compensating rightsholders. Nor should ISPs be allowed to destroy copyright holders’ businesses by republishing DMCA notices containing thousands of their copyrighted works on the Internet without redaction. If this Court upholds the District Court’s erroneous rulings, the DMCA will be eviscerated and copyright holders will suffer significant negative consequences. For the reasons stated above, and in Perfect 10’s Opening Brief, this Court should reverse the PI and SJ Orders and/or remand the case for consideration by a Special Master.

Dated: January 19, 2011

Respectfully submitted,  
LAW OFFICES OF JEFFREY N. MAUSNER

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**CERTIFICATE OF COMPLIANCE PURSUANT TO FEDERAL RULE OF  
APPELLATE PROCEDURE 32(A)(7)(C) AND NINTH CIRCUIT RULE 32-1**

I certify that the attached Reply Brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because the brief contains 6,995 words, excluding the portions exempted by Fed.R.App.P. 32(a)(7)(B)(iii). The brief's type size and type face comply with Fed.R.App.P. 32(a)(5) and (6).

Dated: January 19, 2011

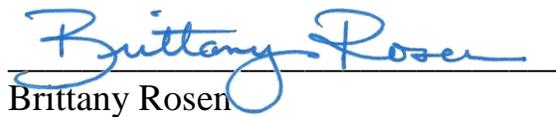
Respectfully submitted,

By Jeffrey N. Mausner  
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CERTIFICATE OF MAILING BY FEDEX

I hereby certify that on January 19, 2011, I sent the REPLY BRIEF OF PLAINTIFF-APPELLANT PERFECT 10, INC. and FURTHER EXCERPTS OF RECORD OF PLAINTIFF-APPELLANT PERFECT 10, INC. to the Clerk of the United States Court of Appeals for the Ninth Circuit via FedEx, for next day delivery to the following address:

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U.S. Court of Appeals  
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San Francisco, California 94103-1526

  
Brittany Rosen

**CERTIFICATE OF SERVICE**

I hereby certify that on January 19, 2011, I sent two copies of the REPLY BRIEF OF PLAINTIFF-APPELLANT PERFECT 10, INC. and one copy of the FURTHER EXCERPTS OF RECORD OF PLAINTIFF-APPELLANT PERFECT 10, INC. to each of the following for overnight delivery via FedEx, for delivery to the following addresses:

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