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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION  
HONORABLE A. HOWARD MATZ, U.S. DISTRICT JUDGE

- - -

PERFECT 10, INC., A CALIFORNIA )  
CORPORATION, )  
 )  
PLAINTIFF, )  
 )  
vs. ) No. CV05-4753-AHM(SHx)  
 )  
AMAZON.COM, INC., ET AL., )  
 )  
DEFENDANTS. )  
\_\_\_\_\_)

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
LOS ANGELES, CALIFORNIA  
MONDAY, OCTOBER 27, 2008

\_\_\_\_\_  
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*COURT EXHIBITS*

*MARKED*

*ADMITTED*

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1 LOS ANGELES, CALIFORNIA; MONDAY, OCTOBER 27, 2008

2 11:13 A.M.

3 - - - - -

4 THE CLERK: Calling Item Number 1, Perfect 10, Inc.  
5 versus Amazon.com, Inc., et al.

6 Counsel, state your appearances, please.

7 MR. MAUSNER: Good morning, Your Honor. Jeff Mausner  
8 for P10. With me is Melanie Poblete, who is a paralegal.

9 THE COURT: Good morning to you both.

10 MR. JANSEN: Good morning, Your Honor. Mark Jansen  
11 representing defendant A9.com.

12 THE COURT: Okay.

13 MR. ZELLER: Good morning, Your Honor. Mike Zeller  
14 for Google.

15 THE COURT: Google is not a party to this case, is  
16 it?

17 MR. ZELLER: It is because the cases are  
18 consolidated. I mean --

19 THE COURT: Well, you're welcome to be here, but I  
20 don't think I need to hear from you.

21 MR. ZELLER: I agree, Your Honor. It's not my  
22 intention to speak unless spoken to.

23 THE COURT: All right. Please be seated.

24 Mr. Mausner, approach the lectern.

25 I will rule on the objections that came in over the

1 weekend to your client, Mr. Zada's, declaration, and I rebuke  
2 you for going beyond the scope of the authorized responses from  
3 the previous questionnaire that I circulated. You filed  
4 something in the nature of a sur-reply, and I don't think that  
5 was warranted, and I don't want you to do it again.

6 Now, turn to the questions that are dated October  
7 27th. The previous pages on this several-page questionnaire,  
8 there are Pages 1 through 5 which simply incorporated in a  
9 pithy fashion the responses that I got to the previous  
10 questionnaire. And if somebody thinks that there is a material  
11 omission or mischaracterization in the responses, then I'll  
12 give you a very brief opportunity to tell me how we flubbed it,  
13 otherwise, I want to focus on the questions that are on the  
14 unnumbered page, which we will call Page 6, the page that has  
15 the date of October 27th.

16 MR. MAUSNER: Thank you, Your Honor.

17 There is one correction. On Page 2, the first  
18 question there regarding the Zada declaration, Paragraph 16,  
19 our response to that is yes where it says, "Did not answer.  
20 (Probably 'no.')

21 THE COURT: Where did you answer yes?

22 MR. MAUSNER: Page 2, Lines 2 through 5.

23 THE COURT: Page 2 of what?

24 MR. MAUSNER: Page 2 of the Perfect 10 Supplemental  
25 Brief.

1 THE COURT: Well, I must have left that in my study.

2 MR. MAUSNER: I have a copy here, Your Honor. Would  
3 you like me to --

4 THE COURT: I'll look at it later.

5 MR. MAUSNER: On Page 2, Lines 2 through 5, we  
6 stated -- and this is a listing of the infringements. We've  
7 listed eight different forms of infringement. It says, "A9 has  
8 provided web search links and cache links to infringing  
9 websites, like the Irina Garenskih example mentioned by the  
10 Court."

11 And we said, "This is infringement of display and  
12 distribution rights by third party websites' reproduction right  
13 by A9 users."

14 THE COURT: All right. I'll look at it.

15 Look at Page 6, please, Mr. Mausner.

16 MR. MAUSNER: Yes, sir.

17 THE COURT: Actually, I meant to do something else  
18 before I heard from you, so why don't you be seated for a  
19 minute.

20 There are certain parts of the pending motion that  
21 I'm in a position to rule on. I'm going to rule orally, and  
22 there's one chunk that I'll take under submission.

23 I grant summary adjudication to A9 on the direct  
24 infringement claims that have been brought against it. The  
25 server test is still the test. It will be up to the Ninth

1 Circuit to revise the test, limit it, refine it, and I can see  
2 that it might.

3           There could be a distinction that would be drawn  
4 between an ISP or a search engine on the one hand and a direct  
5 infringer on the other, but nothing in the current state of the  
6 law warrants a disregard. And P10 does not dispute and could  
7 not dispute that A9.com never did and has not stored any of the  
8 images on its own servers.

9           That's in the Statement of Undisputed Facts,  
10 Paragraph 13 in the SGI response. That's true for the  
11 thumbnails or the actual size.

12           Although A9 provides a "see full-size image" option,  
13 the Ninth Circuit did not address this, and I don't think that  
14 the conclusion it would draw would be any different.

15           What the Court in Germany ruled may be interesting,  
16 but it's only part of the developing jurisprudence, and I'm  
17 going to stick with the server test and grant summary  
18 adjudication against Perfect 10 and in favor of A9 on the  
19 direct infringement claims.

20           I'm also going to grant summary adjudication on the  
21 vicarious infringement claims. There is clearly no legal right  
22 that A9 has to stop the infringing conduct, and it doesn't have  
23 the practical ability to do so.

24           I don't have to get into issues of whether there was  
25 a direct financial benefit. That was part of the Grokster

1 formulation because really the only issue here is control.

2 And the opinion of the Ninth Circuit in this case  
3 when it went up on appeal, 508 F.3d at 1173 through 74, and  
4 later on 74 and 75, deal in sequence with this issue of a legal  
5 right to stop it or a practical ability to stop it. I find  
6 that the language, the analysis and the conclusion that is set  
7 forth by the Ninth Circuit in that case precludes Perfect 10  
8 from establishing vicarious infringement liability in this  
9 case.

10 A9 never had and still doesn't have a contractual or  
11 other right to control the content on any third party websites.  
12 That's reflected in Paragraph 14 of the Statement of Undisputed  
13 Facts.

14 P10 attempts to dispute those, but the dispute that  
15 it sets forth in the SGI Paragraph 14 goes to contributory  
16 liability, not vicarious liability.

17 And I don't find that any ability that A9 may have to  
18 control its own index comes close to meeting the Ninth Circuit  
19 standard for having the practical ability to shut down the  
20 infringing sites or remove the infringing content from those  
21 sites.

22 The ability to stop or limit that kind of conduct  
23 doesn't mean the ability -- or isn't synonymous with the  
24 ability to detect it. It means to shut it down, and there is  
25 no evidence that would permit a jury to find that A9 had that



1 ability here.

2 So those are my rulings on the direct infringement  
3 and vicarious infringement parts of this motion.

4 And you can file a very pithy order confirming that  
5 those were my rulings, Mr. Jansen, and that will go out in  
6 writing, but I'm not going to be supplementing these oral  
7 findings with any opinion.

8 So let's turn to the crux of this case and of the  
9 other consolidated cases which are the claims for contributory  
10 liability. And on the contributory liability prong, I see the  
11 possibility of there being two genuine factual -- and to some  
12 extent mixed factual and legal issues that probably -- but I'm  
13 not making a conclusive ruling -- warrant denying the summary  
14 adjudication motion.

15 The first has to do with whether or not the threshold  
16 question for invoking 512(a), which is the premise of the  
17 summary adjudication motion, the Safe Harbor, in 512(a),  
18 whether the threshold requirement of complying with 512(i), the  
19 repeat infringer policy, has been established.

20 The focus there -- and that will be the focus of this  
21 very limited hearing. I have seven or eight matters on my  
22 afternoon calendar, and I intend to break not a minute later  
23 than 12:00, if we go that far. The focus will be on  
24 Clickriver, and there are some questions that I will address  
25 when we get to that.

1           And as to 512(a) itself, if you turn to that and get  
2 past the 512(i) threshold, there are two aspects of statutory  
3 requirements that seem to be at play here in the sense that I'm  
4 not satisfied that A9 has made the necessary irrefutable  
5 showing, and that is whether or not they retained the material  
6 longer than necessary and whether it modified the content.

7           So those are the overviews that may place in context  
8 some of the questions and some of the colloquy that we are  
9 about to have, counsel.

10           Please return to the lectern, Mr. Mausner.

11           MR. MAUSNER: Yes, sir.

12           THE COURT: Okay. Now, start out with Question 14,  
13 please.

14           MR. MAUSNER: It's our position that an entity either  
15 is or is not a 512(a) service provider. If they modify some of  
16 their content on some searches, then they are not a Section  
17 512(a) service provider.

18           THE COURT: What authority is there for that  
19 proposition? Let's assume, for the sake of your answering that  
20 question, that there were a hundred searches, and they modified  
21 the content on one and did not on 99.

22           MR. MAUSNER: They had the ability to do so. They  
23 make the choice.

24           THE COURT: I -- go ahead. I'm sorry to interrupt  
25 you. Keep going. What else?

1 MR. MAUSNER: They make the choice of whether or not  
2 to modify the content. There may only be some that content  
3 needs to be modified. But once they do that and once they have  
4 that ability, then they are a 512(a) service provider, period.

5 THE COURT: Well, why do you say period? Can you  
6 tell me what supports that conclusion?

7 MR. MAUSNER: Well, I think it will be --

8 THE COURT: Again, assuming, Mr. Mausner, that there  
9 are a hundred searches and 99 are not modified.

10 MR. MAUSNER: Okay. First of all, that's not what  
11 we're being faced with here. A9 has submitted no evidence that  
12 there are search results that they didn't modify.

13 The only evidence that has been submitted is what  
14 Perfect 10 submitted which shows that for searches on Perfect  
15 10 models, these search results are modified.

16 This is their motion for summary judgment, and they  
17 clearly have not met their burden of showing that there are any  
18 search results where there is no modification.

19 But even apart from that, I think this will be -- or  
20 this could be a case, if Your Honor wants to reach that, that  
21 issue, that determines it, but Your Honor doesn't have to reach  
22 that issue because there's no evidence at all that's been  
23 submitted that there are any search results that weren't  
24 modified.

25 THE COURT: So putting aside the question-of-proof

1 burdens -- and one should never put those aside. You gave a  
2 perfectly responsible answer -- you think that the law is such  
3 that if a provider has the capacity to modify and it sometimes  
4 chooses to do so, it's precluded from that safe harbor? Is  
5 that your position?

6 MR. MAUSNER: Yes, Your Honor.

7 THE COURT: Do you have any statutory or case  
8 authority support for that proposition and conclusion?

9 MR. MAUSNER: No, Your Honor.

10 But the reason for Section 512(a), which does not  
11 have a notice and take-down provision in it, is for those very  
12 kind of service providers who cannot do -- cannot take down  
13 material, cannot modify it.

14 It's for companies like cable companies and phone  
15 companies that actually provide the transmission, and they do  
16 not have the ability to do that.

17 If a service provider has the ability, and they  
18 exercise that ability in some cases, then they are no longer a  
19 512(a) provider -- or I should say they never were a 512(a)  
20 provider.

21 THE COURT: What can you tell me about the degree to  
22 which the evidence that Dr. Zada attached and the searches he  
23 chose to address are representative?

24 MR. MAUSNER: Well, they're searches on Perfect 10  
25 models only. As to Perfect 10 models, you know, they are

1 representative of all searches.

2 All of the evidence shows that A9 never got a link  
3 from Alexa. What they got is the URL, and then A9 created the  
4 link by putting in the code. We submitted a -- there's only  
5 one --

6 THE COURT: Why did you refer to Alexa in your answer  
7 and not to Google?

8 MR. MAUSNER: That's another point, Your Honor. The  
9 only evidence that A9 submitted of what it got from the search  
10 provider was that one -- it's Page 7 of Exhibit 1 to the  
11 Amacker supplemental declaration.

12 They never submitted what they got from Google, and  
13 they never submitted what they got from Microsoft. And, again,  
14 Your Honor, this is their burden of proof to show what they  
15 received from their search provider. And if they had done  
16 that, we could have shown for those cases as well what it was  
17 that A9 added. We did that for the Alexa case. They provided  
18 us that one page, and we submitted the actual source code that  
19 A9 created.

20 THE COURT: You know, you just cross-referred to the  
21 Alexa case, and I want to tell you that to the extent that you  
22 expected me to take into account in your opposition to this  
23 motion the notices that you apparently incorporate in something  
24 you filed in your own separate summary judgment motion against  
25 Alexa is a baffling notion. I don't do that. I will not do

1 that.

2 I'm not incorporating into my analysis anything that  
3 you asked me to consider by reference. Different motion,  
4 different defendant. And you've got to understand that we  
5 can't go searching around for tidbits of information even in  
6 related cases, even when we are pouring a lot of effort into  
7 those cases that aren't presented before us.

8 We have as much work as you do, Mr. Mausner, at  
9 least. So I'm not going to let you cure that in any  
10 supplemental thing. I don't want any more papers on this  
11 motion. Zero.

12 MR. MAUSNER: Your Honor, we don't think it's  
13 necessary.

14 THE COURT: Well, don't do that again.

15 MR. MAUSNER: We submitted a sample, but we didn't  
16 want to burden the Court with, you know, many, many DMCA  
17 notices.

18 THE COURT: Okay. In any event, keep going. You  
19 were saying that you were really responding only to the  
20 evidence that A9 incorporated, and that was on Page 7 of  
21 Exhibit 1.

22 MR. MAUSNER: Yes, Your Honor. That is one instance  
23 that A9 provided any evidence of what they got from their  
24 search provider.

25 And then this is what A9 got from its search

1 provider, Your Honor (indicating). Do you have a --

2 THE COURT: I don't have the screen on.

3 Move the easel, Steve, so I can see the monitor,  
4 please.

5 MR. MAUSNER: We have a blow-up also. This is  
6 Exhibit 1, Page 9, of the Amacker supplemental declaration.

7 THE COURT: Page 9 or Page 7?

8 MR. MAUSNER: Page 9. And I have an extra copy, Your  
9 Honor, if you'd like.

10 THE COURT: Just put it up on the easel. And give  
11 your extra copy to your paralegal, and I'll take it.

12 MR. MAUSNER: Okay.

13 THE COURT: Go ahead.

14 MR. MAUSNER: As you can see, Your Honor, what A9  
15 received from Alexa is very little. There is no link at all in  
16 here. The only thing that is contained in what it received  
17 from Alexa is the URL and the snippet of text.

18 THE COURT: What part of this document do you refer  
19 to as the snippet of text? Is it the context?

20 MR. MAUSNER: The snippet of text is "US CATS  
21 Tournaments."

22 THE COURT: Okay. Go ahead.

23 MR. MAUSNER: This is what Alexa did with this.

24 Melanie, can you give a copy of this to Judge Matz,  
25 please.

1           And this is Exhibit 37 to the Zada supplemental  
2 declaration. Okay. So Exhibit 37 to the Zada declaration  
3 shows what A9 did with the URL and the text snippet that it  
4 got.

5           A9 wrote all of this code here (indicating), and in  
6 particular it put in the code for the link which is this href  
7 command. And it wrote other code regarding where the link is  
8 going to appear and what the link and the web page itself is  
9 going to look like.

10           THE COURT: All right. I get the point. We don't  
11 have to tarry on it.

12           Answer 15(a), please.

13           MR. MAUSNER: As a matter of fact, Your Honor, we do.

14           What happened is they submitted a motion to strike  
15 Dr. Zada's supplemental declaration, which I believe was filed  
16 on Saturday.

17           At Page 9, Lines 5 to 14 of the motion to strike, A9  
18 claims that sponsored links on amazon.com for the massive  
19 infringing pay sites Giganews and NewsRazor are not coming from  
20 A9. And then A9 quotes from a statement on Amazon's website  
21 that says, "The amazon.com sponsored links are provided by  
22 Clickriver ads and other third party networks."

23           Now, we had cited this for the proposition that it's  
24 coming from A9. They claim now that those ads are coming from  
25 third party networks, and they rely on Gil Sheinfeld's



1 declaration where he says that, "Clickriver did not provide  
2 those ads. They were provided by Google or some other third  
3 party provider." He doesn't say who those third party  
4 providers are.

5 Now -- so over the weekend, we took a look at this,  
6 and --

7 THE COURT: Wait a minute. You are now introducing  
8 new evidence?

9 MR. MAUSNER: Yes, Your Honor, in response to their  
10 motion to strike.

11 THE COURT: Which I haven't even looked at.

12 MR. MAUSNER: That's correct -- oh, you haven't  
13 looked at their motion to strike?

14 THE COURT: No.

15 MR. MAUSNER: Well, this is directly responsive to  
16 this question anyway as to whether we have any evidence that  
17 infringers it has identified are Clickriver subscribers.

18 Now, this --

19 THE COURT: The evidence you are about to show me is  
20 something that you've given to Mr. Jansen?

21 MR. MAUSNER: Yes, Your Honor.

22 THE COURT: Tell me what it is.

23 MR. MAUSNER: The first page -- this one here  
24 (indicating) -- is part of a search that was done on amazon.com  
25 for Usenet. And as a result of that search, there were some

1 sponsored links that came up which are shown close to the  
2 middle of the page, a little bit down. There are sponsored  
3 links for Giganews, NewsRazor, and Easynews.

4 MR. JANSEN: I'm sorry. Excuse me, Your Honor.

5 I'm not sure I did get what you are showing to the  
6 Court right now, unless this was an exhibit that was in your  
7 prior --

8 MR. MAUSNER: No. I gave it to you this morning.

9 MR. JANSEN: You gave me this which is a printout of  
10 some kind (indicating).

11 MR. MAUSNER: And I gave you the other one.

12 MR. JANSEN: No, I never got that.

13 THE COURT: Hand it to Mr. Jansen, please.

14 By the way, what's the difference, if any, between a  
15 Clickriver ad and a sponsored link?

16 MR. MAUSNER: They are synonymous. Ad and sponsored  
17 link are the same. Basically, it's an advertisement that also  
18 has a link in it.

19 THE COURT: So what does this document that you've  
20 handed -- let's call it Exhibit A to this hearing. What does  
21 this show me?

22 *(Court Exhibit A was marked for identification.)*

23 MR. MAUSNER: This shows sponsored links on  
24 amazon.com, and it shows the sponsored links are Giganews,  
25 NewsRazor and Easynews.

1           Now, when you put your curser over the Giganews  
2 sponsored link, you get the link that appears at the very  
3 bottom of the page, which is RD.A9.com and then a bunch of  
4 other letters and symbols.

5           And notice just above that link, it says "Search  
6 powered by A9." That's highlighted in yellow just above the  
7 link at the bottom.

8           Now, when you do a View Source for these three  
9 sponsored links, this is what you get, the other sheet that was  
10 handed up.

11           It shows that these sponsored links are coming from  
12 A9.com. There's no mention in this code of Google or any other  
13 third party network. The sponsored link is coming from A9.

14           So it does not appear that what A9 stated in its  
15 motion to strike or in Mr. Sheinfeld's declaration is correct.

16           THE COURT: All right. I will give A9 a chance to  
17 answer that. But I don't -- we'll mark the second page, which  
18 has various portions highlighted in yellow, most of them  
19 references to A9, as Exhibit B.

20           *(Court Exhibit B was marked for identification.)*

21           THE COURT: Now, I don't follow what all of this is  
22 supposed to tell me about these materials establishing that the  
23 infringers are Clickriver subscribers. I don't see where it  
24 links to Clickriver, Exhibit A and B.

25           MR. MAUSNER: Well, Amazon has stated that the

1 sponsored links come from A9 through Clickriver or from third  
2 parties. They have stated that the links for these infringing  
3 websites, Giganews and NewsRazor, are not coming from A9, they  
4 are coming from some third party provider, which could have  
5 been Google or someone else.

6 The current links that are -- sponsored links that  
7 are on Amazon's website for Giganews and NewsRazor, this  
8 exhibit, the second one, is the source code for those links.

9 The only mention of any entity in that code is A9.  
10 There's no mention of Google or any other third party which  
11 shows that the link is coming from A9.

12 THE COURT: Okay. Please be seated.

13 Mr. Jansen, please go to the lectern, and start out  
14 by telling me whether you think any of the answers I  
15 incorporated into the previous outline, which I listed  
16 questions only, need correction or amplification.

17 MR. JANSEN: Your Honor, I don't think so except with  
18 the issue of modification, which I think is a critical question  
19 the Court's posed in a number of questions that were handed out  
20 today as well.

21 THE COURT: Yeah, well, we'll get to that. I'm going  
22 to give you a chance to respond to what Mr. Mausner just told  
23 me. But in terms of the questions 1 through 13, no changes?

24 MR. JANSEN: No changes. Our answer is the same. We  
25 don't believe we modify the search results as the code should

1 be interpreted.

2 THE COURT: All right. Well, now, the concerns that  
3 I have with your motion -- to give you a chance to respond in  
4 context to what Mr. Mausner told us -- include the following --  
5 and this is going to be a little hard for you to address  
6 piece-by-piece, so do your best to do it kind of generally or  
7 generically. The items in Question 7 -- this is before you get  
8 to this page -- is this issue of modification. It resulted  
9 from various exhibits that were attached to the initial Zada  
10 declaration, Exhibits 2, 7 and 8, which were addressed in  
11 Paragraphs 13, 18 and 19 of his declaration.

12 It appeared that A9 recommended search results based  
13 on the user search history and added certain text and links to  
14 the search results page. This is with reference to Toolbar.  
15 Now, I know that Toolbar had only a certain life span, and we  
16 will get back to that later.

17 Paragraph 16 of that declaration, the previous one  
18 from Zada, pointed out that A9 had more search results than  
19 search results in the underlying search engine, had changed the  
20 order of the search results sometimes, and sometimes there  
21 appeared to be filtering in what results were returned.

22 So if that's what you were alluding to when you first  
23 responded a moment ago, my question to you now is why do those  
24 not constitute modifications that would preclude application of  
25 512(a)?

1           MR. JANSEN: Well, let me just try to clarify what I  
2 think we tried to point out in our papers, which is that we  
3 concede that if you do a search on Google, that is, if you had  
4 done a search on Google in 2005 and up through 2006 when A9  
5 changed to MSN, and if you did a search on Alexa today, which  
6 now provides the web search results, you might get a different  
7 listing of result sets, but it's not because of anything that  
8 A9.com does. It's because of the -- because A9.com is -- I  
9 think Amacker said repeatedly -- takes exactly the URLs, the  
10 search results that are provided by the search provider, and  
11 relays those to the user.

12           There is some reformatting in the sense that they  
13 have to be made readable by the user's computer screen so that  
14 they display and can be read, because the XML format that's  
15 delivered by the supplier's search engine is just data. It's  
16 not readable. It has to be formatted so it can be displayed by  
17 the user's web browser when the user is sitting at his computer  
18 screen.

19           So Google, for example -- and Dr. Zada had examples  
20 of this I think at Exhibits 5 through 6 of his declaration --  
21 did provide different search results to the users that visited  
22 Google.

23           And if the user visited A9.com at that time, the  
24 search result would go to Google, and Google selected a  
25 different set of responses to send back to A9. That's the

1 reason that the results look different to the user who searched  
2 on A9.com as opposed to Google.

3 THE COURT: But I'm talking about Toolbar for the  
4 last series of questions and references that I made before, and  
5 Toolbar was something that A9 created. It went out of  
6 operation I guess in 2006 or so.

7 MR. JANSEN: Toolbar. I will address Toolbar, right.

8 Toolbar, as I understand it, Number 1 has never been  
9 put at issue in this case, but I will try to explain my  
10 understanding.

11 THE COURT: Well, I don't know how you can say it's  
12 never been put in issue. I mean, I flagged it as a concern  
13 back in early October.

14 MR. JANSEN: It was put in issue for the very first  
15 time in the opposition to the summary judgment motion but never  
16 in responses to interrogatories or the complaint.

17 But let me explain how Toolbar does not -- and the  
18 Toolbar functionality -- doesn't constitute a modification of  
19 the results.

20 THE COURT: Please do.

21 MR. JANSEN: Okay. Toolbar users would visit A9.com.  
22 They were the only account holders or subscribers that ever  
23 existed with the A9 functionality. And as to them, there was  
24 clear policy in their agreement that they would be subject to  
25 termination if they engaged in any kind of copyright violation.

1           As part of that program, their search history was  
2 stored on an A9.com search history server, as I understand.  
3 And I haven't got all of the details on this, but that's my  
4 understanding.

5           So as Matt Amacker explains in his declaration, when  
6 a user who is a Toolbar subscriber sent in a query, they would  
7 receive automatically the results from the provider, Google, as  
8 search results.

9           And on the exhibit that Matt Amacker attaches to his  
10 declaration -- I don't have the number offhand. It may be  
11 Number 3 to his supplemental declaration -- the left-hand  
12 column has got the search results coming back immediately from  
13 Google, unmodified except to the extent that there is  
14 formatting so that the viewer can see it and click on the  
15 links, which is what the whole purpose of a search engine is.

16           On the right-hand side, there is a column showing the  
17 Toolbar subscriber's prior use history that relates to that  
18 search. So if that person had done a search for Mt. Everest  
19 previously, there would be -- or child safety seats I think is  
20 the example in Matt Amacker Exhibit 3 -- there would be a  
21 listing on the right side that would show that user's prior  
22 search history on Mt. Everest or child safety seats.

23           THE COURT: Why does that not constitute a  
24 modification?

25           MR. JANSEN: The material that is being forwarded at



1 the request of the user is material from Google in a search  
2 request. There is additional information that's being given,  
3 but it's not a modification of the URLs that are provided by  
4 Google. There is additional information that's being given to  
5 the user, but it's not modification of the material that is the  
6 issue of this lawsuit, i.e., the material claimed to be --

7 THE COURT: You mean the content of the photos -- the  
8 photos?

9 MR. JANSEN: The photos, or I think Mr. Mausner is  
10 also concerned about simply a link to a website that might have  
11 a lot of text and maybe photographs in it somewhere. I think  
12 he's gone beyond image search and photos, but, yes.

13 Those cached -- if you want to say that the  
14 history -- the Toolbar history information that's being given  
15 is not the instantaneous search result that is being provided  
16 back to the user.

17 The user submits the request to A9. A9.com  
18 immediately brings back instantaneously, without storage on its  
19 facilities, to the user. And it does store the history of --  
20 if that user went to a particular website, then, I think, as I  
21 understand it, it was stored, the information that they  
22 visited, that URL. The photograph is not stored. The image,  
23 if there was an image visited, is not stored on that, just the  
24 URL address that corresponds to the site that was visited.

25 That's what I know about that generally right now.

1 THE COURT: Okay. Mr. Jansen, given the limited  
2 time, turn now, please, to the evidence that Mr. Mausner  
3 proffered here in court this morning in response to Question  
4 15(a), and give me your take on what he claims it shows.

5 MR. JANSEN: Well, I want to, first of all, say  
6 that -- this is Exhibit B?

7 THE COURT: Yeah.

8 MR. JANSEN: Or is it Exhibit A? His Exhibit A is a  
9 search that was done on amazon.com. It was not done on A9.com,  
10 Number 1. That's important I think for the Court to recognize.

11 And I don't believe this is a new issue at all  
12 because -- I believe if you looked at Exhibit 29 to Dr. Zada's  
13 previous declaration, he has a very similar printout of a  
14 search for Usenet on amazon.com.

15 And I want to point out right now that Exhibit 29 to  
16 his declaration --

17 THE COURT: Look, the simple question I would like  
18 you to clarify, please, is whether there is now in the content  
19 of Exhibit A and B, as I defined those, evidence that Giganews  
20 and NewsRazor and Usenet, certain other Usenets, have been  
21 Clickriver subscribers. Yes or no?

22 MR. JANSEN: I believe that's not true, Your Honor,  
23 but I have no way of -- having just gotten this Exhibit B and  
24 not being able to really tell how or whether it's related, and  
25 not being a code expert myself, I can't possibly comment on

1 what this even means.

2 THE COURT: Can you comment on --

3 MR. JANSEN: I can't comment -- yes?

4 THE COURT: Can you comment on what your client's  
5 contention is in answer to 15(b)?

6 MR. JANSEN: My client's contention in response to  
7 15(b) is, Number 1, as I understand it -- and this is in the  
8 declaration of Gil Sheinfeld. I asked specifically about this  
9 when we put together our supplemental response -- or, actually,  
10 we put this together as part of the motion to strike when we  
11 got the first -- the opposition brief -- is that Clickriver  
12 does not have any contractual arrangement with any of those  
13 Usenets. And the understanding that I have -- and it was put  
14 in the declaration -- was that those are provided on  
15 amazon.com. Sponsored links come from other sources besides  
16 simply Clickriver, including Google and others.

17 And the understanding I had -- and this was put in  
18 Mr. Sheinfeld's declaration -- is that Clickriver would not  
19 have referred links to those entities because it did not -- and  
20 it doesn't now and it never had a contractual relationship with  
21 those Usenets.

22 So I don't believe there is any evidence that  
23 plaintiff has submitted -- and plaintiff has had three years to  
24 take discovery of a relationship -- a contractual relationship  
25 between any alleged infringer and Clickriver. And to hand this

1 up on the day of the hearing after three years of discovery,  
2 and then make this claim that is really -- just really a lot of  
3 innuendo, as far as I can tell, just like the rest of Mr.  
4 Zada's declaration, I believe is completely improper and should  
5 be ignored.

6 But to get to the other points in Question 15,  
7 Clickriver, again, does not -- it does not put sponsored links  
8 on the A9.com system. It provides sponsored links, and now  
9 it's limited to only service providers, such as, for example,  
10 refrigerator repairmen or TV installers on amazon.com in  
11 connection with advertisement for particular products.

12 Like, for example, televisions on amazon.com, if you  
13 were in the Los Angeles area, you would also get a sponsored  
14 link for, you know, installers who would install home theater  
15 systems.

16 Clickriver does have -- and this I think is one of  
17 the questions on your sheet -- it does have a repeat infringer  
18 policy that complies with what's expected in the Ninth Circuit;  
19 that is, it has a very clear provision to subscribers. And  
20 this is Exhibit 13 to Zada's declaration.

21 And I'm holding that up right now, Your Honor  
22 (indicating).

23 I don't know if this can be seen, but it says that  
24 Clickriver adds content guidelines, and this is Exhibit 13 to  
25 Zada's declaration. It says very clearly at the very

1 beginning, "We reserve the right at any time to refuse or  
2 suspend any ad;" and, "Intellectual property violation: Ads  
3 are not permitted for products that violate intellectual  
4 property rights," Page 1.

5 It goes through, and there is a notice provision at  
6 the bottom for trademark issues in particular.

7 And to answer the other question you had about -- the  
8 last page provides very clearly that communications or  
9 trademark complaints, for example, would go to A9.com.

10 And to answer the other question, I believe that if  
11 there was a violation of some copyright -- or perceived  
12 violation of some copyright on amazon.com, which is what  
13 Counsel is referring to with this so-called evidence, this new  
14 evidence, the proper place to send the notice is to amazon.com  
15 because amazon.com is the entity that would obviously have that  
16 sponsored link. But certainly if a notice was sent to A9.com,  
17 then that would be dealt with.

18 The problem is in this case -- and I think in your  
19 last two questions on your sheet, the issue of notice is not  
20 relevant to this motion because 512(a), if A9.com qualifies --  
21 and I think it certainly does with respect to at least the vast  
22 majority of searches. I can see questions from the judge about  
23 possibly searches that involve responses to the Toolbar  
24 subscribers, but as to all the other searches, there was no  
25 modification of the content without doubt.

1           Certainly, as to all the post-Toolbar period, there  
2 is no doubt that we're a 512(a). And if we qualify as 512(a),  
3 we are not required to respond to a notice and take-down  
4 directed to the 512(a) activity.

5           Now, I think if there was a Clickriver-sponsored link  
6 problem that really existed, then probably a notice to A9.com  
7 would -- A9.com would look at that notice and deal with it  
8 appropriately. But we've never gotten a notice.

9           And that's another issue that will be an issue later  
10 in this case should the Court deny the summary judgment motion,  
11 is that Perfect 10 never sent A9.com a notice as required under  
12 the DMCA. The notice was supposed to go to A9.com's legal  
13 department in Palo Alto. And that's very clear in --

14           THE COURT: Yeah, let's not get into that right now.  
15 I agree with you.

16           MR. JANSEN: Okay.

17           THE COURT: How do you answer Number 17 on this list  
18 of questions for today? Dr. Zada fished around and came up  
19 with something.

20           MR. JANSEN: Well, this is interesting. Number 1, A9  
21 never got the January 21, 2005 notice. It went to amazon.com.  
22 At that time amazon.com did have an A9 search function.

23           Amazon.com told Mr. Zada -- that was Karen Rusmyer  
24 told Mr. -- Dr. Zada that A9 had no way of removing the links  
25 technically because of the nature of how they received the data

1 automatically from Google. And that notice was sent to Google  
2 with the understanding that Google would take care of that  
3 issue.

4 THE COURT: What evidence is there that the notice  
5 was sent to Google?

6 MR. JANSEN: Oh, it's undisputed, I think. But I  
7 haven't submitted it with this paper because, again, notice is  
8 not an issue, you know, in this motion. But it is an  
9 undisputed fact that that notice was forwarded to Google.

10 As far as the statement that this particular link was  
11 not taken down, I can't tell by looking at -- I haven't  
12 analyzed it enough to know whether or not what Dr. Zada says in  
13 his supplemental declaration is true, and we'd move to strike  
14 it for that reason. I haven't investigated whether it's true  
15 or not, but I can, I think, tell you that A9.com hasn't because  
16 it can't, Number 1, technically, on a reasonable basis; and,  
17 Number 2, because it has no duty to do so. A9.com itself has  
18 not made any effort to remove that link.

19 THE COURT: Okay. And the last question is Number  
20 16.

21 MR. JANSEN: I think the answer for that is yes.

22 I think I tried to answer that in one of my last  
23 answers that I think, certainly, if there is an issue with  
24 Clickriver, if there were -- and this is purely hypothetical --  
25 an issue with Clickriver providing sponsored links onto A9.com,

1 which Gil Sheinfeld says it does not, then a notice should go  
2 to A9.com to be dealt with, because I pointed out, to the  
3 extent that Clickriver had some problematic sponsored link that  
4 went to amazon.com and was visible on the amazon.com website,  
5 the notice should go to amazon.com complaining about a  
6 Clickriver-sponsored link there because amazon.com is the  
7 entity that is actually supplying that content to the user, if  
8 there is a problem with it.

9 But the notices would definitely get dealt with if  
10 they're specific enough. And the problem again was that A9.com  
11 never got a notice -- especially one relating to Clickriver --  
12 ever from plaintiff.

13 THE COURT: Is it your contention that the repeat  
14 infringer policy that A9 had for A9.com is applicable to and  
15 sufficient to the extent that the conduct of Clickriver is at  
16 issue?

17 MR. JANSEN: Yes, I believe it is. I don't believe  
18 the conduct of Clickriver is at issue because I don't think  
19 Clickriver ever put sponsored links onto A9.com, and there's  
20 been no showing by plaintiff that it ever did so. All the  
21 evidence that plaintiff has submitted has been alleged  
22 sponsored links on the amazon.com website. And, again, the  
23 notice, if there was one, should go there.

24 THE COURT: Okay. That will be the segue for the  
25 only question that I will permit Mr. Mausner to answer and that



1 is -- thank you, Mr. Jansen. You may be seated -- is the last  
2 thing that Mr. Jansen said.

3 Do you have any evidence in the record to refute what  
4 he just said; that all of the sponsored links went to Amazon  
5 and not to A9?

6 MR. MAUSNER: I believe there was evidence in the  
7 record that at one time sponsored links were on A9 itself.

8 THE COURT: What is that evidence?

9 MR. MAUSNER: One second, Your Honor.

10 *(Counsel confers with Dr. Zada off the record.)*

11 MR. MAUSNER: This is Dr. Zada.

12 THE COURT: I know that.

13 MR. MAUSNER: He forgot his jacket this morning. I  
14 apologize.

15 THE COURT: That's all right.

16 MR. MAUSNER: Okay. Exhibit 11 to the original  
17 declaration of Dr. Zada -- would you like me to put it up on  
18 the Elmo, Your Honor?

19 THE COURT: I think I have it.

20 Okay. It's an A9 search. The search was Usenet,  
21 November 13th, 2005?

22 MR. MAUSNER: Correct, Your Honor. And near the top,  
23 it shows sponsored links for giganews and guba.net. On the  
24 second page, it shows sponsored links for usenetbinaries and  
25 powerusenet.com. Third page shows sponsored links for

1 poweruset.net and thundernews.com, and the fourth page shows  
2 newsdemon, and so on.

3 There are quite a few sponsored links on A9.

4 THE COURT: Okay. Thank you, Mr. Mausner.

5 Did you see that material just now?

6 MR. JANSEN: Yes, I did. I want to respond to it  
7 right now, Your Honor.

8 THE COURT: Go ahead.

9 MR. JANSEN: This is completely another example of  
10 plaintiff taking things totally out of context. If you take a  
11 look at that, yes, there was sponsored links provided by Google  
12 automatically as part of the search results when A9.com had a  
13 contract with Google. And the date of this at the bottom is  
14 11/13, November 13th, 2005.

15 THE COURT: Right.

16 MR. JANSEN: If you look at Gil Sheinfeld's  
17 declaration, it says very clearly that Clickriver programs did  
18 not start --

19 THE REPORTER: I'm sorry, Counsel.

20 MR. JANSEN: I'm sorry.

21 If you look at the declaration of Gil Sheinfeld that  
22 we submitted --

23 THE COURT: I'll look at it. You don't have to  
24 display it.

25 MR. JANSEN: Yeah, I won't.

1 Paragraph 3, it began running on a very limited alpha  
2 basis starting April 2006. This cannot be from Clickriver.  
3 This was a feed -- again, an automatic response from Google in  
4 response to a user search query. And that's the evidence they  
5 have, and they are constantly trying to make things into things  
6 they are not.

7 THE COURT: All right. I'll take this motion under  
8 submission. Thank you, counsel.

9 MR. MAUSNER: Thank you, Your Honor.

10 MR. JANSEN: Thank you, Your Honor.

11 *(Proceedings concluded.)*

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