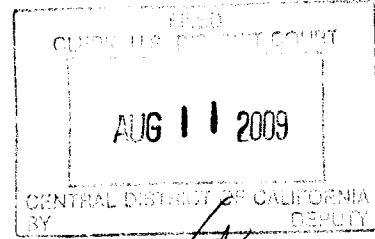


**ORIGINAL**

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6 Attorneys for Plaintiff Perfect 10, Inc.

8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA

11 PERFECT 10, INC., a California  
12 corporation,  
13 Plaintiff,  
14 v.  
15 GOOGLE, INC. a corporation, and  
16 DOES 1 through 100, inclusive,  
17 Defendants.

Case No. CV04-9484 AHM (SHx)  
Consolidated with Case No. CV05-4753  
AHM (SHx)

**PERFECT 10'S STATEMENT OF  
GENUINE ISSUES IN OPPOSITION  
TO GOOGLE'S MOTION FOR  
SUMMARY JUDGMENT RE: SAFE  
HARBOR UNDER 17 U.S.C. § 512(b)  
FOR ITS CACHING FEATURE**

18 AND CONSOLIDATED CASE.

**FILED UNDER SEAL PURSUANT TO  
PROTECTIVE ORDER**

**BEFORE JUDGE A. HOWARD MATZ**

Date: October 5, 2009  
Time: 10:00 A.M.  
Place: Courtroom 14, Courtroom of the  
Honorable A. Howard Matz

23 Discovery Cut-Off Date: None Set  
24 Pretrial Conference Date: None Set  
25 Trial Date: None Set

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28 Perfect 10's Statement of Genuine Issues In Opposition To Google's Motion For Summary  
Judgment Re: Safe Harbor Under 17 U.S.C. § 512(b) For Its Caching Feature

1 Perfect 10 submits the following Statement of Genuine Issues In Opposition  
 2 to Google's Motion For Summary Judgment Re: Safe Harbor Under 17 U.S.C. §  
 3 512(b) For Its Caching Feature:

GOOGLE'S ALLEGED UNDISPUTED MATERIAL FACTS	PERFECT 10'S REPLY AND EVIDENCE
4 5 6 7 1. Google maintains an Internet search engine accessible on the World Wide Web at www.google.com. 8 9 Declaration of Bill Brougher in Support of Google's Motion for Summary Judgment Re: Google's Entitlement to Safe Harbor Under 17 U.S.C. § 512 ("Brougher Dec.") ¶ 2. 10 11 12	Undisputed.
13 2. Google does not interfere with any known "standard technical measures." 14 15 Declaration of Paul Haahr in Support of Google's Motion for Summary Judgment Re: Google's Entitlement to Safe Harbor Under 17 U.S.C. § 512 ("Haahr Dec.") ¶ 18. 16 17	Undisputed.
18 3. Google uses an automated software program to obtain copies of publicly available web pages by sending requests to the server for the originating website and receiving the requested content in response. 19 20 21 22 Brougher Dec. ¶ 4.	Undisputed.
23 4. Google's proprietary software analyzes a copy of each web page it receives from the originating web servers and compiles an index of the text available on accessible websites. 24 25 26 27 Brougher Decl. ¶ 4.	Undisputed.
28 5. Google provides Web Search users	Undisputed, except to the extent that

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<p>with the option of selecting a link to a “cached” copy of the web pages that appear in search results.</p> <p>Brougher Dec. ¶ 6.</p>	<p>this implies that Google is entitled to the Section 512(b) safe harbor for system caching, by calling its storing of material on its servers a “cache.” Google has stored what it calls “cache” pages, which display full-size infringing P10 Images, for fourteen months. Declaration of Dr. Norman Zada 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 (“Zada Decl.”) ¶39, Exh. 26, pages 11-15, Exh 9. This long term storage is not intermediate and temporary.</p>
<p>6. When a user clicks on the “cached” link. The user sends a request to Google’s computers, which respond automatically by transmitting the archival copy of the text of a web page that is stored in the Web Search cache made available to users</p> <p>Brougher Dec. ¶ 8.</p>	<p>Undisputed.</p>
<p>7. There are no images stored in Google’s cache made available to users.</p> <p>Brougher Dec. ¶ 7.</p>	<p>Unknown.</p>
<p>8. Any images displayed on a cached page are delivered from their original source, if they still exist at that source.</p> <p>Brougher Dec. ¶ 7.</p>	<p>Undisputed, except that the original source may be Google servers.</p> <p>Zada Decl. ¶¶9, 41-52, Exhs. 2, 28-36, 9; Declaration of Sheena Chou 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 (“Chou Decl.”) ¶¶7-10.</p>

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<p>9. Google maintains a copy of the text of a web page in the cache available to users only until its web robot next visits that particular web page.</p> <p>Brougher Dec. ¶ 6.</p>	<p>Disputed. Google essentially keeps the copy indefinitely and simply refreshes it. Zada Decl. ¶39.</p>
<p>10. In the vast majority of cases, Google’s cache made available to users will be refreshed approximately every few weeks.</p> <p>Brougher Dec. ¶ 6.</p>	<p>Disputed. Google has stored “cache” pages which display full-size infringing P10 Images for fourteen months, without “refreshing” them.</p> <p>Zada Decl. ¶39, Exh. 26, pages 11-15, Exh 9 (Cache folder).</p>
<p>11. Google’s cache available to users provides Internet users with several important benefit, including allowing users to view the text of pages when the users cannot access them directly, allowing users to determine how a particular web page has changed over time, and allowing users to more readily determine why a particular page was responsive to their query, but highlighting the terms of the query.</p> <p>Brougher Dec. ¶¶ 10-12.</p>	<p>Disputed. There is no benefit to society as a whole to facilitate the unauthorized distribution of copyrighted works. Google has been put on notice of infringements on its cache links and has failed to expeditiously remove or disable access to the infringing material.</p> <p>Zada Decl. ¶¶39, 59, Exhs. 26, 44.</p>
<p>12. The material in Google’s cache is made available online by a person other than Google—namely, the originating third-party websites crawled by Google’s web crawler.</p> <p>Brougher Dec. ¶ 4.</p>	<p>Disputed. The materials in Google’s cache are stored on Google’s servers. Google makes the determination of what it stores in its cache and what cache links it provides. Google stores material, including web pages that infringe P10’s copyrights, in its cache for up to fourteen months. Zada Decl. ¶39, Exh. 26, pages 11-15, Exh. 9; Deposition of Dr. John Levine (“Levine Depo.”), Google’s expert, pages 234:4-13, 207:9-23, attached as Exh. E to Mausner Decl. Google’s cache is not a situation where the material is temporarily stored en route while being</p>

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	transmitted from a website to an end user. Google affirmatively goes out and gets the material. The material is then made available online by Google and maintained by Google on its servers for up to fourteen months without being refreshed.
13. The material in Google's cache is transmitted from third party websites to Google at Google's request.  Brougher Dec. ¶ 4.	Disputed. Google makes a copy of the HTML code itself, without any involvement by the third party website.  Zada Decl. ¶39.
14. Google's storage of the web page text in its cache is carried out through an automated technical process.  Brougher Dec. ¶ 6.	Unknown.
15. Google provides users with the option of selecting a link to the "cached" copy of the web page through an automatic technical process, as opposed to a direct link to the website itself, for the purpose of making the material available to users who wish to access it after it is initially transmitted by third-party websites.  Brougher Dec. ¶ 6.	Disputed, on the basis that this is unintelligible.
16. Google's web robot obtains copies of the web pages from originating websites without modification of their content.  Brougher Dec. ¶ 6.	Disputed. The HTML code for Google's cache page has additional code to generate the text that Google places at the top of its cache page. Google makes modifications to the material, putting Google's logo on it, and text created by Google.  Zada Decl. ¶39, Exh. 26.
17. If webmasters of the originating websites specify rules concerning refreshing, reloading, or other updating of the material, Google complies with	Unknown.

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those rules. Brougher Dec. ¶ 13.	
18. Google does not interfere with any technology used by a website to collect information directly from users visiting that website. Haahr Dec. ¶ 19.	Unknown.
19. Google's cache made available to users does not alter the mechanisms for access to copyrighted material established by webmasters, such as payment or password protection. Haahr Dec. ¶ 20.	Disputed. If a website which Google caches is showing infringing P10 Images, Google provides its users with free access to those images, bypassing Perfect 10's payment and password requirements.
20. If a valid notice of infringement under § 512(c)(3) is received, it is Google's policy to respond expeditiously to remove or disable access to the infringing material. Declaration of Shantal Rands Poovala in Support of Google's Motion for Summary Judgment Re: Google's Entitlement to Safe Harbor Under 17 U.S.C. § 512 ("Poovala Dec.") ¶ 5.	Disputed. Perfect 10 has identified to Google at least 30,000 URLs of infringing web pages and images on free sites linked to by Google. Google has not provided a log listing what it has done in response to Perfect 10's identification of each of those infringing URLs and when. Zada Decl. ¶19. Google has not established a procedure for handling notices that does not result in hundreds of pages of notices being garbled beyond recognition. Zada Decl. ¶73, Exhs. 55, 9 (Unreadable notices folder).
	Google has falsely claimed that it could not remove or exclude infringing material from its index. Google has not even kept notices received prior to March of 2002. Zada Decl. ¶¶16-19, Exhs. 8-10; Declaration of Jeffrey N. Mausner Submitted In Opposition to Google's Three Motions For Summary

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Judgment Re DMCA Safe Harbor For Its Web and Image Search, Blogger Service, and Caching Feature, submitted herewith (“Mausner Decl.”), ¶16, Exh. M; ¶17, Exh. B.

Google has not expeditiously removed or disabled access to thousands of infringing links identified by Perfect 10. Zada Decl. ¶¶16-31, Exhs. 8-20.

Google’s policy of only removing a link if it goes directly to an infringing work is contrary to the language of the DMCA, which indicates that a search engine may be liable for “*referring or linking* users to an online location *containing* infringing material.” 17 U.S.C. §512(d) (emphasis added); Mausner Decl. ¶17, Exh. B.

Google does not actually remove or disable access to infringing material as required. Google continues to display and place its ads around the same P10 Images that have been identified to it over and over. Google has also forwarded Perfect 10’s confidential notices to chillingeffects.org without permission, thus republishing on the Internet the same links it allegedly removed. Zada Decl. ¶¶28, 55, 58, 64, Exhs. 17, 40, 43, 48; Mausner Decl. ¶28, Exh. L.

Google’s policy towards copyright holders has been described as a “*sham,*” “*obstructionist,*” “*hopelessly broken,*” and “*unnecessarily difficult.*”

A copyright holder, Dean Hoffman, states in his declaration: “[I]t soon became clear to me that Google was not even removing the infringing links I put in my take-down notices. I kept checking back and performing searches

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on Google to see if they were removing the links I gave notice of, and those links were still in the search results after my notices.” Declaration of Dean Hoffman ¶5, submitted herewith. Mr. Hoffman stated: “When I continued to send notices, Google wrote back to me on a couple of occasions, saying that they wanted the notices in electronic format when I faxed them, or saying they wanted the notices in fax format when I emailed them. I thought Google was just giving me the run-around, but I sent the notices again in whatever format they asked me for. Nevertheless, Google did not remove the infringing links, after the first couple of notices.” *Id.* ¶6. Mr. Hoffman stated: “Google sent my notice and take-down letters to a website called Chillingeffects.org. Chillingeffects.org published some of my notice and take-down letters on the Internet. Google then included links in its search results to my take-down notices on the Chillingeffects.org website. My take-down notices stated the URLs of the infringing websites, so people could find where they could download the infringing software just as easily through Google and Chillingeffects.org. I realized that the posting of my take-down notices on Chillingeffects.org could draw as much or more attention to the infringing links than simply having the links on Google’s search results.” *Id.* ¶4. Mr. Hoffman concluded: “*Google operates punitively towards copyright holders,*” and Google has “*no intent to cooperate with copyright holders.*” *Id.* ¶7.

Another copyright holder, C.J. Newton, states in his declaration: “Google was not taking any action in response to my notices. I sent well over one hundred



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notices to Google between October 2002 and November 2007. By the end of November 2007, I simply gave up trying to get Google to remove or disable access to infringing material. After I sent notices to Google, I would perform searches to see if Google had removed any of the links, and I saw that Google was not doing so.” Declaration of C.J. Newton, ¶3, submitted herewith. Mr. Newton also stated: “Even though Google did not respond to my notices or remove links to the infringing articles from its search results, it sent copies of my notices to chillingeffects.org, a website that published my notices on the Internet. My notices, which were then published, gave the location of where the infringing articles were located, so that was another way that people could find the infringing articles. *Id.* ¶5.

Another copyright holder, Les Schwartz, states in his declaration: “Google kept giving me contradictory instructions, and even when I did what they asked, Google did not remove most of the infringing material. Google was being disingenuous in that it was saying that the material was not there when it clearly was. I got the impression that Google was just trying to make me jump through hoops, to make the process unnecessarily difficult, so that I would stop sending notices. I sent Google approximately 35 to 50 notices, and as far as I can tell, Google did not remove more than a handful of the URLs I complained about.” Declaration of Les Schwartz, ¶7, submitted herewith.

Google does not cooperate with copyright owners who submit DMCA notices, and makes things as difficult as

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	<p>possible for them. Google does not remove or disable access for other copyright owners who give notice. Declarations of Les Schwartz, Dean Hoffman, and C.J. Newton, filed concurrently; Mausner Decl. Exh. C; Exh. N filed under seal.</p> <p>Google's use in 2004 of a fax line for its copyright agent that also received general corporate faxes, its requirement that notices be faxed or mailed rather than emailed, its failure to utilize fax machines of sufficient quality to ensure the reception of readable notices, its redaction of DMCA logs and notices, its failure to keep usable logs, and its failure to utilize one or two employees to prevent repeatedly identified infringing images from continuing to reappear in Google's Image Search results and be surrounded by Google ads, all argue against Google's maintenance of an adequate DMCA policy. Zada Decl. ¶¶58, 73, 23, Exhs. 43, 55, 12.</p>
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**Google's DMCA Policy and Procedure for Web Search and Cache**

<p>21. Google has developed and maintains a DMCA policy and procedure for processing complaints received under the DMCA regarding Web Search.</p> <p>Poovala Dec. ¶ 5, Ex. B.</p>	<p>Disputed. Perfect 10 has identified to Google at least 30,000 URLs of infringing web pages and images on free sites linked to by Google. Google has not provided a log listing what it has done in response to Perfect 10's identification of each of those infringing URLs and when.</p>
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	<p>Zada Decl. ¶19.</p> <p>In her deposition, Shantal Rands Poovala testified that Google's Web Search instructions, which Google sent to Perfect 10 on June 1, 2004, asked copyright holders to send to Google URLs which were not sufficient for</p>
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Google to act.

Deposition of Shantal Rands Poovala, submitted under seal as Exhibit P to Mausner Decl. (“Poovala Depo.”) 11:23-12:2; Zada Decl. ¶23, Exh. 12.

However, that testimony was incorrect.

Chou Decl. ¶6; Declaration of David O’Connor (“O’Connor Decl.”) ¶6; Zada Decl. ¶31, Exh. 20; Declaration of Bennett McPhatter (“McPhatter Decl.”) ¶6.

Google’s Rule 30(b)(6) witness, Ms. Poovala, testified that she was not aware that Adobe had a feature for extracting URLs from Adobe documents. She also testified that she does not remember ever asking any technical person if there was a simple way to extract URLs from an Adobe document.

Deposition of Shantal Rands Poovala, submitted under seal as Exhibit P to Mausner Decl. (“Poovala Depo.”) 11:5-18.

Once Ms. Poovala was advised of Adobe’s URL extraction feature during her deposition on November 19, 2008, Google has still refused to process Perfect 10’s outstanding Adobe Style notices.

Zada Decl. ¶¶39-61, Exhs. 26-45.

Google has not established a procedure for handling notices that does not result in hundreds of pages of notices being garbled beyond recognition.

Zada Decl. ¶73, Exhs. 55, 9

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(Unreadable notices folder).

Google has falsely claimed that it could not remove or exclude infringing material from its index. Google has not even kept notices received prior to March of 2002. Zada Decl. ¶¶16-19, Exhs. 8-10; Declaration of Jeffrey N. Mausner 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, submitted herewith ("Mausner Decl."), ¶16, Exh. M; ¶17, Exh. B.

Google has not expeditiously removed or disabled access to thousands of infringing links identified by Perfect 10. Zada Decl. ¶¶16-31, Exhs. 8-20.

Google's policy of only removing a link if it goes directly to an infringing work is contrary to the language of the DMCA, which indicates that a search engine may be liable for "*referring or linking* users to an online location *containing* infringing material." 17 U.S.C. §512(d) (emphasis added); Mausner Decl. ¶17, Exh. B.

Google does not actually remove or disable access to infringing material as required. Google continues to display and place its ads around the same P10 Images that have been identified to it over and over. Google has also forwarded Perfect 10's confidential notices to chillingeffects.org without permission, thus republishing on the Internet the same links it allegedly removed. Zada Decl. ¶¶28, 55, 58, 64, Exhs. 17, 40, 43, 48; Mausner Decl. ¶28, Exh. L.

Google's policy towards copyright

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A copyright holder, Dean Hoffman, states in his declaration: "[I]t soon became clear to me that Google was not even removing the infringing links I put in my take-down notices. I kept checking back and performing searches on Google to see if they were removing the links I gave notice of, and those links were still in the search results after my notices." Declaration of Dean Hoffman ¶5, submitted herewith. Mr. Hoffman stated: "When I continued to send notices, Google wrote back to me on a couple of occasions, saying that they wanted the notices in electronic format when I faxed them, or saying they wanted the notices in fax format when I emailed them. I thought Google was just giving me the run-around, but I sent the notices again in whatever format they asked me for. Nevertheless, Google did not remove the infringing links, after the first couple of notices." *Id.* ¶6. Mr. Hoffman stated: "Google sent my notice and take-down letters to a website called Chillingeffects.org. Chillingeffects.org published some of my notice and take-down letters on the Internet. Google then included links in its search results to my take-down notices on the Chillingeffects.org website. My take-down notices stated the URLs of the infringing websites, so people could find where they could download the infringing software just as easily through Google and Chillingeffects.org. I realized that the posting of my take-down notices on Chillingeffects.org could draw as much or more attention to the infringing links than simply having the links on

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Another copyright holder, C.J. Newton, states in his declaration: “Google was not taking any action in response to my notices. I sent well over one hundred notices to Google between October 2002 and November 2007. By the end of November 2007, I simply gave up trying to get Google to remove or disable access to infringing material. After I sent notices to Google, I would perform searches to see if Google had removed any of the links, and I saw that Google was not doing so.” Declaration of C.J. Newton, ¶3, submitted herewith. Mr. Newton also stated: “Even though Google did not respond to my notices or remove links to the infringing articles from its search results, it sent copies of my notices to chillingeffects.org, a website that published my notices on the Internet. My notices, which were then published, gave the location of where the infringing articles were located, so that was another way that people could find the infringing articles.” *Id.* ¶5.

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	<p>Google approximately 35 to 50 notices, and as far as I can tell, Google did not remove more than a handful of the URLs I complained about.” Declaration of Les Schwartz, ¶7, submitted herewith.</p> <p>Google does not cooperate with copyright owners who submit DMCA notices, and makes things as difficult as possible for them. Google does not remove or disable access for other copyright owners who give notice. Declarations of Les Schwartz, Dean Hoffman, and C.J. Newton, filed concurrently; Mausner Decl. Exh. C; Exh. N filed under seal.</p> <p>Google’s use in 2004 of a fax line for its copyright agent that also received general corporate faxes, its requirement that notices be faxed or mailed rather than emailed, its failure to utilize fax machines of sufficient quality to ensure the reception of readable notices, its redaction of DMCA logs and notices, its failure to keep usable logs, and its failure to utilize one or two employees to prevent repeatedly identified infringing images from continuing to reappear in Google’s Image Search results and be surrounded by Google ads, all argue against Google’s maintenance of an adequate DMCA policy. Zada Decl. ¶¶58, 73, 23, Exhs. 43, 55, 12.</p>
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<p>22. When Google suppresses a web page from appearing in Web Search results, it automatically prevents all cached links to that page from appearing in search results as well.</p> <p>Poovala Dec. ¶ 10.</p>	<p>Undisputed.</p>
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<p>23. Google has a designated agent for</p>	<p>Undisputed. Since at least 2001.</p>
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<p>receiving notifications of claimed infringement.</p> <p>Declaration of Rachel Herrick Kassabian in Support of Google's Motion for Summary Judgment Re: Google's Entitlement to Safe Harbor Under 17 U.S.C. § 512 ("Kassabian Dec."), Ex. G (P10's Responses to Requests for Admission); Poovala Dec. ¶ 3, Ex. A.</p>	<p>Google has always had just one agent designated at the Copyright Office at any one time, to send notices to for all of Google's services. Perfect 10 sent all of its notices to Google's agent designated at the Copyright Office. Zada Decl. ¶21, Exh. 11.</p>
<p>24. Google publishes the information required for DMCA complaints related to Web Search at <a href="http://www.google.com/dmca.html">http://www.google.com/dmca.html</a></p> <p>Poovala Dec. ¶ 5, Ex. B.</p>	<p>Disputed to the extent that the fax number listed in Google's current Web Search instructions does not match the fax number listed at the Copyright Office. In the past, other information regarding the addresses of the copyright agent shown on Google's website did not match the information that was listed at the Copyright Office for Google's agent. Perfect 10 sent all of its notices to Google's agent designated at the Copyright Office. Zada Decl. Exhs. 11-12.</p>
<p>25. It is Google's policy to respond expeditiously to notices of copyright infringement direct to Web Search.</p> <p>Poovala Dec. ¶ 5.</p>	<p>Disputed. Google did not even respond at all to notices prior to March of 2002, other than to falsely say that it could not remove or exclude infringing material from its index. Google has not even kept notices received prior to March of 2002. Zada Decl. ¶¶15-19, Exhs. 8-10; Mausner Decl. ¶16, Exh. M; ¶17, Exh. B, ¶¶14-15.</p>
	<p>Google cannot respond expeditiously to hundreds of pages of notices that are so garbled by its DMCA notice handling procedures as to be unreadable.</p> <p>Zada Decl. ¶73, Exhs. 55, 9 (Unreadable notices folder).</p> <p>Google has no record of what it has done in response to thousands of notices</p>



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or when.

Zada Decl. ¶¶19, 73, Exhs. 55, 9 (Unreadable notices folder); Mausner Decl. ¶¶25, 26, Exhs. I, J.

Google did nothing in response to Perfect 10's notices in 2004 until Perfect 10 threatened Google with a lawsuit. Google has failed to expeditiously process most of Perfect 10's DMCA notices. Zada Decl. ¶¶26-61, Exhs.14-45, 9; Declaration of Sheena Chou ("Chou Decl.") ¶¶3-11, Exh. 9.

Other copyright holders have had similar experiences with Google not responding expeditiously. Declarations of Margaret Jane Eden ("Eden Decl."), Dean Hoffman ("Hoffman Decl."), C.J. Newton ("Newton Decl."), and Les Schwartz ("Schwartz Decl.") 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, filed herewith; Mausner Decl. Exh. C.

Perfect 10 incorporates its response to Paragraph, 21 above.

26. For a Web Search DMCA complaint, Google directs complainants to identify the copyrighted work infringed by providing a brief description of it and the complete URL or other location where the work can be found.

Poovala Dec. ¶ 7.

Disputed. Google does not provide any documentary support for this contention, which does not even match ¶7 of the Poovala Dec. In fact, Google only requires that the copyright holder specify the title of the publication containing the infringed material. Zada Decl. ¶23, Exh. 12, pages 3, 6.

Perfect 10 provided more information than Google asked for, by providing the Volume and Issue Number of Perfect 10 Magazine that the images appeared in.

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	as well as the page range at which the images appeared. Zada Decl. ¶¶23-24, Exh. 13.
<p>27. For a Web Search DMCA complaint, Google directs complainants to provide the complete URL at which the allegedly infringing material is located and the Web Search query that directly links to that web page.</p> <p>Poovala Dec. ¶ 8, Ex. B.</p>	<p>Disputed. Google has no evidentiary support for this contention. Ex. B uses the term “URL,” not “complete URL.” Google’s instructions for Web Search sent to Perfect 10 on June 1, 2004, specifically asked for the URL in green which Google placed at the end of each web search result. That is not, by Google’s definition, a “complete URL,” as it is missing the starting http:// and sometimes contains ellipses. Perfect 10 followed Google’s instructions, and cut and pasted the URL in green at the end of each web search result in its spreadsheet style (Group B) notices. Zada Decl. ¶23, Exh. 12.</p> <p>Perfect 10 incorporates its responses to Paragraphs 29 and 58 below.</p> <p>(Although Perfect 10 believes it understands what Google is trying to say, Google’s statement is not accurate, since Web Search queries do not link to web pages.)</p>
<p>28. Unless provided with the necessary information from the copyright owner, Google has no way of knowing which uses the owner regards to be infringing, as opposed to those uses that are licensed, a fair use, or otherwise acceptable to the owner.</p>	<p>Disputed. Perfect 10 has repeatedly instructed Google that it is not authorized to make copies of any Perfect 10 images under any circumstances. Zada Decl. ¶¶34, 56, Exhs. 22, 41. Furthermore, Perfect 10 has sent 68 DMCA notices to Google specifically stating that Perfect 10 has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law. Zada Decl. ¶¶34, 56, Exhs. 22, 41, 9 (DMCA Notices folder).</p>
<p>Poovala Dec. ¶ 15.</p>	<p>Disputed. Google’s instructions sent to Perfect 10 on June 1, 2004 specifically</p>
<p>29. For Web Search DMCA complaints, incomplete URLs</p>	<p>Disputed. Google’s instructions sent to Perfect 10 on June 1, 2004 specifically</p>

1 containing improper ellipses,  
2 misspellings, or extra spaces, hinder  
3 Google's ability to locate the materials  
4 in question.

5 Poovala Dec. ¶ 9; Haahr Dec. ¶ 4.

6 asked for the URL in green which  
7 Google placed at the end of each web  
8 search result. Those URLs did not have  
9 the starting http:// and sometimes  
10 contained ellipses. Perfect 10 followed  
11 Google's instructions, and cut and  
12 pasted the URL in green at the end of  
13 each web search result in its spreadsheet  
14 style (Group B) notices. Zada Decl.  
15 ¶23, Exh. 12.

16 Thus any ellipses or anything else that  
17 Google claims slowed it down were in  
18 URLs provided by Google. By  
19 searching its index for the base URL  
20 and other characters present in an  
21 "incomplete URL," Google can readily  
22 find and suppress the full URL. Zada  
23 Decl. ¶41, Exh. 28, page 12;  
24 Declaration of Sean Chumura  
25 ("Chumura Decl.") ¶6. Google does not  
26 deny that it can find and suppress the  
27 URL, it just claims that it takes a little  
28 longer.

30. For Web Search DMCA  
complaints, URLs which are not live  
on the web, not indexed by Google, or  
are excluded from search results,  
cannot be blocked because they already  
do not appear in Web Search results.

Poovala Dec. ¶ 9; Haahr Dec. ¶ 4.

Disputed. URLs which are not indexed  
by Google can definitely be blocked so  
that they will never be indexed by  
Google, have Google ads placed on them,  
be hosted by Google, or appear in any  
one of over 33 Google programs.  
Google's AdSense policy requires  
copyright holders to provide web page  
URLs identifying infringing web pages.  
Zada Decl. ¶10, Exh. 3. Once that is  
done, those web pages should be blocked  
from appearing in Google's search index  
or in any other Google program.

31. Google has a team of employees  
charged with processing DMCA  
removal requests.

Poovala Dec. ¶ 11.

Undisputed. If the current team cannot  
expeditiously handle all of Perfect 10's  
and other copyright owners' notices, the  
team should be expanded. Furthermore,  
Google should at least try to use its  
unquestioned image recognition  
capability to supplement what the team

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	does. Zada Decl. ¶67, Exh. 51.
<p>32. If a DMCA notice for Web Search does not contain the required information, Google notifies the complainant and requests additional information.</p> <p>Poovala Dec. ¶ 13.</p>	<p>Disputed. Google claims it does that, but it did not do so, at least in the case of Perfect 10. Google did not contact Perfect 10, and has in fact stated that it has processed Perfect 10's notices but later claimed that such notices were defective. Zada Decl. ¶¶61, Exh. 45.</p> <p>Google has refused to provide Perfect 10 with a concrete example of a compliant notice for P10 Images. Zada Decl. ¶70, Exh. 53.</p>
<p>33. Google verifies claims of infringement by comparing the copyright work claimed to be infringed to the allegedly infringing URL identified in the DMCA notice.</p> <p>Poovala Dec. ¶ 14.</p>	<p>Disputed. Google's instructions for Image Search do not ask for the location of the allegedly infringed work. Thus it is not possible for Google do this type of verification for notices identifying Image URLs. Zada Decl. ¶54, Exh. 39.</p> <p>Perfect 10's Adobe Style notices provided a copy of both the infringed and infringing image so it was not necessary for Google to perform such a verification for Perfect 10's notices, particularly when the infringing image had a Perfect 10 copyright notice on it.</p> <p>Zada Decl. ¶54.</p> <p>This claim is inconsistent with the Declaration of Heraldo Botelho, who claimed that Google took no action against its AdSense affiliates until October 2005, because Perfect 10 had never advised Google that the identified infringing web pages were displaying Google ads. That means that Google never looked at those web pages, because if it had, it would have seen the Google ads. Zada Decl. Exh. 9; Botelho Decl., ¶¶3, 6, submitted under seal as Exh. K to Mausner Decl.</p>

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Google's Web Search and Blogger Instructions only ask for an identification of the publication or book in which the alleged infringing material appears, i.e., "Touch Not This Cat" by Dudley Smith. Zada Decl. ¶¶8, 23, Exhs. 1, 12.

There is no need for Google to make such a comparison because the copyright holder states in the DMCA notice that he own the copyright, under penalty of perjury. Section 512(c); Zada Decl. Exh. 9 (DMCA Notices folder). But if Google wanted to do so, it had enough information to make the comparison. And if Google was having difficulty doing so, it should have contacted the copyright owner.

In his deposition, Mr. Macgillivray testified that he didn't know if anyone at Google ever compared an allegedly infringing image identified by Perfect 10 to any image on Perfect 10's website. Macgillivray Depo. 133:24-134:15, attached as Exh. H to Mausner Decl.

Mr. Macgillivray also did not know if anyone from Google ever compared allegedly infringing images identified by Perfect 10 to images from Perfect 10 Magazine. Macgillivray Depo. 132:10-16, attached as Exh. H to Mausner Decl.

34. Google blocks infringing web page URLs from appearing in Google search results, including the cache feature of Web Search.

Haahr Dec. ¶¶ 6, 7, 9; Poovala Dec. ¶¶ 10, 14, 24.

Disputed: Google has not blocked thousands of Web Page and Image URLs identified by Perfect 10 from appearing in its search results. Zada Decl. ¶¶39, 41-61, Exhs. 26, 28-45, 9.

Google does not actually remove or disable access to the infringing material, because it displays the same infringing images over and over to its

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users, just from different URLs. In order to actually block access to the identified infringing material, Google must stop displaying that same infringing material to its users, and it must stop placing ads around those same infringing images. Zada Decl. ¶¶41-61, Exhs. 28-45, 9.

Google has also forwarded Perfect 10's confidential DMCA notices to chillingeffects.org, for publication on the Internet, despite repeated objections by Perfect 10. By doing so, Google is continuing to enable its users to find the same identified infringing web pages. Zada Decl. ¶64, Exh. 48; Mausner Decl. ¶28, Exh. L.

Furthermore, Google has not blocked infringing material for other copyright owners. Declarations of Dean Hoffman, Les Schwartz, C.J. Newton, and Margaret Jane Eden; Mausner Decl. Exh. C.

Perfect 10 incorporates its response to Paragraph 21, above.

35. If Google received a counter-notification as a result of a DMCA removal and the original complainant responds within ten days and informs Google it has filed a lawsuit, the URL will remain blocked from search results.

Undisputed.

Poovala Dec. ¶ 18.

36. Google's Web Search service has no subscribers or account holders.

Haahr Dec. ¶ 17.

Disputed. Google has many different types of account holders, including admitted account holders such as blogspot.com, blogger.com, and AdSense account holders. In addition, Google uses the word "account holders" to describe its AdWords, email, and

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other clients. Zada Decl. Exh. 4.

Google links to infringing blogger and AdSense websites in its web search results, and displays infringing images from those sites via its Image Search results. Google cannot suitably implement a policy against repeat infringers if it does not list and monitor all infringement notices, because a website that received a notice may be, or may shortly thereafter become, a Google AdSense or hosting client. Zada Decl. ¶12, Exh. 5.

Furthermore, because Google makes copies of images from websites across the Internet, it must keep track of infringement complaints against such websites to stop copying infringing material from them and putting it in its Image Search results, or placing ads next to such known infringing materials.

Section 512(d) is predicated on the assumption that there is some procedure in place to prevent a search engine like Google from forever linking to the same infringing content, offered by the same webmaster, but just from different URLs. Two ways that can be accomplished are if either a) Google employs image recognition software to stop linking to web pages containing previously identified infringing material, or b) Google keeps track of the identities of repeat infringers who operate websites to which it links or from which it copies images, and cuts off all links to sites owned by such webmasters after repeated notice of infringement. If Google does not employ image recognition technology as described above, it must treat the webmasters of the websites to which it

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	links as account holders for the purposes of §512(i) to avoid forever contributing to the infringement of the same previously identified copyrighted material. Both image recognition and terminating repeat infringers are “simple measures.”
37. Webmasters do not “sign up” to have their websites listed in Google’s organic search results.  Haahr Dec. ¶ 17.	Unknown. Google may have a procedure that allows webmasters to request to be listed.
38. Websites are included in Google’s organic search results if they were crawled by the Googlebot and if they are relevant to users’ queries.  Haahr Dec. ¶ 17.	Disputed. Perfect10.com is presumably “relevant” to a search for Jamike Hansen, as P10 is the sole owner of copyrights of her published images. However, a Google search on Jamike Hansen yields only infringing websites, most of which are Google advertising affiliates. Such search results do not contain a single link to perfect10.com. Zada Decl. ¶69, Exh. 9.
39. Google has repeat infringer policies for its products and services with account holders, such as AdSense and Blogger.  Poovala Dec. ¶ 36.	Disputed. Undisputed that Google views such account holders as being account holders for the purposes of Section 512(i) of the DMCA. Disputed that Google has or reasonably implements such repeat infringer policies, as it has neither suitably terminated repeat infringers identified by Perfect 10 or maintained logs that would allow it to do so. Zada Decl. ¶¶6-12, 19, 41-52, 61, 73, Exhs. 1-5, 28-36, 45, 55, 9; Chou Decl. ¶¶8-11.
	Google only requires an email address and password for its blogger accounts and therefore does not know the identities of its account holders. so Google cannot establish that it terminates repeat infringers. Google has submitted no evidence that it terminates the repeat infringer himself, rather than just one



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	<p>infringing account. Furthermore, Google has not suppressed most of the 3808 infringing Blogger URLs identified by Perfect 10, let alone expeditiously. Perfect 10 has identified to Google at least 325 post URLs which Google has not claimed it has suppressed or even listed in its Blogger Log. Google's Blogger log does not contain any of the 3,808 infringing blogger URLs identified by Perfect 10, any Perfect 10 notices from 2005, and does not contain the identity of the alleged infringer. So Google cannot prove that it terminated repeat infringers of Perfect 10 Images on Blogger. Zada Decl. ¶¶8, 19, 41-52, 61, Exhs. 1, 28-36, 45; Chou Decl. ¶¶8-11, Exh. 9.</p> <p>Google cannot respond suitably to DMCA notices or adopt or reasonably implement a policy against repeat infringers when it allows hundreds of pages of notices to be so garbled by its processing as to be unreadable.</p> <p>Zada Decl. ¶73, Exhs. 55, 9 (Unreadable notices folder).</p> <p>Google has no record of what it has done in response to thousands of notices or when.</p> <p>Zada Decl. ¶¶19, 26, Exh. 14, page 31; Mausner Decl. ¶¶25, 26, Exhs. I, J.</p>
<p>40. Google does not actively prevent copyright owners from collecting information needed to issue notifications of copyright infringement under the DMCA.</p> <p>Poovala Dec. ¶ 39.</p>	<p>Disputed. Google does things like instructing copyright owners to cut and paste the URL from a Web Search result and provide that to Google in DMCA notices. However, Google places ellipses in those URLs, which it then claims makes the URLs incomplete. Zada Decl. ¶23, Exh. 12; <i>see also</i> Declarations of Dean Hoffman, Les Schwartz, Margaret Jane Eden, and C.J. Newton, filed concurrently;</p>

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Mausner Decl. Exh. C.

**Group A: The 2001 Notices<sup>1</sup>**

41. During discovery in this action, P10 produced 17 claimed DMCA notices dated in 2001, all of which were dated more than three years prior to P10's filing of this action.

Kassabian Dec. ¶ 13, Exs. 1 – L17.

Undisputed, but this does not mean that Perfect10's 2001 notices cannot be considered.

Google seems to be implying that any claims that relate to the 2001 notices are time-barred. However, in a case of continuing copyright infringements, an action may be brought for all infringing acts that took place within the three years preceding the filing of suit. This lawsuit was filed on November 10, 2004. That means that the lawsuit includes any infringements that occurred on November 10, 2001 onward. For any image that was available using Google's search engine on or after that date, the claim accrued on or after that date. The fact that the notice was sent prior to November 10, 2001 does not change this. A claim accrued whenever the infringing image was available using Google's search engine. Giving notice is not part of Perfect 10's claim for copyright infringement. Notice relates only to Google's affirmative defense, not to the accrual of Perfect 10's claim. Therefore, claims involving any image that was available using Google's search engine on or after November 10, 2001 are not time barred, and the 2001 notices are relevant to Google's affirmative safe harbor defense. In 2004,

<sup>1</sup> The Group A Notices include e-mail communications from PI 0 to Google dated May 11,2001, May 15,2001 (bearing control numbers PG\_DMCA00100011, PG\_DMCA0012-0015 and PG\_DMCA0016-0018), May 18,2001 (bearing control numbers PG\_DMCA0019-0021, PG\_DMCA0022-24, and PG\_DMCA002525 0028), May 21, 2001 (bearing control numbers PG\_DMCA0029-0032, PG\_DMCA0033-0036, and PG\_DMCA0037-0040), and May 22, 2001 (bearing control numbers PG\_DMCA0041-0045, PG\_DMCA0046-0050, and PG\_DMCA0051-0055), May 24, 2001, June 26,2001 and June 29, 2001, and July 6,2001. Kassabian Dec. Exs. L1-L17.

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	<p>the year Perfect 10 filed this lawsuit, Google was still providing links in its search results to infringing webpages that Perfect 10 had identified in its 2001 notices. Zada Decl. ¶¶15-17, Exhs. 8-10.</p> <p>Furthermore, when Google responded to the 2001 notices on Jun 27, 2001, it provided false information to Perfect 10 regarding its ability to remove or disable access to infringing material. Google wrote: “[T]here is nothing that Google can do to remove the offending content without the cooperation of the site administrator. ... Only an administrator can, by including code that blocks our robots or placing a request with us, prevent his/her page from being listed. Without administrator cooperation we cannot exclude material available on the Internet from our index.” Mausner Decl. ¶16, Exh. M.</p> <p>Google’s failure to respond to anyone’s notices until at least March of 2002, precludes a safe harbor, certainly at least for that period. Google has not proven that it has removed <i>any</i> of the infringing links which Perfect 10 identified in its 2001 notices. Zada Decl. ¶¶15-17, Exhs. 8-10.</p>
42. P10 has indicated that its suit is not based on the DMCA notices purportedly sent to Google in 2001.  Kassabian Dec. ¶ 3, Ex. B.	Disputed. Perfect 10 has never indicated that its suit is not based on the DMCA notices sent to Google in 2001. Mausner Decl. ¶¶14-16.
	<p>Google’s failure to process anyone’s notices prior to at least March of 2002, plus its failure to even keep those notices, illustrates Google’s disregard for the rights of copyright holders. Zada Decl. ¶¶19, 73, Exh. 55.</p>
43. None of the Group A Notices properly identified the copyrighted	Disputed. Perfect 10’s May 21, 2001 notice provided a copy of the actual work

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work allegedly infringed.  
Kassabian Dec. ¶¶ 2, 13, Exs. A & L1-L17.

infringed, which was the **cover** of Perfect 10 Magazine, Volume 1, Number 2, as well as the URL of the infringing material, which was <http://www.celebritypictures.com/MayaRubin/maya1.htm> . Google never suggested that any of Perfect 10's 2001 notices were deficient, and is estopped from doing so now.  
Zada Decl. ¶¶15-17, Exhs. 8-10.  
Google has failed to provide in its motions, any concrete examples of what would be a compliant notice, yet alone for this example.

44. None of the Group A Notices properly identified the location of the allegedly infringing material.  
Kassabian Dec. ¶¶ 2, 13, Exs. A & L1-L17.

Disputed. The Group A Notices identified the location of the allegedly infringing material. For example, Perfect 10's May 21, 2001 notice provided a copy of the actual infringing/infringed work, which was the **cover** of Perfect 10 Magazine, Volume 1, Number 2, as well as the URL of the infringing material, which was <http://www.celebritypictures.com/MayaRubin/maya1.htm> . Google never suggested that any of Perfect 10's 2001 notices were deficient, and is estopped from doing so now. Zada Decl. ¶¶15-17, Exhs. 8-10.  
In fact, the only response that Google gave to the 2001 notices was its Jun 27, 2001 email, in which it falsely stated: "[T]here is nothing that Google can do to

remove the offending content without the cooperation of the site administrator. ... Only an administrator can, by including code that blocks our robots or placing a request with us, prevent his/her page from being listed. Without administrator cooperation we cannot exclude material available on the Internet from our index."  
Mausner Decl. ¶16, Exh. M. Google

remove the offending content without the cooperation of the site administrator. ... Only an administrator can, by including code that blocks our robots or placing a request with us, prevent his/her page from being listed. Without administrator cooperation we cannot exclude material available on the Internet from our index."  
Mausner Decl. ¶16, Exh. M. Google

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never said at the time that any of the Group A Notices did not properly identify the location of the allegedly infringing material.  
  
Google has failed to provide in its motions, any concrete examples of what would be a compliant notice, yet alone for this example.

**Group B: The Spreadsheet Notices<sup>2</sup>**

45. None of the Group B Notices properly identified the copyrighted work allegedly infringed.  
  
Poovala Dec. ¶¶ 41-47, Exs. L1-L48;  
Kassabian Dec. ¶ 2, Ex. A.

Disputed. Google should be estopped from making such claims because Perfect 10's notices *followed Google's instructions*. Perfect 10 placed the URL that Google requested in the left side of its excel spreadsheet and placed the search term that Google requested in the middle column. On the right side of its spreadsheet, Perfect 10 identified the location of the copyrighted work at issue by either providing a Volume No. and Issue No. of Perfect 10 Magazine along with a page range, or a reference to perfect10.com. That is more than Google currently requires, which is just the title of the publication or book. Google has admittedly been able to process Perfect 10's spreadsheet notices (Group B Notices), albeit belatedly. Zada Decl. ¶¶23-26. Exhs. 12-14;

<sup>2</sup> The Group B Notices include PI O's notices dated May 31, 2004, June 1, 2004, June 4, 2004, June 16, 2004, June 28, 2004, July 6, 2004, July 11, 2004, July 19, 2004, October 11,2004, November 2,2004, November 8, 2004, November 15, 2004, November 16, 2004, November 18,2004, November 26, 2004, December 1, 2004, December 9,2004, December 21, 2004, December 27, 2004, December 29, 2004, December 31,2004, January 3, 2005, January 16,2005, January 21, 2005, January 25, 2005, February 3, 2005, February 7, 2005, February 11,2005, February 17,2005, February 23, 2005, March 6, 2005, March 27, 2005, April 3, 2005, April 3,2005, April 11,2005, May 1,2005, May 7, 2005, June 12,2005, June 19,2005, July 16,2005, July 26, 2005, August 30,2005, September 27,2005, December 7, 2005, December 22, 2005, December 23, 2005, February 13,2006, and April 24, 2007. Poovala Dec. Exs. L1-L48.

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Declaration of Sean Chumura (“Chumura Decl.”) ¶¶3-7, Exh. 1-2;  
Declaration of David O’Connor (“O’Connor Decl.”) ¶¶3-6, Exh. 1;  
Declaration of Bennett McPhatter (“McPhatter Decl.”) ¶¶3-6, Exh. 1.

Yahoo! has processed similar notices in three days. Zada Decl. ¶¶62-63, Exhs. 46-47.

On May 31, 2004, Perfect 10 provided Google with the complete URL *http://pix.alronix.net/Photo\_Scans/Tits/Monika\_Zsibrita/pic00076.htm*, along with the exact page of Perfect 10 Magazine, Volume 2, Number 2, in which the infringed image appeared. The identified infringing web page contained one large image, a P10 Image of Monika Zsibrita. Google ultimately removed that infringing link from its Web Search results more than four months later. Google has not explained why that notice was deficient, or provided a concrete example of what would constitute a compliant notice for that specific situation. Without providing such a concrete example, Google should be estopped from claiming that the notice is deficient.

Zada Decl. ¶¶21, 26, Exhs. 11, 14.

Google’s instructions for Web Search and all other products state that it is sufficient to give the name of a book (without specifying page numbers) to identify the copyrighted work allegedly infringed. Google’s instructions state: “(for example, ‘The copyrighted work at issue is the “Touch Not This Cat” by Dudley Smith, published by Smith Publishing, ISBN #0123456789.’” Zada Decl. ¶23, Exh. 12 pages 3, 6; see

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	<i>also</i> Exh. 1, page 9.
<p>46. None of the Group B Notices properly identified the location of the allegedly infringing material.</p> <p>Poovala Dec. ¶¶ 41-47, Exs. L1-L48; Kassabian Dec. ¶ 2, Ex. A.</p>	<p>Disputed. Had Google looked at the web page identified by the very first URL in Perfect 10's May 31, 2004 notice, it would have seen only one large image, a P10 Image of Monika Zsibrita, which Perfect 10 stated was from page 27 of Volume 2, No. 2 of Perfect 10 Magazine.</p> <p>Zada Decl. ¶21, Exh. 11.</p> <p>Google needed to expeditiously suppress that URL and others like it, in order to satisfy one of the conditions for safe harbor. It did not do so.</p> <p>Zada Decl. ¶26, Exh. 14.</p> <p>Google should be estopped from making such claims because Perfect 10's notices <i>followed Google's instructions</i>. Perfect 10 placed the URL that Google requested in the left side of its excel spreadsheet and placed the search term that Google requested in the middle column. On the right side of its spreadsheet, Perfect 10 identified the location of the copyrighted work at issue by either providing a Volume No. and Issue No. of Perfect 10 Magazine along with a page range, or a reference to perfect10.com. That is more than Google currently requires, which is just the title of the publication or book.</p> <p>Google has admittedly been able to process Perfect 10's spreadsheet notices (Group B Notices), albeit belatedly.</p>
	<p>Zada Decl. ¶¶23-26, Exhs. 12-14; Chumura Decl. ¶¶3-7, Exh. 1-2; O'Connor Decl. ¶¶3-6, Exh. 1; McPhatter Decl. ¶¶3-6, Exh. 1.</p> <p>Yahoo! has processed similar notices in three days. Zada Decl. ¶¶62-63, Exhs.</p>

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46-47.  
Perfect 10 incorporates its responses to Paragraphs 21, 27, 29 above.

47. P10's notices dated May 31, June 1, June 4, June 16, June 28, July 6, July 11, and July 19, 2004 do not identify a specific copyrighted work claimed to be infringed for one or more of the allegedly infringing URLs included in that communication.  
Poovala Dec. ¶¶ 41,44, Exs. L1-L8.

Disputed. Had Google looked at the web page identified by the very first URL in Perfect 10's May 31, 2004 notice, it would have seen only one large image, a P10 Image of Monika Zsibrita, which Perfect 10 stated was from page 27 of Volume 2, No. 2 of Perfect 10 Magazine.  
Zada Decl. ¶21, Exh. 11.  
Google needed to expeditiously suppress that URL and others like it, in order to satisfy one of the conditions for safe harbor. It did not do so.  
Zada Decl. ¶26, Exh. 14.  
Google's Web Search instructions since at least December 21, 2005 ask that the copyright holder merely identify the title of the publication or book containing the infringing image(s).  
Zada Decl. ¶23-24, Exhs. 12-13.  
Perfect 10 incorporates its response to Paragraph No. 33, above.  
Perfect 10 placed enough magazine page ranges on the right side of its spreadsheet so that Google would have known that all the images were coming from Perfect 10 Magazine. Google did not claim at the time it received these notices that any were deficient in the manner described, and had there been such a deficiency, Google claims it would have notified Perfect 10, which it did not do. Instead, Google claimed



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that it had “nearly finished” processing Perfect 10’s notices. Zada Decl. ¶25;  
Perfect 10 incorporates its responses to Paragraphs 33 and 45, above.

48. P10’s notices dated May 31, June 1, June 4, and June 16,2004 do not identify the Google search query used to locate the allegedly infringing material for one or more of the allegedly infringing URLs included in that communication.  
Poovala Dec.¶ 41, Exs. L1-L4.

Undisputed but irrelevant. Google can and did eventually block the identified infringing URL provided by Perfect 10. Google does not require search terms in its current Image, Blogger, and AdSense instructions, and they are not necessary to block URLs. Google is referring to Perfect 10’s first notices in 2004. Subsequent Perfect 10 notices did contain search terms. Zada Decl. ¶¶8, 10, 54, Exhs. 1, 3, 39, 9 (DMCA Notices folder).

49. P10’s notices dated June 16, June 28, July 6, July 11, July 19, October 11, November 2, November 8, November 15, November 16, November 18, November 26, December 1, December 9, December 21, December 27, December 29, and December 31, 2004, January 3, January 16, January 21, January 25, February 3, February 7, February 11, February 17, February 23, March 6, March 27, April 3, April 3, April 11, May 1, May 7, June 12, June 19, July 16, July 26, and August 30, 2005 list multiple pages in Perfect 10 Magazine as the copyrighted work claimed to be infringed at one or more of the allegedly infringing URLs included in that communication.

Disputed and irrelevant. Perfect 10 listed those page ranges in case Google wished to locate the original infringed image, which as far as Perfect 10 knows, Google never did. Perfect 10’s description is more than Google or AOL currently require, which is just the title of the publication which contains the infringed work. Zada Decl. ¶¶8, 23, Exhs. 1, 12.  
Perfect 10 used a page range for two reasons. First, it was quite common that the infringing website copied each of the images of that model that were in a particular issue, so that every image in the given page range was infringed. Secondly, if the website in fact copied only one or two images from a particular page range, it would have taken Perfect 10 hundreds of additional hours to go back to its magazines for each infringing URL to determine exactly which page numbers to include. So specifying the page range was the only feasible way to provide sufficient information without making the

Poovala Dec.¶¶ 41, 44, Exs. L4-L42.

only one or two images from a particular page range, it would have taken Perfect 10 hundreds of additional hours to go back to its magazines for each infringing URL to determine exactly which page numbers to include. So specifying the page range was the only feasible way to provide sufficient information without making the

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	<p>notification burdensome to the point of being effectively impossible. In contrast, it would be quite easy for a service provider like Google to locate the image in question in a 4 to 6 page range, if it wanted to compare a few sample images.</p> <p>Zada Decl. ¶24.</p>
<p>50. P10's notices dated June 28, July 6, July 11, July 19, October 11, November 2, November 8, November 15, November 16, November 18, November 26, December 1, December 9, December 21, December 27, December 29, and December 31, 2004, January 3, January 16, January 21, January 25, February 3, February 7, February 11, February 17, February 23, March 6, April 11, May 1, May 7, June 12, July 16, December 7, December 22, and December 23, 2005 list "amyweber.net" as the copyrighted work claimed to be infringed at one or more of the allegedly infringing URLs included in that communication.</p> <p>Poovala Dec. ¶¶ 41, 44, Exs. L5-L31, L35-L38, L40, L44-L46.</p>	<p>Disputed. Perfect 10 listed amyweber.net as the location of one or more of the infringed images, and did not imply that all the works in that website were infringed. Zada Decl. Exh. 9 (DMCA notices folder).</p>
<p>51. P10's notices dated January 21, February 3, February 7, February 11, February 17, February 23, March 6, March 27, April 11, May 7, June 12, June 19, July 26, August 30, September 27, December 7, and December 22, and December 23, 2005, February 13, 2006, and April 24, 2007 list "perfect10.com" as the copyrighted work claimed to be infringed at one or more of the allegedly infringing URLs included in that communication.</p> <p>Poovala Dec. ¶¶ 41, 44, Exs. L24, L26-</p>	<p>Disputed. Perfect 10 listed perfect10.com as the location of the allegedly infringed work, and did not suggest that the entirety of the website was being infringed, because it provided the name of the model whose image was allegedly infringed. However, if the notice listed the search term as "perfect10.com passwords," by offering unauthorized passwords, Google was contributing to the infringement of every image on perfect10.com.</p> <p>Zada Decl. Exh. 9 (DMCA notices</p>

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L32, L35, L37-L39, L41-L48.

folder).  
  
By providing the name of the model whose image was infringed and the location of the infringed work as perfect10.com, Perfect 10 did provide Google with an easy way to locate the infringed image if it wished to do so.  
  
Zada Decl. ¶5.  
  
Google could not locate the infringed image on perfect10.com by using a webpage URL or image URL, because perfect10.com is password protected. The simplest way to locate the infringed image on perfect10.com was what Perfect 10 provided: the name of the model, an explanation of how to find the images of that model (which was very simple), and the offer of a free password for perfect10.com to Google. Google never asked for the free password, and there is no evidence that Google ever attempted to view an infringed image on perfect10.com.  
Zada Decl. ¶19.

52. P10's notice dated January 16, 2005 lists "Perfect 10 DVD" as the copyrighted work claimed to be infringed at one or more of the allegedly infringing URLs included in that communication.  
  
Poovala Dec. ¶¶ 41, 44, Ex. L23.

Undisputed. By "Perfect 10 DVD" Perfect 10 meant footage from Perfect 10's Model of the Year Video, or one of Perfect 10's other videos that displayed Perfect 10's trademark, which would have been apparent upon viewing the infringing web page.

53. P10's notices dated April 11 and December 7, 2005 list "Perfect 10 Model Boxing DVD" as the copyrighted work claimed to be infringed at one or more of the allegedly infringing URLs included in that communication.

Undisputed.

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Poovala Dec. ¶¶ 41, 44, Ex. L35, L44.

54. At many of the web page URLs identified in P10's Group B Notices, multiple images were displayed, but P10 did not identify which images infringed its copyrights.

Poovala Dec. ¶¶ 41, 45, Ex. L.

Disputed. Google should be estopped from making such claims because Perfect 10 followed Google's Web Search instructions, which have not substantially changed since 2004. Google received the URL that it asked for, the search term that it asked for, and more information regarding the identification of the infringed image(s) than it asks for, which is only the title of the publication in which the images appear. Zada Decl. ¶23, Exh. 12.

Google cannot claim that instructions which it provides, when followed, result in deficient notices.

Perfect 10 incorporates its response to Paragraph No. 33.

Google does not explain how multiple images on an infringing web page can be identified other than by sending an actual copy of the infringing web page, carefully edited to clearly identify the P10 Images on that page. However, when Perfect 10 has done that, Google has claimed those Adobe style notices (Group C Notices) were deficient as well. Zada Decl. ¶¶38-52, Exhs. 26-36.

Google also does not explain why it needs to know what images on an identified infringing web page are infringing. In order to stop directly linking to an indetified infringing web page, Google has to remove all direct links to that web page, independent of which images happen to be infringing on that page.

Zada Decl. ¶54.

Google has never asked for Image

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	<p>URLs in its published Web Search instructions. Furthermore, just providing an image URL without the image won't show Google what the image looks like. Furthermore, Google has also refused to give Perfect 10 a concrete example of what it believes is a compliant notice in this instance, so Perfect 10's notices must be deemed sufficient under 17 U.S.C §512(c)(3)(B)(ii). Zada Decl. ¶¶25, 70, Exh. 53.</p> <p>By receiving the URL of the allegedly infringing webpage, along with the name of the model whose image was allegedly infringed (the search term), which is what Google asked for, Google did have sufficient information to locate the infringing image, if it chose to do so. Zada Decl. ¶23.</p>
<p>55. P10 does not claim that the entirety of "perfect10.com" was infringed at any of the URLs in P10's Group B Notices.</p> <p>Kassabian Dec. ¶ 10, Ex. I (P10's Responses to Requests for Admission).</p>	<p>Disputed. When Google displays passwords to perfect10.com, Perfect 10 takes the position that such an action contributes to the infringement of all images on the website. Zada Decl. ¶65, Exh. 49.</p> <p>Furthermore, there are websites that Google continues to link to, like the massive paysites (usenet sites), that infringe a very large percentage of Perfect 10's images. Zada Decl. ¶¶34-37, Exhs. 22-25.</p>
<p>56. There are thousands of images viewable on perfect10.com.</p> <p>Kassabian Dec. ¶ 9, Ex. H (Zada Declaration).</p>	<p>Undisputed, although it is necessary to have a password, which users are supposed to pay for, to view those images. Zada Decl. ¶5.</p>
<p>57. P10 does not claim that every image in the multiple-page sections of Perfect 10 Magazine cited in its Group B Notices was infringed at any of the</p>	<p>Disputed. There were instances in which every image in the specified page range was infringed.</p>

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URLs cited therein.  
Kassabian Dec. ¶ 10, Ex. I (P10's Responses to Requests for Admission).

Perfect 10 used a page range for two reasons. First, it was quite common that the infringing website copied each of the images of that model that were in a particular issue, so that every image in the given page range was infringed. Secondly, if the website in fact copied only one or two images from a particular page range, it would have taken Perfect 10 hundreds of additional hours to go back to its magazines for each infringing URL to determine exactly which page numbers to include. So specifying the page range was the only feasible way to provide sufficient information without making the notification burdensome to the point of being effectively impossible.  
Zada Decl. ¶24.  
Perfect 10 provided more information than Google asks for, which is just the title of the publication in which the infringing material appears. Zada Decl. ¶23, Exh. 12.

58. Each of P10's Group B Notices contain one or more incomplete URLs.  
Poovala Dec. ¶¶ 41, 45, Ex. L.

Disputed. The term "incomplete URL" is a misnomer. As long as the URL contains enough information to locate the infringing web page, for the purposes of the DMCA, it is not "incomplete." Perfect 10 has already repeatedly demonstrated that the starting http:// and www. are not needed to locate an infringing webpage, and that the full URL can almost always be located by doing a Google search involving the base URL and some of the other characters from the URL. To the extent that there were any URLs in Perfect 10's notices that had ellipses, those URLs were provided by Google, and Perfect 10 simply cut and pasted those URLs into its notices as instructed

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	<p>by Google.</p> <p>Zada Decl. ¶¶31, 41, Exhs. 20, 28; Chumura Decl. ¶¶3-7, Exh. 1; O'Connor Decl. ¶¶3-6, Exh. 1; McPhatter Decl. ¶¶3-6, Exh. 1.</p>
<p>59. Each of P10's Group B Notices cited one or more URLs that displayed multiple images, with no specification as to which image was at issue.</p> <p>Poovala Dec. ¶¶ 41, 45, 46, Exs. L and M.</p>	<p>Disputed. Perfect 10 incorporates its responses to Paragraphs 33, 45, 47, and 49.</p>
<p>60. P10's notices dated June 28, July 6 and July 11, 2004 contained identical lists of allegedly infringing URLs, but P10 did not disclose this fact to Google when submitting them.</p> <p>Poovala Dec. ¶¶ 41, 45, Exs. L5, L6, L7.</p>	<p>Disputed. The lists were not identical. Perfect 10's July 11, 2004 notice contained more URLs than its June 28, 2004 notice, as it had approximately 19 more pages. Perfect 10's notices repeated URLs that had been identified in prior notices if Google had not removed or disabled access to them. Zada Decl., ¶26, Exhs. 14, 9 (DMCA Notices folder).</p>
<p><b>Group C: The DVD and Hard Drive Notices<sup>3</sup></b></p>	
<p>61. Google's search products do not crawl, index, or link to Usenet news servers.</p> <p>Haahr Dec. ¶ 14-15.</p>	<p>Disputed. Google does crawl the home pages of infringing usenet sites (pay sites) and does both link to, and provide sponsored links to, such content. Some of the largest usenet infringers have also been Google AdSense affiliates, such as binaries.net and usenet.com. Google has not responded to Perfect 10's notices regarding such sites. Zada Decl. ¶¶34-37, Exhs. 22-25.</p>
	<p>Google provides both regular links and</p>

<sup>3</sup> The Group C Notices include P10's notices dated December 9,2005, March 20,2007, June 28,2007, July 2, 2007, July 12,2007, July 31,2007, October 16, 2007, December 13,2007, January 24, 2008, March 17,2008, July 9, 2008, November 26, 2008, November 27, 2008, April 24, 2009, May 7, 2009, May 30, 2009, June 4,2009, and June 13,2009. Poovala Dec. Exs. NI-N18.

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sponsored links to the massively infringing usenet sites (paysites). Google provides thousands of regular links to the home pages and other non-password protected pages of these websites, even though it knows that these websites infringe almost all of Perfect 10's images, and almost all major motion pictures, songs, TV shows, and software. Google also provides sponsored links to the home pages of these websites; every time a Google user clicks on one of these sponsored links, Google makes money. Zada Decl. ¶¶34-37, Exhs.22-25.

Google crawls xuset.net and myuset.net, which do make thumbnails freely available (but not full-size images until payment is made). Perfect 10 included copies of such infringements in its notices but Google has refused to disable access to them, as well. Zada Decl. ¶¶32, 34, Exhs. 21-22, Exh. 9 (DMCA Notices folder).

62. Google's search products do not crawl, index, or link to password-protected content.  
Haahr Dec. ¶ 14-15.

Disputed. Google does crawl the home pages of infringing password protected sites and does both link to, and provide sponsored links to such content. Some of the largest usenet infringers have also been Google AdSense affiliates, such as binaries.net and usenet.com. Google has not responded to Perfect 10's notices regarding such sites. Zada Decl. ¶¶34-37, Exhs. 22-25. Perfect 10 incorporates its response to Paragraph No. 61.

63. None of the Group C Notices properly identified the copyrighted work allegedly infringed.  
Poovala Dec. ¶¶ 48-55, Exs. N1-N18; Kassabian Dec. ¶ 2, Ex. A.

Disputed. All of Perfect 10's Group C Notices (Adobe style notices) properly identified the copyrighted work allegedly infringed. Those notices contained a copy of the infringing/infringed images. Many of the images Perfect 10 sent to Google as part of its Group C Notices still



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contained the Perfect 10 copyright notice on them. Zada Decl. ¶¶33-61, Exhs. 22-45.

Perfect 10's Adobe style notices, which Google calls "C" notices, followed Google's instructions. The only difference is that instead of just providing the complete URL that Google requested, Perfect 10 provided that URL along with a copy of the infringing web page to identify the infringing/infringed image(s). For example, for Image Search, Google only requires the Image URL, which is exactly what Perfect 10 provided, along with a copy of the infringed and infringing the image. Zada Decl. ¶¶53-55, Exhs. 38-40.

Perfect 10 provided to Google as part of its notices six Examples that are included in Perfect 10's Opposition To Defendant Google's Motion For Summary Judgment Re: Safe Harbor For Cache Feature. Zada Decl. Exh. 8, page 4, Exh. 26, page 9, Exh. 40, page 1, Exh. 38, page 1, Exh. 54, page 1, Exh. 38, page 7.

Google has not explained why any of those notices fail to properly identify the copyrighted work infringed, or what would constitute a compliant notice in those specific situations. Without providing examples of compliant notices for those examples, Google should be estopped from claiming that any such notices are deficient, under

§512(c)(3)(B)(ii). Google has refused to provide such examples to Perfect 10.

Zada Decl. ¶70, Exh. 53.

For Web Search and Blogger, Google only asks for the title of the publication containing the infringed work. Perfect 10 provided a copy of the actual

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	<p>infringed and infringing image, and stated that the work was available on perfect10.com. Perfect 10 offered Google a free password for perfect10.com. Zada Decl. ¶¶8, 23, 40-51, 56-57, Exhs. 1, 12, 28-35, 40-42.</p>
<p>64. None of the Group C Notices properly identified the location of the allegedly infringing material.</p> <p>Poovala Dec. ¶¶ 48-55, Exs. N1-N18; Kassabian Dec. ¶ 2, Ex. A.</p>	<p>Disputed. All of Perfect 10's Group C Notices (Adobe style notices) properly identified the location of the allegedly infringing material. Zada Decl. ¶¶34-61, Exhs. 22-45.</p> <p>Perfect 10's Adobe style notices, which Google calls "C" notices, followed Google's instructions. The only difference is that instead of just providing the complete URL that Google requested, Perfect 10 provided that URL along with a copy of the infringing web page to identify the infringing/infringed image(s). For example, for Image Search, Google only requires the Image URL, which is exactly what Perfect 10 provided, along with a copy of the infringed/infringing the image. Zada Decl. ¶¶53-55, Exhs. 38-40.</p> <p>For Web Search, Google asks for the URL of the infringing Web Page. That is exactly what Perfect 10 provided, along with a copy of the actual web page. Zada Decl. ¶¶38-40, 56-57, 61, Exhs. 26-27, 41-42, 45, 9.</p> <p>For Blogger, Google asks for the post URL. Perfect 10 provided to Google at least 329 post URLs. Zada Decl. ¶¶8, 41-51, 61, Exhs. 28-35, 45. Chou Decl. ¶¶8-11, Exh. 9.</p>
	<p>On page 15 of its Search Motion, lines 12-20, Google admits that it suppressed approximately 2,300 URLs from Perfect 10's Adobe-style notices and then <i>chose not to continue because it required too much work</i>. Google states that it</p>

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*manually typed* in the URLs from Perfect 10's Adobe folders when *Google could have rapidly extracted them using Adobe's URL extraction feature*. Zada Decl. ¶9, Exh. 2; Chou Decl. ¶7; Chumura Decl. ¶4..

Perfect 10 provided to Google as part of its notices six Examples that are included in Perfect 10's Opposition To Defendant Google's Motion For Summary Judgment Re: Safe Harbor For Cache Feature. Zada Decl. Exh. 8, page 4, Exh. 26, page 9, Exh. 40, page 1, Exh. 38, page 1, Exh. 54, page 1, Exh. 38, page 7.

Google has not explained why any of those notices fail to properly identify the copyrighted work infringed, or what would constitute a compliant notice in those specific situations. Google has refused to provide such examples to Perfect 10, and should be estopped from claiming that any such notices are deficient, under §512(c)(3)(B)(ii).

Zada Decl. ¶70, Exh. 53.

65. P10's notices dated December 9, 2005, March 20, June 28, October 16, and December 13, 2007, March 17, and March 26, 2008, and May 7, 2009 complain of alleged infringement on the Usenet.

Poovala Dec. ¶¶ 48-49, Exs. NI-N3,

Undisputed that those notices gave Google specific notice of specific usenet sites (paysites) that were providing thousands of infringing P10 Images. Many of those usenet sites not only had links in Google's search results, but also had sponsored links, that Google made money from. Zada Dec. ¶¶34-37, Exhs. 22-25.

N7-N8, N10, N12, N15.

66. The DVDs and hard drive received with p10's notices dated December 9, 2005, March 20, June 28, October 16, and December 13, 2007, January 24, March 17, and July 9, 2008, and April 24 and May 7, 2009 include raw image files that do not display web page

Disputed. Most of what Google refers to as "raw image files" do display Image URLs, which can be used to search for those specific images *in the infringing pay site*. Zada Decl. ¶35, Exh. 23.

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<p>URLs.</p> <p>Poovala Dec. ¶¶ 48, 53, 54, Exs. N1-N3, N7-N11, N14, N15.</p>	
<p>67. The folder “z perfect 10 web site” on the hard drive that accompanied P10’s June 28, 2007 notice contains 367 subfolders and over 15,000 pages of allegedly copyright P10 images.</p> <p>Poovala Dec. ¶ 48, Ex. N3; Declaration of Sibring Khan in Support of Google’s Motions for Summary Judgment Re: Entitlement to Safe Harbor Under 17 U.S.C. § 512 (“Khan Dec.”) ¶ 20.</p>	<p>Undisputed that it contains a reproduction of the images that were contained on Perfect 10’s website, perfect10.com, as of June 2007.</p>
<p>68. Other than the reference to the entire folder name “z perfect 10 web site” on the hard drive that accompanied P10’s notice dated June 28, 2007, P10’s notices dated between June 28, 2007 and May 7, 2009 do not identify the copyright works claimed to be infringed.</p> <p>Poovala Dec. ¶¶ 48, 50, Exs. N3 – N15.</p>	<p>Disputed. Perfect 10’s Adobe style notices, which Google calls “C” notices, followed Google’s instructions. The only difference is that instead of just providing the complete URL that Google requested, Perfect 10 provided that URL along with a copy of the infringing web page to identify the infringing/infringed image(s). For example, for Image Search, Google only requires the Image URL, which is exactly what Perfect 10 provided, along with a copy of the infringed/infringing the image. Zada Decl. ¶¶53-55, Exhs. 38-40.</p> <p>For Web Search and Blogger, Google only asks for the title of the publication containing the infringed work. Perfect 10 provided a copy of the actual infringed and infringing image, and stated that the work was available on perfect10.com.</p>
	<p>Perfect 10 also provided a reproduction of what was on perfect10.com as of June 2007, in the folder entitled “z perfect 10 web site.” Zada Decl. ¶¶8, 23, 41-51, 56-57, Exhs. 1, 12, 28-35, 41-42.</p> <p>For usenet sites, Perfect 10 sent to Google copies of the infringing images, which displayed in most cases, the same</p>

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Image URL that Perfect 10 assigned to those images on perfect10.com. Those same Image URLs were in the “z perfect 10 web site” folder. Zada Decl. ¶35, Exh. 23.

69. P10’s notice dated December 9, 2005 does not identify any copyrighted works claimed to be infringed.  
  
Poovala Dec. ¶ 48, Ex. N1.

Disputed. There was a DVD attached with the notice that contained copies of the infringing images (which were the same as the infringed images).  
  
Zada Decl. Exh. 9 (DMCA Notices folder, 2005\_12\_09 notice).  
  
Google has refused to provide examples of what would constitute a compliant notice for usenet sites, and as a result, should be estopped from claiming that Perfect 10’s notices regarding such sites are deficient.  
  
Zada Decl. ¶70, Exh. 53.  
  
In her deposition, Ms. Poovala testified that she did not know if she or anyone else at Google had ever gone on a usenet site. Poovala Depo. 88:20-23; 90:2-9; 90:24-91:4; 93:3-11.

70. P10’s notice dated December 9, 2005 does not identify any web page URLs that allegedly infringe P10’s copyrighted works.  
  
Poovala Dec. ¶ 48, Ex. N1.

Disputed and irrelevant. This notice dealt mostly with pay sites (usenet sites), most of which do not have web pages on which the infringing images reside. Web page URLs therefore cannot be given for these websites. Many of the images contained in the DVD for pay sites showed image URLs.

Those image URLs could have been used to find the allegedly infringing image in the infringing pay site. Zada Decl. ¶35, Exh. 23.  
  
Furthermore, Google did not really need to find the infringing images, or certainly not many. Once Google received copies of tens of thousands of

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	<p>infringing images from Perfect 10, most of which displayed Perfect 10 copyright notices, it should have realized the scope of the infringement and stopped linking to and having any business dealings with such massive infringers. Zada Decl. ¶¶34-37, Exhs. 22-25.</p> <p>In her deposition, Ms. Poovala testified that she did not know if she or anyone else at Google had ever gone on a usenet site. Poovala Depo. 88:20-23; 90:2-9; 90:24-91:4; 93:3-11.</p>
<p>71. P10's notice dated March 20, 2007 was addressed to Google's Board of Directors.</p> <p>Poovala Dec. ¶ 48, Ex. N2.</p>	<p>Undisputed. Perfect 10's copyright agent registered at the Copyright Office was not removing or disabling access to the infringing material, so Perfect 10 wanted to make sure that those in charge at Google knew what was going on.</p>
<p>72. None of the members of Google's Board of Directors has ever served as Google's designated agent for the receipt of notices of claimed copyright infringement under the DMCA.</p> <p>Poovala Dec. ¶ 3.</p>	<p>Undisputed. Perfect 10 incorporates its response to Paragraph No. 71.</p>
<p>73. Each of P10's notices dated December 9, 2005, March 20, 2007, June 28, 2007, July 2, 2007, July 12, 2007, July 31, 2007, October 16, 2007, December 13, 2007, January 24, 2008, March 17, 2008, July 9, 2008, April 24, 2009, and May 7, 2009 contains multiple layers of electronic folders comprising thousands of pages of allegedly infringing material.</p> <p>Poovala Dec. ¶¶ 48, 52, Exs. N1-N11, N14-N15; Khan Dec. ¶ 4-5, 10-19.</p>	<p>Undisputed. Perfect 10 switched to sending Adobe style notices in part because of Google's failure to take proper action in response to previous notices, and in part to deal with Google's incorrect contention, after Perfect 10 had sent it 29 DMCA notices and filed a lawsuit, that Google could not locate the infringing images. Zada Decl. ¶¶25, 33.</p>
<p>74. The "z other infringing websites folder" on the hard drive received with</p>	<p>Undisputed that the referenced folder contains a significant amount of</p>

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P10's notice date June 28, 2007 has three subfolders consisting of 46,187 pages of allegedly infringing material.  
  
Poovala Dec. ¶ 48, Ex. N3; Khan Dec. ¶ 19.

allegedly infringing material.

75. The "ALL LARGE ARE P10" subfolder in the "z other infringing websites" folder on the hard drive received with P10's notice dated June 28, 2007 comprises at least 24,870 pages of allegedly infringing material.  
  
Poovala Dec. ¶ 48, Ex. N3; Khan Dec. ¶ 19.

Undisputed that the referenced folder contains a significant amount of allegedly infringing material.

76. DVD2 submitted with P10's notice dated December 13, 2007 contains 28,672 pages of allegedly infringing material within layers of folders and subfolders.  
  
Poovala Dec. ¶ 48, Ex. N8; Khan Dec. ¶ 16.

Undisputed that the referenced DVD contains a significant amount of allegedly infringing material.

77. Each of P10's notices dated December 9, 2005, March 20, 2007, June 28, 2007, July 2, 2007, July 12, 2007, July 31, 2007, October 16, 2007, December 13, 2007, January 24, 2008, March 17, 2008, July 9, 2008, November 26, 2008, April 24, 2009, and May 7, 2009 contains one or more incomplete URLs.  
  
Poovala Dec. ¶¶ 48, 55, Exs. N1-N12, N14-N15.

Disputed. The term "incomplete" URL is a misnomer. As long as the URL contains enough information to locate the infringing web page, for the purposes of the DMCA, it is not "incomplete." Perfect 10 has already repeatedly demonstrated that the starting http:// and www. are not needed to locate an infringing webpage, and that the full URL can often be located by doing a Google search involving the base URL and some of the other characters from the URL. Zada Decl. ¶¶ 31, 41, Exhs. 20, 28; Chumura Decl. ¶¶ 3-6, Exh. 1; O'Connor Decl. ¶¶ 3-6, Exh. 1; McPhatter Decl. ¶¶ 3-6, Exh. 1.

For Perfect 10's Adobe style notices (Group C notices), an actual copy of the infringing web page was provided.

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	<p>which almost always displays a full URL. Zada Decl. ¶¶39-57, Exhs. 26-42.</p> <p>Perfect 10 incorporates its responses to paragraphs 29 and 58, above.</p>
<p>78. Each of P10's notices dated March 20,2007, June 28,2007, July 2, 2007, July 12, 2007, July 31, 2007, October 16,2007, December 13, 2007, January 24, 2008, March 17, 2008, July 9, 2008, November 27, 2008, April 24, 2009, May 7, 2009, May 30, 2009, June 4, 2009, and June 13,2009 includes one or more screen shots displaying multiple Images.</p> <p>Poovala Dec. ¶¶ 48, 55, Exs. N2-N11, N13-N18.</p>	<p>Undisputed but irrelevant. When multiple images were displayed, Perfect 10 clearly indicated which images were copyrighted by Perfect 10 by either saying that all were copyrighted by P10, placing checkmarks by the P10 Images, or some other similar specification. Zada Decl. ¶¶38-57, Exhs. 26-42.</p>
<p>79. P10's notices dated between March 20, 2007 and June 13, 2009 included screen shots depicting alleged framing or inline linking showing apparent independent navigation of the framed web page such that even when the complete URL for that page is displayed in the screen shot, the URL does not lead to the allegedly inline-linked web page.</p> <p>Poovala Dec. ¶¶ 48, 55, Exs. N2-N18, R.</p>	<p>Undisputed but irrelevant. Google, a technological powerhouse, can certainly locate its own web page if given a copy of that web page with the web page URL on it.</p> <p>Chumura Decl. ¶¶3-7, Exh. 1-2; O'Connor Decl. ¶¶3-6, Exh. 1; McPhatter Decl. ¶¶3-6, Exh. 1; Deposition of Derrick Pallas, Alexa's Rule 30(b)(6) deponent ("Pallas Depo.") 145:6-146.10; 148:23-149:7, submitted as Exh. G to Mausner Decl. (filed under seal).</p> <p>Even if there were a few images which Google could not find, and Perfect 10 does not concede that there were, that does not excuse Google's failure to remove or disable access to thousands of infringements that it could find.</p>
<p><b>Google's Processing of P10's Notices</b></p>	
<p>80. Over the past four-plus years, Google has reviewed numerous URLs—over 15,000—in response to</p>	<p>Disputed in part and undisputed in part.</p> <p>Undisputed that Google belatedly</p>



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P10's DMCA notices, and has blocked many of those URLs—roughly 9,000—from appearing in search results, including the caching feature.

Poovala Dec. ¶ 91, Exs. FF, GG, HH, II; Haahr Dec. ¶¶ 6, 9, Exs. 1 and 2.

blocked approximately 9,000 URLs out of approximately 15,000 identified by Perfect 10. That fact strongly supports Perfect 10's contention that its notices were compliant. In fact, this is an admission by Google that it can block access to at least 3/5 of the URLs submitted by Perfect 10, if Google makes the effort.

Disputed that Google actually removes or disables access to the infringing material, because it displays the same infringing images over and over to its users, just from different URLs. In order to actually remove or disable access to the identified infringing material, Google must stop displaying that same infringing material to its users, and it must stop placing ads around those same infringing images. Zada Decl. ¶¶41-61, Exhs. 28-45, 9.

Furthermore, Google has also forwarded Perfect 10's confidential DMCA notices to chillingeffects.org, for publication on the Internet, despite repeated objections by Perfect 10. By doing so, Google is continuing to enable its users to find the same identified infringing web pages. Zada Decl. ¶64, Exh. 48; Mausner Decl. ¶28, Exh. L; Dean Hoffman Decl. ¶¶4-9; C.J. Newton Decl. ¶5.

Google has not blocked thousands of Web Page and Image URLs identified by Perfect 10 from appearing in its search results. Zada Decl. ¶¶41-61, Exhs. 28-45.

81. Google carefully reviewed P10's notices to ensure that its repeat infringer policies were enforced.

Disputed. This is an incredible statement given that Google suppressed at most 71 blogger.com URLs out of more than 3,808 that were identified to Google by Perfect 10. Zada Decl. ¶61.

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Poovala Decl. ¶ 92.

Exh. 45; Chou Decl. ¶¶8-11, Exh. 9.  
  
One folder alone in Perfect 10's July 9, 2008 DMCA notice had 1264 occurrences of the term blogger.com. There were so many full-size blogger.com images in that folder alone, that it is hard to see how Google could have even looked at it, yet alone "carefully reviewed" it.  
  
Zada Decl. ¶12, Exh. 5, pages 13-14.  
  
Google apparently did not even look at the infringing web pages identified by Perfect 10 in its 2004 notices. Google's witness Heraldo Botelho claimed that Google took no action against its AdSense affiliates until October 2005, because Perfect 10 had never advised Google that the identified infringing web pages were displaying Google ads. That means that Google never looked at those web pages, because if it had, it would have seen the Google ads. Zada Decl. Exh. 9; Botelho Decl., ¶¶3, 6, submitted under seal as Exh. K to Mausner Decl.  
  
Google has not even produced a log showing what URLs were identified by Perfect 10, what actions it took in response to those allegations of infringement, and when.  
  
Zada Decl. ¶19.

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<b>Google's Processing of the Group B Notices</b>	
82. Google sent P10 correspondence identifying deficiencies in P10's DMCA notices.  Poovala Dec. ¶¶ 56-73, Exs. S-EE.	Disputed. Google has never offered actual suggestions to cure alleged deficiencies. Google just keeps claiming the notices are deficient without providing concrete examples of what constitute compliant notices. In fact, Google has refused requests by Perfect 10 that it provide Perfect 10

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with concrete examples of compliant notices that Perfect 10 could simply replicate. Zada Decl. ¶70, Exh. 53.

Google has never explained how several infringing images residing on a web page containing 100 images can be easily identified other than by sending an actual copy of the infringing web page, edited down to show just the infringing images on that page or with check marks next to the infringing images..

However, when Perfect 10 has done that, Google has claimed those Adobe style notices were deficient as well.

Google has never asked for Image URLs in its published Web Search instructions. Furthermore, just providing an image URL without the image won't show Google what the image looks like.

Google waited until Perfect 10 had sent to Google 29 DMCA notices and had filed a lawsuit before Google first claimed that Perfect 10 needed to provide Image URLs or "complete URLs." However, Google has never asked for Image URLs or complete URLs in its published Web Search instructions.

Zada Decl. ¶25.

83. In response, P10 disputed that its notices were defective, and did not re-submit corrected notices.

Poovala Dec. ¶ 74.

Disputed. Perfect 10 has provided Google with a variety of different types of notices, including a "check the box" style notice modeled after this Courts' May 8, 2006 ruling. Furthermore, one of the reasons Perfect 10 switched to Adobe style notices (Group C notices), was to provide Google with more information than was contained in the

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	spreadsheet style notices (Group B notices). Zada Decl. ¶¶33, 53-55, Exhs. 37-40; Mausner Decl. ¶¶2-13, Exh. AA.
<p>84. The majority (i.e. more than half) of P10's notices dated between May 31, 2004 and June 13, 2009 did not include electronic soft copy lists of allegedly infringing URLs.</p> <p>Poovala Dec. ¶ 84, Exs. L and N.</p>	<p>Disputed. First of all, Google's published instructions continue to require notices by mail or fax, not by email, and there is no DMCA requirement to send notices by soft copy. However, Perfect 10 did do that in most cases, at Google's request. Zada Decl. ¶¶23-26, Exhs. 12-14, Exh. 9 (DMCA Notices folder).</p> <p>The Adobe style notices (Group C notices) are all in electronic format. Adobe has a URL extraction feature and provides a bookmark feature that lists all the URLs in each file. Adobe is an electronic document. Adobe is searchable, preserves the link structure, and the URLs are extractible. Zada Decl. ¶12, Exh. 5, page 13.</p> <p>Google has made no proposals at all, as to exactly how Perfect 10 should both identify the infringing URL as well as provide a copy of the infringing image.</p> <p>Google has provided no concrete examples of compliant notices with its motions.</p> <p>Google has refused repeated requests by Perfect 10 that Google provide Perfect 10 with an example of a compliant notice.</p>
	<p>Zada Decl. ¶70, Exh. 53.</p>
<p>85. In response to P10's notices, Google blocked access to any discernable web page URL identified by P10 that displayed (1) a nude, semi-nude, or provocatively dressed female.</p>	<p>Disputed. This claim contradicts the Declaration of Herald Botelho. If Google had actually looked at the web pages identified by Perfect 10, it would have seen Google ads on many of them.</p>

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or (2) purported passwords to P10's website. This also blocked these web page URLs from appearing in Google's cache.

Poovala Dec. ¶¶ 10, 75-77.

Botelho's declaration indicates that Google waited until October of 2005 to remove ads from such web pages because it did not know they existed. Botelho Decl. submitted as Exh. K to Mausner Decl.

Google waited for more than four months (after it received a complaint) before taking any action at all in response to Perfect 10's 2004 notices. When it did, it removed infringing links from its Web Search results but not from its Image Search results. Google did not remove 900 Images identified by Perfect 10's July 19, 2004 notice. In some cases, Google admittedly took seventeen months to suppress identified infringing Image URLs. Zada Decl. ¶¶26-31, Exhs. 14-20, 9.

Google has not really removed or disabled access to anything, as it continues to display and place ads around the same repeatedly identified infringing images, and continues to display the same unauthorized passwords. Zada Decl. ¶¶53-59, 65, Exhs. 38-43, 49.

86. Google tracked the processing of P10's notices.

Poovala Dec. ¶ 78-80, 88, Exs. FF, GG, HH, II.

Disputed. Perfect 10 has identified to Google at least 30,000 URLs of infringing web pages and images on free sites linked to by Google. Google has not provided a log listing what it has done in response to Perfect 10's identification of each of those infringing URLs and when.

Zada Decl. ¶19.

Google's DMCA logs are woefully inadequate, list only a tiny fraction of all notices received, are broken into disjointed pieces, have significant portions redacted, and do not even list

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most of the URLs identified by Perfect 10 in its notices. Zada Decl. ¶¶19, 73, Exhs. 55, 9.

For example, Perfect 10 has identified to Google at least 3,808 infringing blogger.com URLs and at least 325 infringing blogspot.com post URLs. However, Google does not have any of these URLs listed in its Blogger Log. Google does not list in its Blogger Log any Perfect 10 notices from 2005, and does not contain the identity of the alleged infringer. Zada Decl. ¶¶8, 19, 41-52, 61, Exhs. 1, 28-36, 45; Chou Decl. ¶¶8-11. Exh. 9.

87. Google completed processing of the majority of the Group B Notices within one to two weeks of receipt; some were completed in as little as two days.

Poovala Dec. ¶ 82.

Disputed. Google admittedly did nothing until at least October 11, 2004, more than four months after receiving Perfect 10's May 31, 2004 notice. Google did not process 900 images identified by Perfect 10 in its July 19, 2004 notice. Google also admittedly took as long as six to ten months to process Perfect 10's December 31, 2004, February 17, 2005, and March 6, 2005 notices. Even though Google belatedly removed identified Web search links, it did not remove those same links from Image Search. Also, Google waited until October 2005 to take action against identified infringing AdSense affiliates. In some cases, Google has not removed its ads from identified infringing web pages for close to four years.

Zada Decl. ¶¶58, 24-31, Exhs. 43, 13-20, 9; Botelho Decl., ¶¶3, 6, submitted under seal as Exh. K to Mausner Decl.

Google doesn't even know what it did in response to Perfect 10's Group B notices because it doesn't have a log that lists each identified URL, what

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	<p>Google did regarding that URL, and when.</p> <p>Zada Decl. ¶19.</p> <p>If it is true that Google was able to quickly process some of Perfect 10's notices once it decided to do so, Google should have expeditiously processed all of them rather than waiting months or never doing so.</p> <p>Zada Decl. ¶26, Exh. 14.</p>
<p>88. Where P10 refused to send complete URLs and electronic soft copies of lists of URLs, or otherwise refused to cooperate, Google's processing efforts were delayed.</p> <p>Poovala Dec. ¶ 82.</p>	<p>Disputed. Disputed that Perfect 10 refused to cooperate with anything that Google reasonably requested.</p> <p>Perfect 10 incorporates by reference its responses to Paragraphs 27, 29, 58, and 84, above.</p>
<p>89. Google tracked the processing of P10's Group C Notices on spreadsheets.</p> <p>Poovala Dec. ¶ 88, Exs. HH and II.</p>	<p>Disputed. Perfect 10 has identified to Google at least 30,000 URLs of infringing web pages and images on free sites linked to by Google. Google has not provided a log listing what it has done in response to Perfect 10's identification of each of those infringing URLs and when.</p> <p>Zada Decl. ¶19.</p> <p>Google does not have a coherent spreadsheet showing which of the 2,300 URLs identified by Perfect 10's Group C notices it claims it suppressed, and the date it did so. The dates when Google suppressed such URLs have been left off of the spreadsheets. Although Google claims it processed them expeditiously, it actually took at least ten months to do so. Zada Decl. ¶¶19, 61, 73, Exhs. 45, 55. Google has not processed the vast majority of infringing URLs identified by Perfect</p>

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	<p>10's Group C Notices. Zada Decl. ¶¶19, 60-61, Exhs. 45, 9. Chou Decl. ¶¶3-11, Exh. 9.</p>
<p>90. Upon receipt of the Group C Notices, Google expeditiously reviewed the notices to determine if they could be further processed, and notified P10 of the defects therein.</p> <p>Poovala Dec. ¶ 90.</p>	<p>Disputed. Google took at least ten months to actually suppress the URLs. Google has stated that it took 200 hours (roughly five weeks) to suppress 2300 URLs, which does not explain why the URLs were not suppressed for at least ten months. Zada Decl. ¶61, Exhs. 45, 9. Chou Decl. ¶¶7-10.</p> <p>Google did not provide Perfect 10 with any actual concrete examples of deficiencies, but rather made sweeping claims of deficiencies with no basis for those claims. The fact that Google was able to suppress not only 2300 URLs from Perfect 10's June 28, 2007 and July 2, 2007 notices, but also process three subsequent Perfect 10 Adobe style notices in June of 2009, demonstrates that the notices were not deficient. Zada Decl. ¶61, Exh. 45.</p>
<p>91. The team reviewed thousands of pages of screenshots contained in the Group C Notices, page by page, and manually typed in the discernable URLs.</p> <p>Poovala Dec. ¶ 87, Exs. HH and II.</p>	<p>Undisputed. However, it is shocking that a company of Google's technological sophistication would hand type in URLs when they could have been rapidly extracted using Adobe's URL extraction feature.</p> <p>Shantal Rands Poovala deposition pages 109:3-111:18, submitted under seal as Exhibit P to Mausner Decl.; Zada Decl. ¶9, Exh. 2; Chou Decl. ¶7; Chumura Decl. ¶4.</p>
<p>92. Google manually checked over 6,300 screen shots of allegedly infringing material provided on the DVDs submitted with P10's July 2, 2007 notice, and blocked over 2,300 URLs from appearing in Google search</p>	<p>Undisputed that Google acted as it claims. Disputed that Google could not have completed the processing in less than 200 hours. If Google had taken advantage of Adobe's URL extraction feature, it would have been able to complete the processing. Perfect 10 has</p>



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Poovala Dec. ¶ 87, Exs. HH an II.

been able to cut and paste URLs from Adobe documents at the rate of about 300 per hour. This means that in 200 hours, Google could have suppressed 60,000 URLs, not 2300. Zada Decl. ¶9, Exh. 2; Chou Decl. ¶7. Furthermore, to be eligible for safe harbor, Google is required to fully process all of Perfect 10's notices; it cannot simply stop processing notices when it has spent 200 hours doing so, because it failed to take advantage of Adobe's URL extraction feature. Google is required to provide the necessary resources to remove or disable access to URLs containing infringing material, even if there are many of them, if it wishes to receive a safe harbor.

93. P10 never re-submitted revised versions of any of the Group C Notices.  
Poovala Dec. ¶ 90.

Disputed. Many of the URLs that Google did not process were resubmitted using a "check the box" type program which provided a copy of the Google thumbnail along with each of the three URLs which Google provides with that thumbnail, including both the full Image URL as well as the full Web Page URL. Google still claimed those notices were deficient and did not process them, even though Microsoft did process them. Perfect 10 also re-identified infringing P10 thumbnails by sending Google copies of Google's Image Search results webpages, edited to remove any non-P10 Images. Google refused to process those notices as well even though they obviously provided Google with both the location of the infringing images and actual copies of the infringed images.  
  
Zada Decl. ¶¶53, 72 Exhs. 38, 54, 9; Chumura Decl. ¶¶3-5, Exh. 1; O'Connor Decl. ¶¶4-5, Exh. 1;

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	McPhatter Decl. ¶¶4-5, Exh. 1.
94. Google received several counter-notifications in response to removals of URLs identified in P10's notices, and sent them to P10. P10 never responded to any of them.  Poovala Dec. ¶ 96; Ex. MM.	Undisputed. Perfect 10 was not willing to file a lawsuit, as Google required.
95. On January 10, 2006, P10 sent Google an email admitting that one of its notices included URLs of website that were authorized to display its images.  Poovala Dec. ¶ 97; Ex. NN.	Disputed. This is a mischaracterization of Perfect 10's notice and email.  Zada Decl. ¶74.
<b>PERFECT 10'S ADDITIONAL MATERIAL FACTS</b>	<b>SUPPORTING EVIDENCE</b>
Perfect 10 incorporates herein its Additional Material Facts set forth in Perfect 10's Statement Of Genuine Issues In Opposition To Google's Motion For Summary Judgment Re: Safe Harbor Under 17 U.S.C. § 512(d) For Web And Image Search, filed concurrently	Perfect 10 incorporates the same Supporting Evidence.

Dated: August 9, 2009

Respectfully submitted,  
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