

1 Jeffrey N. Mausner (State Bar No. 122385)
 2 Law Offices of Jeffrey N. Mausner
 3 Warner Center Towers
 4 21800 Oxnard Street, Suite 910
 5 Woodland Hills, California 91367-3640
 6 Email: Jeff@mausnerlaw.com
 7 Telephone: (310) 617-8100, (818) 992-7500
 8 Facsimile: (818) 716-2773

9 Attorneys for Plaintiff Perfect 10, Inc.

10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA

12 PERFECT 10, INC., a California corporation,

13 Plaintiff,

14 v.

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

17 Defendant.

18
 19 AND CONSOLIDATED CASE.

Case No. CV 04-9484 AHM (SHx)
 Consolidated with Case No. CV 05-4753
 AHM (SHx)

**PERFECT 10'S REDACTED REPLY
 TO GOOGLE, INC.'S
 EVIDENTIARY OBJECTIONS TO
 THE DECLARATION OF
 DR. NORMAN ZADA
 RE: GOOGLE'S MOTIONS FOR
 SUMMARY JUDGMENT**

[UNREDACTED VERSION FILED
 SEPARATELY UNDER SEAL
 PURSUANT TO PROTECTIVE ORDER]

BEFORE JUDGE A. HOWARD MATZ

Date: None Set (taken under submission)
 Time: None Set
 Place: Courtroom 14, Courtroom of the
 Honorable A. Howard Matz

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

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Statutes

Fed. R. Civ. P. 56(e)3

1 Plaintiff Perfect 10, Inc. (“Perfect 10”) hereby responds to Defendant
2 Google Inc.’s (“Google”) Evidentiary Objections to the Declaration of Dr.
3 Norman Zada, filed by Perfect 10 on August 10, 2009 in opposition to Google’s
4 Summary Judgment Motions (Docket Nos. 491, 488, 489, 490) (the “Zada
5 Declaration” or “Zada Decl.”).

6 Google’s Evidentiary Objections to the Zada Declaration are set forth in
7 a highly repetitive, 91-page document, in which Google attempts to raise every
8 conceivable objection, whether justified or not. This is inappropriate and
9 unhelpful. *See* Section I, below. Moreover, “if [Google] has to resort to [140
10 paragraphs of] evidentiary objections to succeed on its motion, there must be a
11 question of fact lurking in the [evidence filed by the parties] that [Google is]
12 attempting to hide from the court.” *Burch v. Regents of the University of*
13 *California*, 433 F.Supp.2d 1110, 1122 (E.D. Cal. 2006).

14 To avoid burdening the Court with another unreasonably lengthy
15 document, Perfect 10 will generally address Google’s Evidentiary Objections
16 and will not respond at this time to each of the 140 separate paragraphs of
17 specific objections raised by Google. The discussion set forth below
18 demonstrates that Google’s Evidentiary Objections lack merit and should be
19 overruled by the Court. Nevertheless, if this Court believes the discussion set
20 forth below insufficiently responds to Google’s Evidentiary Objections, Perfect
21 10 is prepared, at the Court’s request, to file a Supplemental Response that
22 specifically addresses, paragraph by paragraph, each of the 140 paragraphs of
23 baseless objections raised by Google.

24 **I. APPLICABLE STANDARDS FOR ADDRESSING**
25 **GOOGLE’S EVIDENTIARY OBJECTIONS.**

26 Google has raised nearly every conceivable objection to the evidence
27 submitted by Perfect 10 in opposition to Google’s Summary Judgment Motions,
28 including almost the entire Zada Declaration. As numerous district courts

1 recently have noted, this practice is inappropriate and unhelpful. For example,
2 in *Johnson v. Roche*, 2009 WL 720891 *6 (E.D. Cal., March 13, 2009), the
3 court stated:

4 Although it appears to have become all the rage for litigants to
5 object to every item of evidence the opposing party submits on
6 summary judgment practice, doing so simply does not help the
7 process. Plaintiff’s evidence and defendants’ objections cannot be
8 divorced from the nature of this proceeding, i.e., summary judgment,
9 in which defendants are the moving parties.

10 Similarly, in *Burch v. Regents of the University of California*, 433
11 F.Supp.2d 1110 (E.D. Cal. 2006), the court condemned the fact that “attorneys
12 routinely raise every objection imaginable without regard to whether the
13 objections are necessary, or even useful, given the nature of summary judgment
14 motions in general, and the facts of their cases in particular.” *Id.* at 1119. As
15 the *Burch* court noted:

16 It appears to have become the “standard of practice” on
17 summary judgment motions for attorneys to comb through the
18 materials submitted by their opponents in search of any statement,
19 phrase, or document which might in any way run afoul of the
20 Federal Rules of Evidence, and to file objections on all conceivable
21 grounds. In some of the larger law firms, newer attorneys are
22 assigned to the case simply for that purpose. Only the attorneys and
23 their clients know how many billable hours are spent on such
24 endeavors.

25 *Id.* at 1118. Merely because Google has objected to almost every portion of the
26 Zada Declaration, as well as the other evidence submitted by Perfect 10, does
27 not mean that its objections have any basis whatsoever. Rather, as explained
28 below, this Court must consider the following principles in evaluating Google’s

1 evidentiary objections:

2 First, a court ruling upon a summary judgment motion “cannot ignore the
3 fact that a non-movant in a summary judgment setting is not attempting to
4 prove its case, but instead seeks only to demonstrate that a question of fact
5 remains for trial.” *Id.* at 1121. Recognizing the significance of this difference,
6 the Ninth Circuit has adopted a “general principle” that courts must “treat the
7 opposing party’s papers more indulgently than the moving party’s papers.”
8 *Lew v. Kona Hosp.*, 754 F.2d 1420, 1423 (9th Cir.1985). *See also Scharf v.*
9 *U.S. Att’y Gen.*, 597 F.2d 1240, 1243 (9th Cir.1979) (“courts generally are much
10 more lenient with the affidavits of a party opposing a summary judgment
11 motion.”); *Doff v. Brunswick Corp.*, 372 F.2d 801, 804 (9th Cir.1966) (referring
12 to the “rule of liberal construction of a counter affiant’s papers”), *cert. denied*,
13 389 U.S. 820, 88 S.Ct. 39 (1967).

14 Second, “objections to the *form* in which the evidence is presented are
15 particularly misguided where, as here, they target the non-moving party's
16 evidence.” *Burch*, 433 F.Supp.2d at 1119 (emphasis in original). Rule 56(e) of
17 the Federal Rules of Civil Procedure provides that affidavits and declarations in
18 connection with a summary judgment proceeding “shall set forth such facts as
19 *would be admissible* in evidence.” Fed. R. Civ. P. 56(e) (emphasis added).
20 Accordingly, the Supreme Court has held that on summary judgment, the non-
21 moving party’s evidence need not “be in a form that is admissible at trial in
22 order to avoid summary judgment . . .” *Celotex Corp. v. Catrett*, 477 U.S. 317,
23 324 (1986). Rather, a court is concerned with the admissibility of the contents
24 of the evidence. *Id.* Similarly, the Ninth Circuit has held that “to survive
25 summary judgment, a party does not necessarily have to produce evidence in a
26 form that would be admissible at trial, as long as the party satisfies the
27 requirements of Federal Rules of Civil Procedure 56.” *Fraser v. Goodale*, 342
28 F.3d 1032, 1036-37 (9th Cir. 2003). “In other words, when evidence is not

1 presented in an admissible form in the context of a motion for summary
2 judgment, *but it may be presented in an admissible form at trial*, a court may
3 still consider that evidence.” *Burch*, 433 F.Supp.2d at 1120, *citing Fraser*, 342
4 F.3d at 1037 (emphasis in original). This principle is particularly relevant both
5 to Perfect 10’s DMCA notices and to Perfect 10’s printouts showing that
6 Google did not remove the infringing material identified by Perfect 10. Google
7 has no basis to exclude this critical evidence from the case. *See* Section XV,
8 below.

9 Third, “objections to evidence on the ground that it is irrelevant,
10 speculative, and/or argumentative, or that it constitutes an improper legal
11 conclusion are all duplicative of the summary judgment standard itself.” *Burch*,
12 433 F.Supp.2d at 1119. As the *Burch* court explained, a court “can award
13 summary judgment only when there is no genuine dispute of *material* fact. It
14 cannot rely on irrelevant facts, and thus relevance objections are redundant.”
15 *Id.* (emphasis in original).

16 Fourth, it is “questionable” whether a court should apply the
17 authentication requirement to bar evidence when its authenticity is not actually
18 disputed. *Id.* at 1120. In fact, the Ninth Circuit has held that a district court's
19 consideration of unauthenticated evidence in conjunction with a motion for
20 summary judgment is harmless error when a competent witness with personal
21 knowledge could have authenticated the document. *Hal Roach Studios, Inc. v.*
22 *Feiner & Co.*, 896 F.2d 1542, 1552 (9th Cir.1990). Such a ruling is “a matter
23 of common sense.” *Burch*, 433 F.Supp.2d at 1120.

24 Finally, a court must carefully consider whether it is appropriate to strike
25 a non-movant’s evidence on the grounds of hearsay, authenticity, or lack of
26 foundation. As one court has noted:

27 [E]ven seemingly appropriate objections based on hearsay and
28 failures to authenticate/lay a foundation are difficult to address away

1 from the dynamics of a trial. During trial, when a party raises valid
2 evidentiary objections, the opposing party will have an opportunity
3 to present the evidence in an alternative and admissible form. At
4 trial, a question can always be rephrased if an objection to it is
5 sustained. Not so in the context of summary judgment practice.

6 *Burch*, 433 F.Supp.2d at 1122.

7 As explained below, this Court should apply the general principles
8 discussed above to the baseless evidentiary objections raised by Google and
9 overrule these objections in their entirety.

10 **II. INCORRECT OBJECTIONS THAT THE ZADA DECLARATION**
11 **LACKS PERSONAL KNOWLEDGE AND LACKS**
12 **FOUNDATION.**

13 Apparently aware that the Zada Declaration establishes numerous issues
14 of material fact sufficient to deny its Summary Judgment Motions, Google
15 asserts, without basis or support, that much of the Zada Declaration “is
16 argumentative and speculative” and “[l]ittle of the Zada declaration could be
17 classified as fact.” Evidentiary Objections at 3. The language of the Zada
18 Declaration itself compels this Court to reject Google’s meritless contentions.

19 First, Dr. Zada has been intimately involved in every aspect of this case.
20 Dr. Zada has testified that he has spent “at least 2,000 hours using Google’s
21 search engine to locate infringements of Perfect 10’s copyrighted works.” Zada
22 Decl. ¶1. He has produced Perfect 10’s documents to Google, attended all of
23 the depositions of Google employees conducted by Perfect 10, and reviewed all
24 of the documents produced by Google, all of Google’s ’s discovery responses,
25 and the declarations submitted by Google’s declarants in this action. Zada
26 Decl. ¶3. Moreover, in Paragraph 4 of the Zada Declaration, Dr. Zada testifies
27 in detail about his personal involvement in the creation of the exhibits to his
28 declaration:

1 The Exhibits attached hereto, except where otherwise noted,
2 fall into one of ten categories: (a) true and correct copies of
3 documents that *I have downloaded* as Adobe PDF files from the
4 Internet – *I have personally downloaded* each and every one of the
5 Adobe files attached to this declaration as printed exhibits; (b) true
6 and correct copies of snapshots of my computer screen, *which I*
7 *captured* using the program “snagit;” (c) true and correct copies of
8 images that *I downloaded* from various pay sites; (d) true and correct
9 copies of Adobe PDF files downloaded from the Internet and print
10 screens of web pages captured using the program “snagit” that are
11 included in Exhibit 9. *I personally* downloaded or print screened
12 each of these documents unless otherwise indicated. e) true and
13 correct copies of DMCA notices that *I sent to Google* (excluding
14 attached disks, if any); (f) true and correct copies of *spreadsheets*
15 *that I created*, or that were created under my supervision; (g) true
16 and correct copies of emails or other communications received from
17 Google; (h) true and correct copies of documents produced by
18 Google in discovery. . . . (Emphasis added).

19 It is unlikely that there have been many cases where the president of a company
20 has been as involved in every aspect of litigation as Dr. Zada has been involved
21 in this action.

22 Accordingly, the statements in the Zada Declaration are based upon Dr.
23 Zada’s personal knowledge. Dr. Zada’s testimony is certainly based upon
24 greater personal knowledge than that of Google’s declarant, Shantal Rands
25 Poovala, who testifies about how Google allegedly processed DMCA notices
26 during years when she was not even working for Google! (*See Perfect 10’s*
27 *Evidentiary Objections to the Declaration and Rebuttal Declaration of Shantal*
28 *Rands Poovala, Section II, filed separately herewith.*)

1 Moreover, as explained in Section I, above, this Court should consider
2 the Zada Declaration, regardless of Google’s objections, because: (i) Google
3 has no basis to exclude any of the exhibits attached to the Zada Declaration; (ii)
4 any objections on the ground that Dr. Zada’s testimony is argumentative or
5 speculative are unnecessary; and (iii) testimony that may appear potentially
6 objectionable nevertheless may be capable of being presented in a form that is
7 admissible at trial.

8 Accordingly, for all of the reasons discussed above, this Court should
9 overrule Google’s objections that the Zada Declaration lacks foundation, lacks
10 personal knowledge, is argumentative, or is speculative. At least one such
11 objection is made to virtually the entire Zada Declaration. In particular, the
12 objections that Dr. Zada’s testimony “do not appear to be based on the
13 witness’s personal knowledge,” found in Paragraphs 8, 9, 11, 17, 24, 25, 30, 31,
14 32, 33, 34, 39, 40, 42, 45, 48, 49, 50, 52, 53, 57, 59, 60, 61, 62, 63, 64, 65, 66,
15 68, 72, 82, 84, 85, 88, 89, 90, 91, 92, 94, 95, 102, 104, and 106 of Google’s
16 Evidentiary Objections, should be overruled.

17 **III. INCORRECT OBJECTIONS THAT THE ZADA DECLARATION**
18 **CONSTITUTES IMPROPER OPINION TESTIMONY.**

19 Google further objects to portions of the Zada Declaration on the ground
20 that they constitute improper opinion testimony. Nowhere in the Evidentiary
21 Objections, however, does Google explain the basis for this objection.

22 In fact, the Zada Declaration sets forth the necessary qualifications for
23 Dr. Zada to render the opinions set forth in his declaration. Dr. Zada: (i)
24 received a Ph.D. in Operations Research from the University of California at
25 Berkeley; (ii) worked as a research staff member in the main computer science
26 department at IBM; (iii) taught as a visiting professor of applied mathematics at
27 Stanford University, UCLA, Columbia University, and UC Irvine; (iv) has
28 programmed computers for more than 20 years; and (v) based upon his

1 experience, is qualified to testify about search engines and their ability to block
2 search results. Zada Decl. ¶3.

3 Accordingly, Google’s unsupported objections that the Zada Declaration
4 includes improper opinion testimony lack merit. In particular, this Court should
5 overrule the objections set forth in Paragraphs 3, 6, 8, 9, 11, 14, 16, 18, 20, 21,
6 23, 24, 25, 26, 27, 30, 35, 37, 41, 42, 43, 44, 48, 49, 51, 53, 55, 57, 58, 59, 60,
7 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 77, 81, 84, 85, 86, 87, 88, 89,
8 90, 91, 92, 93, 94, 96, 97, 98, 99, 100, 101, 102, 103, 106, 107, 109, 111, 112,
9 114, 115, 116, 118, 120, 128 of the Evidentiary Objections.

10 **IV. INCORRECT OBJECTIONS REGARDING SAMPLE DMCA**
11 **NOTICES.**

12 Google also objects that, in opposing Google’s Summary Judgment
13 Motions: (i) Perfect 10 did not submit copies of all of its DMCA notices to the
14 Court, and (ii) the Zada Declaration merely demonstrated the sufficiency of a
15 number of sample DMCA notices, and not all Perfect 10’s notices to Google.
16 Evidentiary Objections at 3-4. Google’s objections have no basis, for the
17 following reasons.

18 First, Google submitted all of Perfect 10’s DMCA notices as part of
19 Google’s exhibits to its Summary Judgment Motions. *See* Declaration of
20 Shantal Rands Poovala (Docket Nos. 433-435, 467-469) (“Poovala Decl.”),
21 Exhibits L, N. Therefore, there was no reason for Perfect 10 to provide a
22 second copy of those notices.

23 Second, in order to defeat Google’s Summary Judgment Motions, Perfect
24 10 only needs to show that there is a triable issue of fact as to whether Perfect
25 10 submitted *one or more* substantially compliant DMCA notices to Google,
26 which Google failed to expeditiously process. Accordingly, it is both
27 reasonable and appropriate for Perfect 10 to demonstrate the sufficiency of a
28 *sample* of its DMCA notices which Google failed to expeditiously process.

1 By contrast, in order to prevail on its Summary Judgment Motions,
2 Google must prove that there is no triable issue of fact that *all* of Perfect 10's
3 notices that Google failed to expeditiously process were substantially non-
4 compliant. To satisfy this burden, Google must, at a minimum, demonstrate
5 that *each and every one* of the sample DMCA notices contained in Perfect 10's
6 opposition papers was substantially non-compliant or was expeditiously and
7 completely processed.¹

8 Here, however, Google has failed even to discuss Perfect 10's sample
9 notices, let alone establish that *any* are deficient. Its lone technical expert, Paul
10 Haahr, does not testify that any of Perfect 10's notices are deficient. Google
11 has not selected its own sample of Perfect 10 notices and demonstrated that
12 each such notice is substantially non-compliant. Instead, Google improperly
13 seeks to rely solely upon blanket statements made by Shantal Rands Poovala
14 that all of Perfect 10's DMCA notices are deficient, even though Ms. Poovala:
15 (i) has no technical qualifications; (ii) was not involved in the processing of
16 many of Perfect 10's notices; and (iii) testified at deposition that she essentially
17 knew nothing about Perfect 10's DMCA notices. *See* Perfect 10's Evidentiary
18 Objections to the Declaration and Rebuttal Declaration of Shantal Rands
19 Poovala, filed separately herewith, Sections I-V.

20 Google cannot establish that Perfect 10's notices are substantially non-
21 compliant without proving that each and every one of Perfect 10's sample
22 notices is deficient. For this reason alone, the Court should overrule Google's
23 objections to Dr. Zada's discussion of a sample of Perfect 10's notices in the
24 Zada Declaration, including the objections set forth in Paragraphs 5, 23, 46, 47,
25 54, 58, 71, 74, 75, 76, 77, 78, 79, 80, 81, 86, 96, 100, 110, 125, 131, 133, 134,

26 ¹ [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 135, and 140 of the Evidentiary Objections. Furthermore, as described above,
2 Google has no basis to exclude any of Perfect 10’s exhibits, which include its
3 DMCA notices and printouts showing that Google did not remove access to
4 identified infringing web pages.

5 **V. INCORRECT OBJECTIONS REGARDING THE “SAMPLE”**
6 **SUBMITTED BY PERFECT 10.**

7 Google mistakenly contends that the sample of 12 images submitted by
8 Perfect 10 in opposition to Google’s Summary Judgment Motions (the
9 “Sample”), described both in the Zada Declaration and the Declaration of
10 Melanie Poblete, is irrelevant and cannot defeat summary judgment.
11 Evidentiary Objections at 4.

12 As discussed above, in order to prevail on its Summary Judgment
13 Motions, Google must establish that: (i) there is no triable issue of material fact
14 that *all* of Perfect 10’s notices that Google failed to expeditiously process were
15 substantially non-compliant; and that: (ii) there is no triable issue of material
16 fact that Google expeditiously and completely processed *each and every one* of
17 Perfect 10’s DMCA notices that were substantially compliant. As explained in
18 the Zada Declaration, the Sample thus is relevant because it demonstrates that
19 Google failed to act expeditiously to remove or disable access to the images
20 found in the Sample upon receiving repeated DMCA notices from Perfect 10
21 identifying the infringement of those images. Zada Declaration, ¶¶1-2 and
22 Exhibit 9. Accordingly, not only are Google’s objections to the Sample
23 incorrect; the discussion of the Sample in the Zada Declaration establishes
24 triable issues of fact as to whether Google expeditiously and completely
25 processed Perfect 10’s DMCA notices sufficient to deny the Summary
26 Judgment Motions.

27 ////////////////

28 ////////////////

1 **VI. INCORRECT OBJECTIONS BASED ON GOOGLE’S CLAIM**
2 **THAT PERFECT 10 NEVER SENT IT A VALID DMCA NOTICE.**

3 Google objects to portions of the Zada Declaration as irrelevant, on the
4 ground that Perfect 10 allegedly never sent Google a valid DMCA notice. *See*
5 Evidentiary Objections, ¶¶ 16, 70, 111. This is not a legitimate evidentiary
6 objection. Rather, whether Perfect 10 sent valid DMCA notices to Google is a
7 disputed issue in the case. Moreover, Google has failed to provide any support
8 for this objection. Indeed, Google has failed to explain why *any* of Perfect 10’s
9 sample notices do not comply with the DMCA. Furthermore, Google has not
10 refuted any of the testimony of Perfect 10’s technical expert declarants – Sean
11 Chumura, David O’Connor, and Bennett McPhatter – that Perfect 10’s notices
12 allowed Google to readily locate the infringing material. Finally, Google has
13 never provided Perfect 10 or this Court with a single example of what it
14 believes constitutes a valid DMCA notice. For all of these reasons, Google’s
15 relevance objection lacks any basis, and this Court should overrule similar
16 objections to the Zada Declaration, including those set forth in Paragraphs 16,
17 70 and 111 of the Evidentiary Objections.

18 **VII. INCORRECT OBJECTIONS REGARDING DR. ZADA’S**
19 **TESTIMONY THAT GOOGLE FAILED TO PROCESS PERFECT**
20 **10’S DMCA NOTICES.**

21 Google objects to certain testimony in the Zada Declaration that Google
22 failed to process Perfect 10’s DMCA notices, on the grounds that such
23 testimony is speculative and lacks foundation. Once again, these objections are
24 baseless. Dr. Zada certainly has the personal knowledge and the foundation
25 sufficient to testify that emails that Google sent to Perfect 10 did not mention
26 any deficiencies in the actual URLs included in Perfect 10’s DMCA notices.
27 These emails are submitted as Exhibits S, T, U, and V to the Declaration of
28 Shantal Rands Poovala and as Exhibits 10, 12 (pages 1-2), and 45 (pages 1-6) to

1 the Zada Declaration.

2 Dr. Zada also has the personal knowledge sufficient to testify that Google
3 did not suppress an image or a URL that contained infringing material
4 identified by Perfect 10 in its DMCA notices. Dr. Zada himself checked to see
5 if the infringing material was removed after he sent the DMCA notice. In the
6 Zada Declaration, Dr. Zada specifically demonstrates Google’s lack of action
7 by comparing the contents of Perfect 10’s DMCA notices with screen captures
8 of the same identified infringements taken months or years later. *See Zada*
9 *Decl.*, ¶¶26-27, 41-53, 55, 58-61, Exhs.14, 16, 28-36, 38, 40, 43-45.

10 For these reasons, this Court should overrule Google’s objections to the
11 Zada Declaration on the grounds that Dr. Zada’s testimony regarding Google’s
12 failure to process Perfect 10’s DMCA notices is speculative and lacks
13 foundation, including those objections set forth in Paragraphs 41, 50, 52, 53, 62,
14 66, 89, 97, 98, 99, 101, 112, 114, 115, 119 and 122 of the Evidentiary
15 Objections.

16 **VIII. INCORRECT OBJECTIONS TO DR. ZADA’S TESTIMONY**
17 **THAT GOOGLE’S INSTRUCTIONS WERE UNUSABLE,**
18 **UNNECESSARILY BURDENSOME, OR WERE FOLLOWED BY**
19 **PERFECT 10.**

20 Google objects to Dr. Zada’s testimony regarding Google’s DMCA
21 instructions on the grounds that it is irrelevant and speculative, lacks
22 foundation, and lacks personal knowledge. These objections lack merit.

23 First, Dr. Zada’s testimony that Google’s “instructions” regarding
24 Blogger are not usable is neither irrelevant nor speculative. Dr. Zada testifies
25 that, although Google requires the identification of a “post URL” in DMCA
26 notices that are sent to it, such URLs do not exist on thousands of blogger.com
27 web pages that infringe full-size Perfect 10 images. This testimony has
28 sufficient foundation because Dr. Zada provides actual examples of

1 blogger.com web pages that do not have post URLs. Zada Decl. Exhs. 28-35.
2 Accordingly, Dr. Zada’s testimony establishes that Google’s instructions, and
3 not Perfect 10’s notices, are deficient. Moreover, Dr. Zada’s testimony
4 regarding this issue is supported by the Declarations of Sheena Chou and Sean
5 Chumura. *See* Declaration of Sheena Chou Submitted In Opposition To
6 Google’s Three Motions For Summary Judgment ¶¶10-11 (Docket No. 483)
7 (“Chou Decl.”) and Declaration of Sean Chumura Submitted In Opposition To
8 Google’s Three Motions For Summary Judgment ¶7 and Exh. 2 (Docket No.
9 479) (“Chumura Decl.”).

10 Second, Dr. Zada’s testimony that Google’s DMCA instructions are
11 incompatible with the DMCA itself is neither irrelevant nor speculative. Dr.
12 Zada properly states that: (i) Google cannot require that DMCA notices be
13 submitted to it only by fax or mail, when the DMCA statute itself requires that
14 an agent provide a street address, fax number, and email address (*see* Zada
15 Declaration, Exh. 11, page 1); and (ii) Google cannot require that users send
16 their DMCA notices to a fax number that is not listed at the Copyright Office,
17 or to the attention of a department not listed at the Copyright Office (*see id.*,
18 Exh. 11, page 1).

19 Third, Dr. Zada’s testimony that Google keeps changing its DMCA
20 instructions, and that Google cites to the wrong instructions in its moving
21 papers, clearly is relevant. Google cites to its current instructions in a
22 misleading attempt to claim that DMCA notices sent by Perfect 10 to Google in
23 2004 are deficient. Defendant Google's Reply In Support Of Motion for
24 Summary Judgment Re: Google's Entitlement to Safe Harbor Under 17 U.S.C.
25 §512(d) for Web and Image Search (Docket No. 529), page 12, lines 17-18. In
26 fact, as Dr. Zada explains, those notices followed Google’s 2004 instructions.
27 Dr. Zada’s testimony has sufficient foundation because he submits copies of
28 Google’s 2004 DMCA instructions as evidence. Zada Decl. ¶23, Exh. 12,

1 pages 1-2.

2 Accordingly, for all of the above reasons, this Court should overrule
3 Google’s objections to Dr. Zada’s testimony regarding its DMCA instructions,
4 including those objections set forth in Paragraphs 12-14, 17, 18, 21, 22, 26, 54,
5 55, 62, 72, 92, 99, 108, 109, and 120 of the Evidentiary Objections.

6 **IX. INCORRECT OBJECTIONS TO DR. ZADA’S TESTIMONY**
7 **REGARDING RAPIDSHARE, GIGANEWS.COM AND**
8 **THEPIRATEBAY.ORG.**

9 Google asserts that Dr. Zada’s testimony regarding rapidshare.com,
10 rapidshare.de, giganews.com, and thepiratebay.org is “irrelevant” because those
11 websites are not parties to the litigation. Google is incorrect. Perfect 10
12 alleges, both in this action and in the Zada Declaration, that Google improperly
13 links to, receives payments from, places ads on, or hosts these infringing
14 websites. *See* Zada Decl. ¶14, Exh. 7. Google must prove that it expeditiously
15 ended business dealings with, and disabled access to, these infringing websites
16 upon receiving knowledge of their infringing conduct. Thus, evidence that
17 Google failed to so act is clearly relevant. Accordingly, this Court should
18 overrule Google’s objections to Dr. Zada’s testimony, including those set forth
19 in Paragraphs 28-36 of the Evidentiary Objections.

20 **X. INCORRECT OBJECTIONS REGARDING DR. ZADA’S**
21 **TESTIMONY CONCERNING THE FUNCTIONALITY OF**
22 **ADOBE PROFESSIONAL SOFTWARE.**

23 Google’s objections to Dr. Zada’s testimony regarding the functionality
24 of Adobe Professional software (*see* Evidentiary Objections, ¶¶20, 24, 123)
25 have no basis. Google’s Summary Judgment Motions rest largely on its
26 completely unsupported claim that DMCA notices sent by Perfect 10 using
27 Adobe Professional software are necessarily deficient and unreasonably
28 burdensome. Nothing could be farther from the truth. Dr. Zada provides

1 evidence that Adobe files are searchable, that URLs can be extracted, and that
2 infringing images can be check marked. These features, as well as many others,
3 make a DMCA notice submitted using Adobe vastly superior to handwritten
4 DMCA notices sent by mail, which nevertheless are acceptable under the
5 DMCA. Zada Decl. ¶12, Exh. 5, pages 13-14.

6 Dr. Zada’s testimony regarding Adobe Professional has sufficient
7 foundation because Dr. Zada provides actual examples of Adobe’s search and
8 bookmark features and demonstrates how URLs can be extracted and how
9 infringing images can be check marked. Zada Decl. ¶¶9, 12, and Exhs. 2, 5,
10 pages 13-14. Moreover, Dr. Zada’s testimony regarding these matters is
11 supported by the Declarations of Sheena Chou and Sean Chumura. *See* Chou
12 Decl. ¶¶7-9, Exh. 9; Chumura Decl. ¶4-5, Exh. 1. Accordingly, this Court
13 should overrule Google’s objections to Dr. Zada’s testimony, including those
14 set forth in Paragraphs 20, 24, and 123 of the Evidentiary Objections.

15 **XI. INCORRECT OBJECTONS TO DR. ZADA’S DESCRIPTIONS OF**
16 **GOOGLE’S FRAGMENTED LOGS AND GARBLED DMCA**
17 **DOCUMENTS.**

18 Google objects to certain testimony by Dr. Zada regarding Google’s
19 fragmented DMCA “logs” and garbled DMCA documents. *See* Evidentiary
20 Objections, ¶¶41, 42, 43, 44, 113, and 116. Dr. Zada specifically testifies that
21 he has reviewed all of the documents produced by both Perfect 10 and Google
22 in this action. *See* Zada Decl. ¶3. Under these circumstances, Dr. Zada
23 certainly has the capability to testify regarding the contents of a particular “log”
24 fragment, whether that log fragment contains dates, redactions, and URLs
25 which Perfect 10 identified to Google in its DMCA notices, and whether that
26 log fragment identifies who processed the notice, when the notice was
27 processed, or the name of the infringer. Dr. Zada can also testify that DMCA
28 notices that Google produced to Perfect 10 in discovery as part of its “DMCA

1 log” were hopelessly garbled. Finally, Dr. Zada can testify regarding the
2 number of rows in Google’s AdSense “log” that was produced to Perfect 10 in
3 discovery. Accordingly, this Court should overrule Google’s objections to Dr.
4 Zada’s testimony.

5 **XII. INCORRECT OBJECTIONS THAT DR. ZADA**
6 **MISCHARACTERIZES DOCUMENTS.**

7 Without further explanation or discussion, Google objects to portions of
8 the Zada Declaration on the ground that Dr. Zada mischaracterizes documents.
9 In many cases, Google raises this objection even though Dr. Zada simply quotes
10 language directly from the document he references. *See, e.g.*, Evidentiary
11 Objections, ¶31. Because Google fails to establish that Dr. Zada has
12 mischaracterized any documents, this Court should overrule Google’s
13 objections, including those set forth in Paragraphs 13, 14, 17, 18, 20, 22, 23, 24,
14 25, 26, 27, 30, 31, 32, 36, 37, 38, 41, 43, 44, 45, 50, 51, 52, 56, 57, 59, 60, 70,
15 72, 85, 88, 91, 93, 97, 98, 99, 101, 103, 109, 114, 115, 116, 120, and 128 of the
16 Evidentiary Objections.

17 **XIII. INCORRECT OBJECTIONS TO DR. ZADA’S TESTIMONY**
18 **THAT PERFECT 10 IDENTIFIED AT LEAST 329 INFRINGING**
19 **POST URLS IN THE DMCA NOTICES IT SENT TO GOOGLE.**

20 Google objects to Dr. Zada’s testimony, set forth at various points in the
21 Zada Declaration, that Perfect 10 identified at least 329 infringing post URLs in
22 the DMCA notices it sent to Google. *See, e.g.*, Zada Decl. ¶¶8, 41, 61. Google
23 fails to refute this testimony, however, which contradicts Google’s incorrect
24 claim in its Blogger Motion that Perfect 10 failed to identify any infringing post
25 URLs in its DMCA notices.

26 Dr. Zada’s testimony regarding the post URLs is based upon his own
27 personal knowledge of the contents of Perfect 10’s DMCA notices. Google has
28 no legitimate basis to strike this testimony. Accordingly, this Court should

1 overrule Google's objections, including those set forth in Paragraphs 18, 72, 73,
2 84, 100, and 103 of the Evidentiary Objections.

3 **XIV. INCORRECT OBJECTIONS TO DR. ZADA'S TESTIMONY**
4 **THAT PERFECT 10 IDENTIFIED AT LEAST 3737 INFRINGING**
5 **BLOGGER.COM URLS THAT GOOGLE DID NOT SUPPRESS.**

6 Google also objects to Dr. Zada's testimony that Perfect 10 identified at
7 least 3737 infringing blogger.com URLs in DMCA notices it sent to Google,
8 that these URLs provided Google with sufficient information to locate the
9 infringing blogger.com webpage, but Google failed to suppress these URLs.
10 *See, e.g., Zada Decl. ¶¶41-51, Exhs. 28-35.* Once again, Google fails to refute
11 Dr. Zada's testimony, or provide a legitimate explanation for its objections.

12 Dr. Zada's testimony is based upon his personal knowledge of the
13 contents of Perfect 10's DMCA notices and Google's responses to these
14 notices. Accordingly, this Court should overrule Google's unsupported
15 objections, including those set forth in Paragraphs 18, 24, 69, 71, 76, 79, 82, 83,
16 84, 85, 86, and 100 of the Evidentiary Objections.

17 **XV. INCORRECT OBJECTIONS TO EXHIBITS SUPPORTING DR.**
18 **ZADA'S TESTIMONY THAT GOOGLE DID NOT**
19 **EXPEDITIOUSLY REMOVE IDENTIFIED INFRINGING**
20 **IMAGES, LINKS, AND GOOGLE ADS.**

21 Throughout the Zada Declaration, Dr. Zada identifies various exhibits
22 demonstrating that Google failed to remove infringing images, links, and
23 Google ads identified by Perfect 10 in its DMCA notices from identified
24 infringing web pages. Dr. Zada personally conducted the Google searches
25 discussed in his declaration and personally printed these exhibits. *See, e.g.,*
26 *Zada Decl., ¶¶4, 24-61, Exhs. 13-45.* Google does not refute any of this
27 evidence. Instead, Google raises objections to these exhibits that lack merit.

28 For all of the reasons discussed above, Dr. Zada's testimony regarding

1 these exhibits is based upon his personal knowledge, has sufficient foundation,
2 and is neither argumentative, nor speculative, nor improper opinion testimony.
3 Accordingly, this Court should overrule Google’s objections to the Exhibits to
4 the Zada Declaration, including those set forth in Paragraphs 122-140 of the
5 Evidentiary Objections.

6 **XVI. MISCELLANEOUS IMPROPER OBJECTIONS.**

7 In Paragraphs 15 and 19 of the Evidentiary Objections, Google objects to
8 Dr. Zada’s testimony regarding AOL’s DMCA requirements on the ground that
9 such testimony is irrelevant. Google is incorrect. AOL has a search engine,
10 like Google. Furthermore, AOL uses Google as a source of its search results.
11 AOL has no incentive to require a copyright holder such as Perfect 10 to
12 provide less information than is necessary for AOL to process a DMCA notice.
13 Accordingly, this Court should overrule Google’s objections set forth in
14 Paragraphs 15 and 19 of the Evidentiary Objections.

15 In Paragraph 16 of the Evidentiary Objections, Google objects to Dr.
16 Zada’s testimony about the domain gghpt.com on the ground that Perfect 10
17 “never sent Google a valid DMCA notice directed to Google Groups
18 (gghpt.com).” This objection mistakenly confuses gghpt.com with
19 groups.google.com and googlegroups.com. These websites are not the same.
20 Zada Decl. ¶¶9, 52, Exhs. 2, 36.

21 In Paragraph 22 of the Evidentiary Objections, Google objects to Dr.
22 Zada’s testimony in Paragraph 11 of the Zada Declaration that “Google does
23 not provide any instructions for notifying Google of infringements on Google
24 AdWords sites that are behind password protected areas” on the ground that Dr.
25 Zada mischaracterizes the documents referenced because “Google does have a
26 DMCA policy for AdWords.” Google’s meritless objection is based upon a
27 misleading assertion. In fact, Google’s policy for AdWords deals only with
28 *infringements in the ad itself, not with infringements on the website of the*

1 *advertiser*. Poovala Decl. ¶95. Accordingly, the Court should overrule
2 Google's unsupported and factually incorrect objection.

3 **XVII. CONCLUSION.**

4 For the foregoing reasons, this Court should disregard all of Google's
5 evidentiary objections to Declaration of Dr. Norman Zada and the exhibits
6 thereto.

7 Dated: October 12, 2009

Respectfully submitted,
LAW OFFICES OF JEFFREY N. MAUSNER

8
9 By: Jeffrey N. Mausner

10 Jeffrey N. Mausner
11 Attorney for Plaintiff Perfect 10, Inc.
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