UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

HONORABLE A. HOWARD MATZ, U.S. DISTRICT JUDGE

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PERFECT 10, INC., A CALIFORNIA CORPORATION, PLAINTIFF, vs. GOOGLE, INC., ET AL., DEFENDANTS.	)	No. CV04-09484-AHM(SHx)
PERFECT 10, INC., A CALIFORNIA CORPORATION, PLAINTIFF, vs. AMAZON.COM, INC., ET AL., DEFENDANTS.	)	No. CV05-4753-AHM(SHx)
PERFECT 10, INC., A CALIFORNIA CORPORATION, PLAINTIFF, vs. MICROSOFT CORPORATION, DEFENDANT.	)	No. CV07-5156-AHM(SHx)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

MONDAY, OCTOBER 6, 2008

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COURT MAGISTRATE JUDGE

LOS ANGELES, CALIFORNIA; MONDAY, OCTOBER 6, 2008

1:43 P.M.

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THE CLERK: Calling Item Number 6, CV04-9484, Perfect 10, Inc. versus Google, Inc., et al.; related to CV05-4753, Perfect 10, Inc. versus Amazon.com, Inc., et al.; related to CV07-5156, Perfect 10, Inc. versus Microsoft Corporation.

Counsel, state your appearances, please.

MR. MAUSNER: Good afternoon, Your Honor. Jeff Mausner for Perfect 10. We filed a --

THE COURT: I got it. I looked at it.

MR. ZELLER: Good afternoon, Your Honor. Mike Zeller and Rachel Herrick for Google.

THE COURT: Okay. Good afternoon.

MR. JANSEN: Good afternoon, Your Honor. I'm Mark Jansen for the defendants amazon.com, A9.com, and the recently added Alexa Internet defendant.

THE COURT: Okay. Good afternoon.

MR. BRIDGES: Good afternoon, Your Honor. Andrew Bridges of the San Francisco office of Winston & Strawn for Microsoft Corporation, and also with me today is Isabella Fu, Associate General Counsel of Microsoft Corporation.

THE COURT: Good afternoon to all of you and to Mr. Mausner.

We're having a status conference, obviously, counsel,

and it relates from the order that I issued on September 25th.

Can you hear me, Judge Hillman?

JUDGE HILLMAN: Yes, but I can't hear that well, unfortunately.

THE COURT: And when any lawyer wishes to be heard, in order to enable Judge Hillman to hear fully, please go to the lectern and speak, and please speak directly into the microphone at the lectern and clearly and loudly, and that will help.

I asked the clerk to let you know, Judge Hillman, that if the transmission -- if the audio is cutting out or you can't really meaningfully follow what's going on or contribute to it, just let me know, and we'll make do without you.

I know you have another matter on your calendar, so I will try to move this along.

JUDGE HILLMAN: I'm sorry I can't be in the courtroom today. It just didn't work out.

THE COURT: Okay. So I issued an order on September 25th, and I got a statement that Mr. Mausner filed in response to it, identical statements in each of the three cases, and that was filed yesterday or today.

I got a statement from Amazon that was also filed today.

I haven't received anything from Google or from Microsoft; is that correct?

MR. ZELLER: That's correct, Your Honor.

MR. BRIDGES: Correct, Your Honor.

THE COURT: All right. Take the microphones that are at your table, if you're just giving these single responses, and put them near you. Okay?

All right. Now, I'll ask about those statements later, but just let me mention a couple of somewhat related items.

I had anticipated and spent a good chunk of the weekend contemplating that we were going to have a hearing today on A9's pending summary judgment motion. There was a mix-up in chambers, and it turns out that for good and understandable reasons -- and I'm not upset -- there was no hearing, the lawyers didn't come in.

We're going to have a hearing on October 27th, and -- is that the date we agreed?

THE CLERK: Yes.

THE COURT: And I'm sending out an order -- you will get it all electronically this afternoon -- that sets forth directions for that hearing for some supplemental briefing in light of specified questions that I worked up over the weekend that relate to the contentions and in some respects to the evidence.

I'm also sending out today and filing a ruling on the evidentiary objections to Dr. Zeda's declaration and to the

parallel declaration -- I forget the guy's name, but I looked over his declaration; I don't have it here before me -- sustaining a lot of the objections to the second Perfect 10 declarant and many, but by no means all, of the objections to Dr. Zeda.

So one of the instructions I'm giving the lawyers is to file supplemental statements of undisputed fact and genuine issues in light of those evidentiary rulings. And you'll see the rest of what I'm instructing you to do.

So I understand that at least Mr. Mausner and maybe more than one lawyer picked up something that was on Mr. Montes', the courtroom deputy's, desk today when you walked in. If you did, I'm not upset, but it wasn't meant to be handed out at this hearing, so return it. You will get something comparable in the attachment as part of the orders that I am issuing today.

All right. Now, turning to the matters at hand, I said what I believe about the way these cases need to be evaluated and approached and possibly handled in the first two or three pages of the September 25th order.

And I construe what you filed today, Mr. Mausner, to be, although cryptic, in agreement that you and your client are prepared to proceed on some kind of representative basis, sample basis.

Before I ask you specific questions about what you

filed, let me confirm that all of the defense lawyers received a copy of Perfect 10's statement. Did any of you not get it?

MR. ZELLER: Your Honor, Google received a copy of it.

THE COURT: If you didn't get it, just say so, otherwise, I'll assume that you all got it.

Did you all get a copy of Mr. Jansen's statement?

MR. BRIDGES: No, Your Honor, Microsoft did not, which raises one administrative point, if I may, which is none of us as a matter of course in the ECF system is receiving filings in the other cases, at least certainly Microsoft is not. I don't know if there is anything that the Court can do about that to have at least the ECF linkages in place.

THE COURT: These cases were formally consolidated, weren't they? When something is filed, isn't it supposed to be served in each of the cases?

THE CLERK: When they are consolidated, the parties are then combined, but this was -- early on it was consolidated for discovery, then there was a stay put in place.

THE COURT: All right. Look, I'm not going to figure out how to handle that.

You talk to Mr. Montes, and I'm instructing Mr. Montes to assist the parties in making sure that everything gets served upon everybody else regardless of which case. The cases are too closely related not to have that happen, and just

make sure it gets done and gets done immediately.

All right. Let me hear from you, Mr. Zeller -- and go to the lectern, please -- about the broad, overall concept of trying to avoid otherwise difficult, time consuming and expensive issues of discovery, of special masters, of technical advisors, and of full-fledged wasteful litigation by a different approach.

And the one that I described is by no means refined, and I'm not wedded to it, but I wanted to prod the lawyers into giving me their views as to what can be done to take a different tact altogether.

Now, please respond on an overall basis, but pithily, if you can, to what I said on September 25th.

MR. ZELLER: Yes. Thank you, Your Honor.

At the outset, we do think that it is problematic to have a sampling approach. We just don't think that there is going to be enough apples-to-apples type comparisons for it to ultimately be that productive.

THE COURT: Now, what do you mean by apples to apples? What are the apples that you are referring to?

MR. ZELLER: Well, first of all, we're dealing with different defendants, obviously different systems, different time periods, but also we're dealing with in Google's case somewhere between 65 and 80 separate DMCA notices, depending on whose testimony or positions you credit.

So we are talking about a lot of different notices with a lot of different URLs, different sites. And in many instances, as I think Mr. Mausner's submission of this weekend makes very clear, there were no URLs associated with those DMCA notices. So that in itself is an entire category that we're dealing with.

THE COURT: Are you stating, Mr. Zeller, that your client received not more than 80 different URL notices?

MR. ZELLER: No. They are notices themselves, not the URLs, not the sites.

THE COURT: The DMCA notices, you mean?

MR. ZELLER: Yes.

THE COURT: You received only at most 80?

MR. ZELLER: I believe that's correct. That's my understanding, Your Honor, somewhere between 65 and 80.

THE COURT: What is so cumbersome about litigating this case based on only those notices?

MR. ZELLER: We don't think it's burdensome at all, and, in fact, that's what we really think should be in the first instance what shapes the way the discovery goes.

There is kind of a more threshold issue I can address in a moment, but assuming that what we really have here based on the Perfect 10 submission of this weekend is a contributory copyright infringement case? I mean, it really is framed by the DMCA notices.

We think that is the first issue that really ought to be addressed by the Court. There are many of these, in fact.

THE COURT: And how should it be addressed, and how should the lawyers be required to proceed in order to get to a point where it can be addressed?

MR. ZELLER: On the contributory infringement issue, Your Honor, we think that Perfect 10 ought to be required to prepare the chart in the first instance that the Court has discussed.

We think that there are additional categories of information that ought to go into it, but certainly narrowing down the universe and having Perfect 10 disclose which URLs, which infringements it is alleging that were the subject of DMCA notices, were not the subject of counter-notifications and which were not taken down, because those would have to be the criteria that would have to be met before they could even get past the Safe Harbor issue.

So once we know what that universe is, then that is when we can potentially bring a motion with some additional discovery I can talk about, but it does at least sort of start to shape the playing field.

THE COURT: Well, look, Mr. Zeller, in order for me to understand what you're saying, look at Page 3 of my order, please.

In paragraph that's numbered 2(a), let's just assume

that the issues that I flagged, which are those that are mentioned in the Ninth Circuit's decision, are really, if not dispositive of all the possible issues, the crux of the issues. Assume that, okay?

When you say that Google should be required to fill in a chart, what information among the categories of information that were attached on the chart that I attached to my order really would be necessary?

MR. ZELLER: In addition?

THE COURT: No. Which of those. And then you can tell me which ones in addition.

MR. ZELLER: Okay. Well, certainly, as I --

THE COURT: Because you only sought the first six or so.

MR. ZELLER: Well, for one thing, Your Honor, certainly, as between all the defendants -- obviously, the chart covers more than that, and --

THE COURT: One thing that we could do, so I don't want you to keep harkening back to the fact that there are differences, as there are not only in time frame and not only in the alleged infringements and the like, but in the technology and other aspects among the different defendants or the Amazon group of defendants here. If I embark -- if I require something different than what you guys have all been doing so far, it could be done three times. It could be done

separately in each of the three cases. Maybe it will be done comprehensively, maybe not. But the idea is to do it more efficiently and more directly.

Now just speak, then, in terms of Google. So answer my question as to Page 3, please.

If I went your way and required that Mr. Mausner compile a chart akin to what is currently sought in the interrogatories that are the subject of the motion before Judge Hillman, just what would have to go into it?

MR. ZELLER: Certainly, I agree, that the Court ought to do it as sort of a unified approach because, obviously, there wasn't coordination among the defendants. Different defendants have different needs for different information.

I would say that to achieve the goal of doing this once, at least with respect to the chart as an initial matter, it ought to contain the categories of information that the Court has set forth in Paragraph 3(b) along with two other categories of information.

The first additional category would be basically the first publication date of the work involved and when the infringement allegedly began, and then, in addition, who is the person depicted in the image. Those would be the additional ones in addition to what the Court has in 3(b).

We think all the ones the Court has in 3(b) make perfect sense there as well. And these are important for

purposes of being able to proceed with the DMCA motion.

Now, one clarification. When the Court says here in 3(b) "the URLs of infringing websites," we would read that as being the URL of the particularly infringing image, if it exists.

THE COURT: Now, let's just assume that in the case of Google, Perfect 10 has sent only not more than 80 DMCA notices, and just assume -- because I don't know what the real facts are -- that those DMCA notices correspond to separate photos, and let's assume they were 80 different websites for that matter, and separate photos of 80 different models for that matter, and separate registrations that were obtained at separate times. Lots of differences among the 80. I don't know. It doesn't matter, but --

I'll hear from you later, Mr. Mausner. Please be seated.

MR. MAUSNER: I just wanted to clarify something, Your Honor, which -- I think there may have been a miscommunication on the URL issue.

JUDGE HILLMAN: Mr. Mausner, speak up.

THE COURT: I'll hear from you later, Mr. Mausner.

Suppose I said we don't need to do it for all 80, we should do it for a fewer number, and I'll just say arbitrarily for the sake of understanding your position, 40.

Isn't it possible to get to where you want to go to

have fewer than all of the universe serve as the sample on which we can get a glimpse as to what the universe consists of and what the legal and probable trial outcomes would be if it went the full distance?

You don't have a problem with that, do you?

MR. ZELLER: Well, actually, in many respects I do, Your Honor.

THE COURT: What is the problem?

MR. ZELLER: Well, the problem is this, is that the winnowing down process can take place because of the fact of the limited universe that we are talking about here is defined by the DMCA notices, and it's just not all, of course, the URLs. I would assume, and maybe Perfect 10 can confirm, that they are not suing on every single one that was ever asserted in the DMCA notices. Some of those were unquestionably taken down. Some of them certainly there will be categories in our view that Google could not even potentially be liable for because they don't give URLs in those notices. But it seems to me that there are categories that we can certainly deal with, but there are different categories within the notices.

THE COURT: Suppose I -- you know, I think the main problem that I tried to flag and didn't come up with it perfect and maybe not even a neat solution for, is how the sample would be determined.

Now, suppose I said not more than 40 DMCA notices,

each side to specify 20 out of the 80? Google goes first, Perfect 10 goes second. Google goes third, Perfect 10 goes fourth.

Once the sampled contents are determined -- and I don't know what they should be, but maybe it will be me who has to determine that -- what's unfair about that?

MR. ZELLER: Well, I think fundamentally -- it's not a matter of what I would consider to be fair, Your Honor.

I think what it really has to do with is where does that ultimately leave us, because, if, say, for example, we deal with 40 of the notices in this first phase, we'll call it, I think, ultimately, the Court's goal here, as stated in the order, is to either have dispositive motions that can narrow down the case or potentially settlement. And without knowing whether those 40 are, in fact, representative of the entire set of infringement claims, I'm not sure what information that gives us. That's the question mark that we have.

THE COURT: Oh, well, I don't know what you mean by knowing, but I would have a pretty high confidence level that if each side had the same number of picks, it's pretty close to representative.

MR. ZELLER: Well, but that would assume that, for example, if Perfect 10 lost on all 40 notices, whether it would say, well, we now admit we have no claim.

I mean, it just seems to me that unless a party is

going to --

THE COURT: Well, I can't be sure what Mr. Mausner and Dr. Zeda will do, but if they lost on all 40, I think you'd be in a very happy position.

I don't think that's a particularly troublesome outcome. And if they won on ten, and they otherwise had claims of thousands -- if you saw what Mr. Mausner told me in the document that was filed today, I don't know how -- other than, of course, by probably statutory damage contentions -- he would deal with the immense number of potential entrants in the universe.

I don't think it would be anything close to what is specified in the Perfect 10 statement that was filed today beginning at Page 3 and especially set forth in Page 4.

But, you know, you could pick and choose free websites, paid websites, others. You just have to tell me what the universe is, and then I have to figure out a way to get it done.

What is the downside? Other than what you're telling me so far, which is you can't guarantee it will change things, Judge, and I agree that I can't, what's the downside?

MR. ZELLER: Well, I would put -- the downside is this, is that Google does want to bring dispositive motions, particularly on the DMCA matter.

And to do that, there is certain discovery that we

need, that we have propounded, we have been at meet and confer sessions with Perfect 10 about that we need to have resolved in order to pin that down.

THE COURT: Okay. But what I am trying to accomplish, Mr. Zeller, is to get you the discovery that is essential and no more, not different kinds of discovery. Now not to preclude you from it, not to say that at no time would you have the chance to compel and to get a judge to agree that Perfect 10 should be compelled to provide other discovery, but at the current time and under this very perhaps innovative -- I've come up with the idea myself. I'm not sure that it has ever been done elsewhere, but maybe it has.

At this stage, that's all you're going to be confined to. You are not going to be able to seek other stuff, and Perfect 10 is not going to be compelled to give it, and whatever they think they need from you for the first stage is all -- once I'm satisfied that they have a right to it for the first stage, that's all they can get.

What's so bad about that?

MR. ZELLER: Well, what I would say -- if I may make a comment, Your Honor, about what it is that Perfect 10 says in its submission, because I do think that there is potentially ways of carving this out.

I mean, without obviously waiving -- what our position is is that, you know, we think we ought to just go

forward with discovery and get this over with.

But at that point, what Perfect 10 says is that approximately 1.4 million of these infringements are due to a hundred-and-twenty sites.

Seventy-five of these, they say, makes up the majority of this infringement. Those are pay sites.

If we get the identification of the hundred-and-twenty sites that they are talking about which ones are pay, which ones are supposedly free, what the URLs that they assert are the infringements on those, we can move forward on those with potentially some other discovery to pin down the adequacy and other issues associated with the DMCA notices.

So I don't disagree with the Court that there is a potential way of organizing this, but what causes me some concern is that I just don't see how the sampling is going to close those issues off.

If we deal with things by category, I think that is more likely to be something that would finish that area off.

THE COURT: What do you mean by category?

MR. ZELLER: Well, one category, for example, would be the pay sites. They say that this is a majority of the images that are infringing.

It is certainly no surprise -- and I don't think Perfect 10 is going to be disputing here today -- that Google does not index those pages. Their theory of infringement has

nothing to do with Google supposedly providing search results that have links to those individual URLs that have the images on them, the infringing images.

They're basically saying, as far as I understand it -- and this would have to be pinned down -- is that Google does business with Giganews, for example, and, therefore, is liable.

So if we can get those theories of infringement flushed out, if those can be pinned down, then we are in a position for moving for summary judgment.

THE COURT: Well, when you talk to me about theories of infringement, that doesn't sound to me like facts. It sounds to me more like contentions. So help me out. I don't know what you're talking about.

MR. ZELLER: Well, I think that there is a threshold issue that we have here, Your Honor, which is, of course, Perfect 10 not too long ago amended its complaint, and there are all manner of other theories that are asserted in this case. There's direct infringement. There's vicarious liability. There's --

THE COURT: Without making a final ruling on any motion that's pending, I will tell you all that this is almost entirely a contributory infringement case.

MR. ZELLER: And that's certainly the way we view it as well. And so what we are looking for, Your Honor, is, I

think, from Perfect 10 confirmation as to what theories is it really pursuing, and that is part of the more global question from our perspective.

And then once we have the idea that, yes, that we're suing contributory infringement, is there a contributory infringement theory? On the pay sites, for example, simply that Google has a business relationship with that particular website as opposed to any linking by Google in its search results or search index -- because as we read it and as we understand it, we think that is what Perfect 10 is saying, but, unfortunately, because we have not been getting the discovery that we need, we don't know that for a fact.

And I'm sure the Court can appreciate that that makes it very difficult for us to move for summary judgment on these issues without knowing because we are going to be finding out what their theory is for the first time in an opposition.

THE COURT: All right. Let me hear from Mr. Mausner for a moment, please.

Thank you, Mr. Zeller.

All right. Now, what did you want to tell me before that I may have been --

MR. MAUSNER: Yeah, I just wanted to clarify, Your Honor. Each of the 65 to 80 notices contained hundreds or thousands of URLs in each notice. It wasn't just, you know, 65 to 80 URLs.

THE COURT: Okay. So if -- let's keep using the Number 80. If I had taken an arbitrary approach and said only 40, and among the 20 you could designate, there was some with 300 URLs in a given DMCA notice, you would be prepared to do that, right?

MR. MAUSNER: Well, that's a lot more URLs than the sample of 100.

THE COURT: But if I require you to do it, you'd have to do it, right?

MR. MAUSNER: If you required us to do it, we would have to try to do it, of course.

THE COURT: You would have to try to do it because what's the alternative? You are going to have to prove these anyway, aren't you?

MR. MAUSNER: Well, I --

THE COURT: How could you possibly not contemplate that if the case went the full distance and there were a trial, you'd have to have all of this information readily available, packaged in a comprehensible way, disclosed and passing the threshold test of admissibility before you can get any jury to go your way?

MR. MAUSNER: Well, we don't think we have to prove every element that's in the chart there.

Certainly, we don't have to prove that for contributory infringement. We have to prove that we own a

copyright, that someone infringed it, and that the defendant knew about it.

THE COURT: Let me ask you to help me out. Please look at the chart that I attached to my September 25th order, and please tell me -- because this was not necessarily a complete universe, and Mr. Zeller said there is some more stuff that he would want to get -- but I think this is an accurate account of who was seeking what at this stage and what your client's contention is as to whether it's already been produced.

Here's a different question to you, Mr. Mausner. Looking at that chart, tell me -- and be careful in what you say -- which of the items that are listed in that chart would not be necessary in order for Perfect 10 to prove contributory infringement?

MR. MAUSNER: I don't think unique identifier would be. Copyright registration numbers would be.

THE COURT: Well, you have said in the status report statement you filed today -- and I appreciate your filing it, and I thought it was helpful -- you said that you are prepared to use the URL as the unique identifier, right?

MR. MAUSNER: Right, for the sample, because it's doable for the sample. If we have to do it for hundreds of thousands of images, it becomes undoable.

THE COURT: But I'm not asking for the moment about

what is doable or not. You are waging a titanic battle here, and I'm not blind to how tough it is, but my job is to make sure that everything is done as the law requires.

Why would a unique identifier of the work not be necessary for you to prove contributory infringement?

MR. MAUSNER: Well, we haven't really thought -- well, we've thought about it, but we haven't come to conclusions about how we're going to prove, ultimately, damages.

To establish liability, what we would do is move for summary judgment -- as we're going to do against Alexa within the next ten days -- with some examples showing the elements that the Ninth Circuit set forth for contributory liability.

THE COURT: Let's suppose that I grant your motion -- and I don't know. How many examples are you going to have in there against Alexa?

MR. MAUSNER: It's over a hundred. Maybe 200 or so.

THE COURT: Okay. 200 infringements. That's 200 different infringing sites or displays, right?

MR. MAUSNER: Right.

THE COURT: Maybe fewer than 200 different models, maybe fewer than 200 different websites, but altogether the universe of what you're going to claim, there can be no factual dispute about, and summary judgment in your favor has to be granted against Alexa, has to do with 200 infringements, right?

MR. MAUSNER: It could be a little bit more, a little bit less than that. Several hundred, I'd say.

THE COURT: I'm not going to hold you to the precise number. Let's just say 200.

JUDGE HILLMAN: Excuse me. Would that be 200 or so URLs?

MR. MAUSNER: Well, it would be -- for free sites, there would be URLs for it. And this is something that is very important. For the pay sites, there are no URLs for the infringing images.

It's like a big box, and the images are all there. So the way we identified the infringing images in our DMCA notices was to send them the URL for the website and a copy of the image.

THE COURT: I understood that, and not until today did I understand that.

MR. MAUSNER: And their position is if there is no URL for the image, we are not going to remove it.

THE COURT: Okay. I'm not going to comment -- certainly not rule upon -- that contention, but as to the free sites, you would have a URL?

MR. MAUSNER: Yes, of the web page.

THE COURT: Okay. And that would be your unique identifier?

MR. MAUSNER: Yes.

THE COURT: So, again, I harken back to the question I asked you a few minutes ago, Mr. Mausner. Which of the other categories on what I attached to the September 25th order would you not have to prove to prove liability?

If it was a paying site, and there was no URL for the particular display of the infringing display of the photo, then it would have been a page number, right?

You would have had to identify it to me or to the jury what it was that was infringed, right?

MR. MAUSNER: Well, we may submit a large number of images, and Dr. Zeda could testify that there were 300,000 images that he downloaded, and they all are infringing Perfect 10 images on this website, and then --

THE COURT: That's not going to cut it.

MR. MAUSNER: Well --

THE COURT: There's no way that that characterization and conclusion could be properly challenged if there wasn't a foundation for it.

Suppose it was 290,000 and that made a difference? You expect the defendants to simply proceed on the basis that because he claimed it was 300,000, they have to deal with 300,000?

MR. MAUSNER: Well, it might not -- you know, a difference of 10,000 might not make a difference on the same website.

THE COURT: Don't lose sight of the point, Mr. Mausner. I am trying to get you, without being hostile to you at all, to understand what evidence is and what you're going to have to prove at trial. And that's my premise here.

If you are going to have to prove something at trial, you're going to have to prove it on summary judgment, even as to just liability, okay? So I want to know what it is that's in this category that you don't have to prove to prove contributory liability.

MR. MAUSNER: Well, going back to -- first of all, we are not at trial yet, and it's our position that we can do motions for summary judgment based on sampling in the categories.

For example, the question of whether a search engine is liable for linking to a pay site, and the DMCA notice does not contain a URL of the image because there is no such URL to give, if it's sufficient that the DMCA notice contains the URL of the website and copies of the images -- and, you know, when you get to the point that --

THE COURT: You are going to have to specify the page number in your document production where that image appeared, right?

MR. MAUSNER: Well, the images are contained in a subfile for that website, and those are all of the images, all of the -- there are, you know, 19,000 Perfect 10 images on this

website. They are contained in this subfolder, okay, but at this point what we're doing is we're giving maybe two or three examples of images on that website, and the question is simply is the search engine liable for linking to that website and having advertising relationships with them.

THE COURT: That's the ultimate question.

So let's just assume it's two or three out of 19,000. Only as to those two or three, tell me what you don't need, because you keep waffling and evading my question.

MR. MAUSNER: Okay. For our motion, we are attaching copies of the images to it. I guess that acts at the unique identifier. The actual image itself is attached. We are giving the copyright registration number.

There is no page number. We're attaching a copy of the image.

The URL that we give is the URL of the website because there is no infringing -- there is no URL of the web page.

THE COURT: Okay. And you would have to give the URL with every precise component of it, even if it were a hundred digits long, right?

MR. MAUSNER: Well, for pay sites, the only URL is www.giganews.com.

THE COURT: All right. Keep going, Mr. Mausner.

Any item on a free site, for example, or URL, it

would be your legal obligation to provide the precise URL?

MR. MAUSNER: Yes.

THE COURT: All right. Keep going.

MR. MAUSNER: Okay. At this point, we're not doing anything about damages. Of course, if we went to trial, we would. But we may seek actual damages. We will seek actual damages, you know, and it could be based on overall loss of customers that Perfect 10 experienced rather than having to ascribe damage from the showing of one picture. I don't know that we could ever do that.

THE COURT: Well, that may be a problem you're going to have to deal with. I grant you that I'm not thinking about damages right now because I think there is a better way, but if you wanted to show damages because of a loss of customers, you would certainly have to show the date the infringed display occurred, the next item on my list, right?

MR. MAUSNER: Right.

THE COURT: Because you've got to know what the customer base was before and after, right?

MR. MAUSNER: Right.

THE COURT: Okay. What about the other entries on this information?

MR. MAUSNER: The date of the conduct is set forth on the printout because the printout has the date that it was accessed by Dr. Zeda or someone else and downloaded.

THE COURT: Well, just tell me is there any other item on this page on the information sought by the defendants in motions to compel, the attachment to my order, that in order to establish liability, you just don't have to prove it all?

MR. MAUSNER: I don't think you have to prove the search term. The thumbnail or full-size images, you may have to prove that under fair use, but that's obvious from the printout itself whether it's a thumbnail or a full size.

Copyright registration of compilations or derivative works, now, that may relate to statutory damages.

Documents showing chain of title --

THE COURT: Don't you have to prove ownership?

MR. MAUSNER: You are talking about documents showing chain of title?

THE COURT: Well, both. We talked about copyright registration previously. That's Item 2 -- or the second.

MR. MAUSNER: Right.

THE COURT: The second on this list. These are related to that. If it's a compilation or derivative work, you still have to prove ownership, right?

MR. MAUSNER: Right. And what we are doing is we are providing the copyright registration certificate, and we are going to have a declaration that says which certificate covers which image.

THE COURT: Okay. Now, here's the point that I think

is becoming pretty clear, I hope. You started out -- you didn't start out, but you said a few minutes ago -- other than -- I think you said 19,000, or something like that, we're going to give three, okay? And let's suppose you got before the fact finder -- or, on summary judgment, before me -- all that you needed to to establish that the defendant you were dealing with in that moment contributorily was liable or liable for contributory infringement on those three. You proved your case, Mr. Mausner. What would be your position as to the other infringements that may have been part of your document production -- but I really should have said alleged infringements -- that proving the three would entitle you to recover for the 19,000?

MR. MAUSNER: It would establish the principle as to whether there is liability for that category of infringement, and then hopefully --

THE COURT: Well, let's just say --

MR. MAUSNER: -- we would settle.

THE COURT: Let's just say it would prove that there was liability for those three infringements.

MR. MAUSNER: Okay.

THE COURT: Don't think too much about category. Where do you go from there?

MR. MAUSNER: Well, those three infringements are representative of a certain number of other infringements. The

facts are basically the same.

THE COURT: How do we know that unless we do a sample and unless the sample is kosher in the sense that it's devised and implemented in a neutral, fair fashion, either by having a technical advisor appointed who will determine exactly what's in the sample and neither side or any side can object or by having the parties negotiate? It's clear to me except for the search term and other instructions or events -- and I'll give a chance to one or more defendants to hear about that -- it's pretty clear to me that you acknowledged in our last few minutes of colloquy that all the information sought by the defendants, one or more defendants, is necessary to prove liability.

I'm giving you the opportunity to pursue what may or may not prove to be a feasible way to determine what your shot is in proving liability.

MR. MAUSNER: Yes, and thank you. We very much want to do it that way, by a sampling.

We definitely support the idea of doing it by sampling because, you know, what happens is when you have so many infringements, the greater the infringer, the more difficult or even impossible it is -- it becomes for the copyright owner to establish each element of the case for each infringement.

THE COURT: Okay. Now, in order for the sample to

have any potential value or validity, the defendants have to have a right to have the sample include the items or a representative number of items that you have designated, in whatever way you have with your Adobe PDF format or your responses to interrogatories or otherwise, of things that you were just plain off base on.

You gave a DMCA notice that was flagrantly defective, and you can't cure it now. All right? And they get their 20 in there, and I look at 40. You have your 20. That defendant has its 20. And on the ones -- on the overall ones, the 40, you just failed to prove 20, okay? And you may or may not have proved something about the other 20, but you flatly failed to prove the 20, some defect. One or more of these items that you would have to prove, you didn't.

So getting back to your 19,000, that's already reducing it, right, by 9500 at best? The sample is the predictor of the total universe?

MR. MAUSNER: It is reducing it somewhat, but I don't think the numbers -- if we go with 20 or 40 DMCA notices, we still may be talking about 40- or 60,000 images that are mentioned in those notices. And what I would suggest is that it be something like a hundred, and there aren't that many different permutations, at least that I've thought of. And I'm certainly open to any --

THE COURT: You want a hundred notices with --

MR. MAUSNER: Not notices, Your Honor. URLs or images, a hundred images.

THE COURT: How many DMCA notices?

MR. MAUSNER: Well, it could cover whatever notices those images are in. That's what it would cover. Or the first one that it's in. There is no reason we would have to -- if a certain URL is mentioned in five notices, we would give the first notices that it's mentioned in. Or if it's not burdensome, we could give --

THE COURT: But multiply that by five if you prevail on that one?

MR. MAUSNER: I'm not sure what you mean.

THE COURT: If you have one notice for one infringement, but the infringement was engaged in multiple times under my sampling approach.

MR. MAUSNER: Well, the infringement is ongoing. The infringing website has an image at a certain URL. Perfect 10 sends a notice to one of the defendants saying, "You're linking to this URL. Stop linking," and the defendant doesn't stop the link or doesn't stop the advertising relationship that they have.

THE COURT: Suppose there was a defect in the notice or some other failure of proof as to that example, okay? Now, that notice was defective for everything it put the recipient on notice of, right? You can't possibly recover for anything

else that was incorporated in that notice, could you?

MR. MAUSNER: You're saying if there is only one URL that we choose in the notice that we are going to be bound by that?

THE COURT: No. If there were a hundred -- because you just told me, Judge, keep in mind that any given DMCA notice could involve hundreds of URL notices.

If the DMCA notice is defective for any reason, you can't prove that there was liability as a contributory infringer within the meaning of the DMCA. Then you can't prove it as to anything that was covered by that notice. And your other examples -- your other -- what you put the recipient on notice of in addition to that one active infringement or that one particular photograph is out the window. What's wrong with that conclusion?

MR. MAUSNER: Well, that's not necessarily true.

There could be -- if there's a DMCA that has a thousand URLs in it, some of those URLs may not have been sufficient to locate the infringing material because there was something wrong with the way it was copied or something. And the other ones could be -- you know, could be sufficient.

THE COURT: So if I appointed someone to determine how the sample was going to be determined, only three DMCA notices with a hundred or more claimed infringements, every other aspect -- because I can see that there's just too much

potential for game playing here, and not only would the determination of what could be part of the sample and the methodology be done, but maybe both sides in any given case would have an equal number of designations once that's been determined within the framework -- then we are not going to be talking about skewing your effort to have incorporated the sample, only the things that you feel strongest about.

And you're going to be bound by the outcome because if there is a defect in the DMCA notice as to one URL, everything in that notice either could be deemed to be a failure of proof -- or certainly that URL. But you can't require a thousand of these to be multiplied by 40 DMCAs. Then you're back in the stew that you claimed you didn't want to be in, right, because you have to prove it just to me? You have to prove all these things.

I'm not going to let you get to summary judgment and prevail on anything unless the evidence of all of the elements that you have to prove for contributory liability -- and I'm not even for the moment focusing on damages -- has been established.

MR. MAUSNER: We think that this motion that we're going to be filing will establish each element. And then once we have the theories of liability nailed down, then we can go on to issues of damages.

THE COURT: Well, that harkens back to what Mr.

Zeller said. Because he, as I understood it, was telling me he doesn't know what your theories of liability are. And that came as a little bit of a surprise to me. You haven't spelled them out yet?

MR. MAUSNER: Well, I think we did. I think Your Honor did. I think the Ninth Circuit did. I mean --

THE COURT: Well, you just said, "Once our theories of liability have been established."

MR. MAUSNER: Right.

THE COURT: Haven't you established your theories of liability?

MR. MAUSNER: Well, the one that he mentioned, I think, is a good one. The pay sites don't have the URLs of the individual images. We think our notice was the best notice you can give in that situation where we give the URL of the website and the actual picture, and we've also given instructions for how you locate that picture in the website.

So the question becomes is that sufficient notice to the defendants to allow them to locate the infringing image and remove access. They have said in that situation they're not going to remove it. We think that they should remove it.

So that's an issue that Your Honor can decide on summary judgment.

THE COURT: Okay. I see what you're talking about.

Let me ask you something. This A9 motion, this

motion against Amazon and Alexa that you are going to be filing, is there something about that motion that is sui generis that would not be a good example of comparable motions you might file later on against Google or Microsoft or even A9?

MR. MAUSNER: Some is and some is, you know, peculiar to Alexa.

THE COURT: Like what?

What I'm driving at, in case it isn't clear -- and this is true for the benefit of everybody. I'll hear from some of the defense attorneys in just a second -- is, okay, you want me to hold off everything, hold off further discovery, hold off any determination about a sample, see how far you get and how far I get on your impending, as you put it, summary judgment motion or partial summary judgment motion against Amazon and Alexa, and I want to know, before I embark on that and whether I go along with your request, how much of a predictor for future work, future summary adjudication motions, other cases, that motion is going to be, what kind of a predictor will it be.

MR. MAUSNER: Okay. For that example of pay sites, that's the same issue that is in all three cases.

There are some issues regarding Alexa that are unique to Alexa.

THE COURT: Like what?

MR. MAUSNER: Alexa did not have a designated

copyright agent registered at the copyright office, so Perfect 10 sent the notices to Amazon, and Alexa takes the position that sending it to Amazon wasn't sufficient, even though it didn't have an agent registered, and the only registered agent was Amazon.

THE COURT: Okay. I've given you a lot of time. I have to give some time to the defendants. I am going to hear from Mr. Bridge (sic) next. But you tell me what you meant at the bottom of Page 2 of what you filed today when you said "Perfect 10 respectfully suggests that large-scale discovery relating to requests made by various defendants be postponed until the Court rules," on your summary adjudication motion.

What do you mean by "large-scale discovery" and what kind of discovery that the defendants are seeking would still be permissible?

MR. MAUSNER: Discovery that relates to the motion, if there is any.

THE COURT: You mean a 56(f) request?

MR. MAUSNER: Yes.

THE COURT: So you're talking just, then, about Amazon and Alexa? You're not asking me to hold off on the discovery efforts that Google and Microsoft are making, are you?

MR. MAUSNER: Well, the large-scale discovery that they're asking about, there is some very -- you know, first of

all, these charts are -- if we were doing the charts, we would not be able to do the summary judgment motion.

Another example is Google has propounded I think it's 962 requests for admissions on us. We answered about half of them, but they're now --

THE COURT: Well, that gets back to this question how much a single lawyer and hard-working, skillful lawyer can do, and, you know, I don't know that there is that much I can do about that. I am not going to knowingly permit someone to bludgeon you, but you've embarked on these claims against all of these defendants. And that argument that "I'm overworked and excessively burdened" can only take you so far, Mr. Mausner. Don't think I'm going to excuse everything that has to be done. Not even close.

Let me hear from you, Mr. Bridge.

MR. MAUSNER: Your Honor, I understand that. I'm just saying let's get these issues decided for the summary judgment and a lot of this may go away.

THE COURT: Well, that's what I am trying to figure out.

Please give me your overview to start with as to whether you think this concept that I came up with, however unformed or incomplete it is -- and I recognize it is and I knew it was when I sent it out -- makes any sense at all.

MR. BRIDGES: Your Honor, Microsoft believes it makes

an enormous amount of sense. And, frankly, I feel that with the statement we received from Perfect 10 over the weekend, we may have had a breakthrough in the case that reflects that the fact that this chart is starting to give this case some structure. And having a structure like this helps us focus on what's really here and what really isn't here so that we can focus all of our energies on what really is in the case.

I just have a few comments to make largely on details just to make sure we don't lose track of what's needed to make this chart successful.

I think Mr. Mausner said something today that was different from what he said in his papers, but a "unique identifier of the work"? This arises in part because we're getting lots and lots of pictures with no Bates numbers or anything, and we just need to know by some identification what the image is that Perfect 10 is claiming.

In the papers, Mr. Mausner said they could be uniquely identified by reference to the URL for the image on the Perfect 10 website. Today I thought he said that URLs of alleged infringements might work.

We really think it needs to be tied to something that Perfect 10 controls, and so I think that's what it should be.

THE COURT: Well, I saw that, too. And you are talking about at the top of Page 4? Perfect 10's filing today?

MR. BRIDGES: That's right. Top of Page 4 under the

URL of the image on perfect10.com. That works for us.

THE COURT: If you got that, Mr. Bridge, is what you're telling me is that you could then see what the photo consists of and then you could find it?

MR. BRIDGES: That's right.

And then also the reason I asked for this -- and, frankly, I drafted the Google interrogatory when I was still representing Google, and so it's parallel.

THE COURT: You're doubly billing this.

(Laughter.)

MR. BRIDGES: No, I'm not, Your Honor.

But the point is we've got to have a handle by which we analyze the common thread of the various facts about various works claimed by Perfect 10, so we have to find a way of uniquely identifying that work. It could be a Bates number in a traditional document production. It could be some sort of abstract image number. Here, if it's a URL, fine. But that gives us the framework so that we can attribute all the other information to that work.

THE COURT: Do you think, Mr. Bridge -- is it Bridge or Bridges?

MR. BRIDGES: Bridges.

THE COURT: Sorry.

MR. BRIDGES: That's all right.

THE COURT: Do you think if I ordered that the world

stop and Mr. Mausner do nothing more than negotiate with you for not more than a full day and I locked you both in some room, you could stipulate to a methodology?

MR. BRIDGES: I think it's possible, Your Honor. I would have to confer, obviously, with allied counsel, but I think -- I don't see a reason why both sides can't come to a reasonable accommodation here.

THE COURT: Well, no. I think I know what you mean by allied counsel, but I am just saying suppose it was just for Microsoft.

MR. BRIDGES: Oh, absolutely. Now, it requires two willing parties.

THE COURT: Well, of course. Microsoft and Perfect 10. Just your case, okay? Then you see what you and Mr. Mausner come up with. And I see it and the other parties, including especially Google, could get the benefit of whether or not it is likely to be helpful.

MR. BRIDGES: I think that would work, Your Honor.

THE COURT: Do you think that you could figure out a way to define what goes into the sample that would be neutral and fair?

MR. BRIDGES: I would like to make a point. I think there has been discussion of samples and there's been discussion of categories. I think both sides can identify categories. They wouldn't be a random sample, but we can look

at the many different permutations of combinations of URLs, notices, claimed works and the like. Whether it's 20 or 60 or 320, I don't know. It's sort of a kaleidoscope, but I think we could at least sit down and say here are categories that can be looked at in the abstract.

THE COURT: Okay. But I knew about the distinction. I wasn't, I hope, inadvertently confusing the sample with the classification, because the sample could skew the validity of doing this on a truncated basis.

Okay. Which ones of all of the information has to be provided for and how many? So I thought just sitting here off the top of my head, give each side the same number of designations.

MR. BRIDGES: I think that works, Your Honor.

We just want to make sure that the designations give us -- that we have a large enough number of designations that each category gets represented because what we need is a sample within each category.

THE COURT: Oh, more than one sample in each category.

MR. BRIDGES: Absolutely.

THE COURT: I would just offhand contemplate at the very least -- and I don't think it would be this few -- for every given classification -- every different category, I should say, that we have to get a microcosm of the full

universe for, each side is going to have at least one sample favorable to it, if I give to each side the right to designate an equal number of samples but probably more than one.

All right. What else did you want to tell me?

MR. BRIDGES: I think all the others are fairly self-evident.

One thing has occurred to me that could be important, and that is that if Mr. Mausner -- and this is in addition to materials on the chart. If Mr. Mausner or Perfect 10 could identify to the best of its knowledge when the first infringement of each work occurred, and that relates substantially to the availability of statutory damages.

And I raise that not because we're ready to litigate the damages phase of this case, but I interpret the Court's efforts here to be directed at two things: To help bring structure to the case, and also to give both sides a realistic appraisal of the likely outcome of the case.

THE COURT: Yeah, that's exactly what I'm driving at.

Now, if you look at the chart that I attached, you see where it says just above the middle of the page "Date of and particular conduct constituting the infringing act"? Would it accommodate your concern if it said "constituting the first infringing act"?

MR. BRIDGES: Yes, Your Honor.

THE COURT: Okay. Anything else you want to tell me?

MR. BRIDGES: That's it on the chart. But if I could go to a broader view of the case for a minute and try to crystalize some things that were said earlier.

THE COURT: Go ahead.

MR. BRIDGES: The Court said, as I believe, that this case is really boiling down to a contributory copyright infringement case.

THE COURT: Yes. That's my decided, but not final, view.

MR. BRIDGES: Understood. And, also, I would like to identify five categories of theories that have been out there, and it would be useful to know formally from Perfect 10, perhaps in 30 days with time to think it through, whether it really still asserts these other theories.

And if I can just tick them off, it would be useful, I think.

The first is trademark infringement. The Google and Microsoft cases both include allegations of direct and indirect trademark infringement, but it's never been a topic of discovery in this case. At least discovery has never happened on it.

Second, after the Court's enunciation of the server test and the affirmance by the Ninth Circuit, is Perfect 10 still claiming direct infringement of the display and distribution rights arising from framed pages and the links to

them?

THE COURT: When you get a copy of the order that's going out this afternoon that I prepared for the hearing that didn't take place this morning, you will see that I asked that question.

MR. BRIDGES: Great.

Third, does Perfect 10 pursue a direct infringement claim relating to the existence of passwords in search results?

Fourth, does Perfect 10 continue still to argue that the copying and display of thumbnail images is not fair use?

Fifth, is it still pursuing a vicarious liability claim under copyright law?

And the sixth one is pretty minor because it's never really been addressed, but does Perfect 10 allege any violation of public performance rights under Section 1064?

In the pleadings I saw earlier, everything was in there, and we just need to trim it down.

If we get clarity here, this could dispense with a number of 12(c) or Rule 56(f) -- Rule 56 motions that may be required.

So those are my comments, Your Honor.

THE COURT: Okay. Well, I'm not going to have time to follow up on that. There are ways using standard discovery techniques, such as, interrogatories or requests for admissions, to narrow the issues.

If I were counsel for Perfect 10, given especially the magnitude of the claims and the difficulties of proving them, I'd want to pick my best shots. And I think I know what the answers would be to most, if not all, of these questions. So we may have a very direct, informal and cheap way of narrowing the issues. So go ahead and do it. I encourage that.

Let me hear from you because you haven't had a chance. And your name is Mr. Jansen, right?

MR. JANSEN: Yes, Your Honor. Mark Jansen for amazon.com, A9.com and Alexa Internet.

I think I want to, first of all, say I agree that sampling is appropriate, you know, at least to kind of get a sense of what are the categories of alleged infringements that the plaintiff is going after here.

I think there is other issues that also have to be, you know, taken discovery of, but I believe the sampling concept is a good one.

I do want to address right now the issue that Mr. Mausner has raised about bringing a motion for summary judgment against Alexa and the alexa.com site.

Alexa.com just got added to this case three months ago. We haven't taken any discovery. And I think the notion that instead of providing the basic information about what this case is about in discovery so we can take discovery and get

ready to oppose a summary judgment motion, instead, Mr. Mausner wants to present his sample in the form of a summary judgment motion against a defendant that's been in the case for less than four months is to me -- it just isn't workable. It just doesn't make sense.

The motions that have been filed by the defendants that have been in it for years have been to try to get basic information. I think the Court is correct to try to get a sense of what this case is about, but we still do not know the basic theories under which Mr. Mausner, the plaintiff, is bringing this case.

The Ninth Circuit decision and Your Honor's review of the preliminary injunction motion dealt with one issue only, one kind of conic, which was so-called thumbnail image searches. And that's what the Ninth Circuit looked at in its decision.

Now, since that decision came down, the plaintiff has completely, as far as I can tell, changed its theory but has never told us what those theories are, which is why one of the categories that we asked for -- that A9 asked for in the chart that is part of the Court's order was the search terms and other instructions or events used to cause the infringing display, because we believe -- and this probably is a matter of law that will be resolved by the Court on summary judgment motion eventually -- is the fact that a search engine, whether

it's Google or Yahoo or Microsoft, can provide an ability to link to some pay site is totally different than automatically retrieving a thumbnail image that can be clicked on to then view a full-size image.

So it's really important for the plaintiff to tell us what and how in his view the evidence will show users use the particular sites to, quote, get access to allegedly infringing materials.

THE COURT: Well, my initial view about what you're saying is that there's potential merit to it, and I understand your position.

It may be that the fastest, most concrete way to determine whether -- first of all, to require Perfect 10 to specify what his theory is, at least against Amazon and Alexa, is to have Mr. Mausner go through what he said he's about ten days away from filing. So he must have begun it already. Have him file the motion, have him file his Memorandum of Points and Authorities, have him attach the evidence that he thinks warrants summary judgment. And maybe he's right. And then you see what you have to deal with.

And if at that point, what you have to deal with is something that requires discovery that you haven't been provided, haven't even had a chance to pursue, especially in the case of Alexa, you would take the appropriate position, probably demand more time under 56(f), maybe then send out

contention interrogatories that are specifically addressed to the contentions and the evidence in Mr. Mausner's opening papers.

What is the theory of liability precisely and what is the support for it that warrants Statement of Undisputed Fact 17? Rather than wallow around in the ether world or the netherworld of abstractions, why don't we reduce it to something concrete?

MR. JANSEN: Well, I believe fundamentally, Your Honor, it's completely inappropriate to have a summary judgment motion brought against a defendant before they have had a chance to take discovery. I have propounded discovery for Alexa. Alexa.com just got added as a defendant.

THE COURT: Yeah, I know.

MR. JANSEN: I don't even know -- as I mentioned in our papers, we don't know, because plaintiffs never told us, whether they contend any infringement by the amazon.com website at all.

So we still haven't gotten any information from plaintiff about what they contend amazon.com, that website, did to infringe.

My understanding all along has been simply that it provided the so-called A9.com functionality for a brief period.

THE COURT: You know, Mr. Jansen, I'm not going to close the courthouse doors to Mr. Mausner.

If he wants to file this motion, he has probably thought it through. And he probably thinks it's not only a meritorious motion -- I assume he's cognizant of Rule 11 -- but a timely motion. And we'll see.

I mean, I'm not going to rule on a motion that is premature. And if the opposing party establishes that something else has to be done or discovery, et cetera, has to be completed or contentions have to be established, then I'll proceed accordingly, but I'm not going to issue a ruling now, if that's what you're asking me to do, that he better not file a motion.

So tell me what else you think about what --

MR. JANSEN: Yeah, as counsel for Google mentioned, I think one of the big issues here, and I think a fundamental threshold issue, is the adequacy of the DMCA notices.

And it's my impression -- I think it's been pretty much confirmed here today that the only basis of knowledge by any particular defendant, including my clients, has been the so-called DMCA notices. But I think that needs to be clarified and, hopefully, that will be as part of the responses to, you know, the structured interrogatories you've got -- you have planned here.

But it is critical that any part of a defense of a contributory infringement case goes to the adequacy of those notices, and we need to get the discovery regarding what

infringing specific URLs were identified in those notices that the plaintiff contends he put us on notice on actual knowledge that we could do something, so we can't address that. And that's why I think it needs to be part of --

THE COURT: Seems to me Mr. Mausner is going to give you that when he moves for summary adjudication as to at least the subject of his motion. If he doesn't, he loses. So let's see what he comes up with.

MR. JANSEN: Okay.

THE COURT: Okay. Here's -- it's almost 3 o'clock.

Are you still with us, Judge Hillman?

JUDGE HILLMAN: Yes.

THE COURT: Do you have any questions you want to ask any specific lawyer?

JUDGE HILLMAN: I have a thought, but I can share it with you after the hearing.

THE COURT: No, I definitely need to speak to you, but I have a courtroom full of other lawyers and litigants, and I'm going to have to turn to that very soon.

JUDGE HILLMAN: Well, let me just say I have been wondering the last hour if -- what you just said would be the potential way of handling the Alexa motion in the near future whether there might be some usefulness to approaching motions in the other cases by having the parties agree as to what is the essential elements in the chart, but only require it as to,

let's say, one or two DMCA motions -- notices, and a single infringement, a single URL, and then invite cross-motions as to contributory liability only at that point, my point being that maybe the Court would wish to forestall the actual sampling but just invite a test cross-motion on contributory.

THE COURT: Well, let's talk about that afterward, but I'm glad you proposed that approach and that idea.

Right now I have under submission the motion that A9 filed, and I do want to have that hearing on the 27th, and we'll see what happens and how I rule.

I have certainly spent a considerable amount of time trying to understand the parties' positions, and I have more guidance that they will have to provide.

Here's what I'm going to do. Mr. Bridges, I have so much respect for the professional manner in which you handle cases that I'm going to put an excessive or unique burden on you, but only in your capacity as counsel for Microsoft. I know that you had to step down as counsel for Google, and I don't want to in any way require something that would raise some kind of professional issue, but I want you to meet with Mr. Mausner.

MR. BRIDGES: Yes, Your Honor.

THE COURT: And I would like you at the conclusion of this hearing, which is going to end in just a couple of minutes, to check your calendars and figure out the earliest

possible date where you could try to negotiate a truncated approach somewhere along the lines of what I contemplated on September 25th in the order I sent out and what has been the subject of discussion today.

Do it only with respect to your case, not with respect to any other and not worrying about the ramifications in any other case.

It may be something that we could do to take care of the Microsoft action and none of the other two. I don't necessarily think that everything is going to be handled the same way, although I think in general and in principle, they can be.

And then file a status report with me. And if you agreed on the crux of what needs to be done but not on everything, and if there were two deal points or two issues that one on each side thought was critical and couldn't get the other side to agree to, or whatever the differences are, specify that, and set up a time to have a telephonic status report. Set up a hearing with Mr. Montes where I'll talk to just you and to Mr. Mausner to see whether there is any point in furthering that effort.

Do that as quickly as you can.

And that means making your schedule available, Mr. Mausner, because I want to get a sense, as I think through this further, as to where we can go. And I think the largest amount

of sunshine that was dispensed at this hearing suggests to me that it's on the Microsoft case that we should start.

I wish I had more time to review these issues with you. They are very difficult for me. The management issues are formidable, and the technological issues are very difficult, but I appreciate your input, counsel.

I'm not going to issue any particular ruling, any special Case Management Order right now.

The matters that are pending before Judge Hillman will remain under submission, or whatever status they're currently in.

I think it might be actually salutary for you to file that motion, Mr. Mausner, so I'm not -- I hope that you don't misconstrue anything I've said in the motion against Alexa and Amazon or one or the other or both.

I want the parties to order a transcript and split the cost four ways. So get a transcript promptly, please, and we'll take it from there.

We stand adjourned. I'll call the various matters for the 3 o'clock calendar a little bit later.

Mr. Zeller?

MR. ZELLER: If I may, Your Honor, a quick clarification. Since Perfect 10 has taken the position that the Court has stayed discovery, I assume that is not the case, the discovery is not stayed?

THE COURT: Discovery is not stayed, but the matters that resulted in discovery motions are not going to be addressed by Judge Hillman or anyone else until we determine whether or not that really has to be decided.

MR. ZELLER: Thank you.

MR. MAUSNER: Thank you, Your Honor.

(Proceedings concluded.)

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