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17 UNITED STATES DISTRICT COURT
18 CENTRAL DISTRICT OF CALIFORNIA

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

21 Plaintiff,

22 vs.

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

25 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(d) FOR WEB AND IMAGE
SEARCH**

26 AND COUNTERCLAIM

27 PERFECT 10, INC., a California
28 corporation,

Plaintiff,

vs.

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

Defendants.

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

Hon. A. Howard Matz

Date: None (taken under submission)
Time: None
Crtrm.: 14

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

PUBLIC REDACTED

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1 Preliminary Statement

2 There are no material facts for trial concerning Google's entitlement to safe
3 harbor under 17 U.S.C. § 512(d) regarding Perfect 10's ("P10's") claims that
4 Google links to third-party websites displaying allegedly infringing material in its
5 Web and Image Search results. P10 opposes Google's motion for summary
6 judgment, not by introducing probative evidence of material facts for trial, but by
7 belaboring issues irrelevant to the outcome of the safe harbor issue.

8 At the heart of P10's opposition are three theories, each of which illustrates
9 P10's fundamental misapprehension of the DMCA's purpose and requirements.
10 First, P10 argues that Google's expeditious processing of P10's DMCA notices is an
11 admission of their sufficiency. Not so. Google's processing efforts establish only
12 that Google went above and beyond what the DMCA requires, and the law is clear
13 that such processing efforts may not be held against Google as evidence of the
14 sufficiency of those notices. Second, P10 insists that Google must cut *all* links to
15 *any* entire website P10 has *ever* accused of infringement, even where no infringing
16 material is displayed at those links. The DMCA contains no such requirement.
17 Third, P10 urges that Google must affirmatively police the World Wide Web for
18 copyright infringement if it wants to claim safe harbor. Congress and the Ninth
19 Circuit have rejected that proposition. Because P10's safe harbor theories are
20 legally untenable and its purported disputes of fact are irrelevant, Google should be
21 granted summary judgment of safe harbor for its Search services.

22 Argument

23 **I. P10 RAISES NO MATERIAL FACTS DISPUTING THAT GOOGLE**
24 **MEETS THE DMCA'S THRESHOLD REQUIREMENTS.**

25 To be eligible for any DMCA safe harbor, a party must meet three threshold
26 conditions. First, the party must be a service provider. Second, it must have
27 adopted and reasonably implemented a repeat infringer policy. Third, the party
28 must not interfere with "standard technical measures" used by copyright owners to

1 identify or protect their works. 17 U.S.C. §§ 512(k), 512(i)(1). P10 does not
2 dispute that Google satisfies the first and third elements. For the second, regarding
3 Google's repeat infringer policy, P10's purported dispute raises no triable issue.¹

4 **A. P10 does not dispute that Google is a service provider.**

5 There is no dispute that Google is a "service provider" as defined by the
6 DMCA. See Google's Consolidated Separate Statement of Undisputed Facts in
7 Support of Google's 512(d) Motion ("Search Consol. Statement") ¶ 36; 17 U.S.C. §
8 512(k)(1)(B); *Field v. Google*, 412 F. Supp. 2d 1106, 1125 (D. Nev. 2006).

9 **B. P10 does not dispute that Google does not interfere with standard**
10 **technical measures.**

11 It is similarly undisputed that Google does not interfere with any known
12 "standard technical measures" that are used by copyright owners. 17 U.S.C.
13 § 512(i)(1)(B); Search Consol. Statement ¶ 3;² Declaration of Paul Haahr in
14 Support of Google's Motions for Summary Judgment ("Haahr Dec.") ¶ 18.

15 **C. P10 offers no material facts contradicting Google's showing that it**
16 **has an appropriate repeat infringer policy.**

17 **1. P10 cannot create issues of fact by stating falsehoods and**
18 **recruiting self-serving testimonials.**

19 P10 makes a number of false factual assertions in its improper Statement of
20 Genuine Issues but its transparent attempt to create issues where none exist is
21 unavailing.³ For example:

22
23 ¹ P10 does not dispute the relevant legal standard in Google's moving papers.

24 ² P10's opposition and Statement of Genuine Issues ("SGI") are replete with
25 misrepresentations and unsupported conjecture. Because most of these factual
26 inaccuracies have no bearing on the material facts, Google addresses them in its
Consolidated Statement of Undisputed Facts filed with this Reply.

27 ³ "A conclusory, self-serving affidavit, lacking detailed facts and any
28 supporting evidence, is insufficient to create a genuine issue of material fact." *FTC*
v. Publ'g Clearing House, 104 F.3d 1168, 1171 (9th Cir.1997). Further, "the mere
(footnote continued)

1 (1) P10 asserts (again) that Google has not produced a [REDACTED]
2 [REDACTED]
3 Search Consol. Statement ¶ 4. **False:** Google has produced voluminous documents
4 tracking Google's processing of P10's notifications of infringement. *See*
5 Declaration of Shantal Rands Poovala in Support of Google's 512(d) Motion
6 ("Poovala Dec.") at ¶¶ 14, 19, 37-38 & Exs. J, K, II; Rebuttal Declaration of Rachel
7 Herrick Kassabian ("Rebuttal Kassabian Dec.") ¶ 2. Indeed, P10 cites to these
8 tracking spreadsheets repeatedly in its opposition papers. *See, e.g.*, P10's
9 Opposition to Google's 512(d) Motion ("Search Opp.") at 22-23.

10 (2) P10 suggests that Google has no [REDACTED]
11 Search Consol. Statement ¶ 4. **False:** At all relevant times, Google has had a
12 process and procedure for handling DMCA notices. *See, e.g.*, Poovala Dec. ¶ 3-39;
13 Rebuttal Declaration of Shantal Rands Poovala ("Rebuttal Poovala Dec.") ¶ 8;
14 Rebuttal Kassabian Dec. ¶ 2.

15 (3) P10 claims Google did not process DMCA notices prior to [REDACTED]
16 [REDACTED]. Search Consol. Statement ¶ 4. **False:** Google did process DMCA notices
17 before [REDACTED]. *See* Rebuttal Poovala Dec. ¶ 8; Rebuttal Kassabian Dec. ¶ 2.

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

22 (5) P10 claims that Google has not processed P10's purported DMCA
23 notices. Search Consol. Statement ¶ 4. **False:** Google has gone beyond the legal
24 requirements to process P10's defective notices. *See* Poovala Dec. ¶¶ 75-100.

25 _____
26 existence of a scintilla of evidence in support of the non-moving party's position is
27 not sufficient." *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir.
28 1995); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

1 In addition to these demonstrably erroneous claims, P10 offers declarations
2 from four individuals—Eden, Schwartz, Newton, and Hoffman—who claim that
3 Google did not process their DMCA notices to their satisfaction as purported
4 evidence that Google does not have an appropriate repeat infringer policy. This
5 evidence too does not create an issue of fact for several reasons.

6 First, even assuming these declarations were not objectionable (they are) and
7 further assuming that they were probative of some material issue before the Court
8 (they are not), *at the very most*, these declarations suggest that four individuals are
9 unhappy with Google's DMCA processing. This does not create a triable issue of
10 material fact regarding Google's qualification for safe harbor. *Anderson*, 477 U.S.
11 at 250. Second, this testimony is inadmissible for the many reasons cited in
12 Google's evidentiary objections (filed herewith), not the least of which is the fact
13 that this case has been pending for almost five years and P10 has never identified
14 these individuals in its Rule 26 disclosures. Rebuttal Kassabian Dec. ¶ 6; *Guang*
15 *Dong Light Headgear Factory Co., Ltd. v. ACIIIntern., Inc.*, 2008 WL 53665, *1 (D.
16 Kan. 2008) (striking summary judgment affidavit because witness identity and
17 testimony not properly disclosed during discovery). Third, Google's records
18 conclusively demonstrate that Google expeditiously processed these declarants'
19 DMCA notices and suppressed hundreds of URLs identified therein from Google's
20 Search results. *See* Rebuttal Poovala Dec. ¶¶ 18-21; *see also* Haahr Dec. Ex. 1.⁴
21 Fourth, some of the declarants made directly contradictory contemporaneous
22 statements to Google, *thanking* Google for its help in processing their DMCA
23 notices, and never indicating that Google had not fully processed them. Rebuttal
24 Poovala Dec. Ex. D ([REDACTED])

25 _____
26 ⁴ The Eden Declaration is irrelevant for the additional reason that it does not
27 state that the alleged infringing material referenced therein was ever included in a
28 DMCA notice to Google. *See* Eden Dec. ¶ 7.

1 [REDACTED]. This renders P10's evidence unavailing
2 for purposes of opposing Google's DMCA Motions. *See Kennedy v. Allied Mutual*
3 *Ins. Co.*, 952 F.2d 262 (9th Cir. 2001) (party cannot avoid summary judgment by
4 submitting a "sham affidavit" contradicting prior testimony.)⁵ P10's citation to
5 these self-serving, previously undisclosed testimonials does not create an issue for
6 trial.⁶

7 **2. The material facts establish Google has an appropriate repeat**
8 **infringer policy.**

9 P10 does not dispute the *material* facts. Nowhere does P10's opposition
10 dispute Google's showing that Web and Image Search have no account holders or
11 subscribers, and thus, Google need not and cannot have a repeat infringer policy for
12 those services. *See* 512 U.S.C. § 512(i)(1)(A) (requiring "a policy that provides for
13 the termination in appropriate circumstances of *subscribers and account holders* of
14 the service provider's system or network who are repeat infringers") (emphasis
15 added).⁷ Even if enforcement of a repeat infringer policy were relevant to Google's
16

17 ⁵ P10's failure to disclose these witnesses pursuant to Rule 26 denied Google
18 the opportunity to depose them regarding Google's extensive processing of the
19 witnesses' notices, and their written acknowledgements of same, among other
20 things. P10's discovery failure should not work as an end-run around the sham
21 affidavit rule by permitting the introduction of affidavits that would not hold up in
22 deposition.

22 ⁶ P10's attempt to create a "case within a case" should be rejected. This suit is
23 not about whether Google processed the DMCA notices of Eden, Schwartz, Newton,
24 and Hoffman—it is about P10's DMCA notices. These declarations are a sideshow
25 and should be disregarded as such. *Unit Drilling Co. v. Enron Oil & Gas Co.*, 108
26 F.3d 1186, 1193 (10th Cir. 1997) (affirming district court exclusion of evidence that
27 threatened a "trial within a trial"); *Jefferson v. Vickers, Inc.*, 102 F.3d 960, 963 (8th
28 Cir. 1996) (same).

26 ⁷ Although P10 purports to dispute this in its Statement of Genuine Issues (*see*
27 *Search Consol. Statement* at ¶ 23), it cites no facts or law supporting its position.
28 Mere allegations do not create a factual dispute. *Nelson v. Pima Community*
(footnote continued)

1 Search Motion, the sole paragraph P10's opposition devotes to this issue (Search
2 Opp. at 4:6-17) does not contest that Google: (1) has a working notification system
3 for Search; (2) has a procedure for dealing with DMCA-compliant notices and; (3)
4 does not actively prevent copyright owners from collecting the information needed
5 to issue a DMCA notice.⁸ See Search Motion Section IV; Poovala Dec. ¶¶ 5, 39,
6 Exs. A and B; Declaration of Rachel Herrick Kassabian in Support of Google's
7 Motions for Summary Judgment ("Kassabian Dec.") Ex G; *Perfect 10, Inc. v.*
8 *CCBill LLC*, 488 F.3d 1102, 1111 (9th Cir. 2007); Search Consol. Statement at ¶¶4,
9 5, 9, 27. The Court need look no further to find that Google has adopted and
10 reasonably implemented a repeat infringer policy.⁹

11
12
13 *College*, 83 F.3d 1075, 1081-82 (9th Cir. 1996). Further, while other Google
14 services do have account holders or subscribers, those services are irrelevant to
15 Google's Search Motion at issue here. Cf. *CCBill*, 488 F.3d 1116-17 (qualification
16 for safe harbor is specific to the function of each service provided).

17 ⁸ P10 claims that Google instructs copyright owners to [REDACTED] URLs
18 from search results into DMCA notices, but then places ellipses in those URLs,
19 resulting in errors. Search Consol. Statement ¶ 27. This is false. Google's
20 instructions do not instruct complainants to cut and paste incomplete URLs. See
21 Poovala Dec. Ex. B (current Web Search DMCA Instructions); Zada Dec. Ex. 12
22 (earlier version of Web Search Instructions). Nor could this possibly constitute
23 "active prevention," since users like P10 may click on the URL to see it in full.

24 ⁹ Instead of contesting the relevant and probative facts, P10 quarrels with the
25 format of Google's Blogger, AdSense and Search DMCA Logs (the same Logs P10
26 elsewhere claims do not exist), asserting that they are not [REDACTED]
27 Search Opp. at 22. Even if P10's attacks on Google's Blogger and AdSense DMCA
28 tracking spreadsheets had any merit (which they do not), they are irrelevant to
Google's qualification for safe harbor regarding its Search services. See fn. 7,
supra. As for P10's quibbles regarding the format of Google's tracking and record-
keeping for Search (Search Opp. at 4, 5, and 22), none raise a triable issue. First,
P10 complains that the Search spreadsheets Google used to track P10's notices do
not list all of the URLs P10 claims to have identified. This is irrelevant – Google
need only show that it has a procedure for processing *DMCA-compliant* notices.
CCBill, 488 F.3d at 1113. Google has made that showing. Second, P10 decries
(footnote continued)

1 **II. P10 PRESENTS NO MATERIAL FACTS DISPUTING GOOGLE'S**
2 **ENTITLEMENT TO SAFE HARBOR UNDER SECTION 512(D)**

3 Despite P10's scattershot efforts to concoct a factual dispute regarding each
4 group of notices, it has failed to do so.

5 First, regarding the Group A Notices from 2001, P10 attempts to revive these
6 previously-abandoned claims, blaming a [REDACTED] See Cache Opp. at 4-6. P10's
7 refusal to answer any discovery requests regarding the Group A Notices can hardly
8 be chalked up to a typo, and moreover, they are time-barred, having been sent more
9 than three years prior to P10's filing of this lawsuit (and are defective as well).

10 Second, regarding the Group B Notices, P10 essentially concedes that Google
11 processed them, complaining only that it wasn't done fast enough for P10's liking.
12 See Cache Opp. at 6 ([REDACTED]). P10's opinions
13 on the subject are irrelevant, however, and its claims of delay are unfounded. These
14 notices were processed expeditiously in light of the circumstances, including P10's
15 complete lack of cooperation in the notice-and-takedown process.

16 Third, regarding the Group C Notices, P10 claims that Google's herculean
17 efforts to process some of them constitute an admission that the entirety of the
18 Group C Notices were DMCA-complaint. See Cache Opp. at 10-11; Search Opp. at
19 2, 17. Not so. The DMCA does not punish service providers for their attempts to
20 process otherwise defective notices. There is no triable issue regarding any of P10's
21 notices.

22
23
24 Google's various tracking mechanisms for Search as [REDACTED] dating back to [REDACTED]
25 [REDACTED]. Search Opp. at 23:5-6. This too is irrelevant. The DMCA imposes no
26 particular record retention period. Google's proffer of DMCA tracking documents
27 dating back more than seven years – and more than two and a half years before P10
28 filed suit – is ample evidence to meet Google's burden of demonstrating that it has
and enforces the necessary DMCA policies. P10 cites no contrary authority.

1 **A. P10's defective notices failed to confer knowledge of infringement.**

2 P10 argues that its notices cannot be defective because (1) Google processed
3 them, (2) P10's provision of "notice" regarding infringements to which Google does
4 not even link was proper, and (3) they followed Google's instructions. All of these
5 arguments fail. P10 also tries in vain to revive its claims based on the Group A
6 Notices. Because P10 refused to provide discovery on those claims, and because
7 they are time-barred in any event, they are not relevant here.

8 **1. Evidence of good-faith processing may not be used to render**
9 **DMCA-compliant an otherwise defective notice.**

10 P10 first claims that because Google did process various portions of P10's
11 Group B and C Notices, it follows that *all* of its notices must be DMCA-compliant.
12 *See* Search Opp. at 2-3. P10 is wrong. That a service provider may have done more
13 than what was required in an attempt to process a defective DMCA notice does not
14 constitute an admission that the notice in question was DMCA-compliant. *See*
15 *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1092 (C.D. Cal. 2001) (eBay's
16 removal of a listing "out of an abundance of caution" did not alter the fact that
17 the plaintiff had failed to identify the location of the infringing material under
18 the DMCA).¹⁰ Google cannot lose safe harbor for its good-faith efforts to process
19 as much of P10's defective notices as could be discerned. A contrary holding would
20 effectively punish service providers like Google for making any attempts to process
21 a notice once defects in that notice are identified. P10 cites no authority for such a
22 conclusion. Thus, that Google processed some of P10's notices does not create an

23
24 ¹⁰ P10's claims that Yahoo! supposedly was able to process [REDACTED] notices
25 and that an Alexa deponent thinks [REDACTED]
26 notices likewise are irrelevant to determining the sufficiency of P10's notices to
27 Google. *See* Evidentiary Objections. Moreover, that these companies might also
28 have gone beyond what the DMCA requires has no bearing on the sufficiency of
P10's notices.

1 issue of fact as to whether P10's notices adequately conferred knowledge of
2 infringement.

3 2. P10's provision of "notice" of infringements not linked to by
4 Google does not comply with the DMCA.

5 To provide sufficient notice of infringement under Section 512(d), DMCA
6 complainants must identify "the *reference or link, to material or activity claimed to*
7 *be infringing*" and information reasonably sufficient to permit the service provider
8 to locate that reference or link. 17 U.S.C. § 512(d)(3) (emphasis added). This
9 means a URL, which is the location or address of content on the Internet. Haahr
10 Dec. ¶¶ 4, 10. Thus, P10 must provide the specific location of the infringing
11 material. It follows that P10's provision of entire website domain names as the
12 "link" in question does not qualify, because P10 is not complaining of any material
13 found at that link, but rather, of material found at other links somewhere within that
14 website, *which may not even be in Google's index*. Of course, without such
15 reference or link, there is nothing to remove, and no duty on the part of the service
16 provider to do anything. 17 U.S.C. § 512(d)(3).¹¹

17 P10 nevertheless insists that any reference to a website—but not the specific
18 web page or image URLs linking to infringing content—is sufficient to confer
19 notice of infringement. Search Opp. at 20-22 (referencing Usenet and paysites).
20 P10 is wrong on both legal and policy grounds. P10's interpretation of the DMCA
21 contravenes its plain terms, which require identification of "the reference or link, to
22

23 ¹¹ It is axiomatic that infringement must actually be found in a service
24 provider's index in order for the service provider to be obliged and able to remove it
25 in response to a valid DMCA notice. Plainly, a service provider cannot remove
26 something that is not there in the first place. But even if the material is 'somewhere'
27 in the index, the DMCA requires that P10 provide the specific link. Indeed, it is
28 difficult to imagine how P10 could have satisfied the DMCA's certification
requirements without first identifying the specific links.

1 material or activity claimed to be infringing” (see 17 U.S.C. § 512(d)(3)). P10 also
2 fails to cite any authority in support of its draconian takedown theory, and the one
3 case it does mention, *Arista Records LLC v. Usenet.com, Inc.*, 2009 WL 1873589
4 (S.D.N.Y. 2009), does not assist P10. See Search Opp. at 20. There, the court
5 sanctioned the defendant for discovery misconduct, and precluded it from asserting
6 the affirmative defense of DMCA safe harbor on that basis. *Arista*, 2009 WL
7 1873589, *12. *Arista* does not support—nor even address—the notion that service
8 providers must remove links to entire websites, where that website’s content is not
9 indexed or linked to by the service provider.

10 In addition to being wrong as a matter of law, P10’s takedown theory is at
11 odds with the spirit of the DMCA. Were P10’s view adopted, all search engines
12 would be held responsible for virtually any infringement anywhere on the Internet,
13 regardless of whether a link to that infringement is found in the search engines’
14 index, so long as the home page of the website in question appears in their search
15 results. This takedown theory imposes the very danger that Congress sought to
16 avoid in enacting the DMCA, because “if America’s service providers are subject to
17 litigation for the acts of third parties at the drop of a hat, they will lack the incentive
18 to provide quick and sufficient access to the Internet.” 144 Cong. Rec. 108, H7095
19 (1998) (statement of Rep. Goodlatte) (Kassabian Dec., Ex. D.) Indeed, even the
20 standards for secondary copyright infringement do not stretch that far. See e.g.,
21 *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007) (applying
22 traditional standards for secondary copyright infringement to alleged infringement
23 accessible via search engines).

24 And finally, the anticompetitive implications of P10’s “entire website”
25 takedown theory should not be overlooked. Many of the websites P10 has
26 complained of are adult entertainment paysites that P10 claims compete directly
27 with P10’s online business, perfect10.com. See, e.g., Poovala Dec. Ex. MM at
28 1737. Google does not crawl, index or link to the password-protected portions of

1 such websites. *See* Haahr Dec. ¶ 14. Nevertheless, under P10's theory, P10 could
2 accuse these competitors of infringement of even a single image somewhere behind
3 their password firewall (and not even accessible on Google), and Google would be
4 obliged to take P10's word for it and remove the entire website from its index,
5 forever. The opportunities for abuse of such a draconian takedown theory are
6 obvious. *See* Poovala Dec. Ex. MM at 1737 (counternotice complaining, "My guess
7 is that Perfect 10, Inc. is doing this to eliminate competition"). P10 may not turn the
8 DMCA's defensive safe harbor provisions into a liability weapon with which to
9 eliminate from Google's search results links to all websites that are not, in P10's
10 estimation, [REDACTED] *See* Search Opp. at 21:10; *see generally* 144 Cong. Rec.
11 108 (1998) (Kassabian Dec. Ex. D); 144 Cong. Rec. 61 (1998) (Kassabian Dec. Ex.
12 C); *CCBill*, 488 F.3d at 1111.¹² Accordingly, P10 fails to create a dispute of fact as
13 to whether its identification of sites and content to which Google does not even link
14 confers knowledge of infringement under the DMCA.¹³

15 **3. P10 admittedly did not follow – and in fact defied – Google's**
16 **DMCA notice instructions for Web and Image Search.**

17 P10 defends its Group B and C Notices by claiming that P10 simply followed
18 Google's instructions. Search Opp. at 3. Nothing could be further from the truth.
19 Indeed, elsewhere in these same briefs P10 admits it did *not* follow Google's
20

21 ¹² Of course, if P10 really believed the position it is taking here, it would be
22 suing all other search engines, including Yahoo!, for linking to the home pages of
23 these Usenet sites and paysites (which Yahoo! and others do).

24 ¹³ P10 repeatedly refers to certain sites, including Usenet sites, as affiliates of
25 Google. In the first instance, P10 presents no evidence establishing this claim.
26 Moreover, Google has no obligation to cut links or advertising relationships with
27 other sites unless and until it receives a DMCA-compliant notice identifying those
28 sites. As P10 has never submitted such a notice, and does not cite to one in its
opposition papers, Google does not have a duty under the DMCA to terminate
advertising relationships with any AdSense websites.

1 instructions, because in P10's opinion, they were unusable or unnecessary. *See*,
2 *e.g.*, Cache Opp. at 8 [REDACTED]
3 [REDACTED]).¹⁴ P10's intentional disregard for Google's DMCA instructions
4 precludes its challenge to Google's safe harbor.

5 Moreover, Google repeatedly gave P10 specific feedback, explaining how to
6 submit proper notices. Poovala Dec. ¶¶ 56-73, Exs. S-EE.¹⁵ P10 flouted those
7 instructions. *Id.* ¶ 74, Exs. L1-L48, N1-N18. For example, just one day after P10
8

9
10 ¹⁴ P10 tries to blame Google for its own inalcitrance, claiming, for example,
11 that Google kept changing its instructions with respect to whether P10 should
12 submit notices by fax or email. Zada Dec. ¶ 26, Ex. 12; Cache Opp. at 6. That is
13 incorrect. P10's May 31, 2004 notice was submitted via email, and Google's policy
14 required that DMCA notices be submitted by mail or fax. Poovala Dec. Exs. L1, S.
15 On June 1, 2004, Google responded to P10 and set forth the requirements for
16 submitting a DMCA notice, including that they be submitted by mail or fax. *Id.*, Ex.
17 S. P10 ignored Google's instructions, submitting additional notices via email on
18 June 1, June 4, and June 16. *Id.*, Exs. L2-L4, and ¶¶ 57-59. On July 15, 2004, after
19 P10 had submitted seven notices in the space of six weeks (containing well over
20 1,000 URLs in total), Google requested that P10 send an electronic soft copy list of
21 the URLs to expedite processing. *Id.*, ¶¶ 60-61. This is consistent with Google's
22 published DMCA policy for Web Search. *See* Poovala Dec. Ex. B ("If you are
23 sending a large number of URLs in one removal request, please also send an
24 electronic copy of the notice").

25 ¹⁵ One such instruction was that Google needs an image URL to fully process
26 Image Search-related DMCA complaints. [REDACTED]

27 [REDACTED] Rebuttal Brougher
28 Dec. ¶ 2. [REDACTED]

29 If, however, the
30 corresponding image URL where that image is actually stored was linked to by
31 *other* webpages, those displays would *not* be impacted. *See* Haahr Dec. ¶ 10. To
32 draw an analogy, an image URL is like the stump of a tree and the various webpage
33 URLs at which that image is displayed – which may spring up as third parties add
34 image links to their webpages – are the branches. To remove *all* webpage displays
35 of a particular image hosted at a particular image URL, one must cut down the tree
36 at the stump, not simply cut off a branch.

1 submitted its May 31, 2004 notice, Google sent P10 instructions advising that P10
2 needed to identify the copyrighted work claimed to be infringed and the exact
3 location of the allegedly infringing material. *Id.*, Ex. S. Yet, P10 consistently
4 refused to provide that information in both the Group B and Group C Notices. *Id.*,
5 Exs. L1-L48, N1-N18.¹⁶ Google also specifically told P10 that the format of Group
6 C notices was unintelligible. *Id.* ¶¶ 67-68, 70-73, Exs. Y-Z, BB-EE. Yet, P10
7 continued to send notices in that format. *Id.* ¶ 74; *see also id.* Exs. N2-N18. Google
8 similarly advised P10 that it does not crawl or index Usenet sites or password-
9 protected content, yet P10 continued to send notices identifying such entire websites
10 as infringing URLs. *Id.*, Exs. BB-EE.

11 In hopes of lending some legitimacy to its Group C Notices, which did not
12 follow Google's instructions, P10 elects *not* to provide them to the Court, but
13 instead submits miniscule, cherry-picked excerpts of them, and argues that if these
14 few-page excerpts are sufficient, then the entirety of all of its Group C Notices must
15 be DMCA-compliant. *See* Cache Opp. at 12-16; *see e.g.* Zada Dec. ¶ 9 [REDACTED]
16 [REDACTED]
17 [REDACTED]); Zada Dec. ¶ 22 [REDACTED]
18 [REDACTED]
19 [REDACTED]) (emphasis added);

21 ¹⁶ P10 makes various excuses for the defects in its Group B Notices, none of
22 which passes muster. For instance, P10 claims its notices were not impermissibly
23 repetitive, because "[REDACTED]." *See* Cache Opp. at 7.
24 This claim is belied by P10's own conduct. For example, P10 waited as little as
25 three business days before sending exact duplicate notices – without identifying
26 them as such – which forced Google to re-process them, hampering and slowing
27 Google's efforts. *See* Search Motion at 15 n.17. Moreover, Google's processing
28 spreadsheets illustrate that P10 identified duplicative URLs even *after* Google had
removed them from search results. *Compare* Poovala Dec. Ex. II, GGL50060 line
238 to GGL50060 line 20.

1 Zada Dec. ¶ 55, Ex. 40 ([REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED])

5 Even a cursory review of any one of the Group C hard drive and DVD

6 Notices demonstrates its incomprehensibility and myriad defects, however. And on

7 a practical level, it would be an impossible task for P10 to try to direct the Court to

8 *where* in its Group C Notices a particular infringement might be found – much like

9 it was an impossible task for Google to piece together the necessary information to

10 verify a claim of infringement in these notices.

11 P10 may not escape its own notices. They must be evaluated in the manner

12 and format in which they were sent to Google – that is, including the hard drives or

13 DVDs consisting of layers upon layers of electronic folders containing thousands of

14 pages of allegedly infringing material. *See* Evidentiary Objections to Zada

15 Declaration. The validity of the Group C Notice cannot be “extrapolated” from a

16 few screen shots, as P10 would have it. P10 makes no attempt to justify or validate

17 the Group C Notices in their entirety, nor could it. *See* Poovala Dec. ¶¶ 54-55, Exs.

18 P, Q, and R (exemplary screen shots of “raw image” files, multi-page screen shots,

19 and manipulated framing or in-line linking, submitted with P10’s Group C

20 Notices).¹⁷ P10’s cherry-picked examples from the Group C Notices, and P10’s

21 conclusory, self-serving statements that it followed Google’s instructions do not

22

23

24 ¹⁷ Even P10’s cherry-picked examples do not provide proper notice of

25 infringement and did not follow Google’s instructions. For example, the screen

26 shots at pages 1-3 of Exhibit 23 to the Zada Declaration do not display web page or

27 image URLs. *See* Zada Dec. Ex. 23. This is because they purport to be images

28 displayed at giganews.com, a site whose content Google does not crawl or index.

Id. ¶ 35.

1 create an issue of fact for trial as to whether the Group C Notices conferred
2 knowledge of infringement under the DMCA.

3 **4. P10 may not base its claims on the Group A Notices.**

4 Lastly, P10 attempts to revive the Group A Notice claims it abandoned many
5 months ago, contending that those claims are still actionable. Cache Opp. at 3. They
6 are not, for at least four independent reasons.

7 First, even if P10 had not waived these claims (it did) and even if they were
8 not time-barred (they are), the Group A Notices do not confer knowledge of
9 infringement. P10 selectively produced these documents in the litigation, which
10 Google has been unable to locate in its records. Rebuttal Poovala Dec. ¶ 9. Google
11 had a DMCA processing procedure in 2001¹⁸ and if all of these notices were sent as
12 P10 claims, it appears that they were not sent to the correct location at Google. *See*
13 *id.* In fact, they all indicate that they were sent by email to
14 “webmaster@google.com” – whereas Google’s designated agent form on file with
15 the Copyright office at the time listed a mailing address for sending DMCA notices
16 (which P10 did not use), an email address of info@google.com (which P10 also did
17 not use), and a fax number (which P10 did not use for 14 of the 17 Group A
18 Notices). Rebuttal Kassabian Dec., Ex. B. Thus, these communications gave
19 Google no notice of infringement.

20 Second, even if they all had been received, the Group A Notices are deficient.
21 All seventeen fail to identify which, if any, P10 works are infringed at the URLs
22

23 ¹⁸ P10 attempts to distort the meaning of a June 2001 email from Google
24 regarding Google’s inability to remove allegedly infringing URLs from its search
25 index. Search Opp. at 8. Google’s statements in that email were accurate then and
26 are accurate now. Google cannot remove allegedly infringing URLs from its *search*
27 *index* without the assistance of the webmaster. *Id.* Google can prevent URLs from
28 appearing in user-generated *search results* using its [REDACTED] files. *See generally*
Haahr Dec.

1 listed in the communications, or which of the displayed images are P10 copyrighted
2 works. Kassabian Dec. ¶ 13, Exs. L1-L17; 17 U.S.C. § 512(c)(3)(A)(ii). For
3 example, the May 24, 2001 communication lists 25 allegedly infringing URLs, but
4 does not identify a single copyrighted work claimed to be infringed at those URLs.
5 Kassabian Dec. Ex. L14. Nor do any specify the location of the allegedly infringing
6 material. 17 U.S.C. § 512(c)(3)(A)(iii).¹⁹ These defects doom the Group A
7 Notices.²⁰

8 Third, P10 waived any claims of infringement based on the Group A Notices
9 through its representations to this Court, and by its refusal to produce discovery on
10 them. P10 claims that its concession that the Group A Notices are not relevant to
11 this action was a typo. Cache Opp. at 3 ([REDACTED]
12 [REDACTED]). This was no typo. P10's statements were entirely consistent
13 with P10's refusal to provide discovery regarding those notices. Indeed, to this day,
14

15 ¹⁹ For instance, in the May 11, May 15, May 18, May 21, and May 22 notices,
16 P10 admitted the identified websites "contain infringing photographs owned by
17 Perfect 10, *as well as other photographs*," but did not identify which of the images
18 were P10's works. Kassabian Dec. Exs. L1-L13 (emphasis added). Similarly, in the
19 May 24 and July 6 notices, Perfect 10 stated that "*some* of these websites contain
20 infringing copies of copyrighted photographs owned by Perfect 10 of [the named
21 models]," but again did not specify the websites to which it was referring. *Id.*, Exs.
22 L14, L17 (emphasis added). Worse, the June 26 and June 29, 2001 notices do not
23 identify any allegedly infringing URLs, let alone any copyrighted works claimed to
24 be infringed at those URLs. Kassabian Dec. Exs. L15-L16; 17 U.S.C. §
25 512(c)(3)(A)(ii) and (iii).

26 ²⁰ Further, fifteen of the Group A Notices do not include a physical or electronic
27 signature of a person authorized to act on behalf of the owner of an exclusive right
28 that is allegedly infringed. Kassabian Dec. Exs. L1-L14, L17; 17 U.S.C.
§ 512(c)(3)(A)(i). And, the May 24, 2001 notice does not comply with subsections
(v) and (vi) of the DMCA's statutory requirements. Kassabian Dec. Ex. L14; 17
U.S.C. § 512(c)(3)(A)(v) and (vi); *Hendrickson v. eBay*, 165 F. Supp. at 1089-90
(failure to comply with § 512(c)(3)(A)(v) and (vi) rendered notification of claimed
infringement deficient).

1 P10 still has not answered the RFAs Google served regarding the Group A Notices.
2 Rebuttal Kassabian Dec. ¶ 7. P10 most certainly cannot pursue claims on which it
3 has refused discovery. *See* Fed. R. Civ. P. 26, 37; *see, e.g., Wolk v. Green*, 2008
4 WL 298757, *3 (N.D. Cal. 2008) (precluding defendant from introducing
5 documents and information that were responsive to plaintiff's discovery requests
6 and should have been produced, but were not); *Guang Dong*, 2008 WL 53665 at *1
7 (granting motion to strike evidence at summary judgment because testimony not
8 properly disclosed during discovery). P10 cannot have it both ways.

9 Fourth, and independently, any claims based on the Group A Notices are
10 time-barred. P10 plainly had knowledge of the infringements alleged in its Group A
11 Notices as of the dates it allegedly submitted those notices (in mid-2001), and thus,
12 its claims accrued then. *See* Search Opp. at 8, fn.2; *Polar Bear Productions, Inc. v.*
13 *Timex Corp.*, 384 F.3d 700, 706 (9th Cir. 2004). P10 filed this suit on November
14 10, 2004, more than three years thereafter. Any claims for infringements occurring
15 prior to November 10, 2001—as was the case with the Group A Notices—are time-
16 barred. *See* Search Motion at 8 n.9; *see also* 17 U.S.C. § 507 (three-year statute of
17 limitations on civil copyright actions).²¹ There is no triable issue regarding the
18 inadequacy and irrelevance of the Group A Notices.

19
20
21
22
23 ²¹ P10 does provide evidence that one URL from one of the Group A Notices
24 was linked to in Google's search results as of September 2004, within the three-year
25 "look-back" of the Copyright Act. *See* Search Opp. at 8. Google concedes that
26 P10's infringement claim as to this one URL therefore is not barred by the relevant
27 statute of limitations. However, that URL still is not actionable because it was
28 contained in a defective notice that was insufficient to confer notice. *See* Section
II.A.4, *supra*.

1 **B. Google processed the intelligible portions of P10's defective notices**
2 **expeditiously in light of the circumstances.**

3 P10 contends that Google's processing efforts were not, in its opinion,
4 expeditious enough. Search Opp. at 8-13. P10 is incorrect, and its opinions are
5 irrelevant. Google's evidence demonstrates that it began processing P10's notices
6 immediately upon receipt. Poovala Dec. ¶¶ 56-91. In the case of the Group B
7 Notices, Google was able to complete its processing of the majority of the notices
8 within one to two weeks of receipt. Poovala Dec. ¶ 82. In some cases, processing
9 was completed in as little as two days. *Id.* This is expeditious by any measure. As
10 for the Group C Notices, their incomprehensibility hindered and slowed Google's
11 processing efforts—and P10 has no one to blame for that delay but itself. Poovala
12 Dec. ¶ 86-91.²²

13 Unsatisfied, P10 urges that a removal is not sufficiently expeditious if it is not
14 completed within three days. Search Opp. at 17. This is both unsupported by the
15 law and patently absurd.²³ The DMCA proscribes no particular time period for
16

17 ²² P10 asserts a variety of complaints regarding alleged delays or omissions in
18 processing its Group C Notices, including that alleged cache pages and “check the
19 box” pages were not properly processed. Search Opp. at 15-17. P10 is simply
20 splitting arguments here—all of these infringements supposedly were included
21 somewhere (though P10 has not demonstrated where) on its hopelessly defective
22 Group C Notices, which Google was under no legal obligation to process—though it
23 did so anyway, as best as it could under the circumstances. *See* Search Motion at
24 15; Poovala Dec. ¶¶ 86-90, Exs. N1-N18.

25 ²³ P10's contention that Yahoo! processed some of its notices in three days is
26 mere conjecture and does not raise a triable issue of material fact. Among other
27 things, P10 offers no testimony from Yahoo!, but bases this statement on its own
28 use of the search engine. Search results, however, are not static, and may change for
a variety of reasons, including third parties' creation or deletion of websites, and
search engines' modifications to their search algorithms. That a particular URL did
not appear in Yahoo!'s search results on a particular day may have nothing to do
with P10 or its notices, and P10's arguments otherwise are speculation.

1 processing to be considered expeditious, and for good reason: “[b]ecause the factual
2 circumstances and technical parameters may vary from case to case, it is not
3 possible to identify a uniform time limit for expeditious action.” H.R. 105-551(II) at
4 53-54 (Kassabian Dec., Ex. E); *see* 17 U.S.C. § 512(c)(3). Even a quick perusal of
5 any of P10’s notices (which P10 tellingly has not submitted to the Court in complete
6 form) demonstrates the impossibility of processing them in P10’s unilaterally
7 imposed, and unsupported, three-day time frame.

8 P10’s various other arguments regarding the timeliness of Google’s
9 processing efforts likewise fail, as set forth below.

10 **1. P10’s refusal to cooperate slowed Google’s processing efforts.**

11 P10 may not be heard to complain of processing delays, because any such
12 delays were of P10’s own doing. For example, with respect to the Group B Notices,
13 P10 claims that Google [REDACTED] four months (during summer 2004) before taking
14 any action. Search Opp. at 8-9. This is demonstrably false. P10 does not dispute
15 that Google responded to P10’s first notice, sent May 31, 2004, *the very next day*.
16 Poovala Dec., Exs. L1, S. During the ensuing weeks, as P10 sent more notices that
17 disregarded Google’s DMCA instructions, Google repeatedly communicated with
18 P10 in an attempt to obtain compliant notices that could be properly processed.
19 Poovala Dec. ¶¶ 57-63, Exs. S-V. P10 sometimes complied with Google’s requests,
20 but often did not. Poovala Dec. ¶¶ 57-63. Not surprisingly, P10’s lack of
21 cooperation hampered Google’s processing efforts. P10 also elected to send
22 duplicative notices during this period that further impeded Google’s work. *Id.* ¶ 60.
23 P10 has no one to blame but itself for any such delays.²⁴


24 Worse, P10 often responded to Google’s requests by *disputing* that Google

25
26 ²⁴ Similarly, P10 may not claim that the Group C Notices were not processed
27 quickly enough for its liking, since P10 elected to compile and send its notices in
28 this unintelligible format.

1 needed the information identified in Google's correspondence. Rebuttal Poovala
2 Dec. Ex. E (Zada email refusing to provide the requested information and instead
3 claiming that "in order to locate and stop displaying the images that are the subject
4 of Perfect 10's notices . . . Google need only use the technology its own search
5 engine provides"). Indeed, P10 is still beating that drum, claiming in its opposition
6 brief that Google does not need identification of the location of the allegedly
7 infringing material in the manner requested by Google (i.e. the web page URL or
8 image URL). Cache Opp. at 8. P10's arguments are as wrong now as they were
9 then.

10 For example, P10 contends that Google must not need image URLs to process
11 a DMCA removal on Image Search, because it can use a webpage URL to remove
12 all images displayed on that webpage from Image Search. See Cache Opp. at 8.
13 This is incorrect. As Google has repeatedly explained, suppressing a webpage URL
14 from Image Search results will *not* prevent *all* instances of those images from
15 appearing in Image Search results, because the images are stored at separate image
16 URLs that could be linked to by webpages *other than* the one suppressed. Haahr
17 Dec. ¶ 10. Thus, a complainant needs to provide the offending image URL, which
18 will effectively preclude all displays of that image from appearing in Image Search
19 results. Haahr Dec. ¶ 10; Poovala Dec. Ex. D (Google Image Search DMCA
20 policy).

21 Similarly, P10 claims that Google must not need image URLs, because

22 
23 Cache Opp. at 8 (emphasis added). But as P10 knows from the parties' extensive
24 prior correspondence, Google needs image URLs to process Image Search removals
25 – not Web Search removals. Poovala Dec., Exs. W, X, Y. P10's refusal to
26 acknowledge Google's processing requirements and follow Google's instructions
27 both dooms its notices under the DMCA and caused any delay in processing.
28 *Hendrickson*, 165 F. Supp. 2d at 1092; *Corbis Corp. v. Amazon.com, Inc.*, 351 F.

1 Supp. 2d 1090, 1107 (W.D. Wash. 2004).

2 **2. The Adobe extraction feature is nothing more than a manual**
3 **cut-and-paste function that does not materially alter**
4 **processing time.**

5 P10 argues that Google could have processed its Group C Notices more
6 quickly had Google used “Adobe’s URL Extraction” and “bookmarks” features.
7 Cache Opp. at 11. As P10 describes the “Adobe URL Extraction” feature, it creates
8 “links from URLs in the document” using Adobe Acrobat 6.0. Rebuttal Poovala
9 Dec. ¶ 13. As P10 describes the “bookmarks” feature it is a claimed means for
10 bookmarking pages in a PDF. *Id.* at ¶ 14. Neither of these features would have
11 expedited Google’s processing efforts, for a multitude of reasons.

12 As for the “Adobe URL Extraction” feature, Zada’s declaration describes
13 copying and pasting one URL at a time from the PDF files – the same way that
14 Google extracted URLs for the PDF files in processing the Group C Notices.
15 Rebuttal Poovala Dec. ¶ 13. Even if it were possible to extract more than one URL
16 or link at a time from the PDF files accompanying P10’s Group C Notices, this
17 would slow Google’s processing down rather than speed it up, as most of the PDF
18 files contain hundreds or thousands of links to admittedly non-infringing URLs that
19 would have to be reviewed individually and discarded. *Id.*

20 As for the “bookmark” method, this feature also would not have eased the
21 burden associated with processing the Group C Notices. *Id.* at ¶ 14. First, many of
22 the PDF files accompanying P10’s Group C Notices did not have any bookmarks at
23 all. *Id.* This was true of the July 2, 2007 notice, for example. *Id.*; *see also* Poovala
24 Dec., Ex. N4. Second, even when there were bookmarks, many did not contain any
25 URLs or other identifiable locations of infringing material. Rebuttal Poovala Dec. ¶
26 14. Third, P10 never stated in the Group C Notices that it was *only* complaining
27 about the infringing material located at the URLs it had listed as bookmarks in
28 certain of the PDF files. *Id.* Thus, Google could not rely on the URLs in the

1 bookmarks to locate and review material claimed to be infringing by P10—Google
2 had to review all of the files manually, one by one. *Id.* Finally, Google could not
3 copy and paste even the URLs that appeared as bookmarks in these PDF files,
4 because the text of the bookmarks was not extractable and thus could not be cut and
5 pasted. *Id.* There is no triable issue here.

6 **3. Google did not delay in processing the January 2005 notice**
7 **directed to Amazon.**

8 P10 claims Google did not timely remove links to infringing URLs identified
9 in a January 21, 2005 notice to Amazon. Search Opp. at 13. This is incorrect. First,
10 Google has no record of Amazon ever forwarding this notice to Google, nor has P10
11 produced such evidence. Rebuttal Poovala Dec. ¶ 3. Second, upon learning of the
12 existence of this 2005 Amazon Notice after reviewing P10's motion for summary
13 judgment (filed July 5, 2009), which attached it, Google immediately processed it,
14 completing that processing two weeks after receipt. Rebuttal Poovala Dec. ¶ 5.
15 There was no delay in Google's processing of the 2005 Amazon notice.²⁵

16 **4. Providing Chilling Effects URL links does not constitute**
17 **delay.**

18 P10 also claims that Google's practice of forwarding DMCA notices to
19 Chilling Effects, a non-profit organization, creates a triable issue. The contention is

20
21 ²⁵ Having received the 2005 Amazon Notice only through this litigation, Google
22 was not obligated to process it, but did so in an abundance of caution. As this Court
23 already has made clear to Perfect 10, notices produced to a service provider only
24 through litigation do not constitute proper notice of infringement under the DMCA.
25 *Perfect 10, Inc. v. Amazon.com, Inc.*, 2009 WL 1334364, at *5 (C.D. Cal. May 12,
26 2009) ("These post-litigation instances of [the defendant] receiving information of
27 claimed infringements do not constitute notifications within the meaning of
28 § 512(c)(3), with respect to infringements claimed in the original complaint. They
are legally irrelevant. The absurd result otherwise would be that the complaint or
any other pleading that contains sufficient identification of the alleged infringement
could count as a DMCA notification.").

1 groundless. Google's provision of Chilling Effects URL links in search results that
2 have had links removed explains to the user the reason for the suppression of a
3 portion of the user's search results. See Haahr Dec. ¶ 7. In fact, targets of P10's
4 notices who submit counter-notifications to Google often discover the removal of
5 links to their webpages and the reason for the removal via Chilling Effects. Poovala
6 Dec. Ex. MM, at 1724 ("We discovered all these using google and see the reference
7 on the site chillingeffects.org"), 1717, 1742. Without a Chilling Effects link, these
8 webmasters may not timely learn of the removal, and their right to submit a counter-
9 notification. Haahr Dec. ¶ 7. In any event, P10 provides no authority whatsoever
10 for the proposition that Google's practice of sending notices to Chilling Effects
11 precludes safe harbor. It does not.²⁶

12 **C. Google is not required to affirmatively police the Internet to**
13 **qualify for safe harbor.**

14 P10 finally argues that Google should not wait to receive DMCA-complaint
15 notices from P10 – identifying the copyrighted work claimed to be infringed and the
16 location of the allegedly infringing material – but instead is obligated to use various
17 technologies to affirmatively police the Internet looking for possible infringements,
18 including (1) using Google's "similar images" feature, (2) using image recognition
19 technology, and (3) assigning employees to run searches on Google and identify P10
20 images, and then to remove them. Search Opp. at 18. Not so; the DMCA places the
21

22 ²⁶ For the first time ever, P10 argues that Google [REDACTED] Search
23 [REDACTED] Search
24 Opp at 19:13-14. P10 cites not a shred of authority for this demand – nor has P10
25 ever submitted this demand in any DMCA notice. In any event, this is just another
26 variant of P10's refrain that Google must police the Internet and remove content
27 without ever having received a DMCA-compliant notice from Google. Of course,
28 this is not the law. *CCBill*, 448 F.3d at 1111. Moreover, Google already has
established that it processed all discernable URLs purporting to display passwords
to perfect10.com. Poovala Dec. ¶ 77; see also Ex. II, GGL50060, line 2,080, line
3,827. P10 presents no material dispute regarding Google's processing of these
URLs.

1 burden of identifying infringements squarely on the shoulders of the copyright
2 owner. *CCBill*, 488 F.3d at 1111. Moreover, even if there were any ambiguity in
3 the law on this point (and there is not), only P10 knows which URLs are displaying
4 material infringing its images, which URLs are licensed to display the images, and
5 the like. Without proper notice, Google has no way of knowing which uses a
6 copyright owner regards to be infringing, and which are licensed, a fair use, or
7 otherwise acceptable to the owner. *Poovala Dec.* ¶¶ 15, 25.²⁷

8 P10's policing demands should be rejected for the additional reason that the
9 DMCA requires the *copyright owners* to review potentially infringing material and
10 make a good faith consideration of whether a particular use is fair use. *Lenz v.*
11 *Universal Music Corp.*, 572 F. Supp. 2d 1150, 1155 (N.D. Cal. 2008) ("Requiring
12 owners to consider fair use will help 'ensure [] that the efficiency of the Internet will
13 continue to improve and that the variety and quality of services on the Internet will
14 expand' without compromising 'the movies, music, software and literary works that
15 are the fruit of American creative genius.'") (quoting Sen. Rep. No. 105-190 at 2
16 (1998)). A complainant must therefore "declare, under penalty of perjury . . . that he
17 has a good-faith belief that the *use* is infringing." *CCBill*, 488 F.3d at 1112
18 (emphasis added). This is not something that Google employees could do for P10 or
19 any copyright holder. Nor is Google's "similar images" feature or any sort of image
20 recognition technology a substitute. Such programs cannot distinguish infringing
21
22

23 ²⁷ P10's claims [REDACTED]

24 [REDACTED] do not
25 alter this conclusion. *See Search Opp.*, at 18. As a preliminary matter, P10's claims
26 lack any support, foundation or evidentiary basis whatsoever. Moreover, the
27 DMCA is clear that Google need only remove or disable access to material at
28 locations identified in DMCA-compliant notices, and P10 has never provided
Google with such notice.

1 images from those that are licensed, a fair use, or otherwise acceptable to the
2 owner—only the owner can make that determination. There is no triable issue here.

3 **III. P10 DOES NOT DISPUTE THAT GOOGLE DOES NOT HAVE THE**
4 **RIGHT AND ABILITY TO CONTROL THE ALLEGED INFRINGING**
5 **CONDUCT AND DOES NOT RECEIVE A FINANCIAL BENEFIT**
6 **ATTRIBUTABLE THERETO.**

7 P10 does not address Google's showing that it does not have the right and
8 ability to control the alleged infringing activity in Google Web and Image Search,
9 and does not receive a financial benefit attributable thereto. P10 accordingly
10 concedes these points.²⁸

11 **Conclusion**

12 For the foregoing reasons, there is no triable issue of material fact with
13 respect to Google's entitlement to safe harbor under Section 512(d) on P10's
14 copyright infringement claims directed to Web Search and Image Search. Summary
15 judgment should be granted on this basis.

16 DATED: September 8, 2009

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23 ²⁸ P10's theory that Google is responsible for a significant amount of traffic
24 on the Internet and therefore has some sort of control over third-party websites (*See*
25 *Consol. Statement. at ¶ 86*) was rejected by the Ninth Circuit in this case. *Perfect*
26 *10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1174 (9th Cir. 2007). P10 does not even
27 address the Ninth Circuit's ruling on this issue. Google similarly does not have the
28 right and ability to control third-party websites with which it has advertising
relationships. *Id.* ("Google's right to terminate an AdSense partnership does not
give Google the right to stop direct infringement by third-party websites. An
infringing third-party website can continue to reproduce, display, and distribute its
infringing copies of Perfect 10 images after its participation in the AdSense program
has ended.").