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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV04-09484-AHM (SHx) * CV05-04753-AHM (SHx)	Date	April 5, 2010
Title	PERFECT 10 INC. v. GOOGLE INC, et al.		

Present: The Honorable	A. HOWARD MATZ, U.S. DISTRICT JUDGE	
Stephen Montes	Cindy Nirenberg	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Jeffrey N. Mausner	Michael T. Zeller Bradley R. Love

Proceedings: PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AGAINST GOOGLE [772] (non-evidentiary)

Court circulates its Memorandum to Parties containing questions to counsel, a copy of which is attached hereto. Court hears oral argument. For reasons stated on the record, the Court takes plaintiff's motion for preliminary injunction under submission. The parties are to order a transcript of this hearing and to split the costs incurred.

On this date, the Court returned the external hard drive ("disk") lodged on October 14, 2008 as Plaintiff Perfect 10's Notice of Filing of Disk that Contains Exhibit 42 to the Declaration of Norman Zada in Support of Perfect 10's Motion for Partial Summary Judgment Against Alexa and Amazon in CV05-4753-AHM (SHx).

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Initials of Preparer SMO

MEMORANDUM

TO: Parties
FROM: Judge Matz
DATE: April 5, 2010
RE: ***Perfect 10 v. Google*, CV 04-9484—Questions for Hearing on Perfect 10's Motion for a Preliminary Injunction**

QUESTIONS FOR THE PARTIES

A. Chilling Effects[1]

1) *P10:* On p. 9 of your motion, you assert that Google's forwarding of the DMCA notices to Chilling Effects and then linking to the notices constitutes direct infringement because it violates P10's distribution, display, and reproduction rights. How does Google's conduct violate P10's display and reproduction rights? Google isn't displaying the content on its servers, right? Also, how does the forwarding of "Group B" spreadsheet notices constitute a direct violation of copyright?

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[1]Chilling Effects is a nonprofit educational project run jointly by the Electronic Frontier Foundation and law school clinics. The public is invited to submit cease and desist notices (including DMCA takedown notices) to the website, on which law students conduct research, all of which is posted in an online database. Google asserts that it forwards P10's (and other) notices to Chilling Effects to further that research and to notify the provider of the material that it has removed or disabled access to the material, as required by the DMCA. The "Group C" Adobe PDF notices contain actual copies of the images at issue, so when Google forwards these notices to Chilling Effects, and then in-line links (or just ordinarily links to the site), the user may obtain copies of the copyrighted work from the PDF document (and the "live links" within that document).

2) *Google:* Why does your forwarding to Chilling Effects, with linking to the Group C notices, not constitute a direct infringement of P10's distribution rights? It appears to be an actual dissemination of copies of P10's claimed copyrighted work with an intent that they be made available to the public. You could cooperate with Chilling Effects, or promote its functions, by providing it with core information only, such as the website taken down and the copyright owner; why punish the owner by forwarding valid takedown notices that actually contain the copyrighted material?

3) *Google:* Wouldn't the linking to copies of images regarding which you have notice of copyright infringement at least constitute contributory infringement?

4) *P10:* Why do Chilling Effects's and Google's actions not constitute fair use? This seems like the quintessential example of fair use, with a nonprofit educational group conducting research on the DMCA notices, and posting the results of that analysis along with annotated notices on the website. Don't you yourself rely on some of Chilling Effect's research on collected DMCA notices to support your assertion that *Rapidshare.com* is a repeat copyright offender? Zada Reply Decl. ¶ 7. Is it because Chilling Effects could claim fair use that you have not issued DMCA notices to it? Nor sued it?

5) *Google:* Though factor 1 of the fair use analysis (purpose and character of the use) probably weighs strongly in your favor, it seems as though factor 2 (the nature of the copyrighted work) is neutral and factors 3 (the amount and substantiality of the portion used in relation to the copyrighted work as a whole) and 4 (effect of the use upon the potential market for or value of the copyrighted work) would probably weigh against you. Why should this not result in a finding for P10?

B. Blogger.com and Blogspot.com

1) *Google:* On this website, which you created and control [correct?], bloggers create, edit, and administer their blogs, whereas it's on Blogspot.com that the blogs are actually hosted. [correct?] In any event, you provide the servers for both, correct? You cited *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 555 (4th Cir. 2004) and *Ellison v. Robertson*, 189 F. Supp. 2d 1051, 1056-57 (C.D. Cal. 2002) (Cooper, J.), *rev'd on other grounds*, 357 F.3d 1072 (9th Cir. 2004) for the proposition that a passive internet service provider is not responsible for direct infringement based upon a user's uploading of infringing material. How do these cases square with the Ninth Circuit's adoption of the server test in this case? Doesn't that test suggest that Google, as owner of the server is responsible for the content of the information relayed through its server?

2) *Google:* How does hosting Blogger constitute fair use? You cite this Court's decision and *Field* with respect to caching and the Ninth Circuit's decision in this case with respect to thumbnails in support of the proposition that automated copying is necessary for the Internet. Blogger isn't automated copying, is it?

3) *P10:* What is the status of your discovery disputes over obtaining DMCA notices?

C. Contributory Infringement

1) *Google:* Can't you possess actual knowledge for contributory infringement purposes regardless of whether a DMCA notice purporting to provide such notice is sufficient under the DMCA?

2) *P10 & Google:* How can the links in P10's notices that Google has failed to remove be classified or categorized?

3) *Google:* Wasn't removing the links you failed to remove a "simple measure" you could have taken to prevent further damage to P10's copyrights? Why has Google not sent P10 a list of the links it has removed?

4) *Google:* Regarding image recognition, why shouldn't Google have to use the "find similar images" feature to find and remove links to images that are similar to the infringed ones, if P10 attests (in blanket terms) that every non-P10 use of its images is unauthorized? How is this different from Veoh implementing the Audible Magic filtering software?

5) *P10:* You argue that "simple measures" Google could take to prevent further copyright damage would include requiring infringers to actually remove all infringing content from their websites or face the removal of all Google links. (Reply at 15.) What authority is there for the latter remedy?

D. Vicarious Infringement

1) *P10:* Isn't your argument that Google is vicariously liable for the conduct of the "major infringing paysites" by virtue of running ads for those sites on other websites and providing sponsored links for them foreclosed by the Ninth Circuit's decision in this case at pp. 1173-74 that Google does not have control for vicarious liability purposes over the sites with which it has advertising relationships?

2) *Google:* Don't you have the right and ability to control the Blogger

websites, insofar as you can terminate the accounts? [The *Io Group* case you cite dealt with the statutory requirement for control under the DMCA safe harbor, not control as it applies to vicarious liability, correct?]

3) *Google:* Even though Blogger is a free service, don't you receive a direct financial benefit from the ad revenues on the Blogger pages?

4) *P10:* Have you presented any evidence to show that Google receives ad revenue directly resulting from the P10 content on its Blogger sites (i.e., evidence that users are clicking on ads *because of* the P10 image)?

E. DMCA Safe Harbor

1) *Google:* How does it affect your claim for safe harbor that Yahoo! and Interserver were able to process the Group C notices in a matter of days?

2) *P10:* Were the Adobe PDF style notices you sent to Yahoo! and Interserver the same size (did they include the same number of files and links) as the ones you sent to Google?

3) *Google:* What have you done to implement an effective notification

system, as ordered by this Court in its prior Preliminary Injunction order? [Ex. A to Mausner Decl., ¶ 9] The Court realizes that the Ninth Circuit vacated the injunction, but have you been working with P10 in good faith on this? Section 512(c)(3)(B)(ii)[2] appears to require a service provider to take reasonable steps to assist in the receipt of notification that is DMCA-compliant.

4) *P10:* You argue that Google's repeat infringer policy is inadequate because it fails to remove all links to websites that repeatedly post infringing content. Why should third-party websites be considered "account holders or subscribers" for the purpose of a repeat infringer policy under the DMCA? What authority is there for that?

5) *P10:* You also argue that Google's repeat infringer policy with respect to Blogger is deficient because Blogger requires only an email address to register, not a method that involves tracking actual identities of users. Why should this Court

[2]Section 512(c)(3)(B)(ii) states: "In a case in which the notification that is provided to the service provider's designated agent fails to comply substantially with all the provisions of subparagraph (A) but substantially complies with clauses (ii), (iii), and (iv) of subparagraph (A) [identifying the location of the infringement, the infringed work, and contact info], clause (i) of this subparagraph [no actual knowledge of alleged infringement imputed by defective notice] applies only if the service provider promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially complies with all the provisions of subparagraph (A)."

not apply the reasoning of the *Io Group* court and find that Google could be entitled to a safe harbor notwithstanding the possibility that an infringing user might register multiple accounts under different email addresses?

6) *P10:* With respect to the Group A notices, they were send to "webmaster@google.com," instead of to Google's designated copyright agent, correct? They also did not specifically identify the infringed image as required by 17 U.S.C. § 512(c)(3)(A)(ii), correct? How, then, can these be considered valid notice?

7) *P10:* With respect to the section 512(d) safe harbor, when links in your DMCA notices are to the "top level" of a website, rather than to a particular infringing image, how does that satisfy the requirement of section 512(d)(3) that the notice include "identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link"?

8) *Google:* Assume that the Court finds the Group B notices to be adequate (at least in part). Have you demonstrated a likelihood of being able to show that

you processed these notices expeditiously?

9) *P10:* Don't the Group C notices put an undue burden on Google under the *CCBill* case and the statute? Won't those processing the notices have to refer to multiple different files (the files containing the P10 images, the PDF files containing the Google image search or Blogger pages, the cover letter containing the contact info and declaration) to ensure that all of the DMCA requirements are met? How is this different from forcing a "copyright holder to cobble together adequate notice from separately defective notices" in *CCBill* at 1113? Doesn't the text of § 512(c)(3) require the notice to be "*a* written communication"? (emphasis added)

10) *P10:* With respect to the § 512(c) safe harbor for Blogger, what is your evidence that Google failed to expeditiously process any Blogger URLs in the Group B spreadsheet notices?

11) *P10 & Google*: Assuming that the Court finds that Google is entitled to safe harbor for its cache, its web search, and its Blogger service, what does that leave to be resolved with respect to this preliminary injunction motion? Chilling Effects, the right of publicity claims, any issues respecting Google's advertising

practices (those that have not already been resolved by the Ninth Circuit). Anything else?

F. The 22,000 Thumbnails

1) *P10:* You rehash your argument that Google is infringing P10's copyrights by displaying thumbnails of P10 images in its image search, with the only difference being that there are now 22,000 thumbnails rather than 2,500. Isn't this argument foreclosed by p. 1168 of the Ninth Circuit's opinion, where it found that the thumbnails constituted fair use?

G. Passwords

1) *P10:* You again argue that Google is infringing (directly and contributorily) P10's copyrights by linking to and hosting on Blogger websites which display usernames and passwords to *perfect10.com*. Why is this argument not foreclosed by this Court's undisturbed finding that you own no copyright interest in username/password combinations that other individuals select when registering as *perfect10.com* members? 416 F. Supp. 2d at 838 n.9.

H. Right of Publicity

1) *P10:* How are you likely to prove the elements of a right of publicity claim under Cal. Civ. Code § 3344? Specifically, how are you likely to prove that *Google* (as opposed to the Blogger account holders) "knowingly uses" the P10 models' likeness on "products, merchandise, or goods, or for purposes of advertising or selling"? Do you have any authority to support the proposition that an entity can be liable for "contributory" or "vicarious" violation of a publicity right?

2) *Google:* Why does the immunity under the Communications Decency Act ("CDA"), 47 U.S.C. § 630, apply? Doesn't this act provide immunity for a service provider's *removal* of user-generated conduct, not for its *creation*?

3) *P10:* Assuming that the CDA applies, what is your evidence that Google is an "information content provider"[3] and therefore not entitled to CDA immunity? You assert that Google is an information content provider because it posts ads on offending websites and returns search results that intermix photos of the models and obscene/offensive images. But Google is not creating or developing the

[3]An information content provider is defined as: "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3).

offending material or the material that allegedly violates the models' publicity rights, is it? Doesn't the *Roomates.com* decision explicitly state, "providing neutral tools to carry out what may be unlawful or illicit searches does not amount to "development" for purposes of the immunity exception"? 521 F.3d at 1169.

I. Scope of Relief Requested

1) *P10:* You ask the Court to enjoin Google from "powering *rapidshare.com* search engines used to find infringing materials offered by *rapidshare.com*." What do you mean by "powering *rapidshare.com* search engines"? Are the searches conducted using Google servers? On whose website(s) are the results displayed? What evidence have you presented to support your contention that Google is doing this (besides an unsupported sentence in Dr. Zada's declaration, ¶ 17, p. 20 l. 24-25)?

2) *P10:* Assuming that the Court finds that Google is entitled to safe harbor for its cache, its web search, and its Blogger service, what specific injunctive relief would be appropriate under 17 U.S.C. § 512(j)?[4]

[4]Section 512(j) limits injunctive relief when safe harbor has been found to "one or more of the following forms:
(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.
(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."