

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
13 corporation,

14 Plaintiff,

15 v.

16 GOOGLE INC., a corporation,

17 Defendants.

Case No.: CV 04-9484 AHM (SHx)

Before Judge A. Howard Matz

**PLAINTIFF PERFECT 10, INC.'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF ITS
MOTION FOR PRELIMINARY
INJUNCTION AGAINST DEFENDANT
GOOGLE INC.**

PUBLIC REDACTED VERSION

[Filed Separately: Notice of Motion;
Declarations of Dr. Norman Zada, Jeffrey N.
Mausner, Sheena Chou, Melanie Poblete,
Dean Hoffman, C.J. Newton, Margaret Jane
Eden, Les Schwartz, Sean Chumura, David
O'Connor, Bennett McPhatter; and
[Proposed] Order]

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Honorable A. Howard Matz

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Plaintiff Perfect 10, Inc.'s Memorandum Of Points And Authorities In Support Of Its
Motion For Preliminary Injunction Against Defendant Google, Inc.

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1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT.**

2 Plaintiff Perfect 10, Inc. (“Perfect 10”) moves this Court to preliminarily enjoin
3 Defendant Google Inc.’s (“Google”) continuing infringement of *tens of thousands* of
4 Perfect 10 copyrighted images (“P10 Images”) and Google’s violation of Perfect 10’s
5 publicity rights. Perfect 10 is entitled to immediate relief because of at least seven new
6 developments since Perfect 10 filed its original motion for preliminary injunction in
7 2005. In its ruling on that motion, the Ninth Circuit reversed this Court’s holding that
8 Perfect 10 was unlikely to succeed on the merits of its secondary liability claims, and
9 held that Google could be liable for contributory infringement “if it had knowledge that
10 infringing Perfect 10 images were available using its search engine, could take simple
11 measures to prevent further damage to Perfect 10’s copyrighted works, and failed to
12 take such steps.” *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1172 (9th Cir.
13 2007).

14 Despite this ruling, Google has failed to take simple measures to prevent further
15 damage to Perfect 10’s copyrighted works. Although Perfect 10 has sent Google more
16 than 167 DMCA notices, the infringement on Google’s system has increased almost
17 ten-fold since 2005. Google is now displaying more than **22,000 thumbnails** of P10
18 Images in its Image Search results and is storing at least 3,837 full-size P10 Images on
19 its own servers. Google has placed ads next to more than 18,000 P10 Images. It has
20 promoted and refused to act against Google paysite affiliates that are collectively
21 stealing and selling more than 180,000 P10 Images. As a result, Perfect 10 has lost an
22 additional \$20 million since 2005, is near bankruptcy, and must have immediate relief
23 to survive. Declaration of Dr. Norman Zada, filed concurrently herewith (“Zada
24 Decl.”), ¶¶5-6, 9, 16, 45, Exhs. 1, 8, 9, 30.

25 The following facts, which were not before the Court in 2005, establish Perfect
26 10’s likelihood of success on the merits of its claims:

1 **A. Google Concedes That It Will Not Act In Most Cases To Prevent**
2 **Further Damage To Copyrighted Works.**

3 Google now concedes that it will only remove links identified by copyright
4 holders that go *directly to an infringing work*. Such links represent only roughly
5 30,000 out of the more than 222 million links that Google currently provides to sites
6 that infringe P10 Images. Google's policy of removing at most 1 out of 7,000 links to
7 infringing websites fails to protect copyright holders and does not constitute a viable
8 DMCA policy. Moreover, Google has admitted that it will not take any action against
9 infringing paysites, including its own advertising affiliates, such as *usenet.com*. Courts
10 have ruled that these websites are massive infringers whose services are "used
11 overwhelmingly for copyright infringement." *See, e.g., Arista Records LLC v.*
12 *Usenet.com, Inc.*, 633 F.Supp.2d 124, 131 (S.D.N.Y 2009). These sites currently
13 infringe hundreds of thousands of P10 Images. Nevertheless, Google: (i) continues to
14 provide hundreds of thousands of links to these sites; (ii) receives fees for promoting
15 these sites through sponsored links and ad placement; and (iii) refuses to sever its
16 business relationship with these sites or require them to remove identified infringing
17 material. Zada Decl. ¶¶17, 42-45, Exhs. 10, 27-30.

18 **B. Google Refuses To Remove 22,000 P10 Thumbnails From Its Image**
19 **Search Results.**

20 In its ruling, the Ninth Circuit noted that "[w]ithout image recognition
21 technology, Google lacks the practical ability to police the infringing activities of third-
22 party websites." *Perfect 10 v. Amazon*, 508 F.3d at 1174. Today, Google and others
23 indisputably possess this technology, which would allow Google to locate and remove
24 infringing P10 Images immediately. Zada Decl. ¶¶87-88, Exh. 66. Nevertheless,
25 Google has refused to use image recognition technology or take any other steps to
26 prevent the same identified infringing P10 Image from repeatedly appearing in
27 Google's Image Search results. Consequently, the number of P10 thumbnails
28 displayed in Google's Image Search results has increased from 2,500 in 2005 to more

1 than 22,000 today. Perfect 10 has identified the same P10 Images to Google, in some
2 cases 80 separate times, but Google has done nothing to prevent those same images
3 from reappearing in its Image Search results. Zada Decl. ¶2, Exh. 9.

4 **C. Google Is Directly Infringing Thousands Of Full-Size P10 Images.**

5 *In the last few months*, Google has begun forwarding both full-size and reduced
6 P10 Images contained in Perfect 10's DMCA notices to Google's partner,
7 *chillingeffects.org*, for publication on the Internet. As a result, P10 Images and links
8 that Perfect 10 has asked Google to remove are instead being *reinstated* on the servers
9 of Google's partner site, *chillingeffects.org*. Because Google provides a direct in-line
10 link to these images, Google users can now search for a Perfect 10 model and
11 download all of the images of that model in Perfect 10's confidential DMCA notices,
12 as well as thousands of other P10 Images, all while remaining at *google.com*. Zada
13 Decl. ¶¶13-15, Exhs. 5-7.

14 Google's unauthorized conveyance of P10 Images to *chillingeffects.org* for
15 display on the Internet is a willful violation of Perfect 10's distribution and display
16 rights. Google's conduct constitutes direct infringement that is not protected by fair
17 use or any DMCA safe harbor. Moreover, Google's in-line linking to that same
18 infringing material via its search results constitutes contributory infringement under the
19 Ninth Circuit's test. Instead of disabling access to identified infringing P10 Images,
20 Google is willfully re-establishing access to these images.

21 Perfect 10 has repeatedly insisted that Google not publish its confidential
22 DMCA notices on the Internet, particularly those containing actual images and live
23 links, but Google refuses to stop. Google's unwillingness to cease such unlawful
24 conduct prevents Perfect 10 from sending it further DMCA notices, which effectively
25 precludes Perfect 10 from protecting its copyrighted works.

26 **D. Google Refuses To Remove More Than 3,837 Full-Size P10 Images**
27 **From Its Own Servers.**

28 When Perfect 10's original preliminary injunction motion was before this Court

1 and the Ninth Circuit, Google failed to reveal that it was storing full-size P10 Images
2 on Google's own servers. Since that time, Perfect 10 has learned that Google is storing
3 at least 3,837 full-size P10 Images on its servers as part of Google's Blogger program,
4 as well as numerous other images associated with other Google hosting programs.
5 Declaration of Sheena Chou, filed concurrently herewith ("Chou Decl."), ¶¶8-11, Exh.
6 9; Zada Decl. ¶¶49-66, 77-78, Exhs. 33-46, 57-58, 9.

7 Google's storage of P10 Images on its own servers constitutes direct
8 infringement of Perfect 10's reproduction right. Moreover, Google's in-line linking in
9 its search results to images on Google's servers violates Perfect 10's display right and
10 establishes Google's direct liability under the Ninth Circuit's server test. Despite
11 Perfect 10's repeated identification of such images in multiple DMCA notices sent to
12 Google, Google refuses to remove these images from its servers. Chou Decl. ¶¶8-11.

13 **E. Google Refuses To Take Action Against Infringing Websites It Hosts.**

14 Google's hosting of infringing websites was also not previously before this
15 Court. Although these websites display Perfect 10 passwords and offer links for users
16 to download thousands of P10 Images, Google refuses to take action against either of
17 these infringing activities. Zada Decl. ¶¶11-12, Exh. 3-4.

18 **F. Google Refuses To Suppress More Than 30,000 Infringing Links**
19 **Identified In Perfect 10's DMCA Notices.**

20 Google has also refused to suppress more than 30,000 URLs identified by
21 Perfect 10 in the 167 DMCA notices it has sent to Google – almost all of the infringing
22 images and links that Perfect 10 has identified in its notices. Although Google has
23 recently begun to process new notices (which identified URLs in a fashion similar to
24 the 30,000 URLs Google has not suppressed), Google has forwarded those same
25 notices to *chillingeffects.org*. Zada Decl. ¶81. Consequently, Google has failed to
26 disable access to the infringing material. Furthermore, Google has asserted that every
27 one of Perfect 10's DMCA notices is deficient, but has refused at least 130 requests by
28 Perfect 10 to provide it with an example of what Google considers to be a compliant

1 notice. Zada Decl. ¶¶26, 91-95.

2 Instead of working with copyright holders to prevent further damage to their
3 copyrighted works, Google has made it as difficult as possible for Perfect 10 and others
4 to submit DMCA notices that Google will process. Zada Decl. ¶¶27, 92-96, Exhs. 16,
5 68-69. It is no wonder that Google’s DMCA policy has been described by others as
6 “*obstructionist*,” “*legally dubious*,” “*likely illegal*,” and a “*sham*.” See Declarations
7 of Jane Eden, Dean Hoffman, Les Schwartz, and C.J. Newton, filed concurrently
8 herewith; Declaration of Jeffrey N. Mausner, filed concurrently herewith (“Mausner
9 Decl.”), Exh. C.

10 **G. Google Refuses To Take Action Against Violations Of Perfect 10’s**
11 **Rights Of Publicity.**

12 Google has consistently refused to take any action against violations of Perfect
13 10’s assigned rights of publicity, including violations by Google’s advertising affiliates
14 on websites that Google hosts. Zada Decl. ¶¶15, 101, Exhs. 7, 73. This issue also was
15 not previously before this Court.

16 **H. Google’s Unlawful Conduct Has Caused Perfect 10 To Suffer**
17 **Irreparable Damage.**

18 The seven new developments identified above have caused Perfect 10 to suffer
19 irreparable damage. Since filing its original motion in 2005, Perfect 10 has been
20 forced to close its magazine and end its cell-phone downloading business. Its revenues
21 have dropped from nearly \$2,000,000 per year to less than \$150,000 per year. Perfect
22 10 cannot earn any appreciable revenue because everything it sells is being given away
23 for free by Google, which earns revenue from Perfect 10’s intellectual property while
24 paying it nothing. Perfect 10’s founder, Dr. Norman Zada, who has already lent
25 Perfect 10 nearly \$60 million, will soon no longer be able to fund Perfect 10. *Id.* ¶5.

26 **II. FACTUAL BACKGROUND.**

27 **A. Perfect 10’s Business And Intellectual Property.**

28 Perfect 10 owns the copyrights for all of the P10 Images described in this

1 Motion. Zada Decl. ¶¶1-2, Exh. 9; Declaration of Melanie Poblete, filed concurrently
2 herewith; Mausner Decl. ¶22.

3 After losing more than \$50 million because of rampant infringement, Perfect 10
4 was forced to close its magazine in June 2007, lay off key employees, and end most of
5 its operations. Perfect 10 still operates *perfect10.com* and sells back issues of its
6 magazine, but its revenues are now less than \$150,000 a year. Zada Decl. ¶5.

7 **B. Google Provides Users With Unauthorized Access To P10 Images.**

8 Google owns and operates the website *google.com*. Google also owns and
9 operates the websites *blogspot.com* and *blogger.com*, which it uses to host third-party
10 websites and store images. Zada Decl. ¶¶2, 8-11, Exhs. 3, 9. Google has provided
11 visitors to its websites with unauthorized access to P10 Images in at least eleven
12 different ways:

13 1) Google is storing at least 3,837 full-size P10 Images on its own *blogger.com*
14 servers, along with 3,837 medium-sized versions of the same images. Google's
15 *blogger.com* servers also store tens of thousands of full-size celebrity images, worth
16 tens of millions of dollars. Chou Decl. ¶¶8-11; Zada Decl. ¶¶8-9.

17 2) Google has hosted more than 565 websites in its *blogspot.com* program that
18 have infringed, in total, more than 11,000 P10 Images. Google's *blogspot.com* hosting
19 program *completely conceals the identity of the webmaster*. A "who is" search on a
20 *blogspot.com* hosted website shows "Google", and not the webmaster, as the website's
21 owner. Google has complete control over the *blogspot.com* websites it hosts and can
22 remove these websites at any time. Zada Decl. ¶¶8-10, Exh. 9.

23 3) Through its AdSense advertising program, Google has placed unauthorized
24 ads next to at least 18,000 infringing P10 Images, as well as hundreds of thousands of
25 other celebrity images. Google has also placed ads on *blogspot.com* websites that it
26 hosts that have infringed at least 4,000 P10 Images. Google continues to place its ads
27 next to the same P10 Images that have been identified to Google, in some cases *eighty*
28 *times* or more. Zada Decl. ¶¶2, 16, 74-76, Exhs. 8, 9, 54-56.

1 4) Google hosts websites which offer links for downloading full-size P10
2 Images from massive infringing sites such as *rapidshare.com*, *megaupload.com*, and
3 *depositfiles.com*. Google has also powered search engines used exclusively to find
4 *rapidshare.com* links. *Rapidshare.com* is the twelfth most visited website on the
5 Internet and one of the world's greatest thieves of intellectual property. It sells
6 thousands of P10 Images and billions of dollars of pirated full-length movies and
7 songs. *Rapidshare.com* has been repeatedly condemned by German courts. Zada
8 Decl. ¶17, Exh. 10; Mausner Decl. Exh. N.

9 Perfect 10 has sent DMCA notices to Google that have identified 26,000 P10
10 Images infringed by *rapidshare.com*. Nevertheless, Google has kept *rapidshare.com*
11 as an AdSense affiliate and continues to host websites that offer thousands of P10
12 Images from *rapidshare.com*. Zada Decl. ¶¶11, 17, 40, Exhs. 3, 10, 26.

13 5) Google also promotes other massive infringers. For example, six months
14 after the operators of the website *thepiratebay.org* were sentenced to one year in jail in
15 Sweden for copyright infringement, Google still provides more than 5 million links to
16 that website. In total, Google is currently providing at least 222 million links to 108
17 massive infringing websites, or roughly 2,000,000 links for each infringer. In contrast,
18 Google provides legitimate businesses such as Macdonald's with only roughly 1,000
19 links each. Zada Decl. ¶17, Exh. 10. Despite repeated notice, Google also promotes,
20 for payment, at least 20 paysites that have collectively infringed more than 180,000
21 P10 Images. Google provides premium search result placement (Sponsored Links) and
22 thousands of regular search result links for these paysites, and places ads for these
23 paysites on other websites. Zada Decl. ¶¶42-45, Exhs. 27-30.

24 6) Google is currently displaying **more than 22,000 P10 thumbnails** in its
25 Image Search results. It is also in-line linking those images to infringing third-party
26 websites, thereby using P10 Images to promote the websites of the very competitors of
27 Perfect 10 who stole those P10 Images. Zada Decl. ¶¶6-7, 11, Exhs. 1-3, 9. Perfect 10
28 has evidence that users have downloaded millions of P10 Images from websites to

1 which Google has in-line linked. Zada Decl. ¶86, Exhs. 65, 9.

2 7) Google has offered thousands of full-size P10 Images to its users via its “see
3 full-size image” links and its in-line links. Zada Decl. ¶¶6-7, 11, Exhs. 1-3.

4 8) Google has itself displayed passwords for *perfect10.com* and has hosted
5 websites which display *perfect10.com* passwords. Such passwords have allowed users
6 to illegally download at least 4,500,000 P10 Images from *perfect10.com*. Google has
7 also linked to password hacking websites which offer such passwords. Perfect 10’s
8 evidence demonstrates that users have gone to *google.com*, searched on *google.com* for
9 *perfect10.com* passwords, and then entered *perfect10.com* using such passwords. Zada
10 Decl. ¶85, Exh. 64.

11 9) Google has provided thousands of links to massive infringers of P10 Images
12 via its Google Web Search results. Zada Decl. ¶¶17, 42-45, 73, Exhs. 10, 27-30, 53.

13 10) Google has specially formatted P10 Images so they could be downloaded on
14 cell phones. Zada Decl. ¶6.

15 11) Google has forwarded Perfect 10’s DMCA notices containing full-size P10
16 Images to its partner, *chillingeffects.org*, for republication on the Internet, and then
17 provided links in its search results to those images. *See* Section IV, below.

18 **III. APPLICABLE LEGAL STANDARDS FOR THIS MOTION.**

19 This Court may grant injunctive relief to Perfect 10 “on such terms as it may
20 deem reasonable to prevent or restrain infringement of a copyright.” 17 U.S.C. §
21 502(a). Under the Ninth Circuit’s test, “[p]reliminary injunctive relief is available to a
22 party who demonstrates either: (1) a combination of probable success on the merits and
23 the possibility of irreparable harm; or (2) that serious questions are raised and the
24 balance of hardships tips in its favor. These two formulations represent two points on
25 a sliding scale in which the required degree of irreparable harm increases as the
26 probability of success decreases.” *Perfect 10 v. Amazon*, 508 F.3d at 1158 (quotation
27 and citation omitted). As explained below, Perfect 10’s evidence establishes its
28 right to injunctive relief on its claims that Google is liable for direct, contributory

1 and vicarious copyright infringement.¹

2 **IV. GOOGLE’S SENDING OF PERFECT 10’S DMCA NOTICES TO**
 3 **CHILLINGEFFECTS.ORG CONSTITUTES DIRECT AND**
 4 **CONTRIBUTORY COPYRIGHT INFRINGEMENT.**

5 Since January 27, 2006, Perfect 10 has sent at least ten emails to Google,
 6 demanding that Google not provide Perfect 10’s confidential DMCA notices to its
 7 partner, *chillingeffects.org*, for publication on the Internet. *Chillingeffects.org* first
 8 published Perfect 10’s spreadsheet-style notices, which provided a roadmap to
 9 infringing P10 Images on the Internet. In December 2009, Google did the unthinkable
 10 and began forwarding all of the *infringing images and live links* in Perfect 10’s
 11 Adobe-style notices to *chillingeffects.org* for display on the Internet. Google also
 12 included links in its search results to these notices. As a result, Google users can do a
 13 Google search for a Perfect 10 model, click on a Google link to *chillingeffects.org*, and
 14 download tens of thousands of full-size P10 Images – images that Perfect 10’s DMCA
 15 notices specifically asked Google to remove. Zada Decl. ¶¶13-15, Exhs. 5-7.

16 Google’s conduct constitutes direct infringement, because it violates Perfect 10’s
 17 distribution, display, and reproduction rights. *See* 17 U.S.C. §106. Google’s
 18 forwarding of these notices and linking to them in its search results also constitutes
 19 contributory infringement. Furthermore, because Google is knowingly providing
 20 access to infringing material, Google is ineligible for any DMCA safe harbor. Finally,
 21 Google’s forwarding of full-size infringing images and live links to *chillingeffects.org*
 22 to repost on the Internet cannot possibly be considered fair use.

23
 24
 25 ¹ Google is liable for direct infringement if Perfect 10 shows “ownership of the
 26 allegedly infringed material” and demonstrates that Google “violat[e] at least one
 27 exclusive right detailed in 17 U.S.C. § 106.” *Id.* at 1159 (quotation omitted). Google
 28 is contributorily liable if it has knowledge that infringing P10 Images are available
 using its system, but fails to take simple measures to prevent further damage to Perfect
 10’s copyrighted works. *Id.* at 1172. Google is vicariously liable if it “profit[s] from
 direct infringement while declining to exercise a right to stop or limit it.” *Metro-*
Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 930 (2005).

1 **V. GOOGLE’S STORAGE OF AT LEAST 3,837 FULL-SIZE P10 IMAGES**
2 **ON ITS OWN SERVERS CONSTITUTES DIRECT INFRINGEMENT.**

3 Google’s storing of full-size P10 Images on its servers, and its in-line linking to
4 those images, were not before this Court or the Ninth Circuit in connection with
5 Perfect 10’s original preliminary injunction motion, because Google concealed its
6 storage of such images in 2005. *See Perfect 10 v. Amazon*, 508 F.3d at 1160 (“Because
7 Google’s computers do not store the photographic images, Google does not have a
8 copy of the images for purposes of the Copyright Act.”).

9 Since that time, Perfect 10 has discovered that Google is hosting thousands of
10 infringing *blogspot.com* websites on Google’s own servers, which offer billions of
11 dollars of pirated full-length movies, songs, computer software, and images. Google
12 has hosted at least 565 *blogspot.com* websites that have infringed, in total, at least
13 11,000 P10 Images. Furthermore, Google has placed Google ads around at least 4,000
14 of those images on its own servers. Perfect 10 has also discovered that Google is
15 storing at least 3,837 *full-size* P10 Images on its own *blogger.com* servers, even though
16 Perfect 10 has sent multiple DMCA notices to Google that include a copy of these
17 infringing images with the full *blogger.com* URL. Even when Google takes down a
18 *blogspot.com* site, the related full-size P10 Images usually remain on Google’s
19 *blogger.com* servers. Moreover, Google often provides multiple URLs for the same
20 image, so that image continues to appear even when one such URL is blocked. Zada
21 Decl. ¶¶64, Exh. 44; Chou Decl. ¶¶8-11.

22 Google has also stored, and failed to expeditiously remove, full-size P10 Images
23 on its Google Groups, Google Sites, and *gghpt.com* servers. This conduct also subjects
24 Google to direct liability. Zada Decl. ¶¶65-66, 77, Exhs. 45-46, 57.

25 Google is vicariously liable because it has placed Google ads around at least
26 4,000 of the P10 Images that it has hosted in its *blogspot.com* program. Zada Decl. ¶9.
27 Google receives a direct financial benefit from clicks on each ad, and has the right and
28 ability to control such infringement, because it occurs on Google’s own servers.

1 Google thus satisfies the requirements for vicarious copyright infringement under the
 2 Supreme Court's *Grokster* test, because Google profits from the infringement while
 3 declining to exercise a right to stop or limit it.

4 Furthermore, Google does not keep track of the identities of the clients it hosts
 5 and thus allows these websites to infringe anonymously. Because Google is listed by
 6 Internet Registrars as the registered *owner and contact* for such infringing websites, it
 7 must take responsibility when it receives notice of such anonymous infringement.
 8 There simply is no one else the copyright holder can hold responsible. Zada Decl. ¶¶8-
 9 10, Exh. 9.

10 **VI. GOOGLE HAS DIRECT, VICARIOUS, AND CONTRIBUTORY**
 11 **LIABILITY FOR DISPLAYING 22,000 P10 IMAGES WHICH COULD**
 12 **BE REMOVED USING IMAGE RECOGNITION TECHNOLOGY.**

13 At the time of Perfect 10's initial preliminary injunction motion, Google was
 14 displaying approximately 2,500 thumbnails of P10 Images in its Image Search results.
 15 A Google user who clicked on these thumbnails could view and download, on average,
 16 between ten and twenty additional P10 Images from the infringing website to which
 17 the thumbnail was linked, including full-size images. Zada Decl. ¶6. The Ninth
 18 Circuit concluded that Google was not vicariously liable for such conduct, however,
 19 because "[w]ithout image-recognition technology, Google lacks the practical ability to
 20 police the infringing activities of third-party websites." *Perfect 10 v. Amazon*, 508
 21 F.3d at 1174.

22 Since that time, Google has demonstrated that it has image recognition
 23 capability by offering a "Find similar images" option, which locates identical or nearly
 24 identical images. Moreover, image recognition has generally been available since at
 25 least 2008. Zada Decl. ¶¶87-88. Exh. 66. Nevertheless, Google refuses to use such
 26 technology to prevent further damage to P10 Images repeatedly identified in Perfect
 27 10's DMCA notices. As a result, the same P10 Image keeps reappearing in Google's
 28 Image Search results, in some cases more than *eighty times*. Furthermore, despite

1 receiving 167 DMCA notices from Perfect 10, Google is now displaying more than
 2 22,000 P10 thumbnails in its Image Search results – almost nine times the number it
 3 displayed in 2005. Each of those infringing thumbnails is now linked by Google to an
 4 infringing website that offers, on average, 9,000 infringing P10 Images. Zada Decl. ¶6.

5 Google’s display of 22,000 P10 thumbnails directly infringes upon Perfect 10’s
 6 copyrighted works. The damage from Google’s infringement is massive, and the
 7 display simply is not a fair use. No fair use analysis that takes into account Google’s
 8 total destruction of Perfect 10’s business would conclude that Google’s display of
 9 22,000 P10 thumbnails, and its linking of those thumbnails to infringing Perfect 10
 10 competitors, was “fair.” Google has lost several much less egregious cases in Europe,
 11 where its display of thumbnails was ruled not to be fair use. Mausner Decl. Exh. P.

12 Google also repeatedly places ads around the same identified P10 Images,
 13 thereby profiting from infringement and severely damaging Perfect 10’s ability to earn
 14 revenue from its copyrighted works. Zada Decl. ¶¶16, 74-76, Exhs. 8, 54-56, 9. Such
 15 conduct constitutes vicarious infringement under *Grokster*.

16 Finally, Google’s providing links from 22,000 repeatedly identified P10
 17 thumbnails to websites that each offer, on average, 9,000 full-size P10 images for
 18 viewing or downloading unquestionably constitutes contributory infringement under
 19 the Ninth Circuit’s test.

20 **VII. GOOGLE IS CONTRIBUTORILY AND VICARIOUSLY LIABLE FOR**
 21 **REFUSING TO TAKE ACTION AGAINST MAJOR INFRINGING**
 22 **PAYSITES.**

23 Google is refusing to stop its paid promotion arrangements with massive
 24 infringing paysites, which offer billions of dollars in pirated movies, songs, computer
 25 software, and images, including infringing P10 Images. Similar massive infringers,
 26 such as *usenet.com*, *thepiratebay.org*, and *rapidshare.com*, have already been found
 27 liable in the United States, Sweden, and Germany, respectively. *See Arista Records v.*
 28 *Usenet.com*, 633 F.Supp.2d at 131 (“There can be no dispute that Defendants’ services

1 were used overwhelmingly for copyright infringement.”); Mausner Decl. Exhs. N and
2 O. Yet Google continues to accept payments to promote such infringers by placing ads
3 for them on other websites and by providing sponsored links and thousands of regular
4 links to them in its search results. Zada Decl. ¶¶17, 42-45, Exhs. 10, 27-30. Such
5 conduct constitutes both contributory and vicarious copyright infringement.

6 **VIII. GOOGLE’S RECENT CONDUCT ESTABLISHES ITS LIABILITY FOR**
7 **CONTRIBUTORY INFRINGEMENT.**

8 In its opinion on Perfect 10’s initial preliminary injunction motion, the Ninth
9 Circuit held as follows:

10 There is no dispute that Google substantially assists websites to distribute
11 their infringing copies to a worldwide market and assists a worldwide
12 audience of users to access infringing materials. We cannot discount the
13 effect of such a service on copyright owners, even though Google’s
14 assistance is available to all websites, not just infringing ones.

15 *Perfect 10 v. Amazon.com*, 508 F.3d at 1172. The Ninth Circuit then held that “Google
16 could be held contributorily liable if it had knowledge that infringing Perfect 10 images
17 were available using its search engine, could take simple measures to prevent further
18 damage to Perfect 10’s copyrighted works, and failed to take such steps.” *Id.*

19 The evidence before this Court of Google’s substantial contribution to
20 infringement is significantly greater than the evidence that was before the Ninth
21 Circuit. Perfect 10 now has evidence that Google is displaying thousands of full-size
22 P10 Images from Google servers and that users have downloaded millions of P10
23 Images on sites linked to by Google. Zada Decl. ¶¶85-86, Exhs. 64-65. This evidence,
24 discussed below, further supports Google’s liability for contributory infringement
25 under the Ninth Circuit’s test.

26 **A. Google Failed To Take Simple Steps To Protect Identified P10**
27 **Images.**

28 Perfect 10 has sent Google at least 167 DMCA notices, which identified more

1 than 40,000 URLs on free sites that infringe P10 Images. Google has not suppressed at
2 least 30,000 of those URLs, and has suppressed less than 500 of them expeditiously.
3 Zada Decl. ¶¶18-81, Exhs. 11-60.

4 Google has also refused to take *any action* against: (i) its massive infringing
5 paysite advertisers, who are infringing, in total, more than 180,000 P10 Images; and
6 (ii) massive paysite infringers *rapidshare.com*, *megaupload.com*, *depositfiles.com*, and
7 *binaries.net*, which have all been Google AdSense affiliates and have infringed tens of
8 thousands of P10 Images. Google currently provides as many as 137 million links to
9 *rapidshare.com* or websites that promote *rapidshare.com*. Zada Decl. ¶¶17, 42-45, 81,
10 Exhs. 10, 27-30.

11 Google also refuses to take action against: (iii) *blogspot.com* websites that
12 Google hosts on its own servers, which offer links for downloading P10 Images,
13 display Perfect 10 passwords, and/or violate Perfect 10's rights of publicity;
14 (iv) massive infringing websites *imagevenue.com* and *imagerise.com*, from which
15 Google copies tens of thousands of infringing thumbnails for its Image Search results;
16 and (v) any Google link that does not lead directly to an infringing image. Zada Decl.
17 ¶¶9, 11-12, 15, 81, 85, Exhs. 3-4, 7, 64. Google's failure in most cases to take any
18 steps whatsoever, despite knowledge that thousands of infringing P10 Images are
19 available using its search engine, establishes Google's contributory liability.

20 **B. Google Has Failed To Remove Identified Infringing Cache Pages.**

21 Perfect 10 has included hundreds of copies of Google's infringing cache pages
22 in Adobe-style DMCA notices it has sent to Google. These pages identified *both the*
23 *infringing Google cache link and the infringed P10 Image*. Nevertheless, Google has
24 failed to remove most identified infringing cache links from its search results. Even
25 when Google has recently processed a few DMCA notices containing infringing cache
26 links, demonstrating their sufficiency, it has forwarded such notices to
27 *chillingeffects.org*. Zada Decl. ¶¶47-48, Exhs. 31-32, 9.

1 **C. Google Refuses To Remove Identified Infringing Thumbnails.**

2 Google has refused to process DMCA notices in which Perfect 10 places check
3 marks next to thumbnails of infringing P10 Images which appear in Google Image
4 Search results and provides Google with a copy of the web pages where those
5 thumbnails appear. Google could easily remove the identified thumbnails because it
6 can obviously find its own webpage when given a copy of that page. Google
7 nevertheless refuses to act, incorrectly claiming that Perfect 10 has not provided it with
8 the applicable URL, even though that URL appears at the bottom of the pages provided
9 by Perfect 10. Zada Decl. ¶¶68-69, Exhs. 48-49.

10 Moreover, even though Google has recently begun to process some such “check-
11 the-infringing-image” style notices, after refusing for years to do so, it is forwarding
12 these very same notices to *chillingeffects.org*. Google’s forwarding of these notices
13 negates any minimal steps it may have taken to prevent further damage to Perfect 10’s
14 copyrighted works and effectively makes it impossible for Perfect 10 to send further
15 DMCA notices to Google. Zada Decl. ¶67, Exh. 47.

16 **D. Google Has Failed To Remove Identified “See Full-Size Image”**
17 **Links.**

18 Perfect 10 has also sent DMCA notices to Google in which Perfect 10 provided
19 copies of the infringing web page obtained by clicking on Google’s “See Full-Size
20 Image” link, as instructed by Google. These notices included a copy of the URL
21 requested by Google, as well as the infringing/infringed images themselves.
22 Nevertheless, Google has failed to suppress the vast majority of links identified by
23 Perfect 10 in these notices. Zada Decl. ¶¶70-71, Exhs. 50-51, 9.

24 **E. Google Refuses To Remove 3,837 Full-Size P10 Images From Its**
25 **Blogger.com Servers.**

26 Google refuses to remove approximately 3,837 full-size P10 Images from its
27 own *blogger.com* servers, even though Perfect 10 has sent DMCA notices to Google
28 which include a webpage showing the complete URL for these images, along with the

1 infringing/infringed images themselves. Google has also refused to process an excel
2 spreadsheet that Perfect 10 has provided which lists most of those 3,837 URLs. Zada
3 Decl. ¶¶49-64, Exhs. 33-44; Chou Decl. ¶¶8-10.

4 **F. Google Continues To Place Its Ads Around The Same Infringing P10**
5 **Images.**

6 Google has placed its advertising (“ads by google”) *next to at least 18,000 P10*
7 *Images* on free websites, including *blogspot.com* websites that Google hosts on its own
8 servers. In most cases, Google has not removed such ads, even after receiving notice
9 from Perfect 10 that the web pages where Google placed these ads infringe upon
10 Perfect 10’s copyrighted works. Furthermore, even when Google has removed ads that
11 it initially placed next to P10 Images on certain infringing websites, Google has simply
12 placed its ads next to those same P10 Images on other infringing websites. In some
13 cases, Google has continued to place its ads around the same image, despite 80 notices
14 from Perfect 10 regarding that image. Zada Decl. ¶¶2, 11, 16, 74-76, Exhs. 3, 8, 54-56,
15 9. Chou Decl. ¶12.

16 Google’s misuse of thousands of P10 Images for advertising purposes, and its
17 failure to take steps to prevent further damage to Perfect 10’s copyrighted works, has
18 substantially damaged Perfect 10’s revenues and constitutes contributory and vicarious
19 copyright infringement.

20 **G. Google Continues To Display Perfect 10 Passwords On Its Own**
21 **Website And Host Websites That Display Such Passwords.**

22 Google continues to display passwords to *perfect10.com* on its own website.
23 Moreover, Google continues to host websites on its *blogspot.com* servers that also
24 display Perfect 10 passwords. Such passwords have been used to illegally download
25 more than 4.5 million images from *perfect10.com*. Perfect 10 also has evidence that
26 users have gone to *google.com*, searched for *perfect10.com* passwords on *google.com*,
27
28

1 and then made unauthorized downloads of P10 Images from *perfect10.com* using those
2 passwords. Zada Decl. ¶¶12, 85, Exhs. 4, 64.²

3 Google's dissemination of these passwords to its users materially assists those
4 users in gaining unauthorized access to the pay-only members' area of Perfect 10's
5 website, from which users make unauthorized copies of P10 Images by downloading
6 them. Google could easily limit its display of passwords to *perfect10.com* because
7 Perfect 10 has provided Google with notice of exactly where those passwords are
8 located in Google's search results. Google could also simply search for and delete
9 strings of the form "username:password@ www.perfect10.com." Nevertheless,
10 Google has chosen not to take any of these simple measures.

11 **H. Google Incorrectly Asserts That It Has Removed Identified Links**
12 **And Images.**

13 On various occasions, Google has: (i) incorrectly claimed that it has removed
14 infringing links and images; (ii) continued to infringe the same image from a slightly
15 different URL on the same website; and/or (iii) sent a Perfect 10 notice to
16 *chillingeffects.org* even when it did not process that notice. For example, Google has
17 incorrectly asserted that it has removed at least 60 P10 Images from Google-hosted
18 websites, when it did not. Zada Decl. ¶¶77-79, Exhs. 57-59. Such conduct is further
19 evidence of Google's liability for contributory infringement.

20 **IX. GOOGLE IS INELIGIBLE FOR THE AFFIRMATIVE DEFENSE OF**
21 **DMCA SAFE HARBOR.**

22 In order to be eligible for the safe harbor affirmative defense under the DMCA,
23 Google must expeditiously process Perfect 10's DMCA notices *and* suitably
24

25 ² Such illegal downloading violates Perfect 10's exclusive rights to reproduce
26 and distribute its copyrighted photographs, pursuant to Sections 106(1) and (3) of the
27 Copyright Act. *See, e.g., A & M Records, Inc. v Napster*, 239 F.3d 1004, 1014 (9th
28 Cir. 2001) ("Napster users who download files containing copyrighted music violate
plaintiffs' reproduction rights."). People who use unauthorized passwords to enter
perfect10.com to download images know or should know that they are engaging in
copyright infringement, just as users of Napster did.

1 implement a policy against repeat infringers.³ Google fails to satisfy either of these
2 requirements, for multiple reasons.

3 **A. Google Has Failed To Process Most Perfect 10 DMCA Notices, Let**
4 **Alone Process Them Expediently.**

5 As explained in greater detail in Section VIII, above, Google has failed to
6 process the vast majority of DMCA notices sent by Perfect 10, which identify
7 infringing material on free sites, massive infringing paysites, and *blogspot.com*
8 websites hosted by Google itself. When Google has suppressed a URL identified by
9 Perfect 10, it has typically waited between 100 and 500 days to do so. Zada Decl.
10 ¶¶18-81, Exhs. 11-60. Google's willingness to provide massive infringers with
11 thousands of links, regardless of the number of complaints against them, should by
12 itself preclude a safe harbor. Zada Decl. ¶17, Exh. 10.

13 Google has expeditiously processed no more than 500 URLs out of the 40,000
14 identified by Perfect 10. Google did not respond at all to 14 DMCA notices sent by
15 Perfect 10 in 2001. Zada Decl. ¶¶18-20, 81, Exhs. 11-12. In 2004, Perfect 10 began to
16 send spreadsheet-style notices to Google created by following Google's instructions.
17 Google did not respond to these notices for at least four months, until after Perfect 10
18 sent it a draft complaint. Google did not process 952 URLs from Perfect 10's July 19,
19 2004 notice at all, and refused to process approximately 1,000 additional URLs
20 identified by Perfect 10 which Google could have processed. Zada Decl. ¶¶28-33,
21 Exhs. 17-19. When Google finally acted on October 11, 2004, it removed certain
22 identified Web Search links but did not remove the same identified links from its
23

24 ³ The safe harbors found in Sections 512 (c) and (d) of the DMCA both apply
25 only if the host or search engine, "upon obtaining such knowledge or awareness [of
26 infringing material or activity], acts expeditiously to remove, or disable access to, the
27 [alleged infringing] material." 17 U.S.C. §§ 512(c)(1) (A)(iii) and (C); *Id.*
28 § 512(d)(1)(C) and (3). Section 512(i) of the DMCA provides that no safe harbor is
available unless the service provider "has adopted and reasonably implemented, and
informs subscribers and account holders of the service provider's system or network
of, a policy that provides for the termination in appropriate circumstances of
subscribers and account holders of the service provider's system or network who are
repeat infringers." *Id.* § 512(i).

1 Image Search results until at least [REDACTED]. Zada Decl. ¶¶35-36, Exhs. 20-22;
2 Mausner Decl. ¶21, Exh. H. Google waited until at least [REDACTED] to take action
3 against its AdSense affiliates. Zada Decl. ¶34, Exh. 9. Google waited as long as
4 seventeen months to remove some identified infringing image URLs. Zada Decl.
5 ¶¶29-32, Exhs. 17-19. Finally, Google did not process certain notices forwarded to it
6 by Amazon for four years. Zada Decl. ¶¶37-39, Exhs. 23-25.

7 **B. Google Cannot Properly Assert That Perfect 10's DMCA Notices Are**
8 **Deficient.**

9 Google has steadfastly asserted that every one of the 167 DMCA notices sent to
10 it by Perfect 10 is deficient. Zada Decl. ¶¶91-92, Exh. 52. Google's assertion is
11 incorrect, for at least six separate reasons.

12 First, the DMCA notices sent by Perfect 10 to Google beginning in 2004
13 complied with Google's instructions. These instructions clearly stated that Perfect 10
14 should include the URL that appears at the end of each Web Search result, and the
15 search term, in its notices. Perfect 10 followed these instructions to create the
16 spreadsheet-style notices it sent Google from May 31, 2004 through April 24, 2007.
17 Zada Decl. ¶¶25-27, Exhs. 14-16. Consequently, Google has no basis to claim that
18 such notices are all substantially non-compliant.

19 Second, Google processed Perfect 10's spreadsheet-style notices, albeit
20 belatedly, so these notices could not have been deficient.

21 Third, the Adobe-style notices that Perfect 10 began to send to Google in June
22 2007 are also not deficient, because they also followed Google's instructions. In
23 addition to providing the URL requested by Google, Perfect 10 used Adobe Acrobat
24 Professional to include an actual copy of the infringing web page with the infringing
25 P10 Images clearly identified. Yahoo! and Interserver processed similar notices in
26 three days and two days, respectively. Zada Decl. ¶¶82-84, Exhs. 61-63.

27 Fourth, many of Perfect 10's Adobe-style notices concerning Google Image
28 Search involved Perfect 10 sending a copy of Google's own Image Search results to

1 Google. Google cannot possibly assert that it cannot find a web page that it created
2 when provided with a copy of that page. Zada Decl. ¶¶68-70, Exhs. 48-50.

3 [REDACTED]
4 [REDACTED]
5 [REDACTED] Other
6 computer experts have provided similar testimony. See Declarations of David
7 O'Connor, Sean Chumura, and Bennett McPhatter, filed concurrently herewith.

8 Finally, Google itself has now conceded that Perfect 10's Adobe-style notices
9 are not deficient, because it has finally begun to process these notices within the past
10 few months. However, because Google is now forwarding the full-size P10 Images in
11 these notices to *chillingeffects.org* for posting on the Internet, and then linking to such
12 images in its search results, Perfect 10 cannot send any further DMCA notices to
13 Google. Zada Decl. ¶¶13-15, Exhs. 5-7.

14 **C. Google's Refusal To Explain How To Cure Alleged Deficiencies In**
15 **Perfect 10's Notices Violates Section 512(c)(3)(B)(ii).**

16 Section 512(c)(3)(B)(ii) of the DMCA provides that, in order to be eligible for
17 safe harbor, Google must attempt to contact the complaining party to cure alleged
18 deficiencies in its DMCA notices. Since May 31, 2004, however, Google has refused
19 to provide Perfect 10 with any meaningful explanation as to why it claims that any of
20 Perfect 10's 167 notices (including those created following Google's instructions) is
21 defective or explain how to cure any alleged deficiencies. Moreover, despite 130
22 requests from Perfect 10, Google has refused to provide a single example of what it
23 considers to be a compliant notice. Zada Decl. ¶¶26, 91-93, 15, Exhs. 52, 68, 7, 9.

24 **D. The Standard For Determining The Sufficiency Of A DMCA Notice**
25 **Should Depend On The ISP's Technological Capability.**

26 In order to comply with the statutory requirements, a DMCA notice must
27 provide an internet service provider with sufficient information to locate the infringing
28 material. Because Google possesses image recognition technology, Perfect 10's

1 notices, which included a copy of the infringing P10 Images and a complete URL,
2 satisfied this standard. All Google needed to do was create a database of identified
3 infringing images and use its image recognition capabilities to block previously
4 identified images from repeatedly reappearing in its Image Search results. Zada Decl.
5 ¶¶87-88, Exh. 66. Google has refused to do so, however. Google has also refused to
6 cooperate with Perfect 10 to implement a “check the infringing image” notification
7 system, even when ordered by this Court to do so. Mausner Decl. ¶¶2-13, Exhs. A,
8 AA. *See* Section IX.G, below.

9 **E. Google Has Not Implemented A Proper DMCA Policy.**

10 Google’s policy of removing, on average, only 1 link in 7,000 to an infringing
11 website, does nothing to prevent further damage to copyrighted works and does not
12 constitute a valid DMCA policy. Google has no policy in place to deal with massive
13 infringing websites or to prevent the same identified infringing image from reappearing
14 in its Image Search results. Zada Decl. ¶¶90-92, 95, Exh. 69; Chou Decl. ¶¶13-14.
15 Once Google receives notice of massive infringement on a website, it must either
16 contact that website’s webmaster and require that the webmaster remove the alleged
17 infringing material, or cut all links to that website. Otherwise, Google users can
18 continue to locate identified infringing images through one of the many thousands of
19 other links that Google provides to that same website.

20 **F. Google Has Neither Adopted, Nor Reasonably Implemented, A**
21 **Repeat Infringer Policy.**

22 Google has taken the extremely narrow view that only its advertising and
23 hosting clients are “account holders and subscribers” under the DMCA. Google asserts
24 that it does not need to track infringement complaints against other websites that
25 appear in its search results, or terminate these sites from its system, even if Google
26 copies thousands of images from these sites for its Image Search results. As a result,
27 Google does not have a suitable repeat infringer policy in place, and does not prevent
28 massive quantities of infringing material from being forever available in its system.

1 For example, Perfect 10 has identified at least 10,000 infringing image URLs from
 2 *imagevenue.com*, a Google AdSense affiliate, in notices sent to Google. Nevertheless,
 3 Google continues to make more than 6,000 infringing P10 Images from
 4 *imagevenue.com* available in its Image Search results. Zada Decl. ¶9. Google simply
 5 does not have a policy in place to prevent ongoing massive repeat infringement, as
 6 required by 17 U.S.C. §512(i)(1)(A).⁴ Even if the Court were to accept Google's
 7 assertion that Section 512(i) is not directly applicable to search results, terminating
 8 repeat infringers from its search results is a simple measure that Google has failed to
 9 employ to prevent further damage to copyrighted works.

10 Furthermore, even if the Court were to accept Google's contention that it does
 11 not have to terminate repeat infringers from its search results, Google still has not
 12 reasonably implemented a repeat infringer policy, for at least seven reasons:

13 (1) Google admits that its advertising and hosting clients are account holders or
 14 subscribers for purposes of the DMCA, but Google does not keep track of the identities
 15 of many such account holders. Zada Decl. ¶¶8-10, 97-99, Exhs. 70-71; (2) Google has
 16 not removed at least 3,837 identified full-size P10 Images from Google's *blogger.com*
 17 servers. *Id.* ¶¶49-65, Exhs. 33-45; (3) Google has taken no action whatsoever against
 18 a number of its AdSense advertising affiliates, even after 28 separate Perfect 10
 19 DMCA notices. *Id.* ¶¶74-76, Exhs. 54-56; (4) Google has not stopped doing business
 20

21 ⁴ A repeat infringer policy is not the same as a copyright policy relating to
 22 notice and take-down of infringing materials, because it must deal with the infringer
 23 rather than the infringing material itself. As the District Court stated in *Perfect 10 v.*
 24 *Cybernet Ventures, Inc.*, 213 F.Supp. 2d 1146, 1177 (C.D.Cal. 2002):

25 [S]ection 512(i) is focused on infringing users, whereas 512(c) is
 26 focused primarily on the infringing material itself. ... The Court does not
 27 read section 512 to endorse business practices that would encourage
 28 content providers to turn a blind eye to the ***source of massive copyright***
infringement while continuing to knowingly profit, indirectly or not, from
 every single one of these same sources until a court orders the provider to
 terminate each individual account. ... [O]nline service providers are
 meant to have strong incentives to work with copyright holders. The
 possible loss of the safe harbor provides that incentive and furthers a
 regulatory scheme in which courts are meant to play a secondary role to
 self-regulation. (emphasis added).

1 with AdWords and AdSense account holders who have infringed, in total, hundreds of
2 thousands of P10 Images. *Id.* ¶¶17, 42-45, Exhs. 10, 27-30; [REDACTED]

3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED] When it was ordered to
9 produce all “notices of termination resulting from intellectual property violations,”

10 [REDACTED]
11 [REDACTED] *Id.* ¶¶97-99, Exh. 9; and

12 (7) Google also continues to place its ads next to the same repeatedly identified
13 infringing P10 Images. *Id.* ¶¶2, 16, 74-76, Exhs. 8, 54-56, 9. Google’s conduct cannot
14 possibly represent a suitable implementation of a repeat infringer policy.

15 **G. Google Has Sought To Discourage Copyright Holders From**
16 **Submitting DMCA Notices.**

17 Google has done everything possible to discourage Perfect 10 and other
18 copyright holders from submitting DMCA notices. Google has changed its
19 instructions, refused to process notices, refused to provide examples of compliant
20 notices, made unreasonable or impossible requests, and refused to stop forwarding
21 confidential notices to *chillingeffects.org*. Zada Decl. ¶¶18-33, 90-96, Exhs. 11-19, 68-
22 69, 9; Chou Decl. ¶¶6-14. For example, Google has demanded that Perfect 10: (i) *not*
23 send notices by email; (ii) resend notices that were first sent by mail or fax *solely by*
24 *email*; and (iii) then resend the very same notices for a third time *solely by email*.
25 Google’s demands are contrary to the language of the DMCA, which allows both
26 emailed and non-emailed notices. Other copyright holders have had similar
27 experiences, and have even called Google’s DMCA policy a “sham.” Declarations of
28 Jane Eden, Dean Hoffman, Les Schwartz, and C.J. Newton; Exh. C to Mausner Decl.

1 Google has also failed to work with Perfect 10 to implement a “check the
2 infringing image” notification system, as ordered by the Court. *See* May 8, 2006 Court
3 Order ¶9, attached as Exh. A to the Mausner Declaration. This system would have:
4 (i) created a simple and effective procedure for removing infringing material; and
5 (ii) prevented Google from asserting that every Perfect 10 notice was deficient.
6 Mausner Decl. ¶¶2-13, Exhs. A, AA. When Perfect 10 tried to follow the Court’s
7 Order on its own, by providing copies of infringing web pages with check marks next
8 to infringing images, Google refused to process such notices. *Zada* Decl. ¶¶67-69,
9 Exhs. 47-49, 9; Mausner Decl. Ex. B.

10 **X. IN LIGHT OF NEW EVIDENCE, THIS COURT SHOULD REVISIT ITS**
11 **RULING ON DISPLAY.**

12 In ruling on Perfect 10’s initial preliminary injunction motion, this Court
13 adopted the server test advocated by Google. *Perfect 10 v. Google, Inc.*, 416
14 F.Supp.2d 828, 839 (C.D. Cal. 2006). The advent of the server test has led to the
15 development of massive infringing websites such as *nudecelebforum.com*, *phun.org*,
16 *pornbb.org*, and *exbii.com*. These websites display infringing images by in-line
17 linking to other websites that host these images, such as *imagevenue.com*,
18 *imagerise.com*, *imageshack.us*, and *blogger.com*, so as to escape liability for direct
19 copyright infringement under the server test. *Zada* Decl. ¶100, Exh. 72. The image
20 hosting sites, in turn, are typically located in countries such as Russia and thus outside
21 the reach of American courts, or claim that they are protected from liability under
22 Section 512(c) of the DMCA. Moreover, the server test allows any website to in-line
23 link to any legitimate website, and thereby make available any copyrighted material
24 from that website. Since there is no direct infringer in this situation, the in-line linking
25 website can use the copyrighted material in a frame, and place its advertising around it,
26 with impunity. Finally, Google’s own expert, Dr. John Levine, stated after the Ninth
27 Circuit’s ruling that the in-line linking site is just as responsible for the display of an
28

1 image as the hosting site, implying that both sites are directly liable. Mausner Decl.
2 Exh. E.

3 Because of the server test, most large infringing third-party websites can no
4 longer be sued for direct copyright infringement. It has become harder than ever for
5 copyright holders to protect their works. In light of this new evidence, this Court
6 should reexamine the viability of the server test when ruling upon this motion.

7 **XI. CONCLUSION.**

8 The stakes in this case are high, for both Perfect 10 and for all copyright holders.
9 Despite receiving 167 DMCA notices from Perfect 10, Google is: (1) providing at least
10 222 million links (which Google will not remove) to websites that infringe P10
11 Images; (2) displaying 22,000 P10 thumbnails in its Image Search results, which
12 Google links to infringing websites; (3) storing 3,837 full-size P10 Images on its own
13 servers; (4) promoting massive infringing paysites that are selling more than 180,000
14 P10 Images; and (5) forwarding Perfect 10's notices to *chillingeffects.org*, thus re-
15 establishing access to thousands of P10 Images that Google was supposed to remove.

16 The evidence submitted by Perfect 10 establishes a likelihood of success on the
17 merits of its claims that Google is liable for direct, contributory and vicarious
18 copyright infringement. Perfect 10's desperate financial condition establishes its need
19 for immediate relief. Accordingly, for all of the reasons set forth herein and in the
20 Declaration of Dr. Norman Zada filed concurrently herewith, Perfect 10 respectfully
21 requests that this Court grant its Motion for Preliminary Injunction.

22 Dated: March 3, 2010

Respectfully submitted,

23 Law Offices of Jeffrey N. Mausner

24 By: Jeffrey N. Mausner
25 Jeffrey N. Mausner,
26 Attorney for Plaintiff Perfect 10, Inc.