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10 UNITED STATES DISTRICT COURT

11 CENTRAL DISTRICT OF CALIFORNIA

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

14 Plaintiff,

15 vs.

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

17 Defendants.

18
19 AND COUNTERCLAIM

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

22 Plaintiff,

23 vs.

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

26 Defendants.

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

**DEFENDANT GOOGLE INC.'S
REPLY IN SUPPORT OF ITS
MOTION FOR SUMMARY
JUDGMENT RE: GOOGLE'S
ENTITLEMENT TO SAFE
HARBOR UNDER 17 U.S.C.
§ 512(b) FOR ITS CACHING
FEATURE**

[Consolidated Separate Statement,
Rebuttal Declarations of Rachel
Herrick Kassabian, Shantal Rands
Poovala, and Bill Brougher filed
concurrently herewith]

Hon. A. Howard Matz

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Statutes

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1 Preliminary Statement

2 Google's caching feature temporarily and automatically stores historical (or
3 "cache") copies of third-party websites that Google crawls and indexes for its Web
4 Search service, gives Web Search users the option to view these copies for a brief
5 period of time, and doesn't charge a dime for it. Section 512(b) of the DMCA
6 provides a safe harbor for this activity. Google meets every condition necessary for
7 that safe harbor, and Perfect 10 ("P10") has failed to raise anything approaching a
8 triable issue. Far from clarifying the issues this Court must decide, P10 has raised a
9 host of irrelevant points in the hopes that something—anything—might stick.

10 In the scant two pages of briefing it actually devotes to the caching issue, P10
11 focuses almost entirely on a cherry-picked handful of examples that it contends were
12 stored for an allegedly "non-temporary" time. But a few outlier examples from
13 years ago (which themselves *were* stored temporarily, [REDACTED]
14 [REDACTED] do not change the fact that Google's cache storage is temporary and
15 intermediate. Indeed, P10 itself acknowledges that at least one district court has
16 already ruled precisely this. *See Field v. Google*, 412 F. Supp. 2d 1106 (D. Nev.
17 2006). Nor does P10 fare any better with its insistence that the 512(b) safe harbor is
18 somehow limited to "[REDACTED]"
19 (apparently other than Google). Again, *Field* already held to the contrary. In sum,
20 P10's rhetoric aside, it does not contest the applicable law, nor does it present even a
21 single material fact in dispute. Google's motion should be granted.

22 Argument

23 Section 512(b) of the Digital Millennium Copyright Act ("DMCA") provides
24 safe harbor for the operation of Google's caching feature. P10 raises a barrage of
25 arguments and purported reasons why Google cannot qualify for this safe harbor,
26 but in doing so, P10 fails to address an alternative ground for summary judgment,
27 misunderstands the cache, misreads the statute, and cites only a single case—which
28 unambiguously *supports* Google's motion.

1 Google meets all conditions and requirements for safe harbor, and Google's
2 motion should be granted.

3 **I. P10 HAS RAISED NO MATERIAL DISPUTE REGARDING**
4 **GOOGLE'S SATISFACTION OF THE DMCA'S THRESHOLD**
5 **REQUIREMENTS.**

6 Google meets all three of the threshold requirements for DMCA safe harbors.
7 See Google's Motion for Summary Judgment re: Google's Entitlement to Safe
8 Harbor Under 17 U.S.C. § 512(d) For Web And Image Search ("Search Motion") at
9 17-18. Specifically, Google (1) is a service provider, (2) has an appropriate and
10 reasonably implemented repeat infringer policy, and (3) does not interfere with any
11 known standard technical measures. See *id.*

12 As fully explained in Google's Reply in support of its Search Motion ("Search
13 Reply"), Perfect 10 does not dispute any of the material facts demonstrating
14 Google's satisfaction of those requirements. See Search Reply at 1-6.¹ There is no
15 triable issue regarding these requirements.

16 **II. P10 DOES NOT DISPUTE (AND THUS CONCEDES) THAT GOOGLE**
17 **STORES NO IMAGES IN ITS CACHE.**

18 P10's opposition completely fails to address a fundamental and key point: *No*
19 *images are stored in Google's cache.* See Declaration of Bill Brougher in Support
20 of Google's Motion for Summary Judgment re: Google's Entitlement to Safe Harbor
21 Under 17 U.S.C. § 512 ("Brougher Dec.") ¶ 7; see also Defendant Google's
22 Consolidated Separate Statement of Undisputed Facts in Support of Google's
23 Motion for Summary Judgment re: Safe Harbor Under 17 U.S.C. § 512(b) for its
24 Caching Feature ("Cache Consol. Statement") ¶ 7. P10's entire case is premised on
25 infringements of images, but there is not a single image in the cache, infringing or
26 otherwise. Each of the images P10 presents in its various examples is stored on and

27 _____
28 ¹ Google hereby incorporates its arguments from the Search Motion and the
supporting Reply as though fully set forth herein.

1 displayed by a third-party website, not Google. Accordingly, Google argued in its
2 moving papers that to the extent P10's claims regarding Google's cache feature are
3 based upon links to (as opposed to storage of) infringing images via its cache,
4 Google is entitled to summary judgment on those claims pursuant to Section 512(d).
5 *See* Cache Motion at 9 n.11; *see also* Search Motion at Sec. II. Perfect 10 does not
6 dispute this at all in its opposition, and therefore concedes this ground for summary
7 judgment.

8 **III. P10 HAS IDENTIFIED NO DISPUTED MATERIAL FACTS**
9 **PRECLUDING GOOGLE'S ENTITLEMENT TO SAFE HARBOR**
10 **UNDER SECTION 512(B) FOR ITS CACHING FEATURE.**

11 Section 512(b) provides safe harbor for service providers "by reason of the
12 intermediate and temporary storage of material on a system or network controlled or
13 operated by or for the service provider" (17 U.S.C. § 512(b)) and imposes eight
14 conditions for this safe harbor (17 U.S.C. § 512(b)(1)(A)-(C) and 17 U.S.C.
15 § 512(b)(2)(A)-(E)). In arguing against summary judgment on this safe harbor, P10
16 first claims that Google's cache is not "intermediate and temporary", citing to a
17 handful of screenshots from several years ago that supposedly reflect cache storage
18 of a few web pages of approximately a year. This unremarkable "evidence" is
19 entirely consistent with Google's moving papers, which made clear that for the vast
20 majority of web pages, the cache is refreshed every few weeks—sometimes more
21 frequently, sometimes less. These outdated outliers do not defeat summary
22 judgment. Second, P10 makes a halfhearted stab at contesting some (but not all) of
23 the eight conditions under Section 512(b). None of P10's protestations create a
24 triable issue.²

25
26 ² P10 directs the bulk of its opposition brief to arguments directed at Google's
27 Search Motion, thereby submitting a total of 48 pages of briefing in opposition to
28 Google's Search Motion in violation of this Court's briefing page limits. Google
responds to those arguments in its Reply in support of its Search Motion. To the

1 A. There Is No Material Fact In Dispute Regarding Whether Google's
2 Cache Is Intermediate And Temporary.

3 P10 has not pointed to any disputed facts that refute the record reflecting that
4 storage is temporary and intermediate, notwithstanding a few outliers in the refresh
5 rate that P10 managed to find. Indeed, at least one district court in this Circuit has
6 already determined that Google's cache falls within Section 512(b)'s definition of
7 "intermediate and temporary storage of material." *See Field*, 412 F. Supp. 2d at
8 1124-25 (finding that the storage of materials in its cache for approximately 14 to 20
9 days is "temporary" under Section 512(b)). That finding is not surprising, since
10 Google's cache is indeed a temporary repository for the textual portions of many of
11 the web pages the Googlebot crawls. *See Brougher Dec.* ¶ 6. Nor do P10's
12 examples disprove that those cache copies were still "temporary," as opposed to
13 permanent.

14 In hopes of creating a triable issue, P10 claims that Google's cache storage is
15 not in fact "intermediate and temporary" by pointing to a handful of screenshots of
16 purported cache results that it claims were stored for between [REDACTED]. But
17 even assuming these stray examples are accurate screenshots and have not been
18 manipulated in any way, they do not contradict the material facts—that "[i]n the vast
19 majority of cases, the cache will be refreshed approximately every few weeks." *See*
20 *Brougher Dec.* ¶ 6.³ [REDACTED]

21 [REDACTED]
22 [REDACTED]

23 extent necessary, Google incorporates each of those arguments by reference into the
24 present motion.

25 ³ P10 makes a related claim that [REDACTED]
26 [REDACTED] Cache Consol. Statement ¶ 9. This is
27 incorrect—Google has already established that it maintains a cache copy "only until
28 the Googlebot next visits the particular web page" (*Brougher Decl.* ¶ 6), and *Field*
has already established that "refreshing" the cache is sufficient for the Section
512(b) safe harbor.

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED] See Rebuttal Declaration of Bill Brougher in
7 Support of Google's Motions for Summary Judgment re: Google's Entitlement to
8 Safe Harbor Under 17 U.S.C. § 512 ("Rebuttal Brougher Dec.") ¶¶ 3-5. Under *Field*
9 and by any reasonable interpretation, an average two-week refresh rate—even with
10 some stray outliers in either direction—is "intermediate and temporary" storage.

11 Moreover, P10's arguments about [REDACTED] storage in the cache are not
12 just incorrect—they are also irrelevant. Google's cache stores HTML text, but
13 again, it *does not store copies of images*. Brougher Dec. ¶ 7. P10 does *not* dispute
14 this fact in its opposition brief. Thus, there are no P10 images—or any other images
15 for that matter—stored in Google's cache, on a temporary basis or otherwise. Any
16 images P10 has submitted as allegedly from Google's cache (including the images
17 from Exhibits 9 and 26 to the Declaration of Norman Zada) are stored on and
18 displayed from third-party websites, *not* from Google's cache. *Id.* As such, P10's
19 claims regarding those images are really claims about *linking to* alleged infringing
20 content, not *storage of* that content. Thus, in addition to the safe harbor provided by
21 Section 512(b), P10's claims also fall within the scope of the safe harbors of Section
22 512(d) as well, and Google is entitled to summary judgment on that additional basis.
23 See Section II, *supra*; Search Motion at Sec. II.

24 **B. Google Satisfies All Eight Conditions For Section 512(b) Safe**
25 **Harbor**

26 Section 512(b) provides eight conditions of eligibility for its safe harbor.
27 P10's opposition does not dispute (and therefore concedes) that Google meets three
28 of the conditions, and presents no meaningful evidence to dispute the remaining

1 five. Accordingly, P10 has failed to raise a triable issue of fact regarding Google's
2 eligibility for this safe harbor.

3 **1. P10 Misapprehends Section 512(b)'s First Condition**

4 Section 512(b)'s first condition is that the allegedly infringing material at
5 issue be made available online by a person other than the service provider. *See* 17
6 U.S.C. § 512(b)(1)(A) & (B). This is indisputably true as to Google. Under the
7 server test, it is the webmasters of the third-party websites who post and display the
8 allegedly infringing material, not Google. *Brougher Dec.* ¶¶ 6-7. Nevertheless, P10
9 urges that because Google crawls the Internet and creates its cache, somehow it is
10 *Google* who has placed the crawled material on the Internet. *See Cache Opp.* at
11 2:12-13 [REDACTED]. P10's
12 fundamental misunderstanding of the application of this condition does not create a
13 triable issue. As the *Field* court made clear, and as the evidence (and common
14 sense) confirms, it is the third-party website, and not Google, who "makes [the
15 material] available online." 412 F. Supp. 2d at 1124.

16 **2. P10 Has No Factual Basis For Its Purported Dispute Of The**
17 **Second Condition**

18 Section 512(b) requires that the allegedly infringing material be transmitted
19 from its originator to a third person at the third person's direction. 17 U.S.C.
20 § 512(b)(1)(B). P10 claims that [REDACTED]
21 [REDACTED] and that therefore, Google does not meet
22 this condition. P10 cites no case, statute, or fact in support of this pronouncement.
23 Nor could it. Any material in Google's cache was transmitted from the third-party
24 website to Google at Google's request via the operation of the Googlebot and any
25 "meta-tags" in the website's HTML code (*see Field*, 412 F. Supp. 2d at 1112-13)
26 and Google obviously is not the same person as the third-party website. Indeed, as
27 *Field* has explained:
28

1 Section 512(b)(1)(B) requires that the material in question be
2 transmitted from the person who makes it available online, here Field,
3 to a person other than himself, at the direction of the other person.
4 Field transmitted the material in question, the pages of his Web site, to
5 Google's Googlebot at Google's request. Google is a person other than
6 Field. Thus, Google's cache meets the requirement of Section
7 512(b)(1)(B).
8 412 F. Supp. 2d at 1124. P10 does not address this holding at all, much less explain
9 why what was true in 2006 somehow is not true in 2009.

10 P10's related argument that the cache [REDACTED]
11 [REDACTED]
12 apparently because [REDACTED]
13 [REDACTED] similarly falls flat. First, P10's entire premise is faulty because this
14 is not the relevant test. And even if it were, Google of course agrees that third-party
15 websites do not "post" infringing images to the cache—indeed, the cache contains
16 no images at all, infringing or otherwise. And, of course, third-party websites most
17 certainly do "transmit[]" their material to the cache at Google's request within the
18 meaning of 512(b)(1)(B), including through the use of meta-tags on those third-
19 party websites' HTML code. *See* Brougher Dec ¶ 4; *Field*, 412 F. Supp. 2d at 1112-
20 13 & 1124. There is no triable issue on this condition.

21 **3. P10 Does Not Dispute That Google Satisfies The Third**
22 **Condition.**

23 P10 does not dispute that Google's cache storage is carried out through an
24 "automatic technical process for the purpose of making the material available to
25 users of the system or network who" wish to access it after being initially made
26 available by third-party websites, as required by 17 U.S.C. § 512(b)(1)(C). *See*
27 Cache Consol. Statement ¶ 14; *see also Field*, 412 F. Supp. 2d at 1124 ("[t]here is
28 no dispute that Google's storage is carried out through an automated technical

1 process" or that "one of Google's principal purposes in including Web pages in its
2 cache is to enable subsequent users to access those pages if they are unsuccessful in
3 requesting the materials from the originating site for whatever reason."); Brougher
4 Dec. ¶¶ 6, 10-12. There is no triable issue on this condition.

5 **4. P10 Has No Factual Basis For Its Purported Dispute Of The**
6 **Fourth Condition.**

7 Section 512(b)'s fourth requirement is that the service provider not modify the
8 content of the stored materials. 17 U.S.C. § 512(b)(2)(A). In hopes of conjuring up
9 a dispute, P10 muses that Google [REDACTED]

10 [REDACTED] See Cache Opp. at 2:19-21. This is
11 devoid of merit. Placing a frame *around* certain content in no way modifies the
12 content itself—just as framing a painting does not turn it into a different painting.
13 Google has established that its "robot obtains copies of the web pages from
14 originating websites without modification to their content." Brougher Dec. ¶ 6.
15 There is no triable issue on this condition.

16 **5. P10 Does Not Dispute That Google Satisfies The Fifth**
17 **Condition.**

18 P10 does not dispute that Google "complies with rules concerning the
19 refreshing, reloading, or other updating of the material when specified by the person
20 making the material available online," as required by 17 U.S.C. § 512(b)(2)(B). See
21 Cache Consol. Statement ¶ 17; *see also* Brougher Dec. ¶ 13. There is no triable
22 issue on this condition.

23 **6. P10 Does Not Dispute That Google Satisfies The Sixth**
24 **Condition.**

25 P10 does not dispute Google's showing that it does not interfere with any
26 technology used by a website to collect information directly from users who may
27 access allegedly infringing materials on their site, as required by 7 U.S.C.
28 § 512(b)(2)(C). See Cache Consol. Statement ¶ 18; *see also* Declaration of Paul

1 Haahr in Support of Google's Motions for Summary Judgment Re Entitlement to
2 Safe Harbor Under 17 U.S.C. § 512 ("Haahr Dec.") ¶ 19. There is no triable issue
3 on this condition.

4 **7. P10 Misreads The Seventh Condition.**

5 Google has established that it meets Section 512(b)'s seventh condition as set
6 forth at 17 U.S.C. § 512(b)(2)(D)—namely, that Google does not alter the
7 prerequisites for access to copyrighted material that third-party webmasters
8 establish, such as payment or password protection. *See* Haahr Dec. ¶ 20. To meet
9 this condition Google may not crawl the password-protected portions of a website
10 and then make those portions available in its cache without the need to input a
11 password. Google indisputably satisfies this requirement because Google does not
12 crawl or cache the password-protected portions of websites in the first place. *See*
13 Haahr Dec. ¶ 14.

14 P10 does not even address this condition in its opposition brief. P10's only
15 reference to it is in its Statement of Genuine Issues, where it claims that Google's
16 cache somehow bypasses *Perfect 10's* password requirements for
17 www.perfect10.com. P10 has misread the statute—Google does not crawl the
18 password-protected portions of perfect10.com, and the person whose password
19 settings must not be altered is the webmaster of the third-party website Google
20 crawls, not P10. Indeed, if P10's distorted conceptualization were correct, Section
21 512(b)(2)(D) would effectively eliminate the 512(b) safe harbor for *any* service
22 provider accused of infringement, by *any* password-protected website, in *every*
23 instance—because the third party's act of infringement would always make the
24 accuser's work available in a manner that bypasses the accuser's password
25 requirements. P10's misconstruction notwithstanding, there is no triable issue on
26 this condition.

27
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1 **8. P10 Fails To Identify A Triable Issue Regarding The Eighth**
2 **Condition.**

3 Section 512(b)'s final condition is that if the service provider receives a
4 statutorily compliant notification that a claimed infringement is in its cache and has
5 been removed from the originating site, the service provider must "respond[]
6 expeditiously to remove, or disable access to," that infringement. 17 U.S.C.
7 § 512(b)(2)(E).

8 P10 makes the cryptic claim in its Statement of Genuine Issues that [REDACTED]
9 [REDACTED] Cache Consol.
10 Statement ¶ 11. In fact, however, none of P10's notices were directed to Google's
11 cache feature, nor did any involve alleged infringements that had been removed
12 from the originating site or provide the required attestation "confirming that the
13 material has been removed from the originating site." 17 U.S.C. § 512(b)(2)(E). As
14 a result, P10's notices failed to trigger the eighth condition, so it does not even apply
15 here. 17 U.S.C. § 512(b)(2)(E)(i) & (ii). This fact alone is dispositive of the eighth
16 condition. But even if P10's notices had been properly directed (which they were
17 not), and even if they were legally valid (which they were not), Google processed
18 them expeditiously. *See* Search Motion at 12-16.

19 P10 does not directly address Google's policy of responding to valid notices
20 of infringement under Section 512(c)(3) in its opposition, making only a passing
21 reference to it in its conclusion. Instead, P10 includes a lengthy five-page argument
22 in its Statement of Genuine Issues, which is improper and a violation of the Court's
23 Scheduling and Case Management Order.⁴ Even if the Court were to consider P10's
24 improper arguments made in its Statement, however, none passes muster.

25
26 ⁴ Section III.C.1 ("No legal argument should be set forth in [the Statement of
27 Genuine Issues]."). *See* Cache Consol. Statement ¶ 20 at 6-10. Accordingly, this
28 argument should be stricken, and this Court should find no triable issue on this
 condition.

1 (1) P10 claims (again) that Google has not produced a [REDACTED]
2 [REDACTED]
3 Cache Consol. Statement ¶ 20. **False:** Google has produced voluminous documents
4 tracking Google's processing of P10's notifications of infringement. *See* Declaration
5 of Shantal Rands Poovala ("Poovala Dec.") at ¶¶ 14, 19, 37-38 & Exs. J, K, II;
6 Rebuttal Declaration of Rachel Herrick Kassabian ("Kassabian Rebuttal Dec.") at
7 ¶ 2. Indeed, P10 actually *cites* to these tracking spreadsheets repeatedly in its
8 opposition papers. *See, e.g.,* Search Opp. at 22-23.

9 (2) P10 suggests that Google has no [REDACTED] Cache
10 Consol. Statement ¶ 20. **False:** At all relevant times, Google has had a process and
11 procedure for handling DMCA notices. *See, e.g.,* Poovala Dec. ¶¶ 3-39; Kassabian
12 Rebuttal Dec. ¶ 2, Ex. B.

13 (3) P10 claims Google did not process DMCA notices prior to [REDACTED]
14 [REDACTED]. Cache Consol. Statement ¶ 20. **False:** Google *did* process DMCA notices
15 before [REDACTED]. *See* Rebuttal Declaration of Shantal Rands Poovala ("Rebuttal Poovala
16 Dec.") ¶ 8; Rebuttal Kassabian Dec. ¶ 2, Ex. B.

17 (4) P10 suggests that Google refused to suppress infringing search results
18 pursuant to the DMCA before [REDACTED]. Cache Consol. Statement ¶ 20.
19 **False:** Google suppressed infringing search results at all times relevant to this
20 lawsuit. *See* Rebuttal Poovala Dec. ¶ 8; Rebuttal Kassabian Dec. ¶ 2, Ex. B.

21 (5) P10 claims that Google has not processed P10's purported DMCA notices.
22 Cache Consol. Statement ¶ 20. **False:** Google has gone beyond its legal
23 requirements to process P10's defective notices. *See* Poovala Dec. ¶¶ 75-100.⁵
24
25

26 ⁵ P10 makes a number of false factual assertions in its (improper) Statement of
27 Genuine Issues that are directed primarily at issues raised by Google's Search
28 Motion. Google accordingly responds to them fully in its Search Reply and
incorporates that response by reference here.

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Conclusion

There are no material facts left for trial regarding Google's entitlement to safe harbor under 17 U.S.C. § 512(b) for all of P10's claims directed to Google's caching feature. Google respectfully requests that the Court grant it summary judgment on this basis.

DATED: September 8, 2009

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