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6 Attorneys for Plaintiff Perfect 10, Inc.

7

8   UNITED STATES DISTRICT COURT

9   CENTRAL DISTRICT OF CALIFORNIA

10

11 PERFECT 10, INC., a California   Case No. CV 04-9484 AHM (SHx)
    corporation,   Consolidated with Case No. CV 05-4753
12   AHM (SHx)
13   Plaintiff,
                                          PERFECT 10'S RESPONSE TO
14   v.   **GOOGLE, INC.'S EVIDENTIARY**
                                          OBJECTIONS TO THE
15   **DECLARATION OF SHEENA CHOU**
    GOOGLE, INC., a corporation; and   **RE GOOGLE'S MOTIONS FOR**
16 DOES 1 through 100, inclusive,   **SUMMARY JUDGMENT**

17   Defendant.   **BEFORE JUDGE A. HOWARD MATZ**
18 _____
                                          Date: None Set (taken under submission)
19 AND CONSOLIDATED CASE.   Time: None Set
                                          Place: Courtroom 14, Courtroom of the
20   Honorable A. Howard Matz

21   Discovery Cut-Off Date: None Set
                                          Pretrial Conference Date: None Set
22   Trial Date: None Set

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                   Perfect 10's Response to Google, Inc.'s Evidentiary
                 Objections to the Declaration of Sheena Chou

1   Plaintiff Perfect 10, Inc. ("Perfect 10") hereby responds to Defendant

2 Google Inc.'s ("Google") Evidentiary Objections to the Declaration of Sheena

3 Chou submitted by Perfect 10 in connection with Perfect 10's Opposition to

4 Google's Motions for Summary Judgment Re DMCA Safe Harbor for its Web

5 and Image Search, Blogger Service, and Caching Feature (the "Chou

6 Declaration" or "Chou Decl.") (Docket No. 483) as follows:

I.   MS. CHOU DOES NOT OFFER OPINION TESTIMONY.

8   Google first objects to the Chou Declaration on the grounds that Ms.

9 Chou allegedly is offering "improper opinion testimony." Evidentiary

10 Objections at 1. However, Ms. Chou is not offering her opinion. On the

11 contrary, Ms. Chou makes the following specific statements, among others,

12 based on tasks that she personally performed for Perfect 10, in connection with

13 locating Perfect 10 infringements.

14   1)   That she inputted 3,737 URLs extracted from Perfect 10's

15 blogger.com DMCA notices into her browser bar and verified that the

16 infringing web pages containing Perfect 10 images were still stored on Google's

17 blogger.com servers. Chou Decl. ¶8.

18   2)   That she was able to extract URLs from Perfect 10's Adobe style

19 DMCA notices at the rate of 5 URLs per minute. *Id.* ¶7.

20   3)   That she reviewed Perfect 10's Adobe style DMCA notices to

21 Google and found that they identified at least 329 post URLs. *Id.* ¶9.

22   4)   That she has not seen any post URLs on web pages with

23 blogger.com URLs (rather than blogspot.com URLs). *Id*. ¶¶10-11.

24   5)   That images on perfect10.com cannot be identified by post URLs.

25 *Id*. ¶11.

26   6)   That she was able to input the URLs provided by Perfect 10 in its

27 DMCA notices into Google's search box to determine if Google had removed

28 from its search results the URLs identified by Perfect 10. *Id*. ¶6.

7)   That she personally downloaded at least 15,000 Perfect 10 images from at least 20 different pay sites identified in Perfect 10's June 28, 2007 DMCA notice. *Id.* ¶3.

All of the above statements merely describe what Ms. Chou did or observed. They do not constitute improper opinion testimony.

Moreover, Ms. Chou's statement in Paragraph 12 of the Chou Declaration that Google's DMCA instructions for Image Search are "in most cases completely unnecessary, and in many cases, unworkable" is based upon her own personal knowledge. Ms. Chou explains, using the website nudecelebforum.com as an example, why Google's Image Search instructions for that website simply do not work. She explains why Google's policy of only allowing the copyright holder to specify an image URL once the image actually appears in Google's Image Search results, coupled with the fact that nudecelebforum.com infringes 17,000 Perfect 10 images, make Google's instructions unusable for that website, and completely inferior to the results that Perfect 10 could obtain if it simply identified 60 web page URLs. Chou Decl. ¶12. If a witness testifies that a process or procedure is unnecessary and/or unworkable, and that testimony is based on a valid explanation supported by personal observations, that testimony is based upon personal knowledge and sufficient foundation, and should not be stricken.

II.   **GOOGLE DOES NOT REFUTE ANY OF MS. CHOU'S TESTIMONY.**

If Ms. Chou's testimony lacks foundation as Google claims, Google should be able to refute at least parts of her testimony. However, in its reply, Google does not refute *any portion* of the Chou Declaration. For example, Google does not refute testimony by Ms. Chou that: (i) URLs can be extracted from Perfect 10's Adobe style notices at the rate of five URLs a minute; (ii) Perfect 10 identified at least 3,737 blogger.com URLs in its notices which

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Objections to the Declaration of Sheena Chou

Google did not suppress; and (iii) Perfect 10 identified at least 329 post URLs to Google in its DMCA notices. Chou Decl. ¶¶7-9.

III. GOOGLE'S OBJECTION THAT PERFECT 10 HAS NOT DESIGNATED MS. CHOU AS AN EXPERT IS PREMATURE AND INAPPLICABLE.

Google also objects that Ms. Chou was not designated as an expert. Evidentiary Objections at 1. This objection fails for at least two reasons.

First, Rule 26(2)(C) of the Federal Rules of Civil Procedures requires that a party designate its expert witnesses within 90 days of trial, unless otherwise ordered by the court. Because no trial date has been set for this action, the time to designate Ms. Chou as an expert has not arrived.

Second, Ms. Chou works part time for Perfect 10. She is merely testifying as to the information she personally retrieved through tasks she was asked to perform. Ms. Chou testifies that she has a degree in Economics from UCLA, as well as considerable familiarity with computers and the Internet. Chou Decl. ¶2. Such a background is more than sufficient for Ms. Chou to perform the tasks described in the Chou Declaration.

IV. MS. CHOU'S STATEMENTS REGARDING PAYSITES ARE DIRECTLY RELEVANT.

At several points in its Evidentiary Objections, Google objects to Ms. Chou's statements concerning infringing material Ms. Chou located through Google's links to "pay sites" (also known as "usenet sites"), on the grounds of relevance. Google's objections are not well founded. The "pay sites" to which Google links contain thousands of unauthorized Perfect 10 images. Google has taken the untenable position that it can continue to receive payments from, promote, and provide links to the home pages and sign-up pages of infringing websites, even after receiving notice that those websites are infringing. Google takes this position even though the DMCA specifically provides, in 17

U.S.C. §512(d), that a search engine may be liable "for infringement of copyright by reason of the provider *referring or linking* users to an online location *containing* infringing material or infringing activity." (emphasis added). Therefore, Google's assertion that Ms. Chou's testimony lacks relevance has no merit. For a complete discussion on this issue, s*ee* Section V of Perfect 10's Opposition to Google's Motion for Summary Judgment Re: Safe Harbor for Web and Image Search, filed under seal (Docket No. 498), at pages 20-22.

V.   <u>GOOGLE'S OTHER OBJECTIONS ARE MERITLESS.</u>

Google's remaining objections that certain statements in the Chou Declaration lack foundation or are not within Ms. Chou's personal knowledge are without merit, and provide an example of Google using inapplicable boilerplate objections. As explained above, all of the statements contained in the Chou Declaration are based on Ms. Chou's first-hand knowledge and personal observations, made in connection with work she was asked to perform.

VI.   <u>CONCLUSION.</u>

For the foregoing reasons, this Court should disregard Google's evidentiary objections and consider the Declaration of Sheena Chou and the statements contained therein in their entirety.

Dated: October 12, 2009   Respectfully submitted,
                                 LAW OFFICES OF JEFFREY N. MAUSNER

                                 Jeffrey N. Mausner
                             By: _____
                                 Jeffrey N. Mausner
                                 Attorney for Plaintiff Perfect 10, Inc.

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