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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PERFECT 10, INC., a California corporation,

Plaintiff,

vs.

GOOGLE INC., a corporation; and DOES 1 through 100, inclusive,

Defendants.

AND COUNTERCLAIM

PERFECT 10, INC., a California corporation,

Plaintiff,

vs.

AMAZON.COM, INC., a corporation; A9.COM, INC., a corporation; and DOES 1 through 100, inclusive,

Defendants.

CASE NO. CV 04-9484 AHM (SHx)
[Consolidated with Case No. CV 05-4753 AHM (SHx)]

GOOGLE INC.'S OBJECTIONS TO THE MAGISTRATE JUDGE'S ORDER OF FEBRUARY 22, 2008, GRANTING IN PART PLAINTIFF PERFECT 10, INC.'S MOTION TO COMPEL; AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

[DECLARATION OF RACHEL M. HERRICK AND [PROPOSED] ORDER FILED CONCURRENTLY HEREWITH]

Hon. A. Howard Matz

Courtroom: 14
Hearing Date: April 14, 2008
Hearing Time: 10:00 am
Discovery Cutoff: None Set
Pretrial Conference Date: None Set
Trial Date: None Set

TO PERFECT 10, INC. AND THEIR ATTORNEYS OF RECORD:

Please take notice that on April 14, 2008, at 10:00 am, or as soon thereafter as the matter may be heard in the above-entitled Court located at Courtroom 14, 312 N. Spring Street, Los Angeles, CA 90012, Defendant Google Inc. ("Google") will and hereby does move this Court pursuant to Fed. R. Civ. P. 72(a) and Local Rule 72-2.1 to sustain Google's Objections to the Magistrate Judge's Order re: Perfect 10's Motion to Compel Defendant Google Inc. to Produce Documents, issued February 22, 2008.

Google's motion is based on this Notice of Motion and Objections to the Magistrate Judge's Order of February 22, 2008 under Fed. R. Civ. P. 72(a) and Local Rule 72-2.1; the Memorandum of Points and Authorities submitted herewith; all other pleadings and matters of record in this case; and such other evidence of which this Court may take judicial notice.

CERTIFICATION OF COMPLIANCE WITH LOCAL RULE 7-3

This motion is made following the conference of counsel pursuant to Local Rule 7-3 which took place on March 4, 2008 and times thereafter.

DATED: March 14, 2008

QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP

By /s/ Michael T. Zeller
Michael T. Zeller
Rachel M. Herrick
Attorneys for Defendant GOOGLE INC.

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MEMORANDUM OF POINTS AND AUTHORITIES

Preliminary Statement

Perfect 10 has sued Google for alleged copyright and trademark infringement and on related state law claims. Perfect 10 asserts that Google is not, in fact, an information location tool, as it is famously known throughout the world, but is instead engaged in a purported "massive misappropriation" of Perfect 10's materials through google.com, its website. During the course of this lawsuit, Perfect 10 has propounded well over a *thousand* document requests, requests for admission and interrogatories, the vast majority of which have had little or no relevance to the claims and issues presented in this case. Thus, rather than engaging in focused litigation to defend its alleged intellectual property, Perfect 10 is on a fishing expedition to uncover information regarding the online adult entertainment world generally and Google's non-public, sensitive research and development efforts.

On February 22, 2008, Magistrate Judge Hillman granted in part and denied in part Perfect 10's latest motion to compel regarding more than 100 document requests. Google respectfully seeks review of the portions of that Order with respect to three specific document categories that the Magistrate Judge compelled: (1) general user behavior and the entire online adult content market (Request Nos. 128-131 and 194-5); (2) Google's research and development efforts regarding image recognition software (Request No. 174); and (3) Google's entire DMCA Log regarding all complaints ever received from any content owner or provider (Request No. 196).

Google respectfully submits that these requests are not relevant to the claims and defenses in the case and thus that the Order compelling production of these documents is clearly erroneous and contrary to law, and should be reversed.

FACTUAL BACKGROUND

On October 9, 2007, Perfect 10 moved to compel on more than 100 separate requests for production of documents. *See* Joint Stipulation re: Plaintiff Perfect 10, Inc.'s Motion to Compel Defendant Google Inc. To Produce Documents, filed

October 9, 2007 ("Joint Stipulation"). At the November 27, 2007 hearing thereon, Magistrate Judge Hillman took oral argument and issued several orders from the bench. *See* November 27, 2007 Hearing Transcript ("Hearing Transcript") (attached as Exhibit A to the Declaration of Rachel M. Herrick, executed March 14, 2008 and filed concurrently herewith). At the close of the hearing, Judge Hillman instructed the parties to reduce his rulings from the bench to a written order and present it for his approval. Hearing Transcript at p. 143.

Because the parties were unable to reach agreement with respect to the precise wording and scope of certain orders Judge Hillman made from the bench, they submitted a proposed order setting out what each party believed Judge Hillman had ordered, along with a Joint Statement containing each party's arguments in support of their respective versions of the orders in dispute. *See* (Proposed) Order re: Perfect 10's Motion to Compel Defendant Google Inc. to Produce Documents, submitted February 14, 2008; Joint Statement Regarding (Proposed) Order On Perfect 10's Motion to Compel Defendant Google Inc. to Produce Documents, submitted February 14, 2008.[1] On February 22, 2008, the Magistrate Judge issued an Order in which he adopted most of Google's versions of his bench orders. *See* Order re: Perfect 10's Motion to Compel Defendant Google Inc. to Produce Documents, entered February 22, 2008 (the "Order") (attached as Exhibit C to the Declaration of Rachel M. Herrick, executed March 14, 2008). The Order also set forth the rulings regarding which there was no dispute as to the precise scope and language of the bench rulings. *Id.*

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[1] The (Proposed) Order, the Joint Statement in Support, and certain exhibits from Perfect 10 do not appear on the docket report, while a Declaration and Exhibits in support of those documents from Google does appear there. This is because Perfect 10 failed to properly e-file its documents, instead submitting them directly to Judge Hillman's chambers as attachments to three emails Perfect 10 sent to Judge Hillman's clerk.

At issue on this motion are the following three categories of document requests that were granted by the Order:

1. Documents Regarding General User Behavior and the Online Adult Content Market.	
Order on Request for Production No. 128	"All reports, studies, internal memorandums, or other DOCUMENTS ordered, requested, or circulated by Bob Brougher, relating to the following topics: search query frequencies, search query frequencies for adult related terms, number of clicks on adult images and images in general, traffic to infringing websites, the draw of adult content, and percentage of searches conducted with the safe search filter off."
Order on Request for Production No. 129	"All reports, studies, internal memorandums, or other DOCUMENTS ordered, requested, or circulated by Susan Wojcicki, relating to the following topics: search query frequencies, search query frequencies for adult related terms, number of clicks on adult images and images in general, traffic to infringing websites, the draw of adult content, and percentage of searches conducted with the safe search filter off."
Order on Request for Production No. 130	("All reports, studies, internal memorandums, or other DOCUMENTS ordered, requested, or circulated by Walt Drummond, relating to the following topics: search query frequencies, search query frequencies for adult related terms, number of clicks on adult images and images in general, traffic to infringing websites, the draw of adult content, and percentage of searches conducted with the safe search filter off."
Order on Request for Production No. 131	"All reports, studies, internal memorandums, or other DOCUMENTS referring or RELATING TO Google user behavior, ordered, requested, or circulated by Eric Schmidt relating to the following topics: search query frequencies, search query frequencies for adult related terms, number of clicks on adult images and images in general, traffic to infringing websites, the draw of adult content, and percentage of searches conducted with the safe search filter off."
Order on Request for Production No. 194	"All documents circulated to John Levine, Heraldo Botelho, Radhika Malpani, Jessie Jiang, Lawrence You, Diane Tang, and Alexander Macgillivray, relating to the following topics: search query frequencies, search query frequencies for adult related terms, number of clicks on adult images and images in general, traffic to infringing websites, the draw of adult content, and percentage of searches conducted with the safe search filter off."

Order on Request for Production No. 195	"All documents constituting, comprising, evidencing, RELATING TO, or referring to communications to, from, or with John Levine, Heraldo Botelho, Radhika Malpani, Jessie Jiang, Lawrence You, Diane Tang, and Alexander Macgillivray, or persons or entities acting on their behalf, relating to the following topics: search query frequencies, search query frequencies for adult related terms, number of clicks on adult images and images in general, traffic to infringing websites, the draw of adult content, and percentage of searches conducted with the safe search filter off."

2. Documents Regarding Google's Research And Development Efforts Regarding Image Recognition Software.	
Order on Request for Production No. 174	"DOCUMENTS sufficient to describe Google's attempts to develop or use any image recognition software."

3. Google's DMCA Log in Its Entirety.	
Order on Request for Production No. 196	"Google's DMCA Log."

See Order at 3-7.

Argument

I. STANDARD OF REVIEW

Rulings of magistrate judges on nondispositive motions may be set aside if "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a); *Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404, 1414 (9th Cir. 1991). The clearly erroneous standard applies to the magistrate judge's factual findings while the contrary to law standard applies to the magistrate judge's legal conclusions, which are reviewed *de novo*. *Columbia Pictures, Inc. v. Bunnell*, 245 F.R.D. 443, 446 (C.D. Cal. 2007) (citing *Wolpin v. Philip Morris, Inc.*, 189 F.R.D. 418, 422 (C.D. Cal. 1999)).

When a magistrate judge grants discovery requests that are not relevant to the claims or defenses of the case, the magistrate commits reversible error. *McCormick v. City of Lawrence, Kan.*, 2007 WL 38400, at *3 (D. Kan. Jan. 5, 2007) ("The magistrate judge's order is ... clearly erroneous and contrary to law insofar as it orders the production of materials which are both irrelevant to this lawsuit and not responsive to defendant['s] original discovery request."). *See also Ferruza v. MTI Technology*, 2002 WL 32344347, at *6 (C.D. Cal. June 13, 2002) (reversing a magistrate's order compelling disclosure of information as "contrary to law," even absent "precedential authority directly on point"); *L.H. v. Schwarzenegger*, 2007 WL 2009807, at *4-5 (E.D. Cal. July 6, 2007) (granting a motion to reconsider a magistrate's order on a motion to compel because the magistrate's legal analysis was incomplete).

II. THIS COURT SHOULD SUSTAIN GOOGLE'S OBJECTIONS TO THE ORDER COMPELLING DOCUMENTS REGARDING GENERAL USER BEHAVIOR AND THE ONLINE ADULT CONTENT MARKET WRIT-LARGE (REQUEST NOS. 128-31, 194-95).

The Order compelling documents responsive to Perfect 10's requests regarding general Google user behavior and the online adult content market are clearly

erroneous and contrary to law. The overbreadth and irrelevance of these requests to the claims and defenses in the case cannot be overstated. These requests seek documents "ordered, requested or circulated by," or comprising "communications" with, eleven custodians regarding exceedingly general topics on Google user behavior and online adult content, including "search query frequencies," "number of clicks on ... images in general," "the draw of adult content," and the "percentage of searches conducted with the safe search filter off." The named custodians include individuals who have nothing to do with the facts and events underlying this case—including Google CEO and Chairman Eric Schmidt. Even though Perfect 10 is concerned about searches for images, the Order is not limited to Google Image Search, which is "[t]he Google search engine that provides responses in the form of images." *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1155 (9th Cir. 2007). Instead, it also sweeps in searches in Google Web Search, a separate search engine that returns website links rather than images in its search results.[2] And further, as discussed below, the compelled requests as worded are so vague and ambiguous that Google has no reasonable way to be sure it is complying. Google sought clarification of these and numerous other ambiguities in the meet and confer process, but Perfect 10 refused and instead simply moved to compel responses to the requests as worded. *See* Declaration of Jennifer A. Golinveaux, executed October 4, 2007, at ¶¶ 2-8 (attached as Exhibit B to the Declaration of Rachel M. Herrick, executed March 14, 2008). The Magistrate Judge largely accepted Perfect 10's approach and placed no meaningful limits on these Requests to tailor them to the claims in this case, such as

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[2] This overbreadth runs contrary to the Ninth Circuit's opinion in this case, which focuses entirely on Image Search and does not even mention Web Search. *See Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007). Moreover, it runs contrary to Perfect 10's *own arguments* to the Ninth Circuit which also focused on Image Search (principally for its claims related to thumbnail images and "inline linking"). *See* First Brief on Cross-Appeal of Plaintiff-Appellant/Cross-Appellee Perfect 10, Inc.

narrowing them to documents prepared by relevant custodians regarding Perfect 10's copyrighted material, to searches for that material, or to alleged infringement of that material. Thus, as compelled, these requests appear to call for documents not identified with any specificity, and which have no bearing on the claims and defenses in this case. Accordingly, the Magistrate Judge's Order thereon should be reversed. *See McCormick*, 2007 WL 38400, at*3.

A. Documents Regarding General User Behavior With Respect to Searches and Clicks Are Irrelevant To Perfect 10's Claims Or Google's Defenses.

With respect to the general topics of user behavior, search query frequencies, and clicks on thumbnail images, it is difficult to imagine a subject matter regarding Google's business that is more expansive and detached from the parties' claims and defenses than these. Google's core business is its search engine. Google users enter search queries for millions of different reasons, in millions of different ways, looking for information on millions of different topics. Similarly, Google has millions of thumbnail images that are clicked on by millions of users. Perfect 10's images comprise just one tiny piece of straw in this giant haystack of search queries and thumbnail clicks, yet the Order requires that the entire haystack be scooped onto a truckbed and delivered to Perfect 10's door. The ruling was clearly erroneous.

To take a simple example, if Google CEO Eric Schmidt sent an email to Google co-founder Larry Page inquiring about the number of times Google users entered the search query "Barack Obama" into Web Search on the day of a major state primary election, that email could be a responsive document—yet it has absolutely no bearing on this litigation. Further, if Mr. Schmidt sent Mr. Page that same email asking how many times *Mr. Page himself* searched for "Barack Obama" on a particular day, that email could also be a responsive document. Plainly, such documents have zero relevance in this federal copyright and trademark case over a discrete set of photos of nude models. Nor are these isolated examples. If there

existed an internal report received by Mr. Schmidt that discussed the total number of clicks users made on all thumbnails in Google Image Search on a particular day, that report too would be a responsive document, even though it has no conceivable bearing on this litigation.

The portion of the request directed at "traffic to infringing websites"—while at least containing the word "infringing"—is still hopelessly vague, overbroad, and irrelevant to this case. It fails to define any of the terms, leaving Google to guess at its scope. Does the phrase "infringing websites" refer only to websites found liable for copyright infringement in a court of law? If so, is Google supposed to canvas the universe of court opinions to devise an "infringing website" list? And if so, does a single instance of adjudged infringement, no matter how long ago, make it an "infringing website"? Such a definition and would sweep in thousands of websites under a "once an infringer, always an infringer" theory. Or is Google to rely on mere *allegations* of infringement in affixing the label "infringing website?" If so, who determines what rises to the level of an allegation, whose allegations should be included (the content owner's, or anyone's), and who determines whether those allegations have merit? And where is Google to find a list of sites so accused?

Even if "traffic to infringing websites" were comprehensible (and it is not), it remains vastly overbroad. If Perfect 10 in fact owns valid copyrights, it is certainly entitled to enforce them against infringers. But the Order is not limited to infringement of Perfect 10's copyrights. It potentially encompasses every website of every infringer—actual or alleged, past or present—of every copyright in the world. For example, if identified custodian Bob Brougher sent an email asking how many users searched for "Grokster.com" in a given year (a website accused of copyright infringement regarding music files shared by its users), that could be a responsive document. Not only would such information be wholly irrelevant to this case, but Perfect 10's requests would require the production of documents relating to even the voluminous news articles about the Grokster litigation. Similarly, eBay.com is often

accused of auctioning goods which allegedly infringe copyrights. Thus, an email from Eric Schmidt asking how many users searched for "golf clubs" and then clicked on eBay auction links could be responsive. Even a memo regarding user searches on the phrase "free music files," which could encompass searches for both legitimate music files and pirated music files, would be responsive. Plainly, these documents regarding other allegedly infringing websites would have *zero* relevance to Perfect 10's copyrights, the third parties alleged to have infringed Perfect 10's copyrights, or to Perfect 10's lawsuit generally. *See, e.g., Cavallo, Ruffalo & Fargnoli v. Torres*, 1988 WL 161313, at *1 (C.D. Cal. 1988) (only the "legal or beneficial owner of an exclusive right under a copyright" has standing to sue) (citing 17 U.S.C. § 501(b)). These topics cast far too broad a net given the claims and defenses asserted here.

B. Documents Regarding Searches For Adult Content And Clicks On Adult Images Are Irrelevant To Perfect 10's Claims Or Google's Defenses.

As for the broad-sweeping "adult content" subject matter area, despite Perfect 10's urgings to the contrary, this case is not about "adult content" generally. It is about Perfect 10's allegations that its copyrights and trademarks have been infringed by Google. Yet the Order appears to require production of all documents from the identified custodians regarding search query frequencies for "adult related terms" (whatever that means), the number of clicks on "adult images" (whatever those are), the draw of "adult content" (whatever that is), and the percentage of searches conducted with the safe search filter off (a Google feature not even at issue in this case). Ordering the production of these documents was clear error and contrary to law, given their irrelevance, vagueness and overbreadth.

To take an example, if in the aftermath of the Eliot Spitzer prostitution ring scandal, Google CEO Mr. Schmidt received an email regarding increased search query frequencies for adult escort services (arguably an "adult-related term," though Perfect 10 did not bother to define it), that email would be a responsive document—

yet it has absolutely no bearing on this litigation. Similarly, if Mr. Schmidt received a report regarding the percentage of users who elected to turn off the "SafeSearch" filter offered by Google (which screens out links to websites containing explicit sexual content) on a particular day, that piece of information would have not a shred of relevance to Perfect 10's claims of infringement. Again, the requests to Google as compelled cast the net of discovery much wider than the sphere of relevance in this case.

Further, even if adult content *generally* were somehow relevant here (which it is not), it is beyond dispute that the Internet is awash with (1) adult subject matter having nothing to do with photographic images, and (2) properly licensed and/or public domain adult photographic images—neither of which has any relevance to this case. Yet these requests calling for documents regarding "search query frequencies for adult related terms" and "the draw of adult content" would encompass them.

Google can only surmise that these requests derive from Perfect 10's fantastical theory that Google either intends to, or has, taken over the market for online adult content. *See* Amended Complaint at ¶ 25(a) ("Under the guise of being a search engine, Google has become the world's largest provider of adult images, which are made available for free to anyone, supplanting all other adult websites ...."). Of course, this is pure speculation and posturing by Perfect 10, and does not entitle Perfect 10 to discovery thereon, because discovery must be based on more than mere speculation. *See, e.g., Sirota v. Penske Truck Leasing Corp.*, 2006 WL 708910, *1 (N.D. Cal. 2006) ("Requested discovery is not relevant to the subject matter involved in a pending action if the inquiry is only based on the requesting party's mere suspicion or speculation.") (citing *Micro Motion, Inc. v. Kane Steel Co., Inc.*, 894 F.2d 1318, 1324 (Fed. Cir. 1990)); *DGM Investments, Inc. v. New York Futures Exchange, Inc.*, 224 F.R.D. 133, 141 (S.D.N.Y. 2004) ("Mere speculation that the discovery sought would help to uncover facts related to a defendant's liability is not sufficient to warrant compelling discovery ....").

Perfect 10 has proffered absolutely no basis for its theories of Google's alleged online pornography distributor aspirations, because those theories are false. Google is a technology company, not a Bond villain, and indeed Perfect 10 previously represented to the Court that Google is not even a competitor of Perfect 10's.[3] Moreover, taking Perfect 10's conjecture to its logical conclusion, if Google is a market participant in any industry whose content appears in its search results, then Google is a player in every conceivable industry in the world—a facially untenable argument if ever there were one.

In sum, before Perfect 10 is permitted to go rifling through the confidential files of high-level Google executives and employees on the speculative hope that it might find some memo instructing Google employees to turn google.com into an infringing online porn emporium, it must articulate some concrete, established connection between the discovery sought and the claims and defenses at issue. Perfect 10 did not do so before Judge Hillman with respect to either the issues of general user behavior regarding searches and clicks or online adult content. Accordingly, the Order requiring Google to produce these broad categories of documents in the absence of some demonstration of relevance to this suit was clearly erroneous and contrary to law. *See McCormick*, 2007 WL 38400, at *3; *see also Ferruza*, 2002 WL 32344347, at *6.

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[3] In its portion of the Joint Stipulation re: Google Inc.'s Motion for Entry of Its Protective Order, filed November 22, 2005, Perfect 10 stated that "Perfect 10 and Google are not competitors in the search engine business." *Id.* at 25. *See also* Order re: Google's Motion for Entry of Protective Order, dated December 28, 2005, at 2 (noting that Perfect 10 claimed "it is not a 'competitor' of [Google] in any business sense (Perfect 10 is not in the search engine business, as are defendants)").

III. THIS COURT SHOULD REVERSE THE ORDER COMPELLING PRODUCTION OF DOCUMENTS REGARDING IMAGE RECOGNITION SOFTWARE RESEARCH AND DEVELOPMENT EFFORTS (REQUEST NO. 174).

The Order granting Perfect 10's request for documents regarding image recognition technology is clearly erroneous and contrary to law because it is irrelevant to the claims and defenses of the case, particularly in light of the Ninth Circuit's prior ruling. Though Perfect 10 did not define the term in its discovery requests, image recognition technology refers generally to software that can recognize certain characteristics of digital imagery. In the Joint Stipulation, Perfect 10 argued that image recognition software

> is relevant to injunctive remedies which may be imposed on Google. It is also relevant to the question of whether Google has made sufficient efforts to stop infringement and Google's knowledge of infringement and willful blindness to infringement. Overall, it relates to Google's ability to prevent infringing material from being copied or displayed, and is one of the key issues in this case. Moreover, this request is particularly important because while Google has insisted that image recognition is something that is technologically not feasible, Perfect 10 is aware of numerous companies that claim otherwise.

Joint Stipulation at 81-82. Perfect 10 thus in essence argued (and the Magistrate Judge apparently agreed) that image recognition software is relevant to Perfect 10's claims of secondary infringement. But the thesis that Google can or should go out and police the Internet-at-large using some form of unspecified image recognition technology is inconsistent with the Ninth Circuit's rulings, and the Order compelling production of such documents was clearly erroneous and contrary to law.

A. Image Recognition Software Is Irrelevant To Perfect 10's Vicarious Copyright Infringement Claim.

To prove vicarious infringement, Perfect 10 must show that Google "profit[s] from direct infringement while declining to exercise a right to stop or limit it." *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1173 (9th Cir. 2007). Image recognition technology is irrelevant to Perfect 10's vicarious copyright infringement claim because the Ninth Circuit has ruled that Google does not control the alleged infringing acts of others, and thus cannot "stop or limit" that behavior. *See id.*, 508 F.3d at 1173-75 (Perfect 10 did not show "a likelihood of success in establishing that Google has the right and ability to stop or limit the infringing activities of third party websites"); *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 802-06 (9th Cir. 2007) ("Google's ability to control its own index, search results, and webpages does not give Google the right to control the infringing acts of third parties even though that ability would allow Google to affect those infringing acts to some degree."). As the Ninth Circuit made particularly clear in *Visa*, the mere ability to reduce infringement does not a vicarious infringer make. Such liability requires that the defendant have the "right and ability to *supervise* and *control* the infringement, not just affect it." *Visa*, 494 F.3d at 805 (emphasis in original). As its name implies, image recognition technology could at most only *identify* images; it could not then somehow determine whether any particular image is being used by the copyright owner, a proper licensee, or an infringer. And further, even if one accepted Perfect 10's conjecture that the use of image recognition software could, theoretically, allow Google to spot infringement, it would give Google no measure of direct control over the websites actually doing the infringing—websites that could continue to infringe regardless of whether they were included in Google's index.

Perfect 10 will surely claim that, since the Ninth Circuit found that "[w]ithout image-recognition technology, Google lacks the practical ability to police the infringing activities of third-party websites," *Amazon.com*, 508 F.3d at 1174, the

negative implication of this must be that, if Google does have image-recognition technology, it must have this practical ability. First of all, this is a textbook logical fallacy: If a statement is true (if A then B), it does not follow that the converse is true (if not A then not B). And second, the Ninth Circuit made clear in the immediately-following paragraphs that even assuming Google failed to change its operations to avoid assisting websites to distribute their infringing content, this failure to act does not meet the test for vicarious infringement. *Id.* at 1175. Again, vicarious liability requires that the defendant have the "right and ability to *supervise* and *control* the infringement, not just affect it." *Visa*, 494 F.3d at 805 (emphasis in original). Image recognition technology, no matter its form, simply cannot meet, and is irrelevant to, that standard.

B. Image Recognition Software Is Irrelevant To Perfect 10's Contributory Copyright Infringement Claim.

Image recognition technology is also irrelevant to contributory copyright liability because it requires the defendant to have taken affirmative steps to foster infringement and cannot be premised on a failure to implement a measure that may or may not mitigate the infringements of others. *See Visa*, 494 F.3d at 800-01 (credit card payment processing does not materially contribute to infringement and does not constitute an "affirmative step[] taken to foster infringement"); *Amazon.com*, 508 F.3d at 1169-73 (contributory liability is "predicated on actively encouraging (or inducing) infringement through specific acts") (citation omitted). As the Ninth Circuit made clear in *Visa*, 494 F.3d at 796-802, contributory infringement requires a material contribution to, or inducement of, the infringement of others. Any attempt to develop or use image recognition software to spot infringements *ex post* simply

cannot be said to encourage or induce others to infringe. That conclusion is all the more obvious as to image recognition technology that Google has not even used.[4]

C. Perfect 10's Failure To Define "Image Recognition" Software Also Renders The Order Clearly Erroneous.

To the extent image recognition technology could be deemed to be even remotely relevant to Perfect 10's case, the Order is still clearly erroneous and contrary to law because of its vagueness and overbreadth. Perfect 10 has never defined the term "image recognition software," nor did the Order. There is no single, specific product known as "image recognition software." Some software labeled as "image recognition" technology identifies images with similar colors, some identifies images with human faces in them (as opposed to images without human faces in them), some filters images to identify pornographic images (typically by identifying images with lots of flesh colors), and some is used for video files.[5] Perfect 10 has made no showing that *any* of these types of technologies would be relevant here, yet the Order would require Google to produce sensitive, proprietary documents regarding its work involving *any or all* of these types of technologies, to the extent Google has such

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[4] Perfect 10 did not assert that image recognition technology is relevant to its direct infringement claims, and for good reason. Under the Ninth Circuit's decision, image recognition technology is irrelevant to Perfect 10's inline linking arguments because inline linking is not infringement at all. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1159-63 (9th Cir. 2007). The presence or absence of image recognition capabilities would not change the analysis of inline linking, because it would still be third-party websites that reproduce, display, and/or distribute any infringing works, not Google. *Id.* Image recognition technology also would not change the fair use analysis of thumbnails because it would not change the transformative nature of the use, the nature of the copyrighted work, the substantiality of the use, or the purported effect on Perfect 10's alleged market. *See id.* at 1163-68.

[5] *See, e.g.*, Datta, Ritendra; Dhiraj Joshi, Jia Li, James Z. Wang, *Image Retrieval: Ideas, Influences, and Trends of the New Age*, ACM Computing Surveys (2008), *available at http://infolab.stanford.edu/~wangz/project/imsearch/review/JOUR/* (discussing developments and limitations on current image recognition technology and noting, at page 8, that "real-world application of the technology is currently limited"). *See also United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 221 (2003) (J. Stevens, dissenting) ("Image recognition technology is immature, ineffective, and unlikely to improve substantially in the near future.").

documents. This is clear error, since at most, the only types of image recognition software that could be even marginally relevant to this case would be those designed to recognize identical copies of still images of human beings.

IV. THIS COURT SHOULD REVERSE THE ORDER ON PERFECT 10'S REQUEST FOR GOOGLE'S DMCA LOG IN ITS ENTIRETY (REQUEST NO. 196).

The Order requiring Google to produce its entire DMCA Log is clearly erroneous and contrary to law because it requires production of *all* DMCA information regarding *all* notices ever sent to Google by *anyone*—not just alleged notices sent by Perfect 10. Indeed, the scope of this request sweeps even more broadly than the already overbroad "adult content" requests since here Google would be required to turn over discovery regarding any kind of alleged copyrighted materials—from music files to software to artwork. Furthermore, the DMCA provides that, to be eligible for its safe harbors, a service provider must "adopt[] and reasonably implement[]" a repeat infringer policy. 17 U.S.C. § 512(i)(1)(A). In *Perfect 10 v. CCBill, Inc.*, 488 F.3d 1102 (9th Cir. 2007), the court held that the defendant service providers' "actions towards copyright holders who are not a party to the litigation are relevant in determining whether [defendants] reasonably implemented their repeat infringer policy." *Id.* at 1113. Google does not dispute that, under *CCBill*, third-party notices could be legally relevant under certain circumstances. However, *CCBill* does not hold, as Perfect 10 suggested, and as the Magistrate Judge appeared to believe, that a copyright plaintiff is entitled to *all* notices of alleged infringement sent to the defendant by *all* parties regarding *all* copyrighted materials—or even that a plaintiff is entitled to *most or many* of them. Rather, *CCBill* simply reversed the district court's conclusion that third party notices were completely irrelevant and remanded for evaluation of reasonableness of implementation. *Id.* at 1113.

To rule that all DMCA notices must be produced in this case would set a dangerous precedent, by suggesting that all parties seeking protection under the DMCA's safe harbor provisions must turn over to the plaintiff their entire DMCA log, in every litigation, no matter what the circumstances. Absent some special showing as to why a party's entire DMCA log is relevant in a particular case (which Perfect 10 did not do here), this requirement would impose too great a burden upon parties like Google, who receive many thousands of DMCA notices from many thousands of alleged copyright owners. This cannot be the law, and with the passage of time such a rule would become difficult if not impossible to implement, as large companies like Google continue to receive and respond to more DMCA notices every single day, every single month, year after year.

And even were the Court to find that Google should produce some discovery beyond Perfect 10's alleged DMCA notices, production of the full DMCA log is unwarranted. Since the applicable standard is "reasonable implement[ation]" of a repeat infringer policy, *see CCBill*, 488 F.3d at 1109 (citing 17 U.S.C. § 512(i)(1)(A)), a representative sample of documents regarding Google's DMCA log would be more than sufficient to fairly evaluate Google's reasonable implementation. The Order of Google's entire DMCA Log was clearly erroneous and should be reversed.

In the alternative, should the Court decline to reverse the Order in this regard, Google respectfully requests a stay of this portion of the Order. Google is preparing and will soon file a dispositive motion regarding the inadequacy of Perfect 10's alleged "notices" to Google under the DMCA, 17 U.S.C. § 512(c)(3). If Google's motion is successful, this portion of the Order will be rendered moot, because this discovery would be irrelevant. *See, e.g.*, *Hendrickson v. eBay, Inc.*, 165 F .Supp. 2d 1082, 1092 (C.D. Cal. 2001) (when plaintiff did not give notices that complied with § 512(c)(3), defendant eBay "did not have a duty to act under the third prong of the safe harbor test," § 512(c)(1)(C), to remove or disable access to the material.). *See*

also CCBill, Inc., 488 F.3d at 1112-13 (finding that Perfect 10's notices to defendants in that case did not substantially comply with 17 U.S.C. § 512(c)(3), and that therefore "knowledge of infringement may not be imputed to [those defendants] based on Perfect 10's communications"); *Rossi v. Motion Picture Ass'n of America Inc.*, 391 F.3d 1000, 1003 (9th Cir. 2004) ("When a copyright owner suspects his copyright is being infringed, he must follow the notice and takedown provisions set forth in § 512(c)(3) of the DMCA ...."). Google should not be compelled to produce this volume of documents regarding issues that may shortly become moot.

CONCLUSION

For the foregoing reasons, Google respectfully requests that the Court sustain its objections to the Magistrate Judge's Order of February 22, 2008 granting in part Perfect 10 Inc.'s Motion to Compel and reverse the portions of that Order compelling Google to produce documents in response to Perfect 10's Requests for Production Nos. 128-31, 174, and 194-96.

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