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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PERFECT 10, INC., a California corporation,

Plaintiff,

v.

GOOGLE INC., a corporation,

Defendants.

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

Before Judge A. Howard Matz

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

PUBLIC REDACTED VERSION

[Filed Separately: Reply Declarations of Dr. Norman Zada and Jeffrey N. Mausner, Declaration of Mark McDevitt]

Date: April 5, 2010
Time: 10:00 a.m.
Place: Courtroom 14, Courtroom of the Honorable A. Howard Matz

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

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I. INTRODUCTION AND SUMMARY OF ARGUMENT.

Google's opposition to Perfect 10's motion for preliminary injunction (the "PI Motion") fails to refute, let alone even address, most of Perfect 10's key facts. Google concedes that there is massive infringement of Perfect 10 copyrighted images ("P10 Images") on its system, and that it will not respond to most DMCA notices. Google concedes that it has no procedure to prevent the same identified image from endlessly reappearing in its Image Search results. In particular, Google's admitted policy of removing, on average, at most 1 link in 7,000 to an infringing website precludes a DMCA safe harbor for Google. Google's attempts to excuse its inaction by misstating applicable law provide no basis for this Court to deny the PI Motion.

A. Google Concedes That There Is Massive Infringement Of Perfect 10 Images On Google's System.

Google does not dispute any of Perfect 10's facts regarding the extraordinary level of infringement of P10 Images on Google's system. In particular, Google does not contest that it is: (1) displaying at least 22,000 Perfect 10 thumbnails ("P10 Thumbnails") that enable the downloading of full-size P10 Images; (2) providing at least 222 million links (that Google refuses to remove) to websites that infringe P10 Images; (3) storing at least 3,837 full-size P10 Images on its *blogger.com* servers; (4) placing Google ads next to thousands of P10 Images; (5) refusing to take action against any Google paysite advertising affiliates that are infringing, in total, at least 180,000 P10 Images; and (6) forwarding thousands of P10 Images to *chillingeffects.org* for publication on the Internet. Google also does not dispute that millions of full-size P10 Images have been downloaded from websites to which Google in-line links. Declaration of Dr. Norman Zada In Support of the PI Motion (Docket Nos. 795-797) ("Zada Decl.") ¶¶6, 9, 13, 17, 45, 86, Exhs. 1, 5, 10, 30, 65, 9.

B. Google Concedes That It Has No Policy To Remove Most Infringing Activity From Its System.

Google also concedes other key facts regarding its DMCA policy. In

particular, Google does not dispute that it: (1) will not take action in response to any complaints alleging violations of rights of publicity; (2) will not take action against any infringing AdWords affiliate; (3) will not remove, on average, more than 1 of 7,000 links to an infringing website; (4) has no procedure in place to stop the copying of thousands of infringing images from known infringing websites for inclusion in Google's Image Search results; (5) has no procedure in place to avoid linking to massive infringing websites in its search results; (6) refuses to honor requests not to forward confidential DMCA notices to *chillingeffects.org*; (7) is not using Image Recognition or any other method to prevent the same repeatedly identified infringing images from reappearing in its Image Search results or being surrounded by Google ads; (8) has not provided copyright holders with a "check-the-box" system to identify infringing images, even though it provides such a system to identify distasteful images; (9) has refused over 130 requests to provide Perfect 10 with an example of a compliant DMCA notice; (10) has no repeat infringer policy for dealing with repeat infringement in its search results; and (11) does not even keep track of the identities of repeat infringers. Zada Decl. ¶¶13-15, 91-99, Exhs. 5-7, 68-71.

C. Google Has Not Provided A Spreadsheet Which Summarizes What Actions It Took In Response To Perfect 10's DMCA Notices.

Google's Opposition does not provide a usable spreadsheet which shows what action Google took in response to each of the 40,000 infringing URLs identified in Perfect 10's DMCA notices, or when Google took such action.[1] Moreover, although Google eventually removed a few identified infringing links from its Web Search results, Google has never indicated whether it has ever removed those same infringing links from its Image Search results or disabled Google ads on those identified infringing web pages. Furthermore, Google has never provided Perfect 10

[1] Google's failure to provide such a document violates this Court's May 13, 2008 Order, requiring Google to produce a "spreadsheet-type document summarizing DMCA notices received, the identity of the notifying party and the accused infringer, and the actions (if any) taken in response." Order, Docket No. 294; Zada Decl. ¶97.

with a list identifying even 500 of the 40,000 infringing URLs identified by Perfect 10 that Google has completely processed expeditiously, by removing ads from the infringing web page and links to the infringing web page from both its Image Search results and its Web Search results. Zada Decl. ¶¶81, 97-98, Exhs. 70-71.

D. Google Fails To Refute Perfect 10's Evidence That Perfect 10's DMCA Notices Were Compliant.

In a desperate attempt to excuse its inaction, Google rehashes its assertion that Perfect 10's DMCA notices are all defective. Opposition at 5.[2] Nowhere in its Opposition, however, does Google refute the following facts: (1) Interserver and Yahoo! processed Perfect 10's DMCA notices in two and three days, respectively; (2) [redacted] (3) Google has belatedly processed some of both Perfect 10's spreadsheet-style notices and its Adobe-style notices; (4) Perfect 10's spreadsheet-style notices closely followed Google's DMCA instructions; and (5) Google has failed to submit evidence from any technical expert demonstrating that Perfect 10's notices are deficient. [redacted] In contrast, Perfect 10 has submitted declarations from several technical experts stating that Perfect 10's DMCA notices were sufficient. *See* Declarations of

[2] The Opposition does not include any argument in support of this assertion. Instead, Google improperly seeks to incorporate six memoranda in support of its three DMCA Motions, its *Ex Parte* Application to strike the PI Motion, and its opposition to Perfect 10's Motion for Evidentiary and Other Sanctions, which total more than 100 pages, in violation of Local Rule 11-6 (no memorandum of points and authorities shall exceed 25 pages). Perfect 10 requests that this Court not consider any of those memoranda, as well as Google's statements of undisputed facts and other supporting documents, when ruling on the PI Motion. If the Court does consider those pleadings, Perfect 10 then asks the Court to consider Perfect 10's related pleadings, found at Exhibit R (a disk) to the Reply Declaration of Jeffrey N. Mausner, submitted herewith (the "Mausner Reply Decl.") ¶5. Perfect 10's pleadings demonstrate that Google is not likely to prevail on its DMCA safe harbor affirmative defense.

David O'Connor, Sean Chumura, Bennett McPhatter, Docket Nos. 780, 781, 782.[3]

E. At The Very Least, Perfect 10 Is Entitled To An Injunction Under Section 512(j).

Google also raises numerous incorrect legal contentions in an attempt to avoid injunctive relief. For example, Google mistakenly asserts that "[b]ecause Google is entitled to DMCA safe harbor, [Perfect 10's] liability arguments need not be reached." Opposition at 6. In fact, Section 512(j) of the DMCA specifically provides that this Court may enjoin Google's conduct even if Google is entitled to a safe harbor defense, including ordering Google not to link to such infringing websites as *rapidshare.com* and *thepiratebay.org*, which infringe thousands of P10 Images and have been condemned by various courts. *See* 17 U.S.C. §512(j)(1)(a); Zada Decl. ¶17, Exh. 10.[4] Furthermore, the PI Motion seeks to enjoin recent unlawful conduct by Google that is not protected by the DMCA or covered by Google's DMCA Motions. Such conduct includes: (i) Google's forwarding of thousands of P10 Images (including full-size P10 Images), attached to Perfect 10's confidential DMCA notices, to *chillingeffects.org* for publication on the Internet, which began in December 2009; and (ii) Google's refusal to take any action against violations of

[3] Google seeks to rely solely upon the Declaration of Shantal Rands Poovala to contend that Perfect 10's notices are defective. *See, e.g.*, Opposition at 5 n.6. Ms. Poovala's testimony is inadmissible, however, because she has admitted that [redacted] *See* Perfect 10's Evidentiary Objections to the Poovala Declaration and Rebuttal Declaration, Docket No. 587, contained in Mausner Reply Decl., ¶5, Exh. R. Furthermore, Ms. Poovala has been unavailable to be deposed regarding her declarations for more than five months. *Id.* ¶6, Exh. S.

[4] Perfect 10 may obtain the following injunctive relief under §512(j): (i) An order restraining the service provider from providing access to infringing material or activity residing at a particular online site on the provider's system or network; (ii) An order restraining the service provider from providing access to a subscriber or account holder of the service provider's system or network who is engaging in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order; and (iii) Such other injunctive relief as the court may consider necessary to prevent or restrain infringement of copyrighted material specified in the order of the court at a particular online location, if such relief is the least burdensome to the service provider among the forms of relief comparably effective for that purpose. 17 U.S.C. §512(j)(1)(a).

Perfect 10's assigned rights of publicity, including violations by Google's advertising affiliates on websites that Google hosts.

F. Google's Defense Is Contrary To Principles Espoused By The Ninth Circuit In Its Recent *Roommates* Decision.

The Ninth Circuit has recently emphasized that internet service providers should not receive preferential treatment over regular merchants:

> The Internet is no longer a fragile new means of communication that could easily be smothered in the cradle by overzealous enforcement of laws and regulations applicable to brick-and-mortar businesses. Rather, it has become a dominant – perhaps the preeminent – means though which commerce is conducted. And its vast reach into the lives of millions is exactly why *we must be careful not to exceed the scope of the immunity provided by Congress and thus give online business an unfair advantage over their real-world counterparts, which must comply with the laws of general applicability.*

Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1164 (9th Cir. 2008) (*en banc*) ("*Roommates*") (emphasis added). Google's assertions in opposition to the PI Motion effectively ask the Court for such preferential treatment. Although real world businesses that accept payments from thieves to help sell stolen materials would be criminally liable, Google asks this Court to sanction Google's ongoing acceptance of similar payments from thieves of intellectual property. Similarly, although entertainment companies would never think of using a celebrity's name or image for advertising purposes without permission, Google asks this Court to give it carte blanche to do just that, on a massive scale.

II. PERFECT 10 IS ENTITLED TO INJUNCTIVE RELIEF BARRING GOOGLE FROM FORWARDING P10 IMAGES TO CHILLING EFFECTS.

Google completely mischaracterizes the harm from its recent forwarding of 28

of Perfect 10's confidential DMCA notices to *chillingeffects.org*. Those notices typically consist of one or two pages of text and an Adobe PDF attachment which contains as many as 457 P10 Images with live links. The Adobe PDF attachments can be immediately copied, and provide live links for downloading as many as 36,000 full-size P10 Images. Reply Declaration of Dr. Norman Zada in support of the PI Motion, submitted herewith ("Zada Reply Decl.") ¶¶10-15, Exhs. 77-80. Third-party websites have started to copy these Perfect 10 Adobe attachments, which are now proliferating across the Internet. Google normally only in-line links to the Adobe PDF attachment. Thus, users are not even aware that the full-size P10 Images displayed by Google via an in-line link to *chillingeffects.org* were ever part of a DMCA notice. Zada Reply Decl. ¶¶10-11, Exhs. 77-78.

Nowhere in its Opposition does Google dispute that: (1) since December 2009, Google has forwarded full-size infringing P10 Images and live links in Perfect 10's Adobe-style notices to *chillingeffects.org* for publication on the Internet; and (2) by reinstating thumbnails in its Image Search results that in-line link to P10 Images in Perfect 10's confidential DMCA notices, Google is allowing its users to view and download a full-size version of every infringing image in these notices while at *google.com* – the very images that Perfect 10 specifically asked Google to remove. Nor does Google refute Perfect 10's argument that Google's copying and forwarding of the full-size P10 Images in Perfect 10's DMCA notices constitutes direct infringement. Instead, Google makes a number of absurd assertions, none of which provides a basis to deny the PI Motion.

First, Google complains that Perfect 10 refers to *chillingeffects.org* as Google's "partner." Opposition at 8. In fact, Google itself refers to *chillingeffects.org* as its partner in emails to Perfect 10. Zada Reply Decl. ¶13, Exh. 79.

Second, Google incorrectly claims that "providing links to DMCA notices at Chilling Effects, in place of the links Google suppresses from search results, is often the only way to inform providers that their material has been removed pursuant to the

DMCA…." Opposition at 9 n.12. In fact, the most effective way to notify providers is to email them, using the email address listed by "who is." Moreover, Google does not normally remove content from third-party websites – it typically just removes one link out of thousands from *google.com* to such websites. Consequently, Google does not even have an obligation in most cases to notify the webmaster.[5]

Third, Google contends that its forwarding of Perfect 10's DMCA notices to *chillingeffects.org* constitutes "fair use." Opposition at 9-10. Google's misapplication of the four "fair use" factors set forth in 17 U.S.C. § 107 provides no basis for Google to rely upon this affirmative defense. On the contrary, these factors favor Perfect 10.

(a) Purpose and Character of the Use. Google's forwarding of Perfect 10's Adobe attachment, which contains full-size P10 Images and live links, does not serve a research purpose**.** If Google were truly concerned with "academic research," it would remove the attachment, redact the images, or at least remove the live links by converting the attachment to TIFF format. Google has done none of these things.[6]

When Google in-line links only to the Adobe attachment to Perfect 10's notices, as it typically does, the notice is not being used for "research." The user sees

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[5] Google also makes the incredible assertion that it lacked notice of the infringement, because Perfect 10 never sent Google a DMCA notice "identifying links to allegedly infringing material" on *chillingeffects.org*. Opposition at 5:18-19. What Google received from Perfect 10 was a *DMCA notice.* The notice specifically stated that the Adobe PDF attachment contained infringing P10 Images. When Google provided the infringing images to *chillingeffects.org* and then in-line linked to those images, Google knew that it was providing access to known infringing images. When Google reproduced those images and forwarded them to *chillingeffects.org*, Google knew that it was making copies of, and distributing, infringing images.

[6] Google's assertion that it is forwarding Perfect 10's DMCA notices to *chillingeffects.org* to notify the alleged infringer and to advance academic research [Opposition at 10] is severely undermined by the fact that Google only forwards selected DMCA notices. For example, [redacted] Zada Reply Decl. ¶14, Exh. 80. Google's forwarding of P10 notices, but not [redacted], shows that Google did so to punish Perfect 10, not for some research purpose.

only the infringing images, not the textual part of the notice. Similarly, when Google AdSense affiliates copy only the Adobe attachment and place Google ads around it, they are using the P10 Images in the attachment only for commercial purposes. Zada Reply Decl. ¶¶10-11, Exhs. 77-78. There is no research purpose whatsoever. Accordingly, this use is not transformative and this factor favors Perfect 10.

(b) Nature of the Work. P10's images are creative but previously published. As the Ninth Circuit previously ruled, this factor weighs slightly in favor of Perfect 10. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1167 (9th Cir. 2007).

(c) Amount Used. "The third factor asks whether the amount and substantiality of the portion used in relation to the copyrighted work as a whole . . . are reasonable in relation to the purpose of the copying." *Id. quoting Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586, 114 S.Ct. 1164 (1994).[7] Here, it is unreasonable and unnecessary to copy the full-size P10 Images found in Perfect 10's notices in order to further Google's alleged purposes of academic research and notifying providers when allegedly infringing material is removed. Google could have accomplished these very same purposes by removing the P10 Images from the notices it forwarded to *chillingeffects.org* or by placing an X or some other mark on these images so they could not be freely used. This factor also weighs heavily in Perfect 10's favor.

(d) Effect on the Market. The fourth factor is "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. §107(4). Google's forwarding to *chillingeffects.org* of the P10 Images in Perfect 10's DMCA notices completely destroys Perfect 10's market for these images. By in-line linking to these images, Google is facilitating the free downloading of thousands of full-size P10

[7] Google's misleading assertion that it "uses no more of [Perfect 10's notices] than necessary to inform providers of their contents" [Opposition at 11] completely ignores this language from *Campbell*. There is no reason that Google had to make thousands of P10 Images, including full-size images and live links, available on the Internet, without redacting the images or eliminating the live links.

Images that Perfect 10 is attempting to sell as its sole means of revenue. Moreover, Google typically places its links to the Adobe attachments in Perfect 10's notices *right near the beginning of its search results.* Zada Reply Decl. ¶¶10-11, Exhs. 77-78. As a result, millions of Google users are likely to click on such links. Zada Decl. ¶86, Exh. 65. Furthermore, Google's AdSense affiliates are now offering a download link to the P10 Images in Perfect 10's Adobe attachments, next to Google ads. Zada Reply Decl. ¶11, Exh. 78. These superseding and commercial uses greatly outweigh any allegedly transformative, noncommercial uses of Perfect 10's images.

Google's assertion that Perfect 10 has no continuing harm because it has "ceased sending Google DMCA notices" [Opposition at 22 n.25] is absurd. Perfect 10 is greatly harmed because it is unable to send Google further DMCA notices to protect its business from continued massive infringement on Google's system.

Thus, the fourth "fair use" factor also weighs heavily in Perfect 10's favor. Accordingly, there is no basis to grant Google's fair use affirmative defense. [8]

Without any evidence or support, Google suggests that Perfect 10 "contrived an infringement claim" by sending its Adobe-style notices. Opposition at 10 n.13. Google's accusation is completely contrary to the facts. Perfect 10 has been complaining to Google about forwarding Perfect 10 notices to Chilling Effects since 2005. Perfect 10 first sent Adobe-style notices to Google on June 28, 2007, more than two years before Google began forwarding such notices to Chilling Effects. Perfect 10 demanded that Google not forward Perfect 10's smaller Adobe notices on

[8] Google also has no basis for asserting that its copyright infringement is protected by the First Amendment. [Opposition at 11-12]. Perfect 10 included a copy of its entire website in its June 28, 2007 notice to Google. Does that mean that Google should be allowed to post all the P10 Images from that website on the Internet? Just as the First Amendment does not allow a doctor to forward confidential records to third parties, it likewise does not permit Google to engage in massive copyright infringement by forwarding Perfect 10's confidential DMCA notices containing, in total, thousands of P10 Images, to *chillingeffects.org. Sosa v. DirecTV, Inc.*, 437 F.3d 923 (9th Cir. 2006), the only case cited by Google [Opposition at 12] involved application of the *Noerr-Pennington* doctrine to pre-litigation demand letters. *Sosa* does not state that copyright infringement is protected by the First Amendment.

November 12, 2009, three weeks before Google began to do so, in spite of repeated Perfect 10 objections. Zada Reply Decl. ¶12, Exh. 79; Mausner Reply Decl. ¶4.

III. GOOGLE HAS DIRECT LIABILITY FOR FAILING TO REMOVE 3,837 FULL-SIZE P10 IMAGES FROM ITS SERVERS.

Perfect 10 demonstrated in its moving papers that Google's storage of 3,837 full-size P10 Images on its own *blogger.com* servers, and Google's failure to remove such images in response to Perfect 10's DMCA notices, constitutes direct and contributory infringement. Perfect 10's Memorandum of Points and Authorities in support of the PI Motion (" Memo") at 10-11, 15-16. Google does not dispute that its own servers are storing these infringing images. Therefore, under the "server test," "Perfect 10 has made a prima facie case that Google's communication of its stored [3,837 full-size P10 Images] directly infringes Perfect 10's display right." *Amazon.com*, 508 F.3d at 1160.

Google's mistaken assertions do not support a contrary conclusion. First, Google "controls the storage and communication" of the full-size P10 Images on its servers. *Id.* at 1160 n.6. Therefore, Google's claim that it is only passively providing a service allowing users to upload content provides no basis to deny Perfect 10's direct infringement claim. This is particularly true here, where Google allows the users of its Blogger service to remain anonymous, so there is no one else that the copyright holder can hold liable. Second, the cases on which Google relies, *Field v. Google Inc.*, 412 F.Supp.2d 1106 (D. Nev. 2006), and *Parker v. Google Inc.*, 422 F.Supp.2d 492 (E.D. Pa. 2006), involved the automatic copying by Google's crawler of text from the copyright holder's website or their postings, and are quite different from the situation here, where Google is allowing infringing full-size P10 Images to be stored and displayed on Google's own servers. Third, the leading copyright treatise states that *Field* and *Parker* were wrongly decided, and specifically rejects Google's assertion that a plaintiff must show volitional conduct by a defendant to establish direct liability. 3 M. Nimmer & D. Nimmer, *Nimmer on Copyright*

(Matthew Bender 2009) § 12B.06[B][2][c][i], at 12B-82.5 (the "requirement for 'some element of volition' should not be viewed as a free-standing feature of copyright law"); *id.*, § 12B.06[B][2][c][ii], at 12B-82.5-12B-83 (focus on non-volitional conduct is not a bar to plaintiff's establishing a *prima facie* case). Finally, Google's fair use defense fails for all the reasons set forth in Section II, above. Google's storage of infringing P10 Images on its servers, particularly when they are surrounded by Google ads, is wholly commercial and unreasonable. Moreover, Google users' ability to download these images for free completely destroys any market Perfect 10 has for these images.[9]

In any event, Google's refusal to remove these 3,837 full-size P10 Images, despite knowledge that they are on its own *blogger.com* servers, establishes its liability for contributory infringement.[10] Indeed, nowhere in the Opposition does Google dispute that users who upload infringing P10 Images onto *blogger.com* servers are themselves liable for direct infringement. *See also* Section V, below.

IV. GOOGLE'S COMMERCIAL EXPLOITATION OF MORE THAN 22,000 P10 THUMBNAILS, AND ITS LINKING OF THESE THUMBNAILS TO FULL-SIZE P10 IMAGES, IS NOT FAIR USE.

Google does not dispute that it currently is displaying more than 22,000 P10 Thumbnails in its Image Search results. It asserts that the Ninth Circuit's ruling that Google's use of these thumbnails is fair use is "binding precedent." Opposition at 7. Perfect 10 nevertheless asks this Court and the Ninth Circuit to revisit this issue, because of changed circumstances since the Ninth Circuit's original ruling in 2007.

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[9] Google incorrectly claims that the Ninth Circuit's opinion in this case "holds that Google's automated copying and storage of material uploaded by third parties is a fair use." Opposition at 13-14, citing *Amazon.com*, 508 F.3d at 1168. In fact, the Ninth Circuit's opinion contains no such holding.

[10] *See. e.g.. Religious Tech. Ctr. v. Netcom On-Line Comm. Serv., Inc.*, 907 F.Supp. 1361, 1374 (N.D.Cal.1995) ("if a computer system operator learns of specific infringing material available on his system and fails to purge such material from the system, the operator knows of and contributes to direct infringement."); *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020 (9th Cir. 2001) (same).

First, the damage to Perfect 10's business is no longer "hypothetical," as the Ninth Circuit previously suggested. *Amazon.com,* 508 F.3d at 1168. Rather, such damage is now established. Perfect 10's cell-phone downloading business ended in 2006. Perfect 10 has also been forced to stop publication of its flagship magazine, and its revenues have dropped from nearly $2,000,000 a year to under $150,000 a year. Zada Decl. ¶5. Second, the number of P10 Thumbnails infringed by Google has increased massively, from roughly 2,500 when Perfect 10 filed its initial preliminary injunction motion in August 2005 to more than 22,000 today. Third, each infringing P10 Thumbnail is now being linked to websites which infringe, on average, 9,000 P10 Images, as opposed to fewer than 20 such images in 2005. Zada Decl. ¶6, Exh. 9. As a result, the damage to Perfect 10, measured by the number of images infringed by Google's actions, has increased by a factor of at least 1,000. Fourth, Perfect 10 has now submitted evidence of thousands of clicks on P10 Thumbnails, and millions of resulting views/downloads of P10 Images. Zada Decl. ¶86, Exh. 65, pp. 8, 9, 1. Finally, Google's provision of *links* from infringing P10 Thumbnails to full-size P10 Images has never been found to be a fair use.

There has never been a finding of fair use where thousands of images were infringed and the copyright holder's business was destroyed. For each of these reasons, this Court should freshly analyze whether Google's current display of 22,000 P10 Thumbnails, which has so damaged Perfect 10, constitutes fair use.

V. PERFECT 10 HAS ESTABLISHED A LIKELIHOOD OF SUCCESS ON ITS CONTRIBUTORY INFRINGEMENT CLAIMS.

The Ninth Circuit has held that "Google could be held contributorily liable if it had knowledge that infringing Perfect 10 images were available using its search engine, could take simple measures to prevent further damage to Perfect 10's copyrighted works, and failed to take such steps." *Amazon.com,* 508 F.3d at 1172. Perfect 10 demonstrated in its moving papers that Google has engaged in numerous activities for which it is contributorily liable under this holding. Memo at 9-17.

Google's misleading assertions fail to support a different conclusion.

Google first asserts, without evidence or support, that Perfect 10 has not shown that Google links to, or places ads by, P10 Images. Opposition at 16:4-7. Google simply is wrong. Perfect 10 has demonstrated, among other things, that Google: (1) has placed unauthorized ads next to at least 18,000 infringing P10 Images through its AdSense advertising program [Zada Decl. ¶¶2, 16, 74-76, Exhs. 8, 9, 54-56]; (2) has placed ads on *blogspot.com* websites that it hosts that have infringed at least 4,000 P10 Images [*id.* ¶9]; (3) has offered thousands of full-size P10 Images to its users via its "see full-size image" links and its in-line links [*id.*, ¶¶6-7, 11, Exhs. 1-3]; (4) has in-line linked to websites from which users have downloaded millions of P10 Images [*id.*, ¶86, Exhs. 65, 9]; and (5) has provided thousands of links to massive infringers of P10 Images via its Google Web Search results and its Sponsored Links [*id.*, ¶¶17, 42-45, 73, Exhs. 10, 27-30, 53]. In addition, Perfect 10 has shown that Google: (6) is storing at least 3,837 full-size P10 Images on its own *blogger.com* servers [*id.* ¶¶8-9]; (7) has hosted more than 565 websites in its *blogspot.com* program that have infringed, in total, more than 11,000 P10 Images [*id.*, ¶¶8-10, Exh. 9]; and (8) hosts websites that offer thousands of P10 Images from massive infringing websites such as *rapidshare.com* [*id.*, ¶¶11, 17, 40, Exhs. 3, 10, 26]. Finally, Google also in-line links to infringing full-size P10 Images on *chillingeffects.org*. *Id.* ¶13.

Google next asserts that it is not liable because it lacks knowledge of the infringement about which Perfect 10 complains. Opposition at 16. This contention fails for two separate reasons. First, it relies entirely upon Google's mistaken claim that Perfect 10's DMCA notices are all defective. *Id.* Perfect 10 showed in its moving papers, however, that Google's claim is wrong and that its DMCA notices were compliant, for at least these reasons: (1) Interserver and Yahoo! processed similar DMCA notices sent to them by Perfect 10 in two and three days, respectively [Zada Decl. ¶¶82-84, Exhs. 61-63]; (2) [redacted] [Declaration of Jeffrey N. Mausner

in support of the PI Motion (Docket No. 773)("Mausner Decl."), Exh. G]; (3) Google has belatedly processed some of both Perfect 10's spreadsheet-style notices and its Adobe-style notices [Zada Decl. ¶81]; (4) Perfect 10's spreadsheet style notices closely followed Google's DMCA instructions [*id.* ¶¶25-27, Exh. 14-16]; and (5) the declarations of three technical experts submitted by Perfect 10 demonstrate that Perfect 10's notices are compliant [*see* Declarations of David O'Connor, Sean Chumura and Bennett McPhatter in support of the PI Motion]. Memo at 19-20. Google has failed to refute this evidence.[11] In fact, the Declaration of Paul Haahr, the [redacted] Mausner Reply Decl. ¶6, Exh. S.[12]

Finally, Google advances the outlandish assertion that it is not liable for contributory infringement because "there are no simple measures that Google could take to prevent further damage to P10's copyrighted works." Opposition at 17. In fact, there are many simple measures that Google could take; it simply does not wish to take them. These include: (1) completely processing DMCA notices by removing links to infringing web pages from both Google's Web Search results and its Image

[11] Google incorrectly contends that Perfect 10's submission of 95 DMCA notices in October and November 2009 "has no bearing on DMCA safe harbor." Opposition at 6. Google misconstrues the relevance of these notices. That Google processed a large number of these recent notices effectively refutes Google's prior claims that similar DMCA notices previously submitted by Perfect 10 were deficient.

[12] Additionally, a secondary infringer may be contributorily liable if it has actual *or* constructive knowledge of direct infringement. *A & M Records v. Napster*, 239 F.3d at 1020 (contributory liability requires that the secondary infringer "know or have reason to know" of direct infringement); *Louis Vuitton Mattetier, S.A. v. Akanoc Solutions, Inc.*, 591 F.Supp.2d 1098, 1107-08 (N.D. Cal. 2008) ("a reasonable jury could find that Defendants should have known that infringing websites were using their services"). At the very minimum, the Perfect 10 copyright notices on thousands of images being displayed by Google in its Image Search results, and Perfect 10's provision to Google of thousands of such images infringed by websites with which Google has business dealings or to which Google links, should have made Google aware of the infringing activity occurring on its system.

Search results and removing ads from such web pages; (2) using image recognition, including Google's existing "Find similar images" feature, to remove identified images from Google's Image Search results; (3) assigning an employee to review Google's Image Search results for identified infringing images; (4) keeping track of infringement complaints against various websites, to avoid copying P10 Images from those websites to use in Google's Image Search results; and (5) requiring infringers to actually remove infringing content from their websites or face the removal of all Google links. *See* Zada Reply Decl. ¶23 (identifying other simple measures that Google has failed to take). Moreover, Google's assertion that it can continue to provide millions of links to massive infringing paysites is directly contrary to the Ninth Circuit's position that "[r]equiring website owners to refrain from taking affirmative acts that are unlawful does not strike us as an undue burden." *Roommates,* 521 F.3d at 1169 n.24.

VI. GOOGLE IS CONTRIBUTORILY AND VICARIOUSLY LIABLE FOR THE INFRINGING ACTIVITIES OF THE *BLOGSPOT.COM* WEBSITES IT HOSTS.

Google does not dispute that: (1) it has hosted at least 565 *blogspot.com* websites that have infringed at least 11,000 P10 Images;[13] (2) it has placed Google ads around at least 4,000 of those P10 Images; (3) it receives a direct financial benefit from clicks on these ads; and (4) it can terminate the accounts of the *blogspot.com* websites it hosts. These undisputed facts are substantially different from those previously before the Ninth Circuit, when it ruled that Google was not vicariously liable because "Google cannot terminate those third-party websites." *Amazon.com,* 508 F.3d at 1174. Here, Google can terminate the *blogspot.com* websites because it hosts them, and Google earns a direct financial benefit from clicks on ads placed next

[13] Google merely suggests that not all of the infringing images were hosted on Google's servers. Opposition at 8, fn. 10.

to infringing P10 Images. Zada Decl. ¶¶16, 74-76, Exhs. 8, 9, 54-56.[14] Google thus is vicariously liable under the Supreme Court's *Grokster* test.

Google also does not dispute that image recognition technology is now available. Nevertheless, Google asserts that it should not be required to remove P10 Images from its *blogger.com* servers or from its Image Search results, because Google would not know if the images were infringing. Opposition at 17. This contention fails because Perfect 10 has repeatedly told Google that Google does not have the right to reproduce any P10 Images. Zada Reply Decl. ¶24. Google thus should remove any P10 Image that appears in its Image Search results, but has not done so. Google is thus both vicariously and contributorily liable for its conduct.

VII. GOOGLE HAS FAILED TO IMPLEMENT A VIABLE DMCA POLICY FOR PROTECTING COPYRIGHTED WORKS.

As Perfect 10 demonstrated in its moving papers, Google has failed to implement a proper DMCA policy. Memo at 12-23. First, Google is willing to remove, on average, only 1 link in 7,000 to an infringing website. Zada Decl. ¶17.

Second, Google concedes that it will not take action against its paysite advertising affiliates, which currently infringe hundreds of thousands of P10 Images. Google does not dispute that it: (i) continues to provide hundreds of thousands of links to these sites; (ii) receives fees for promoting these sites through sponsored links and ad placement; and (iii) refuses to sever its business relationship with these sites or require them to remove identified infringing material. Zada Decl. ¶¶17, 42-45, Exhs. 10, 27-30.

Third, Google does not dispute that it is not using image recognition technology, or some other method, to prevent further infringement of the same repeatedly identified P10 Image. Google thus has no mechanism to prevent the same

[14] Therefore, this case is distinguishable from *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 2009 WL 334022 (C.D. Cal., Feb. 2, 2009), where this Court held that "the alleged financial benefit that the Investor Defendants might some day enjoy will not come directly from Veoh's users or from Veoh's advertisers." *Id.* at *6.

infringing P10 Image from repeatedly appearing in Google's Image Search results. Zada Decl. ¶¶2, 6, Exhs. 1, 9 (folder labeled "20,000 P10 Thumbnails").

Fourth, Google concedes that it has not kept track of infringements by particular websites that appear in its search results. As a result, Google has no procedure in place to prevent it from continuing to make copies of thousands of infringing images from those websites to use in its Image Search results.

Fifth, Google has no mechanism to prevent it from displaying confidential information in its search results. Google points to no policy that would prevent it from forever displaying credit card numbers, social security numbers, or other confidential information, such as usernames and passwords which allow the authorized infringement of copyrighted works. Indeed, Google concedes that: (1) it continues to display passwords to *perfect10.com* on its own website; (2) it continues to host websites on its *blogspot.com* servers that also display Perfect 10 passwords; and (3) such passwords have been used to illegally download more than 4.5 million images from *perfect10.com.* Zada Decl. ¶¶12, 85, Exhs. 4, 64.

Sixth, Google does not refute Perfect 10's contention that Google has failed to work with Perfect 10 to implement a "check the infringing image" notification system, as was earlier ordered by the Court. Mausner Decl. ¶¶2-13, Exhs. A, AA.

The above discussion demonstrates that Google does not have a policy to prevent ongoing infringement and thus is not entitled to a DMCA safe harbor.

VIII. GOOGLE DOES NOT COMPLY WITH THE REQUIREMENTS FOR DMCA SAFE HARBOR.

Perfect 10 demonstrated in its moving papers that Google has failed to expeditiously process Perfect 10's DMCA notices and failed to suitably implement a policy against repeat infringers. Memo at 12-23. Google provides no evidence in its Opposition that it has satisfied either of these requirements. In fact, Google has failed to provide a list of even 500 URLs that it has completely processed expeditiously, meaning that it removed identified infringing links from both its Web

Search and Image Search results, and any ads on the identified infringing web page. Zada Decl. ¶81. Furthermore, Google has not provided a spreadsheet of any kind which describes what action Google has taken in response to the more than 40,000 URLs identified in the DMCA notices sent by Perfect 10 to Google, and when it took such action. Zada Decl. ¶¶97-98, Exhs. 70-71. Without such a spreadsheet, Google has no basis to claim that it processed Perfect 10's notices at all, let alone expeditiously. Moreover, Google concedes that it has taken no action whatsoever in response to nine DMCA notices (dated July 12, 2007; July 31, 2007, October 16, 2007, December 14, 2007; January 24, 2008; March 17, 2008; July 9, 2008; April 24, 2009; and May 7, 2009) which identified at least 30,000 infringing URLs, even though these notices identified infringements in the same fashion as other notices which Google later did process. Zada Decl. ¶¶48, 67, 81, Exhs. 32, 47. For these reasons as well, Google is not entitled to a DMCA safe harbor affirmative defense.

IX. GOOGLE HAS NOT DEMONSTRATED THAT IT HAS SUITABLY IMPLEMENTED A POLICY AGAINST REPEAT INFRINGERS.

In its Opposition, Google does not provide [redacted]

Google's attitude toward infringement is illustrated by its response to what are now more than 90 DMCA notices it received regarding Rapidshare, a massive infringer that a German court declared "was used mainly for illegal activities." Instead of terminating Rapidshare, Google created a rapidshare search engine and programs to assist in the downloading of Rapidshare links. Zada Reply Decl. ¶¶7-9,

Exhs. 74-76. Google's attitude toward infringement is also illustrated by its willingness to pay $1.65 billion to purchase YouTube, even though Google knew that 80% of the content on YouTube was infringing. Mausner Reply Decl. ¶2, Exh. Q.

X. PERFECT 10 HAS DEMONSTRATED THAT IT IS LIKELY TO SUCCEED ON ITS RIGHT OF PUBLICITY CLAIM.

Google does not dispute that it has consistently refused to take any action against violations of Perfect 10's assigned rights of publicity, including violations by Google's advertising affiliates on websites that Google hosts. Zada Decl. ¶¶15, 101, Exhs. 7, 73. Instead, Google raises various erroneous assertions, none of which provides a basis for this Court to deny injunctive relief on Perfect 10's right of publicity ("ROP") claim.

Google first asserts that Perfect 10 is a non-exclusive licensee which "may not hold any publicity rights at all." Opposition at 21. Google is wrong as a matter of fact and law. Rights of publicity are assignable under California law. *See, e.g., Lugosi v. Universal Pictures,* 25 Cal.3d 813, 820 (1979); *KNB v. Matthews,* 78 Cal.App.4th 362, 365 (2000). Here, a number of Perfect 10 models entered into written agreements assigning their publicity rights, and all causes of action relating to those publicity rights, to Perfect 10, and authorizing Perfect 10 to bring an action in its own name. Zada Decl. ¶101, Exhs. 73, 9; Mausner Reply Decl., ¶7, Exh. T. Under California law, the language of these agreements controls this issue. *See* Cal.Civ.Code §1639 ("[w]hen a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible"); Cal.Civ.Code §1638 ("language of a contract is to govern its interpretation").[15] Accordingly, Google's

[15] For this reason, Google's attempt to rely upon snippets of deposition testimony by three models, rather than the language of the assignments themselves [Opposition at 21], is improper. In any event, Google mischaracterizes the deposition testimony it cites. In fact, each of these models acknowledged that she had assigned her rights of publicity to Perfect 10. *See, e.g.*, Kassabian Decl., Exh. P. [redacted]

misguided claim that Perfect 10 has no right to assert its ROP claim fails.[16]

Google next contends that Perfect 10's ROP claim is preempted by Section 230 of the Communications Decency Act (the "CDA") because Google is not a "content provider." Opposition at 22. Google misinterprets both the CDA and controlling Ninth Circuit authority.

First, the grant of immunity provided by Section 230 "applies only if the interactive computer service provider is not also an 'information content provider,' which is defined as someone who is 'responsible, in whole or in part, for the creation or development of' the offending content." *Roommates,* 521 F.3d at 1162, *quoting* 47 U.S.C. § 230(f)(3). Moreover, in passing Section 230, "Congress sought to immunize the *removal* of user-generated content, not the *creation* of content." *Id.* at 1163 (emphasis in original). As the Ninth Circuit noted, Section 230 is titled "Protection for 'good samaritan' blocking and screening of offensive material." Accordingly, "the substance of section 230(c) can and should be interpreted consistent with its caption." *Id.* at 1163-64. The Ninth Circuit has held that an entity "helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct." *Id.* at 1168.

Here, Google is not entitled to immunity under Section 230 because it contributes materially to illegal conduct in at least two different ways. First, it is undisputed that Google has placed its Adsense advertising on free websites, including *blogspot.com* websites that Google hosts on its own servers, next to the images for which Perfect 10 owns the rights of publicity. Google shares with these websites the revenue it obtains from clicks by users on these ads. Zada Decl. ¶¶9, 11, Exhs. 3, 9.

[16] *Upper Deck Authenticated, Ltd. v. CPG Direct*, 971 F. Supp. 1337 (S. D. Cal. 1997), the one case upon which Google relies [Opposition at 21-22], is not to the contrary. *Upper Deck* involved two trading card companies that each had licensing agreements with the same famous athletes. The District Court found that plaintiff did not have standing to assert claims for rights of publicity violations by defendant because it was a non-exclusive licensee. Here, by contrast, Perfect 10 is suing as the assignee of all of the rights of publicity of nine Perfect 10 models.

Section 3344 of the California Civil Code provides that a person violates another's right of publicity by knowingly using another's photograph or likeness "on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent . . ." A claim for common law right of publicity also requires a commercial purpose. *See. e.g., KNB,* 78 Cal.App.4th at 366. Here, Google is materially contributing to violations of Perfect 10's assigned rights of publicity by providing the advertising which satisfies the commercial purpose necessary to establish a violation of Section 3344(a) and common law. Google provides the commercial element needed to establish a right of publicity violation by placing AdSense ads around the images of Perfect 10 models. *Polydoros v. Twentieth Century Fox Film Corp.,* 67 Cal.App.4th 318, 322 (1997) (in order to succeed on a claim under Section 3344, plaintiff "must establish a direct connection between the use of his name or likeness and a *commercial* purpose") (emphasis in original). For this reason alone, Perfect 10 is entitled to injunctive relief on its ROP claim. Such a result is fair and logical where, as here, Google is providing the advertising that allows it to profit from the misappropriation of images for which it does not own the rights of publicity.

Second, the evidence submitted by Perfect 10 establishes that Google is not entitled to immunity under the CDA because it acts as the information content provider when it intermixes bestiality and other sexually explicit images of third parties with images of Perfect 10 models in its Image Search results. Zada Reply Decl. ¶21, Exh. 85. (Please note that pages 2 and 6 of Exhibit 85, pages created by Google that show bestiality images in response to a Perfect 10 model search, are extremely graphic). Because Google is unnecessarily adding explicit sexual images to normal search results, Google is "sufficiently involved with the design and operation of" its search function so as to "forfeit any immunity" under Section 230.

Roommates, 521 F.3d at 1170.[17]

Finally, Google contends that Perfect 10's ROP claim is preempted by the Copyright Act because it seeks to exercise rights equivalent to the scope of copyright law. Opposition at 22. Once again, Google is wrong. State law right of publicity claims are not preempted by the Copyright Act because the subject of these claims is a person's name or likeness, which is not copyrightable. *Downing v. Abercrombie & Fitch,* 265 F.3d 994, 1003-1005 (9th Cir. 2001); *KNB,* 78 Cal.App.4th at 374-75.

XI. PERFECT 10 HAS ESTABLISHED THAT IT WILL SUFFER IRREPARABLE HARM WITHOUT INJUNCTIVE RELIEF.

Google does not dispute that Perfect 10 has lost an additional $20 million since 2005, is near bankruptcy, and must have immediate relief to survive. Zada Decl. ¶5; Zada Reply Decl. ¶2. Nevertheless, Google asserts that Perfect 10 has not demonstrated that it has suffered the irreparable harm necessary to obtain injunctive relief. Opposition at 22-24. Google is wrong, for at least three separate reasons.

First, under controlling Ninth Circuit authority, "a plaintiff that demonstrates a likelihood of success on the merits of a copyright infringement claim is entitled to a presumption of irreparable harm." *Sun Microsystems, Inc. v. Microsoft Corp*., 188 F.3d 1115, 1119 (9th Cir.1999) "A copyright holder seeking a preliminary injunction is therefore not required to make an independent demonstration of irreparable harm." *LGS Architects, Inc. v. Concordia Homes of Nevada*, 434 F.3d 1150, 1156-57 (9th Cir. 2006).

The Supreme Court's decision in *eBay Inc. v. MercExchange, LLC.*, 547 U.S. 388 (2006), upon which Google seeks to rely [Opposition at 23 n.26], does not

[17] Moreover, state law intellectual property claims such as the one brought by Perfect 10 may be excepted from immunity under the CDA, even if Google were not a content provider. *See* 47 U.S.C. § 230(e)(2); *Doe v. Friendfinder Network, Inc.,* 540 F.Supp.2d 288, 298-302 (D.N.H. 2008); *Atlantic Recording Corp. v. Project Playlist, Inc*, 603 F.Supp.2d 690, 703-704 (S.D.N.Y. 2009); *Stayart v. Yahoo! Inc.*, 651 F.Supp.2d 873, 887-88 (E.D. Wisc. 2009). There is now a clear split of authority on this issue..

change the above conclusion. *eBay* involved a permanent injunction in a patent infringement case, not a preliminary injunction in a copyright infringement case. This Court itself has ruled, in the analogous area of preliminary injunctions involving trademark infringement, that "although the Supreme Court's decision in *eBay* has cast some doubt on to the continued viability of the presumption of irreparable harm in trademark cases, this Court will apply current Ninth Circuit law," which provides that "irreparable harm may be presumed upon a finding of a likelihood of success." *Garcoa, Inc. v. PH Beauty Labs, Inc.*, 2009 WL 2489223 *2 n.3 (C.D. Cal., Aug. 10, 2009) (Matz, J.). This Court likewise should apply current Ninth Circuit law regarding the presumption of irreparable harm in copyright infringement cases.

Even if the presumption of irreparable harm does not apply here, however, Perfect 10 has submitted sufficient evidence to establish that it will suffer irreparable harm without injunctive relief. The Supreme Court has held that plaintiffs' undisputed allegation that "absent preliminary relief they would suffer a substantial loss of business and perhaps even bankruptcy" establishes irreparable injury. *Doran v. Salem Inn, Inc.*, 422 US 922, 932, 95 S.Ct. 2561, 2568 (1975). "Certainly the latter type of injury sufficiently meets the standards for granting interim relief, for otherwise a favorable final judgment might well be useless." *Id. See also* 13 *Rutter Group Practice Guide: Federal Civil Procedure Before Trial* (TRG 2010) §13:58.

Here, as well, Perfect 10 has submitted undisputed evidence that it will suffer a substantial loss of business and likely go into bankruptcy without injunctive relief. Zada Decl. ¶¶5-6, 9, 16, 45, Exhs. 1, 8, 9, 30, 9; Zada Reply Decl. ¶2. Under these circumstances, any favorable judgment against Google years from now would be useless. Accordingly, such evidence supports a finding of "irreparable harm" under the Supreme Court's holding in *Doran.*[18]

[18] *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597 (9th Cir. 1991), upon which Google seeks to rely for the proposition that "monetary damages cannot constitute the irreparable harm required for a preliminary injunction" [Opposition at 23], is not to the contrary. First, unlike this case or *Doran, Rent-A-*

Finally, Google's assertion that Perfect 10 improperly delayed in bringing the PI Motion, and therefore cannot establish irreparable harm [Opposition at 22], is contrary to fact. As Perfect 10 explained in its moving papers, seven new developments following this Court's ruling on Perfect 10's first preliminary injunction motion caused Perfect 10 to bring this PI Motion. In particular, Google did not start forwarding the full-size P10 Images and live links found in Perfect 10's Adobe-style notices to *chillingeffects.org* for display on the Internet until *December 2009.* Memo at 9. Google does not dispute this point. Under these circumstances, Perfect 10 did not improperly delay in bringing the PI Motion. Accordingly, the timing of the motion provides no basis for this Court to find that Perfect 10 has not satisfied the "irreparable harm" requirement.

XII. RECENT EVIDENCE OF GOOGLE'S OBSTRUCTION IN THE VIACOM CASE IMPACTS THIS ACTION.

Evidence just released on March 18, 2010, in the lawsuit brought by Viacom against Google and YouTube in the Southern District of New York suggests that Google may be guilty of major discovery obstructions in that case and in this case. For example, Google CEO Eric Schmidt testified that "[i]**t was my practice to delete or otherwise cause the emails that I had read to go away as quickly as possible**." Mausner Reply Decl. ¶2, Exh. Q (emphasis added). Schmidt's testimony is directly relevant to this case because Google produced no meaningful documents in response to this Court's May 13, 2008 Order compelling Google to produce reports ordered, requested or circulated by Schmidt. *Id.* In addition, Viacom states that Larry Page, one of Google's co-founders "**essentially disclaimed memory on any topic relevant to this litigation,** even including, for example, whether he was in favor of Google's

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Center did not involve possible bankruptcy. Moreover, the *Rent-A-Center* court acknowledged that "intangible injuries, such as damage to ongoing recruitment efforts and goodwill, qualify as irreparable harm." *Id.* at 603. Here, as well, Perfect 10 will suffer irreparable damage to its entire business, including its goodwill, and will have to lay off additional employees without injunctive relief. Zada Reply Decl. ¶2. For this reason as well, Perfect 10 has established "irreparable harm."

acquisition of YouTube." Mausner Reply Decl. ¶2, Exh. Q. Similar obstruction by Google in this case has prevented Perfect 10 from fully and fairly litigating its case, and is directly relevant to Perfect 10's contention that it would be improper for this Court to rule on Google's pending DMCA Motions until Google is required to produce a vast array of documents previously ordered by the Court but not produced by Google. Zada Decl. ¶97; Mausner Reply Decl. ¶2, Exh. Q.

XIII. CONCLUSION.

Google has failed to address, let alone refute, virtually all of Perfect 10's evidence. Despite receiving 167 DMCA notices from Perfect 10, Google is, among other things: (1) providing at least 222 million links (which Google will not remove) to websites that infringe P10 Images; (2) displaying 22,000 P10 thumbnails in its Image Search results (that Google will not prevent from reappearing), which allow the downloading of tens of thousands of full-size P10 Images; (3) storing 3,837 full-size P10 Images on its own servers (which Google will not remove); (4) promoting massive infringing paysites (which Google will take no action against) that are selling more than 180,000 P10 Images; and (5) refusing to stop forwarding Perfect 10's DMCA notices to *chillingeffects.org*, thus re-establishing access to thousands of P10 Images that Google was supposed to remove and preventing Perfect 10 from sending further DMCA notices to protect its copyrighted works.

Perfect 10 has demonstrated that it is likely to succeed on its copyright infringement and right of publicity claims. Without injunctive relief, what is left of Perfect 10's business and goodwill will end. Accordingly, for all of the reasons discussed above and in Perfect 10's moving papers, this Court should grant Perfect 10's PI Motion and enter a preliminary injunction against Google.

Dated: March 22, 2010

Respectfully submitted,
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