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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 REPLY IN SUPPORT OF ITS OBJECTIONS TO THE MAGISTRATE JUDGE'S ORDER OF FEBRUARY 22, 2008, GRANTING IN PART AND DENYING IN PART PLAINTIFF PERFECT 10, INC.'S MOTION TO COMPEL

[PUBLIC REDACTED]: PORTIONS FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Local Rule

MEMORANDUM OF POINTS AND AUTHORITIES

Preliminary Statement

Perfect 10's Opposition brief fails to present a single valid reason why this Court should not sustain Google's Objections to the Magistrate Judge's Order. Perfect 10 ignores the substance of several of Google's objections explaining why portions of the Order are impermissibly vague and overbroad. To the extent Perfect 10 does profess to address some of Google's objections, Perfect 10 either distorts those objections or seeks to mischaracterize Google's past discovery efforts.

Indeed, apparently recognizing that its evidence and arguments submitted to the Magistrate Judge did not support such a broad and sweeping Order, Perfect 10 seeks to substantiate the Order by introducing voluminous new evidence to this Court. That is improper under black-letter law, and Perfect 10's efforts to resuscitate its position through new arguments and new purported evidence must be disregarded. Nor, in any event, is there any merit to Perfect 10's newly minted contentions.

As Google's Objections made clear, the portions of the Magistrate Judge's Order that Google has challenged are clearly erroneous and contrary to law. Perfect 10's Opposition does not show otherwise, and Google's Objections should be sustained.

Argument

I. PERFECT 10 DOES NOT ADDRESS, AND THUS CONCEDES, THE VAST OVERBREADTH OF THE COMPELLED DOCUMENTS REGARDING GENERAL USER BEHAVIOR AND THE ONLINE ADULT CONTENT MARKET (REQUEST NOS. 128-31, 194-95).

Perfect 10 ignores the vast overbreadth of this portion of the Order by telling this Court not what the Requests as compelled fairly encompass, but what Perfect 10 really wants from them. This is all well and good, but Google is not

objecting to Perfect 10's intentions—it is objecting to the scope of the actual Order that has issued.

As Google explained in its Objections, this portion of the Order compelled production of documents regarding exceedingly sweeping and vague 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." By way of example, Google showed in its Objections that these Requests are so overbroad that they could sweep in an email from Google CEO Eric Schmidt asking for the frequency of queries for the term "Barack Obama" in Web Search. Objections at 7.

Perfect 10 argues in opposition that it is not "interested in search queries involving Presidential candidates" (Opposition at 18), and that Mr. Obama "has nothing to do with the adult entertainment industry." Opposition at 17. But that is Google's point. Despite Perfect 10's disavowal of any interest in such information, Perfect 10 sought, and the Order has compelled, that it be produced. Perfect 10's interests aside, Perfect 10 does not dispute that the Magistrate Judge's Order, as worded, is not limited to the "adult entertainment industry," and certainly could encompass information far outside that subject matter. *See, e.g.*, Order on Request 131 ("All ... DOCUMENTS referring or RELATING TO Google user behavior, ordered, requested, or circulated by Eric Schmidt relating to ... *search query frequencies*."). Moreover, even if the order *were* limited to the "adult entertainment industry" as a general topic (which it is not), that topic too is far broader than the category of discovery to which Perfect 10 is entitled in this case. *See, e.g.*, Google Inc.'s Objections at 9 ("[D]espite 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.").

Perfect 10's Opposition similarly ignores the other overbreadth and irrelevance problems identified in Google's Objections. *See, e.g.*, Objections at 8 (noting that Perfect 10 fails to indicate what it means by "infringing websites," and even assuming this is discernible, the Request "potentially encompasses every website of every infringer—actual or alleged, past or present—of every copyright in the world").

By failing to even address Google's enumerations of overbreadth, and by confirming that Perfect 10 only sought a small subset of the documents ordered produced (i.e., documents regarding the adult entertainment industry), Perfect 10 has effectively conceded the overbreadth of the Order. *See, e.g.*, *Judith Miller, M.A., LMFCT v. Provident Life and Acc. Ins. Co.*, 2000 WL 1341480, at *5 (C.D. Cal. 2000) ("Plaintiff appears to concede" a particular claim because her "opposition does not address" it.); *Lauterborn v. R&T Mechanical, Inc.*, 2006 WL 3098747, at *8 (M.D. Pa. 2006) (finding a party "apparently concedes" that her opponent met its burden on one element of an affirmative defense "because in her opposition brief she does not contest the point or even address this element of the affirmative defense in any manner").

Instead of addressing the merits of Google's overbreadth and irrelevance objections, Perfect 10 offers a number of red herrings. First, Perfect 10 states that "Google has failed to submit any evidence whatsoever to establish that its compliance with these requests would be burdensome in any way." Opposition at 17. This is beside the point, however, because the objections to these portions of the Order are based on overbreadth and the lack of relevance to any claim or defense in this case, not undue burden.

Perfect 10 further argues that it needs documents responsive to Requests 128-31 and 194-95 because (1) it has not received adequate production of documents in response to unspecified portions of the Magistrate Judge's Order of May 22, 2006, and (2) Google has initiated meet-and-confer efforts under Rule

26(b)(2) on Perfect 10's Requests Nos. 135-37 and 146. Neither claim has any relevance to *this* motion for review under Rule 72(a) regarding an *entirely different* group of Requests for Production. And contrary to Perfect 10's suggestion, Google has indeed produced a great deal of information regarding the most frequently-searched terms on both Web Search and Image Search. *See* Declaration of Rachel M. Herrick, executed April 4, 2008 and filed concurrently herewith ("Herrick Decl."), at Ex. A (Google's Supplemental Response to Perfect 10's Revised Interrogatory No. 24, dated April 26, 2006). As for the Rule 26(b)(2) meet and confer efforts regarding certain log information Perfect 10 has sought, those efforts are indeed proceeding, as the Magistrate Judge instructed. Google hopes that the parties will be able to reach compromise on these issues, but if not, they will be presented to the Magistrate Judge in due course. But again, this issue—regarding historical log and/or index data—has no bearing on whether the Order compelling documents regarding general user behavior or the adult content market is impermissibly overbroad and irrelevant.

Lastly, Perfect 10 tries to introduce new evidence for the first time on this motion[1] in hopes of persuading this Court that the Magistrate Judge's Order was proper—a decidedly improper strategy on a motion for review under Rule 72(a). *See In re Seroquel Products Liability Litigation*, 2008 WL 591929, at *4 (M.D. Fla. 2008) (disregarding exhibits to the Plaintiff's response in a Rule 72(a) appeal because "none of these exhibits were before the magistrate judge when he considered Plaintiffs' motion to compel," and therefore "it would be improper to look to anything but the record that existed at the time the magistrate judge issued his ruling"). This Court should disregard this new alleged evidence for this reason alone.

Even if considered, however, Perfect 10's new "evidence" proves nothing with respect to Google's Objections. As shown in Google Inc.'s Evidentiary Objections to Perfect 10's Newly-Introduced Evidence ("Objections to Evidence"), that evidence is inadmissible, irrelevant, or both. *See* Objections to Evidence, filed concurrently herewith (objecting to paragraphs 8, 10, 11, and 13-20, and Exhibits 4 and 6-14, of the Zada Declaration on this ground). Indeed, this new evidence concerns such matters as the number of search results that appear in response to a Google image search for the term "Talia Harvalik"—which is wholly immaterial to whether the Order compelling documents regarding general user behavior is impermissibly overbroad and irrelevant.

In sum, as compelled, the Requests 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 v. City of Lawrence, Kan.*, 2007 WL 38400, at *3 (D. Kan Jan. 5, 2007).

II. THIS COURT SHOULD REVERSE THE ORDER REGARDING IMAGE RECOGNITION SOFTWARE, BECAUSE PERFECT 10 STILL HAS NOT DEMONSTRATED THE RELEVANCE OF THESE DOCUMENTS (REQUEST NO. 174).

In its Objections, Google established that the Order compelling Perfect 10's request for documents regarding "image recognition software" is clearly erroneous, because (1) it is irrelevant to a claim of vicarious infringement, (2) it is irrelevant to a claim of contributory infringement, and (3) it is vague and overbroad. Objections at 12-16.

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[1] *See* Declaration of Norman Zada, dated March 26, 2008 ("Zada Decl."), at ¶ 15 and Ex. 12.

Perfect 10 tries to attack this analysis by claiming that Google's is a "merits-based argument" (Opposition at 13). Perfect 10 has missed the point of Google's Objection, and the point of the rules of discovery. Discovery is constrained by relevance, and to be proper requests for documents must seek information relevant to the claims and defenses of the case. *See McCormick*, 2007 WL 38400, at *3. That standard has not been met here. Moreover, Perfect 10 strains that the "inverse" of the Ninth Circuit's statement on policing ability is that, "with image recognition technology, Google *may* have the practical ability to prevent its users from accessing infringing images on third-party websites." Opposition at 13 (emphasis added). As Google showed in its Objections and as Perfect 10 does not dispute, Perfect 10's argument is logically fallacious: It most certainly does *not* follow from A → B that ~A → ~B.

As explained in Google's Objections, documents related to "image recognition software" are irrelevant to a claim of vicarious copyright infringement. The Ninth Circuit made clear in *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, that vicarious liability requires the "right and ability *supervise* and *control* the infringement, not just affect it." 494 F.3d 788, 805 (9th Cir. 2007) (emphasis in original). Image recognition technology does not tend to prove or disprove this factor. Perfect 10 has identified no countervailing authority.

Nor are such documents relevant to contributory liability. Perfect 10's claim that Google misstates the standard for contributory liability is incorrect. Google's quotations of binding Ninth Circuit authority are accurate: *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"); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1169-73 (9th Cir. 2007) (contributory liability is "predicated on actively encouraging (or inducing) infringement through specific acts") (citation omitted). In urging otherwise, Perfect 10 focuses on a different portion of the Ninth Circuit's opinion in

Amazon.com, claiming that image recognition technology is a "simple step" that could be taken to reduce infringement. Perfect 10 did not, however, even establish before the Magistrate Judge what "image recognition technology" *actually is* (see below), much less that it could in fact reduce infringement, or that it would be a "simple step" for Google to take. Perfect 10 also fails to recognize that the *Visa* opinion post-dates the *Amazon.com* opinion. As such, reliance on *Visa*'s articulations of the test for contributory liability is entirely proper here.

The Magistrate Judge's Order on this request is also clearly erroneous for its failure to define "image recognition technology"—a defect Perfect 10's Opposition brief ignores. Perfect 10 speaks as if there is a particular thing universally referred-to as "image recognition technology," and that Google could somehow easily find documents related to "image recognition software." As Google identified in its Objections, however, this is mistaken; there is no single, specific product known as "image recognition software." The term could potentially encompass a wide range of sensitive, proprietary technologies having nothing whatsoever to do with the claims or defenses of this case. Objections at 15-16. Perfect 10 fails to address the ambiguities and resultant overbreadth of its Request No. 197. For this reason as well, the Magistrate Judge's Order compelling it was clearly erroneous, and Perfect 10 concedes the point by its silence. *Judith Miller, M.A., LMFCT v. Provident Life and Acc. Ins. Co.*, 2000 WL 1341480, at *5 (C.D. Cal. 2000); *Lauterborn v. R&T Mechanical, Inc.*, 2006 WL 3098747, at *8 (M.D. Pa. 2006).

Perfect 10 cites new evidence in this portion of its Opposition as well.[2] As discussed above, Perfect 10's new evidence should be disregarded because it was not before the Magistrate Judge. *See In re Seroquel Products Liability Litigation*,

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[2] *See* Zada Declaration, at Exhs. 6-9.

2008 WL 591929, at *4 (M.D. Fla. 2008); *Estate of Gonzales ex rel. Gonzales v. Hickman*, 2007 WL 3231956, at *2 (C.D. Cal. 2007). Even if considered, it gets Perfect 10 nowhere, because this new "evidence" is inadmissible and irrelevant. *See* Objections to Evidence. None of it changes the fact that the Order as worded is impermissibly vague and overbroad.

For instance, Perfect 10 submits a technical paper authored by three Google employees discussing "an algorithm for building parallel distributed hybrid spill trees which can be used for efficient online or batch searches for nearest neighbors of points in high dimensional spaces." *See* Zada Declaration, Ex. 7, at p. 6 (pages unnumbered). What this has to do with Perfect 10's claims is a mystery. Perfect 10 seems to be suggesting that "if Google can do something as complicated as grouping large numbers of images into clusters, then surely it can develop software to recognize Perfect 10's images." Perfect 10 has no basis to make this claim, short of pure speculation. Similarly, Perfect 10 has submitted an article regarding Google's acquisition of a company called Neven Vision. *See* Zada Declaration, Ex. 8. The article states that Neven Vision's technology includes recognition of whether an image contains a face, as well as video recognition. Neither of these technologies has any relevance to Perfect 10's case, yet Perfect 10 claims entitlement to them all under the broad, vague umbrella of "image recognition software."

If anything, this only serves to confirm Google's objections to the Order. Perfect 10's suggestion that the Order would sweep in documents regarding *all* of these different types of technologies, which are plainly in various states of research and development, in various departments at Google, promising a variety of capabilities having nothing to do with Perfect 10's case, underscores the overbreadth and vagueness of the Order. The Order compelling documents regarding the general and undefined subject of "image recognition software," which is untethered to any

claim or defense in this case, was clearly erroneous and contrary to law and should be reversed.[3]

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

Regarding the Magistrate Judge's Order compelling Google's entire DMCA log, Google explained in its Objections that there is no such requirement in statute or caselaw, and that implying one, perhaps in a penumbra emanating from *Perfect 10, Inc. v. CCBill, Inc.* or from the DMCA itself would set a dangerous precedent. Perfect 10's arguments in opposition are unavailing. Perfect 10 also relies upon purported new "evidence" that is both improper on this motion and false in several respects. Each is addressed below.

Perfect 10 first argues that Google's objection is "untimely" because the Magistrate Judge "ordered" Google to produce "its DMCA log or the equivalent" in May 22, 2006, and Google did not object to that order at that time. Opposition at 3-4. Perfect 10 misstates the record. The Magistrate Judge's May 22, 2006 Order affirmed Google's agreement to produce documents responsive to a request for "GOOGLE's DMCA Log for the years 2001 through 2005, **or any other DOCUMENTS sufficient to IDENTIFY** all ENTITIES other that Perfect 10 from whom GOOGLE has received a notice regarding an intellectual property violation,

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[3] Perfect 10's casual insinuation that John Levine did nothing less that commit perjury by stating in his Declaration that "[t]here is no image recognition technology that would allow Google to create an index or search effectively using characteristics of the images themselves" should be dismissed out of hand as baseless and wrong. *See* Opposition at 13; Herrick Decl., at Ex. B (Declaration of John Levine, executed September 24, 2005). Perfect 10 has no foundation for (footnote continued)

the URL's complained about in each notice from each such ENTITY, and the dates of the complaints for each such URL." Herrick Decl., at Ex. C (May 22, 2006 Order at 2); Herrick Decl., at Ex. D (Perfect 10, Inc.'s Request for Production No. 51 (emphasis added)). Perfect 10 is quite right that in response to the 2006 Order, Google did not produce a DMCA log. Google instead elected to produce DMCA notices pursuant to the Order's clear alternative ("or any other DOCUMENTS sufficient..."). Consequently, there was no need for Google to challenge the portion of that Order relating to its DMCA log, and Perfect 10's suggestion to the contrary should be rejected out of hand.

Further, the "evidence" Perfect 10 relies on to bolster its position is in many respects demonstrably false. For example, the Zada Declaration states under penalty of perjury that Zada has reviewed "all of the documents produced by Google to Perfect 10 in this action," and that "[n]one of the documents produced by Google that [he] reviewed indicated which URLs were removed by Google or when the URLs were removed." Zada Decl. at ¶¶ 6, 7. In truth, Google produced several hundred pages of documents which ***do*** "indicate[] which URLs were removed by Google [and] when the URLs were removed." [redacted] Perfect 10 indisputably has reviewed these documents previously, since it specifically referred

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leveling such a serious accusation and has submitted nothing which contradicts Mr. Levine's declaration.

[4] [redacted]

to them in Perfect 10's Fourth Set of Requests for Admission.[5] Perfect 10's demonstrably erroneous evidence should be rejected.

Next, Perfect 10 argues that, under *Perfect 10, Inv. v. CCBill, Inc.*, 488 F.3d 1102 (9th Cir. 2007), Google's responses to third-party DMCA notices are relevant to implementation of a repeat-infringer policy under § 512(i). Google does not dispute the holding of *CCBill*. Contrary to Perfect 10's suggestion, and as identified in Google's Objections, however, *CCBill* does not hold that *every single* copyright plaintiff is entitled to *all* documents regarding *all* notices of alleged infringement sent to the defendant by *all* parties regarding *all* copyrighted materials, as Perfect 10 seeks here. Rather, *CCBill* reversed the district court's conclusion that actions toward third parties who had sent DMCA notices were completely irrelevant and remanded for evaluation of reasonableness of implementation. *Id.* at 1113. Requiring production of entire DMCA logs to every plaintiff in every copyright suit would set a dangerous precedent, and is not the law. The standard that must be met is "reasonable implementation." Google's offer to produce log information regarding Perfect 10's own notices (*in addition to* the log information Google has *already produced*),[6] or alternatively to produce a representative sample of log information regarding third-party notices (*in addition to* the third party DMCA notices and URL removal information Google has *already* produced as described

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[5] [redacted].

[6] *See* Herrick Decl., Ex. G (excerpts of Google's production control numbered GGL 001362 - GGL 001554, the[Proposed] Sur-reply declaration of Alexander MacGillivray in Support of Google's Opposition to Plaintiff's Motion to Preliminary Injunction, attaching two spreadsheets listing (1) every URL alleged to have been noticed by Perfect 10 and identified as infringing Perfect 10 copyrights between May 31, 2004 and June 19, 2005, (2) any corrections Google had to make to the

(footnote continued)

below), are more than adequate to show Google's responses to these third-party DMCA notices.[7]

Google's production to date also provides ample information for Perfect 10 to make an evaluation of Google's response to these DMCA notices. Google has already produced over 3,000 pages of third-party DMCA notices, and over 2,000 pages of Perfect 10 notices. *See* Herrick Decl., at Ex. H. [redacted]

URLs to process them, (3) whether the URLs were removed from Google's index, and (4) the date the URLs were removed from Google's index).

[7] Perfect 10 rejects Google's offer to provide a representative sample of log information on the ground that it would "allow Google to cherry pick a few examples where it adequately responded to DMCA notices and suppress those instances where it did not adequately respond." Opposition at 7. Google did not, of course, offer to produce "cherry-picked" examples; it made a good faith offer to produce a ***representative*** sample. Perfect 10's rejection is premised on the unfounded belief that Google will lie, cheat, and commit fraud on Perfect 10, and indeed on the Court. These aspersions are groundless, and shed light on Perfect 10's regrettably hyperbolic approach to this discovery matter.

[redacted]

Lastly, Perfect 10 claims that Google has somehow taken "contradictory litigation positions" on the existence of a DMCA log. As evidence, Perfect 10 claims (1) that Google denied that it did not maintain a DMCA log, and (2) that [redacted] Opposition at 9. On point (1), Perfect 10 is partially correct—Google did deny that it did not maintain a DMCA log. *See* Perfect 10's Request for Admission No. 400). That admission, however, is wholly irrelevant to whether the pending Order is vastly overbroad and burdensome, and thus clearly erroneous. On point (2), Perfect 10 mischaracterizes the very testimony it quotes in the same breath. [redacted]

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[8] Perfect 10 also questions the volume of notices it has received, believing it to be too small, and that this is somehow evidence that Google either has failed to comply with the Magistrate Judge's May 2006 Order, or is now misstating how many notices it has received. Opposition at 5. Perfect 10's accusations are dismissed with a simple truth: Google's production of DMCA notices for the time period from March 2002-March 2005 consisted of several thousand pages, and the number of notices Google receives has increased since March 2005 (as will be demonstrated in Google's supplemental production, to be served shortly). Google is currently in the process of updating and supplementing its production, which left off in March 2005, to make it current. When Google's supplemental production is concluded, Perfect 10 will have received all Perfect 10 and third party DMCA notices received by Google over the past six years, as well as a listing of all URLs removed from Google's web and image search results over that same time period. This production is more than sufficient for Perfect 10 to evaluate Google's enforcement of its DMCA policy.

[redacted]

[redacted]

Google respectfully requests that the portion of the Magistrate Judge's Order compelling production of Google's entire DMCA log be overturned.

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[9] In addition to its deficiencies on the merits, Perfect 10 failed to follow proper filing procedures for its Opposition papers. This case is being litigated subject to a Protective Order, entered December 27, 2005. The proper procedure for filing under seal, per the Protective Order and the applicable local rules, is that Perfect 10 must review its own filings to determine which portions contain or reference materials designated Confidential or Highly Confidential, and file *only those materials* under seal. *See* Protective Order at ¶ 11; Hon. A. Howard Matz, Order re. Protective Orders and Treatment of Confidential Information, ¶ D (when making a filing under seal, the filing party "shall designate the particular aspects that are confidential"); Local Rule 79-5. Perfect 10 declined to follow these procedures, and instead claimed that it was somehow *Google's* burden to review Perfect 10's proposed opposition papers and inform it of which portions Google believed referenced or quoted material designated Confidential or Highly Confidential. When Google rightly refused to do Perfect 10's legal work for it, Perfect 10 improperly punted by filing the *entire* Opposition under seal, including several publicly available articles attached to the Zada Declaration (see Exhs. 6-9), and even the Application to File Under Seal itself.

Conclusion

For the foregoing reasons, Google's Objections to the Magistrate Judge's Order of February 22, 2008, Granting in Part and Denying in Part Plaintiff Perfect 10, Inc.'s Motion to Compel should be sustained, and 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, should be reversed.

DATED: April 4, 2008

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