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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PERFECT 10, INC., a California corporation,

Plaintiff,

vs.

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

Defendants.

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

DEFENDANT GOOGLE'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT RE: GOOGLE'S ENTITLEMENT TO SAFE HARBOR UNDER 17 U.S.C. § 512(d) FOR WEB AND IMAGE SEARCH

AND COUNTERCLAIM

[Separate Statement, Declarations of Rachel Herrick Kassabian, Sibrina Khan, Bill Brougher, Shantal Rands Poovala and Paul Haahr filed concurrently herewith]

PERFECT 10, INC., a California corporation,

Plaintiff,

vs.

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

Defendants.

Hon. A. Howard Matz

Date: August 17, 2009
Time: 10:00 a.m.
Crtrm.: 14

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

PUBLIC REDACTED

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on August 17, 2009, in the courtroom of the
3 Honorable A. Howard Matz, located at 312 North Spring Street, Los Angeles,
4 California 90012, Courtroom 14, Defendant Google Inc. ("Google") shall and hereby
5 does move this Court for summary judgment pursuant to the safe harbor provisions of
6 the Digital Millennium Copyright Act, 17 U.S.C. § 512 ("DMCA") with respect to
7 plaintiff Perfect 10, Inc.'s ("P10") claims of copyright infringement directed to
8 Google Web and Image Search.¹ This motion for summary judgment is made on the
9 grounds that Google satisfies each of the statutory requirements for safe harbor under
10 the governing DMCA provision, 17 U.S.C. § 512(d).

11 This motion is based on this Notice of Motion and Motion, the concurrently-
12 filed Memorandum of Points and Authorities and Separate Statement, the supporting
13 Declarations of Rachel Herrick Kassabian, Sibrina Khan, Bill Brougher, Shantal
14 Rands Poovala and Paul Haahr, the pleadings and other papers on file in this action,
15 and such additional evidence as may be presented at or before the hearing.

16 **Statement of Local Rule 7-3 Compliance**

17 Google's counsel engaged in the Local Rule 7-3 pre-filing conference with
18 P10's counsel on November 7, 2008 as well as times thereafter.

19 _____
20 ¹ Under separate covers, Google is filing motions for summary judgment of
21 entitlement to DMCA safe harbor under Sections 512(b) regarding Google's caching
22 feature ("Caching Motion") and 512(c) regarding Google's Blogger service ("Blogger
23 Motion"). Google respectfully suggests that the Court consider the instant motion
24 regarding Section 512(d) first, as it includes a recitation of the facts common to all
the three motions, and is incorporated by reference in Google's Caching and Blogger

25 Additionally, to the extent Google's Blogger service and Web Search caching
26 feature function as information location tools under 17 U.S.C. § 512(d), by linking
27 users to content hosted on third-party websites, Google moves for summary judgment
28 on P10's copyright infringement claims regarding those services and features under
Section 512(d) as well.

1 DATED: July 2, 2009

QUINN EMANUEL URQUHART OLIVER &
HEDGES, LLP

3 By *Rachel Herrick Kassabian*

4 Michael Zeller
5 Rachel Herrick Kassabian
6 Attorneys for Defendant GOOGLE INC.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **Preliminary Statement**

3 Congress enacted the Digital Millennium Copyright Act (“DMCA”) to protect
4 and promote free enterprise and free speech on the Internet. Concerned about the
5 impact of service provider liability on Internet access and free speech, Congress
6 established the safe harbor provisions of the DMCA to shield service providers from
7 claims of infringement based on providing information location and content hosting
8 services, among other activities. The DMCA’s notice requirements establish that
9 service providers are not expected to police the Internet for claimed copyright
10 infringement, but are expected to respond to proper notices by copyright owners. The
11 notice requirements are indispensable to the statute’s protection of technological
12 development, commerce and free speech.

13 There are no material facts for trial regarding whether Google qualifies for safe
14 harbor under Section 512(d) of the DMCA. It does. Perfect 10, Inc. (“P10”)
15 delivered to Google burdensome, abusive, repetitive and incomplete notices that were
16 hopelessly defective under the DMCA, and worse, appeared to be designed to
17 advance a strategic litigation objective rather than secure actual DMCA takedowns.
18 Although the notices were inadequate and thus failed to impose any obligation on
19 Google under the DMCA, Google nevertheless went beyond what the law requires in
20 a good faith effort to process them. Accordingly, Google is entitled to DMCA safe
21 harbor, and should be granted summary judgment on P10’s copyright infringement
22 claims regarding Web and Image Search.

23 **Statement of Facts**

24 **I. THE PARTIES**

25 **A. P10**

26 P10 alleges that it creates, licenses and sells copyrighted adult entertainment
27 products, including photographs, magazines and a website. Second Amended
28 Complaint ¶¶ 8-10. P10 has pursued litigation against a wide variety of parties, but

1 has focused its litigation efforts on companies such as Google, Amazon, Microsoft
2 and CCBill, rather than the parties who have actually made copies of P10 images
3 available on their websites. In one of those cases, the court has addressed the
4 inadequacies of P10's notices. *See Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102,
5 1113 (9th Cir. 2007).

6 **B. Google**

7 Google operates the world's most popular Internet search engine. Declaration
8 of Bill Brougher ("Brougher Dec."), ¶ 2. Google has indexed billions of web pages
9 on the Internet. *Id.* ¶ 3. As the Ninth Circuit has recognized, Google offers a
10 valuable information location service to the public for free. *See Perfect 10, Inc. v.*
11 *Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007).

12 Google uses an automated software program, known as a web crawler or the
13 "Googlebot," to obtain copies of publicly-available web pages for use in its search
14 index. Brougher Dec. ¶ 4. For Image Search, Google's search engine compiles an
15 index of the text associated with each image crawled, which is in turn associated with
16 a particular "thumbnail" image. *Id.* When a user enters a query, the search engine
17 searches the relevant index and delivers the links (for Web Search) or thumbnails (for
18 Image Search) that aid the user in identifying and locating the third-party content
19 most relevant to the search. *Id.* ¶ 5. Although Google crawls and indexes billions of
20 web pages, it does not crawl or index all web pages. For instance, web pages hosted
21 on servers with a robot exclusion .txt file, which instructs robots not to crawl or index
22 those web pages, are not crawled and indexed by Google. *Id.* ¶ 4. Google also does
23 not crawl or index websites that are accessible only by password. Declaration of Paul
24 Haahr ("Haahr Dec.") ¶ 14. Not all websites in the Google index will appear in the
25 search results. Haahr Dec. ¶¶ 4, 11. Google regularly blocks links to content
26 (including thumbnails) from search results for policy and legal reasons, including a
27 valid DMCA notice. *Id.* ¶¶ 4, 11.

1 **II. P10'S RELEVANT ALLEGATIONS AGAINST GOOGLE**

2 P10's main claims are directed to Web and Image Search. P10 contends that
3 Google directly infringes P10's copyrights by making thumbnail copies of images
4 that are available on third-party Internet sites and displaying those thumbnails in
5 Image Search results. Second Amended Complaint ¶ 26(a), (b). P10 also alleges that
6 Google is secondarily liable for copyright infringement for (1) allowing users to see
7 full-size images of P10's copyrighted works hosted or displayed by third parties (*id.* ¶
8 26(c)); (2) linking users to allegedly infringing copies of P10's images hosted or
9 displayed by third parties (*id.* ¶ 26(d)); and (3) linking to third-party sites with names
10 or passwords allegedly permitting access to perfect10.com (*Id.* ¶ 26(e)).

11 **III. THE DMCA**

12 The DMCA reflects Congress' careful balance between the rights of copyright
13 holders and the rights of citizen-consumers on the Internet. *See* 144 Cong. Rec. 108,
14 H7092 (1998)) (statement of Rep. Coble) (attached to the Declaration of Rachel
15 Herrick Kassabian ("Kassabian Dec.") as Ex. D). Congress enacted the DMCA to
16 "updat[e] the copyright laws for the digital age and prepar[e] a sizable portion of our
17 economy for the next century." 144 Cong. Rec. 61, S4887 (1998) (statement of Sen.
18 Lott) (attached to the Kassabian Dec. as Ex. C). Congress sought to address the
19 expansion of secondary liability for copyright infringement, which threatened the
20 very "infrastructure of the Internet." *Id.* at S4888 (statement of Sen. Ashcroft).

21 Two recurring concerns were emphasized during the congressional debate.
22 The first was that "if America's service providers are subject to litigation for the acts
23 of third parties at the drop of a hat, they will lack the incentive to provide quick and
24 sufficient access to the Internet." 144 Cong. Rec. 108, H7095 (1998) (statement of
25 Rep. Goodlatte) (Kassabian Dec., Ex. D). Congress noted the potentially disastrous
26 consequences for consumers if search engines become subject to civil liability
27 because they "categoriz[e] [web pages] for a directory" or develop other "true
28 consumer-oriented products." *Id.* at S4889 (statement of Sen. Ashcroft) Kassabian

1 Dec., Ex. C. Congress considered the protection of such web infrastructure "critical
2 to unlock the potential for the Internet." *Id.* at S4888.

3 The second concern was to safeguard Internet service providers from copyright
4 liability that could threaten free speech on the Internet. Congress correctly predicted
5 that the Internet would become the forum for individual expression in the 21st
6 Century, and that "an increasingly high percentage of what we say to each other will
7 be electronically transmitted." 144 Cong. Rec. 108, H7092 (statement of Rep. Frank)
8 (Kassabian Dec., Ex. D). Unless carefully managed, secondary copyright liability
9 had the potential "to diminish the freedom [ISPs] felt in presenting things." *Id.* Thus,
10 the DMCA was structured to avoid "either an incentive or an excuse to censor" on the
11 part of service providers. *Id.*

12 To address these concerns, Congress created four "safe harbors" that shield
13 certain activities from liability or damages under the Copyright Act. 17 U.S.C. § 512.
14 The goal was to encourage and "facilitate the robust development and worldwide
15 expansion of electronic commerce, communications, research, development, and
16 education," by "protect[ing] qualifying Internet service providers from liability for all
17 monetary relief for direct, vicarious and contributory infringement." *Hendrickson v.*
18 *EBay, Inc.*, 165 F. Supp. 2d 1082, 1088 (C.D. Cal. 2001) (quoting S. Rep. No. 105-
19 190, at 20); *see also CCBill*, 488 F.3d at 1111; *Ellison v. Robertson*, 357 F. 3d 1072,
20 1076 (9th Cir. 2004).

21 Congress made clear that "a service provider need not monitor its service or
22 affirmatively seek facts indicating infringing activity . . . in order to claim [the
23 DMCA's] limitation on liability." H.R. Rep. No. 105-511 (II), at 53 (1998) (attached
24 to the Kassabian Dec. as Ex. E); *see* 17 U.S.C. § 512(m) (codifying same). The Ninth
25 Circuit has echoed this important precept. *CCBill*, 488 F.3d at 1111 ("a service
26 provider need not affirmatively police its users for evidence of repeat infringement
27 Were we to require service providers to terminate users under circumstances
28 other than those specified in § 512(c), § 512(c)'s grant of immunity would be

1 meaningless."). The DMCA places the burden squarely on the copyright holder to
2 provide proper notice to service providers. *CCBill*, 488 F.3d at 1113. This means
3 that copyright owners must review each alleged infringement, make a good faith
4 determination regarding whether it is infringing (including considering the possibility
5 of fair use), and submit a DMCA-compliant notice. *See id.*; *Lenz v. Universal Music*
6 *Corp.*, 572 F. Supp. 2d 1150, 1155-56 (N.D. Cal. 2008). Absent proper notice or
7 actual knowledge of infringement, service providers are under no obligation to
8 respond in any fashion. *See CCBill*, 488 F.3d at 1113.

9 **IV. GOOGLE'S DMCA POLICIES**

10 **A. Google's DMCA Policy And Process For Web Search**

11 Google publishes information required for DMCA complaints relating to Web
12 Search at <http://www.google.com/dmca.html>. Declaration of Shantal Rands Poovala
13 ("Poovala Dec."), Ex. B. For a Web Search DMCA complaint, Google directs
14 complainants to identify the copyrighted work infringed by providing a brief
15 description of it and the complete URL (web address) or other location where the
16 work can be found. *Id.* ¶ 7. Google also directs complainants to provide the
17 complete URL at which the infringing material is located and the Web Search query
18 that directly links to that web page. *Id.* ¶ 8. Google needs this information in order to
19 verify the complaint and prevent abuses of the DMCA removal procedure. *Id.* ¶ 7-8.
20 Without proper notice, Google has no way of knowing which uses a copyright owner
21 regards to be infringing, in contrast to those uses that are licensed, a fair use, or
22 otherwise acceptable to the owner. *Id.* ¶ 15. If a URL is incomplete or contains
23 ellipses or misspellings, it hinders Google's ability to locate the materials in question.
24 *Id.* ¶ 9, Haahr Dec. ¶ 4.

25 Google expeditiously processes DMCA notices using a team of employees
26 charged with processing removal requests. Poovala Dec. ¶¶ 11-20. On receipt,
27 notices are entered into an electronic "queue" for tracking purposes, and reviewed to
28 confirm that they contain the required information. *Id.* ¶¶ 11, 13. If they do not,

1 Google asks for more information. *Id.* ¶ 13. If they are complete, the [REDACTED] team
2 then compares the copyrighted work to the infringing material. *Id.* ¶ 14. If there is a
3 match, the team forwards the URL in question to an engineering team responsible for
4 DMCA removals, which then blocks that URL from appearing in Google search
5 results. *Id.*; Haahr Dec. ¶¶ 5-6. Google then notifies the complainant of the removal.
6 Poovala Dec. ¶ 14. Google also notifies the complainant of any counter-notifications
7 received. *Id.* ¶ 18. If there is a counter-notification, and if the complainant informs
8 Google within ten days that it has filed a lawsuit, the URL will remain blocked. *Id.*
9 Otherwise, the URL will again be able to appear in search results. *Id.*

10 **B. Google's DMCA Policy And Process For Image Search**

11 Google's DMCA policy for Image Search removals is published at
12 http://www.google.com/images_dmca.html, and is similar to its policy for Web
13 Search. Poovala Dec. ¶ 22.² Google directs complainants to provide the complete
14 URL at which the infringing material is located, but for Image Search, this requires
15 an image URL. *Id.* ¶¶ 22-23, Ex. E; Haahr Dec. ¶ 10. Google's policy for Image
16 Search explains how copyright holders can locate the image URL of an infringing
17 image. Poovala Dec. ¶ 23 & Ex. E. The same image may be displayed on the page
18 actually hosting the image on its servers, as well as on one or more web pages using a
19 hyperlink to the hosted image. Haahr Dec. ¶ 10. Again, Google has no way of
20 knowing which uses of an image the copyright owner regards to be infringing, so the
21 owner must identify each infringing web page URL and/or image URL. Poovala
22 Dec. ¶ 15.

23 **V. GOOGLE'S REPEAT INFRINGER POLICY**

24 Google's Web and Image Search services have no subscribers or account
25 holders. Haahr Dec. ¶ 17. Webmasters do not "sign up" to have their websites listed

26
27 ² Google's handling of Image Search DMCA notices is similar to the process for
28 Web Search. Poovala Dec. ¶ 25; *see supra* Part IV.A.

1 in Google's organic search results—websites appear in Google search results if they
2 are crawled by the Googlebot and are relevant to users' queries. *Id.* Thus, there are
3 no subscriptions or accounts to terminate pursuant to a repeat infringer policy with
4 respect to Web and Image Search. Of course, Google has repeat infringer policies for
5 its products and services with account holders, such as AdSense or Blogger.³
6 Pursuant to those policies, Google will terminate account holders following receipt of
7 [REDACTED] verified DMCA notices.⁴ Even though not required by the DMCA, Google also
8 makes a good faith attempt to enforce its repeat infringer policies even where the
9 notice in question is defective or not otherwise directed to those products or services.

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]

13 **VI. P10'S DEFECTIVE NOTICES**

14 P10 purports to have sent Google 83 DMCA notices.⁷ Kassabian Dec., Ex. L;
15 Poovala Dec., Exs. L & N. In spite of the fact that P10 has been advised by the
16

17 ³ Beyond the fact that Google has such policies, Google does not concede that
18 the enforcement of these policies is relevant to the Section 512(d) analysis, where the
19 information location service itself does not have account holders or subscribers.

20 ⁴ [REDACTED]

21 ⁵ An AdSense account holder, or "publisher," places certain code on its web pages
22 in order to signal to Google's servers that Google-provided ads should be delivered to
23 that page. See https://www.google.com/adsense/login/en_US/?sourceid=aso&subid=na-en-ha-bk&utm_medium=ha&utm_term=adsense.

24 ⁶ [REDACTED]

25 ⁷ For ease of reference, Google refers to P10's DMCA communications as
26 "notices." However, Google does not concede that these communications constituted
27 valid notices of copyright infringement pursuant to the DMCA. Nor does Google
28 concede that the URLs identified by P10 as "infringing URLs" in its claimed notices
were actually infringing.

1 courts, and by various service providers including Google, regarding the important
2 notice requirements of the DMCA, P10's notices consistently failed to meet those
3 requirements. As the summary table at Exhibit A of the Kassabian Declaration
4 demonstrates, P10's notices failed to include at least two—and in some cases as many
5 as five—of the seven required components set forth in the DMCA. Moreover, P10's
6 obvious strategy has been to impose an impossible burden on Google in the hope that
7 Google is not able to remove the content at issue, and that P10 can then sue Google.
8 The format and content of P10's defective notices evolved over time, and are grouped
9 here by their shared characteristics. *See generally* Kassabian Dec., Ex. L; Poovala
10 Dec., Exs. L & N.

11 **A. Group A: The 2001 Notices**

12 During discovery, P10 produced seventeen notices from 2001 (collectively, the
13 “Group A Notices”). Kassabian Dec., Ex. L.⁸ P10 has conceded that its suit is not
14 based on these alleged notices, so they are irrelevant here. *Id.*, Ex B.⁹

15 **B. Group B: The Spreadsheet Notices**

16 P10 sent Google a series of notices in spreadsheet format (hereinafter, the
17 “Group B Notices”). Each comprised a cover letter or email and a three-column
18 spreadsheet. Poovala Dec. ¶ 42, Ex. L.¹⁰ The first column listed infringing URLs,
19 the second listed the corresponding search terms used, and the third listed the
20 copyrighted work at issue. *Id.* ¶ 42.¹¹ Some of the same URLs were listed multiple
21

22 ⁸ *See* Kassabian Dec. ¶ 13 (listing the dates of the 17 Group A Notices).

23 ⁹ Even had P10 not waived any claims based on the Group A Notices, they suffer
24 from a myriad of defects, including failing to identify the copyrighted works at issue,
25 or the URLs of the infringing material. *See* Kassabian Dec., Exs. A & L. Moreover,
any such claims would be time-barred. *See* 17 U.S.C. § 507.

26 ¹⁰ *See* Poovala Dec. ¶ 41 (listing the dates of the 48 Group B Notices). The May
31, and June 1, 4, and 16, 2004 notices did not include a spreadsheet. *Id.* ¶ 43.

27 ¹¹ Google does not concede that any of the works identified in P10's notices
28 actually belong to P10. Google has yet to receive complete discovery establishing
(footnote continued)

1 times in various Group B Notices. *Id.* ¶ 45, Ex. L. Numerous fields in the
2 spreadsheets were left blank. *Id.* ¶ 44, Ex. L.

3 The Group B Notices consistently failed to identify P10's copyrighted work at
4 issue. *Id.*, Ex. L. In many instances, the Group B Notices made no attempt to
5 identify any work at all. Poovala Dec. ¶ 44, Ex. L. In other instances, they listed
6 various media containing dozens, hundreds, or even thousands of images—without
7 specifying which of the many images was at issue—such as (1) entire websites like
8 perfect10.com, amyweber.net and ambersmith.net, (2) multiple pages from P10
9 Magazine, (3) an unidentified “Perfect10 DVD,” and (4) an unspecified “Perfect 10
10 Model Boxing DVD.” *Id.*

11 The Group B Notices also failed to properly identify the location of the
12 infringing material. The vast majority of the URLs listed were web page URLs, but
13 the Group B notices largely failed to include the image URLs that would allow
14 Google to block the hosted image to which other pages had linked. Poovala Dec. ¶
15 46, Ex. L. At many of those web page URLs, multiple images were displayed. *Id.*
16 Ex. M. Additionally, many of the URLs were incomplete. *Id.* ¶ 45.

17 **C. Group C: The DVD And Hard Drive Notices**

18 In December 2005, and from spring 2007 onward, P10 provided notices with a
19 cover letter, a spreadsheet, and a several-hundred gigabyte hard drive or DVDs
20 containing electronic files (“Group C Notices”). Poovala Dec., ¶ 48, Ex. N.¹² The
21 cover letters represented that the accompanying hard drive or DVDs contained
22 infringing copies of P10 images in various folders. *Id.* ¶ 49, Ex. N. For at least eight
23 of the eighteen notices, the cover letters acknowledged that P10 located the infringing
24 images not on Google, but on password-protected “Usenet” sites with which P10

25 _____
26 P10's copyright ownership, including all registration, deposit and chain of title
27 documents. Kassabian Dec. ¶ 14.

28 ¹² See Poovala Dec. ¶ 48 (listing the dates of the 18 Group C Notices).

1 apparently established accounts. *Id.* As noted above, Google's search services do not
2 crawl, index or link to the content on password-protected sites. Haahr Dec. ¶¶ 14-15.
3 In addition, many of the cover letters directed Google to search for the P10 works at
4 issue amongst P10's entire 15,000+ image collection contained on a hard drive it sent
5 on June 28, 2007. Poovala Dec. ¶ 50, Ex. N.

6 The spreadsheets failed to properly identify the location of the infringing
7 materials. The first column listed the top-level URL for various websites without
8 specifying the location within that site of an infringing image. Poovala Dec. ¶ 51,
9 Ex. N. The second and/or third columns listed only the electronic folder in which the
10 files containing infringing material were saved on the accompanying drive or DVDs.
11 *Id.*¹³ The spreadsheets likewise did not identify the corresponding P10 images
12 infringed. Instead, the cover letters directed that if Google wished to see and
13 compare the P10 images corresponding to each alleged infringement, it had to search
14 for them amongst P10's entire 15,000+ image collection from perfect10.com,
15 contained on a hard drive P10 had sent on June 28, 2007. *Id.* ¶ 50, Ex. N

16 The hard drive and DVDs contained a myriad of nested electronic folders in
17 the form of (1) raw image files such as JPEG files, and (2) screen shots of Google
18 search results. Poovala Dec. ¶¶ 52-53, Ex. O. None of the raw image files displayed
19 a web page or image URL. *Id.* ¶ 54, Ex. P.¹⁴ Some of the screen shots failed to
20 include a complete URL of the page depicted. *Id.* ¶ 55. Other screen shots appear to
21

22 ¹³ Seven of the Group C Notices did not even include a spreadsheet to guide
23 Google's review of the accompanying DVD, but were otherwise the same as the other
24 Group C Notices. Poovala Dec. ¶ 48, n. 4, Exs. N1, N2, N13, N16, N17 & N18. The
25 March 20, 2007 DVD also included three large folders of extraneous materials which
26 P10 does not even claim are alleged infringements of P10 works. For example,
27 Folder 4 contains alleged infringements of songs and movies, none of which P10
28 claims to own. Poovala Dec., Ex. N2.

¹⁴ Many raw image files displayed other companies' copyright notices (such as
Playboy), and may not have even belonged to P10. Poovala Dec., ¶ 54, Ex. N3.

1 have been manipulated such that the image depicted could not be found at the URL
2 depicted. *Id.*, Ex. R. In total, these folders contained over 70,000 distinct files.
3 Declaration of Sibrina Khan ("Khan Dec."), ¶ 6. Many individual folders contained
4 tens of thousands of pages of screen shots of infringing material. *Id.* ¶¶ 12-17.

5 The hard drive and DVDs were incomprehensible, failing to direct Google to
6 the specific works or infringements claimed. For example, just one of the hundreds
7 of electronic folders on the hard drive provided with the June 28, 2007 notice, entitled
8 "z other infringing websites," contains 46,187 pages of screen shots. Khan Dec. ¶ 19.
9 This folder includes a subfolder named "ALL LARGE ARE P10" which contains 107
10 of its own subfolders that in turn contain 24,870 pages of screen shots. Poovala Dec.,
11 Ex. N3; Khan Dec. ¶ 19. For 108 of the 246 top-level URLs listed in the June 28
12 notice, P10 referred to the entire "ALL LARGE ARE P10" subfolder as the location
13 of the infringing material without specifying which of the images contained within
14 those 24,870 pages was infringing. Poovala Dec., Ex. N3. Likewise, one of the
15 DVDs sent with the December 13, 2007 notice contains several layers of folders and
16 subfolders comprising 28,672 pages of screen shots of infringing material. Poovala
17 Dec., Ex. N8; Khan Dec. ¶ 16.

18 In total, Google received one hard drive and 21 DVDs with the Group C
19 Notices, all in the format described above. Poovala Dec. ¶ 48.

20 **VII. GOOGLE'S REQUESTS FOR DMCA-COMPLIANT NOTICES**

21 Google repeatedly advised P10 of the various defects that hindered or
22 precluded Google from completely processing its notices. Poovala Dec. ¶¶ 56-73,
23 Exs. S-EE. In particular, Google advised P10 to: (1) follow Google's DMCA
24 guidelines (which comply with the statute's requirements); (2) provide complete
25 URLs; (3) submit notices in electronic soft copy, given the large number of URLs
26 involved; (4) identify the infringed works at issue, and (5) identify the URLs at which
27 Google could find the infringing material. *Id.* Google also explained that it could do

28

1 nothing with raw image files, nor could it do anything about material located on
2 password-protected sites not crawled or indexed by Google. *Id.*

3 At no time did P10 respond to Google's letters by resubmitting its notices in an
4 intelligible and DMCA-compliant format. Poovala Dec. ¶ 74. To this day, P10
5 continues to send notices in these unintelligible formats, and refuses to provide
6 Google with soft copy spreadsheets listing individual URLs. *Id.*

7 **VIII. GOOGLE'S PROCESSING OF P10'S DEFECTIVE NOTICES**

8 Google first describes its overall approach to processing P10's notices, and
9 then describes the challenges unique to processing each of Groups B and C.

10 **A. Google's General Approach To The P10 Notices**

11 P10's notices were unlike any others Google has received, in both their volume
12 and incomprehensibility. Poovala Dec. ¶ 75. Although Google does not concede that
13 it was required to do so, Google went above and beyond the DMCA's requirements
14 in order to process P10's notices. *Id.* ¶¶ 75-77. [REDACTED]

15 [REDACTED]

17 As noted above, the notices consistently
18 failed to specify the location of the infringing materials. In addition, P10 uniformly
19 failed, in every notice, to identify the work that Google should compare with the
20 alleged infringing material (assuming a discernable URL was listed). Nevertheless,
21 Google made a good-faith attempt to process these defective notices. [REDACTED]

22 [REDACTED]

26 Though P10 sporadically sent electronic soft copies of its notices, it has refused
27 to do so since 2005, even though Google has repeatedly explained that an electronic
28 soft copy URL facilitates the speed and accuracy of processing. Poovala Dec. ¶ 84.

1 An electronic soft copy URL, which may be copied and pasted directly to/from the
2 browser address bar, allows Google to immediately access the specific page that
3 contains infringing material. *Id.* Without electronic soft copies, Google was forced
4 to manually type thousands of URLs, many of which were lengthy and complex.¹⁵
5 *Id.* Given the poor quality of many of P10's notices (including those transmitted by
6 fax), this was often an impossible task. *Id.*¹⁶

7 Over the past four-plus years, Google has reviewed numerous URLs [REDACTED]
8 [REDACTED] in response to P10's DMCA notices, and has blocked many of those
9 URLs [REDACTED] from appearing in Web or Image Search results, despite the
10 inadequacy of P10's notices. Poovala Dec. ¶ 91.

11 Google received numerous counter-notifications in response to P10's notices.
12 Poovala Dec. ¶ 96, Ex. MM; *see* 17 U.S.C. § 512(g). In these counter-notifications,
13 various counter-complainants swore under oath that the images displayed on their
14 sites were not owned by P10. *See* Poovala Dec. ¶ 96, Ex. MM. Some further
15 declared that P10's notices appeared to be aimed at stifling competition. *Id.*, Ex. MM

17 ¹⁵ Examples of URLs in P10's notices include: http://www.minovia.com/modules/uskolaxgallery/index.php?carpeta=vibe_sorensen&foto=vibe%20sorensen01.jpg&inicio=0&PHPSESSID=1531ec14c93c0e1cef7323d013e4c51b and
18 http://www.wallpapers-zone.com/original/stars_et_top_models_femmes/alena_seredova/alena_seredova_004.html.

19
20
21 ¹⁶ P10's failure to provide soft copy lists is puzzling now that Google has
22 confirmed through discovery that P10 has them—but apparently chooses not to send
23 them to Google. P10 [REDACTED]
24 [REDACTED] recently filed one such soft-copy
25 spreadsheet with the Court in the related *Amazon* case. *See* Kassabian Dec. ¶ 11, Exs.
26 J (email) and K (Ex. 9 to the Zada Dec. in Support of P10's MSJ Against Alexa and
27 Amazon). That sheet includes much of the very information that Google has been
28 asking P10 to provide, including the web page URL where the alleged infringing
material is located and the image URL where the same image is hosted. *Id.* P10's
conduct is inconsistent with the DMCA and suggests a stronger interest in harassment
than in facilitating the removal of links to infringing copies of its images.

1 at 1737. For example, one such counter-complainant declared: "I have no idea why
2 I'm being named in this infringement notice. Perfect 10, Inc. owns no copyrights to
3 any of the images posted on my sites . . . **My guess is that Perfect 10, Inc. is doing**
4 **this to eliminate competition. . . ."** *Id.* (emphasis added).

5 These counter-complainants also asserted that P10's failure to identify in its
6 notices the specific image claimed to be infringing deprived them of the information
7 they needed to prepare proper counter-notifications. Poovala Dec., Ex. MM at 1737,
8 1757. For example, one such counter-complainant declared:

9 **The notice that Perfect 10, Inc. sent you is so vague that I don't even**
10 **know which image/file they are complaining about.** They just list
11 models. You can't own a particular model. **If he would have listed an**
12 **actual file I could have easily produced documentation showing that**
13 **I have the rights to display it.** He probably did this because he knew
14 that larger companies, like myself, would have counter sued his pathetic
15 attempt to reduce the amount of competition he has to deal with.

16 *Id.* at 1737 (emphasis added); *see also id.* at 1757 ("I never received any additional
17 information about this, such as which images in particular were problematic. I have
18 done my best to resolve this issue, but without the specific information I cannot be
19 sure that the issue has been resolved.") Though Google forwarded all of these
20 counter-notifications to P10, P10 never responded to them. Poovala Dec. ¶¶ 96.

21 P10 also has conceded that it has sent Google DMCA notices complaining
22 about websites that were actually licensed to display P10's images. Poovala Dec. ¶¶
23 97-98, Ex. NN; *see also* Kassabian Dec., Ex. J (email from Norman Zada



26 **B. Google's Processing Of The Group B Notices**

27 With few exceptions, Google was able to complete its processing of the
28 majority of the Group B Notices within one to two weeks of receipt. Poovala Dec.

1 ¶ 82. In some cases, these notices (which often contained hundreds of URLs) were
2 processed in as little as two days. *Id.* Google's efforts were hampered by the severity
3 of the notices' defects and P10's lack of cooperation. Where P10 refused to
4 cooperate by sending complete URLs, electronic soft copies of lists of URLs, and the
5 like, Google's processing efforts were delayed. *Id.* Further, P10 would often send
6 several identical or slightly revised versions of the same notice, thereby forcing
7 Google to re-review and re-process hundreds of URLs. *Id.* ¶ 83.¹⁷

8 C. Google's Processing Of The Group C Notices

9 Given the massive volume of materials in the Group C Notices and their
10 general incomprehensibility, [REDACTED]
11 [REDACTED] Poovala Dec. ¶ 87. Again, though Google does not
12 concede that any of this was required under the DMCA, the team reviewed the
13 thousands of pages of screenshots page by page, and manually typed in the
14 discernable URLs. [REDACTED]

15 [REDACTED]
16 [REDACTED] P10 is the only copyright holder that has
17 refused to provide notices in a format amenable to the standard processing done by
18 the [REDACTED] team. *Id.* [REDACTED]
19 [REDACTED]
20 [REDACTED]

21 D. Google's Enforcement Of Its Repeat Infringer Policies

22 Google carefully reviewed P10's notices to ensure that its repeat infringer
23 policies were enforced.¹⁸ As noted above, Web and Image Search have no such
24

25 ¹⁷ For example, on June 28, 2004, P10 sent a notice listing 316 allegedly
26 infringing URLs. Eight days later, P10 sent the same list of 316 URLs. Five days
27 later, P10 sent the same list yet again. Poovala Dec., Exs. L5, L6, L7.

28 ¹⁸ Facts specific to Google's enforcement of its Blogger repeat infringer policy
with respect to P10's notices are stated in Google's Blogger Motion.

1 policy because there are no account holders or subscribers, but Google did not turn a
2 blind eye to other services where it was evident that another service might be
3 implicated.¹⁹

4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]

12 Summary Judgment Standard

13 “A party against whom relief is sought may move at any time . . . for summary
14 judgment on all or part of a claim,” or on an affirmative defense. Fed. R. Civ. P.
15 56(b); *Rivera v. Anaya*, 726 F.2d 564, 566 (9th Cir. 1984). The moving party must
16 demonstrate the absence of a genuine issue of material fact for trial. *Anderson v.*
17 *Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). The opposing party “may not rest
18 upon the mere allegations or denials of the adverse party’s pleadings, but the adverse
19 party’s response, by affidavits or as otherwise provided . . . [by Rule 56], must set
20 forth specific facts showing that there is a genuine issue for trial.” *Cusano v. Klein*,
21 280 F. Supp. 2d 1035, 1038 (C.D. Cal. 2003).

22
23 ¹⁹ Google does not concede that its efforts here were required for Section 512(d)
24 safe harbor regarding a product or service that has no account holders or subscribers
25 (as is the case with Web and Image Search). However, Google does make a good
26 faith attempt to enforce its repeat infringer policies wherever the information
27 provided makes that possible.

28 ²⁰ None of P10’s notices was actually directed to a Google service with account
holders or subscribers, as instructed by Google’s product-specific DMCA policies.
See, e.g., http://www.google.com/adsense_dmca.html.

1 Argument

2 **I. GOOGLE MEETS THE DMCA'S THRESHOLD REQUIREMENTS**

3 To be eligible for any DMCA safe harbor, a party must meet three threshold
4 conditions. First, the party must be a service provider. Second, it must have adopted
5 and reasonably implemented a repeat infringer policy. Third, the party must not
6 interfere with "standard technical measures" used by copyright owners to identify or
7 protect their works. 17 U.S.C. §§ 512(k), 512(i)(1). Google meets all of these
8 requirements.

9 **A. Google Is A Service Provider**

10 It is beyond dispute that Google is a "service provider" as defined by the
11 DMCA. *See* 17 U.S.C. § 512(k)(1)(B) (service provider is "a provider of online
12 services or network access, or the operator of facilities therefor"); *Corbis Corp. v.*
13 *Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1100 (W.D. Wash. 2004) (DMCA's
14 definition of service provider is a broad one encompassing a variety of activities). At
15 least one other district court has already found Google to be a "service provider" in
16 the context of a safe harbor motion. *See Field v. Google*, 412 F. Supp. 2d 1106, 1125
17 (D. Nev. 2006) (granting Google's motion for partial summary judgment of DMCA
18 safe harbor under § 512(b)). Google satisfies this condition as a provider of Web and
19 Image Search and other services.

20 **B. Google Has An Appropriate Repeat Infringer Policy**

21 Web and Image Search do not have account holders or subscribers, and thus
22 Google need not (and cannot) have a repeat infringer policy for those services. As
23 noted above, AdSense and Blogger are services for which Google has repeat infringer
24 policies, since those services have account holders. The DMCA requires "a policy
25 that provides for the termination in appropriate circumstances of subscribers and
26 account holders of the service provider's system or network who are repeat
27 infringers." 17 U.S.C. § 512(i)(1)(A). A policy is considered implemented if the
28 service provider "has a working notification system, a procedure for dealing with

1 DMCA-compliant notifications, and ... it does not actively prevent copyright owners
2 from collecting information needed to issue such notifications.” *CCBill*, 488 F.3d at
3 1109. A policy is considered *reasonably* implemented if the service provider
4 terminates those subscribers or account holders when “appropriate.” *Id.* at 1111.
5 Google’s repeat infringer policy meets all of these conditions.

6 First, Google has a designated agent for receiving DMCA notices. Poovala
7 Dec., Ex. A; Kassabian Dec., Ex. G (P10 admitting same). Google also publishes
8 detailed instructions explaining what information Google needs to process a DMCA
9 notice, and how and where the notice should be submitted. Poovala Dec. ¶ 5 & Ex.
10 B; *see e.g.*, <http://www.google.com/dmca.html>. If a notice is deficient, Google
11 requests the necessary information. *Id.* ¶ 13.

12 Second, Google has a procedure for dealing with DMCA-compliant notices,
13 including verifying the complaints, ensuring that offending links or content are
14 removed, and tracking its processing efforts. *See* Part IV, *supra*.

15 Third, Google does not actively prevent copyright owners from collecting
16 information needed to issue a DMCA notice. Poovala Dec. ¶ 39. To the contrary,
17 copyright owners are free to utilize search services to locate infringing content.²¹

18 **C. Google Does Not Interfere With Standard Technical Measures**

19 Google does not interfere with any known technical measures that are used by
20 copyright owners. 17 U.S.C. § 512(i)(1)(B); Haahr Dec. ¶ 18.²²

24 ²¹ Again, beyond the fact that Google has such policies, Google does not concede
25 that the enforcement of these policies is relevant to the Section 512(d) analysis, since
26 Google's Web and Image Search services have no account holders to terminate.

27 ²² The DMCA does not identify any "standard technical measures," nor does
28 Google know which such measures (if any) are considered "standard" by copyright
owners.

1 **II. GOOGLE IS ENTITLED TO SAFE HARBOR UNDER SECTION**
2 **512(D)**

3 Having satisfied the threshold requirements, the undisputed evidence
4 demonstrates that Google is entitled to safe harbor under Section 512(d) with respect
5 to P10's search-related infringement claims. Section 512(d) provides safe harbor for
6 service providers linking users to an online location containing infringing material or
7 infringing activity if the service provider:

8 (1)(A) does not have actual knowledge that the material ... is infringing;

9 (B) in the absence of such actual knowledge, is not aware of facts or
10 circumstances from which infringing activity is apparent; or

11 (C) upon obtaining such knowledge or awareness, acts expeditiously to
12 remove, or disable access to the material;

13 (2) does not receive a financial benefit directly attributable to the infringing
14 activity, in a case in which the service provider has the right and ability to
15 control such activity; and

16 (3) upon notification of claimed infringement, responds expeditiously to
17 remove, or disable access to, the material that is claimed to be infringing ...
18 except that, for purposes of this paragraph, the [identification of the location of
19 the claimed infringement in the required DMCA notice] shall be identification
20 of the reference or link, to material or activity claimed to be infringing, that is
21 to be removed or access to which is to be disabled, and information reasonably
22 sufficient to permit the service provider to locate that reference or link.

23 17 U.S.C. § 512(d). Google meets this test.²³

24
25
26
27 ²³ The statutory requirements for a valid DMCA notice are attached as Exhibit F
28 to the Kassabian Declaration.

1 **A. P10's Defective Notices Failed To Confer Any Knowledge**

2 P10 claims that Google has knowledge of infringement of P10's images via
3 Web and Image Search by virtue of its 80+ notices. Not so. P10's notices are the
4 epitome of non-compliance with the DMCA. Without exception, they fail to identify
5 the "copyrighted work claimed to have been infringed" or the "material that is
6 claimed to be infringing," and thus conferred no knowledge upon Google. *See* 17
7 U.S.C. § 512(c)(3)(B); *CCBill*, 488 F.3d at 1113 (defective notice does not impute
8 knowledge of infringement). A defective notice does not trigger any obligation to
9 remove infringing material. 17 U.S.C. § 512(c)(3)(B). Thus, because P10's notices
10 did not confer actual or constructive knowledge of infringement, they did not trigger
11 an obligation to remove anything. *See* 17 U.S.C. § 512(c)(3)(B)(i) and (d)(3). Each
12 group of notices is addressed below.

13 **1. The Group A Notices Are Irrelevant**

14 The Group A Notices consist of 17 letters P10 allegedly sent to Google in
15 2001. P10 has confirmed that these notices are irrelevant to its case, and thus, it is
16 not basing its claims on these notices. *See* Kassabian Dec., Ex. B. Indeed, such
17 claims would be time-barred anyway. *See* 17 U.S.C. § 507. Accordingly, to the
18 extent P10's complaint can be read to include the 2001 Group A Notices, Google is
19 entitled to judgment in its favor on those claims.²⁴

20 **2. The Group B Notices Did Not Confer Knowledge**

21 The Group B Notices do not comply with the DMCA's notice requirements.
22 The Group B Notices failed to identify the works at issue in a number of ways. For
23 many of the URLs listed, P10 did not identify *any* copyrighted works whatsoever,
24

25
26 ²⁴ As discussed above, even had P10 not waived any claims based upon the Group
27 A Notices, these notices are fatally defective, and Google is entitled to summary
28 judgment on this basis as well. *See supra* at 8 fn. 9; Kassabian Dec. ¶ 13 & Exs. A
and L.

1 listing only a model name. Poovala Dec., Ex. L (column for work identification left
2 blank). A bare reference to model names is insufficient under the DMCA. *See Arista*
3 *Records, Inc. v. Mp3Board, Inc.*, 2002 WL 1997918, *8-9 (S.D.N.Y. 2002) (DMCA
4 letters listing only artists' names, but no songs, held insufficient). Three of the Group
5 B Notices identified entire DVDs described as "P10 DVD" or "P10 Model Boxing
6 DVD" as the infringed work. Poovala Dec., Exs. L23, L35, L44. P10 did not
7 provide Google with these DVDs. *Id.*

8 Similarly, P10 identified entire websites or multi-page ranges of various
9 magazines as "the work" at issue, without specifying any particular images. Poovala
10 Dec. ¶ 44 & Ex. L.²⁵ For example, P10's February 13, 2006 notice identified the
11 entire perfect10.com website as the infringed work for *all 1,181 URLs* listed, and the
12 September 27, 2005 notice identified perfect10.com as the infringed work for *all 247*
13 *URLs* listed. *Id.*, Ex. L47. Likewise, the June 28, 2004 notice identified multiple
14 pages of Perfect 10 magazine as the work infringed at 175 of the 316 allegedly
15 infringing URLs listed, and the December 21, 2004 notice identified a 24-page
16 section of P10 magazine as the infringed work at one or more of the URLs listed. *Id.*,
17 Exs. L5, L18. P10's abusive and improper blanket citation to entire image collections
18 fails to confer sufficient notice under the DMCA. *CCBill*, 488 F.3d at 1113.

19 The Group B Notices also failed to identify the location of the infringing
20 material as required. 17 U.S.C. § 512(c)(3)(A)(iii); 17 U.S.C. § 512(d)(3). P10
21 routinely provided URLs for pages displaying multiple images—without specifying
22 which images were infringed. Poovala Dec., Ex. L. Similarly, several of the Group
23 B Notices listed incomplete URLs—i.e., they contained ellipses, misspellings, and/or
24 extra spaces. *Id.* P10's failure to provide the specific location of infringing materials
25

26
27 ²⁵ P10 does not claim to own two of those sites: amyweber.net and
28 ambersmith.net.

1 is fatal under the DMCA. *CCBill*, 488 F.3d at 1112-13; *see* 17 U.S.C.
2 § 512(c)(3)(A)(iii); 17 U.S.C. § 512(d)(3).

3 Additionally, as referenced above, P10 submitted the same Group B Notices
4 multiple times, and largely refused to submit electronic soft-copy notices. P10's
5 barrage of duplicative, hard-copy notices only made Google's task of processing
6 them more burdensome. Such harassing conduct violates the letter and spirit of the
7 DMCA. *See UMG Recordings, Inc. v. Veoh Networks, Inc.*, ___ F. Supp. 2d ___,
8 2008 WL 5423841, *9 (C.D. Cal. 2008) (Matz, J.) (the "'notice and take-down'
9 procedure is a formalization and refinement of a *cooperative* process that has been
10 employed to deal efficiently with network-based copyright infringement.") (quoting
11 S. Rep. 105-190, at 45) (emphasis added).

12 **3. The Group C Notices Did Not Confer Knowledge**

13 The Group C Notices do not substantially comply with the DMCA's notice
14 requirements either. 17 U.S.C. § 512(c)(3)(A)(ii) and (iii); § 512(d)(3). Worse, these
15 notices appear to have been designed to burden Google in the hope of cultivating a
16 lawsuit.

17 First, the Group C Notices categorically fail to identify the specific works at
18 issue, instead directing Google to P10's entire 15,000+ image collection from
19 perfect10.com as the work infringed.

20 Second, the Group C Notices also fail to identify the location of the infringing
21 material as required. These notices referred to entire websites, screen shots of which
22 are on the DVDs or a hard drive provided with the notices, rather than specifying
23 URLs at which infringing content might be located. Many of the thousands of pages
24 of electronic files on the DVDs and hard drive either failed to reflect a complete
25 URL, or any URL at all. *Poovala Dec., Ex. N.* Some screen shots appeared to be
26 altered in that the URL depicted did not result in the page reflected. The Group C
27 Notices present an incomprehensible jumble of screenshots, files and folders that are
28 ineffective to confer notice under the DMCA. *CCBill*, 488 F.3d at 1112-13 (service

1 providers are not required to “piece together the relevant information for each
2 instance of claimed infringement” from thousands of pages of materials).

3 The Group C Notices also referenced the home pages for password-protected
4 “Usenet” sites, which home pages did not contain any images. Indeed, P10 conceded
5 that those infringing materials could only be accessed by logging onto the Usenet
6 sites directly. P10 claims that these Usenet sites contain 93% of the infringements at
7 issue in this case, yet—as P10 is well-aware—it is impossible for Google to remove
8 links to them from its search results, because those links do not exist in Google's
9 index in the first place. Haahr Dec. ¶¶ 14-15.

10 Thus, P10’s notices conferred no knowledge of any infringements via Web or
11 Image Search. *See* 17 U.S.C. § 512(d)(3) & (c)(3) (defective notices cannot be
12 considered in determining whether a service provider has actual or apparent
13 knowledge of infringement); *CCBill*, 488 F.3d at 1113 (defective notice does not
14 impute knowledge of infringement).

15 **B. Google Expeditiously Processed P10’s Defective Notices**

16 Although P10’s notices fell far short of the DMCA’s requirements, Google
17 exceeded what the law requires to process them. As described in detail above,
18 Google (1) notified P10 of the defects and how to correct them; [REDACTED]
19 [REDACTED] (3)
20 blocked discernable URLs from search results even when P10 had failed to identify
21 the specific work allegedly infringed at those URLs; and (4) enforced (wherever
22 possible) Google’s repeat infringer policies, despite the defects in the notices. *See*
23 Part VIII, *supra*; *see also* Poovala Dec. ¶¶ 75-91. Google’s processing efforts were
24 beyond reasonable in light of the numerous defects therein, and P10’s repeated
25 refusals to cure them. *Id.* ¶ 85. Google processed the notices as quickly as possible,
26 sometimes in as little as two days, and routinely [REDACTED] asked
27 employees to work over holidays. *Id.* ¶¶ 82, 85. By any standard, Google
28 expeditiously processed P10’s notices, despite their gross defects and inadequacies.

1 See 17 U.S.C. § 512(c)(3); H.R. 105-551(II) at 53-54 (“Because the factual
2 circumstances and technical parameters may vary from case to case, it is not possible
3 to identify a uniform time limit for expeditious action.”) (Kassabian Dec., Ex. E).
4 Thus, even if the Court were to find P10’s notices sufficient (which they are not),
5 Google expeditiously responded to them.

6 **III. GOOGLE DOES NOT HAVE THE RIGHT AND ABILITY TO**
7 **CONTROL THE ALLEGED INFRINGING CONDUCT, NOR DOES IT**
8 **RECEIVE A FINANCIAL BENEFIT ATTRIBUTABLE THERETO.**

9 Google does not have the right and ability to control the alleged infringing
10 activity, but even if it did, Google does not receive a financial benefit directly
11 attributable that activity. 17 U.S.C. § 512(c)(1)(B) & (d)(2). Both elements must be
12 met for the safe harbor to be denied. *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F.
13 Supp. 2d 1132, 1150 (N.D. Cal. 2008) (quoting *Corbis*, 351 F. Supp. 2d at 1109).

14 **A. Google Does Not Have The Right And Ability To Control The**
15 **Alleged Infringing Activity**

16 The Ninth Circuit has already ruled that “Google cannot stop any of the third-
17 party websites from reproducing, displaying, and distributing unauthorized copies of
18 P10 images because that infringing conduct takes place on third-party websites.”
19 *Amazon.com*, 508 F.3d at 1174. Google’s ability to remove access to materials
20 accessed through its system does *not* equate to the right and ability to control the
21 infringing activity. *Id.*; see *Corbis*, 351 F. Supp. 2d at 1110; *Hendrickson*, 165 F.
22 Supp. 2d at 1093-94. Google cannot remove these sites from the Internet, or dictate
23 what they choose to display. Haahr Dec. ¶ 16. All Google can do is to prevent third-
24 party websites from appearing in search results. The ability to do so is not enough to
25 establish a right and ability to control the allegedly infringing activity. *Perfect 10,*
26 *Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 805 (9th Cir. 2007) (“the defendant must
27 have the right and ability to *supervise* and *control* the infringement, not just affect
28 it.”). Google lacks any such right or ability.

1 **B. Google Does Not Receive A Financial Benefit Directly**
2 **Attributable To The Alleged Infringing Activity**

3 Because Google lacks the right and ability to control the alleged infringing
4 activity, it need not show that it does not receive a financial benefit directly
5 attributable to it. *See Visa*, 494 F.3d at 806 (declining to address financial benefit on
6 an appeal from dismissal because there was no right and ability to control); *Io Group*,
7 586 F. Supp. 2d at 1150. Nevertheless, Google receives no such benefit.

8 Google does not charge websites a fee to appear in its organic Web and Image
9 Search results generated in response to user queries, nor does Google charge a fee to
10 use Web and Image Search. Haahr Dec. ¶ 16. “In determining whether the financial
11 benefit criterion is satisfied, courts should take a common-sense, fact-based approach,
12 not a formalistic one. In general, a service provider conducting a legitimate business
13 would not be considered to receive a ‘financial benefit directly attributable to the
14 infringing activity’ where the infringer makes the same kind of payment as non-
15 infringing users of the provider’s service. . .” H.R. Rep. 105-551(II), at 54
16 (Kassabian Dec., Ex. E). Because infringing and non-infringing websites and users
17 pay the same—nothing—to use Web and Image Search, the direct financial benefit
18 test is not met here.

19 **Conclusion**

20 Google is entitled to safe harbor under Section 512(d) on P10’s copyright
21 infringement claims directed to Web Search and Image Search, and respectfully
22 requests that the Court grant it summary judgment on this basis.

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