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10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA

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

14 Plaintiff,

15 v.

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

18 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 DECLARATION OF SHEENA
 CHOU IN SUPPORT OF PERFECT
 10'S MOTION FOR PRELIMINARY
 INJUNCTION AGAINST GOOGLE**

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

1 Plaintiff Perfect 10, Inc. (“Perfect 10”) hereby responds to Defendant
2 Google Inc.’s (“Google”) Evidentiary Objections to the Declaration of Sheena
3 Chou submitted by Perfect 10 in connection with Perfect 10’s Motion for
4 Preliminary Injunction Against Defendant Google, Inc. (the “Chou
5 Declaration”) (Docket No. 774) as follows:

6 **I. MS. CHOU DOES NOT OFFER OPINION TESTIMONY.**

7 Google first objects to the Chou Declaration on the grounds that Ms.
8 Chou allegedly is offering “improper opinion testimony.” Evidentiary
9 Objections at 2. However, Ms. Chou is not offering her opinion. On the
10 contrary, Ms. Chou makes the following specific statements, among others,
11 based on tasks that she personally performed, in connection with locating
12 Perfect 10 infringements.

13 1) That she inputted 3,837 blogger URLs extracted from Perfect 10’s
14 DMCA notices into her browser bar and verified that the infringing web pages
15 containing Perfect 10 images were still stored on Google’s blogger.com servers.
16 Chou Decl. ¶8.

17 2) That she was able to extract URLs from Perfect 10’s Adobe style
18 DMCA notices at the rate of 5 URLs per minute. *Id.* ¶7.

19 3) That she reviewed Perfect 10’s Adobe style DMCA notices sent to
20 Google and found that they identified at least 346 post URLs. *Id.* ¶9.

21 4) That she has not seen any post URLs on web pages with
22 blogger.com URLs. *Id.* ¶10.

23 5) That images on perfect10.com cannot be identified by post URLs.
24 *Id.* ¶13.

25 6) That she was able to input the URLs provided by Perfect 10 in its
26 DMCA notices into Google’s search box to determine if Google had removed
27 from its search results the URLs identified by Perfect 10. *Id.* ¶6.

28 7) That she personally downloaded at least 15,000 Perfect 10 images

1 from each of at least 20 different pay sites identified in Perfect 10's June 28,
2 2007 DMCA notice. *Id.* ¶3.

3 All of the above statements merely describe what Ms. Chou did or
4 observed. They do not constitute improper opinion testimony.

5 Moreover, Ms. Chou's statement in Paragraph 14 of the Chou
6 Declaration that Google's DMCA instructions for Image Search are "in most
7 cases completely unnecessary, and in many cases, unworkable" is based upon
8 her own personal knowledge. Ms. Chou explains, using the website
9 nudecelebforum.com as an example, why Google's Image Search instructions
10 for that website simply do not work. She explains why Google's policy of only
11 allowing the copyright holder to specify an image URL once the image actually
12 appears in Google's Image Search results, coupled with the fact that
13 nudecelebforum.com infringes 17,000 Perfect 10 images, make Google's
14 instructions unusable for that website, and completely inferior to the results that
15 Perfect 10 could obtain if it simply identified 60 web page URLs. Chou Decl.
16 ¶14. If a witness testifies that a process or procedure is unnecessary and/or
17 unworkable, and that testimony is based on a valid explanation supported by
18 personal observations, that testimony is based upon personal knowledge and
19 sufficient foundation, and should not be stricken.

20 **II. GOOGLE DOES NOT REFUTE ANY OF MS. CHOU'S**
21 **TESTIMONY.**

22 If Ms. Chou's testimony lacks foundation as Google claims, Google
23 should be able to refute at least parts of her testimony. However, in its reply,
24 Google does not refute *any portion* of the Chou Declaration. For example,
25 Google does not refute testimony by Ms. Chou that: (i) URLs can be extracted
26 from Perfect 10's Adobe style notices at the rate of five URLs a minute;
27 (ii) Perfect 10 identified at least 3,837 blogger.com URLs in its notices which
28 Google did not suppress; and (iii) Perfect 10 identified at least 346 post URLs

1 to Google in its DMCA notices. Chou Decl. ¶¶7-9. Google did not submit
2 evidence that contradicted Ms. Chou’s declaration. It should be noted that Ms.
3 Chou was deposed for a full day, but Google did not submit any of her
4 deposition in an attempt to contradict the testimony in her declaration.

5 **III. GOOGLE’S OBJECTION THAT PERFECT 10 HAS NOT**
6 **DESIGNATED MS. CHOU AS AN EXPERT IS PREMATURE**
7 **AND INAPPLICABLE.**

8 Google also objects that Ms. Chou was not designated as an expert.
9 Evidentiary Objections at 1. This objection fails for at least two reasons.

10 First, Rule 26(2)(C) of the Federal Rules of Civil Procedures requires that
11 a party designate its expert witnesses within 90 days of trial, unless otherwise
12 ordered by the court. Because no trial date has been set for this action, the time
13 to designate Ms. Chou as an expert has not arrived.

14 Second, Ms. Chou merely testifies regarding the information she
15 personally retrieved through tasks she was asked to perform. Ms. Chou testifies
16 that she has a degree in Economics from UCLA, as well as considerable
17 familiarity with computers and the Internet. Chou Decl. ¶2. Such a background
18 is more than sufficient for Ms. Chou to perform the tasks described in her
19 declaration.

20 **IV. MS. CHOU’S STATEMENTS REGARDING PAYSITES ARE**
21 **DIRECTLY RELEVANT.**

22 At several points in its Evidentiary Objections, Google objects to Ms.
23 Chou’s statements concerning infringing material Ms. Chou located through
24 Google’s links to pay sites on the grounds of relevance. Google’s objections
25 are not well founded. The pay sites to which Google links contain thousands of
26 unauthorized Perfect 10 images. Google has taken the untenable position that it
27 can continue to receive payments from, promote, and provide links to the home
28 pages and sign-up pages of infringing pay sites, even after receiving notice that

1 those websites are infringing. Google takes this position even though the
2 DMCA specifically provides, in 17 U.S.C. §512(d), that a search engine may be
3 liable “for infringement of copyright by reason of the provider *referring or*
4 *linking* users to an online location *containing* infringing material or infringing
5 activity.” (emphasis added). Therefore, Google’s assertion that Ms. Chou’s
6 testimony lacks relevance has no merit.

7 **V. GOOGLE’S OTHER OBJECTIONS ARE MERITLESS.**

8 Google’s remaining objections that certain statements in the Chou
9 Declaration lack foundation or are not within Ms. Chou’s personal knowledge
10 are without merit, and provide an example of Google using inapplicable
11 boilerplate objections. As explained above, all of the statements contained in
12 the Chou Declaration are based on Ms. Chou’s first-hand knowledge and
13 personal observations, made in connection with work she performed.¹

14 **VI. CONCLUSION.**

15 For the foregoing reasons, this Court should disregard Google’s
16 evidentiary objections and consider the Declaration of Sheena Chou and the
17 statements contained therein in their entirety.

18
19 ¹ Even if this Court has questions about the admissibility of portions of
20 the Chou Declaration, it should still consider the Declaration when ruling upon
21 the PI Motion. Because a preliminary injunction is not a trial, both appellate
22 courts and leading treatises have stated that the rules of evidence may be
23 relaxed. *See, e.g., Sierra Club, Lone Star Chapter v. FDIC*, 992 F.2d 545, 551
24 (5th Cir.1993) (“at the preliminary injunction stage, the procedures in the
25 district court are less formal, and the district court may rely on otherwise
26 inadmissible evidence, including hearsay evidence”). As a leading treatise has
27 noted:

28 [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).

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Dated: March 28, 2010

Respectfully submitted,
LAW OFFICES OF JEFFREY N. MAUSNER

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