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9 Attorneys for Plaintiff Perfect 10, Inc.

10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA

12 PERFECT 10, INC., a California
 13 corporation,

14 Plaintiff,

15 v.

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

18 Defendant.

19 AND CONSOLIDATED CASE.

Case No. CV 04-9484 AHM (SHx)

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

**DECLARATION OF LES SCHWARTZ
 SUBMITTED IN OPPOSITION TO
 GOOGLE’S THREE MOTIONS FOR
 SUMMARY JUDGMENT RE DMCA
 SAFE HARBOR FOR ITS WEB AND
 IMAGE SEARCH, BLOGGER
 SERVICE, AND CACHING FEATURE
 (DOCKET NOS. 428, 427, AND 426)**

BEFORE JUDGE A. HOWARD MATZ

Date: October 5, 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

1 I, Les Schwartz, declare as follows:

2 1. I am the president of Les Schwartz, Inc. dba DecisionBar
3 Trading Software. Our software, called DecisionBar, assists individuals
4 and professional traders in making trading decisions. My company owns
5 the copyright for the computer program and also the trademark
6 DecisionBar. The software is leased on a monthly basis. I submit this
7 declaration in connection with Perfect 10's lawsuit against Google. All of
8 the matters stated herein are of my own personal knowledge, except where
9 otherwise stated, and if called as a witness, I could and would testify
10 competently thereto.

11 2. Starting in approximately September of 2007, I began sending DMCA
12 notices to Google, to try to get Google to stop linking to and hosting websites that
13 sell pirated versions of my company's software and use our trademark. I crafted
14 my initial notices based on instructions on Google's website. I followed Google's
15 requirements and put in the swearing language Google requested as well as my
16 contact information as Google requested. I understand that since Google has
17 designated my DMCA notices as Confidential, copies of those notices will be
18 submitted by Mr. Mausner as exhibits to his declaration, filed under seal. Google's
19 instructions asked me to fax my notices, which I did. After I sent Google
20 approximately 15 to 20 notices by fax, I received an email from Google stating that
21 all my notices that were sent by fax should be emailed. I re-sent the notices by
22 email that I had earlier faxed, along with perhaps 20 to 30 more notices. So in
23 total, I sent Google somewhere between 35 and 50 notices.

24 3. Google asked that I resend my notices in a different format, by email.
25 Google asked me to provide a) "Copyrighted URL"; b) "Allegedly infringing
26 URL"; and c) "Make BRIEF reference to the text/images which you feel are in
27 violation of your own material." A true and correct copy of this email is attached
28 as Exhibit 1. I had already provided the same information in at least as much detail

1 to Google in my prior notices, following Google's instructions, but Google asked
2 me to resend this information again in a different format, which I did. Attached as
3 Exhibit 2 is a true and correct copy of one such email that I sent to Google on June
4 4, 2008, which followed Google's new instructions.

5 4. Attached as Exhibit 3 is a true and correct copy of an email that I
6 received from Google on June 17, 2008, in response to my June 4 email. In this
7 email, Google claims that "we were unable to locate the allegedly infringing
8 content on the page(s) in question." That is completely untrue. All Google had to
9 do was click on the links I provided in my notices and then search for
10 "decisionbar".

11 5. I wrote back to Google on about June 17, so stating. A true and
12 correct copy of my email is attached as Exhibit 4. I was very angry with the way
13 Google was avoiding removing the pirated software of my company. I wrote:

14 Each of these sites are selling pirated version of our copyrighted
15 software using our trademark. Your statement that you are "unable to
16 locate the allegedly infringing content" is actually laughable. I'm sure
17 Google would not take that view if someone was pirating selling their
18 proprietary software.

19 As an example, lets look at a link where YOU are the webmaster:

20 [http://groups.google.com/group/be.finance/browse_thread/thread/d1e3
21 16c832d03aff/](http://groups.google.com/group/be.finance/browse_thread/thread/d1e316c832d03aff/)

22 It is obvious that this site is illegal selling pirated software. Do a
23 search for DecisionBar among all of the pirated software you are
24 allowing them to sell.

25 How about this one:

26 <http://www.youseewealth.com/forum/archive/index.php/t-1081.html>

27 The use of DecisionBar with the word "Crack" should be a dead give
28 away. They even use content from our website to sell our stolen
product.

There is no question in my mind that you are being disingenuous
when you claim you can't find the infringing material, and are just
trying to make me jump through hoops.

1 You have all the information you need in my original letter. I expect
2 you to do what is right.

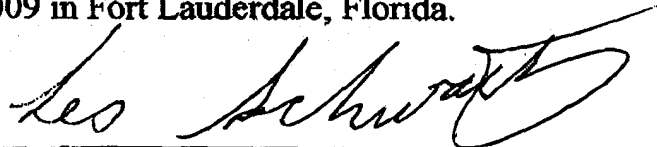
3 As a long time Google advertiser, I would have expected better
4 treatment.

5 6. Pirated copies of my company's software are still being offered on
6 Google Groups, at [http://groups.google.com/group/be.finance/browse_thread/
7 thread/d1e316c832d03aff/](http://groups.google.com/group/be.finance/browse_thread/thread/d1e316c832d03aff/), the same URL shown first on my June 17, 2008 email,
8 Exhibit 4. Attached as Exhibit 5 is a download of the relevant pages from that
9 URL, showing pirated copies of my company's software being offered for sale (see
10 highlighted URLs) as of July 27, 2009.

11 7. Google kept giving me contradictory instructions, and even when I
12 did what they asked, Google did not remove most of the infringing material.
13 Google was being disingenuous in that it was saying that the material was not there
14 when it clearly was. I got the impression that Google was just trying to make me
15 jump through hoops, to make the process unnecessarily difficult, so that I would
16 stop sending notices. I sent Google approximately 35 to 50 notices, and as far as I
17 can tell, Google did not remove more than a handful of the URLs I complained
18 about. The pirated material, DecisionBar software, was obviously being offered on
19 the sites, and yet Google claimed it couldn't find it.

20 8. Based upon my experience with Google, I have come to the
21 conclusion that Google's supposed DMCA procedure is nothing but a sham.

22 I declare under penalty of perjury under the laws of the United States of
23 America that the foregoing is true and correct to the best of my knowledge.
24 Executed this 28th day of July, 2009 in Fort Lauderdale, Florida.

25 

26 Les Schwartz
27
28

Exhibit 1

To: optionpro@bellsouth.net

From: help@google.com (by way of Les Schwartz <optionpro@sprynet.com>)

Subject: Re: [#205011304] Your previous requests

At 07:05 AM 11/19/2007, you wrote:

>Hi Les,

>

>Please find a copy of multiple complaints you sent to our office,
>previously. As you aware, you now have a signature on file with us.

Please

>let us know which of these requests are still of concern to you and feel
>free to email us those URLs in the format which we have requested in
>earlier emails.

1. (a) Copyrighted URL: www._____.com

(b) Allegedly infringing URL: www._____,com

(c) Make BRIEF reference to the text/images which you feel are in violation of your own material.

>We thank you for your cooperation and patience as we sort out the confusion.

>

>Regards,

>The Google Team

Exhibit 2

From: Les Schwartz <optionpro@bellsouth.net>

Subject: Trademark Infringement Requests

Date: Wed, 04 Jun 2008 14:08:08 -0400

Dear Google,

Some months ago we sent you numerous DMCA trademark infringement requests.

At that time you put our signature on file and asked that we submit request

via email in the format below. Here is a list of sites infringing on our trademark. It should be pointed out that these are mostly sites which sell

bootleg software and have no place being listed. These site are selling bootleg copies of our copyrighted software using our registered trademark. Our TradeMark is DecisionBar. Reg. #3,279,777

1. (a) Copyrighted URL: www.decisionbar.com

(b) Allegedly infringing URL:

<http://www.fullfileaccess.com/warez-download-full-version-rapidshare-file-crack-serial-keygen-decision+bar.html>

(c) Make BRIEF reference to the text/images which you feel are in violation of your own material.

Selling bootleg copies of our copyrighted software using our registered trademark: DecisionBar

2. (a) Copyrighted URL: www.decisionbar.com

(b) Allegedly infringing URL:

<http://www.youseewealth.com/forum/archive/index.php/t-1081.html>

(c) Make BRIEF reference to the text/images which you feel are in violation of your own material.

Selling bootleg copies of our copyrighted software using our registered trademark: DecisionBar

3. (a) Copyrighted URL: www.decisionbar.com

(b) Allegedly infringing URL:

<http://traderclub.com/discus/messages/18/1804.html?ThursdayMay3120071222am>

(c) Make BRIEF reference to the text/images which you feel are in violation of your own material.

Selling bootleg copies of our copyrighted software using our registered trademark: DecisionBar

4. (a) Copyrighted URL: www.decisionbar.com

(b) Allegedly infringing URL:

<http://www.bradynet.com/bbs/jobs/100267-0.html>

(c) Make BRIEF reference to the text/images which you feel are in violation of your own material.

Selling bootleg copies of our copyrighted software using our registered trademark: DecisionBar

5. (a) Copyrighted URL: www.decisionbar.com

(b) Allegedly infringing URL:

http://groups.google.com/group/be.finance/browse_thread/thread/d1e316c832d03aff/8708005bd0772ff3

(c) Make BRIEF reference to the text/images which you feel are in violation of your own material.

Selling bootleg copies of our copyrighted software using our registered trademark: DecisionBar

6. (a) Copyrighted URL: www.decisionbar.com

(b) Allegedly infringing URL:

http://www.forexnews.com/fxforum/forum/forum_posts.asp?TID=1809

(c) Make BRIEF reference to the text/images which you feel are in violation of your own material.

Selling bootleg copies of our copyrighted software using our registered trademark: DecisionBar

7. (a) Copyrighted URL: www.decisionbar.com

(b) Allegedly infringing URL:

http://www.forexnews.com/xforum/forum/forum_posts.asp?TID=1809

(c) Make BRIEF reference to the text/images which you feel are in violation of your own material.

DecisionBar

8. (a) Copyrighted URL: www.decisionbar.com

(b) Allegedly infringing URL:

<http://www.fullreleases.com/NewMembers/full-ddl-download-serial-crack-torrent-new-Decisionbar.php?search=Decisionbar>

(c) Make BRIEF reference to the text/images which you feel are in violation of your own material.

Selling bootleg copies of our copyrighted software using our registered trademark: DecisionBar

9. (a) Copyrighted URL: www.decisionbar.com

(b) Allegedly infringing URL: <http://www.daytradetools.com/new.htm>

(c) Make BRIEF reference to the text/images which you feel are in violation of your own material.

Selling bootleg copies of our copyrighted software using our registered trademark: DecisionBar

10. (a) Copyrighted URL: www.decisionbar.com

(b) Allegedly infringing URL: Shocking-Review.com/Decision-Bar

(c) Make BRIEF reference to the text/images which you feel are in violation of your own material.

Using our registered trademark: DecisionBar

Please note that #10 was also filed as an adwords complaint.

Thank you,

Les Schwartz

Exhibit 3

Date: Tue, 17 Jun 2008 21:24:36 -0000
From: help@google.com
To: "Les Schwartz" <optionpro@bellsouth.net>
Subject: Re: [#290277671] Your Complaint
User-Agent: Neotonic Trakken/combo_frontend-3.1.50D
X-Antivirus: AVG for E-mail 8.0.100 [270.3.0/1505]

Hi Les,

We have received your DMCA complaint dated June 4, 2008. Upon recent review of the website(s) mentioned in your complaint, we were unable to locate the allegedly infringing content on the page(s) in question. If this matter is still a concern, please reply to this email with detailed information to enable us to locate the allegedly infringing content.

Please note that in matters involving trademark, it is best to directly address the webmaster of the page in question. Once the webmaster has altered the page in question, Google's search results will automatically reflect this change after we crawl the site.

Regards,
The Google Team

Exhibit 4

To: help@google.com
From: Les Schwartz <optionpro@sprynet.com>
Subject: Re: [#290277671] Your Complaint
X-ELNK-Trace:
3b4972aff6260a054969b67446a45b3899594df05feb3df10ff772a7796ae10760bc1103a8f1c5d93
50badd9bab72f9c350badd9bab72f9c350badd9bab72f9
X-Originating-IP: 66.32.17.55
X-Antivirus: AVG for E-mail 8.0.100 [270.3.0/1505]

Dear Google Team,

Each of these sites are selling pirated version of our copyrighted software using our trademark. Your statement that you are "unable to locate the allegedly infringing content" is actually laughable. I'm sure Google would not take that view if someone was pirating selling their proprietary software.

As an example, lets look at a link where YOU are the webmaster:

http://groups.google.com/group/be.finance/browse_thread/thread/d1e316c832d03aff/

It is obvious that this site is illegal selling pirated software. Do a search for DecisionBar among all of the pirated software you are allowing them to sell. How about this one:

<http://www.youseewealth.com/forum/archive/index.php/t-1081.html>

The use of DecisionBar with the word "Crack" should be a dead give away. They even use content from our website to sell our stolen product.

There is no question in my mind that you are being disingenuous when you claim you can't find the infringing material, and are just trying to make me jump through hoops.

You have all the information you need in my original letter. I expect you to do what is right.

As a long time Google advertiser, I would have expected better treatment.

Regards,

Les Schwartz
Decisionbar Trading Software

Les Schwartz
DecisionBar Trading Software
6555 NW 9th Ave., #403

Ft. Lauderdale, FL 33309

Phone: 800-228-4256, FAX: 954-771-2337

Email1: optionpro@sprynet.com

Email2: les@decisionbar.com

<http://www.decisionbar.com>

No virus found in this incoming message.

Checked by AVG.

Version: 8.0.100 / Virus Database: 270.3.0/1505 - Release Date: 6/16/2008 7:20 AM

Exhibit 5

ANALYTICAL SOFTWARE for Traders (September 2007)

[Options](#)★ 2 messages - [Collapse all](#)**Forex Club** [View profile](#)[More options](#) Sep 26 2007, 5:32 am

4000 best analytical programs, best trading systems, books, courses and seminars (52 CDs)

TradeStation 8.3 + OwnData 2.5

MetaStock Pro 10.0

NexGen T-3 ProTrader (July 2007)

Ocean for TS by Jim Sloman

Vantage Point 7.0 (June 2007, all modules)

OmniTrader RT 2007 (all add-ons)

The Ultimate Trading Machine Complete Set of Courses, TS Indicators &

Daily Updates

Omega Research ProSuite 2000i

Advanced GET 9.1

Safir-XP 1.7 + SirTrade 2004

Ninja Trader v5.1

MTPredictor EOD 5.0 and RT 4.0

MTPredictor for Tradestation

Wealth Lab 4.0

...and others

<http://fc-cd.com/news.htm><http://visit-to.us/news.htm><http://forexclub.us/news.htm><http://max51.mail333.com/news.htm>

CD#43

Advanced GET RT for Tradestation 2000i v1.3 build 396

AIQ TradingExpert Pro v7.2

BestChoice Software v4.20

Captool v1.71a Pro

Cyclone for TS

Elliott Wave Analyser v3.0.44

Elwave v7.1 RT

eASCTrend v6.02 Pro

Index Point 2003

Investor RT v7.0

NeuroShell DayTrader v4.8 Pro + Add-ons

NeuroSolutions v5.0 Developer Edition

NexGen T-3 Pro

Safir-XP v1.6

Trading Solutions Suite RT

Trend Reflection Software

MB Risk Management 9.0

MT Predictor EOD and RT

Vantage Point v6.0 (43 Market modules)

Visual Trader 2002

Wave59 RT v1.45

WizeTrade v7.04 for Esignal

<http://visit-to.us/cd43.htm>

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toolbar.google.com[Penny Stocks That Explode](#)

1000% in 1 day

Small cap stocks with huge movement

www.StockEgg.com

Wealth-Lab Pro 4.3.36 (wealth-lab.com)

eSignal EFS Studies

Bryce Gilmores WaveTrader 2004 for eSignal, open code
(wavetrader2004.com)

DecisionBar 2.0 for eSignal, open code (decisionbar.com)

DecisionBar 2.4 for eSignal + Manual (open source code)
(decisionbar.com)

EZ2 Trade Charting Collection by Raghee Horner, open code
(ez2tradesoftware.com)

Hawkeye Trading for eSignal, open code (hawkeyetrading.co.uk)

Jan Arp's Traders Toolbox Crown Jewels for eSignal, open code
(janarps.com)

KwikPOP 4.1 for eSignal + Manual (06.12.2006) (kwikpop.com)

MTPredictor Extensions 8 for Esignal (mtpredictor.com)

Nexgen T-3 Fibs ProTrader for TS8 + Manual (28.10.2006) (www.nss-t3.com)

Roy Kelly - Floor Trader Tools 8.2 for eSignal, open code
(roykelly.info)

WaveTracker Pro 6.36 for eSignal, open code (tic2tic.com)

MetaTrader Studies index

Unsorted Metatrade Studies ~ 80 Mb.

Automoney 1,2,3,4 for MT4 (forex-soft.netfirms.com)

BrainTrading 7.0 FIX for MT4 (braintrading.com)

Central Pips for MT4 (centralpips.com)

eASCTrend Experts for MT4

eASCTrend Indicators for MT4

EuroX2 Expert Advisor for MT4 (forex-soft.netfirms.com)

Vermillion FX Trading System for MT4 (elitafxsystems.com)

WalkByTrend Expert Advisors for MT4 (forex-soft.netfirms.com)

=====
Trading Software DVD
=====

Advanced GET - Manuals

Advanced GET EOD 8.0 (tradingtech.com)

Advanced GET RT 1.2.165 for Quote.com (tradingtech.com)

Advanced GET RT 1.3.320 for eSignal (tradingtech.com)

Advanced GET RT 1.3.396 for Tradestation 2000 (tradingtech.com)

Athena Money Management 4.0.01 (iitm.com)

Attrasoft Predictor 2.6 (attrasoft.com)

Aztec - Stand Alone Version (trade-system.com)

Bull's-Eye Broker Pro v3.50 (archeranalysis.com)

Candelstick Forecaster Samurai 2.1.3 (highestsummit.com)

CycleTimer v1.1.2 (cycle-trader.com)

Danalyzer EuroChart 2.12M

DeepInsight RT Pro 8.1 (deepinsight.com)

Delta Graphics EOD Forex 1.0 build 3.12 (deltasociety.com)

Delta Graphics Intraday Forex 1.0 build 3.19 + Book (deltasociety.com)

Dynamic Gann Levels

Dynamic Gann Levels for Excel

Dynamic Trader 4.0.78 EOD and Quote.com with Trading Course
(dynamictraders.com)

eASCTrend Pro 6.0 (ablesys.com)

Elliott Wave Analyzer 4.0.4 (elliottician.com)

Elliott Wave Analyzer 3.3042 (elliottwaveresearch.com)

Elwave RT 7.1 (prognosis.nl)

Ensign Internet (ensignsoftware.com)

Ensign Windows for eSignal (ensignsoftware.com)

Erlangerquote v2.17 for Quote.com