

1 Jeffrey N. Mausner (State Bar No. 122385)  
 2 Law Offices of Jeffrey N. Mausner  
 3 Warner Center Towers, Suite 910  
 4 21800 Oxnard Street  
 5 Woodland Hills, California 91367-3640  
 Telephone: (310) 617-8100, (818) 992-7500  
 Facsimile: (818) 716-2773

6 Attorneys for Plaintiff Perfect 10, Inc.

7  
 8 UNITED STATES DISTRICT COURT  
 9 CENTRAL DISTRICT OF CALIFORNIA

10  
 11 PERFECT 10, INC., a California  
 12 corporation,  
 Plaintiff,  
 13 v.  
 14 GOOGLE, INC., a corporation,  
 Defendant.

**Case No. CV 04-9484 AHM (SHx)**  
 Consolidated with Case No. CV 05-4753 AHM (SHx)

**Before Judge A. Howard Matz**

**PERFECT 10'S MEMORANDUM OF  
 POINTS AND AUTHORITIES IN  
 OPPOSITION TO GOOGLE'S  
 MOTION FOR SCHEDULING  
 ORDER WHICH WOULD DELAY  
 PERFECT 10 FROM FILING ITS  
 MOTION FOR SUMMARY  
 JUDGMENT**

**[DECLARATIONS OF JEFFREY N.  
 MAUSNER AND DR. NORMAN  
 ZADA IN SUPPORT THEREOF  
 FILED CONCURRENTLY  
 HEREWITH]**

Date: June 1, 2009  
 Time: 10:00 a.m.  
 Place: Courtroom 14, Courtroom of the  
 Honorable A. Howard Matz

Discovery Cut-Off Date: None Set  
 Pretrial Conference Date: None Set  
 Trial Date: None Set

**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

I. INTRODUCTION AND SUMMARY OF ARGUMENT. .... 1

II. GOOGLE’S FAILURE TO COMPLY WITH LOCAL RULE 7-3 PROVIDES SUFFICIENT GROUNDS FOR THIS COURT TO DENY THE MOTION. .... 3

III. THIS COURT SHOULD DENY THE MOTION BECAUSE HEARING P10’S SJ MOTION BEFORE GOOGLE’S DMCA MOTIONS WILL PROMOTE JUDICIAL ECONOMY AND CONSERVE RESOURCES..... 4

IV. THIS COURT SHOULD NOT HEAR THREE MOTIONS FIRST THAT HAVE VIRTUALLY NO CHANCE OF SUCCEEDING. .... 5

    A. Google’s Admitted Delay in Removing Identified Infringing Links Precludes a DMCA Safe Harbor..... 7

    B. Google’s Failure To Act In Response To Nine Perfect 10 Notices Also Precludes A DMCA Safe Harbor..... 8

    C. In Order For Google To Prevail On Its DMCA Motions, This Court Must Decide All Of the Thirteen Legal Issues Identified Below In Google’s Favor..... 9

        1. Google’s Continued Storage Of Full-Size P10 Images On Its Servers, Despite Notice. .... 10

        2. Google’s Continued Hosting Of Websites That Infringe P10 Images, Despite Notice..... 10

        3. Google’s Continued Hosting Of Websites That Display Google Ads Next To Thousands Of P10 Images, Despite Notice..... 11

        4. Google’s Failure To Remove Identified Infringing Links For Three to Seventeen Months After Notice. .... 12

        5. Google’s Failure To Remove Identified Infringing Links From Its Image Search Results..... 12

        6. Google Cannot Assert That Perfect 10’s Notices Are Deficient Because Those Notices Were Created Based On Google’s Own Instructions. .... 13

        7. Google’s Refusal To Provide Perfect 10 With Specific DMCA Instructions When Requested Violates Section 512(c)(3)(B)(ii) Of The Statute. .... 15

        8. Google Has Failed To Maintain A DMCA Log..... 15

        9. Google Has Failed To Keep Track Of The Identities Of Its Hosting Clients. .... 16

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

10. Google Has Failed To Utilize Image Recognition To Remove Or Disable Access To P10 Images..... 17

11. Google’s Policy Of Publishing DMCA Notices It Receives On Chillingeffects.org Precludes A Safe Harbor. .... 17

12. Google’s Refusal To Remove Sponsored Links And Regular Links To Massive Infringing Paysites Precludes DMCA Safe Harbor..... 18

13. Google’s Policy Of Removing One Link Out Of Thousands In Its Search Results Fails To Satisfy The DMCA Requirement Of Removing Or Disabling Access To Infringing Material. .... 19

V. GOOGLE’S MISLEADING DISCUSSION OF THE DISCOVERY IT ALLEGEDLY NEEDS TO OPPOSE P10’S SJ MOTION PROVIDES NO REASON FOR THIS COURT TO POSTPONE THE FILING OF P10’S SJ MOTION. .... 20

A. Perfect 10 Has Already Provided Google With The Discovery Google Contends It Needs To Oppose P10’s SJ Motion..... 20

B. Google’s Assertion That It Will Oppose P10’s SJ Motion By Seeking Relief Under Rule 56(f) Provides No Basis To Grant Google’s Present Motion. .... 22

VI. GOOGLE’S TRUE PURPOSE IN FILING THE MOTION IS TO DELAY PERFECT 10’S ATTEMPT TO RESOLVE THE CASE AND INSTEAD BURY PERFECT 10 IN UNNECESSARY AND ABUSIVE DISCOVERY..... 23

VII. CONCLUSION..... 25

**TABLE OF AUTHORITIES**

**Cases**

*A&M Records, Inc. v. Napster, Inc.*, 2000 WL 573136, 54 U.S.P.Q.2d 1746 N.D. Cal., 2000)..... 5

*Aimster Copyright Litigation*, 252 F.Supp.2d 634 (N.D. Ill. 2002)..... 5

*Chance v. Pac-Tel Teletrac Inc.*, 242 F.3d 1151 (9<sup>th</sup> Cir. 2001)..... 22

*Fox v. Good Samaritan Hospital*, 2007 WL 2938175 (N.D Cal.) ..... 22

*Mattel Inc. v. Walking Mountain Productions* 353 F.3d 792 (9<sup>th</sup> Cir. 2003)..... 24

*Nidds v. Schindler Elevator Corp.*, 113 F.3d 912 (9th Cir. 1997) ..... 22

*Perfect 10 v. Google, Inc.*, 416 F.Supp.2d 828 (C.D. Cal. 2006) ..... 6

*State of California v. Campbell*, 138 F.3d 772 (9th Cir. 1998)..... 22

*UMG Recordings, Inc., v. Veoh Networks, Inc.*, 2008 WL 5423841 (C.D.Cal. 2008)..... 6

**Statutes**

17 U.S.C. §512.....passim

**Rules**

Fed.R.Civ.P.56(c) ..... 23

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT.**

2 Defendant Google, Inc. (“Google”) has filed a motion for an Order  
3 setting a schedule for the filing of motions in this action (the “Motion”) that  
4 improperly seeks to prevent Plaintiff Perfect 10, Inc. (“Perfect 10”) from filing  
5 its motion for summary judgment (“P10’s SJ Motion”). Google asks this  
6 Court to bar Perfect 10 from filing P10’s SJ Motion – which Google has not  
7 even seen – until after this Court rules upon three separate summary judgment  
8 motions that Google wishes to file, seeking rulings that Google is entitled to a  
9 safe harbor under Sections 512(b), (c), and (d) of the Digital Millennium  
10 Copyright Act (the “DMCA”).

11 Google seeks such extraordinary relief even though: (i) it admittedly  
12 violated the 20-day hold requirement of Local Rule 7-3 when filing its present  
13 motion; (ii) hearing P10’s SJ Motion before Google’s three DMCA Motions  
14 will conserve judicial resources; (iii) Google does not explain, and cannot  
15 explain, how it can prevail on its DMCA motions when it took between *three*  
16 *and seventeen months* to process some of Perfect 10’s notices, completely  
17 failed to process others, and did not even maintain a DMCA log, and  
18 (iv) Google’s assertion that it needs discovery to respond to P10’s SJ Motion is  
19 incorrect and, in any event, can be resolved, if Google chooses, under Rule  
20 56(f) in opposition to P10’s SJ Motion.

21 Moreover, Google fails to explain to this Court the true reason  
22 underlying its present motion: Google wishes to delay Perfect 10’s right to  
23 obtain a judgment as to Google’s liability so that Google can seek to bury  
24 Perfect 10 with overwhelmingly abusive discovery and discovery motion  
25 practice. On May 1, Google demanded the right to take 45 depositions in this  
26 case. With the filing of its most recent discovery motion, Google now has  
27 pending three separate discovery motions totaling more than 550 pages, not  
28 even counting declarations and exhibits [*see* Section VI, below].

1 Perfect 10 is prepared to file P10's SJ Motion shortly after the scheduled  
2 hearing date on June 1. This Court should prevent Google from engaging in its  
3 improper tactics and deny its motion, for the following reasons:

4 First, Google concedes in its moving papers that it failed to comply with  
5 the requirements of Local Rule 7-3 when it filed its motion without waiting 20  
6 days after conducting the conference of counsel. For this reason alone, this  
7 Court should deny Google's motion [*see* Section II, below].

8 Second, granting Google's present motion will result in a waste of  
9 judicial resources, forcing this Court to consider four motions rather than one.  
10 As explained below, P10's SJ Motion covers not only the issue of Google's  
11 liability, but Google's eligibility for the safe harbor affirmative defense under  
12 the DMCA as well. Accordingly, this Court can address the DMCA issues in  
13 this case by ruling upon P10's SJ Motion just as easily as it can by ruling on  
14 Google's three contemplated DMCA Motions. P10's SJ Motion currently  
15 involves only thirteen images, demonstrates Perfect 10's ownership of the  
16 copyrights on those images, and establishes that Google received notice  
17 regarding infringement of those images and failed to expeditiously remove or  
18 disable access to those infringements.

19 Third, nowhere in Google's motion does Google establish its likelihood  
20 of succeeding on any of its DMCA Motions. In fact, hearing Google's three  
21 DMCA motions will be a waste of resources, because Google cannot win its  
22 motions for the following reasons: It is undisputed that Google received Perfect  
23 10's notices, belatedly processed certain notices, and completely failed to  
24 process others. Moreover, Google has: (i) failed to keep a DMCA log; (ii)  
25 failed to remove more than 4,000 identified full-size Perfect 10 copyrighted  
26 images ("P10 Images") from its blogger.com servers; and (iii) hosted more than  
27 400 websites via its blogspot.com program that have infringed, in total, more  
28 than 10,000 P10 Images. Finally, as explained below, this Court must resolve

1 at least 13 separate legal issues in Google’s favor in order to grant Google’s  
2 DMCA Motions. Under these circumstances, postponing P10’s SJ Motion to  
3 first consider Google’s unwinnable DMCA Motions would be a waste of this  
4 Court’s time and resources [*see* Section IV, below].

5 Lastly, Google’s assertion that this Court should prevent the filing of  
6 P10’s SJ Motion because Google needs certain discovery to respond to that  
7 motion is simply incorrect. Perfect 10 has already produced copyright  
8 registration certificates, deposit materials, work for hire agreements, model  
9 releases, DMCA notices to third parties, detailed financial statements, tax  
10 returns, server logs, and tens of thousands of other documents.<sup>1</sup> Moreover, if  
11 Google truly believes that it needs additional discovery to oppose P10’s SJ  
12 Motion, which it has not yet even seen, Google can always seek a continuance  
13 under Rule 56(f). Google’s mistaken contentions regarding discovery,  
14 however, provide no basis for this Court to grant Google’s present motion [*see*  
15 Section V, below].

16 **II. GOOGLE’S FAILURE TO COMPLY WITH LOCAL RULE 7-3**  
17 **PROVIDES SUFFICIENT GROUNDS FOR THIS COURT TO**  
18 **DENY THE MOTION.**

19 Local Rule 7-3 specifically provides that a moving party such as Google  
20 must wait 20 days after the conclusion of the conference of counsel before  
21 filing its motion. Here, Google concedes that it failed to comply with the 20-  
22 day waiting period of Local Rule 7-3 before filing its motion. *See* Motion at 1.  
23 For this reason alone, this Court should deny the Motion.

24 \_\_\_\_\_  
25 <sup>1</sup> In an attempt to minimize discovery motion practice, Perfect 10 has been  
26 particularly forthcoming in discovery, producing tax returns, detailed financial  
27 reports, server logs, copyright certificates, work for hire agreements, deposit  
28 materials, records regarding cell phone downloads, and DMCA notices to third  
parties. In total, Perfect 10 has produced hundreds of gigabytes of documents to  
Google, organized by folder and subfolder so that Perfect 10 (and Google) can  
readily find relevant documents. Declaration of Dr. Norman Zada (“Zada Decl.”)  
¶16, filed concurrently.

1 **III. THIS COURT SHOULD DENY THE MOTION BECAUSE**  
2 **HEARING P10'S SJ MOTION BEFORE GOOGLE'S DMCA**  
3 **MOTIONS WILL PROMOTE JUDICIAL ECONOMY AND**  
4 **CONSERVE RESOURCES.**

5 Google asserts that this Court should prohibit the filing of P10's SJ  
6 Motion until after it rules upon Google's three DMCA Motions because  
7 "hearing Google's DMCA's motions first serves the interests of judicial  
8 economy." Motion at 6. Even though it has not seen P10's SJ Motion, Google  
9 contends that "even if Perfect 10 were to succeed on its copyright liability  
10 motion, the Court would still need to reach Google's DMCA motion." *Id.*

11 Google is incorrect. Consideration of P10's SJ Motion first would  
12 actually conserve judicial resources, because the Court would only have to  
13 consider one motion, rather than the three DMCA Motions Google plans to file.  
14 Perfect 10's entire argument in support of its motion is contained in less than  
15 25 pages. Moreover, P10's SJ Motion is simple and straightforward. It  
16 involves only thirteen sample images, demonstrates Perfect 10's ownership of  
17 the copyrights on those images, and establishes that Google received notice  
18 regarding infringement of those images and failed to expeditiously remove or  
19 disable access to those infringements.

20 Furthermore, P10's SJ Motion covers both Google's liability for  
21 copyright infringement *and* Google's ineligibility for the safe harbor  
22 affirmative defenses found in the DMCA. If this Court grants P10's SJ Motion,  
23 it necessarily will have addressed the affirmative defenses Google wishes to  
24 raise in the DMCA Motions. Accordingly, if Perfect 10 prevails on its motion,  
25 this Court will not need to reach Google's three DMCA Motions. Google  
26 concedes as much elsewhere in its moving papers, when it asserts, without  
27 support or authority, that "[l]imiting Google to just a single opposition  
28 brief/cross-motion on this critical defense would deny Google the opportunity



1 to fully and fairly defend itself against Perfect 10’s copyright claims.” Motion  
2 at 7. In short, Google does not truly dispute that it is possible for this Court to  
3 address the issues relating to its affirmative defense under the DMCA in the  
4 context of P10’s SJ Motion.

5 Finally, Google’s assertion that this Court should hear Google’s DMCA  
6 motions first because granting these motions will moot P10’s SJ Motion  
7 [Motion at 6] is fatally flawed, because, as explained in Section IV below,  
8 Google’s three to seventeen month delay in processing certain Perfect 10  
9 notices and its complete failure to process thousands of other URLs similar to  
10 those that Yahoo! has processed, precludes a safe harbor.

11 In sum, it makes more sense for this Court to first consider P10’s SJ  
12 Motion – a single motion that addresses all of the relevant issues, including the  
13 safe harbor affirmative defense, and that has a possibility of being granted –  
14 rather than the three DMCA motions that Google wishes to bring, which,  
15 because of Google’s admitted inaction and its failure to even maintain a DMCA  
16 log, have virtually no chance of success.

17 **IV. THIS COURT SHOULD NOT HEAR THREE MOTIONS FIRST**  
18 **THAT HAVE VIRTUALLY NO CHANCE OF SUCCEEDING.**

19 Google’s right to rely upon the safe harbor provisions of the DMCA is an  
20 affirmative defense.<sup>2</sup> In order to prevail on any of its three DMCA Motions,  
21 Google must establish, among other things, that upon receiving knowledge of  
22 infringing material, Google acted expeditiously to remove or disable access to  
23 the material. This requirement is present in each of Sections 512(b), (c), and  
24 (d) of the DMCA.

25 \_\_\_\_\_  
26 <sup>2</sup> *UMG Recordings, Inc., v. Veoh Networks, Inc.*, 2008 WL 5423841 at \*1  
27 (C.D.Cal. 2008); *In re Aimster Copyright Litigation*, 252 F.Supp.2d 634, 657  
28 (N.D. Ill. 2002) (“Liability protection under the DMCA is an affirmative defense  
and, as such, Defendants bear the burden of establishing its applicability.”); *A&M  
Records, Inc. v. Napster, Inc.*, 2000 WL 573136 at \*6, 54 U.S.P.Q.2d 1746 (N.D.  
Cal., 2000).

1 As explained below, Google’s delay of between three and seventeen  
2 months to process certain Perfect 10 DMCA notices and its complete failure to  
3 remove or disable access to thousands of identified infringing images and web  
4 pages in other notices, precludes Google from being able to rely on the safe  
5 harbor affirmative defense [*see* Section IV.A and B, below]. In fact, in order  
6 for Google to prevail on its DMCA Motions, this Court must decide at least 13  
7 separate key legal issues in Google’s favor. [*see* Section IV.C, below]. If  
8 Perfect 10 prevails on any one of these 13 issues, Google’s DMCA Motions  
9 must be denied.

10 The issue of whether Perfect 10’s notices complied with the DMCA was  
11 before this Court in 2005-2006 in connection with Perfect 10’s preliminary  
12 injunction motion. *Perfect 10 v. Google, Inc.*, 416 F.Supp.2d 828, 838 (C.D. Cal.  
13 2006). During the oral argument, which occurred on November 7, 2005, Andrew  
14 Bridges, then Google’s attorney, admitted that “...their [Perfect 10’s] notices  
15 improved; and with the improvement of their notices, Google has been able to do a  
16 better job.” Transcript of Hearing at page 46, attached as Exhibit F to the  
17 Declaration of Jeffrey Mausner (“Mausner Decl.”). In its ruling on the preliminary  
18 injunction, this Court noted that “Google acknowledges that it received P10’s  
19 notices,” and the Court assumed that these notices were sufficient to provide  
20 Google with knowledge of the alleged infringements. 416 F.Supp.2d at 854. ***It***  
21 ***would be incredibly prejudicial for this Court to rule, more than three years***  
22 ***later, that over sixty Perfect 10 DMCA notices, which Perfect 10 took months to***  
23 ***create, and which others have been able to process, were so deficient as a matter***  
24 ***of law that Google is entitled to summary judgment in its favor.*** The Ninth  
25 Circuit also did not rule, in any way, that Perfect 10’s notices were deficient. For  
26 all of these reasons, this Court should not delay the filing of P10’s SJ Motion.

1           **A. Google’s Admitted Delay in Removing Identified Infringing Links**  
2           **Precludes a DMCA Safe Harbor.**

3           Perfect 10 created spreadsheet-style DMCA notices *following Google’s*  
4 *own instructions*, which were sent to Google in 2004. In the leftmost column  
5 of each spreadsheet, Perfect 10 included the URL that Google requested. This  
6 URL appeared in green at the end of Google’s Web Search result. In the center  
7 column of each spreadsheet, Perfect 10 included the search term Perfect 10  
8 used, also as Google requested. This term typically was the name of the Perfect  
9 10 model whose image was infringed. In other words, the notices prepared by  
10 Perfect 10 contained both the URL and the search term requested by Google.  
11 Declaration of Dr. Norman Zada, submitted herewith (“Zada Decl.”), ¶8, Exh. 6.

12           In response to Perfect 10’s 2004 spreadsheet-style notices, Google  
13 admittedly waited between *three and seventeen months* to remove the identified  
14 infringing links from Google’s Web Search results. Zada Decl. ¶6, Exh. 4.  
15 That Google was able to belatedly remove these links means that Perfect 10’s  
16 notices were substantially compliant, because they provided Google with  
17 sufficient information to locate and remove the infringing links. Because  
18 Google did not act expeditiously to remove these links, however, as required by  
19 the DMCA, Google is not entitled to a safe harbor defense and cannot win any  
20 of its contemplated DMCA motions.

21           Furthermore, while Google belatedly removed identified infringing links  
22 from its Web Search results, *it did not remove those same links from its Image*  
23 *Search results.*<sup>3</sup> Zada Decl. ¶7, Exh. 5. Because Google did not remove the  
24 identified infringing links from its Image Search results at all, there can be no  
25

---

26           <sup>3</sup> Google links each thumbnail in its Image Search results back to the web  
27 page containing the original image from which Google created the thumbnail.  
28 Google cannot satisfy the statutory requirement of disabling access to an infringing  
web page if it continues to copy infringing images from that web page for its  
Image Search results and then link those images back to that infringing web page.

1 dispute that it did not remove such links expeditiously. For this reason alone,  
2 Google has virtually no chance of prevailing on its DMCA Motions.

3 **B. Google's Failure To Act In Response To Nine Perfect 10 Notices**  
4 **Also Precludes A DMCA Safe Harbor.**

5 After Perfect 10 sent to Google 34 notices of the spreadsheet style  
6 described above, which were created following Google's instructions, Google  
7 claimed that all of those notices were deficient.<sup>4</sup> Google's instructions to  
8 Perfect 10 kept changing, and even contradicted themselves, to the point where  
9 it became clear that whatever Perfect 10 did, Google would claim it was  
10 deficient. To deal with such contradictory instructions, Perfect 10 decided in  
11 June 2007 to anticipate and address all conceivable objections, by sending  
12 actual copies of infringing web pages, which contained both the URL that  
13 Google requested as well as a copy of the infringed and infringing image. The  
14 notices that Perfect 10 sent to Google using Adobe, had several advantages.  
15 The files were searchable and the URLs were extractable. By providing actual  
16 copies of infringing web pages along with the infringing URLs, it was much  
17 less likely that Perfect 10 would make a mistake and submit the wrong URL.  
18 Zada Decl. ¶9. Finally, because the link structure was preserved, Google could  
19 see what search term was used and exactly how Perfect 10 got to a particular  
20 infringing web page. Zada Decl. ¶9.

21 Using this new format, Perfect 10 submitted DMCA notices to Google  
22 dated June 28, 2007, July 2, 2007, July 12, 2007, October 16, 2007, December  
23 14, 2007, January 24, 2008, March 17, 2008, July 9, 2008, and April 24, 2009.

---

25 <sup>4</sup> Google's primary contentions, which were not raised at the time of the  
26 notices but were raised much later, were that: (i) Perfect 10 should not have  
27 removed the starting "www." from the URLs identified in its notices; and (ii)  
28 Google could not tell which image on the identified infringing webpage belonged  
to Perfect 10, even though in many cases, there was only one such image. As  
explained in the Zada Declaration, neither of these assertions has any merit. Zada  
Decl. ¶9.

1 Zada Decl. ¶¶9, 15. These notices identified *tens of thousands of infringements*  
2 available via Google’s search engine, on Google’s servers, hosted by Google,  
3 and/or surrounded by Google ads on Google AdSense affiliated websites. The  
4 notices were painstakingly edited so that each webpage contained only P10  
5 Images, or all large or checked images were P10 Images. Zada Decl. ¶¶3-10,  
6 15, Exhs. 1-7.

7 Google has not processed the nine notices identified above. Instead,  
8 Google has claimed that these notices are deficient as well, because they  
9 include images.<sup>5</sup>

10 Google cannot establish that it acted expeditiously to remove infringing  
11 material identified by Perfect 10 in these nine notices, *because it did nothing or*  
12 *next to nothing in response to the notices*. Zada Decl. ¶15. Moreover, in order  
13 to demonstrate that these notices were deficient, Google will have to establish  
14 the absurd proposition that a notice that provides the URL of an infringing web  
15 page, standing alone, complies with the DMCA, but a notice that adds a copy of  
16 the image to the URL does not.

17 **C. In Order For Google To Prevail On Its DMCA Motions, This**  
18 **Court Must Decide All Of the Thirteen Legal Issues Identified**  
19 **Below In Google’s Favor.**

20 Because the safe harbor provisions of the DMCA are affirmative  
21 defenses, Google must prove that it satisfied all of the statutory requirements in  
22 order to qualify. In particular, Google must prove that: (i) upon receiving  
23 notification of claimed infringement, it responded expeditiously to remove or  
24 disable access to the material that is claimed to be infringing or to be the  
25 subject of infringing activity (17 U.S.C. §512(b)-(d)); (ii) it adopted and  
26

---

27 <sup>5</sup> It is ironic that Google would claim that the inclusion of images in DMCA  
28 notices is a hindrance, when its fair use argument depends on its contention that  
there is no textual substitute for an image.

1 reasonably implemented a policy for the termination of repeat infringers; and  
2 (iii) it did not receive a direct financial benefit from infringing activity that it  
3 had the right and ability to control. As explained below, in order for Google to  
4 prevail on its DMCA Motions, this Court must decide that there is no triable  
5 issue of fact regarding any of the 13 issues discussed below, and that Google is  
6 entitled to a ruling in its favor on each of these issues. If Perfect 10 prevails on  
7 any of these issues, this Court will be forced to deny Google's DMCA Motions.  
8 For this reason as well, Google is unlikely to prevail on its Motions, and P10's  
9 SJ Motion should not be delayed.

10 **1. Google's Continued Storage Of Full-Size P10 Images On Its**  
11 **Servers, Despite Notice.**

12 Perfect 10 has evidence that Google has continued to store more than  
13 4,000 full-size P10 Images on its blogger.com servers, despite receiving notice  
14 of all of these infringing images in Perfect 10's DMCA notices. For example,  
15 Perfect 10's July 2, 2007 notice to Google included the full-size P10 Image  
16 found at page 1 of Exhibit 1 to the Zada Decl. As may be seen by the URL at  
17 the bottom of this page, this P10 Image is stored on Google's blogger.com  
18 servers. As of May 10, 2009, however, almost two years later, that image was  
19 still on Google's servers, as shown on page 2 of Exhibit 1 to the Zada Decl.  
20 *See Zada Decl.* ¶3, Exh. 1.

21 Legal Issue 1: Given Google's failure to remove or disable access to  
22 4,000 full-size P10 Images on its own servers, is Google nevertheless entitled  
23 to summary judgment on the affirmative defense of DMCA safe harbor? Or  
24 does this conduct by Google constitute direct or contributory infringement?

25 **2. Google's Continued Hosting Of Websites That Infringe P10**  
26 **Images, Despite Notice.**

27 In addition to storing over 4,000 infringing full-size P10 Images directly  
28 on its blogger.com servers, Google has also hosted over 400 websites via its

1 blogspot.com hosting program that have infringed, in total, more than 10,000  
2 P10 Images. Zada Decl. ¶4, Exh. 2. Page 1 of Exhibit 2 to the Zada Decl.  
3 shows a page that was sent to Google as part of Perfect 10's October 16, 2007  
4 DMCA notice. The lone image on that page was identified as copyrighted by  
5 Perfect 10, and the highlighted cache link at the top of the page shows the exact  
6 URL for that cache link in Google's Web Search results. Furthermore, the  
7 blogspot.com in the cache link URL shows that this page was hosted by  
8 Google. Thus Google knew that it was directly linking to this infringing web  
9 page via its Web Search results, and that the page was hosted on Google  
10 servers. Perfect 10 also provided to Google as part of that October 16, 2007  
11 notice, the full-size image shown on page 2 of Exhibit 2 to the Zada Decl.,  
12 which was stored on Google's blogger.com servers. Nevertheless, pages 3 and  
13 4 of Exhibit 2 show that Google did not remove either of those images from its  
14 servers as of May 9, 2009, more than *eighteen months* later. Zada Decl. ¶4,  
15 Exh. 2. Google also did not stop directly linking to the identified infringing  
16 web page. This is just one example of Google's inaction, among thousands.

17 Legal Issue 2: Is Google entitled to summary judgment on the affirmative  
18 defense of the DMCA safe harbor even though, upon receiving notice, it has  
19 failed to remove or disable access to thousands of P10 Images on websites it  
20 hosts? Or does this conduct constitute contributory or direct infringement?

21 **3. Google's Continued Hosting Of Websites That Display**  
22 **Google Ads Next To Thousands Of P10 Images, Despite**  
23 **Notice.**

24 Google has hosted websites in its blogspot.com hosting program that  
25 have displayed Google ads next to at least 4,000 P10 Images. Zada Decl. ¶5,  
26 Exh. 3. Page 1 of Exhibit 3 to the Zada Decl. shows a webpage hosted on  
27 Google's blogspot.com servers, which was sent to Google as part of Perfect  
28 10's July 9, 2008 DMCA notice. Page 2 of Exhibit 3 shows that Google

1 displayed on May 9, 2009, ten months later, “Ads by Google” on that same web  
2 page with the same infringing images. Because Google was receiving a  
3 financial benefit from clicks on ads next to infringing P10 Images, over which  
4 it had complete control since everything was on Google’s servers, these facts  
5 would preclude summary judgment for Google under §512(c)(1)(B).

6 Legal Issue 3: Is Google precluded from summary judgment on the  
7 DMCA when it places thousands of Google ads next to P10 Images on websites  
8 which it hosts, particularly if it does not remove such infringements upon  
9 notice?

10 **4. Google’s Failure To Remove Identified Infringing Links**  
11 **For Three to Seventeen Months After Notice.**

12 Google admittedly has removed hundreds of links to infringing web  
13 pages identified in Perfect 10’s notices, but only after waiting more than three  
14 months. In some cases, Google admittedly waited *seventeen months* before  
15 removing the links to the infringing material. For example, Google received  
16 the URL [http://www.britney-spears-nude-pics.com/vsorensen](http://www.britney-spears-nude-pics.com/vsorensen/vsorensen_010.jpg)  
17 [/vsorensen\\_010.jpg](http://www.britney-spears-nude-pics.com/vsorensen/vsorensen_010.jpg) from Perfect 10 in its May 31, 2004 notice, but did not  
18 remove that URL from its search results until November 3, 2005, seventeen  
19 months later. (*See* portion of the Sur-Reply Declaration of Mr. Macgillivray,  
20 Google’s Intellectual Property Counsel, attached as Exh. 4 to the Zada Decl.)

21 Legal Issue 4: Can Google delay between three months and seventeen  
22 months before removing infringing links and nevertheless be ruled to have  
23 “acted expeditiously” under the DMCA as a matter of law? Or does this  
24 conduct by Google constitute contributory infringement?

25 **5. Google’s Failure To Remove Identified Infringing Links**  
26 **From Its Image Search Results.**

27 Although Google eventually removed certain links to infringing web  
28 pages identified in Perfect 10’s notices from its Web Search results, it failed to



1 remove the same links from its Image Search results. For example, as may be  
2 seen from page 1 of Exhibit 5 to the Zada Decl., which is a page from Mr.  
3 Magillivray’s Sur-Reply declaration, on June 28, 2004, Perfect 10 provided  
4 Google with notice of the allegedly infringing webpage at [web.tiscali.it/raskz/  
5 donne/giugno.htm](http://web.tiscali.it/raskz/donne/giugno.htm). Although Google removed the link to this web page from  
6 its Web Search results on October 11, 2004, more than three months later,  
7 Google still had not removed the same link to that infringing web page from its  
8 Image Search results as of July 9, 2006, more than two years later, as shown by  
9 Zada Decl. ¶7, Exhibit 5, page 2.

10 Moreover, as may be seen from page 3 of Exhibit 5 to the Zada Decl.,  
11 Perfect 10 identified the infringing URL [bukuroshe.parajsa.com/  
12 sashabrinkova1.htm](http://bukuroshe.parajsa.com/sashabrinkova1.htm) to Google in its July 19, 2004 notice. As may be seen  
13 from page 4 of Exhibit 5 to the Zada Decl., Google was continuing to link to  
14 that same infringing web page via its Image Search results on May 31, 2008,  
15 and had even placed “Ads by Google” below the infringing P10 Image on that  
16 page. Moreover, page 5 of Exhibit 5 shows that Google was continuing to link  
17 to that same infringing web page as of May 9, 2009, almost five years after  
18 receiving notice. Zada Decl. ¶7, Exh. 5.

19 Legal Issue 5: Is Google entitled to a DMCA safe harbor as a matter of  
20 law, even though it did not remove infringing links that it was aware of, from  
21 its Image Search results? Or is Google contributorily liable for such conduct?

22 **6. Google Cannot Assert That Perfect 10’s Notices Are**  
23 **Deficient Because Those Notices Were Created Based On**  
24 **Google’s Own Instructions.**

25 Because of Google’s failure to expeditiously remove virtually any of the  
26 tens of thousands of infringing URLs and images identified in Perfect 10’s  
27 sixty plus DMCA notices, Google will undoubtedly claim that all of Perfect  
28 10’s notices were substantially deficient. Even if they were somewhat

1 deficient, Google was required, under §512(c)(3)(B)(ii), to contact Perfect 10  
2 and explain how to correct any such deficiencies, which it did not do. *See*  
3 Section IV.C.7 below. Furthermore, most of the URLs included in Perfect 10's  
4 notices were determined based on instructions provided by Google, and  
5 therefore could not have been substantially deficient.

6 Google cannot demonstrate that the approximately forty-three  
7 spreadsheet style notices that Perfect 10 sent to it from June 4, 2004 through  
8 April 24, 2007 are deficient because a) they were created following Google's  
9 instructions, b) other search engines, such as Yahoo! have been able to process  
10 them in three days, and c) Google was able process them, albeit belatedly.  
11 Zada Decl. ¶¶6-9, Exhs. 4-6. Furthermore, when Google changed some of its  
12 instructions in 2006, Perfect 10 followed those instructions as well. *Id.* ¶10,  
13 Exh. 7. For example, sometime in 2006 or 2007, Google began to claim that  
14 copyright holders had to provide image URLs to remove images from its Image  
15 Search results. That is not actually correct.<sup>6</sup>

16 Nevertheless, despite the fact that Google's special instructions for  
17 removing images from its Image Search results were not necessary, Perfect 10  
18 followed those instructions in its notices. For example, page 1 of Exhibit 7 to  
19 the Zada Decl. is a page that was included in Perfect 10's March 17, 2008  
20 notice to Google, using the instructions given by Google. Page 2 of Exhibit 7  
21 shows that Google did not remove that image from its Image Search results as  
22 of May 17, 2009, fourteen months after notice. Zada Decl. ¶10, Exh. 7.

23 Legal Issue 6: If a copyright holder follows an ISP's instructions in  
24 creating DMCA notices, can that ISP nevertheless claim that such notices are

---

25 <sup>6</sup> It is sufficient to send a copy of the infringing web page and checkmark the  
26 infringing image on the page. That allows Google to block the web page from its  
27 Web Search and Image Search results, and block the specified image from its  
28 Image Search results. In Perfect 10's spreadsheet style notices, Perfect 10 gave the  
web page URL and the model name, as well as the page range of the Perfect 10  
Magazine containing the image, which was sufficient as well. Zada Decl. ¶¶8-11.

1 substantially deficient?

2           **7. Google’s Refusal To Provide Perfect 10 With Specific**  
3           **DMCA Instructions When Requested Violates Section**  
4           **512(c)(3)(B)(ii) Of The Statute.**

5           The initial instructions for creating DMCA notices that Google provided  
6 to Perfect 10 on June 1, 2004, were vague. Specifically, Google asked Perfect  
7 10 to “Identify in sufficient detail the copyrighted work that you believe has  
8 been infringed upon.” Zada Decl. ¶8, Exh 6. In Perfect 10’s initial notices, it  
9 provided a page range of where the infringing image was located in Perfect 10  
10 Magazine and the name of the model whose image was infringed. When  
11 Google claimed that all of Perfect 10’s notices were deficient, Perfect 10 began  
12 to identify the infringed work by sending to Google a copy of the infringing  
13 web page with the infringed image on it. Google claimed those notices were  
14 deficient as well. Because Google claimed that every notice sent by Perfect 10  
15 was deficient, on November 27, 2008, Perfect 10 sent Google five specific  
16 examples involving Google search results for passwords, image search, web  
17 search, and sponsored advertising links, and asked Google what information it  
18 required for each such example. Google refused to provide Perfect 10 with the  
19 information it requested, ostensibly so it could continue to claim that  
20 everything Perfect 10 did was deficient. Zada Decl. ¶11, Exh. 8.

21           Legal Issue 7: If an ISP refuses to answer a copyright holder’s questions  
22 as to exactly what to include in a DMCA notice, is that ISP in violation of  
23 §512(c)(3)(B)(ii) of the DMCA and therefore ineligible for safe harbor?

24           **8. Google Has Failed To Maintain A DMCA Log.**

25           Google admittedly receives thousands of DMCA notifications for a  
26 variety of its programs which involve infringing material. In particular, Google  
27 hosts and/or stores infringing material through its blogger.com and  
28 blogspot.com programs and through google groups. It links to infringing

1 websites through its Web Search, Web Search cache, and Image Search results,  
2 and places ads on infringing websites through its AdSense program. *See Zada*  
3 *Decl.* ¶¶3-7, 15, Exhs. 1-5. Nevertheless it is undisputed that Google has failed  
4 to keep a DMCA log. Indeed, when ordered to produce such a log, Google  
5 failed to do so. *Zada Decl.* ¶15.<sup>7</sup>

6 Legal Issue 8: Can an ISP like Google, that hosts, copies, links to, and  
7 places ads next to, massive amounts of unauthorized copyrighted material,  
8 satisfy the requirements of the DMCA if it fails to keep a DMCA log which  
9 would allow copyright holders to readily determine what actions Google has  
10 taken in response to notices and when, and whether Google has suitably  
11 terminated repeat infringers?

12 **9. Google Has Failed To Keep Track Of The Identities Of Its**  
13 **Hosting Clients.**

14 Section 512(i) of the DMCA, which deals with a service provider's  
15 repeat infringer policy, states, in relevant part, as follows:

16 (i) Conditions for eligibility.--

17 (1) Accommodation of technology.--The limitations on  
18 liability established by this section shall apply to a service provider  
only if the service provider--

19 (A) has adopted and reasonably implemented, and informs  
20 subscribers and account holders of the service provider's system or  
21 network of, a policy that provides for the termination in appropriate  
circumstances of subscribers and account holders of the service  
provider's system or network who are repeat infringers.

22 17 U.S.C. §512(i). Google admits that its hosting clients are subscribers and  
23 account holders. Nevertheless, Google has failed to keep track of the identities  
24 of its hosting clients or maintain a DMCA log listing the complaints against

25 \_\_\_\_\_  
26 <sup>7</sup> In affirming and modifying Judge Hillman's Order compelling Google to  
27 produce documents, Judge Matz ordered Google to produce a "DMCA log,"  
28 meaning "a spreadsheet-type document summarizing DMCA notices received, the  
identity of the notifying party and the accused infringer, and the actions (if any)  
taken in response." Order of Judge Matz dated May 13, 2008, Docket No. 294,  
page 5, lines 1-9. Google has not produced such a DMCA log. *Zada Decl.* ¶15.

1 them. Zada Decl. ¶4, Exh. 2. Google has also not removed 4,000 full-size  
2 infringing P10 Images which Google helped to create on its blogger.com  
3 servers.

4 Legal Issue 9: Under the circumstances, can the Court still rule, as a  
5 matter of law, that Google has suitably implemented a policy against repeat  
6 infringers?

7 **10. Google Has Failed To Utilize Image Recognition To Remove**  
8 **Or Disable Access To P10 Images.**

9 Google has a “similar images” feature that allows its users to find images  
10 that are identical or nearly identical in appearance. Nevertheless, Google  
11 continues to display multiple copies of the same P10 images for which it has  
12 received notice. Zada Decl. ¶12, Exh. 9. Legal Issue 10: Can Google, a  
13 technological powerhouse armed with image recognition, possibly satisfy the  
14 statutory requirement that it expeditiously remove or disable access to  
15 infringing material, if its Image Search results continue to display multiple  
16 copies of the same P10 Images for which it has received notice?

17 **11. Google’s Policy Of Publishing DMCA Notices It Receives**  
18 **On Chillingeffects.org Precludes A Safe Harbor.**

19 Despite repeated objections by Perfect 10, Google has continued to send  
20 Perfect 10’s confidential DMCA notices to chillingeffects.org for publication  
21 on the Internet. Google then links to those confidential notices in its search  
22 results. The net effect is to provide Google users with a listing of where  
23 infringing P10 Images are located on the Internet. Perfect 10 has been able to  
24 cut and paste URLs from such notices posted on chillingeffects.org into its  
25 browser and readily locate such infringing P10 Images. Zada Decl. ¶13, Exh.10.

26 Legal Issue 11: Has Google violated the DMCA requirement of  
27 expeditiously removing or disabling access to infringing material when it  
28 republishes on the Internet the same URLs it was asked to remove, and links to

1 the notice containing those URLs in its search results?

2 **12. Google's Refusal To Remove Sponsored Links And Regular**  
3 **Links To Massive Infringing Paysites Precludes DMCA**  
4 **Safe Harbor.**

5 Perfect 10 has given repeated notice to Google of tens of thousands of  
6 infringing P10 Images available through paysites like giganews.com, which  
7 pays Google money for special sponsored link search result placement. Google  
8 also provides Giganews.com with more than 12,000 regular search links.

9 Perfect 10 has advised Google that giganews.com and other Google advertising  
10 affiliates have stolen and sell virtually every major movie, song, and image.

11 Nevertheless, Google has refused to remove or disable any sponsored links or  
12 regular links to these websites and instead helps these thieves sell their stolen  
13 wares for a fee. Zada Decl. ¶15. The operators of a similar site,  
14 thepiratebay.org, were recently sentenced to a year in jail in Sweden.

15 Legal Issue 12: Does Google's refusal to remove links to these massive  
16 infringing paysites preclude a DMCA safe harbor? This issue is extremely  
17 important, since these massive infringing sites are destroying the entertainment  
18 industry and other copyright holders, which are unable to compete with such  
19 sites that steal billions of dollars of major movies, songs, images, and other  
20 copyrighted works, and then sell them for pennies on the dollar.<sup>8</sup>

21 \_\_\_\_\_  
22 <sup>8</sup> This issue has been previously discussed with the Court:  
THE COURT: Haven't you established your theories of liability?

23 MR. MAUSNER: Well, the one that he mentioned, I think, is a good one.  
24 The pay sites don't have the URLs of the individual images. We think our  
25 notice was the best notice you can give in that situation where we give the  
26 URL of the website and the actual picture, and we've also given instructions  
27 for how you locate that picture in the website. So the question becomes is  
28 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.

Transcript of hearing, October 6, 2008, Pg. 37 Lns. 10 -24, Mausner Decl., Exh. B.

1                   **13. Google’s Policy Of Removing One Link Out Of Thousands**  
2                   **In Its Search Results Fails To Satisfy The DMCA**  
3                   **Requirement Of Removing Or Disabling Access To**  
4                   **Infringing Material.**

5                   Google has a policy of removing links only if they directly link to an  
6                   infringing web page. Because of Google’s policy, even if it were to remove a  
7                   specific infringing link from its Image Search results (which it has rarely done),  
8                   it would still, through in-line linking, allow its users to readily view and  
9                   download the same infringing images from google.com. Furthermore, Google  
10                  has enough power on the Internet to force the infringing website to actually  
11                  remove identified infringing images or risk being cut off from Google search  
12                  results. Instead of contacting the infringing webmaster and demanding that the  
13                  identified infringing material be removed, Google has simply removed at most  
14                  one link, out of potentially thousands, to that infringing website from its Web  
15                  Search results. As a result, its users can still access the same infringing  
16                  material for which Google received notice. Zada Decl. ¶14, Exh. 11.

17                  Legal Issue 13: Does Google’s policy of removing links only if they  
18                  directly link to infringing web pages, and its refusal to cut all links to infringing  
19                  websites if they do not remove the identified infringing material, preclude a  
20                  DMCA safe harbor?

21                  In sum, for Google to prevail on its three DMCA Motions, it must  
22                  establish that there is no triable issue of material fact as to any of the above 13  
23                  issues and that Google is entitled to a ruling in its favor as a matter of law on  
24                  each of these issues. As explained above, such a result seems extremely  
25                  unlikely. Accordingly, there is no basis for this Court to hear Google’s three  
26                  DMCA Motions before it hears P10’s SJ Motion.

1 **V. GOOGLE’S MISLEADING DISCUSSION OF THE DISCOVERY**  
2 **IT ALLEGEDLY NEEDS TO OPPOSE P10’S SJ MOTION**  
3 **PROVIDES NO REASON FOR THIS COURT TO POSTPONE THE**  
4 **FILING OF P10’S SJ MOTION.**

5 After five years of litigation, Google makes the incredible assertion that  
6 P10’s SJ Motion is “premature because relevant discovery is outstanding.”  
7 Motion at 1. Moreover, Google asserts that this Court should grant the Motion  
8 because it intends to delay any hearing on P10’s SJ Motion by opposing the  
9 motion under Rule 56(f). As explained below, Google is wrong. Its mistaken  
10 claims about discovery provide no basis for this Court to prevent the filing of  
11 P10’s SJ Motion.

12 **A. Perfect 10 Has Already Provided Google With The Discovery**  
13 **Google Contends It Needs To Oppose P10’s SJ Motion.**

14 This action has been pending since 2004. Google thus has had five years  
15 to conduct discovery and has conducted massive amounts. Under these  
16 circumstances, it is difficult to conceive that Google, with its massive  
17 resources, was unable to prepare its defense during that time. Nevertheless,  
18 even though it has never seen P10’s SJ Motion, Google asserts that it has not  
19 received three items of discovery it needs to oppose P10’s SJ Motion. *See*  
20 Motion at 9. As explained below, Perfect 10 already has provided Google with  
21 this discovery.

22 First, Google contends that it needs “[e]vidence of copyright ownership and  
23 registration of the images at issue—a necessary predicate for maintaining Perfect  
24 10’s copyright infringement claims.” Motion at 9. Perfect 10 has produced these  
25 documents for virtually all of its copyrights. Moreover, it has produced these  
26 documents for each of the thirteen images that are currently being used as a sample  
27 in P10’s SJ Motion. (If any additional images are used in the sample, they will  
28 only be images for which Perfect 10 has produced documents.) Finally, Perfect 10



1 will include additional copies of those documents as exhibits to the motion.  
2 Google’s mistaken contention thus provides no basis for this Court to grant the  
3 Motion and prevent the filing of P10’s SJ Motion.<sup>9</sup>

4 Second, Google asserts that it needs “an identification of the alleged  
5 infringements Perfect 10 is asserting here, including evidence of the date and  
6 location of infringement, publication date of the infringed image and registration  
7 date.” Motion at 9. As counsel for Perfect 10 explained to counsel for Google  
8 during the conference of counsel with respect to P10’s SJ Motion, the Motion is  
9 currently based on a sample of 13 images. The information sought by Google with  
10 respect to those 13 images has already been provided to Google, and will be  
11 included in the documents filed in support of P10’s SJ Motion. See Mausner  
12 Decl., ¶7.

13 Third, Google claims that it needs “[e]vidence regarding the alleged market  
14 (if any) for Perfect 10’s cell phone download images—relevant to Google’s fair  
15 use defense.” Motion at 9. Perfect 10 has produced whatever evidence it has with  
16 respect to this issue. Zada Decl. ¶16. Moreover, Google fails to explain, and  
17 indeed cannot explain, why it needs such evidence to oppose P10’s SJ Motion,  
18 when the motion does not deal with fair use.

19 In sum, Google’s contention that it needs allegedly outstanding discovery to  
20

---

21 <sup>9</sup> Perfect 10 produced existing copyright registrations at the beginning of the  
22 case and has periodically produced new registrations as they are received from the  
23 Copyright Office. On October 6, 2008, Google sent Perfect 10 a letter identifying  
24 a limited number of copyright materials it claimed were missing and demanded  
25 that Perfect 10 immediately provide those documents. Perfect 10 ordered the  
26 limited number of documents that Google specified, which were in fact missing,  
27 from the Copyright Office. Perfect 10 has received most of the missing documents  
28 from the Copyright Office, and offered to make them available to Google on May  
20. It is important to note that none of the documents Google claimed were  
missing related to the sample that Perfect 10 is using for its summary judgment  
motion. Furthermore, Google can obtain all documents itself from the Copyright  
Office, just as Perfect 10 did. Nevertheless, Google went ahead and filed a motion  
to compel the production of the documents that had not yet been obtained from the  
Copyright Office, even though Perfect 10 represented that it would obtain and  
produce any missing documents it could obtain.

1 oppose P10’s SJ Motion lacks any basis in fact. This contention certainly provides  
2 no grounds for this Court to bar the filing of P10’s SJ Motion until after this Court  
3 rules on Google’s DMCA Motions.

4 **B. Google’s Assertion That It Will Oppose P10’s SJ Motion By**  
5 **Seeking Relief Under Rule 56(f) Provides No Basis To Grant**  
6 **Google’s Present Motion.**

7 In ruling on a Rule 56(f) motion, “the burden is on the party seeking  
8 additional discovery to proffer sufficient facts to show that the evidence sought  
9 exists”... “and that it would prevent summary judgment.” *Nidds v. Schindler*  
10 *Elevator Corp.*, 113 F.3d 912, 921 (9th Cir. 1997). The evidence a party moving  
11 under Rule 56(f) expects to obtain must be “essential” or “material” to opposing a  
12 summary judgment or summary adjudication motion. “The party seeking the  
13 continuance must show that it lacks the ‘facts essential’ to resist the summary  
14 judgment motion.” *State of California v. Campbell*, 138 F.3d 772, 780 (9th Cir.  
15 1998) (citations omitted). “By its very terms, this standard [Fed.R.Civ.P.56(c)]  
16 provides that the mere existence of some alleged factual dispute between the  
17 parties will not defeat an otherwise properly supported motion for summary  
18 judgment; the requirement is that there be no genuine issue of *material fact*.” *Id.*  
19 (emphasis added).

20 Furthermore, in ruling on a Rule 56(f) motion, “...the district court does not  
21 abuse its discretion by denying further discovery if the movant has failed diligently  
22 to pursue discovery in the past.” *Chance v. Pac-Tel Teletrac Inc.*, 242 F.3d 1151,  
23 1161 (9<sup>th</sup> Cir. 2001). Additionally, the fact that a case has been pending for a long  
24 time militates against the granting of a Rule 56(f) motion. *See Fox v. Good*  
25 *Samaritan Hospital*, 2007 WL 2938175, \*16 (N.D Cal. 2007)(Rule 56(f) motion  
26 denied where case pending for a long time (three years) and discovery not  
27 diligently pursued). If Google actually lacks the discovery it needs to oppose  
28 P10’s SJ Motion (which it does not), it would be because Google has wasted

1 everyone's time and effort pursuing irrelevant issues involving Perfect 10's models  
2 and financial matters that have nothing to do with the upcoming motions.

3 Here, as explained above, Google's contentions regarding the purported  
4 evidence it believes it would need to oppose P10's SJ Motion it has yet to see fail  
5 to satisfy Google's burden under Rule 56(f). In any event, if there is a basis for  
6 Google to file a Rule 56(f) motion, it can do so after it receives P10's SJ Motion.  
7 Google's threat to file a Rule 56(f) motion, however, provides no grounds for this  
8 Court to grant this motion or delay the filing of P10's SJ Motion.

9 **VI. GOOGLE'S TRUE PURPOSE IN FILING THE MOTION IS TO**  
10 **DELAY PERFECT 10'S ATTEMPT TO RESOLVE THE CASE**  
11 **AND INSTEAD BURY PERFECT 10 IN UNNECESSARY AND**  
12 **ABUSIVE DISCOVERY.**

13 Perfect 10 has attempted to minimize discovery disputes in this case by  
14 being extraordinarily forthcoming in its document productions. It has produced  
15 hundreds of gigabytes of material, including copyright registration certificates,  
16 deposit materials, work for hire/assignment of rights agreements, tax returns,  
17 detailed financial statements, server logs, DMCA notices to third parties. Zada  
18 Decl. ¶16.

19 Moreover, this Court has specifically directed the parties to engage in  
20 "circumscribed" discovery and to use a sampling approach. The Court set  
21 "objectives -- i.e., summary judgment and settlement readiness -- [to be achieved]  
22 without 'going the distance' via full-fledged, uncircumscribed discovery."  
23 (Mausner Decl., ¶2, Exh. 1, September 25, 2008 Order, p. 2.)<sup>10</sup>

---

24  
25 <sup>10</sup> At the hearing on October 6, 2008, Google's lead counsel, Michael Zeller,  
26 argued that the Court should not use this approach, and the Court disagreed.

27 **The Court: Okay. But what I am trying to accomplish, Mr. Zeller, is to**  
28 **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

1 Prior to the stay, Mr. Mausner and Mr. Zeller submitted a joint letter to  
2 Judge Hillman, which detailed Google's abuses up to that time. (See letter from  
3 Mausner and Zeller to Judge Hillman, dated November 14, 2008, attached as  
4 Exhibit E to Mausner Declaration). Google resumed its abusive conduct as soon as  
5 the stay lifted. Google has already served 229 document requests, 18  
6 interrogatories, and 962 requests for admissions. On May 1, Google stated that it  
7 will seek relief from this Court to take **45 depositions**, even though such  
8 depositions are unnecessary to defend against P10's SJ Motion. (Letter from  
9 Rachel Herrick to Mausner, May 1, 2009, attached as Exh. C to Mausner Decl.)<sup>11</sup>

10 Finally, Google is intentionally burying this Court and Perfect 10 under a  
11

---

12 and under this very perhaps innovative – I've come up with the idea myself.  
13 I'm not sure that it has ever been done elsewhere, but maybe it has.  
14 **At this stage, that's all you're going to be confined to. You are not**  
15 **going to be able to seek other stuff, and Perfect 10 is not going to be**  
16 **compelled to give it, and whatever they think they need from you for the**  
17 **first stage is all – once I'm satisfied that they have a right to it for the**  
18 **first stage, that's all they can get.**  
19 **What's so bad about that?**

20 (Transcript of 10/06/08 hearing, p. 18, lines 4 – 20, emphasis added, Exh. B to  
21 Mausner Declaration.)

22 <sup>11</sup> Similar tactics by Google's lead counsel, Michael Zeller of Quinn  
23 Emanuel, have been sanctioned by the District Court for the Northern District of  
24 California and the Ninth Circuit. In *Mattel, Inc. v. Walking Mountain Productions*,  
25 No. C 01-0091 MISC WHA, the District Court held that "Mattel had sought the  
26 discovery for the improper purpose of annoyance and harassment and had failed to  
27 take reasonable steps to avoid imposing undue burden . . . ." The court found that  
28 "Mattel and its law firm of Quinn, Emanuel, Urquhart, Oliver & Hedges, LLP are  
engaging in unwarranted oppressive tactics." Order Determining Amount of  
Attorney's Fees, attached as Exh. D to Mausner Decl. The Ninth Circuit affirmed  
the award of sanctions, in *Mattel Inc. v. Walking Mountain Productions* 353 F.3d  
792, 813-14 (9<sup>th</sup> Cir. 2003), holding that much of the requested discovery had "no  
bearing on this litigation" or "no relation to this litigation," and that the subpoena  
was "abusively drawn." *Id.* at 813. The district court, as quoted by the 9<sup>th</sup> Circuit,  
had further found that "...no attempt had been made to try to tailor the information  
request to the immediate needs of the case," that "...the two subpoenas were  
served for the purpose of getting the museums to exert pressure on the witnesses  
not to testify" and concluded that "...the Subpoena was 'served for the purpose of  
annoying and harassment and not really for the purpose of getting information.'"  
*Id.* at 813-814. The Court of Appeals concluded that the district court's finding that  
the subpoena was overly burdensome and served for an improper purpose was  
justified. *Id.* at 814.

1 mountain of discovery motions. Indeed, the joint stipulations accompanying  
2 Google's three pending motions to compel total over 550 pages. Mausner Decl.  
3 ¶5. One of those joint stipulations, relating to Google's 962 requests for  
4 admission, is more than 450 pages and was served by Google before the meet and  
5 confer process was even concluded.

6 When Google's Motion is viewed in light of Google's conduct described  
7 above, Google's true intention becomes clear. Google wishes to delay Perfect 10's  
8 ability to file its motion and obtain a judgment as to Google's liability so that, in  
9 the meantime, Google can seek to bury Perfect 10 with overbroad discovery and  
10 abusive and unnecessary discovery motions. The only effective way to stop this  
11 abuse is to expeditiously determine P10's SJ Motion. Accordingly, for this reason  
12 as well, this Court should deny the Motion and allow the filing of P10's SJ Motion  
13 to go forward.

14 **VII. CONCLUSION.**

15 Google has failed to present any justifiable reason for its attempt to  
16 prohibit Perfect 10 from filing its motion until after Google's three DMCA  
17 Motions have been decided. Google has failed to establish, and cannot  
18 establish, either that it has any likelihood of prevailing on its DMCA Motions  
19 or that it needs allegedly outstanding discovery to oppose P10's SJ Motion.  
20 Accordingly, for all of the foregoing reasons, Perfect 10 respectfully requests  
21 that this Court deny Google's Motion and allow Perfect 10 to file its motion.

22 Dated: May 17, 2009

Respectfully submitted,

23 Law Offices of Jeffrey N. Mausner

24 By: Jeffrey N. Mausner

25 Jeffrey N. Mausner

26 Attorney for Plaintiff Perfect 10, Inc.