

1 QUINN EMANUEL URQUHART & SULLIVAN, LLP  
 2 Michael T. Zeller (Bar No. 196417)  
 3 michaelzeller@quinnemanuel.com  
 4 865 South Figueroa Street, 10th Floor  
 5 Los Angeles, California 90017-2543  
 6 Telephone: (213) 443-3000  
 7 Facsimile: (213) 443-3100  
 8 Charles K. Verhoeven (Bar No. 170151)  
 9 charlesverhoeven@quinnemanuel.com  
 10 50 California Street, 22nd Floor  
 11 San Francisco, California 94111  
 12 Rachel Herrick Kassabian (Bar No. 191060)  
 13 rachelkassabian@quinnemanuel.com  
 14 555 Twin Dolphin Drive, 5th Floor  
 15 Redwood Shores, California 94065  
 16 Attorneys for Defendant Google Inc.

11 UNITED STATES DISTRICT COURT  
 12 CENTRAL DISTRICT OF CALIFORNIA

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

15 Plaintiff,

16 vs.

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

19 Defendants.

CASE NO. CV 04-9484 AHM (SHx)

**GOOGLE INC.'S EVIDENTIARY  
 OBJECTIONS TO THE  
 DECLARATION OF SHEENA  
 CHOU IN SUPPORT OF PERFECT  
 10, INC.'S SECOND MOTION FOR  
 PRELIMINARY INJUNCTION  
 AGAINST GOOGLE**

Hon. A. Howard Matz

Date: April 5, 2010  
 Time: 10:00 a.m.  
 Place: Courtroom 14

Discovery Cut-off: None Set  
 Pre-trial Conference: None Set  
 Trial Date: None Set

1 Google hereby submits the following objections to the Declaration of Sheena  
2 Chou ("Chou Declaration"), Submitted in Support of Perfect 10's Second Motion  
3 for Preliminary Injunction Against Google ("Second PI Motion"). The Chou  
4 Declaration is objectionable for several reasons, and should be disregarded or  
5 accorded little or no weight in the determination of Perfect 10's Second PI Motion.

6 **I. THE CHOU DECLARATION SHOULD BE STRICKEN BECAUSE**  
7 **CHOU WAS NOT DISCLOSED AS AN EXPERT.**

8 In her Declaration, Ms. Chou repeatedly offers improper opinion testimony.  
9 This testimony should be disregarded on multiple grounds. First, P10 failed to  
10 disclose Chou as an expert witness in this matter. Further, at no point does Chou tie  
11 her qualifications—she claims to "have a degree in Economics from UCLA and [be]  
12 quite familiar with computers and the Internet"—to Google's search engine or  
13 services. Chou Declaration ¶ 2. She identifies no specialized knowledge or  
14 expertise whatsoever that would qualify her to opine on the subjects set forth in her  
15 declaration, including (1) her purported evaluation of Google's DMCA compliance  
16 program and an explanation of her preferred means for identifying allegedly  
17 infringing websites. (2) the inner workings of Google's Blogger and Search  
18 services, and (3) the "necessity" of Google's DMCA policies and  
19 instructions. See Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 591 (1993)  
20 (an expert's testimony must "aid the jury in resolving a factual dispute."); see  
21 also Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147-48 (1999) (expert must have  
22 some form of specialized knowledge). Because Chou plainly lacks the necessary  
23 qualifications to testify as an expert on these subjects, her declaration should be  
24 disregarded, or in the alternative, her testimony should be accorded no evidentiary  
25 weight.

1 **II. PORTIONS OF THE CHOU DECLARATION SHOULD BE**  
2 **DISREGARDED.**

3 The Chou Declaration should be disregarded for purposes of the Perfect 10's  
4 Second PI Motion for the additional reason it is inadmissible under the Federal  
5 Rules of Evidence.

6 The Federal Rules of Evidence apply to evidence submitted to the Court on  
7 motion practice. Fed. R. Evid. 101 (Rules of Evidence apply to all proceedings in  
8 the courts of the United States); Fed. R. Evid. 1101 (listing exceptions to Rule 101).  
9 While courts have some discretion to consider inadmissible evidence when a  
10 preliminary injunction is urgently needed to prevent irreparable harm before a full  
11 resolution on the merits is possible, courts routinely decline to consider, or afford  
12 any weight to, such inadmissible evidence in appropriate circumstances. See  
13 Beijing Tong Ren Tang (USA) Corp. v. TRT USA Corp., --- F.Supp.2d ----, 2009  
14 WL 5108580, at \*3 (N.D. Cal. Dec. 18, 2009) (upholding evidentiary objections and  
15 denying preliminary injunction); U.S. v. Guess, 2004 WL 3314940, at \*4 (S.D. Cal.  
16 Dec. 15, 2004) ("conditional inferences, innuendo, and even strong suspicions do  
17 not satisfy [the movant's] burden"); Kitsap Physicians Service v. Washington Dental  
18 Service, 671 F.Supp. 1267, 1269 (W.D. Wa. 1987) (refusing to consider affidavits  
19 "that would have been inadmissible under the Federal Rules of Evidence" and  
20 denying preliminary injunction). Because P10 has had nearly *six years* to obtain  
21 evidence regarding its Second PI Motion, it is particularly appropriate to hold P10's  
22 evidence to the usual standards of admissibility for motion practice.

23 Such evidence must be relevant to the claims and defenses of the case. Fed.  
24 R. Evid. 401; 403; Beijing Tong Ren Tang, 2009 WL 5108580, at \*3 (striking  
25 irrelevant evidence). Testimonial evidence must be based on the personal  
26 knowledge of the witness offering the evidence. Fed. R. Evid. 602. Testimony  
27 requiring scientific, technical, or other specialized knowledge may be given only by  
28 an expert witness with the requisite knowledge, skill, experience, training, or

1 education, and opinion testimony is not permitted of a lay person. Fed. R. Evid.  
 2 701, 702. The Chou Declaration fails to meet one or more of these criteria, as set  
 3 forth below.

	<u>Proffered Evidence</u>	<u>Google's Objection</u>
6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	1. <b>Chou Decl., at ¶¶ 3-5</b>	<u>Fed. R. Evid. 401, 402, 403, 602, 701, 702</u> The statements are irrelevant (because Google does not crawl or index websites (or those portions of websites) that are only accessible by entering a password, nor does it crawl or index content hosted on Usenet servers (Haahr Decl. ¶¶ 14-15)), speculative, lack foundation, constitute improper legal opinion, and do not appear to be based upon the witness's personal knowledge. Ms. Chou has never been disclosed by P10 as an expert in this case, nor does she appear to have the necessary expertise to provide such expert testimony.
23 24 25 26 27 28	2. <b>Chou Decl., at ¶ 6</b> ("One of my other assignments has been to determine whether Google has removed URLs identified by Perfect 10 from its search results. I have	<u>Fed. R. Evid. 401, 402, 403, 602</u> The statements are irrelevant, argumentative, speculative, lack foundation, are not within the witness's personal knowledge, constitute

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	<p>been able to do this simply by inputting the URL provided by Perfect 10, without the starting http:// or www., into the Google search box.")</p>	<p>improper legal opinion, and are improper opinion testimony. Further, Ms. Chou has never been disclosed by P10 as an expert in this case, nor does she appear to have the necessary expertise to provide such expert testimony.</p>
<p>3.</p>	<p><b>Chou Decl., at ¶ 7</b> ("The Adobe files provided by Perfect 10 in its notices have been sufficient to allow Google to find the infringing material. I know this because I have extracted hundreds of URLs from those same files using Adobe's URL extraction feature, and have placed those same URLs into Google's search box or into my browser bar to verify that those web pages were still either directly linked to by Google in its search results, or were still on Google's blogger.com servers. I was able to locate the infringing material in this manner using the URLs provided by Perfect 10 in its notices. I have been able to extract URLs from Adobe documents at the rate of approximately 5 URLs a minute.")</p>	<p><u>Fed. R. Evid. 401, 402, 403, 602, 701, 702, Fed. R. Civ. P. 26</u> The statements are irrelevant, argumentative, mischaracterize the documents, speculative, lack foundation, are not within the witness's personal knowledge, constitute improper legal opinion, and are improper opinion testimony. Further, Ms. Chou has never been disclosed by P10 as an expert in this case, nor does she appear to have the necessary expertise to provide such expert testimony.</p>

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4.	<b>Chou Decl., at ¶ 8</b>	<u>Fed. R. Evid. 401, 402, 403, 602</u> The statements are irrelevant, argumentative, mischaracterize the document, speculative, lack foundation, are not within the witness's personal knowledge, constitute improper legal opinion, and are improper opinion testimony. Further, Ms. Chou has never been disclosed by P10 as an expert in this case, nor does she appear to have the necessary expertise to provide such expert testimony.
5.	<b>Chou Decl., at ¶ 9</b> ("I was also assigned to determine the number of blogspot.com post URLs and other blogspot.com URLs that Perfect 10 identified to Google in its notices, and the number of identified blogspot.com post-URLs that Google had not suppressed as of July 2009. I will use the term "post URL" to refer to what Google's Blogger DMCA instructions call the "permalink of the post." I found at least 219 blogspot.com URLs that were not post URLs, and at least 346 blogspot.com post URLs, for a total	<u>Fed. R. Evid. 401, 402, 403, 602, 1002</u> The statement is argumentative, mischaracterizes the facts, irrelevant (because Perfect 10's "Adobe style" notices were failed to provide Google with notice of any alleged infringement), speculative, lacks foundation (among other things, the declarant provides no explanation for how or what she allegedly did), and constitutes improper legal opinion and opinion testimony. The statements also violate the Best Evidence Rule, because they reference electronic excerpts of certain of Perfect 10's

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	<p>of at least 565 blogspot.com URLs, that Perfect 10 identified to Google in its Adobe style notices, beginning June 28, 2007. Of the 346 post URLs identified to Google, at least 190 had not been suppressed as of February 2010.")</p>	<p>DMCA notices, and the complete notices themselves are the best evidence of their contents. Further, Ms. Chou has never been disclosed by P10 as an expert in this case, nor does she appear to have the necessary expertise to provide such expert testimony.</p>
<p>6.</p>	<p><b>Chou Decl., at ¶ 10</b> ("I have observed that in a number of cases, the full-size blogger image still appears on Google's blogger.com servers, even when the original blogspot site that displayed those images no longer exists. In those situations, there is no permalink or top level domain of the blog and date of the blog entry that Perfect 10 could provide, as requested by Google. Furthermore, Perfect 10 has provided the top level domain with the date, as well as the permalink, in most notices, because it has sent to Google a copy of the infringing web page which typically displays that information. Perfect 10 has also provided to Google, in its DMCA</p>	<p><u>Fed. R. Evid. 401, 402, 403, 602, 701, 702</u> The statements are argumentative, irrelevant, speculative, conclusory, lack foundation, and constitute improper legal opinion and opinion testimony by a lay witness. The statements also violate the Best Evidence Rule, because they reference and characterize certain of Perfect 10's DMCA notices without attaching them, and the complete notices themselves are the best evidence of their contents. Further, Ms. Chou has never been disclosed by P10 as an expert in this case, nor does she appear to have the necessary expertise to provide such expert testimony.</p>

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	notices, the complete URL of the blogger.com web page containing the full-size P10 image, along with a copy of that web page.")	
7.	<b>Chou Decl., at ¶ 11</b> ("I have also observed that image URLs on blogger.com are also available on blogspot.com servers, showing the same image. The URL is the same, except with the base URL changed. For example, "bp0.blogger.com/_aAjR8G9PWr8/Rzut2EjjNqI/AAAAAAAAABZk/bHNb3OFY9R8/s1600-h/066_DeathSCPX_Nickie_Yager_02.jpg" displays the same image as "1.bp.blogspot.com/_aAjR8G9PWr8/Rzut2EjjNqI/AAAAAAAAABZk/bHNb3OFY9R8/s1600-h/066_DeathSCPX_Nickie_Yager_02.jpg." One can take any of the blogger URLs in the spreadsheet and substitute "bpX.blogspot.com" for "X+1.blogspot.com" and receive the same image. In other words, the images on blogger.com are also on blogspot.com. Bp2.blogspot.com can	<u>Fed. R. Evid. 401, 402, 403, 602, 701, 702, Fed. R. Civ. P. 26</u> The statements are irrelevant, argumentative, mischaracterize the documents, speculative, lack foundation, are not within the witness's personal knowledge, constitute improper legal opinion, and are improper opinion testimony. Further, Ms. Chou has never been disclosed by P10 as an expert in this case, nor does she appear to have the necessary expertise to provide such expert testimony.



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	<p>be substituted with 3.bp.blogspot.com, bp3.blogger.com can be substituted with 4.bp.blogspot.com and so on and so forth.")</p>	
8.	<p><b>Chou Decl., at ¶ 12</b> ("I have also done work to verify that Google has not removed its ads from web pages that Perfect 10 has identified in its notices.")</p>	<p><u>Fed. R. Evid. 401, 402, 403, 602, 1002</u> The statement is argumentative, mischaracterizes the facts, irrelevant (because Perfect 10's defective notices failed to provide Google with notice of any alleged infringement), speculative, lacks foundation (among other things, the declarant provides no explanation for how or what she allegedly did), and constitutes improper legal opinion and opinion testimony. The statement also violates the Best Evidence Rule, because it references and characterizes certain of Perfect 10's DMCA notices without attaching them, and the complete notices themselves are the best evidence of their contents. Further, Ms. Chou has never been disclosed by P10 as an expert in this case, nor does she appear to have the necessary expertise to provide such expert testimony.</p>

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9.	<b>Chou Decl., at ¶ 13</b> ("I am quite familiar with perfect10.com, which is not a blog. The images on perfect10.com cannot be identified by a "permalink of the post" as there is no such thing on perfect10.com. I have examined thousands of infringing blogger.com web pages that Perfect 10 included in its DMCA notices to Google. Those web pages consisted of a P10 Image and a blogger.com URL. There was no other text on those web pages, no posts, and no 'permalink of a post.'")	<u>Fed. R. Evid. 401, 402, 403, 602, 701, 702</u> The statements are irrelevant, argumentative, speculative, lack foundation, mischaracterize the facts, are not within the witness's personal knowledge, constitute improper legal opinion, and are improper opinion testimony. The statements also violate the Best Evidence Rule, because they reference and characterize certain of Perfect 10's DMCA notices without attaching them, and the complete notices themselves are the best evidence of their contents. Further, Ms. Chou has never been disclosed by P10 as an expert in this case, nor does she appear to have the necessary expertise to provide such expert testimony.
10.	<b>Chou Decl., at ¶ 14</b>	<u>Fed. R. Evid. 401, 402, 403, 602, 701, 702</u> The statements are irrelevant, argumentative, mischaracterize the documents and facts, speculative, lack foundation, are not within the witness's personal knowledge, constitute

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DATED: March 16, 2010

QUINN EMANUEL URQUHART & SULLIVAN, LLP

By   
Michael Zeller  
Rachel Herrick Kassabian  
Attorneys for Defendant GOOGLE INC.