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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PERFECT 10, INC.,	)	
	)	
PLAINTIFF-APPELLANT,	)	
	)	
VS.	)	CASE NO: 10-56316
	)	
	)	
GOOGLE INC.,	)	
	)	
DEFENDANT-APPELLEE.	)	
_____	)	

ORAL ARGUMENT HEARD BEFORE  
THE HONORABLE ALEX KOZINSKI, CHIEF JUDGE  
THE HONORABLE SANDRA S. IKUTA  
THE HONORABLE MICHAEL DALY HAWKINS

SAN FRANCISCO, CALIFORNIA  
MONDAY, APRIL 11, 2011

PROCEEDINGS RECORDED BY ELECTRONIC SOUND RECORDING;  
TRANSCRIPT PRODUCED BY TRANSCRIPTION SERVICE.

1 APPEARANCES:

2 FOR PLAINTIFF: LAW OFFICES OF JEFFREY N. MAUSNER  
3 BY: JEFFREY N. MAUSNER  
4 DAVID NATHAN SCHULTZ  
5 ATTORNEYS AT LAW  
21800 OXNARD STREET  
SUITE 910  
WOODLAND HILLS, CALIFORNIA 91367

6 ALSO PRESENT: DR. NORMAN ZADA  
7 PRESIDENT, PERFECT 10

8 FOR DEFENDANT: MAYER BROWN LLP  
9 BY: ANDREW H. SCHAPIRO  
10 ATTORNEY AT LAW  
1675 BROADWAY  
NEW YORK, NEW YORK 10019

11 TRANSCRIBER: DOROTHY BABYKIN  
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I N D E X  
CASE NOS: 10-56316  
PROCEEDING: ORAL ARGUMENT

APRIL 11, 2011

1 SAN FRANCISCO, CALIFORNIA; MONDAY, APRIL 11, 2011

2 MR. SCHULTZ: MAY IT PLEASE THE COURT. I'M DAVID  
3 SCHULTZ. THIS IS JEFF MAUSNER. AND WE REPRESENT PLAINTIFF  
4 AND APPELLANT PERFECT 10.

5 PERFECT 10'S PRESIDENT DR. NORMAN ZADA IS ALSO  
6 HERE.

7 I WOULD LIKE TO RESERVE 10 MINUTES FOR REBUTTAL.

8 THE DISTRICT COURT COMMITTED PERHAPS ITS MOST  
9 CRITICAL ERROR IN THIS CASE BY INVALIDATING EVERY PERFECT 10  
10 GROUP C NOTICE WITHOUT PROPERLY EXAMINING OR ANALYZING EACH  
11 TYPE OF NOTICE.

12 THE COURT INCORRECTLY APPLIED THE REQUIREMENTS OF  
13 THE DMCA. IT ERRONEOUSLY RULED THAT EACH NOTICE FAILED TO  
14 IDENTIFY THE COPYRIGHTED WORK CLAIMED TO HAVE BEEN INFRINGED  
15 AND WAS TOO BURDENSOME.

16 THE HONORABLE ALEX KOZINSKI: IT APPROVED THE GROUP  
17 B NOTICES.

18 MR. SCHULTZ: IT APPROVED --

19 THE HONORABLE ALEX KOZINSKI: IN FORM. SO, SOME OF  
20 THEM WERE NOT COMPLETE, BUT IN FORM IT APPROVED THE GROUP B  
21 NOTICES.

22 MR. SCHULTZ: CORRECT, YOUR HONOR. IT APPROVED  
23 CERTAIN UNIDENTIFIED GROUP B NOTICES. AND AS WE STAND HERE  
24 TODAY, WE DON'T KNOW WHICH GROUP B NOTICES THE DISTRICT COURT  
25 BELIEVED WAS COMPLIANT AND WHICH WERE NOT. BUT YOU ARE

1 CORRECT THAT THE FORM OF THE GROUP B NOTICES WAS APPROVED BY  
2 THE DISTRICT COURT.

3 THE HONORABLE SANDRA S. IKUTA: COULD --

4 THE HONORABLE ALEX KOZINSKI: YOU COULD HAVE SAVED  
5 YOURSELF PROBABLY A MINUTE BY JUST SAYING YES.

6 THE HONORABLE SANDRA S. IKUTA: COULD I GET BACK TO  
7 THE PRELIMINARY INJUNCTION MOTION BECAUSE THAT IS REALLY WHAT  
8 IS BEFORE US, AND WE GET TO DMCA ONLY IF IT'S INEXTRICABLY  
9 INTERTWINED.

10 NOW, ON THAT, THE DISTRICT COURT SAID, ASSUME THAT  
11 THERE WAS CONSTRUCTIVE NOTICE, BECAUSE OF THE NATURE OF THE  
12 INFORMATION IN THE DRIVES THAT WERE GIVEN TO GOOGLE, THERE  
13 WEREN'T SIMPLE MEASURES. IT WASN'T -- IT WASN'T SUFFICIENTLY  
14 DIRECTIVE TO GOOGLE. SO THERE WEREN'T SIMPLE MEASURES FOR  
15 BLOCKING THOSE URLS.

16 NOW, WHAT WAS WRONG WITH THAT ANALYSIS? IT SAYS,  
17 THERE ARE EIGHT STEPS OR TEN STEPS THAT GOOGLE WOULD HAVE TO  
18 DO IN ORDER TO FIND THE APPROPRIATE URL?

19 MR. SCHULTZ: WELL, YOUR HONOR, THERE'S SEVERAL --  
20 THERE ARE SEVERAL PROBLEMS WITH THAT ANALYSIS. FIRST OF ALL,  
21 WE SUBMITTED EVIDENCE THAT ONE OF THE THINGS THAT GOOGLE  
22 WOULD HAVE BEEN ABLE TO DO WAS TO USE IMAGE RECOGNITION  
23 TECHNOLOGY IN ORDER TO BE ABLE TO REMOVE INFRINGING IMAGES.

24 WE HAD TWO TECHNICAL EXPERTS WHO SUBMITTED  
25 DECLARATIONS TO THAT EFFECT, AND IT WAS NOT CONTROVERTED BY

1 GOOGLE.

2 THE HONORABLE SANDRA S. IKUTA: NOW, THE DISTRICT  
3 COURT SAID THE ONLY THING BEFORE HIM IS THE ZADA DECLARATION,  
4 AND THAT'S SPECULATIVE I THINK IS WHAT HE SAID.

5 SO, WERE THE OTHER DECLARATIONS -- I THINK IT WAS  
6 -- I'VE FORGOTTEN HIS NAME -- OF THE EXPERTS, WERE THEY  
7 BEFORE THE DISTRICT COURT --

8 MR. SCHULTZ: YES.

9 THE HONORABLE SANDRA S. IKUTA: -- OR WERE THEY  
10 BROUGHT TO THE DISTRICT COURT'S ATTENTION?

11 MR. SCHULTZ: YES, YOUR HONOR. THEY WERE SUBMITTED  
12 TO THE DISTRICT COURT.

13 THOSE DECLARATIONS I BELIEVE IT WAS -- IT WAS THE  
14 O'CONNOR, CHUMURA --

15 THE HONORABLE SANDRA S. IKUTA: OH, AND MC PHATTER.

16 MR. SCHULTZ: -- AND MC PHATTER. TWO OF THOSE  
17 DECLARATIONS SPECIFICALLY ADDRESSED THOSE ISSUES. THEY WERE  
18 SUBMITTED WITH THE SUMMARY JUDGMENT MOTION AND RESUBMITTED IN  
19 CONNECTION WITH THE P.I. MOTION.

20 IN ADDITION, YOUR HONOR, THE -- WE SUBMITTED 95  
21 WHAT WE'VE REFERRED TO AS P.I. NOTICES IN CONNECTION WITH THE  
22 PRELIMINARY INJUNCTION MOTION. THOSE WERE VERY SIMPLE  
23 NOTICES IN MANY CASES INVOLVING A FEW NUMBERS OF IMAGES.

24 AND THE DISTRICT COURT SIMPLY DID NOT EVEN TURN TO  
25 LOOK AND SEE WHETHER THERE WERE SIMPLE MEASURES THAT COULD

1 HAVE BEEN USED TO ELIMINATE THE INFRINGING MATERIAL ON THOSE  
2 NOTICES BECAUSE IT NEVER, AS FAR AS WE CAN TELL, EVEN  
3 ADDRESSED THOSE PARTICULAR NOTICES IN CONNECTION WITH THE  
4 PRELIMINARY INJUNCTION MOTION. IT SIMPLY TOOK ITS UNDERLYING  
5 RULING WITH RESPECT TO NOTICES IN THE SUMMARY JUDGMENT  
6 MOTION, REFERRED TO IT AND RELIED UPON IT ON THOSE -- ON THE  
7 SIMILAR ISSUES THAT WERE BEFORE IT ON THE PRELIMINARY  
8 INJUNCTION MOTION.

9 AND IF YOUR HONOR WOULD LIKE, I CAN ACTUALLY GO  
10 THROUGH SOME OF THESE NOTICES WHICH WOULD ACTUALLY  
11 DEMONSTRATE HOW SIMPLE IT REALLY WAS FOR GOOGLE TO BE ABLE TO  
12 ADDRESS THE PARTICULAR NOTICES THAT WERE BEFORE IT. SOME OF  
13 THESE WERE BEFORE IT ON THE PRELIMINARY INJUNCTION MOTION.

14 THE HONORABLE SANDRA S. IKUTA: WELL, IF THE  
15 DISTRICT COURT DIDN'T ADDRESS THOSE 95 NOTICES, THEN, I DON'T  
16 THINK THAT WE WOULD LOOK AT THEM IN THE FIRST INSTANCE. SO,  
17 I DON'T THINK WE NEED TO GO THROUGH THEM HERE UNLESS ONE OF  
18 MY COLLEAGUES HAS A DIFFERENT THOUGHT.

19 MR. SCHULTZ: THAT'S FINE, YOUR HONOR. BUT I DO  
20 WANT TO SAY THAT SOME OF THESE NOTICES AS WELL WERE BEFORE  
21 THE COURT IN FORM IN CONNECTION WITH THE SUMMARY -- IN  
22 CONNECTION WITH THE SUMMARY JUDGMENT MOTIONS AND IN  
23 CONNECTION WITH THE P.I. MOTIONS.

24 AND WE HAVE REPRODUCED ON THESE BOARDS FOUR  
25 DIFFERENT NOTICES. THEY'RE FOUND AS WELL ON PAGES 15, 13, 8

1 AND 10 OF PERFECT 10'S REPLY BRIEF. AND THESE NOTICES WHICH  
2 IDENTIFIED INFRINGEMENT CONCERNING BLOGGER, THE FIRST NOTICE,  
3 ADSENSE, THE SECOND NOTICE. AND THE LAST TWO ARE  
4 INFRINGEMENT ON IMAGE SEARCH.

5 THEY ALL SATISFY SECTION 512(C) (3) (A) (2) OF THE  
6 DMCA. THEY IDENTIFY THE INFRINGED IMAGE BY PROVIDING A COPY  
7 OF THAT IMAGE. FOR EXAMPLE --

8 THE HONORABLE SANDRA S. IKUTA: BUT CAN WE  
9 CONCENTRATE ON THE PRELIMINARY INJUNCTION. I'M --

10 MR. SCHULTZ: WELL --

11 THE HONORABLE SANDRA S. IKUTA: I HAVE A QUESTION  
12 ABOUT EVEN HOW WE GET TO THE DMCA ISSUES AND WHY THEY'RE  
13 INEXTRICABLY INTERTWINED --

14 MR. SCHULTZ: OKAY.

15 THE HONORABLE SANDRA S. IKUTA: -- IF WE'RE LOOKING  
16 AT THE PRELIMINARY INJUNCTION STANDARD.

17 MR. SCHULTZ: OKAY. YOUR HONOR, THE ISSUE -- THE  
18 ISSUE BECOMES WHETHER OR NOT THERE WAS CONSTRUCTIVE NOTICE  
19 HERE.

20 THE HONORABLE SANDRA S. IKUTA: DIDN'T THE DISTRICT  
21 COURT JUST ASSUME CONSTRUCTIVE NOTICE?

22 MR. SCHULTZ: THE DISTRICT COURT ACTUALLY --  
23 ACTUALLY DID NOT ADDRESS THE ISSUE OF CONSTRUCTIVE NOTICE.  
24 IT SAID THAT OUR NOTICES DID NOT PROVIDE CONSTRUCTIVE NOTICE.  
25 AND, THEN, IT TURNED ON TO SAY THAT, IN FACT, IF THERE WAS --



1 IF THERE WAS CONSTRUCTIVE NOTICE, THEN, THERE WAS SIMPLE  
2 MEASURES THAT -- THERE WERE NO SIMPLE MEASURES THAT COULD  
3 HAVE BEEN TAKEN.

4 BUT IT SEEMS TO ME THE SIMPLEST MEASURES -- IF THE  
5 NOTICES WERE SUFFICIENT, YOUR HONOR, AND IF THE NOTICES  
6 COMPLIED WITH THE DMCA, THEN, THE SIMPLEST MEASURE WOULD HAVE  
7 BEEN THROUGH REMOVING INFRINGING MATERIALS.

8 SO, THEREFORE, THAT'S THE MAJOR REASON WHY THE  
9 ISSUE OF THE UNDERLYING NOTICES IS DIRECTLY RELEVANT HERE.

10 THE HONORABLE SANDRA S. IKUTA: YOU'RE SAYING THAT  
11 IF THE NOTICES WERE ADEQUATE, THEN, PER SE THERE WERE SIMPLE  
12 MEASURES.

13 MR. SCHULTZ: I'M SAYING IF THE NOTICES WERE  
14 ADEQUATE, A SIMPLE MEASURE WOULD HAVE BEEN REMOVING THE  
15 INFRINGING IMAGES.

16 AND EVEN IF THERE WAS NOTICE OUTSIDE -- EVEN IF  
17 THERE WAS KNOWLEDGE OUTSIDE THE NOTICES, WHETHER OR NOT THE  
18 NOTICES WERE COMPLIANT, THERE STILL WERE SIMPLE MEASURES THAT  
19 COULD HAVE BEEN TAKEN.

20 THE HONORABLE SANDRA S. IKUTA: AND IF WE FOUND  
21 THAT THE DISTRICT COURT WAS RIGHT, AT LEAST IN CERTAIN  
22 INSTANCES, SAY, IN GROUP C, THAT DMCA NOTICES WERE NOT  
23 COMPLIANT -- OR WERE DEFICIENT UNDER THE DMCA, DOES THAT MEAN  
24 THERE WEREN'T SIMPLE MEASURES? IS --

25 MR. SCHULTZ: NO, YOUR HONOR, BECAUSE --

1 THE HONORABLE SANDRA S. IKUTA: WOULD --

2 MR. SCHULTZ: BECAUSE -- LET ME GIVE YOU ANOTHER  
3 EXAMPLE. THERE WERE A VARIETY OF DIFFERENT WAYS THAT THE  
4 COURT HAD -- THAT GOOGLE HAD KNOWLEDGE OF INFRINGEMENT ON ITS  
5 SYSTEM. IT WAS, FOR EXAMPLE, FORWARDING PERFECT 10'S NOTICES  
6 TO CHILLING EFFECTS.

7 A SIMPLE MEASURE THAT WOULD HAVE REDUCED THE DAMAGE  
8 ON ITS SYSTEM COULD HAVE BEEN TO STOP FORWARDING THE LIVE  
9 LINKS AND THE PICTURES WITHOUT REDACTING THEM. IT COULD HAVE  
10 STOPPED CONNECTING TO THOSE. IT COULD HAVE TAKEN A WHOLE  
11 VARIETY OF STEPS TO LOOK AT THE IMAGES THAT WERE ON ITS  
12 SYSTEM. IT COULD HAVE ATTEMPTED TO PROCESS OUR NOTICES. IT  
13 COULD HAVE GOTTEN IN TOUCH WITH US IF OUR NOTICES WERE  
14 ALLEGEDLY DEFICIENT.

15 AND, IN FACT, GOOGLE CLAIMED THAT EACH AND EVERY  
16 ONE OF OUR NOTICES WAS DEFICIENT AND NEVER BOTHERED TO  
17 EXPLAIN TO US WHAT WAS A COMPLIANT NOTICE. UNDER THE WHOLE  
18 SYSTEM OF THE DMCA IT WAS SUPPOSED TO BE A BACK AND FORTH.

19 GOOGLE COULD HAVE GOTTEN IN TOUCH WITH PERFECT 10  
20 AND SAID, THIS IS HOW YOU MAKE A NOTICE COMPLIANT. THIS IS  
21 WHAT WE NEED TO DO TO ADDRESS THE SIGNIFICANT AND MASSIVE  
22 INFRINGEMENT ON OUR SYSTEM, AND IT SIMPLY DID NOT DO SO.

23 THE HONORABLE ALEX KOZINSKI: I'M SORRY. WHERE IS  
24 THIS REQUIREMENT THAT THEY EDUCATE YOU AS TO HOW TO BE  
25 COMPLIANT WITH THE LAW?

1           MR. SCHULTZ: WELL, THERE IS A -- THERE IS THE  
2 NOTION THAT --

3           THE HONORABLE ALEX KOZINSKI: EVEN THOUGH THIS IS  
4 LAWFULLY COMPLIANT --

5           MR. SCHULTZ: I'M SORRY?

6           THE HONORABLE ALEX KOZINSKI: EVEN THOUGH THE  
7 NOTICE IS LAWFULLY COMPLIANT OR IT'S NOT LAWFULLY COMPLIANT.  
8 AND IF IT IS, THEN, YOU DON'T NEED TO CHANGE ANYTHING.

9           MR. SCHULTZ: CORRECT, YOUR HONOR.

10          THE HONORABLE ALEX KOZINSKI: AND IF IT'S NOT, I  
11 DON'T SEE WHERE THERE IS A REQUIREMENT THAT THEY TEACH YOU  
12 HOW TO BE LAWFULLY COMPLIANT.

13          MR. SCHULTZ: WELL, I BELIEVE THAT THERE'S  
14 CERTAINLY A REQUIREMENT TO WORK TOGETHER TO TRY TO MAKE THIS  
15 THE LEAST POSSIBLE BURDEN. THERE'S A WHOLE DISCUSSION OF  
16 WHAT IS OR ISN'T BURDENSOME HERE.

17          THE HONORABLE ALEX KOZINSKI: IT MAY BE A --

18          MR. SCHULTZ: AND --

19          THE HONORABLE ALEX KOZINSKI: IT MAY BE A GOOD IDEA  
20 OR MAY NOT, BUT WHERE'S THE REQUIREMENT?

21          MR. SCHULTZ: WELL, I THINK -- I THINK THE STATUTE  
22 DOES TALK ABOUT -- I THINK THE STATUTE DOES TALK ABOUT THAT  
23 IF THE NOTICES ARE SUBSTANTIALLY COMPLIANT, THEN, THERE IS  
24 SUPPOSED TO BE ON THE PART OF THE ISP DISCUSSING HOW THOSE  
25 NOTICES CAN BE MADE COMPLETELY COMPLIANT. I THINK THAT'S

1 512 (C) (3) (B), YOUR HONOR, BUT I WILL -- I CAN COME BACK AND  
2 GET YOU THE EXACT CITE DURING OUR REBUTTAL.

3 THE HONORABLE SANDRA S. IKUTA: COULD I ASK YOU  
4 ABOUT A DIFFERENT ISSUE?

5 MR. SCHULTZ: ABSOLUTELY, YOUR HONOR.

6 THE HONORABLE SANDRA S. IKUTA: THE DISTRICT COURT  
7 SAID THAT PERFECT 10 DID NOT REALLY PRESENT ANY EVIDENCE OF  
8 IRREPARABLE HARM, THE BALANCE OF THE EQUITIES, OR THE PUBLIC  
9 INTEREST ON THE PRELIMINARY INJUNCTION STANDARD. AND THE  
10 DISTRICT COURT RAISED SOME QUESTION ABOUT WHETHER WE SHOULD  
11 -- WHETHER THE PRESUMPTION OF IRREPARABLE HARM WAS STILL  
12 AVAILABLE. AND SINCE THEN WE'VE HAD THE MONSANTO CASE, WHICH  
13 SORT OF UNDERLIES WHAT THE SUPREME COURT SAID IN EBAY, THAT  
14 THERE'S NO PRESUMPTION OF IRREPARABLE HARM.

15 ASSUMING THAT WE CAN'T PRESUME IT THEN, WHAT  
16 EVIDENCE DID PERFECT 10 PRODUCE ON IRREPARABLE HARM AND WHAT  
17 EVIDENCE ON BALANCE OF EQUITIES AND PUBLIC INTEREST, THE  
18 OTHER STEPS?

19 MR. SCHULTZ: YOUR HONOR, WE SUBMITTED  
20 UNCONTROVERTED EVIDENCE THAT PERFECT 10 HAD LOST AN  
21 ADDITIONAL \$20 MILLION SINCE 2005.

22 THE HONORABLE SANDRA S. IKUTA: OKAY. THE DISTRICT  
23 COURT SAID YOU DIDN'T MAKE THE CAUSAL LINK BETWEEN YOUR  
24 FINANCIAL PROBLEMS OR PERFECT 10'S FINANCIAL PROBLEMS AND  
25 GOOGLE'S ACTIONS.

1 DID YOU PRESENT ANY EVIDENCE ON THAT, OR DO YOU NOT  
2 HAVE TO?

3 MR. SCHULTZ: WE -- WELL, I'M NOT CERTAIN WHETHER  
4 WE HAVE TO, YOUR HONOR. BUT I BELIEVE THAT WE DID. WE  
5 PRESENTED EVIDENCE THAT AS A RESULT OF THE MASSIVE  
6 INFRINGEMENT THAT WAS AVAILABLE ON PERFECT 10'S SYSTEM THAT  
7 WE WERE UNABLE TO SELL OR SELL ANYTHING THAT WAS OFFERED BY  
8 GOOGLE ON ITS SYSTEM FOR FREE.

9 FOR EXAMPLE, WE SHOWED THAT THE NUMBER OF P-10  
10 THUMBNAILS ON IMAGE SEARCH HAD INCREASED FROM APPROXIMATELY  
11 2,500 TO 22,000 WHEN WE WERE BEFORE THE COURT AT THAT TIME.  
12 AS A RESULT PERSONS WERE ABLE TO LINK TO INFRINGING WEBSITES  
13 OFFERING AN AVERAGE OF 9,000 -- 9,000 IMAGES. AND,  
14 THEREFORE, IT SEEMS TO ME THAT WE DID PRESENT SIGNIFICANT  
15 EVIDENCE OF HARM. WE WEREN'T -- WE PRESENTED -- WE WEREN'T  
16 ABLE TO SELL ANY OF OUR PRODUCT. OUR REVENUE WENT DOWN  
17 SIGNIFICANTLY. AND ONE OF THE MAJOR REASONS AS STATED IN THE  
18 UNCONTROVERTED DECLARATION OF DR. ZADA WAS BECAUSE ALL THESE  
19 MATERIALS WAS AVAILABLE BEFORE --

20 THE HONORABLE SANDRA S. IKUTA: WAS THAT SORT OF  
21 LIKE A RES IPSA LOQUITUR, IF YOU CAN GET IT FREE, WHY BUY IT.  
22 OR DID YOU HAVE A DECLARATION THAT MADE THAT LINK?

23 MR. SCHULTZ: I BELIEVE THE DECLARATION OF DR. ZADA  
24 MADE THAT LINK. BUT I THINK IT'S VERY LOGICAL, YOUR HONOR,  
25 THAT IF ALL THESE IMAGES ARE BEING DOWNLOADED FOR FREE

1 BECAUSE THEY'RE AVAILABLE ON PERFECT 10 -- THEY'RE AVAILABLE  
2 ON GOOGLE'S SYSTEM THROUGH IMAGE SEARCH OR WEB SEARCH, AND IN  
3 FACT PERFECT 10 SHOWS THAT ITS INCOME HAS SIGNIFICANTLY  
4 DECREASED, I THINK THERE IS SORT OF A RES IPSA LOQUITUR  
5 ARGUMENT THERE. BUT WE ALSO STATED THAT IT WAS AS A RESULT  
6 OF WHAT PERFECT 10 DID.

7 THE HONORABLE MICHAEL DALY HAWKINS: DO YOU HAVE  
8 ANY EVIDENCE THAT INDIVIDUALS WHO IN THE PAST PURCHASED  
9 PROTECTIVE MATERIAL FROM YOUR CLIENT, THEN STOPPED PURCHASING  
10 THOSE ITEMS BECAUSE THEY WERE AVAILABLE FOR FREE?

11 MR. SCHULTZ: I BELIEVE WE HAVE GENERALIZED  
12 EVIDENCE, YOUR HONOR, THAT THE NUMBER OF PEOPLE PURCHASING  
13 ITEMS DECREASED SIGNIFICANTLY. I CAN'T POINT TO A SPECIFIC  
14 PERSON WHO SAID, LOOK, I'M NO LONGER PURCHASING IT.

15 BUT IT MAKES PERFECT SENSE. IF YOU'RE ABLE TO GET  
16 THIS MATERIAL FOR FREE ON THE INTERNET, WHY BOTHER TO PAY  
17 PERFECT 10.

18 THE HONORABLE SANDRA S. IKUTA: SO, THE DISTRICT  
19 COURT ALSO SAID THAT THERE WAS NOTHING ON BALANCE OF EQUITIES  
20 OR THE PUBLIC INTEREST, THAT YOU DIDN'T ADDRESS EITHER OF  
21 THOSE TWO FACTORS.

22 WAS THE DISTRICT COURT WRONG ON THAT?

23 MR. SCHULTZ: I THINK THE DISTRICT COURT WAS WRONG  
24 ON THAT, YOUR HONOR, BECAUSE I THINK -- THE DISTRICT COURT,  
25 IN FACT, STATED IN ITS EARLIER OPINION IN THIS CASE THAT THE

1 PUBLIC INTEREST IS ALSO SERVED WHEN THE RIGHTS OF COPYRIGHT  
2 HOLDERS ARE PROTECTED AGAINST ACTS LIKELY CONSTITUTING  
3 INFRINGEMENT.

4 AND FOR THAT MATTER, THE BALANCE OF THE EQUITIES  
5 AND THE PUBLIC -- THE BALANCE OF THE EQUITIES WHEN THERE'S  
6 COPYRIGHT INFRINGEMENT -- ALSO, THERE'S CASE LAW THAT WE  
7 CITED IN OUR PAPERS THAT STATES THAT UNDER THOSE  
8 CIRCUMSTANCES ONE IS ENTITLED TO INJUNCTIVE RELIEF.

9 SO, I THINK THAT THE DISTRICT COURT WAS INCORRECT  
10 THERE. IF WE HAVE SHOWN THAT WE'RE ENTITLED TO INJUNCTIVE  
11 RELIEF BECAUSE OF THE COPYRIGHT INFRINGEMENT THAT EXISTS  
12 HERE, I THINK WE SATISFY THE OTHER FACTORS AS WELL.

13 THE HONORABLE SANDRA S. IKUTA: OKAY. BECAUSE THE  
14 SUPREME COURT SAYS, NO, YOU'VE GOT TO LOOK AT ALL FOUR. AND  
15 THEY REVERSED US ON THAT VERY POINT.

16 MR. SCHULTZ: NO, I UNDERSTAND THAT ALL FOUR ARE  
17 NECESSARY TO LOOK AT. WHAT I'M SAYING IS I BELIEVE THAT IN  
18 THIS CIRCUMSTANCE WHERE THERE ARE MILLIONS OF UNAUTHORIZED  
19 DOWNLOADS, WHERE PEOPLE ARE ABLE TO GET ALL OF THESE  
20 MATERIALS FOR FREE -- AND WE HAVE UNCONTROVERTED EVIDENCE OF  
21 THAT FACT -- UNDER THOSE PARTICULAR FACTUAL CIRCUMSTANCES,  
22 THAT EVIDENCE SATISFIES BOTH THE IRREPARABLE HARM, THE  
23 SUBSTANTIAL LIKELIHOOD OF SUCCESS AND THE OTHER FACTORS.  
24 BECAUSE IT IS IN THE PUBLIC INTEREST, AND THE BALANCE OF THE  
25 EQUITIES DO FAVOR INJUNCTIVE RELIEF UNDER THOSE

1 CIRCUMSTANCES.

2 THE HONORABLE ALEX KOZINSKI: LET'S TALK A LITTLE  
3 BIT ABOUT CHILLING EFFECTS. I'M NOT SURE I QUITE UNDERSTAND  
4 HOW THIS WORKS. YOU GET A NOTICE, A TAKE-DOWN NOTICE. AND,  
5 THEN, AFTER THE IMAGE IS TAKEN DOWN, YOU SEND SOMETHING TO  
6 CHILLING EFFECTS.

7 WHAT EXACTLY IS IT YOU SEND?

8 MR. SCHULTZ: YOUR HONOR, WE'RE NOT SENDING --

9 THE HONORABLE ALEX KOZINSKI: NOT YOU. WHAT IS IT  
10 THAT GOOGLE SENDS?

11 MR. SCHULTZ: GOOGLE. MY UNDERSTANDING, YOUR  
12 HONOR, IS WE'RE SENDING NOTICES AGAIN IDENTIFYING INFRINGING  
13 PERFECT 10 IMAGES TO CHILLING -- TO GOOGLE. GOOGLE IS  
14 TURNING AROUND AND FORWARDING THOSE NOTICES; IN SOME CASES,  
15 NOTICES THAT THEY HAVEN'T EVEN PROCESSED DIRECTLY TO CHILLING  
16 EFFECTS.

17 THE HONORABLE ALEX KOZINSKI: SO, IT IS -- WHAT  
18 THEY'RE SENDING TO CHILLING EFFECTS ARE THE THINGS THAT YOU  
19 SEND THEM?

20 MR. SCHULTZ: EXACTLY. NOT ONLY THAT, YOUR HONOR,  
21 THEY ARE THEN TURNING AROUND AND LINKING TO THE NOTICES OF  
22 CHILLING EFFECTS. SO, FOR EXAMPLE --

23 THE HONORABLE ALEX KOZINSKI: HAVE YOU EVER HEARD  
24 THE WORD "YES"? IS YOUR ANSWER YES?

25 MR. SCHULTZ: YES.



1 THE HONORABLE ALEX KOZINSKI: OKAY. I DON'T WANT A  
2 WHOLE STORY.

3 MR. SCHULTZ: SORRY, YOUR HONOR.

4 THE HONORABLE ALEX KOZINSKI: SO, THE THINGS THAT  
5 THEY ARE MOVING -- THEY ARE SENDING ARE ENTIRELY WITHIN YOUR  
6 CONTROL? I MEAN, YOU COULD DISTORT THE IMAGES. YOU COULD  
7 PUT A DISCLAIMER ON THEM. YOU COULD PUT YELLOW POLKA DOTS,  
8 ANYTHING LIKE THAT, RIGHT?

9 MR. SCHULTZ: THE PROBLEM, YOUR HONOR --

10 THE HONORABLE ALEX KOZINSKI: YES OR NO?

11 MR. SCHULTZ: YES.

12 THE HONORABLE ALEX KOZINSKI: OKAY. SO, WHAT'S  
13 THAT BASED ON? IF YOU KNOW THAT THEY'RE GOING TO SEND THEM  
14 TO CHILLING EFFECTS, AND YOU HAVE IT ENTIRELY WITHIN YOUR  
15 POWER OR YOUR CLIENT'S POWER TO DISTORT THE IMAGES TO AVOID,  
16 YOU KNOW, THEM BEING USED FOR THE WAY YOU DID IT HERE, WHAT'S  
17 YOUR COMPLAINT WITH THEM?

18 MR. SCHULTZ: WELL, FIRST OF ALL, YOUR HONOR, WHEN  
19 WE STARTED SENDING OUR GROUP C NOTICES, WE HAD NO IDEA THEY  
20 WERE BEING FORWARDED TO CHILLING EFFECTS. THEY WERE -- AND  
21 WE ONLY STARTED SENDING THEM BECAUSE PERFECT -- BECAUSE  
22 PERFECT 10'S GROUP B NOTICES WERE NOT BEING PROCESSED --

23 THE HONORABLE ALEX KOZINSKI: BUT WE'RE HERE ON A  
24 PRELIMINARY INJUNCTION, RIGHT? SO, YOU'RE TRYING TO DEAL  
25 WITH FUTURE CONDUCT. SO NOW YOU KNOW.

1           SO, WHY IS THIS SOMETHING FOR WHICH YOU NEED THE  
2 COURT'S HELP? WHY ISN'T IT SOMETHING --

3           MR. SCHULTZ: WELL, WE NEED THE COURT'S HELP, YOUR  
4 HONOR, BECAUSE THE DISTRICT COURT FOUND THAT IN THIS CASE  
5 THERE WAS DIRECT COPYRIGHT INFRINGEMENT. THERE'S NO EVIDENCE  
6 WHATSOEVER IN THE RECORD THAT THESE NOTICES WERE, IN FACT,  
7 BEING FORWARDED FOR ANY RESEARCH PURPOSES. AND IT SEEMS TO  
8 ME, WHEREAS HERE THE NOTICES ARE CONTINUING TO BE FORWARDED,  
9 THERE ARE TONS OF LINKS TO P-10 IMAGES ON CHILLING EFFECTS  
10 STILL THERE.

11           WHERE WE'RE TRYING TO FORWARD OUR NOTICES IN SUCH A  
12 WAY THAT THE IMAGES CAN BE REMOVED.

13           WHERE THE IMAGES CLEARLY IDENTIFY BOTH THE  
14 INFRINGED MATERIAL AND THE INFRINGING MATERIAL, IT SEEMS TO  
15 ME UNDER THE FAIR USE FACTOR ANALYSIS IT'S THEIR BURDEN --  
16 IT'S GOOGLE'S BURDEN, AND THEY HAVE NOT SATISFIED THAT  
17 BURDEN.

18           THE HONORABLE ALEX KOZINSKI: THIS MAY OR MAY NOT  
19 BE TRUE, BUT YOU DIDN'T ANSWER MY QUESTION.

20           WHY DO YOU NEED THE COURT'S HELP, WHY DO YOU NEED  
21 TO EXERCISE THE COURT'S EQUITABLE JURISDICTION AUTHORITY WHEN  
22 YOU COULD SOLVE THE PROBLEM YOURSELF? THAT WAS MY QUESTION.

23           MR. SCHULTZ: BECAUSE, YOUR HONOR --

24           THE HONORABLE ALEX KOZINSKI: THE ANSWER YOU GAVE  
25 ME WAS A LEGAL ARGUMENT AS TO WHY YOU'RE ENTITLED TO RELIEF.

1           MR. SCHULTZ: BUT LET ME ADD ONE MORE POINT THEN,  
2 YOUR HONOR. IT SEEMS TO ME THAT IN ADDITION THESE NOTICES  
3 HAVE LIVE LINKS, THAT WE -- THAT ARE REMAINING LIVE. WE  
4 CAN'T DO ANYTHING ABOUT THOSE, YOUR HONOR. GOOGLE -- WHEN  
5 THOSE NOTICES ARE BEING FORWARDED TO CHILLING EFFECTS, WE  
6 HAVE TO POINT OUT THE LINKS IN ORDER TO SEND THE NOTICES IN  
7 THE ADOBE FORMAT THAT WILL ALLOW THEM TO BE PROCESSED.  
8 THAT'S HOW WE HAVE TO DO IT. WE'RE SORT OF DAMNED IF YOU DO,  
9 DAMNED IF YOU DON'T.

10           IF WE SEND THEM IN A FORMAT WHERE THEY CAN'T BE  
11 PROCESSED, THEY'RE DEFICIENT. WHERE WE TRY TO SEND THEM IN  
12 ADOBE WHERE THEY HAVE THESE LIVE LINKS, THEY NOT ONLY REFUSE  
13 TO PROCESS THE NOTICES, BUT THEY FORWARD THE LIVE LINKS TO --

14           THE HONORABLE ALEX KOZINSKI: WHEN YOU SAY LIVE  
15 LINKS, YOU MEAN IF YOU CLICK ON THEM, THEY TAKE YOU THERE?

16           MR. SCHULTZ: EXACTLY. THEY TAKE YOU THERE AND --

17           THE HONORABLE ALEX KOZINSKI: WHY DO THEY HAVE TO  
18 BE LIVE LINKS? WHY CAN'T THEY BE DEAD LINKS?

19           MR. SCHULTZ: BECAUSE IN ADOBE, YOUR HONOR, I  
20 BELIEVE THAT'S THE WAY THAT THE NOTICES ARE FORWARDED.

21           THE HONORABLE ALEX KOZINSKI: AND YOU CAN'T GET  
22 ADOBE TO GIVE YOU JUST SIMPLY A PRINTED LINK NOT A LIVE LINK?

23           MR. SCHULTZ: I DON'T BELIEVE SO, YOUR HONOR, BUT  
24 I'M NOT CERTAIN --

25           THE HONORABLE ALEX KOZINSKI: BUT IF YOU'RE WRONG

1 --

2 MR. SCHULTZ: -- OF THAT.

3 THE HONORABLE ALEX KOZINSKI: BUT IF YOU'RE WRONG  
4 ABOUT THAT, THAT KILLS YOUR ARGUMENT?

5 MR. SCHULTZ: I DON'T THINK IT KILLS MY ARGUMENT,  
6 YOUR HONOR. BUT --

7 THE HONORABLE ALEX KOZINSKI: WELL, WHY DO YOU HAVE  
8 TO SEND IT IN ADOBE? WHY CAN'T YOU SEND AN IMAGE, A J-PEG OR  
9 SOMETHING THAT IT DOESN'T HAVE THE LIVE LINK IN IT?

10 IT HAS A FULL LINK. IT GIVES YOU A FULL -- BUT NOT  
11 SOMETHING THAT YOU CAN ACTUALLY CLICK ON. YOU COULD  
12 CERTAINLY DO IT IN WORD. YOU JUST TURN OFF THE FUNCTION THAT  
13 TURNS URLS INTO LIVE LINKS.

14 MR. SCHULTZ: YOUR HONOR, YOU COULD CERTAINLY DO  
15 THAT, AND THEN THEY WOULD BE VERY -- AND, THEN, IT WOULD BE  
16 MUCH MORE BURDENSOME FOR ANYONE TO BE ABLE TO PROCESS THOSE  
17 NOTICES BECAUSE YOU WOULD THEN HAVE TO --

18 THE HONORABLE ALEX KOZINSKI: THIS WOULD BE --  
19 YOU'RE DOING GOOGLE A FAVOR BY MAKING LIVE LINKS. I'M NOT  
20 BEING SARCASTIC. I'M JUST -- YOU'RE TRYING TO MAKE IT EASY  
21 ON THEM TO --

22 MR. SCHULTZ: YES, YOUR HONOR. I THINK USING ADOBE  
23 MAKES IT A LOT EASIER.

24 THE HONORABLE ALEX KOZINSKI: OKAY. I THINK --

25 MR. SCHULTZ: IF YOU HAVE NO OTHER QUESTIONS, I'D

1 LIKE TO RESERVE MY TIME.

2 THE HONORABLE ALEX KOZINSKI: YOU HAVE NO TIME TO  
3 RESERVE. WE'LL SEE IF WE GIVE YOU SOME TIME AFTERWARDS.

4 MR. SCHULTZ: THANK YOU, YOUR HONOR.

5 THE HONORABLE ALEX KOZINSKI: WE'LL HEAR FROM THE  
6 OTHER SIDE.

7 MR. SCHAPIRO: THANK YOU. MAY IT PLEASE THE COURT,  
8 ANDREW SCHAPIRO FOR THE APPELLEE GOOGLE.

9 THIS CASE IS HERE ON THE APPEAL OF A DENIAL OF A  
10 MOTION FOR A PRELIMINARY INJUNCTION.

11 AND AS I THINK MANY OF THE COURT'S QUESTIONS HAVE  
12 SUGGESTED, THAT'S A CRITICAL FACT. AND IT'S CRITICAL FOR AT  
13 LEAST FOUR REASONS. THE FIRST IS THAT ABSENT A SHOWING OF  
14 IRREPARABLE HARM, THE PLAINTIFFS CANNOT PREVAIL.

15 THE HONORABLE SANDRA S. IKUTA: WHAT'S WRONG WITH  
16 THE RES IPSA LOQUITUR ARGUMENT? I MEAN, IT CERTAINLY HAS A  
17 LOT OF COMMON SENSE APPEAL BECAUSE WE'RE REVIEWING THE  
18 DISTRICT COURT'S OPINION FOR AN ABUSE OF DISCRETION. SO, WE  
19 WOULD HAVE TO FIND THAT IT MADE -- IT MADE AN ERROR ON THAT.  
20 BUT YOU SAY, WELL, IF I CAN GET IT FOR FREE JUST BY PUTTING A  
21 MODEL'S NAME INTO THE GOOGLE'S SEARCH ENGINE, WHY AM I GOING  
22 TO SUBSCRIBE AND BUY IT. I MEAN, THAT HAS A LOT OF COMMON  
23 SENSE APPEAL.

24 MR. SCHAPIRO: SURE. EXCEPT THAT THE RECORD  
25 CONTAINS EVIDENCE THAT PERFECT 10 HAS NEVER MADE MONEY, YOUR

1 HONOR. IT HAS NEVER MADE MONEY. AND THE FACT THAT A  
2 MAGAZINE IN THIS DAY AND AGE IS HAVING SOME DIFFICULTIES,  
3 FINANCIAL OR OTHERWISE, IS NOT EVIDENCE THAT IT IS BEING  
4 IRREPARABLY HARMED BY GOOGLE. IT WOULD BE SIMPLE ENOUGH TO  
5 PUT IN A DECLARATION THAT HAS SOMETHING MORE THAN  
6 SPECULATION, THAT HAS SOME EXPERT ANALYSIS PROVIDING  
7 CAUSALITY.

8 BUT EVEN IF -- EVEN IF THERE WERE A SHOWING THAT  
9 PERFECT 10 WAS LOSING MONEY BECAUSE OF GOOGLE -- AND THERE IS  
10 NO SUCH SHOWING IN THE RECORD -- THAT'S NOT IRREPARABLE HARM.

11 THE HONORABLE SANDRA S. IKUTA: WELL, THEY MAKE --

12 MR. SCHAPIRO: THAT'S COMPENSABLE.

13 THE HONORABLE SANDRA S. IKUTA: THEY MAKE A SHOWING  
14 THAT THEY'RE LOSING MONEY. IT'S THE CAUSAL LINK --

15 MR. SCHAPIRO: THEY'VE ALWAYS BEEN LOSING MONEY.

16 THE HONORABLE SANDRA S. IKUTA: IT'S THE CAUSAL--  
17 THEY'RE LOSING MORE MONEY MORE RAPIDLY AS THE THUMBNAILS  
18 INCREASE. IT WAS THE CAUSAL LINK THAT THE DISTRICT COURT  
19 FOUND WAS LACKING. AND THEY SAID, WELL, WE STATED IT.  
20 THERE'S A DECLARATION. AND IT'S ALSO COMMON SENSE.

21 MR. SCHAPIRO: SO, I DON'T THINK THAT THE EVIDENCE  
22 SHOWS THAT THE RATE OF LOSING MONEY HAS INCREASED. BUT EVEN  
23 IF IT WERE, AND EVEN IF THIS COURT WERE WILLING -- AND I  
24 DON'T THINK IT SHOULD -- TO OVERLOOK THE CAUSATION PROBLEM,  
25 THAT'S STILL NOT IRREPARABLE HARM BECAUSE IT'S MONEY DAMAGES.

1 SO, THEY HAVEN'T MADE OUT THAT ELEMENT OF A SHOWING.

2 THEY'VE ALSO DELAYED TWO YEARS. AND THE CASES OF  
3 THIS COURT SUGGEST THAT A DELAY OF FAR MORE -- OF FAR LESS,  
4 RATHER, IS ENOUGH TO DEFEAT ANY CLAIM OF IRREPARABLE HARM.

5 BUT THERE ARE OTHER REASONS WHY THE POSTURE --

6 THE HONORABLE ALEX KOZINSKI: CAN YOU GIVE ME THE  
7 DELAY, FROM WHEN TO WHEN.

8 MR. SCHAPIRO: IT WAS TWO YEARS FROM THE TIME THE  
9 CASE WAS SENT BACK TO THE DISTRICT COURT TO THE TIME THAT  
10 THERE WAS THE SECOND MOTION FOR A PRELIMINARY INJUNCTION.

11 AND THE TIMING OF IT IS INTERESTING AND WORTH  
12 ATTENTION BECAUSE SUMMARY JUDGMENT PAPERS --

13 THE HONORABLE ALEX KOZINSKI: BUT MY GUESS THE  
14 DISTRICT COURT WOULD HAVE BEEN VERY UNHAPPY WITH THEM IF THEY  
15 HAD FILED A PRELIMINARY INJUNCTION MOTION RIGHT AFTERWARDS.  
16 YOU KNOW, YOU HAVE TO BE PRETTY CAREFUL. DISTRICT JUDGES CAN  
17 BE PRETTY TOUCHY. YOU PROBABLY KNOW THAT. YOU PRACTICE IN  
18 DISTRICT COURT. AND THEY DON'T LIKE TO HAVE THEIR DOCKETS  
19 BURDENED WITH UNNECESSARY, PREMATURE MOTIONS.

20 MR. SCHAPIRO: THAT IS CERTAINLY TRUE. AND,  
21 UNFORTUNATELY, THIS WAS AN UNNECESSARY AND PREMATURE MOTION.  
22 THIS MOTION WAS FILED --

23 THE HONORABLE ALEX KOZINSKI: YOU CAN'T TAKE A  
24 POSITION IT'S BOTH PREMATURE AND TOO LATE. I MEAN, TWO  
25 MINUTES AGO YOU SAID, OH, THEY WAITED TWO YEARS. NOW YOU'RE

1 SAYING IT'S PREMATURE.

2 MR. SCHAPIRO: I'M SORRY. MY POINT, YOUR HONOR,  
3 WAS THAT THEY PULLED THE TRIGGER ON THIS ON THE EVE OF A  
4 DECISION ABOUT SUMMARY JUDGMENT. THIS COURT WILL HAVE THE  
5 OPPORTUNITY, AND THESE PLAINTIFFS WILL HAVE THE OPPORTUNITY  
6 TO RAISE THE OBJECTIONS THEY MIGHT HAVE TO JUDGE MATZ'S  
7 RULINGS ABOUT THE CONTENT OF THE NOTICES IN DUE COURSE. THIS  
8 CASE IS STILL PLAYING ITSELF OUT. YOUR HONOR ASKED EARLY ON,  
9 WHAT ABOUT THE GROUP B NOTICES, FOR EXAMPLE. AND COUNSEL FOR  
10 THE PLAINTIFF SAID, WELL, WE'RE NOT SURE WHICH ONES WERE  
11 RULED APPROPRIATE OR NOT APPROPRIATE. THAT'S BECAUSE THEY  
12 RAN IN, SOUGHT A PRELIMINARY INJUNCTION. AND THAT WAS  
13 SUPPOSED TO BE THE NEXT STEP IN THE DISTRICT COURT BELOW.

14 THE HONORABLE SANDRA S. IKUTA: BUT ISN'T THAT JUST  
15 ON THE DMCA NOTICES. SO, IT'S JUST ON GOOGLE'S SAFE HARBOR,  
16 CORRECT, THE SUMMARY JUDGMENT PENDING BEFORE THE DISTRICT  
17 COURT? OR IS IT ALSO ON THE INFRINGEMENT CLAIMS?

18 MR. SCHAPIRO: SUMMARY JUDGMENT IS ON THE DMCA SAFE  
19 HARBOR ONLY.

20 THE HONORABLE SANDRA S. IKUTA: SO, EVEN IF GOOGLE  
21 PREVAILED, THE DISTRICT COURT STILL HAS TO FASHION INJUNCTIVE  
22 RELIEF. IT'S JUST LIMITED BY THE DMCA.

23 MR. SCHAPIRO: IT'S LIMITED AND, IMPORTANTLY -- AND  
24 THIS IS ANOTHER REASON WHY THIS COURT NEED NOT REACH THE  
25 ISSUES UNDERLYING PLAINTIFF'S ARGUMENTS -- THERE'S NOTHING



1 LEFT TO ENJOIN. THERE IS NOTHING IN ANY SUFFICIENT OR  
2 INTELLIGIBLE NOTICE THAT HAS NOT BEEN PROCESSED AND THAT HAS  
3 NOT BEEN DISABLED. AND THAT'S AN EXTREMELY --

4 THE HONORABLE SANDRA S. IKUTA: THAT'S THE DISPUTE,  
5 RIGHT? THAT'S WHAT'S IN DISPUTE? I MEAN, THE DISTRICT COURT  
6 DIDN'T AGREE WITH YOU ON THAT POINT.

7 MR. SCHAPIRO: EVEN THE GROUP B NOTICES, MY  
8 UNDERSTANDING IS THAT EVEN THE REMAINING GROUP B NOTICES AND  
9 EVEN THE -- SOME OF THE DIFFICULT-TO-UNDERSTAND NOTICES HAVE  
10 NOW BEEN PROCESSED. THERE'S SOME --

11 THE HONORABLE SANDRA S. IKUTA: HOW ABOUT THE 95  
12 NOTICES THAT THEY CLAIM THE DISTRICT COURT OVERLOOKED IN THE  
13 PRELIMINARY INJUNCTION MOTION?

14 MR. SCHAPIRO: MOST OF THOSE HAVE NOW BEEN  
15 PROCESSED AS WELL. THEY'VE NOT YET BEEN CONSIDERED BY THE  
16 DISTRICT COURT.

17 BUT GOOGLE HAS ALWAYS THROUGHOUT HAD A SIMPLE  
18 STANCE IN THIS CASE THAT HAS SAID -- AND IN ITS DEALINGS WITH  
19 PERFECT 10, THAT HAS SAID, TELL US WHAT THE MATERIAL IS, GIVE  
20 IT TO US IN SOME CLEAR WAY, SHOW US THEY OWN IT, AND WE'LL  
21 TAKE IT DOWN.

22 SO, WE HAVE GONE ABOVE AND BEYOND IN THE CASE OF  
23 MANY OF THESE DEFECTIVE NOTICES. WE DON'T HAVE AN OBLIGATION  
24 TO, BUT WE HAVE DONE THAT.

25 AND THERE WAS A DIALOGUE BETWEEN JUDGE KOZINSKI AND

1 THE LAWYER FOR THE PLAINTIFFS EARLIER ABOUT WHETHER THERE'S  
2 AN OBLIGATION FOR US TO WORK WITH THE PLAINTIFFS TO TRY AND  
3 HELP THEM SOLVE THE DEFECTS IN THEIR NOTICES.

4 AND THE RECORD IS VERY CLEAR ON THAT, THAT GOOGLE  
5 HAS, WHETHER WE'RE REQUIRED TO OR NOT, REACHED OUT TO  
6 PLAINTIFFS TIME AND TIME AGAIN. AND THERE'S CITATIONS FOR  
7 THIS IN THE SUPPLEMENTAL EXCERPTS FROM RECORD AT PAGE 1780.  
8 YOU'LL FIND AN EMAIL FROM GOOGLE POLITELY ASKING FOR SOFT  
9 COPY SPREADSHEETS, WHICH IS ALL WE WANT --

10 THE HONORABLE SANDRA S. IKUTA: LET ME JUST TAKE A  
11 STEP BACK FOR A MINUTE. AND THIS IS WHAT I WAS STRUGGLING  
12 WITH ON THE CONTRIBUTORY INFRINGEMENT ARGUMENT AND THE SIMPLE  
13 MEASURES ARGUMENT.

14 BECAUSE GOOGLE IS SO EFFECTIVE AS A SEARCH ENGINE  
15 -- I MEAN, THEY NOW REALLY ASSISTED ALL OF THESE INFRINGING  
16 SITES TO MULTIPLY THEMSELVES IMMENSELY. I DON'T THINK THERE  
17 CAN BE A BIG DISPUTE ABOUT THAT. AND, THEN, PERFECT 10 SAYS,  
18 WELL, LOOK, YOU HAVE THIS SIMILAR IMAGES SEARCH. YOU COULD  
19 GO THROUGH AND GET ALL OF THE IMAGES THAT THEY'VE INDICATED  
20 ARE INFRINGING, THAT ONLY THEY HAVE THE RIGHT TO DISPLAY, AND  
21 YOU COULD BLOCK ALL THOSE URLS.

22 THAT ARGUMENT HAS SOME APPEAL GIVEN GOOGLE'S  
23 CURRENT EXISTING TECHNOLOGY THAT IT'S USING. SO, WHY ISN'T  
24 WHEN YOU LOOK AT -- IS GOOGLE -- DOES IT KNOW OF THE  
25 INFRINGEMENT. YES. AND COULD IT TAKE STEPS TO BLOCK THESE

1 SITES. AND THEY ARGUE, YES, THEY HAVE THE TECHNOLOGY  
2 ALREADY.

3 WHY DOESN'T THAT MEET THE CONTRIBUTORY INFRINGEMENT  
4 STANDARD OR TEST?

5 MR. SCHAPIRO: JUDGE MATZ DID NOT ABUSE HIS  
6 DISCRETION TO FIND, A, THAT THE DECLARATION SUBMITTED BY DR.  
7 ZADA WAS PURELY SPECULATIVE ABOUT THE POWERS OF IMAGE  
8 RECOGNITION.

9 BUT MORE IMPORTANTLY, IMAGE RECOGNITION IS NOT  
10 LICENSE RECOGNITION. IT'S NOT FAIR USE RECOGNITION.

11 THE HONORABLE SANDRA S. IKUTA: BUT IF PERFECT 10  
12 -- I KNOW YOU MADE THAT ARGUMENT. BUT IF PERFECT 10 SAYS,  
13 LOOK, WE GIVE OUR MODEL A DIFFERENT NAME, AN ALIAS. SO, IF  
14 YOU FIND ANYTHING WITH THAT NAME OR ANY IMAGE WITH THAT NAME,  
15 IT'S ONLY -- WE'RE THE ONLY ONES WHO HAVE THE RIGHT TO USE  
16 IT.

17 AND, THEN, YOU CAN GET A COUNTER NOTICE IF YOU  
18 MISTAKENLY TAKE DOWN AN IMAGE WHERE THE PERSON HAS A LICENSE.

19 MR. SCHAPIRO: UNFORTUNATELY, IT'S SIMPLY NOT TRUE  
20 THAT THEY'RE THE ONLY PEOPLE ENTITLED TO USE THOSE  
21 LIKENESSES. I'LL DIRECT THE COURT TO THE SUPPLEMENTAL  
22 EXCERPTS OF RECORD AT PAGES 2136 TO 2196 WHERE WE HAVE A  
23 WHOLE SERIES OF COUNTER NOTIFICATIONS --

24 THE HONORABLE ALEX KOZINSKI: WHAT VOLUME IS THAT?

25 MR. SCHAPIRO: PARDON ME?

1 THE HONORABLE ALEX KOZINSKI: DO YOU KNOW WHAT  
2 VOLUME IT IS?

3 (MR. SCHAPIRO BRIEFLY CONFERRING.)

4 THE HONORABLE ALEX KOZINSKI: IS IT A SUPPLEMENTAL?

5 MR. SCHAPIRO: IT'S IN A SUPPLEMENTAL, 2136 TO  
6 2196.

7 THE HONORABLE ALEX KOZINSKI: 136?

8 MR. SCHAPIRO: 2136 TO 2196, VOLUME X.

9 THE HONORABLE ALEX KOZINSKI: VOLUME X.

10 GO AHEAD.

11 MR. SCHAPIRO: AT THOSE PAGES THE COURT WILL FIND  
12 MANY EXAMPLES OF COUNTER NOTIFICATIONS, ONE IN WHICH AN  
13 AUTHOR POINTS OUT THAT HE HOLDS LICENSES FOR THE IMAGES AT  
14 ISSUE; ANOTHER IN WHICH THE AUTHOR EXPLAINS THAT HE ONLY CAME  
15 TO LEARN OF THE TAKE-DOWN FROM THE CHILLING EFFECTS -- FROM  
16 THE CHILLING EFFECTS WEBSITE.

17 SIMILARLY, A COUNTER NOTIFICATION IN WHICH THE  
18 AUTHOR DESCRIBES PERFECT 10'S DMCA NOTICE AS VAGUE AND  
19 INCOMPREHENSIBLE AND SAYS, I QUOTE, YOU CAN'T EVEN TELL WHICH  
20 IMAGE OR FILE THEY'RE COMPLAINING ABOUT.

21 AND NEITHER CAN WE.

22 SO, THE MERE FACT THAT THERE'S SOME SPECULATION IN  
23 THE RECORD SUGGESTING THAT THE IMAGE TECHNOLOGY -- IMAGE  
24 RECOGNITION TECHNOLOGY OUT THERE EVEN IF IT DIDN'T HAVE THE  
25 OTHER DEFECTS, EVIDENTIARY DEFECTS, WOULD ALSO SUFFER FROM

1 THE -- THAT IMAGE RECOGNITION TECHNOLOGY IS NOT INFRINGEMENT  
2 RECOGNITION TECHNOLOGY.

3 THE HONORABLE SANDRA S. IKUTA: WELL, THEY DID HAVE  
4 NUMEROUS PAGES SHOWING SIMILAR IMAGE. AND I KNOW THAT GOOGLE  
5 DOES HAVE THAT CAPABILITY. AND THEY HAVE THE PAGES THERE  
6 THAT WERE SENT TO THE DISTRICT COURT. AND THERE WAS THE  
7 MC PHATTER DECLARATION, AND THERE WAS THE TIN EYE MATERIAL.  
8 SO, THEY HAD MORE THAN THE ZADA DECLARATION. I'M WONDERING  
9 WHETHER THAT WAS NOT SHOWN TO THE DISTRICT COURT OR WHY THE  
10 DISTRICT COURT SAID THAT ALL THAT WAS PRESENTED WAS THE ZADA  
11 DECLARATION.

12 MR. SCHAPIRO: HERE'S WHAT THE MC PHATTER  
13 DECLARATION SAID, YOUR HONOR. IT SAID, QUOTE, GOOGLE APPEARS  
14 TO HAVE IMAGE RECOGNITION TECHNOLOGY. AND HE SAID THAT BASED  
15 ON HIS USE OF IMAGE SEARCH HE HAS NO KNOWLEDGE OF GOOGLE  
16 TECHNOLOGY. HE WAS NEVER DISCLOSED AS AN EXPERT. NO  
17 METHODOLOGY OR BASIS FOR THE OPINION. AND HE DOES NOT  
18 ADDRESS -- SORRY. AND O'CONNOR DOES NOT ADDRESS IMAGE  
19 RECOGNITION TECHNOLOGY.

20 WE FIND OURSELVES HERE IN THE UNITED STATES COURT  
21 OF APPEALS BATTLING ABOUT THESE EVIDENTIARY ISSUES. AND I  
22 THINK THAT THAT ILLUSTRATES WHY THIS FIGHT IS IN THE WRONG  
23 COURTROOM, UNLESS THERE'S SOME STRONG BASIS FOR AN  
24 INJUNCTION. AND I LOOK AT THESE EXHIBITS, AND I FEEL LIKE  
25 I'VE WALKED INTO A DISTRICT COURT.

1           BUT THESE ARE NOT THE FACTS THAT WERE FOUND BY THE  
2 DISTRICT COURT. AND THE DISTRICT COURT'S FINDINGS WERE NOT  
3 CLEARLY ERRONEOUS. THEY WERE, IN FACT, WE BELIEVE CLEARLY  
4 CORRECT.

5           THIS CASE CAN BE DISPOSED OF ON OTHER GROUNDS AS  
6 WELL. SOME OF THE FACTS THAT THERE WAS NO SHOWING -- NOT  
7 EVEN A SHOWING, BUT THERE WAS NO ARGUMENT MADE BELOW ABOUT  
8 PUBLIC INTEREST OR BALANCE OF THE EQUITIES.

9           YOU ASKED QUESTIONS ABOUT THAT, JUDGE IKUTA. JUDGE  
10 MATZ AT PAGE 10027 OF THE EXCERPTS OF RECORD IN HIS DECISION,  
11 THE DECISION ON APPEAL, STATED THAT PERFECT 10 MADE NO  
12 ARGUMENT, ZERO, ABOUT PUBLIC INTEREST OR BALANCE OF EQUITIES  
13 IN ITS MOTION OR ITS REPLY BRIEF.

14           WHY DOESN'T THAT DISPOSE OF THE ISSUE. WHY ISN'T  
15 THAT WAIVER.

16           THE STANDARD OF REVIEW HERE AS WELL IS ONE THAT I  
17 THINK COUNSELS AGAINST GETTING DEEPLY INTO THE MERITS OF THIS  
18 NOTICE OR THAT NOTICE OR WHETHER GOOGLE CAN USE IMAGE  
19 RECOGNITION TECHNOLOGY.

20           AS I SAID EARLIER, THERE WAS ONLY A PARTIAL SUMMARY  
21 JUDGMENT ORDER ISSUED BELOW. SO, THOSE ISSUES, EVEN IN THE  
22 CONTEXT OF THE DMCA, CAN FIND THEIR WAY TO THIS COURT IN DUE  
23 COURSE BUT NOT AT THIS TIME.

24           THE HONORABLE ALEX KOZINSKI: TALKING A LITTLE BIT  
25 -- TALK A LITTLE BIT ABOUT BLOGGER.

1 MR. SCHAPIRO: YES.

2 THE HONORABLE ALEX KOZINSKI: THIS IS SORT OF A  
3 DIFFERENT CASE IN A WAY.

4 MR. SCHAPIRO: SURE. FIRST OF ALL --

5 THE HONORABLE ALEX KOZINSKI: I MEAN, IT PRESENTS A  
6 DISCRETE ISSUE.

7 MR. SCHAPIRO: IT WASN'T UP BEFORE THE COURT  
8 BEFORE.

9 FIRST OF ALL, SINCE WE ARE AGAIN IN THE PRELIMINARY  
10 INJUNCTION POSTURE, THERE'S BEEN NO SHOWING OF IRREPARABLE  
11 HARM RELATING TO BLOGGER. IT INVOLVES ONLY -- AS TO  
12 UNDERLYING LIABILITY, IT INVOLVES ONLY PASSIVE PROCESSING OF  
13 USER'S UPLOADS. SO, THERE'S LITTLE LIKELIHOOD OF SUCCESS ON  
14 DIRECT INFRINGEMENT. AND ON --

15 THE HONORABLE ALEX KOZINSKI: BUT THOSE IMAGES ARE  
16 ON GOOGLE'S OWN SERVERS.

17 MR. SCHAPIRO: YES, MANY OF THEM ARE. YES.

18 THE HONORABLE ALEX KOZINSKI: AND THEN YOU GET --

19 MR. SCHAPIRO: AND JUST AS THE COURT SAID --

20 THE HONORABLE ALEX KOZINSKI: SO, THEN YOU GET TO  
21 THE OTHER PERFECT 10 CASE, RIGHT? WHICH TALKED ABOUT  
22 CARRYING THINGS ON, YOU KNOW, A SERVER.

23 MR. SCHAPIRO: THE ISSUE WAS LEFT OPEN.

24 THE HONORABLE ALEX KOZINSKI: SORRY.

25 MR. SCHAPIRO: THE ISSUE WAS LEFT OPEN. THE WEIGHT

1 OF AUTHORITY -- IN FACT, ALL THE AUTHORITIES HAVE FOUND THAT  
2 PASSIVE UPLOADS SUCH AS THIS DO NOT RESULT IN THE STRICT  
3 LIABILITY, WHICH IS THE HALLMARK OF DIRECT INFRINGEMENT.  
4 THERE'S THE COSTAR CASE. THERE ARE DISTRICT COURT CASES THAT  
5 WE CITE IN OUR BRIEF.

6 BUT BEYOND THAT, THERE IS NO EVIDENCE -- AND JUDGE  
7 MATZ CITED THIS -- OF ANY BLOGGER URLS THAT GOOGLE DIDN'T  
8 DISABLE. ACTUALLY, THE ONLY ONES WERE IN GROUP C WHICH HAS  
9 ITS OWN PROBLEMS. BUT OTHER THAN THOSE THAT WERE IN GROUP C  
10 THERE ARE NONE THAT WERE NOT DISABLED BY BLOGGER. SO,  
11 THERE'S NOTHING TO -- BY GOOGLE. THERE'S NOTHING TO ENJOIN  
12 HERE.

13 THE HONORABLE SANDRA S. IKUTA: COULD YOU ADDRESS  
14 THE DISTRICT COURT'S DISCUSSION ON THE VICARIOUS LIABILITY ON  
15 THE FINANCIAL BENEFIT AND WHETHER THE USE OF THE ADSENSE AND  
16 THE CLICKS IS ENOUGH TO GIVE A DIRECT FINANCIAL OR A DIRECT  
17 ENOUGH FINANCIAL BENEFIT.

18 MR. SCHAPIRO: IT'S NOT ENOUGH FOR A DIRECT  
19 FINANCIAL BENEFIT. AS THE ELLISON CASE HOLDS, THERE HAS TO  
20 BE A CAUSAL LINK BETWEEN THE INFRINGEMENT OR THE PRESENCE OF  
21 THE INFRINGING MATERIAL AND THE FINANCIAL BENEFIT. THAT'S  
22 THE WORK THAT IS DONE BY THE WORD "DIRECT."

23 THE HONORABLE SANDRA S. IKUTA: SO, THE IMAGES OF  
24 THE WOMEN ATTRACT PEOPLE TO THE SITE, AND, THEN, WHEN THEY'RE  
25 THERE, THEY CLICK ON THE ADS. ISN'T THAT THE WHOLE IDEA



1 BEHIND ADSENSE?

2 MR. SCHAPIRO: THE IMPORTANT POINT FOR DIRECT  
3 FINANCIAL BENEFIT IS THAT THERE HAS TO BE SOME  
4 DIFFERENTIATION BETWEEN THE DRAW FROM LEGITIMATE MATERIAL AND  
5 INFRINGING MATERIAL. ARE YOU GETTING A DIRECT FINANCIAL  
6 BENEFIT FROM INFRINGING ACTIVITY, OR ARE YOU JUST GETTING THE  
7 SAME SORT OF FINANCIAL BENEFIT YOU WOULD GET FROM RUNNING  
8 YOUR SITE IN ANY EVENT.

9 I THINK THE AUTHORITIES ARE SOLID ON THAT. AND  
10 THIS COURT'S ELLISON DECISION CERTAINLY FOUND THAT -- I'M  
11 GOING TO QUOTE FROM IT HERE -- "THE ESSENTIAL ASPECT OF THE  
12 DIRECT FINANCIAL BENEFIT INQUIRY IS WHETHER THERE IS A CAUSAL  
13 RELATIONSHIP BETWEEN THE INFRINGING ACTIVITY AND ANY  
14 FINANCIAL BENEFIT A DEFENDANT REAPS."

15 AND IT HELD IN THAT CASE THAT -- THIS COURT HELD  
16 RATHER -- THAT THERE WAS NOT A DIRECT FINANCIAL BENEFIT FROM  
17 PROVIDING ACCESS TO INFRINGING MATERIAL WHERE THE RECORD  
18 LACKED EVIDENCE THAT THE DEFENDANT ATTRACTED OR RETAINED  
19 SUBSCRIPTIONS BECAUSE OF THE INFRINGEMENT SPECIFICALLY.

20 AND THAT'S NOT SATISFIED HERE. THERE'S CERTAINLY  
21 NOTHING IN THE RECORD THAT WOULD SUPPORT THAT.

22 NOW, OF COURSE, AS YOU KNOW, YOUR HONOR, VICARIOUS  
23 LIABILITY ALSO HAS A SECOND INDEPENDENT FACTOR, AND THAT'S  
24 THE RIGHT OR ABILITY TO CONTROL THE INFRINGEMENT. AND I  
25 THINK WITH BLOGGER IN PARTICULAR THAT TEST CAN'T BE MET AS

1 WELL. GOOGLE DOES NOT CONTROL WHAT PEOPLE POST ON BLOGGER.

2 IT DOES TAKE DOWN INFRINGING MATERIAL --

3 THE HONORABLE ALEX KOZINSKI: -- USE BLOGGER YOU  
4 HAVE TO CLICK ON AN AGREEMENT OR AGREE TO THE TERMS OF USE.  
5 AND I AM GUESSING THE TERMS OF USE INVOLVES PROMISES NOT TO  
6 DISPLAY ILLEGAL MATERIAL.

7 MR. SCHAPIRO: YES, YES.

8 THE HONORABLE ALEX KOZINSKI: INFRINGING MATERIAL,  
9 DEFAMATORY MATERIAL, RIGHT?

10 MR. SCHAPIRO: YES.

11 THE HONORABLE ALEX KOZINSKI: I AM JUST GUESSING,  
12 BUT I'VE READ ENOUGH OF THOSE LICENSES. I'VE SCROLLED DOWN  
13 OFTEN ENOUGH TO KNOW THAT --

14 MR. SCHAPIRO: YOU'RE THE ONLY PERSON WHO READS TO  
15 THE END OF THEM, YOUR HONOR. MOST PEOPLE JUST CLICK RIGHT  
16 THROUGH. BUT, YES, YOUR HONOR, YOU'RE CORRECT.

17 THE HONORABLE ALEX KOZINSKI: I DIDN'T SAY TO THE  
18 END OF THEM. I JUST SAID ENOUGH.

19 THE HONORABLE MICHAEL DALY HAWKINS: -- OUR INTEREST  
20 UP.

21 MR. SCHAPIRO: THAT'S ABSOLUTELY TRUE. BUT MERE  
22 CONTROL OVER THE SITE IS NOT CONTROL OVER THE ENTIRE --

23 THE HONORABLE ALEX KOZINSKI: WELL, HOW IS THAT  
24 DIFFERENT THAN KICKING SOMEBODY OFF A FLEA MARKET?

25 MR. SCHAPIRO: WELL, THE FONOVISA -- IN FONOVISA,

1 FIRST OF ALL -- AND I KNOW THAT YOUR HONOR IN THE DISSENT IN  
2 THE VISA CASE QUESTIONED THIS, BUT THERE IS MERIT TO THE  
3 ARGUMENT THAT IN A CONTROLLED, PHYSICAL SPOT THEY CAN EASILY  
4 BE PATROLLED. PEOPLE WALK THROUGH AND THEY SEE WHAT'S THERE.  
5 THEY'RE MASSIVELY AWARE OF WHAT'S GOING ON IN THE FLEA  
6 MARKET. THAT PRESENTS A DIFFERENT SITUATION THAN A BLOG.

7 BUT EVEN IF IT DIDN'T -- THE RECORD AS I STATED  
8 BEFORE SHOWS --

9 THE HONORABLE ALEX KOZINSKI: WELL, I'M SORRY. I  
10 THOUGHT YOU WERE GOING TO TELL ME HOW IS THAT DIFFERENT. YOU  
11 JUST SAID, OH, THEY'RE DIFFERENT. OH, WELL. OKAY. HOW ARE  
12 THEY DIFFERENT. I MEAN, YOU KNOW, YOU'RE NOT GOING TO RELY  
13 ON THE DIFFERENCE BETWEEN PHYSICAL SPACE AND CYBER SPACE AND  
14 --

15 MR. SCHAPIRO: NO, NOT ON THAT DIFFERENCE, YOUR  
16 HONOR. IT'S A DIFFERENCE OF THE SIZE, THE SCOPE AND THE  
17 ABILITY SIMPLY BY WALKING THROUGH THE FLEA MARKET, FOR  
18 EXAMPLE, TO SEE WHAT'S GOING ON THERE. GOOGLE HAS NO  
19 OBLIGATION TO PATROL BLOGGER.

20 BUT IN ANY EVENT IT HAS TAKEN DOWN ANYTHING FOR  
21 WHICH IT HAS RECEIVED AN INTELLIGIBLE NOTICE FROM P-10 FROM  
22 BLOGGER. THERE IS NO INFRINGING MATERIAL STILL ON BLOGGER  
23 THAT HAS A URL THAT CAN BE DISCERNED.

24 THE HONORABLE ALEX KOZINSKI: SO, THAT'S YOUR  
25 ANSWER. I MEAN, IT'S PERFECTLY ALL RIGHT. I JUST WANT TO

1 KNOW WHAT YOUR ULTIMATE ANSWER WAS.

2 AND HOW ABOUT CHILLING EFFECTS. DOES GOOGLE REALLY  
3 HAVE TO SEND LIVE LINKS TO CHILLING EFFECTS?

4 MR. SCHAPIRO: YOUR HONOR WAS ABSOLUTELY CORRECT IN  
5 THAT THIS IS A PROBLEM UTTERLY OF PERFECT 10'S OWN MAKING.  
6 GOOGLE HAS ASKED PERFECT 10 AGAIN AND AGAIN, A, STOP SENDING  
7 IMAGES LIKE THIS IN YOUR DMCA NOTICES. WE DON'T NEED THEM.  
8 THEY MAKE OUR JOB HARDER, IN FACT. PLEASE JUST SEND US SOFT  
9 COPY SPREADSHEETS. B, DON'T SEND THEM IN ADOBE. WE DON'T  
10 WANT THEM IN ADOBE. THAT ACTUALLY MAKES IT HARDER FOR US.

11 AND IN TERMS OF WORKING BACK AND FORTH, AS I SAID,  
12 STARTING AT PAGE 1780 IN THE SUPPLEMENTAL EXCERPTS, THERE'S A  
13 WHOLE EMAIL CHAIN BACK AND FORTH IN WHICH WE'RE TRYING TO GET  
14 THEM TO BE COOPERATIVE WITH US.

15 THERE'S NO NEED FOR THEM TO HAVE THIS  
16 SELF-INFLICTED WOUND UNLESS PERHAPS THEY WOULD RATHER BE IN  
17 LITIGATION THAN IN A MONEY-LOSING SOFT CORE ADULT  
18 ENTERTAINMENT BUSINESS.

19 IT'S INEXPLICABLE TO US WHY THEY KEEP --

20 THE HONORABLE ALEX KOZINSKI: WHAT?

21 MR. SCHAPIRO: IT'S INEXPLICABLE TO US. AND WHEN  
22 PLAINTIFF'S COUNSEL STOOD UP A FEW MOMENTS AGO AND SAID,  
23 WELL, WE HAD NO IDEA THAT --

24 THE HONORABLE ALEX KOZINSKI: I'M SORRY. JUST TO  
25 BE SURE I UNDERSTAND. YOU ARE NOT ASKING FOR LIVE LINKS.

1 MR. SCHAPIRO: WE ARE NOT ASKING FOR LIVE LINKS.

2 THE HONORABLE ALEX KOZINSKI: AND YOU DON'T LIKE  
3 ADOBE -- YOU DON'T LIKE PDFS.

4 MR. SCHAPIRO: WE WANT SOFT COPY SPREADSHEETS SO  
5 THAT WE CAN COPY THINGS OUT OF THEM RATHER THAN TO HAVE TO  
6 MANUALLY TYPE THEM IN. AND WE'VE SAID THIS TO PERFECT 10 A  
7 HUNDRED DIFFERENT WAYS. AND THE VAST MAJORITY OF CONTENT  
8 OWNERS OUT THERE UNDERSTAND IT EVEN IF THEY HAVE LOTS OF  
9 CONTENT, AND THEY PROVIDED IT, AND WE WORK WITH THEM TO DO  
10 OUR JOB AND DISABLE THE LINKS.

11 BUT WHEN PLAINTIFF'S COUNSEL SAID A FEW MINUTES AGO  
12 THAT HE HAD NO IDEA UNTIL RECENTLY THAT -- THAT PERFECT 10  
13 HAD NO IDEA THAT THEIR NOTICES WERE BEING FORWARDED TO  
14 CHILLING EFFECTS, I TRULY HAD TO SCRATCH MY HEAD BECAUSE  
15 PERFECT 10 ITSELF HAS USED CHILLING EFFECTS AND CITED IT IN  
16 LITIGATION, IN THIS LITIGATION.

17 THE COURT CAN LOOK AT THE CHILLING EFFECTS AMICUS  
18 BRIEF WHICH HAS SOME OF THOSE CITATIONS. SO, MAYBE I'M JUST  
19 CONFUSED ABOUT THE TIMING, BUT THAT STATEMENT IS HARD TO TAKE  
20 SERIOUSLY WHEN THEY'VE USED CHILLING EFFECTS THEMSELVES IN  
21 THE LITIGATION.

22 UNLESS THE COURT HAS FURTHER QUESTIONS.

23 THE HONORABLE ALEX KOZINSKI: THANK YOU.

24 I'LL HAVE TIME. WE'LL GIVE YOU A MINUTE FOR A  
25 REBUTTAL IF YOU WISH TO TAKE IT.

1 MR. SCHULTZ: HOW MUCH, YOUR HONOR?

2 THE HONORABLE ALEX KOZINSKI: ABOUT A MINUTE. A  
3 MINUTE.

4 MR. SCHULTZ: WITH RESPECT TO BLOGGER, WE'VE  
5 SUBMITTED UNCONTROVERTED EVIDENCE THAT THERE ARE STILL 565  
6 BLOG SPOT SITES THAT ARE HOSTING THOUSANDS OF PERFECT 10  
7 IMAGES. SO, THE NOTION THAT GOOGLE HAS DONE EVERYTHING IS  
8 SIMPLY INCORRECT. THERE IS IRREPARABLE HARM GOING FORWARD.

9 WITH RESPECT TO THE ISSUE OF IMAGE RECOGNITION,  
10 JUDGE IKUTA GOT IT EXACTLY RIGHT. THE WAY TO DEAL WITH THIS  
11 IS THE COUNTER NOTIFICATION PROCESS. AND GOOGLE CAN USE ITS  
12 "SEE SIMILAR IMAGE" FUNCTION.

13 WITH RESPECT TO THE ISSUE OF WHETHER OR NOT WE'VE  
14 SHOWN IRREPARABLE HARM, WE'VE SHOWN UNCONTROVERTED EVIDENCE  
15 THAT WE'RE NEAR BANKRUPTCY. PUTTING THE CAUSAL ISSUE ASIDE  
16 FOR THE MOMENT, THE SUPREME COURT IN DORAN SPECIFICALLY --  
17 SPECIFICALLY SAYS THAT THAT IS SUFFICIENT TO GET YOU  
18 IRREPARABLE HARM.

19 AND, FINALLY, WITH RESPECT TO THE RIGHT AND ABILITY  
20 TO CONTROL, IN FACT, GOOGLE IS ABLE TO TAKE DOWN AND DO  
21 WHATEVER IT WANTS WITH THESE BLOG SPOT SITES. SO, IT SEEMS  
22 TO ME THAT'S DIRECT INFRINGEMENT RIGHT THERE.

23 MR. MAUSNER HAS ASKED IF HE COULD HAVE A MINUTE AS  
24 WELL AFTER --

25 THE HONORABLE MICHAEL DALY HAWKINS: I HAVE A

1 QUESTION.

2 MR. SCHULTZ: YES.

3 THE HONORABLE MICHAEL DALY HAWKINS: IF WE WERE TO  
4 SEND THIS BACK TO DISTRICT COURT AND DIRECT THE ISSUE OF A  
5 PRELIMINARY INJUNCTION, CAN YOU BOND AROUND IT? CAN YOUR  
6 CLIENT BOND IT?

7 MR. SCHULTZ: I BELIEVE SO. I MUST ADMIT, YOUR  
8 HONOR, I HAVE NOT -- I HAVE NOT ASKED MY CLIENT THAT SPECIFIC  
9 QUESTION, BUT I BELIEVE WE WOULD BE ABLE TO DO SO. THAT  
10 SHOULD NOT PREVENT YOUR HONORS FROM SENDING US BACK TO THE  
11 DISTRICT COURT.

12 THE HONORABLE ALEX KOZINSKI: I'M SORRY. MR.  
13 MAUSNER WANTS TO SPEAK?

14 MR. MAUSNER: YES, ONE MINUTE, YOUR HONOR.

15 THE HONORABLE ALEX KOZINSKI: ALL RIGHT. YOU  
16 REPRESENT SOMEBODY ELSE?

17 MR. MAUSNER: I'M SORRY?

18 THE HONORABLE ALEX KOZINSKI: YOU REPRESENT THE  
19 SAME CLIENT?

20 MR. MAUSNER: YES, YOUR HONOR.

21 THE HONORABLE ALEX KOZINSKI: OKAY. WE'LL HEAR A  
22 MINUTE.

23 MR. MAUSNER: THE PROVISION OF THE DMCA REQUIRING  
24 COOPERATION IS 512(C)(3)(B)(I) -- 512((C)(3)(B)(1). THE SHOW  
25 "SIMILAR IMAGES" WAS SHOWN TO THE DISTRICT COURT, JUDGE

1 IKUTA. IT'S AT ER 40211 TO 40235, I BELIEVE.

2 GOOGLE HAS REPEATEDLY TOLD PERFECT 10 THAT THE  
3 SPREADSHEET NOTICES ARE ALL DEFICIENT. THAT'S WHY PERFECT 10  
4 STARTED SENDING THE ADOBE GROUP C NOTICES.

5 AND THE LAST THING, YOUR HONORS, IS GOOGLE HAS  
6 CITED TO PAGES 2136 TO 2196, VOLUME X. THAT'S 60 PAGES OF  
7 COUNTER NOTIFICATIONS. PERFECT 10 HAS SENT THOUSANDS -- TENS  
8 OF THOUSANDS OF URLS, AND THERE HAVE ONLY BEEN AT MOST 60  
9 COUNTER NOTIFICATIONS THAT THEY SUBMITTED.

10 THAT'S ALL.

11 THE HONORABLE ALEX KOZINSKI: OKAY.

12 MR. MAUSNER: THANK YOU, YOUR HONOR.

13 THE HONORABLE ALEX KOZINSKI: -- WE'RE ADJOURNED.

14 THE CLERK: ALL RISE.

15 (PROCEEDINGS CONCLUDED.)

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C E R T I F I C A T E

I CERTIFY THAT THE FOREGOING IS A CORRECT  
TRANSCRIPT FROM THE ELECTRONIC SOUND RECORDING OF THE  
PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

DOROTHY BABYKIN

*Dorothy Babykin*

FEDERALLY CERTIFIED TRANSCRIBER

DOROTHY BABYKIN

4/19/11

*4/19/11*

DATED