

1 QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP

Michael T. Zeller (Bar No. 196417)

2 michaelzeller@quinnemanuel.com

865 South Figueroa Street, 10th Floor

3 Los Angeles, California 90017-2543

Telephone: (213) 443-3000

4 Facsimile: (213) 443-3100

Charles K. Verhoeven (Bar No. 170151)

5 charlesverhoeven@quinnemanuel.com

50 California Street, 22nd Floor

6 San Francisco, California 94111

Rachel Herrick Kassabian (Bar No. 191060)

7 rachelkassabian@quinnemanuel.com

555 Twin Dolphin Drive, Suite 560

8 Redwood Shores, California 94065

9 Attorneys for Defendant Google Inc.

11 UNITED STATES DISTRICT COURT

12 CENTRAL DISTRICT OF CALIFORNIA

13 PERFECT 10, INC., a California  
corporation,

14 Plaintiff,

15 vs.

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

18 Defendants.

19 AND COUNTERCLAIM

20 PERFECT 10, INC., a California  
21 corporation,

22 Plaintiff,

23 vs.

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

26 Defendants.

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

**DEFENDANT GOOGLE INC.'S  
EX PARTE APPLICATION RE:  
PLAINTIFF PERFECT 10, INC.'S  
MOTION FOR SUMMARY  
JUDGMENT AND SUMMARY  
ADJUDICATION RE: COPYRIGHT  
INFRINGEMENT AGAINST  
DEFENDANT GOOGLE INC.; AND**

**MEMORANDUM OF POINTS AND  
AUTHORITIES**

[Declaration of Rachel Herrick  
Kassabian filed concurrently herewith]

Hon. A. Howard Matz

Date: None Set

Time: None Set

Crtrm.: 14

Discovery Cut-Off Date: None Set

Pretrial Conference Date: None Set

Trial Date: None Set

1 Pursuant to the Federal Rules of Civil Procedure and this Court's Local  
2 Rule 7-19, Defendant Google Inc. ("Google") respectfully submits this *ex parte*  
3 application seeking guidance from the Court regarding the appropriate response (if  
4 any) to Perfect 10, Inc.'s ("Perfect 10") Motion for Summary Judgment and Summary  
5 Adjudication re: Copyright Infringement Against Defendant Google Inc., filed  
6 yesterday.

7 Google makes this application on two grounds. First, Perfect 10's motion  
8 contravenes Section III.C.5 of the Court's Scheduling and Case Management Order,  
9 which precludes the parties from "filing cross-motions for summary judgment on  
10 identical issues of law," because it raises issues identical to those presented by  
11 Google's previously filed and pending Motions for Summary Judgment Regarding  
12 Entitlement to DMCA Safe Harbor. Second, because Google's motions (if  
13 successful) would moot Perfect 10's motion (whereas Perfect 10's motion, even if  
14 successful, would not moot Google's motions), the interests of judicial economy  
15 weigh in favor of hearing Google's motions first. Accordingly, Google requests  
16 expedited judicial intervention to set an orderly briefing schedule on these motions.

17 Pursuant to Local Rule 7-19, Google contacted Jeffrey N. Mausner, Warner  
18 Center Towers, 21800 Oxnard Street, Suite 910, Woodland Hills, CA 91367-3640  
19 (Telephone: (310) 617-8100, (818) 992-7500), counsel of record for Perfect 10,  
20 regarding the substance of this *ex parte* application telephonically on July 7, 2009.  
21 Perfect 10's counsel declined to stipulate to Google's requested relief, necessitating  
22 this *ex parte* application. Pursuant to Perfect 10's request, Google has agreed that  
23 Perfect 10 may have until Friday, July 10, 2009 to file its opposition to this *ex parte*  
24 application.

25 This application is based on this Application and the accompanying  
26 memorandum, the concurrently filed Declaration of Rachel Herrick Kassabian  
27  
28

1 ("Kassabian Decl."), the pleadings and other papers on file in this action, and all  
2 matters of which the Court may take judicial notice.

3  
4 DATED: July 7, 2009

QUINN EMANUEL URQUHART OLIVER &  
HEDGES, LLP

5  
6 By /s/ Rachel Herrick Kassabian  
7 Rachel Herrick Kassabian  
8 Attorneys for Defendant Google Inc.  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1                                    **MEMORANDUM OF POINTS AND AUTHORITIES**

2                                    **Background**

3            On July 2, 2009, Google filed three motions for summary judgment regarding  
4 Google's entitlement to DMCA safe harbor on Perfect 10's copyright infringement  
5 claims ("Google's DMCA Motions").<sup>1</sup> Google's pending DMCA Motions, if granted,  
6 will resolve the entirety of Perfect 10's copyright infringement claims against Google.

7            Subsequently, on July 6, 2009, Perfect 10 filed its own Motion for Summary  
8 Judgment and Summary Adjudication, arguing that Google is (1) liable for copyright  
9 infringement and (2) ineligible for the same DMCA safe harbors that Google's  
10 DMCA Motions seek, with respect to twelve images—i.e., approximately 0.04% of  
11 the images Perfect 10 claims are at issue in this action ("Perfect 10's DMCA and  
12 Liability Motion").

13           This Court's Scheduling and Case Management Order provides, in relevant  
14 part:

15           **The parties shall avoid filing cross-motions for summary judgment**  
16           **on identical issues of law, such that the papers would be**  
17           **unnecessarily cumulative.** (*E.g.*, a party's moving and reply papers on  
18           its own motion would advance the same arguments as its opposition  
19           papers to the other party's cross-motion).

20 Scheduling and Case Management Order Section III.C.5 (emphasis added). Google  
21 now requests the Court's guidance in responding to Perfect 10's DMCA and Liability  
22

23 \_\_\_\_\_  
24           <sup>1</sup> See Google's Motion for Summary Judgment re: Google's Entitlement to Safe  
25 Harbor Under 17 U.S.C. § 512(b) for its Caching Function (Docket No. 426),  
26 Google's Motion for Summary Judgment re: Google's Entitlement to Safe Harbor  
27 Under 17 U.S.C. § 512(c) for its Blogger Service (Docket No. 427), and Google's  
28 Motion for Summary Judgment re: Google's Entitlement to Safe Harbor Under 17  
U.S.C. § 512(d) for Web and Image Search (Docket No. 428).

1 Motion.<sup>2</sup>

2 **Argument**

3 **I. PERFECT 10'S MOTION VIOLATES THE COURT'S STANDING**  
4 **ORDER PROHIBITING DUPLICATIVE DISPOSITIVE MOTIONS.**

5 More than half of Perfect 10's DMCA and Liability Motion is devoted to  
6 arguments that Google is ineligible for the very same DMCA safe harbors that  
7 Google's previously-filed DMCA Motions seek. Specifically, Perfect 10's DMCA  
8 and Liability Motion has an entire section arguing that "Google Does Not Qualify for  
9 Safe Harbor" (*see* Perfect 10's DMCA and Liability Motion at 5-6, 20-25), and  
10 devotes the bulk of its contributory liability arguments to briefing whether Perfect  
11 10's claimed DMCA notices, and Google's responses thereto, were sufficient (*see id.*  
12 at 3-5, 13-20). Plainly, Perfect 10's DMCA and Liability Motion is duplicative of the  
13 issues already joined in Google's DMCA Motions. Not only does Perfect 10's Motion  
14 thus place extra, unnecessary burdens on this Court and Google, but Perfect 10's  
15 actions are an effort to obtain an inappropriate "sur-reply" on these issues in response  
16 to Google's replies in support of Google's DMCA Motions.

17 This is precisely the sort of duplicative briefing that the Court's Scheduling and  
18 Case Management Order prohibits. Because the duplicative portions of Perfect 10's  
19 DMCA and Liability Motion were improperly filed, Google believes that simply  
20

---

21 <sup>2</sup> At the August 18, 2008 scheduling conference, the Court also instructed the  
22 parties to sequence dispositive motions so that motions with the potential to moot  
23 others be heard first. *See* Google's Motion for an Order Setting a Schedule for the  
24 Filing of Dispositive Motions (Docket No. 411), at 2. Following these instructions  
25 (and because Google's DMCA Motions could potentially moot Perfect 10's planned  
26 liability motion), Google met-and-conferred multiple times with Perfect 10 to seek  
27 agreement that (1) Google would be the moving party on its affirmative defense of  
28 DMCA safe harbor, (2) Perfect 10 would be the moving party on liability, and (3)  
Google's DMCA Motions would be heard first. *Id.* at 2-4. Perfect 10 refused to  
stipulate to any of these issues. *Id.* at 4.

1 responding to Perfect 10's improper filing would only further increase the burden  
2 Perfect 10 has imposed on this Court. Accordingly, Google requests that these  
3 duplicative portions of Perfect 10's DMCA and Liability Motion be stricken or held  
4 in abeyance, and that Google be relieved from any obligation to respond to them.

5 **II. PERFECT 10'S MOTION IS PREMATURE AND THREATENS TO**  
6 **WASTE JUDICIAL AND PARTY RESOURCES, SINCE GOOGLE'S**  
7 **DMCA MOTIONS MAY RENDER IT MOOT.**

8 As Google explained in its Motion for an Order Setting a Schedule for the  
9 Filing of Dispositive Motions (Docket No. 411), currently under submission with this  
10 Court, Google's DMCA Motions (if successful) will moot the portions of Perfect 10's  
11 Motion devoted to direct and secondary copyright liability issues.<sup>3</sup> By contrast, even  
12 if the Court were to grant Perfect 10's Motion as to liability, it would still need to  
13 reach the issues briefed in Google's previously-filed DMCA Motions.<sup>4</sup> Moreover,  
14 because Perfect 10's Motion is limited to adjudicating the merits of Perfect 10's  
15 copyright infringement claims with respect to a mere twelve images (i.e., 0.04% of  
16 the images purportedly at issue), the Court would still need to hear and resolve  
17 subsequent motions directed to the remaining 99.96% of Perfect 10's copyright  
18 claims—as well as all of the pending discovery motions related to those claims.<sup>5</sup>

---

20 <sup>3</sup> Although Google's prior motion is still pending, Google presents this *ex parte*  
21 application now in light of Perfect 10's filing of its Motion yesterday, which Google  
22 had not yet seen at the time Google filed its prior motion. The need for guidance on a  
23 briefing order and schedule has become more pressing in light of the clear  
24 redundancies in Perfect 10's Motion as filed.

25 <sup>4</sup> Other Courts have recognized this imbalance by hearing DMCA arguments  
26 before liability arguments. See, e.g., Hendrickson v. eBay Inc., 165 F. Supp. 2d  
27 1082, 1087-88 (C.D. Cal. 2001) ("Before the Court reaches the merits of that  
28 [secondary liability question], the Court must address a preliminary issue: whether  
the DMCA shields eBay from liability for copyright infringement.").

<sup>5</sup> In addition, Perfect 10's Motion is premature because relevant discovery  
(including discovery relating to proof of copyright ownership and identification of  
(footnote continued)

1 Accordingly, it would serve the interests of judicial economy for the Court to hear  
2 and decide Google's DMCA Motions first, before requiring briefing on and reaching  
3 (if necessary) the liability portions of Perfect 10's Motion.

4 In opposition, Perfect 10 likely will argue that this Court should resolve its  
5 Motion first, since its Motion includes both DMCA and liability issues. Perfect 10  
6 misses the point. The DMCA is a complete defense to Perfect 10's copyright  
7 infringement claims. If Google prevails under the DMCA (whether under its Motions  
8 or under the duplicative portions of Perfect 10's Motion), the Court and the parties  
9 will have wasted time and resources on numerous issues that the liability portion of  
10 Perfect 10's Motion raises, such as ownership and other prima facie elements of an  
11 infringement claim. Having Perfect 10's Motion proceed before or simultaneously  
12 with briefing on the DMCA cannot avoid that problem. Furthermore, Google  
13 informed Perfect 10 many months ago that Google intended to file a DMCA  
14 summary judgment motion. See Motion for an Order Setting a Schedule for the  
15 Filing of Dispositive Motions, at 7. Perfect 10 never contested that Google should be  
16 the moving party on this affirmative defense. Id. Indeed, as the party asserting (and  
17 bearing the burden of proof on) the DMCA affirmative defense, Google should have  
18 the right to be the moving party on this important issue. Limiting Google to just a  
19 single opposition brief/cross-motion on this critical defense would deny Google the  
20 opportunity to fully and fairly defend itself against Perfect 10's copyright claims.

### 21 Conclusion

22 For the above-stated reasons, Google respectfully requests that the Court grant  
23 its *ex parte* application to set a briefing schedule whereby (1) Google's DMCA  
24 \_\_\_\_\_

25 infringements) is still outstanding. Thus, resolution of Perfect 10's Motion will be  
26 delayed because Google will have no choice but to respond pursuant to Rule 56(f) as  
27 to at least some issues unique to Perfect 10's Motion, thus further proliferating the  
28 (footnote continued)

1 Motions are heard and decided first, relieving Google of any obligation to respond to  
2 Perfect 10's DMCA and Liability Motion at this time, (2) the portions of Perfect 10's  
3 Motion raising DMCA safe harbor issues are stricken as duplicative, (3) if the Court  
4 grants Google's DMCA Motions, Google is relieved of any obligation to respond to  
5 Perfect 10's DMCA and Liability Motion, and (4) if the Court denies Google's  
6 DMCA Motions, a briefing schedule shall be set for the filing of Google's opposition  
7 and cross-motion regarding the liability portions of Perfect 10's Motion, and Perfect  
8 10's reply thereto.

9 DATED: July 7, 2009

QUINN EMANUEL URQUHART OLIVER &  
HEDGES, LLP

11 By /s/ Rachel Herrick Kassabian  
12 Rachel Herrick Kassabian  
13 Attorneys for Defendant Google Inc.  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

26 \_\_\_\_\_  
27 matters before the Court that may turn out to be unnecessary in the event Google's  
28 DMCA Motions are granted.