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10  
11 UNITED STATES DISTRICT COURT  
12 CENTRAL DISTRICT OF CALIFORNIA

13 PERFECT 10, INC., a California  
corporation,

14 Plaintiff,

15 vs.

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

18 Defendants.

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.

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

**DISCOVERY MATTER**

Hon. Stephen J. Hillman

**GOOGLE INC.'S REPLY IN  
SUPPORT OF ITS MOTION FOR A  
DOCUMENT PRESERVATION  
ORDER TO PREVENT FURTHER  
SPOILIATION OF EVIDENCE BY  
PERFECT 10, INC.**

**[Reply Declaration of Rachel Herrick  
Kassabian filed concurrently  
herewith]**

Date: January 15, 2010  
Time: 10:00 a.m.  
Crtrm.: 550

Discovery Cutoff: None Set  
Pretrial Conference Date: None Set  
Trial Date: None Set

**PUBLIC REDACTED**

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**Preliminary Statement**

P10 has now admitted that documents held by key custodians in this case have been lost or destroyed. P10 also has refused to describe the full scope of that destruction, nor has P10 identified what steps it has taken (if any) to preserve relevant documents. Instead, P10 attempts to draw the Court’s attention away from its document preservation failures by levying false accusations against Google, and insisting that a “mutual preservation order” is the answer. It is not. Preservation orders are issued only as necessary, and only for good cause shown. P10’s Opposition leaves no doubt that P10 has failed to honor its obligation to preserve relevant evidence, and that absent a preservation order additional documents are in danger of being lost or destroyed. By contrast, P10 has presented no basis for a similar order against Google. P10’s reactive posturing has wasted this Court’s time, and its groundless “best defense is a good offense” litigation strategy should be rejected out of hand. A document preservation order against P10 should issue.

**Argument**

**I. P10’S OPPOSITION BRIEF DOES CONTEST THAT RELEVANT DOCUMENTS HAVE BEEN DESTROYED.**

P10 does not dispute that emails and other documents of key P10 custodians have been lost or destroyed during the pendency of this case, warranting issuance of a document preservation order. See Pueblo of Laguna v. U.S., 60 Fed. Cl. 133, 138 (Fed. Cl. 2004) (document preservation order warranted where proponent shows that opposing party has lost or destroyed evidence in the past or has inadequate retention procedures in place).

**A. P10 Does Not Dispute – Or Even Address – Its Employee Wendy Augustine’s Sworn Testimony That** [REDACTED]

[REDACTED]  
Ms. Augustine testified under oath that [REDACTED]  
[REDACTED]

1 [REDACTED]. See Declaration of Rachel Herrick Kassabian  
2 dated December 2, 2009 (Dkt. No. 658) (“Kassabian Decl.”) at Exh. H (Augustine  
3 Deposition Transcript at 103:20-104:18). P10’s Opposition brief does not even  
4 address this testimony. Indeed, P10 submits an opposing declaration from  
5 Ms. Augustine, yet nowhere in that declaration does Ms. Augustine retract or even  
6 address her prior sworn testimony that [REDACTED]

7 [REDACTED]. See Declaration of Wendy Augustine dated December 10, 2009  
8 (“Augustine Decl.”) (Dkt. No. 661). P10 also submits a declaration from its counsel  
9 Mr. Mausner, yet nowhere in that declaration does Mr. Mausner contest his  
10 September 8, 2009 letter to Google confirming that [REDACTED]

11 [REDACTED]. See Declaration of Jeffrey Mausner dated  
12 December 10, 2009 (Dkt. No. 662); compare Kassabian Decl., Ex. B (9/8/09 letter  
13 from Mausner). Thus, is it undisputed that [REDACTED]

14 [REDACTED]  
15 [REDACTED].  
16 Instead, P10 offers that the admittedly-deleted emails may (or may not) be  
17 recoverable through some sort of unspecified “backup system” P10 claims to  
18 maintain. Joint Stipulation on P10’s Motion for a Mutual Document Preservation  
19 Order (“Opp.”) at 2.<sup>2</sup> Yet P10 provides no details whatsoever regarding that system,  
20 such as what time periods and custodians it covers. See Declaration of Norman  
21 Zada dated December 10, 2009 (“Zada Decl.”) at ¶ 3 (Dkt. No. 663). Nor does P10  
22  
23

24 <sup>1</sup> See Google’s Motion (Dkt. No. 657) at 13-14 (explaining Ms. Augustine’s role  
25 as a critical witness in this case).

26 <sup>2</sup> As the Court is aware, P10 filed its “opposition” to Google’s Motion in the  
27 form of a purported “Joint Stipulation” which includes both P10’s opposition, and  
28 P10’s separate motion for its own document preservation order. For ease of  
reference, Google refers to the Joint Stipulation filed by Google on December 11,  
(footnote continued)

1 explain why it is that, in the more than four months since Google first raised this  
2 issue in meet and confer, P10 has not been able to recover even a single one of the  
3 lost emails (if in fact they are recoverable). See Kassabian Decl., Exh. A (Google's  
4 8/25/09 meet and confer letter first raising issue of lost P10 emails).

5 P10 cannot play hide the ball with the Court, the way it did with Google  
6 during meet and confer. P10 should be ordered to provide the information Google  
7 requested in its moving papers, including a complete explanation of what documents  
8 were lost during what time period and for which custodians, and what portion of  
9 these documents (if any) have been or can be recovered from backup sources. See  
10 Google's Motion at 19-20.

11 **B. P10 Admits That Additional Document Destruction Has Occurred**  
12 **With Respect to Documents Stored on Ms. Augustine's Computer.**

13 In its Opposition, P10 admits to additional document destruction involving  
14 Ms. Augustine – specifically, that Ms. Augustine “lost everything on her hard drive,  
15 in the fall of 2008,”<sup>3</sup> “most likely from a virus.” See Opp. at 2; Zada Decl. ¶ 2. P10  
16 does not identify the time period of the document loss, which it could have done by  
17 confirming when (before the fall 2008 hard drive failure) Ms. Augustine's electronic  
18 documents were last gathered and produced. P10 again speculates that these lost  
19 documents *may* (or may not) be recoverable through some sort of unspecified  
20

21 \_\_\_\_\_  
22 2009 (Dkt. No. 657) as Google's “Motion,” and the Joint Stipulation filed by P10 on  
23 December 14, 2009 (Dkt. No. 690) as P10's “Opposition” (“Opp.”).

24 <sup>3</sup> P10 submits contradictory declarations from Dr. Zada and Ms. Augustine  
25 which only raise further questions regarding what was lost, why and when. First,  
26 Dr. Zada declares that “all of the information on [Ms. Augustine's] hard drive was  
27 lost.” Zada Decl. ¶ 2. By contrast, Ms. Augustine declares that a computer  
28 technician “was able to retrieve emails dated September 17, 2008 and after” from  
that same computer. Augustine Decl. ¶ 5. P10 should be ordered to submit the  
comprehensive declaration Google has asked for in its moving papers.

1 "backup system," (see Opp. at 2-3), but provides no further information. This is yet  
2 another reason why Google's motion should be granted.

3 C. Other Key P10 Witnesses Lost Or Destroyed Documents During  
4 This Litigation As Well.

5 In addition to Ms. Augustine, Google has recently learned that various P10  
6 independent contractors also have lost or destroyed documents during this litigation.  
7 As the Court will recall, P10 is asserting publicity violations on behalf of nine  
8 individuals (the "Nine Models"). Google has begun its depositions of the Nine  
9 Models and has learned that key documents relevant to those publicity claims,  
10 including contracts and assignments of rights, have been lost or shredded during  
11 recent years. See Reply Declaration of Rachel Herrick Kassabian ("Kassabian  
12 Reply Decl."), filed concurrently, at Exh. A (10/16/09 Schoenweitz Deposition  
13 Transcript at 54:23-25 [REDACTED]  
14 [REDACTED]); *id.* at 55:9-14  
15 ([REDACTED]  
16 [REDACTED]  
17 [REDACTED]);<sup>4</sup> see also  
18 Kassabian Reply Decl., Exh. D (11/11/09 Weber Deposition Transcript at 68:3-14)  
19 ([REDACTED]); *id.*, Exh. E (11/19/09 Smith Deposition Transcript at  
20 19:17-20:15 and 25:24-26:2) ([REDACTED]).

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23 <sup>4</sup> Google initiated meet-and-confer efforts regarding Ms. Schoenweitz's  
24 destruction of documents by letter dated October 27, 2009. Kassabian Reply Decl.  
25 ¶ 3 and Exh. B. P10 refused to provide a substantive response to Google's letter for  
26 nearly two months, until December 22, 2009, *after* Google filed the instant motion.  
27 *Id.* ¶ 3 and Exh. C. In that December 22 letter, Mr. Mausner's office (which is  
28 representing both P10 and Ms. Schoenweitz) did not dispute Ms. Schoenweitz's  
testimony that [REDACTED]. *Id.* at  
¶ 3 & Exh. C.

1 P10 knew that documents related to these models' publicity rights would be  
 2 relevant to its litigation purportedly asserting those rights, yet apparently failed to  
 3 take steps necessary to preserve such documents. A document preservation order  
 4 against P10 should issue for this reason as well. See, e.g., In re NTL, Inc. Securities  
 5 Litigation, 244 F.R.D. 179, 194 (S.D.N.Y. 2007) (preservation obligation extends to  
 6 the 'key players' in the case.") (citing Zubulake v. UBS Warburg LLC, 220 F.R.D.  
 7 212, 218 (S.D.N.Y. 2003)); Silvestri v. General Motors Corp., 271 F.3d 583, 591  
 8 (4th Cir. 2001) ("If a party cannot fulfill this duty to preserve because he does not  
 9 own or control the evidence, he still has an obligation to give the opposing party  
 10 notice of access to the evidence or of the possible destruction of the evidence if the  
 11 party anticipates litigation involving that evidence."). See also Turner v. Hudson  
 12 Transit Lines, Inc., 142 F.R.D. 68, 73-74 (S.D.N.Y. 1991) ("a party's discovery  
 13 obligations are not satisfied by relying on non-parties to preserve documents").

14 **D. P10's Failure To Preserve Documents Also Extends To Its Own**  
 15 **Financial Records.**

16 And further, even though P10 was specifically ordered to produce its periodic  
 17 financial statements by the Court's Order dated October 6, 2009 (Dkt. No. 560), P10  
 18 has failed to produce financial statements for many months (including months  
 19 during the pendency of this litigation), and has now acknowledged that some of  
 20 those documents "do not exist." Specifically, P10 has failed to produce monthly  
 21 financial statements for the following months:

22 1997	January, February, March, April, May, June, July, September and 23 October
24 1998	November
25 1999	April, May, June, July, August, September, October and November
26 2000	January, February, April, May, June, July, August, September, 27 October, and November



1	2001	January, February, March, April and May
2	2002	February, June, July, August and October
3	2003	June and August
4	2004	March and April
5	2005	February
6	2006	January and February
7	2007	February, May, June, August, October and November
8	2008	January, February, April, July, October, and November
9	2009	January, February, April, June, July, August, September, October,
10		November, and December

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12 See Kassabian Reply Decl., Exh. F (excerpts of Joint Stipulation on Google’s

13 Motion to Compel (Dkt. No. 408) at 25-26). During recent meet and confer, P10

14 vaguely asserted that the missing documents “do not exist,” and confirmed that the

15 missing statements from 2007 were never created. Id. ¶ 6 & Ex. G. But P10 has

16 steadfastly refused to confirm specifically which of the remaining dozens of missing

17 statements (1) were never generated in the first place, or (2) were generated, but lost

18 or destroyed during this litigation. Id. P10 also recently informed Google that the

19 original copies of two of its monthly statements (for December 2001 and June 2004)

20 which were produced but only with redactions, no longer exist either. Id. Google

21 asked P10 to advise if these complete and unredacted statements were *not* lost or

22 destroyed during this litigation, and P10 did not respond. Id.

23       The record is replete with instances in which relevant P10 documents have

24 been lost or destroyed during the pendency of this action. A document preservation

25 order is necessary.

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1 **II. P10 DOES NOT CONTEST THAT IT FAILED TO TAKE STEPS**  
2 **NECESSARY TO PRESERVE RELEVANT DOCUMENTS.**

3 Not only does P10 concede the actual loss and destruction of documents, but  
4 its Opposition also does not contest that it failed to take any steps necessary to  
5 preserve documents, such as by giving document preservation instructions. See  
6 Motion at 5-8. Indeed, Ms. Augustine—the primary custodian of P10’s copyright  
7 records—testified that [REDACTED]. See Motion at  
8 4 (quoting Augustine Deposition Transcript). All three of the Nine Models who  
9 have been deposed to date testified similarly—[REDACTED]  
10 [REDACTED]. See, e.g., Kassabian Reply Decl., Exh. A (Schoenweitz Deposition  
11 Transcript at 75:11-18 ([REDACTED]  
12 [REDACTED]).<sup>5</sup>

13 Thus far, the only evidence of any preservation instruction of any kind from  
14 P10 to anyone is from P10 part-time employee Sheena Chou, who testified that  
15 [REDACTED]  
16 [REDACTED]. Motion at 5-8.  
17 This is insufficient. All litigants—including P10—have an obligation to preserve  
18 relevant documents. Since P10 has not honored this obligation voluntarily, the  
19 Court should order P10 to do so now.

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24 <sup>5</sup> Ms. Weber and Ms. Smith gave similar testimony. Id., Exh. D (Weber  
25 Deposition Transcript at 22:8-11 ([REDACTED]  
26 [REDACTED])); id., Exh. E (Smith Deposition Transcript at 79:8-11 (“Q. Did  
27 anyone tell you that you needed to preserve documents that related to the Perfect 10  
28 versus Google litigation? A. No.”)).

1 **III. NONE OF P10'S COUNTERARGUMENTS HAVE MERIT.**

2 Instead of addressing its failure to preserve documents directly, P10 raises a  
3 series of unsupported claims and other distractions. First, P10 audaciously asserts  
4 that Google did not meet and confer prior to filing this motion. Opp. at 22-23.  
5 Nothing could be further from the truth. Google sent repeated letters and emails to  
6 P10 dating back to August 25, 2009, asking P10 to confirm that it would take steps  
7 necessary to [REDACTED]  
8 [REDACTED] ensure that no further document destruction occurred. Kassabian  
9 Decl., Exh. A. Google also asked P10 to disclose the scope and extent of P10's  
10 document destruction. *P10 completely ignored Google's letters for more than*  
11 *three months.* See Kassabian Decl. ¶ 10. It was only *after* Google filed this motion  
12 that P10 provided at least *some* of this information, and even then only via its  
13 opposition papers. See Zada Decl. ¶ 2 (partially explaining loss of Augustine  
14 emails); Augustine Decl. ¶ 5 (stating that after her August 2009 deposition,  
15 Ms. Augustine instructed a technician to modify the settings on her computer to  
16 prevent further email deletion). P10 should be sanctioned for its obstinate and  
17 groundless refusal to participate in the meet and confer process, which obstinance  
18 left Google with no choice but to file this motion.

19 Second, P10 insists that the documents that have been lost or destroyed are  
20 "irrelevant." Opp. at 2. P10 has no basis to claim that the emails Ms. Augustine  
21 lost are irrelevant, because P10 does not know which emails have been lost. Indeed,  
22 when documents are lost, inferences regarding relevance are drawn *against* the party  
23 who lost them, not in its favor. See Leon v. IPX Sys. Corp., 464 F.3d 951, 959 (9th  
24 Cir. 2006) ("because the relevance of destroyed documents cannot be clearly  
25 ascertained because the documents no longer exist, a party can hardly assert any  
26 presumption of irrelevance as to the destroyed documents"); Hamilton v. Signature  
27 Flight Support Corp., 2005 WL 3481423, at \*6 (N.D. Cal. Dec. 20, 2005) ("For  
28 purposes of relevance ... courts must take care not to 'hold[ ] the prejudiced party to

1 too strict a standard of proof regarding the likely contents of the destroyed [or  
2 unavailable] evidence,' because doing so 'would subvert the ... purposes of the  
3 adverse inference, and would allow parties who have ... destroyed evidence to profit  
4 from that destruction.'" (citation omitted); E\*Trade Securities v. Deutsche Bank  
5 AG, 230 F.R.D. 582, 589-90 (D. Minn. 2005) (selected preservation of documents  
6 gives rise to inference that relevant information was lost). Similarly, documents  
7 related to the nine models' past assignments of their publicity rights to companies  
8 other than P10 are indeed relevant to P10's publicity claims—since P10 contends  
9 that its assignments are exclusive. See Second Amended Complaint ¶ 16. P10's  
10 relevance argument fails.

11 Third, P10 defends its paltry email production by claiming that it withheld  
12 certain emails on privilege and/or work-product grounds—for example, emails  
13 between Wendy Augustine (a non-lawyer) and Sheena Chou (another non-lawyer).  
14 Opp. at 3-4. As a preliminary matter, such emails presumptively would *not* be  
15 privileged, and P10's opposition brief does not even attempt to justify or  
16 substantiate that withholding.<sup>6</sup> In any event, the fact that certain unidentified emails  
17 may have been withheld (on apparently improper grounds) does not change the fact  
18 that other emails have been destroyed.

19 Fourth, P10 argues that "Google has never served a single request ...  
20 specifically requesting emails." Opp. at 3, n.2. This is false. As Google pointed out  
21 in its moving papers, Google has served dozens of document requests seeking  
22 "communications," which term was defined to include emails (to the extent that

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23  
24 <sup>6</sup> P10 appears to be taking the position that all of its internal emails are  
25 privileged because P10 currently is engaged in litigation. That is not the law. See,  
26 e.g., United States v. ChevronTexaco Corp., 241 F.Supp.2d 1065, 1069 (N.D. Cal.  
27 2002) ("The privilege protects communications between an attorney and her client  
28 made in confidence for the purpose of securing legal advice from the lawyer.")  
(citing United States v. Chen, 99 F.3d 1495, 1501 (9th Cir. 1996)).

1 point was not already obvious). See Kassabian Decl. ¶ 15 (listing examples of such  
2 document requests).

3 And fifth, P10 argues that Google has not produced certain documents. Opp.  
4 at 24-37. In addition to being untrue (*see* Google's Opposition to P10's  
5 Preservation Motion, Dkt. No. 647), what Google has or has not produced is  
6 irrelevant to whether P10 has lost or destroyed documents.<sup>7</sup> P10's attempt to draw  
7 the Court's attention away from P10's failings by levying false accusations at  
8 Google should be rejected summarily.<sup>8</sup>

9 At bottom, what P10 does *not* do in its Opposition is answer the following  
10 questions Google posed months ago during the meet-and-confer process, and again  
11 in Google's moving papers:

- 12 • How the settings on [REDACTED] P10 email account were  
13 established, by whom, and when;

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15  
16 <sup>7</sup> All of the discovery issues P10 recounts in opposition to the instant Motion  
17 (see Opp. at 26-37) have already been fully briefed in P10's Sanctions Motion and  
18 Google's Opposition thereto. See Docket Nos. 633 and 647. Rather than burden the  
19 Court by repeating those arguments here, Google respectfully refers the Court to its  
20 Opposition at 5-11 (Docket No. 647), and incorporates those arguments by reference  
21 as though fully set forth herein.

22 <sup>8</sup> In seeking what it describes as a mutual preservation order, P10 erroneously  
23 suggests that two cases cited in Google's Motion support the notion that a court can  
24 enter a preservation order against a party without cause. The cases stand for no such  
25 thing. The court in Realnetworks, Inc. v. DVD Copy Control Ass'n, Inc. instructed  
26 the parties to cooperate in drafting a document preservation order that would apply  
27 only to one party, the plaintiff, after finding that "Real did not have a preservation  
28 policy in place." 2009 WL 1258970, at \*10 (N.D. Cal. May 5, 2009). Similarly, the  
court in Pueblo of Laguna only ordered one party – the United States – to preserve  
documents after finding that failures in its document retention procedures were  
"pervasive and systematic." 60 Fed. Cl. at 139. Since P10 has demonstrated no  
cause whatsoever, and has not pointed to even a single instance of loss or  
destruction of documents by Google, a mutual preservation order is unnecessary.

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- Whether emails on [REDACTED] P10 email account have been deleted, and if so, how many and when;
- The location of any "backup" files for the deleted [REDACTED] emails, including [REDACTED], on P10 computers or servers, or at an off-site location maintained by any P10 service provider or vendor;
- Whether P10 gave any document preservation instruction to any P10 employees, contractors, or other personnel regarding this lawsuit, and if so, when; and
- Whether the email accounts of any P10 employees, contractors, or other personnel [REDACTED] have ever been set to automatically delete emails (and if so, who, when and after how long).

P10 should be ordered to answer these questions now, and to immediately take all steps necessary to preserve all relevant documents.

**Conclusion**

P10 has confirmed that it has destroyed documents, and has failed to implement even the most basic litigation hold or otherwise take steps to ensure that relevant documents were not lost or destroyed. For all the reasons identified in Google's moving papers, the Court should issue an order (1) requiring P10 to identify the scope, duration and extent of its email deletion activities, and any other document loss or destruction that has occurred, and (2) instructing P10 to immediately take all steps necessary to preserve all documents relevant to this litigation, including modifying its computer settings for all employees and officers to remove any auto-deletion instructions.

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1 DATED: January 6, 2009

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