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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PERFECT 10, INC., a California corporation,

Plaintiff,

v.

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

Defendant.

Case No. CV 04-9484 AHM (SHx)

Before Judge A. Howard Matz

RESPONSE OF PLAINTIFF PERFECT 10, INC. TO DEFENDANT GOOGLE INC.'S EVIDENTIARY OBJECTIONS TO THE DECLARATIONS OF MARGARET JANE EDEN, DEAN HOFFMAN, C.J. NEWTON, AND LES SCHWARTZ RE: PERFECT 10'S MOTION FOR PRELIMINARY INJUNCTION AGAINST GOOGLE

[Declaration Of Jeffrey N. Mausner In Support Of Perfect 10's Responses To Google's Evidentiary Objections Re Perfect 10's Motion For Preliminary Injunction Against Google, Filed Concurrently Herewith]

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

Plaintiff Perfect 10, Inc. ("Perfect 10") hereby responds to Defendant Google Inc.'s ("Google") Evidentiary Objections to the following four declarations submitted by Perfect 10 on March 3, 2010 in connection with Perfect 10's Motion for Preliminary Injunction against Google (Docket No. 791) (the "PI Motion"):

1. Declaration of Margaret Jane Eden (Docket No. 778) (the "Eden Declaration");

2. Declaration of Dean Hoffman (Docket No. 776) (the "Hoffman Declaration");

3. Declaration of C.J. Newton (Docket No. 777) (the "Newton Declaration"); and

4. Declaration of Les Schwartz (Docket No. 779) (the "Schwartz Declaration").[1]

The Hoffman and Newton Declarations are identical to earlier Declarations of Dean Hoffman and C.J. Newton submitted by Perfect 10 on July 6, 2009 in this action in support of Perfect 10's Motion for Summary Judgment (Docket Nos. 444 and 445) and submitted by Perfect 10 on August 9, 2009 in opposition to Google's Motions for Summary Judgment (Docket Nos. 476 and 477). The Eden and Schwartz Declarations are identical to earlier Declarations of Margaret Jane Eden and Les Schwartz submitted by Perfect 10 on August 9, 2009 in opposition to Google's Motions for Summary Judgment (Docket Nos. 475 and 478).

I. THE DECLARANTS WERE DISCLOSED PROMPTLY TO GOOGLE.

As noted above, the Eden Declaration, Hoffman Declaration, Newton Declaration and Schwartz Declaration submitted by Perfect 10 in support of the PI

[1] Google's separate Evidentiary Objections to the Eden Declaration, the Hoffman Declaration, the Newton Declaration, and the Schwartz Declaration, all filed on March 15, 2010 (collectively, the "Evidentiary Objections"), are Docket Nos. 804, 805, 807, and 809, respectively.

Motion (collectively, the "Declarations") are identical to declarations previously submitted by Perfect 10. On September 8, 2009, Google submitted evidentiary objections to each of these earlier declarations (Docket Nos. 509,510, 513, and 515) which are substantively identical to the Evidentiary Objections submitted by Google to the Declaration. As explained below, Google's Evidentiary Objections, like its similar earlier objections, lack merit.

Google first raises the same mistaken objection to all four of the Declarations. Google asserts that this Court should strike the Declarations because Perfect 10 did not disclose Ms. Eden, Mr. Hoffman, Mr. Newton, or Mr. Schwartz (the "Declarants") as "persons having knowledge of the facts relevant to the case" and instead "sprung" the Declarations on Google. *See* Evidentiary Objections at 1. This assertion is even more inappropriate and inapplicable than when it was first raised by Google in September 2009.[2]

Perfect 10 timely disclosed each of the Declarants to Google by providing Google with their declarations, shortly after Perfect 10 became aware of the witnesses. In particular, Perfect 10's attorney, Jeffrey N. Mausner, first knew about and spoke with Margaret Jane Eden on or about July 31, 2009; her declaration was obtained on August 4, 2009 and provided to Google on August 9, 2009. (Docket No. 475.) Mausner first knew about and spoke with Les Schwartz on or about July 27, 2009; his declaration was obtained on July 28, 2009 and provided to Google on August 9, 2009. (Docket No. 478.) Mausner first knew about and spoke with C.J. Newton on or about May 27, 2009; his declaration was obtained on May 28, 2009 and provided to Google on July 6, 2009. (Docket Nos. 445, 477.) Mausner first knew about and spoke with Dean Hoffman on or about

[2] *See* Perfect 10's Response to Google, Inc.'s Evidentiary Objections to the Declarations of Margaret Jane Eden, Dean Hoffman, C.J. Newton, and Les Schwartz Re: Google's Motions for Summary Judgment, filed on October 12, 2009, Docket No. 566.

May 29, 2009; his declaration was obtained on May 29, 2009 and provided to Google July 6, 2009. (Docket Nos. 444, 476.) *See* Declaration of Jeffrey N. Mausner in Support of Perfect 10's Responses to Google's Evidentiary Objections Re Perfect 10's Motion for Preliminary Injunction Against Google, filed concurrently herewith ("Mausner Evidentiary Objections Decl."), ¶3. Google has had more than six months to depose the Declarants or to propound discovery regarding these witnesses. Nevertheless, Google has chosen not to depose any of the Declarants or to propound any such discovery. Consequently, Google has no basis for its objections.[3]

Moreover, Google's assertion that Perfect 10 somehow "sprung" the Declarations upon Google is absurd. *Google knew about the Declarants,* because they sent DMCA notices to Google. For example, C. J. Newton sent more than 100 notices to Google beginning in 2002, and Margaret Jane Eden sent approximately 70 notices to Google. Google's failure to suitably address the concerns of such copyright holders, who have been forced to send Google notice after notice regarding the same repeat infringers, is particularly relevant to the question of whether Google is eligible for safe harbor under *Perfect 10, Inc. v. CCBill, LLC,* 488 F.3d 1102, 1115 (9th Cir. 2007), discussed in Section II.A, below. Under these circumstances, where Google knew or should have known about the Declarants even before Perfect 10 learned of them, there is no basis for Google to preclude Perfect 10 from relying upon the Declarations. *See, e.g., El Ranchito, Inc. v. City of Harvey,* 207 F.Supp.2d 814, 818 (N.D. Ill. 2002) (failure

[3] Furthermore, the Declarants rebut claims made by Google's witness, Shantal Rands Poovala, that Google expeditiously removed or disabled access to infringing material upon notice from all copyright claimants. (Ms. Poovala's declaration is attached as part of Exhibit A to the Declaration of Rachel Herrick Kassabian in opposition to Perfect 10's PI Motion, Docket No. 817). The Declarants therefore fall within the exception for disclosure of impeachment witnesses set forth in Rule 26(a)(1)(A)(i) of the Federal Rules of Civil Procedure.

to disclose persons known to opposing party and "obvious" subjects for deposition was "harmless").

II. THE EDEN, HOFFMAN, NEWTON, AND SCHWARTZ DECLARATIONS ARE DIRECTLY RELEVANT TO THE CASE AND CONTRADICT STATEMENTS BY GOOGLE IN OPPOSITION TO PERFECT 10'S PRELIMINARY INJUNCTION MOTION.

Google's assertion that the Eden, Hoffman, Newton and Schwartz Declarations are irrelevant, a "case within a case," or a "sideshow" [*see* Evidentiary Objections at 2-3] is unfounded and incorrect, for all of the reasons discussed below.

A. The Declarations Are Relevant To The Issue Of Whether Google Has Suitably Implemented A Policy Against Repeat Infringers.

Google asserts that its entitlement to an affirmative defense under the safe harbor provisions of the DMCA should cause this Court to deny Perfect 10's PI Motion. *See, e.g.,* Google's Memorandum of Points and Authorities in Opposition to the PI Motion (Docket No. 815), at 4.[4] In order to be eligible for the safe harbor provisions of the DMCA, however, a service provider such as Google must have "adopted and reasonably implemented . . . a policy that provides for the termination of . . . repeat infringers." 17. U.S.C. § 512(i). The Ninth Circuit has held that the failure to implement a "repeat infringer" policy does not have to be connected with the plaintiff in the lawsuit at hand. Rather, the plaintiff can submit evidence of the defendant's failure to adopt and implement such a policy in connection with third-parties as well. *See Perfect 10, Inc. v. CCBill, LLC,* 488 F.3d at 1115 ("we remand to the district court to determine whether ***third-party notices made CCBill and CWIE aware that it provided services to repeat***

[4] As explained in Perfect 10's reply papers, Google is incorrect. Perfect 10 is entitled under all circumstances to a preliminary injunction under Section 512(j) of the DMCA. *See* Perfect 10's Reply Memorandum of Points and Authorities in support of the PI Motion (Docket No. 825), at 4-5.

infringers, and if so, whether they responded appropriately") (emphasis added). Accordingly, declarations by third parties such as the Declarants that a service provider such as Google has failed to remove or disable access to infringing material upon notice, or has failed to implement a policy for the termination of repeat infringers, *are relevant to whether that service provider is eligible for safe harbor protection under the DMCA.*

For example, in her declaration, Ms. Eden explains how she has complained about the infringing website *rapidshare.com* in her notices to Google. Eden Decl. ¶7. Exhibit 3 to the Eden Declaration shows "Ads by Google" on a ***Google-hosted site***, *xchaix-rapidshare.blogspot.com*, that offers rapidshare links for illegally downloading the complete works of Ms. Eden and her husband. Perfect 10 has repeatedly complained to Google about *rapidshare.com* as well. *See, e.g.,* Declaration of Dr. Norman Zada Submitted in Support of Perfect 10's Motion for Preliminary Injunction Against Google, Inc. (Docket Nos. 797, 795-796,) (the ("Zada Decl.") ¶17, Exh. 10.

Google's demonstrated failure to remove or disable access to such infringing material, and to terminate such repeat infringers that are its hosting and advertising clients, precludes a safe harbor and prevents Google from relying upon this affirmative defense in opposition to Perfect 10's PI Motion.

B. **<u>The Eden, Hoffman, Newton, and Schwartz Declarations Refute The Testimony Of Shantal Rands Poovala</u>.**

Google's Opposition to the PI Motion largely depends on the declaration of one witness, Shantal Rands Poovala. *See* Declaration of Shantal Rands Poovala in support of Defendant Google's Motions for Summary Judgment Re: Google's Entitlement to Safe Harbor Under 17 U.S.C.§ 512 (the "Poovala Declaration"). (Google submitted the Poovala Declaration as part of Exhibit A to the Declaration of Rachel Herrick Kassabian in opposition to the PI Motion. Ms. Kassabian's declaration also improperly included every pleading that Google had previously

submitted in connection with the three DMCA Motions Google filed in July 2009). Ms. Poovala makes two important claims in her declaration: that Google suitably implemented a policy against repeat infringers, and that Google expeditiously processed all DMCA-compliant notices.

The Eden, Hoffman, Newton, and Schwartz Declarations directly refute those claims. If Google did not expeditiously process these witnesses' notices, Google could not have expeditiously processed all notices, as Ms. Poovala asserts.

C. <u>The Declarations Prove That Google Has Not Complied With The DMCA and Is Ineligible For Safe Harbor</u>.

The Eden, Hoffman, Newton, and Schwartz Declarations demonstrate that Google has not cooperated with copyright holders as envisioned by the DMCA and that Google has made demands on copyright holders that are incompatible with being eligible for safe harbor.

In order for an internet service provider such as Google to be eligible for safe harbor under the DMCA, it must provide a means for allowing copyright holders to submit their notices by either mail, fax, or email. For this reason, the Register of Copyrights has sections on its form requiring the ISP to provide a street address, a fax number, and an email address. *See* 17 U.S.C. §512(c)(2)(A) and (B).

As may be seen by a review of Exhibit 1 to the Eden Declaration, however, Google states that it will not process Ms. Eden's DMCA notices unless they are sent by email. This position violates the DMCA requirement that the ISP provide a mailing address and fax number to accept notices sent in that fashion. Google's refusal to process faxed or mailed DMCA notices is particularly outrageous, because Google states in its instructions to copyright holders that *notices cannot be emailed* (*see* Zada Decl., Exh. 14, page 1); then Google subsequently refuses to process the notices unless they are emailed. Finally, Exhibit 1 to the Eden Declaration completely refutes Ms. Poovala's assertion in her declaration that Google has expeditiously processed all DMCA-compliant notices. Google cannot

possibly have processed all DMCA-compliant notices if it has refused to process some notices that otherwise comply with the DMCA simply because they were not emailed. The Eden, Schwartz, Newton, and Hoffman declarations contain other specific instances where Google refused to remove or disable access to infringing material set forth in their DMCA notices.

D. The Declarations Support Perfect 10's Position That Google Has Made It As Difficult As Possible For Copyright Holders To Submit Notices.

The Eden, Hoffman, Newton, and Schwartz Declarations also undermine any claims by Google that Google's refusal to process Perfect 10's notices was Perfect 10's fault. Rather, the Declarations clearly show that Google has a policy of wearing down copyright holders by changing its rules and requests until copyright holders simply give up. This is not the type of policy that warrants any sort of safe harbor protection under the DMCA.

III. GOOGLE'S ADDITIONAL OBJECTIONS TO THE HOFFMAN DECLARATION LACK MERIT.

Google further objects to portions of the Hoffman Declaration on the ground that Mr. Hoffman lacks personal knowledge and specialized expertise, even though he is in the computer business. *See, e.g.*, Evidentiary Objections at 3-5. These objections are without merit.

The Hoffman Declaration is based on Mr. Hoffman's personal knowledge. Mr. Hoffman testifies that he was the president of a company that owns copyrights to certain software, that websites stole that software and sold it on the Internet, and that Google's search engine provided the links to the infringing material. Hoffman Decl. ¶¶1, 2. Mr. Hoffman further testifies that he continued to send DMCA notices to Google in whatever format Google requested, but Google did not remove links to the infringing material. Hoffman Decl. ¶¶3-6. Google's objection that such testimony lacks personal knowledge is baseless.

Finally, the Hoffman Declaration contains no testimony that requires specialized scientific or technical knowledge.

IV. GOOGLE'S ADDITIONAL OBJECTIONS TO THE NEWTON DECLARATION LACK MERIT.

Google's additional objections to the Newton Declaration also lack merit, for the same reasons. First, the Newton Declaration is based on Mr. Newton's personal knowledge. Mr. Newton testifies that, starting in October 2002, he personally sent more than 100 DMCA notices to Google, asking it to remove infringing links. Newton Decl. ¶3. Mr. Newton further testifies that, as of the date of the Newton Declaration, Google had not removed access to links forwarded to Google by Mr. Newton. *Id.* ¶4 and Exh. 2. Such testimony, based on Mr. Newton's personal knowledge and supported by exhibits, is not objectionable.

Second, the Newton Declaration contains no specific technical details requiring specialized knowledge. Moreover, Mr. Newton is the chief executive officer of a company "in the business of developing and rehabilitating websites so they perform better in natural search results." Newton Decl. ¶1. Mr. Newton therefore is qualified to make general statements about using the Internet, links on the Internet, and infringing material on the Internet.

V. GOOGLE'S ADDITIONAL OBJECTIONS TO THE SCHWARTZ DECLARATION LACK MERIT.

Google further objects to portions of the Schwartz Declaration on the grounds that Mr. Schwartz, even though he is in the computer business, lacks personal knowledge and specialized expertise. These objections lack merit, for all of the reasons discussed above. First, the Schwartz Declaration is based on Mr. Schwartz's personal knowledge. Mr. Schwartz simply sets forth the difficulties he personally encountered in seeking to have Google remove access to material infringing his company's copyrights, and adds that some of the infringing material is still available. Schwartz Decl. ¶¶2-8. Second, there are no statements in the

Schwartz Declaration that require a specialized background or training.

VI. GOOGLE'S ADDITIONAL OBJECTIONS TO THE EDEN DECLARATION LACK MERIT.

Google's objection that the Eden Declaration lacks personal knowledge has no basis. Ms. Eden testifies, based upon her own knowledge and experience, about the onerous procedures Google requires content owners to follow in order to have infringing material removed. Eden Decl. ¶5. Ms. Eden further testifies, based on her personal knowledge, that Google refused to remove certain infringing links without explanation; that she complained to Google about sites such as *rapidshare.com* and *bittorrent.com* infringing her copyrighted works; and that links to those sites are still available on Google. Eden Decl., ¶¶6-7. Ms. Eden's testimony, which is supported by attached exhibits, is unobjectionable. [5]

VIII. CONCLUSION.

For all of the foregoing reasons, this Court should disregard Google's objections to the Eden, Hoffman, Newton, and Schwartz Declarations, and should consider these Declarations in their entirety in connection with Perfect 10's Motion for Preliminary Injunction against Google.

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[5] Even if this Court has questions about the admissibility of portions of the Eden, Hoffman, Newton, or Schwartz Declarations, it should still consider these Declarations when ruling upon the PI Motion. Because a preliminary injunction is not a trial, both appellate courts and leading treatises have stated that the rules of evidence may be relaxed. *See, e.g.*, *Sierra Club, Lone Star Chapter v. FDIC*, 992 F.2d 545, 551 (5th Cir.1993) ("at the preliminary injunction stage, the procedures in the district court are less formal, and the district court may rely on otherwise inadmissible evidence, including hearsay evidence"). As a leading treatise has noted:

> [I]nasmuch as the grant of a preliminary injunction is discretionary, the trial court should be allowed to give even inadmissible evidence some weight when it is thought advisable to do so in order to serve the primary purpose of preventing irreparable harm before a trial can be had.

11A C. Wright, A. Miller & M. Kane, Federal Practice & Procedure: Civil § 2949, at 216-17 (2d ed.1995).

Dated: March 25, 2010

Respectfully submitted,
LAW OFFICES OF JEFFREY N. MAUSNER

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