

1 QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP  
 Michael T. Zeller (Bar No. 196417)  
 2 michaelzeller@quinnemanuel.com  
 865 South Figueroa Street, 10th Floor  
 3 Los Angeles, California 90017-2543  
 Telephone: (213) 443-3000  
 4 Facsimile: (213) 443-3100  
 Charles K. Verhoeven (Bar No. 170151)  
 5 charlesverhoeven@quinnemanuel.com  
 50 California Street, 22nd Floor  
 6 San Francisco, California 94111  
 Rachel Herrick Kassabian (Bar No. 191060)  
 7 rachelherrick@quinnemanuel.com  
 555 Twin Dolphin Drive, Suite 560  
 8 Redwood Shores, California 94065  
 9 Attorneys for Defendant Google Inc.

11 UNITED STATES DISTRICT COURT  
 12 CENTRAL DISTRICT OF CALIFORNIA

13 PERFECT 10, INC., a California  
 corporation,  
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 Plaintiff,  
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 vs.  
 16 GOOGLE INC., a corporation; and  
 17 DOES 1 through 100, inclusive,  
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 Defendants.

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

**GOOGLE INC.'S EVIDENTIARY  
 OBJECTIONS TO THE  
 DECLARATION OF SEAN  
 CHUMURA IN OPPOSITION TO  
 GOOGLE'S THREE MOTIONS  
 FOR SUMMARY JUDGMENT RE  
 DMCA SAFE HARBOR FOR ITS  
 WEB AND IMAGE SEARCH,  
 BLOGGER SERVICE, AND  
 CACHING FEATURE**

19 AND COUNTERCLAIM

20 PERFECT 10, INC., a California  
 corporation,  
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 Plaintiff,  
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 vs.  
 23 AMAZON.COM, INC., a corporation;  
 24 A9.COM, INC., a corporation; and  
 25 DOES 1 through 100, inclusive,  
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 Defendants.

Hon. A. Howard Matz  
 Date: None Set (taken under  
 submission)  
 Time: None Set  
 Place: Courtroom 14  
 Discovery Cut-off: None Set  
 Pre-trial Conference: None Set  
 Trial Date: None Set

1 Google hereby submits the following objections to the Declaration of Sean  
 2 Chumura, Submitted in Opposition to Google Inc.'s Motions for Summary Judgment  
 3 Re: DMCA Safe Harbor for its Web and Image Search, Blogger Service, and  
 4 Caching Feature. The Chumura Declaration is objectionable for several reasons,  
 5 and should be disregarded in its entirety.

6 Evidence submitted to the Court on motion practice must meet all  
 7 requirements for admissibility of evidence if offered at the time of trial. *Beyene v.*  
 8 *Coleman Sec. Services, Inc.*, 854 F.2d 1179, 1181-1182 (9th Cir. 1988); *Travelers*  
 9 *Cas. & Sur. Co. of Am. v. Telstar Const. Co., Inc.*, 252 F. Supp. 2d 917, 923 (D.  
 10 Ariz. 2003). *See also* Fed. R. Evid. 101 (Rules of Evidence apply to all proceedings  
 11 in the courts of the United States); Fed. R. Evid. 1101 (listing exceptions to Rule  
 12 101). Such evidence must be relevant to the claims and defenses of the case. Fed.  
 13 R. Evid. 401; 403; *McCormick v. City of Lawrence, Kan.*, 2007 WL 38400, at \*3 (D.  
 14 Kan. Jan. 5, 2007). Testimonial evidence must be based on the personal knowledge  
 15 of the witness offering the evidence. Fed. R. Evid. 602. Testimony requiring  
 16 scientific, technical, or other specialized knowledge may be given only by an expert  
 17 witness with the requisite knowledge, skill, experience, training, or education, and  
 18 opinion testimony is not permitted of a lay person. Fed. R. Evid. 701, 702; *see also*  
 19 *U.S. Aviation Underwriters, Inc. v. Yellow Freight Sys., Inc.*, 296 F. Supp. 2d 1322,  
 20 1331 (S.D. Ala. 2003) (unqualified expert opinions inadmissible at summary  
 21 judgment). The Chumura Declaration fails to meet one or more of these criteria, as  
 22 set forth below.

	<u>Proffered Evidence</u>	<u>Objection</u>
25 26 27	1. <b>Chumura Decl., at ¶ 3</b> ("I have examined Exhibit 1 which is attached to this declaration, which I obtained	<u>Fed. R. Evid. 401, 402, 403, 602</u> The statement is irrelevant, lacks foundation, and such information was

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from Jeff Mausner. Page 1 of Exhibit 1 is the output of a computer program that I created under the direction of Dr. Norman Zada. The program allows Perfect 10 to select images from Google Image Search by checking a box that the program makes available next to each Google thumbnail. The program places the date the Google search was done in the upper right corner, and puts the three links offered by Google for each image in the block corresponding to that image. The first URL after the term "Image" is the URL associated with Google's "See full-size image" link; the second URL after the term "Site" is the link Google provides to the underlying third party website (often called a Web Page URL); and the bottom URL after the term "Thumbnail" is the link to the location at which the "thumbnail" resides on Google's server. The program also has a Web Search option which allows Perfect 10 to

never disclosed in discovery.

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	save selected Google Web Search results.")	
2.	<b>Chumura Decl., at ¶ 4</b> ("If Google received page 1 of Exhibit 1 in a notice, it would have more than enough information to readily locate and block all the URLs listed on page 1. Adobe Acrobat has a feature which allows for the extraction of URLs. So Google could cut and paste whatever URLs it wanted from page 1 of Exhibit 1 into a text file or excel spreadsheet.")	<u>Fed. R. Evid. 401, 402, 403, 602, 701, 702</u> The statement is irrelevant, argumentative, mischaracterizes the document, speculative, lacks foundation, is not within the witness's personal knowledge, and is improper opinion testimony. Mr. Chumura has never been disclosed by P10 as an expert in this case, nor does he appear to have the necessary expertise to provide such expert testimony. <i>See Daubert v. Merrell Dow Pharms., Inc.</i> , 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i> , 526 U.S. 137, 147-48 (1999).
3.	<b>Chumura Decl., at ¶ 5</b> ("If Google received any of those pages in a notice, it would have enough information to locate the images on that page, and remove the images and the webpage from both its Image Search and Web Search results. All Google needs to act is the Web Page URL, which is contained on each of	<u>Fed. R. Evid. 401, 402, 403, 602, 701, 702</u> The statement is irrelevant, argumentative, mischaracterizes the document, speculative, lacks foundation, is not within the witness's personal knowledge, constitutes improper legal opinion, and is improper opinion testimony. Mr. Chumura has

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	<p>those pages. Once Google has the URL of the Web Page containing an infringement, it can block it. The Web Page URL may be thought of as the specification of a particular page in a particular book. It tells Google where to go on the Internet to find the infringing material, equivalently, which book to open and which page to turn to.")</p>	<p>never been disclosed by P10 as an expert in this case, nor does he appear to have the necessary expertise to provide such expert testimony. <i>See Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-48 (1999).</p>
4.	<p><b>Chumura Decl., at ¶ 5</b> ("The Thumbnail Source URL contains both the "See full-size image" URL as well as the Web Page URL embedded in it, along with information such as whether the user had their safe search on and what browser they were using. It may be readily extracted using Adobe's URL extraction feature, as shown on page 9 of Exhibit 1.")</p>	<p><u>Fed. R. Evid. 401, 402, 403, 602, 701, 702</u> The statement is irrelevant, argumentative, speculative, lacks foundation, is not within the witness's personal knowledge, and is improper opinion testimony. Mr. Chumura has never been disclosed by P10 as an expert in this case, nor does he appear to have the necessary expertise to provide such expert testimony. <i>See Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-48 (1999).</p>
5.	<p><b>Chumura Decl., at ¶ 6</b> ("Sometimes when a URL is too long, Google will</p>	<p><u>Fed. R. Evid. 401, 402, 403, 602, 701, 702</u></p>

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	<p>replace it with a URL that has ellipses in it. However, the original full URL can almost always be found by doing a Google combination search on the base URL along with a character string from the rest of the URL. Effectively, one searches on the two portions of the URL that one has. The base URL is usually the URL of the home page of the website, like google.com.")</p>	<p>The statement is irrelevant, argumentative, speculative, mischaracterizes the evidence, lacks foundation, is not within the witness's personal knowledge, and is improper opinion testimony. Mr. Chumura has never been disclosed by P10 as an expert in this case, nor does he appear to have the necessary expertise to provide such expert testimony. <i>See Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-48 (1999).</p>
<p>6.</p>	<p><b>Chumura Decl., at ¶ 7</b> ("The only URL shown with this image is not a post URL. However, anyone can find the image with this URL, by cutting and pasting the URL into their browser bar.")</p>	<p><u>Fed. R. Evid. 401, 402, 403, 602, 701, 702</u> The statements are irrelevant, argumentative, speculative, lack foundation, and constitute improper opinion testimony. Mr. Chumura has never been disclosed by P10 as an expert in this case, nor does he appear to have the necessary expertise to provide such expert testimony. <i>See Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-</p>

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		48 (1999).
7.	<b>Chumura Decl., at ¶ 8</b> ("I do not believe that Google's Image Search instructions are necessary or helpful in the vast majority of situations. In fact, they can be unnecessarily burdensome when an infringing web page contains many infringing images, as is illustrated by page 2 of Exhibit 1 to my declaration.")	<u>Fed. R. Evid. 401, 402, 403, 602, 701, 702</u> The statement is irrelevant, argumentative, mischaracterizes the facts, is unduly prejudicial, speculative, confuses the issues, lacks foundation, is not within the witness's personal knowledge, constitutes improper legal opinion, and is improper opinion testimony. Mr. Chumura has never been disclosed by P10 as an expert in this case, nor does he appear to have the necessary expertise to provide such expert testimony. <i>See Daubert v. Merrell Dow Pharms., Inc.</i> , 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i> , 526 U.S. 137, 147-48 (1999).
8.	<b>Chumura Decl., at ¶ 8</b> ("Each of the first fifteen thumbnails appearing on page 2 of Exhibit 1 is linked to, and appears on, the same infringing web page, darkshadow.3xforum.ro. If Perfect 10 were to follow Google's Image search instructions, it would have to provide at least 15 Image	<u>Fed. R. Evid. 401, 402, 403, 602, 701, 702</u> The statement is irrelevant, argumentative, mischaracterizes the document, speculative, lacks foundation, is not within the witness's personal knowledge, constitutes improper legal opinion, and is improper

<p>1 2 3 4 5 6 7 8 9</p>	<p>URLs (one for each of the images shown on page 2), but possibly many more.")</p>	<p>opinion testimony. Mr. Chumura has never been disclosed by P10 as an expert in this case, nor does he appear to have the necessary expertise to provide such expert testimony. <i>See Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-48 (1999).</p>
<p>10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28</p>	<p>9. <b>Chumura Decl., at ¶ 8</b> ("Suppose on the other hand that Perfect 10 were to identify a single URL for the infringing web page, darkshadow.3xforum.ro. In order to stop directly linking to that infringing web page, Google would have to remove the first fifteen images shown on page 2 of Exhibit 1 from its Image Search results, <i>as well as any other image that Google was displaying in its search results from that web page, even if it were not a P10 Image</i>. That is the only way that Google, given its current method of linking infringing thumbnails back to infringing web pages, could block all direct links to the identified</p>	<p><u>Fed. R. Evid. 401, 402, 403, 602, 701, 702</u> The statement is irrelevant, argumentative, mischaracterizes the document, speculative, lacks foundation, is not within the witness's personal knowledge, constitutes improper legal opinion, and is improper opinion testimony. Mr. Chumura has never been disclosed by P10 as an expert in this case, nor does he appear to have the necessary expertise to provide such expert testimony. <i>See Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-48 (1999).</p>



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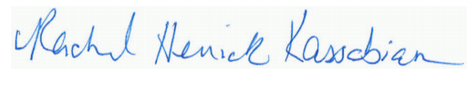
	infringing web page darkshadow.3xforum.ro. So specifying a single web page URL does much more in this case than specifying possibly hundreds of Image URLs.")	
10.	<b>Chumura Decl., at ¶ 8</b> ("In fact, just specifying P10 Image URLs by themselves would not prevent Google from continuing to directly link to darkshadow.3xforum.ro from a non-P10 thumbnail from that same web page.")	<u>Fed. R. Evid. 401, 402, 403, 602, 701, 702</u> The statement is irrelevant, argumentative, speculative, lacks foundation, is not within the witness's personal knowledge, constitutes improper legal opinion, and is improper opinion testimony. Mr. Chumura has never been disclosed by P10 as an expert in this case, nor does he appear to have the necessary expertise to provide such expert testimony. <i>See Daubert v. Merrell Dow Pharms., Inc.</i> , 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i> , 526 U.S. 137, 147-48 (1999).
11.	<b>Chumura Decl., at ¶ 8</b> ("Of course, once Google in-line links a user to that web page, the user can view and download any of the infringing images on that page, regardless of	<u>Fed. R. Evid. 401, 402, 403, 602, 701, 702</u> The statement is irrelevant, argumentative, mischaracterizes the document, speculative, lacks

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	<p>which Google thumbnail he clicked on to get there. That is why it is necessary for Google to remove all thumbnails that link to that webpage from its Image Search results, rather than just a few thumbnails.")</p>	<p>foundation, is not within the witness's personal knowledge, constitutes improper legal opinion, and is improper opinion testimony. Mr. Chumura has never been disclosed by P10 as an expert in this case, nor does he appear to have the necessary expertise to provide such expert testimony. <i>See Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-48 (1999).</p>
12.	<b>Chumura Decl. Exhs. 1-2</b>	<p><u>Fed. R. Evid. 401, 402, 403, 602, 901</u>  The evidence is irrelevant, lacks foundation, does not appear to be based on the witness's personal knowledge, and is not properly authenticated.</p>

DATED: September 8, 2009

QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP

By   
Michael Zeller  
Rachel Herrick Kassabian  
Attorneys for Defendant GOOGLE INC.