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10 UNITED STATES DISTRICT COURT

11 CENTRAL DISTRICT OF CALIFORNIA

12 PERFECT 10, INC., a California  
corporation,

13 Plaintiff,

14 vs.

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

17 Defendants.

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

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

18 AND COUNTERCLAIM

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

20 PERFECT 10, INC., a California  
corporation,

21 Plaintiff,

22 vs.

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

25 Defendants.

Hon. A. Howard Matz

Date: None (taken under submission)

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

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1 Preliminary Statement

2 There are no material facts for trial regarding Google's entitlement to safe  
3 harbor under 17 U.S.C. § 512(c) for Perfect 10's ("P10") claims relating to Google's  
4 Blogger service. Far from identifying any material factual dispute, P10's Blogger  
5 opposition papers concede the bulk of Google's motion, ignore the relevant facts and  
6 law, and seek to cloud the real issues with hyperbole and innuendo. P10's admitted  
7 flouting of Google's published DMCA instructions for Blogger reflects an  
8 impermissible disregard for the letter and spirit of the DMCA that should not be  
9 rewarded.

10 Perfect 10's opposition makes two major claims, each of which is wrong.  
11 First, P10 urges that Google did not reasonably implement a repeat infringer policy  
12 for Blogger. But P10 *itself* cites documents that prove Google does. P10 may prefer  
13 that Google track repeat infringers differently, but Google complies with the statute,  
14 which is all that is required. Second, P10 claims that it did not need to comply with  
15 Google's published DMCA policy for Blogger because it knows better than Google  
16 what information Google needs to process a Blogger notice. This is, of course, not  
17 the case—the DMCA itself (and not just Google's policy) requires P10 to follow  
18 Google's instructions, by identifying the particular post containing the alleged  
19 infringement.

20 P10 has failed to raise any triable issue regarding Google's safe harbor from  
21 P10's Blogger-related copyright claims. Google's motion for summary judgment  
22 should be granted.

23 Argument

24 **I. P10 HAS RAISED NO MATERIAL DISPUTE REGARDING**  
25 **GOOGLE'S SATISFACTION OF THE DMCA'S THRESHOLD**  
26 **REQUIREMENTS**

27 As discussed in Google's Motion for Summary Judgment re: Google's  
28 Entitlement to Safe Harbor Under 17 U.S.C. § 512(d) for Web and Image Search

1 (“Search Motion”), to be eligible for a DMCA safe harbor, a party must meet three  
2 threshold conditions. First, the party must be a service provider. Second, it must  
3 have adopted and reasonably implemented a repeat infringer policy. Third, the party  
4 must not interfere with “standard technical measures” used by copyright owners to  
5 identify or protect their works. 17 U.S.C. §§ 512(k), 512(i)(1).

6 P10 does not dispute that Google satisfies the first and third elements. For the  
7 second, regarding Google’s repeat infringer policy for Blogger, P10’s purported  
8 dispute raises no triable issue.

9 **A. P10 Does Not Dispute—And Therefore Concedes—Two Of The**  
10 **Three Threshold Requirements.**

11 P10 does not dispute that Google is a service provider under 17 U.S.C.  
12 § 512(k)(1)(B). *See* Google’s Consolidated Separate Statement of Undisputed Facts  
13 in Support of Google’s 512(d) Motion (“Search Consol. Statement”), at ¶ 1.  
14 Likewise, there is no dispute that Google does not interfere with any known “standard  
15 technical measures” as defined by 17 U.S.C. 512(i). *See* Google’s Consolidated  
16 Separate Statement of Undisputed Facts in Support of Google’s 512(c) Motion  
17 (“Blogger Consol. Statement”), at ¶ 2. P10 therefore concedes both points, and in  
18 any event, Google clearly meets both requirements. *See* Search Motion at 17-18.

19 **B. Google’s Repeat Infringer Policy For Blogger Is Both Appropriate**  
20 **And Reasonably Implemented.**

21 P10 purports to dispute that Google has an appropriate repeat infringer policy,  
22 but proffers no material facts on this issue. Instead, P10’s “evidence” consists of a  
23 hodgepodge of assertions regarding other Google services that have no bearing on the  
24 Blogger motion, statements of opinion that are irrelevant to the governing legal  
25 standards, and mischaracterizations of Google’s evidence. *See, e.g.*, Blogger Consol.  
26 Statement ¶ 13. None of this saves P10’s claims from summary judgment.

27 As discussed in Google’s moving papers, a repeat infringer policy is  
28 considered implemented if the service provider (1) “has a working notification

1 system, [(2)] a procedure for dealing with DMCA-compliant notifications, and ...  
2 [(3)] does not actively prevent copyright owners from collecting information needed  
3 to issue such notifications,” and the policy is considered *reasonably* implemented if  
4 the service provider (4) terminated subscribers or account holders “when it had  
5 knowledge of infringement.” *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1109,  
6 1113 (9th Cir. 2007). P10 does not dispute that the *CCBill* standard for reasonable  
7 implementation of a repeat infringer policy governs here, as outlined in Google’s  
8 motions. *See* Blogger Opp. at 19-20. Google’s repeat infringer policy meets all four  
9 of *CCBill*’s conditions, and P10 presents no colorable evidence to the contrary.

10 **1. There is no real dispute that Google has a working notification**  
11 **system for Blogger.**

12 Google’s moving papers set forth its DMCA notification system for Blogger –  
13 that it (1) has an agent for receiving notifications of claimed infringement, (2)  
14 publishes instructions regarding the information needed to process a DMCA notice,  
15 (3) tells complainants how and where to submit notices, and (4) if a notice is  
16 deficient, Google requests the necessary information. *See* Poovala Dec. ¶¶ 27-35.

17 P10’s many and varied claims fail to establish a material dispute as to any of  
18 these facts. These include the following:

19 (1) P10 does not dispute that Google has a designated agent for receiving  
20 notifications of claimed infringement. *See* Blogger Consol. Statement ¶ 4.<sup>1</sup>

21 (2) P10 purports to dispute that “Google publishes the information required for  
22 DMCA complaints related to Blogger at [http://www.google.com/blogger\\_dmca.html](http://www.google.com/blogger_dmca.html).”

23 \_\_\_\_\_  
24 <sup>1</sup> P10 relatedly argues that [REDACTED]  
25 [REDACTED] *See* Blogger Consol. Statement ¶ 5. This is irrelevant because the DMCA  
26 does not require it. P10 also claims that the Blogger fax number listed on Google’s  
27 DMCA webpage does not match the fax number on file with the Copyright Office.  
28 *Id.* This, too, is irrelevant since both fax numbers are checked and responded to. *See*  
*Poovala Dec.* ¶ 12, 31.

1 **False:** P10 provides no contrary evidence disputing this fact (*see* Blogger Consol.  
2 Statement ¶ 5), and its own submission of the published Blogger instructions  
3 effectively admits it. *See* Zada Dec., Ex. 1 at 1-10 (attaching published Blogger  
4 instructions) & ¶ 8 (discussing same).<sup>2</sup>

5 (3) P10 argues that Google's Blogger instructions [REDACTED]  
6 [REDACTED] *See* Blogger Consol. Statement ¶  
7 5. **False:** The Blogger DMCA instructions apply to any hosted P10 images the same  
8 way they do all other hosted material.

9 (4) P10 claims that [REDACTED]  
10 [REDACTED] *See* Blogger Opp. at 7. **False:** All blog posts have a post  
11 URL. Google asks for a post URL because that is the removable unit of content and  
12 the only way to ensure that the infringing material is removed from all locations that  
13 display it. When Google takes down a post URL, an automated process also takes  
14 down all images displayed at that post URL. *Rebuttal Poovala Dec.* ¶ 17. Thus,  
15 P10's refusal to submit post URLs prevents Google from removing all content  
16 associated with allegedly infringing Blogger posts.

17 (5) P10 further criticizes the instructions as [REDACTED] and [REDACTED]  
18 Blogger Opp. at 7. **False and irrelevant:** P10 may not like Google's instructions,  
19 but Google has and informs copyright owners of its notification system for accepting  
20

21 \_\_\_\_\_  
22 <sup>2</sup> P10 ignored these instructions, and it is now evident why – because P10 believes  
23 that it [REDACTED] which supposedly [REDACTED]  
24 Blogger Opp. at 13:19-21. P10's deliberate refusal to follow Google's instructions  
25 and requests is yet another reason why its notices do not pass muster under the  
26 DMCA, and required no response at all from Google. *See Hendrickson v. eBay, Inc.*,  
27 165 F. Supp. 2d 1082, 1085 (C.D.Cal. 2001) (finding notices deficient where plaintiff  
28 "refused to fill out eBay's Notice of Infringement form ... [and] never provided eBay  
the specific item numbers that it sought."); *see also* Section II.A, *infra*.



1 DMCA notices—which is all that is required—and P10 does not dispute that fact.  
2 *CCBill*, 488 F.3d at 1109.

3 (6) P10 claims Google does not tell complainants how and where to submit  
4 Blogger notices. *See* Blogger Consol. Statement ¶¶ 7-9. **False:** P10 attaches those  
5 very instructions to Zada’s own declaration. Zada Dec., Ex. 1 pp. 1-10.<sup>3</sup>

6 (7) P10 claims that Google must never request information from a copyright  
7 owner when a Blogger notice is insufficient, since Google supposedly did not do so  
8 with P10. *See* Blogger Consol. Statement ¶ 10. This too is demonstrably false. *See*  
9 Poovala Dec. ¶¶ 57-73 (recounting Google’s repeated notifications to P10 of the  
10 deficiencies in its notices) & Exs. S-EE.

11 **2. P10 presents no evidence disputing Google’s showing that it**  
12 **has a procedure for dealing with DMCA-compliant notices.**

13 Google has demonstrated that it has a policy and procedure for processing  
14 DMCA-compliant notices directed to Blogger, which includes providing directions  
15 for submitting Blogger complaints, verifying the complaints, ensuring that offending  
16 content is removed, notifying the Blogger account holder of the removal, processing  
17 counter-notifications, and tracking its processing efforts. *See* Poovala Dec. ¶¶ 27-37,  
18 Exs. J & II. P10 offers a series of non-consequential nitpicks about Google’s tracking  
19 procedure, but presents no material facts disputing that Google actually employs it.  
20 *See* Blogger Opp. at p. 21-22; Blogger Consol. Statement ¶¶ 6, 10, 11.<sup>4</sup>

21 \_\_\_\_\_  
22 <sup>3</sup> P10’s proffered “disputes” – that Google did not personally email P10 a copy of  
23 these publicly available instructions and does not have a separate designated agent for  
24 Blogger (neither of which is required by the DMCA) and that Google has more than  
25 one fax number for DMCA notices (which the DMCA does not prohibit) – fall flat.  
*See* Blogger Consol. Statement ¶¶ 7-9; *CCBill*, 488 F.3d at 1109.

26 <sup>4</sup> As an example of the immaterial “facts” P10 proffers, it claims that Google’s

27 [REDACTED]  
28 *See* Blogger Consol. Statement ¶ 11. Those instructions “suggest”  
(footnote continued)

1 (1) P10 claims Google's Blogger log is not [REDACTED] **False:** The Blogger  
2 notice tracking spreadsheet is usable to Google and facilitates Google's  
3 implementation of its repeat infringer policy for Blogger. Poovala Dec. ¶ 37, Exs. J  
4 and II. That is all that matters.

5 (2) P10 asserts that the log is somehow defective because it tracks [REDACTED]  
6 [REDACTED]  
7 **False:** The DMCA imposes no obligation to track users in any particular way, and  
8 certainly does not prohibit doing so with [REDACTED]. *See Io Group, Inc. v. Veoh*  
9 *Networks, Inc.*, 586 F. Supp. 2d 1132, 1145 (N.D. Cal. 2008) ("section 512(i) does  
10 not require service providers to track users in a particular way"); *CCBill*, 488 F.3d at  
11 1110 (holding that a DMCA log need only record the *email addresses* of *most* repeat  
12 infringers).

13 (3) P10 opines that the log is [REDACTED] **False and irrelevant:** The size of  
14 the log is a function of the valid DMCA notices Google receives, which Google does  
15 not control. And in fact, the current spreadsheet contains [REDACTED] rows, [REDACTED]  
16 [REDACTED] [REDACTED] DMCA notices directed to  
17 Blogger [REDACTED]. *See* Poovala Dec. Exs. J & II.

18 (4) P10 claims the Blogger spreadsheets don't date far enough back to include  
19 P10's 2005 notices. **False:** Google's spreadsheets list Blogger processing of P10's  
20 9/27/2005 and 12/22/2005 notices, among others. *See* Poovala Dec. Ex. KK at 1510-  
21 1539.<sup>5</sup>

22  
23 no such thing – nor has P10 ever submitted a DMCA notice regarding any alleged  
24 written work such as the text of a book.

25 <sup>5</sup> With its moving papers, Google submitted its current Blogger notice processing  
26 spreadsheet, which dates from [REDACTED]. *See* Poovala Dec. Exs. J & II. Google  
27 also submitted excerpts from various earlier Blogger spreadsheets that pertained to  
28 Google's processing of P10's Blogger notices dating back to [REDACTED]. *See id.* Ex. KK.  
During discovery, Google produced complete copies of its earlier Blogger DMCA  
(footnote continued)

1 (5) P10 claims that Google's Blogger spreadsheet is missing many of the  
2 Blogger-related URLs P10 claims it included in its hopelessly defective Group C  
3 notices. **Irrelevant:** Google need only show that it has a procedure for processing  
4 *DMCA-compliant* notices. *CCBill*, 488 F.3d at 1113. Google made that showing.<sup>6</sup>

5 (6) P10 objects that the log is in small type. **Irrelevant:** The DMCA contains  
6 no particular font requirements.

7 (7) P10 states that the log is not searchable. **False:** Google's Blogger  
8 processing spreadsheets are indeed text searchable—by Google internally (in Excel  
9 format), and as produced to P10 during discovery (in TIFF format—a courtesy P10  
10 has not extended to Google with much of its own production). Rebuttal Kassabian  
11 Dec. ¶¶ 2, 3.

12 (8) P10 claims that the log contains redactions. **False:** The current Blogger  
13 spreadsheet contains no redactions, and P10's contrary assertion is simply wrong.  
14 Poovala Dec., Ex. II.<sup>7</sup>

15  
16  
17 spreadsheets to P10 (again dating back to [REDACTED]). Rebuttal Kassabian Dec. ¶ 5.  
18 Indeed, Google's Blogger logs predate both P10's (July 2008) complaint amendment  
19 to add Blogger claims, and its claimed discovery that Google hosted Blogger content  
20 (2006). *See id.* Ex. A at ¶ 6 (6/12/2008 Zada Dec. in Supp. of Mot. for Leave to File  
21 2d Am. Complaint).

22 <sup>6</sup> For the same reason, P10's complaint that Google's current Blogger spreadsheet  
23 only shows what it considers to be a small number of repeat infringer terminations is  
24 equally irrelevant. The number of such terminations is purely a function of the  
25 number of (compliant) Blogger DMCA complaints Google receives, and how many  
26 are directed to the same account. *See* Poovala Dec. ¶ 37, Exs. J and II.

27 <sup>7</sup> As P10 knows, Google marks any redacted material in its document productions  
28 with "redacted" stamps. *See* Zada Dec. Ex. 9 ("Redacted Documents" folder).

[REDACTED]

Poovala Dec., Ex. II at GGL 045217-045224.

1 In sum, none of P10's groundless accusations regarding Google's Blogger  
2 spreadsheets comes close to creating a material dispute concerning Google's process  
3 for responding to DMCA-compliant notices.<sup>8</sup>

4 **3. P10 concedes that Google does not actively prevent copyright**  
5 **owners from collecting information needed to issue Blogger**  
6 **notifications.**

7 P10's opposition brief fails to address – and thus concedes – that Google does  
8 not actively prevent copyright owners from collecting the necessary information to  
9 submit Blogger notices to Google, and rightly so. Far from actively preventing the  
10 collection of information, Google provides copyright owners with powerful tools for  
11 locating and remedying infringement on the Internet. P10 provides no evidence to  
12 the contrary, instead making only some unsupported allegations in its Statement of  
13 Genuine Issues pertaining to Search, not Blogger.<sup>9</sup> Blogger Consol. Statement ¶ 16  
14 There is no triable issue here.

15 **4. P10 presents no material facts contesting Google's showing**  
16 **that it terminates Blogger account holders when appropriate.**

17 P10 makes two arguments in attempting to create a triable issue regarding  
18 Google's otherwise-uncontested showing that it terminates Blogger account holders  
19

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20 <sup>8</sup> P10's complaints regarding Google's AdSense log are both wrong and misplaced,  
21 since Google's processing of AdSense complaints is irrelevant to Google's safe harbor  
22 for Blogger hosting. *Cf. CCBill*, 488 F.3d 1116-17 (qualification for safe harbor is  
23 specific to the function of each service provided). Any Blogger account that violates  
24 Google's repeat infringer policy is terminated—regardless of whether AdSense  
25 advertisements are displayed on that blog. *Poovala Dec.* ¶¶ 37, 93.

26 <sup>9</sup> P10 claims that Google makes things ██████████ for copyright  
27 holders and proffers various ways P10 might implement DMCA procedures  
28 differently if P10 ran Google. *See Blogger Opp.* at 15-16. P10's suggestions are  
irrelevant and do not even imply that—must less constitute *evidence* that—Google  
“actively prevent[s] copyright owners from collecting information needed to issue  
notifications” directed to Blogger. *CCBill*, 488 F.3d at 1109.

1 when appropriate. First, P10 claims that Google's tracking of Blogger accounts by  
2 ██████████ renders Google ineligible for safe harbor. Second, P10 claims that  
3 Google did not terminate repeat infringers in response to P10 notices. P10 is wrong  
4 on both counts.

5 First, as discussed above, the DMCA imposes no obligation on service  
6 providers to register subscribers for their services in any particular way, using any  
7 particular information. *See Io Group*, 586 F. Supp. 2d at 1144, 1145 (rejecting  
8 arguments that Veoh needed to verify and track actual identities or block material  
9 based on IP addresses because of "the hypothetical possibility that a rogue user might  
10 reappear under a different user name and identity does not raise a genuine fact issue  
11 as to the implementation of" a repeat infringer policy). Google's procedure for  
12 terminating Blogger accounts identified by ██████████ is sufficient under the  
13 DMCA. *See also CCBill*, 488 F.3d at 1113.

14 Second, P10's claim that Google did not properly terminate repeat infringers in  
15 response to P10's notices is demonstrably incorrect. P10 points to not a single  
16 Blogger account that (1) was identified in multiple DMCA-compliant notices but (2)  
17 was not properly terminated under Google's policies.<sup>10</sup> *See Blogger Consol.*  
18 *Statement ¶ 33.* Moreover, *all* of P10's purported evidence of infringing material on  
19 Blogger that is "still up" relates to P10's defective Group C Notices, which failed to  
20 provide notice of repeat infringement. *Zada Decl., Exs. 9, 45; see Section II.A.2*  
21 *infra; CCBill*, 488 F.3d at 1113. The undisputed facts establish that Google did track  
22  
23  
24

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25 <sup>10</sup> P10's references to AdSense, Google Groups and gghpt.com servers have no  
26 bearing on Google's enforcement of its Blogger repeat infringer policy, and were not  
27 the subject of any valid P10 notices. *CCBill*, 488 F.3d 1116-17; *see Section II.A.2,*  
28 *infra.*

1 and terminate repeat infringers in response to all intelligible portions of P10's  
2 notices.<sup>11</sup> Poovala Dec., Ex. KK, at 1531-1535; Zada Dec., Ex. 45, at 3.

3 Because there is no genuine dispute regarding material facts which establish  
4 that Google meets the threshold conditions of eligibility with respect to its Blogger  
5 service, Google is entitled to seek safe harbor under the DMCA.

6 **II. P10 HAS FAILED TO RAISE A TRIABLE ISSUE REGARDING**  
7 **GOOGLE'S ENTITLEMENT TO SAFE HARBOR UNDER § 512(C).**

8 Nowhere in its opposition materials does P10 contend that Google failed to  
9 expeditiously process a single Blogger URL identified in any of P10's Group B  
10 Notices.<sup>12</sup> See Zada Dec. ¶¶ 8, 41-51, 60-61 Exs. 1, 28-35, 45, 9; Chou Dec. ¶¶ 8-11  
11 (citing only examples of infringing material on Blogger from P10's Group C Notices  
12 as having not been taken down). Thus, even assuming the Group B Notices were  
13 DMCA-compliant (which they were not), Google is entitled to safe harbor on the  
14 Group B Notice claims for its Blogger service.

15 As for the Group C Notices, they were hopelessly defective – as is aptly  
16 demonstrated by P10's failure even to submit them to this Court for examination.<sup>13</sup>  
17 As P10 concedes, the Group C Notices were not directed to Blogger, and even if they  
18 were, they failed to confer notice of any infringement (on Blogger or otherwise). But  
19

---

20 <sup>11</sup> Likewise, P10's submission of several declarations by other DMCA complainants  
21 is irrelevant here, since (among other reasons) none of these declarations reference  
22 Blogger DMCA notices in any way. See also Evidentiary Objections.

23 <sup>12</sup> P10 does not claim that Blogger is implicated in its Group A Notices, nor did  
24 Google own Blogger when the Group A Notices allegedly were sent.

25 <sup>13</sup> Instead, P10 submitted purported "excerpts" of certain of its Group C Notices –  
26 for the obvious reason that it would be an impossible task to try to direct the Court to  
27 where in its Group C notices a particular infringement might be found. See Zada  
28 Dec. ¶¶ 9, 22, 55. Google has submitted complete copies of the Group C Notices as  
they were received by Google, so the Court can examine them for itself. The validity  
of the Group C Notices must be evaluated in the format in which they were sent to  
Google – not in some cherry-picked, excerpted manner. See Evidentiary Objections.

1 in any event, Google processed them to the fullest extent possible given the  
2 circumstances, and P10 presents no contrary material facts. See Search Motion at 15;  
3 Search Reply at 18-23; Blogger Motion at 5-6.<sup>14</sup>

4 **A. P10's Defective Notices Failed To Confer Any Knowledge of**  
5 **Infringement.**

6 P10 asserts two arguments as purported triable issues regarding whether P10  
7 provided proper notice of infringements on Blogger. First, P10 argues that its notices  
8 were proper because [REDACTED] Blogger Opp. at 2.  
9 Second, P10 claims that its notices *must* have been compliant because [REDACTED]  
10 [REDACTED] *Id.* P10 is mistaken on both counts.<sup>15</sup>

11 **1. Far from following Google's Blogger DMCA instructions, P10**  
12 **intentionally disregarded them.**

13 P10's purported DMCA notices and their multiple deficiencies under the  
14 DMCA are fully discussed in Google's Search Motion, and Google's reply in support  
15 thereof. To the extent necessary, Google incorporates those discussions by reference  
16 here. Regarding Google's DMCA policy for Blogger specifically, P10's own brief  
17 refutes its first argument that its notices must be compliant because it simply  
18 followed Google's published Blogger DMCA instructions. In fact, P10 proudly  
19 *admits* that it did not follow Google's published Blogger instructions and that [REDACTED]  
20 [REDACTED] (as Google's  
21  
22

23 <sup>14</sup> The general failure of P10's Group C notices to identify the infringed work or the  
24 location of any infringing material, and the impermissible burden they placed on  
25 Google as a service provider, is described in detail in Google's Search Motion (and  
incorporated herein by reference).

26 <sup>15</sup> Again, because P10 has proffered no evidence in opposition regarding Google's  
27 expeditious processing of the Group B Notices, these arguments pertain only to the  
28 Group C Notices, and warrant safe harbor regarding all Group C Notice claims.

1 instructions request),<sup>16</sup> and concedes that it did not send a single notice to the address  
2 or fax number designated in those instructions. *See* Blogger Opp. at 7-8, Blogger  
3 Consol. Statement ¶ 17. P10's intransigence continued even after it amended its  
4 complaint in the summer of 2008 to specifically add Blogger-related claims. *See*  
5 Blogger Opp. at 9:5-6 [REDACTED]  
6 [REDACTED] referring to the Group C Notices).  
7 P10's lack of cooperation violates the letter and spirit of the DMCA. *See UMG*  
8 *Recordings*, 620 F. Supp. 2d at 1089-91 (describing cooperative process).

9 P10 asserts a variety of excuses for failing to follow Google's instructions, but  
10 none of them matter.<sup>17</sup> Google's published DMCA instructions apply to all  
11 complainants, and P10's refusal to follow them dooms its Blogger copyright claims  
12 under the DMCA. The Court need look no further to find that P10's purported  
13 notices conferred no "knowledge" of infringement, and to grant Google safe harbor  
14 for P10's Blogger-related copyright claims. *Hendrickson*, 165 F. Supp. 2d at 1092  
15 (no duty to act in response to insufficient notices to be eligible for safe harbor under §  
16 512(c)); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1107 (W.D. Wash.  
17 2004) ("[Plaintiff's] decision to forego the DMCA notice provisions ... stripped it of  
18  
19  
20

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21 <sup>16</sup> [REDACTED]  
22 [REDACTED]. Zada Dec. ¶ 50.

23 <sup>17</sup> P10 claims that images on blogger.com [REDACTED]  
24 Blogger Opp. at 14. This is incorrect. *See* Sec. I.B.1, *supra*.

25 P10 further urges Google does not need a post URL, because different web pages  
26 display the same image, and Google removed other types of URLs in the past.  
27 Blogger Opp. at 14. This too is incorrect. Again, the fact that several web pages can  
28 display the same posted image is *why* Google needs a post URL to properly remove  
infringing material. Providing the post URL allows Google to remove any images  
displayed at that post, which effectively prevents those images from being displayed  
on other web pages too. Poovala Dec. ¶¶ 30, 34; Rebuttal Poovala Dec. ¶ 17.  
(footnote continued)



1 the most powerful evidence of a service provider's knowledge – actual notice of  
2 infringement from the copyright holder.”).<sup>18</sup>

3           **2. Evidence of good-faith processing may not be used to render**  
4           **DMCA-compliant an otherwise defective notice.**

5           P10 next claims that because Google did remove some material on Blogger in  
6 response to P10's notices, all of its notices must be DMCA-compliant. *See* Blogger  
7 Opp. at 2. As discussed more fully in the Search Motion at 15-16 and Search Reply  
8 at 11-15, however, that a service provider may have done more than what was  
9 required in an attempt to process a defective DMCA notice does not constitute an  
10 admission that the notice in question was DMCA-compliant. *See Hendrickson v.*  
11 *eBay, Inc.*, 165 F. Supp. 2d 1082, 1092 (C.D. Cal. 2001) (finding that eBay's  
12 removal of a listing “out of an abundance of caution” did not alter the fact that the  
13 plaintiff had failed to identify the location of the infringing material under the  
14 DMCA).<sup>19</sup> Google cannot lose safe harbor for its good-faith efforts to process as  
15 much of P10's defective notices as could be discerned. A contrary holding would  
16

17  
18 P10 additionally argues that Google's Blogger instructions are inconsistent with its  
19 Web Search instructions. Of course they are different– they concern different  
20 services with different DMCA removal processes requiring different information.

21 <sup>18</sup> P10 claims that it submitted its Group B Notices containing Blogger URLs  
22 according to Google's Web Search instructions. This is incorrect. *See* Search Motion  
23 at 15-16; Search Reply at 11-15. It is also irrelevant to P10's attempts to defeat safe  
24 harbor, because P10 only proffers purported evidence that Google did not  
25 expeditiously process Blogger URLs in its Group C notices. *See* Section I.B.2, *supra*.  
26 P10 admits that [REDACTED] notices (Blogger  
27 Opp. at 2), which were hopelessly defective for the reasons discussed in Google  
28 Search Motion papers.

29 <sup>19</sup> P10's claims that Yahoo! supposedly was able to process [REDACTED] notices and  
30 that an Alexa deponent thinks [REDACTED] notices  
31 likewise are irrelevant to determining the sufficiency of P10's notices to Google. *See*  
32 Evidentiary Objections. Moreover, that these companies might also have gone  
33 beyond what the DMCA requires has no bearing on the sufficiency of P10's notices.  
34

1 effectively punish service providers like Google for making any attempts to process a  
2 notice once defects in that notice are identified. *See* H.R. Rep. 105-551(II), at 54  
3 (Kassabian Dec., Ex. E) (stating that the limitation on liability set for in 512(c) will  
4 not be lost from a notice “that does not comply with the notification provisions of  
5 [512(c)(3)]”). Google’s efforts do not transform a defective notice into a compliant  
6 one, and a defective notice does not confer knowledge of infringement.

7           **3. P10’s linking allegations have no bearing on Blogger safe**  
8           **harbor.**

9           P10 also argues that Google does not address its claims that Google is [REDACTED]  
10 [REDACTED] *See* Blogger Opp. at 16-17. P10’s opposition  
11 does not identify a single DMCA-compliant notice referencing rapidshare.  
12 Moreover, this is not a hosting issue; it is a linking issue covered by the Search  
13 Motion.<sup>20</sup> There is no dispute that Google does not host rapidshare content. *See*  
14 Blogger Opp. at 17. P10’s claims regarding rapidshare.com are irrelevant to Blogger  
15 safe harbor.

16           **4. P10’s reference to Google Groups and ggph.com are**  
17           **irrelevant too, having never been pleaded nor the subject of a**  
18           **valid DMCA Notice.**

19           Finally, P10 claims that Google’s motion ignores alleged infringements on  
20 ggph.com and Google Groups. *See* Blogger Opp. at 17-18. P10 has never raised the  
21 \_\_\_\_\_

22 <sup>20</sup> P10’s argument that Google does not address the claimed hosting of websites that  
23 display passwords to perfect10.com also is incorrect. First, P10 has not identified any  
24 DMCA-compliant notices complaining of a Google-hosted site displaying P10  
25 Blogger URLs [REDACTED]. *See* Poovala Dec. ¶ 79. Finally,  
26 because passwords are not copyrightable, this too is a linking issue, not a hosting  
27 issue. *See* Search Motion and Search Reply. *See* 37 C.F.R. § 202.1 (2004) (“words  
28 and short phrases such as names, titles, and slogans” are “not subject to copyright”);  
*Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276, 286 (3d Cir. 2004) (same).

1 issue of Google Groups or ggpht.com before. Neither is included in the operative  
2 complaint. Nor does P10 point to a single DMCA-compliant notice directed to  
3 Google Groups or ggpht.com. *See* Zada Dec. ¶¶ 9, 52, Exs. 2, 36. Claims not  
4 properly before this Court cannot defeat Google’s summary judgment motion for its  
5 Blogger service.

6 **B. Google Expediently Processed P10’s Defective Notices**

7 Notwithstanding P10’s admitted failure to (1) mention Blogger in its notices,  
8 (2) follow Google’s DMCA instructions for Blogger, or (3) send its notices to the  
9 address or fax number provided for Blogger complaints, Google expediently  
10 processed P10’s claimed notices to the fullest extent possible. P10 concedes this  
11 point with respect to its Group B Notices. *See* Section II, *supra*. As for its Group C  
12 Notices, none of P10’s various arguments in opposition create an issue of material  
13 fact.<sup>21</sup>

14 P10 claims that Google’s processing of certain Blogger URLs in its Group C  
15 Notices was not expeditious enough. Blogger Opp. at 3. To the contrary, as  
16 explained in Google’s moving papers, its processing efforts were expeditious in light  
17 of the circumstances—which included massively defective notices, no cooperation  
18 whatsoever from P10, and a pending lawsuit. *See* Poovala Dec. ¶¶ 40-94. P10 may  
19 not fault Google for any processing delays that P10 caused. *See Hendrickson*, 165 F.  
20 Supp. 2d at 1092 (no need to process defective notices); *Perfect 10, Inc. v.*  
21 *Amazon.com, Inc.*, 2009 WL 1334364, at \*5 (C.D. Cal. May 12, 2009).

22  
23  
24  
25  
26 <sup>21</sup> As explained in Google’s Search Motion and Reply, P10 has identified no  
27 material factual disputes regarding Google’s expeditious processing of the Group C  
28 Notices. Google incorporates those arguments here by reference.

1 **III. GOOGLE IS NOT REQUIRED TO POLICE ITS BLOGGER SERVERS**  
2 **FOR INFRINGEMENTS.**

3 P10 next contends that even where Google took down a Blogger site that  
4 displayed a particular image in response to P10's notices, Google failed to remove all  
5 ██████████ (i.e., identical) full-size P10 images that might reside elsewhere on its  
6 servers. Blogger Opp. at 4. P10's refrain that Google should affirmatively police the  
7 Internet to find all copies of P10's images, presume that they are infringing, and take  
8 them down—without any notice from P10 – is contrary to law. The DMCA does not  
9 require service providers to police the Internet for copyright infringement (*see* Search  
10 Motion at 3-5; 17 U.S.C. 512(m); *CCBill*, 488 F.3d at 1112), and the fact that Google  
11 might host an infringing website does not affect this principle. Under the DMCA, it  
12 is P10's burden to identify all infringing URLs in a valid notice. *See CCBill*, 488  
13 F.3d at 1113 (“The DMCA notification procedures place the burden of policing  
14 copyright infringement – identifying the potentially infringing material and  
15 adequately documenting infringement – squarely on the owners of the copyright.”).<sup>22</sup>

16 **IV. GOOGLE DOES NOT HAVE THE RIGHT AND ABILITY TO**  
17 **CONTROL NOR DOES IT RECEIVE A FINANCIAL BENEFIT FROM**  
18 **INFRINGING ACTIVITY.**

19 P10 does not contest that if Google does not have the right and ability to  
20 control the alleged infringing activity on Blogger, the Court need not decide whether  
21 Google receives a financial benefit directly attributable thereto. *See* Blogger Opp. at  
22

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23 <sup>22</sup> In addition to the DMCA's prohibitions, in this case there have been instances  
24 where P10 complained of alleged infringement pertaining to a Blogger URL that in  
25 fact was a licensed use of that P10 image. *See* Poovala Dec. Ex. NN (P10  
26 counternotification identifying elmanaba.blogspot.com and joesbabes.blogspot.com  
27 as licensed users.); *see also* Poovala Dec. ¶ 15 (“Google has no way of knowing what  
28 links a copyright owner regards to be infringing, in contrast to those uses that are  
licensed....”).

1 19:6-18.<sup>23</sup> Instead, P10 insists that Google has the right and ability to control  
2 infringement by Blogger users. P10 misses the mark.

3 **A. Google Does Not Have the Right And Ability To Control Alleged**  
4 **Infringing Activity Of Blogger Account Holders**

5 P10's only "evidence" supporting its claim that Google has the right and ability  
6 to control infringing activity on Blogger is that such infringement is on Google's  
7 servers, and that Google can take it down after it has been uploaded by Blogger  
8 users. Blogger Opp. at 19. This is insufficient as a matter of law to establish the  
9 right and ability to control required by § 512(c)(1)(2)B). *See Io Group*, 586 F. Supp.  
10 2d at 1152-53 (holding that a service provider's capacity to remove materials posted  
11 on its website or stored on its system does *not* equate to the right and ability to  
12 control infringing activity); *Corbis*, 351 F. Supp. 2d at 1110 (same); *Hendrickson*,  
13 165 F. Supp. 2d at 1093-94 (same). There is no triable issue here.

14 **B. Google Does Not Receive A Financial Benefit Directly Attributable**  
15 **To Alleged Infringing Activity On Blogger**

16 As noted, because P10 has presented no evidence to suggest that Google has  
17 the right and ability to control the alleged infringing activity, there is no need to  
18 address whether Google receives a direct financial benefit from that activity. *Visa*,  
19 494 F. 3d at 806. Nonetheless, Google does not receive such a benefit.

20 P10 does not address – and thus concedes – that a service provider does not  
21 receive a financial benefit directly attributable to the claimed infringement “where the  
22 infringer makes the same kind of payment as non-infringing users of the provider’s  
23 service....” H.R. Rep. 105-551(II), at 54 (Kassabian Dec., Ex. E). P10 also does not  
24 dispute that infringing and non-infringing Blogger users pay the same thing – nothing  
25

26 <sup>23</sup> See 17 U.S.C. § 512(c)(1)(B) and (d)(2); *Perfect 10, Inc. v. Visa International*  
27 *Serv. Assn.*, 494 F.3d 788, 806 (9th Cir. 2007). “Both elements must be met for the  
28 safe harbor to be denied.” *Io Group*, 586 F. Supp. 2d at 1150 (emphasis added).

1 – to use Blogger. Thus, there is no dispute that Google does not receive a financial  
2 benefit directly attributable to the alleged infringing activity, and P10 has failed to  
3 establish any material facts to the contrary.

4 First, the fact that some Bloggers display advertising using the AdSense  
5 service—and are thus AdSense account holders—is not enough. P10 puts forward  
6 no evidence suggesting that clicks on AdSense advertisements located near infringing  
7 material (if any) were a direct result of the display of the alleged infringing image.  
8 Second, Bloggers who use AdSense, like any other AdSense user, are not financially  
9 incentivized to display infringing material. To the contrary, once Google is provided  
10 with notice of infringing material, the ability to generate revenue on that page is  
11 eliminated immediately. *See* Poovala Dec. ¶ 37. There simply is no direct link  
12 between the revenue Google receives and any infringing use that would suggest that  
13 Blogger users are encouraged to infringe, for Google’s profit. To the contrary—the  
14 Blogger terms of service (and the AdSense terms of service) expressly prohibit and  
15 punish any such infringements. *See id.* ¶27 & Ex. G.

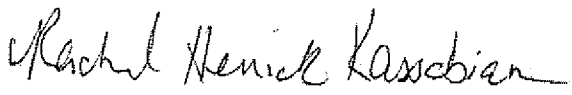
16 **Conclusion**

17 P10 has presented no material facts left for trial regarding Google’s entitlement  
18 to safe harbor under Section 512(c) regarding P10’s Blogger-related copyright  
19 infringement claims. Google respectfully requests that the Court grant it summary  
20 judgment on this basis.

21 DATED: September 8, 2009

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23  
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