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10 UNITED STATES DISTRICT COURT  
 11 CENTRAL DISTRICT OF CALIFORNIA

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

14 Plaintiff,

15 vs.

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

18 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 BENNETT  
 MCPHATTER 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  
 21 corporation,

22 Plaintiff,

23 vs.

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

26 Defendants.

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 Bennett  
2 McPhatter, Submitted in Opposition to Google Inc.'s Motions for Summary  
3 Judgment Re: DMCA Safe Harbor for its Web and Image Search, Blogger Service,  
4 and Caching Feature. The McPhatter Declaration is objectionable for several  
5 reasons, and should be disregarded in its entirety.

6 **I. THE MCPHATTER DECLARATION SHOULD BE STRICKEN**  
7 **BECAUSE P10 FAILED TO DISCLOSE MR. MCPHATTER IN ITS**  
8 **RULE 26(A) DISCLOSURES.**

9 The McPhatter Declaration should be disregarded in its entirety because,  
10 although this case has been pending for close to five years, P10 never disclosed Mr.  
11 McPhatter in its Rule 26 Initial Disclosures or its interrogatory responses as a person  
12 having knowledge of facts relevant to this case. A party cannot rely on evidence at  
13 summary judgment that the party failed to provide during discovery.<sup>1</sup> *Wolk v.*  
14 *Green*, 2008 WL 298757, \*3 (N.D. Cal. 2008); *Guang Dong Light Headgear*  
15 *Factory Co., Ltd. v. ACIIntern., Inc.*, 2008 WL 53665, \*1 (D. Kan. 2008). P10's  
16 failure to disclose Mr. McPhatter as a witness deprived Google of the opportunity to  
17 depose him prior to P10's submission of his self-serving declaration, which is  
18 demonstrably false in several respects. For example, the McPhatter Declaration  
19 mischaracterizes the facts with respect to Google's processing of his DMCA notices  
20 and his responses thereto (*see* Rebuttal Declaration of Shantal Poovala in Support of  
21 Google's Motions for Summary Judgment Re Entitlement to Safe Harbor Under the

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23 <sup>1</sup> On April 10, 2008, Google propounded an interrogatory asking P10 to "State  
24 all facts which support YOUR contention, if YOU so contend, that GOOGLE has  
25 not adopted and reasonably implemented a policy for termination in the appropriate  
26 circumstances of subscribers and account holders who are repeat infringers, as  
27 described in 17 U.S.C. § 512(i)(I)(A), and IDENTIFY all PERSONS with  
28 knowledge of such facts and all DOCUMENTS that REFER OR RELATE TO such  
(footnote continued)

1 DMCA, ¶ 20), which facts Google would have established had it had the  
2 opportunity to depose Mr. McPhatter. The McPhatter Declaration should be  
3 stricken in its entirety. Fed. R. Civ. P. 26, 33, 37; *see also Guang Dong Light*  
4 *Headgear Factory* 2008 WL 53665, \*1 (D. Kan. 2008) (granting motion to strike  
5 summary judgment affidavit because witness identity and testimony not properly  
6 disclosed during discovery).

7 **II. MCPHATTER WAS NOT DISCLOSED AS AN EXPERT AND DOES**  
8 **NOT APPEAR TO HAVE THE NECESSARY QUALIFICATIONS.**

9 Moreover, just as Perfect 10 failed to disclose McPhatter as a person having  
10 knowledge of the facts relevant to the case, so too did the company fail to disclose  
11 McPhatter as a potential expert witness. Instead, P10 has sprung McPhatter's  
12 declaration upon Google, without first allowing Google a fair opportunity to depose  
13 McPhatter. For the reasons discussed, *supra*, McPhatter's late-in-the-game  
14 declaration should be stricken in its entirety. In addition, at no point does McPhatter  
15 tie his qualifications and purported expertise, which involve doing work for federal  
16 law enforcement, to Google's search engine or services. *See Daubert v. Merrell*  
17 *Dow Pharms., Inc.*, 509 U.S. 579, 591 (1993) ("[requirement of fit] goes primarily  
18 to relevance," and an expert's testimony must "aid the jury in resolving a factual  
19 dispute."); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-48 (1999)  
20 (expert must have specialized knowledge). As McPhatter appears to lack the  
21 necessary qualifications to testify as to Google's search engine or services, again, his  
22 testimony should be stricken.

23 **III. THE MCPHATTER DECLARATION IS A SIDESHOW AND SHOULD**  
24 **BE DISREGARDED AS SUCH.**

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27 facts." Interrogatory No. 12. P10 did not list Mr. McPhatter in its May 26, 2008  
28 response, nor in its May 29, 2009 updated response.

1           Ultimately, P10’s attempt to create a “case within a case” should be rejected.  
2 This suit is not about whether Google processed the DMCA notices of McPhatter—it  
3 is about P10’s DMCA notices. These declarations are a sideshow and should be  
4 disregarded as such. *Unit Drilling Co. v. Enron Oil & Gas Co.*, 108 F.3d 1186,  
5 1193 (10th Cir. 1997) (affirming district court exclusion of evidence that threatened  
6 a “trial within a trial”); *Jefferson v. Vickers, Inc.*, 102 F.3d 960, 963 (8th Cir. 1996)  
7 (same).

8 **IV. VARIOUS PORTIONS OF MCPHATTER DECLARATION ARE**  
9 **INADMISSIBLE UNDER THE FEDERAL RULES OF EVIDENCE.**

10           Even were the Court to consider the McPhatter Declaration, portions of it are  
11 inadmissible and should be disregarded. Evidence submitted to the Court on motion  
12 practice must meet all requirements for admissibility of evidence if offered at the  
13 time of trial. *Beyene v. Coleman Sec. Services, Inc.*, 854 F.2d 1179, 1181-82 (9th  
14 Cir. 1988); *Travelers Cas. & Sur. Co. of Am. v. Telstar Const. Co., Inc.*, 252 F.  
15 Supp. 2d 917, 923 (D. Ariz. 2003). *See also* Fed. R. Evid. 101 (Rules of Evidence  
16 apply to all proceedings in the courts of the United States); Fed. R. Evid. 1101  
17 (listing exceptions to Rule 101). Such evidence must be relevant to the claims and  
18 defenses of the case. Fed. R. Evid. 401; 403; *McCormick v. City of Lawrence, Kan.*,  
19 2007 WL 38400, at \*3 (D. Kan. Jan. 5, 2007). Testimonial evidence must be based  
20 on the personal knowledge of the witness offering the evidence. Fed. R. Evid. 602.  
21 Testimony requiring scientific, technical, or other specialized knowledge may be  
22 given only by an expert witness with the requisite knowledge, skill, experience,  
23 training, or education, and opinion testimony is not permitted of a lay person. Fed.  
24 R. Evid. 701, 702; *see also U.S. Aviation Underwriters, Inc. v. Yellow Freight Sys.,*  
25 *Inc.*, 296 F. Supp. 2d 1322, 1331 (S.D. Ala. 2003) (unqualified expert opinions  
26 inadmissible at summary judgment). The McPhatter Declaration fails to meet one  
27 or more of these criteria, as set forth below.

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	<u>Proffered Evidence</u>	<u>Objection</u>
1.	<b>McPhatter Decl., at ¶ 3</b> ("I have sufficient expertise in computer science and the Internet to determine whether the various portions of notices attached as Exhibit 1 would provide a search engine such as Google with enough information to locate the infringing image(s) or link(s).")	<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. McPhatter 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).
2.	<b>McPhatter Decl., at ¶ 4</b>	<u>Fed. R. Evid. 401, 402, 403, 602, 701, 702</u> The statements are irrelevant, argumentative, mischaracterize the document, speculative, lack foundation, are not within the witness's personal knowledge, and are improper opinion testimony. Mr. McPhatter has never been disclosed by P10 as an expert in this case, nor does he appear to have

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		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>McPhatter Decl., at ¶ 5</b>	<u>Fed. R. Evid. 401, 402, 403, 602, 701, 702</u> The statements are irrelevant, argumentative, mischaracterize the document, speculative, lack foundation, are not within the witness's personal knowledge, constitute improper legal opinion, and are improper opinion testimony. Mr. McPhatter 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).
4.	<b>McPhatter Decl., at ¶ 6</b> ("The URLs on the left side of page 11 of Exhibit 1 appear to be Web Page URLs with the starting http:// and www.	<u>Fed. R. Evid. 401, 402, 403, 602, 701, 702</u> The statement is irrelevant, argumentative, mischaracterizes the

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	<p>removed. If that is the case, Google can use those URLs, to locate the associated web pages. It can then prevent either its Image Search or its Web Search results from directly linking to those web pages. Google can do this without any of the other information shown in the middle and right hand columns of page 11.")</p>	<p>document, is unduly prejudicial, speculative, lacks foundation, is not within the witness's personal knowledge, and is improper opinion testimony. Mr. McPhatter 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>5.</p>	<p><b>McPhatter Decl. Exh. 1</b></p>	<p><u>Fed. R. Evid. 401, 402, 403, 602, 901</u> The evidence is irrelevant and is not properly authenticated,</p>

DATED: September 8, 2009

QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP

By   
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 Rachel Herrick Kassabian  
 Attorneys for Defendant GOOGLE INC.