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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PERFECT 10, INC., a California corporation,

Plaintiff,

vs.

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

Defendants.

AND COUNTERCLAIM

PERFECT 10, INC., a California corporation,

Plaintiff,

vs.

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

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**

[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

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## Preliminary Statement

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

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

## Argument

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

First, even assuming these declarations were not objectionable (they are) and further assuming that they were probative of some material issue before the Court (they are not), *at the very most,* these declarations suggest that four individuals are unhappy with Google's DMCA processing. This does not create a triable issue of material fact regarding Google's qualification for safe harbor. *Anderson*, 477 U.S. at 250. Second, this testimony is inadmissible for the many reasons cited in Google's evidentiary objections (filed herewith), not the least of which is the fact that this case has been pending for almost five years and P10 has never identified these individuals in its Rule 26 disclosures. Rebuttal Kassabian Dec. ¶ 6; *Guang Dong Light Headgear Factory Co., Ltd. v. ACIIntern., Inc.*, 2008 WL 53665, *1 (D. Kan. 2008) (striking summary judgment affidavit because witness identity and testimony not properly disclosed during discovery). Third, Google's records conclusively demonstrate that Google expeditiously processed these declarants' DMCA notices and suppressed hundreds of URLs identified therein from Google's Search results. *See* Rebuttal Poovala Dec. ¶¶ 18-21; *see also* Haahr Dec. Ex. 1.[4] Fourth, some of the declarants made directly contradictory contemporaneous statements to Google, *thanking* Google for its help in processing their DMCA notices, and never indicating that Google had not fully processed them. Rebuttal Poovala Dec. Ex. D ([redacted]

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

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

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

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

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

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

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

(footnote continued)

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

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

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

[9] Instead of contesting the relevant and probative facts, P10 quarrels with the format of Google's Blogger, AdSense and Search DMCA Logs (the same Logs P10 elsewhere claims do not exist), asserting that they are not [redacted] Search Opp. at 22. Even if P10's attacks on Google's Blogger and AdSense DMCA 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)

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

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

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

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

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

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Google's various tracking mechanisms for Search as [redacted] dating back to [redacted]. Search Opp. at 23:5-6. This too is irrelevant. The DMCA imposes no particular record retention period. Google's proffer of DMCA tracking documents dating back more than seven years – and more than two and a half years before P10 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

such websites. *See* Haahr Dec. ¶ 14. Nevertheless, under P10's theory, P10 could accuse these competitors of infringement of even a single image somewhere behind their password firewall (and not even accessible on Google), and Google would be obliged to take P10's word for it and remove the entire website from its index, forever. The opportunities for abuse of such a draconian takedown theory are obvious. *See* Poovala Dec. Ex. MM at 1737 (counternotice complaining, "My guess is that Perfect 10, Inc. is doing this to eliminate competition"). P10 may not turn the DMCA's defensive safe harbor provisions into a liability weapon with which to eliminate from Google's search results links to all websites that are not, in P10's estimation, [redacted] *See* Search Opp. at 21:10; s*ee generally* 144 Cong. Rec. 108 (1998) (Kassabian Dec. Ex. D); 144 Cong. Rec. 61 (1998) (Kassabian Dec. Ex. C); *CCBill*, 488 F.3d at 1111.[12] Accordingly, P10 fails to create a dispute of fact as to whether its identification of sites and content to which Google does not even link confers knowledge of infringement under the DMCA.[13]

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

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

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

[13] P10 repeatedly refers to certain sites, including Usenet sites, as affiliates of Google. In the first instance, P10 presents no evidence establishing this claim. Moreover, Google has no obligation to cut links or advertising relationships with other sites unless and until it receives a DMCA-compliant notice identifying those 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.

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

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

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

[15] One such instruction was that Google needs an image URL to fully process Image Search-related DMCA complaints. [redacted] Rebuttal Brougher Dec. ¶ 2. [redacted] If, however, the corresponding image URL where that image is actually stored was linked to by *other* webpages, those displays would *not* be impacted. *See* Haahr Dec. ¶ 10. To draw an analogy, an image URL is like the stump of a tree and the various webpage URLs at which that image is displayed – which may spring up as third parties add image links to their webpages – are the branches. To remove ***all*** webpage displays of a particular image hosted at a particular image URL, one must cut down the tree at the stump, not simply cut off a branch.

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

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

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[16] P10 makes various excuses for the defects in its Group B Notices, none of which passes muster. For instance, P10 claims its notices were not impermissibly repetitive, because "[redacted]." *See* Cache Opp. at 7. This claim is belied by P10's own conduct. For example, P10 waited as little as three business days before sending exact duplicate notices – without identifying them as such – which forced Google to re-process them, hampering and slowing Google's efforts. *See* Search Motion at 15 n.17. Moreover, Google's processing 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.

Zada Dec. ¶ 55, Ex. 40 ([redacted])

Even a cursory review of any one of the Group C hard drive and DVD Notices demonstrates its incomprehensibility and myriad defects, however. And on a practical level, it would be an impossible task for P10 to try to direct the Court to *where* in its Group C Notices a particular infringement might be found – much like it was an impossible task for Google to piece together the necessary information to verify a claim of infringement in these notices.

P10 may not escape its own notices. They must be evaluated in the manner and format in which they were sent to Google – that is, including the hard drives or DVDs consisting of layers upon layers of electronic folders containing thousands of pages of allegedly infringing material. *See* Evidentiary Objections to Zada Declaration. The validity of the Group C Notice cannot be "extrapolated" from a few screen shots, as P10 would have it. P10 makes no attempt to justify or validate the Group C Notices in their entirety, nor could it. *See* Poovala Dec. ¶¶ 54-55, Exs. P, Q, and R (exemplary screen shots of "raw image" files, multi-page screen shots, and manipulated framing or in-line linking, submitted with P10's Group C Notices).[17] P10's cherry-picked examples from the Group C Notices, and P10's conclusory, self-serving statements that it followed Google's instructions do not

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[17] Even P10's cherry-picked examples do not provide proper notice of infringement and did not follow Google's instructions. For example, the screen shots at pages 1-3 of Exhibit 23 to the Zada Declaration do not display web page or image URLs. *See* Zada Dec. Ex. 23. This is because they purport to be images displayed at giganews.com, a site whose content Google does not crawl or index. *Id.* ¶ 35.

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

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

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

First, even if P10 had not waived these claims (it did) and even if they were not time-barred (they are), the Group A Notices do not confer knowledge of infringement. P10 selectively produced these documents in the litigation, which Google has been unable to locate in its records. Rebuttal Poovala Dec. ¶ 9. Google had a DMCA processing procedure in 2001[18] and if all of these notices were sent as P10 claims, it appears that they were not sent to the correct location at Google. *See id.* In fact, they all indicate that they were sent by email to "webmaster@google.com" – whereas Google's designated agent form on file with the Copyright office at the time listed a mailing address for sending DMCA notices (which P10 did not use), an email address of info@google.com (which P10 also did not use), and a fax number (which P10 did not use for 14 of the 17 Group A Notices). Rebuttal Kassabian Dec., Ex. B. Thus, these communications gave Google no notice of infringement.

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

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

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

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

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

[20] Further, fifteen of the Group A Notices do not include a physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right 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).

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

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

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

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

P10 contends that Google's processing efforts were not, in its opinion, expeditious enough. Search Opp. at 8-13. P10 is incorrect, and its opinions are irrelevant. Google's evidence demonstrates that it began processing P10's notices immediately upon receipt. Poovala Dec. ¶ 56-91. In the case of the Group B Notices, Google was able to complete its processing of the majority of the notices within one to two weeks of receipt. Poovala Dec. ¶ 82. In some cases, processing was completed in as little as two days. *Id.* This is expeditious by any measure. As for the Group C Notices, their incomprehensibility hindered and slowed Google's processing efforts—and P10 has no one to blame for that delay but itself. Poovala Dec. ¶ 86-91.[22]

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

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

[23] P10's contention that Yahoo! processed some of its notices in three days is mere conjecture and does not raise a triable issue of material fact. Among other things, P10 offers no testimony from Yahoo!a, but bases this statement on its own 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.

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

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

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

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

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

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

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

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

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

[redacted]

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

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

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

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

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

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

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

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

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

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

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

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[25] Having received the 2005 Amazon Notice only through this litigation, Google was not obligated to process it, but did so in an abundance of caution. As this Court already has made clear to Perfect 10, notices produced to a service provider only through litigation do not constitute proper notice of infringement under the DMCA. *Perfect 10, Inc. v. Amazon.com, Inc.*, 2009 WL 1334364, at *5 (C.D. Cal. May 12, 2009) ("These post-litigation instances of [the defendant] receiving information of claimed infringements do not constitute notifications within the meaning of § 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.").

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

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

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

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[26] For the first time ever, P10 argues that Google [redacted] Search Opp at 19:13-14. P10 cites not a shred of authority for this demand – nor has P10 ever submitted this demand in any DMCA notice. In any event, this is just another variant of P10's refrain that Google must police the Internet and remove content without ever having received a DMCA-compliant notice from Google. Of course, 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.

burden of identifying infringements squarely on the shoulders of the copyright owner. *CCBill*, 488 F.3d at 1111. Moreover, even if there were any ambiguity in the law on this point (and there is not), only P10 knows which URLs are displaying material infringing its images, which URLs are licensed to display the images, and the like. Without proper notice, Google has no way of knowing which uses a copyright owner regards to be infringing, and which are licensed, a fair use, or otherwise acceptable to the owner. Poovala Dec. ¶¶ 15, 25.[27]

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

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

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

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

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

## Conclusion

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

DATED: September 8, 2009

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[28] P10's theory that Google is responsible for a significant amount of traffic on the Internet and therefore has some sort of control over third-party websites (*See* Consol. Statement. at ¶ 86) was rejected by the Ninth Circuit in this case. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1174 (9th Cir. 2007). P10 does not even address the Ninth Circuit's ruling on this issue. Google similarly does not have the 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.").