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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION
HONORABLE A. HOWARD MATZ, U.S. DISTRICT JUDGE

- - -

PERFECT 10, INC., A CALIFORNIA)	
CORPORATION,)	
)	
PLAINTIFF,)	
)	
vs.)	No. CV04-09484-AHM(SHx)
)	
GOOGLE, INC., ET AL.,)	
)	
DEFENDANTS.)	
_____)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
MONDAY, APRIL 5, 2010

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COMMENTS BY:

PAGE

1 LOS ANGELES, CALIFORNIA; MONDAY, APRIL 5, 2010

2 10:15 A.M.

3 - - - - -

4 THE CLERK: Calling Item Number 1, CV04-9484, Perfect
5 10, Inc. versus Google, Inc., et al.

6 Counsel, state your appearances, please.

7 MR. MAUSNER: Good morning, Your Honor. Jeff Mausner
8 for the plaintiff Perfect 10.

9 And may Ms. Poblete -- she's a legal assistant, she's
10 not an attorney -- may she sit up here to assist me?

11 THE COURT: Yes.

12 MR. MAUSNER: Thank you.

13 MR. ZELLER: Good morning, Your Honor. Mike Zeller
14 and Brad Love for Google.

15 THE COURT: Okay. Good morning to both of you as
16 well.

17 Perfect 10 has moved for a preliminary injunction,
18 and I'm not in a position to grant it or deny it, and I'm not
19 in a position to go over all of the questions, but I will go
20 over some of the materials that I made available to counsel,
21 and I'm referring to 12 pages of questions for the parties.

22 I'm aware of the fact that there's summary
23 adjudication and summary judgment motions that are outstanding,
24 and I'm aware of Google's contention that this is an end run
25 around it.

1 I don't see it that way, but this case and all of the
2 Perfect 10 cases have captured a huge amount of my time -- and
3 sometimes I think an inordinate amount -- and I'm just going to
4 do them when I can in light of all of the other matters on the
5 calendar and assignments and responsibilities I undertake, so
6 don't expect a ruling on this overnight by any means.

7 The part of the case that I think is most timely may
8 be Chilling Effects, so I'll ask questions as reflected in
9 parts of this memorandum. And to do it efficiently, I'll just
10 go not in the sequence that the questions are put, but by
11 parties.

12 So you go to the lectern, please, Mr. Mausner.

13 MR. MAUSNER: Yes, sir.

14 THE COURT: Okay. And look at Page 1 and answer the
15 first question that's directed to Perfect 10.

16 MR. MAUSNER: Okay. The reproduction takes place
17 when Google makes a copy of it to send to Chilling Effects.

18 As far as display, that would be contributory
19 infringement rather than direct, and the Group B notices would
20 be contributory infringement as well, but there is reproduction
21 when a copy is made to send to Chilling Effects.

22 THE COURT: So you're changing the theory of some of
23 your contentions, am I correct?

24 MR. MAUSNER: If we made that claim, I guess so. I
25 don't recall that we made that.

1 The direct is reproducing it and distributing it to
2 Chilling Effects. Contributory would be displaying it, in
3 other words, assisting Chilling Effects in displaying it by
4 providing the images to them and also linking to them.

5 THE COURT: Now answer Number 4, please.

6 In order to make this transcript comprehensible --
7 because sometimes I may have a need to refer to it -- I intend
8 to file the document that is entitled Memorandum to Parties,
9 and it will be an attachment to a minute order reflecting that
10 this hearing was held. That way, the transcript references to
11 questions will be accompanied by the questions themselves.

12 Now please answer Number 4.

13 MR. MAUSNER: I don't think that it's necessarily
14 true that Google has to send notices to Chilling Effects, but
15 even if it does, they do not have to send the notices in such a
16 way that it allows users to locate infringing material.

17 For the Adobe-style notices, they certainly do not
18 have to send all of the images, including full-size images,
19 without any attempt at all to block them out, put x's over
20 them, disable the links in those images.

21 Basically, what they're doing is they're just giving
22 copyright images -- copyrighted images to another entity for
23 that entity to post on the internet.

24 If the purpose of this is truly to allow people to do
25 research on DMCA notices, they could send the textual part of

1 it, which has the 512(c) information in there, and they could
2 take a few sample notices, put some x's over them so you can't
3 use the images for viewing, and black out the links in there.
4 There is no reason that they have to send thousands of
5 copyrighted images to Chilling Effects for posting.

6 And what this does is it really prevents Perfect 10
7 from sending notices to Google, because every time we send a
8 notice, it gets posted.

9 THE COURT: Yes, I understand that. If Perfect 10
10 wanted to prevent Chilling Effects from providing access to the
11 full-size images or to the material that contains the
12 copyrighted content, why couldn't it send notices to Chilling
13 Effects and why hasn't it?

14 MR. MAUSNER: You mean for Perfect 10 to send another
15 DMCA notice saying, "Don't publish our first DMCA notice"?

16 THE COURT: Yes. I mean, if the question is you are
17 being indirectly back-doored by what Google is doing vis-a-vis
18 Chilling Effects and that is preventing you from providing
19 notice to Google, isn't there an alternative way to address
20 that situation?

21 MR. MAUSNER: Well, they received the DMCA notice.
22 That's what they're publishing. If we send them another DMCA
23 notice, I don't know what they will do. They may publish that
24 notice as well.

25 THE COURT: You don't know because you haven't done

1 it.

2 MR. MAUSNER: Yeah.

3 THE COURT: And I know that it's not feasible,
4 realistic or even fair to expect every single claimed
5 infringement to be the subject of an immediate or separate DMCA
6 notice, but you could send a notice to Chilling Effects that
7 doesn't contain the contents; simply say, "Don't publish the
8 content that was transmitted to you along with our DMCA notice
9 that we sent to Google," couldn't you?

10 MR. MAUSNER: Well --

11 THE COURT: Yes or no, could you do that?

12 MR. MAUSNER: We could, but we have sent that to
13 Google, and we've also stated in -- in the DMCA notices
14 themselves, we stated, "Don't publish this DMCA notice," so,
15 you know, I think they know. They know that we don't want them
16 published, but, sure, we can do that. There are a lot of
17 things we can do.

18 By the way, there is evidence in the record -- there
19 was one of those four third-party witnesses who was complaining
20 about their notices being sent to Chilling Effects, testified
21 that they tried to get Chilling Effects not to publish them,
22 and Chilling Effects would not -- would not stop.

23 THE COURT: Which witness was that?

24 MR. MAUSNER: I don't remember who that was.

25 THE COURT: All right. I'll look it up. You can sit

1 down for a moment.

2 Your turn, Mr. Zeller.

3 First of all, you don't have a duty -- there is no
4 legal obligation on Google's part to send anything to Chilling
5 Effects, correct?

6 MR. ZELLER: I believe that's -- in terms of a pure
7 legal obligation, that's correct. We do believe that it is
8 furtherance of the DMCA, but I don't think we take the position
9 that the DMCA mandates it.

10 THE COURT: Okay. And the DMCA not only doesn't
11 mandate that anything be sent to Chilling Effects, but doesn't
12 mandate that the actual claimed copyrighted images be included
13 in the notice that is sent to Chilling Effects, correct?

14 MR. ZELLER: It is not mandated, but, again, we --

15 THE COURT: So answer the question, too, please, why
16 couldn't you cooperate with Chilling Effects or promote its
17 functions by providing it only with core information
18 identifying the website that was taken down, the copyright
19 owner and the content without it actually publishing the
20 content? That's doable, isn't it?

21 MR. ZELLER: It would not achieve the same purposes,
22 Your Honor, and it would not achieve the same purposes as
23 forwarding the actual notice they would receive from Perfect 10
24 in terms of notifying webmasters and other persons who do
25 control these websites in notifying them of the fact that it

1 was a Perfect 10 DMCA notice that was the cause of that
2 take-down, and that allows for counter-notification, so we
3 don't agree with just simply trying to revamp it.

4 And also --

5 THE COURT: Wait a minute. Wait a minute. If the
6 idea is to inform the bad guy why the infringing website was
7 taken down, you can't accomplish that unless you actually
8 include the copyrighted material that was infringed.

9 MR. ZELLER: Well, we're sending the notices, Your
10 Honor. We're not sending the copyrighted materials for the
11 purpose of sending the copyright materials. We are sending the
12 take-down notice that we receive, and we are under no
13 obligation from our perspective to revamp it.

14 And it's particularly inappropriate from our
15 perspective that this should be the subject of an injunction
16 for the simple fact that, as Perfect 10 concedes, it could
17 simply send us the Group B spreadsheet-style notices in the
18 first place, which is what Google asked for.

19 It can then just provide the URLs, and it can do the
20 supression that way. Those can be forwarded to Chilling
21 Effects without any of the arguments that they have made here
22 about the other kinds of notices.

23 THE COURT: That may well be true -- and I understand
24 the fundamental distinction between the various groups that
25 you've created classification for. What do you do with the

1 Group B notices vis-a-vis Chilling Effects?

2 MR. ZELLER: I'm sorry? Group B?

3 THE COURT: What does Google do with the Group B
4 notices?

5 MR. ZELLER: Google also forwarded the Group B
6 notices to Chilling Effects and has for years, which is exactly
7 our point as to why there is this delay.

8 I mean, to the extent that it is now Perfect 10's
9 theory that the Group B notices also, I think he said, were
10 contributory infringement as well, I mean, that is a practice
11 that -- as Perfect 10 has known full well, that has been going
12 on for years.

13 I actually find it inconceivable that it could be an
14 argument of contributory infringement, but that is certainly a
15 new argument here, but it only underscores the delay.

16 There is no question Google was sending the Group B
17 notices to Chilling Effects. Those are on Chilling Effects and
18 have been for a long time.

19 THE COURT: Is there anything in the record that
20 establishes whether it's Google's practice without exception
21 every time it has complied with the DMCA notice and taken down
22 some infringing material to send notice of that conduct, of
23 that action to Chilling Effects?

24 MR. ZELLER: I would have to look up the cite but
25 it's my recollection that the Shantal Poovala declaration says

1 that that is, in fact, Google's policy and practice.

2 THE COURT: No matter who the complainant is or
3 copyright owner or sender of the DMCA notice?

4 MR. ZELLER: That's correct.

5 And I would just point out as a further -- because
6 this is in rebuttal to what Perfect 10 says, which is, it's
7 claiming that, for example, notices from other organizations
8 haven't shown up.

9 I would also point out that this appears to be just a
10 backlog on Chilling Effects' part because there is also a
11 number of Perfect 10 notices that have been sent by Google to
12 Chilling Effects that also don't yet appear on Chilling
13 Effects, so it appears that that's a backlog by Chilling
14 Effects, not because Google is picking and choosing who to send
15 these notices or whose notices to send.

16 THE COURT: Does Google -- is there any counterpart
17 to Chilling Effects to whom Google sends DMCA notices that
18 resulted in takedowns?

19 MR. ZELLER: I would have to investigate that, but my
20 understanding is no. Based on what I know now, the answer is
21 no.

22 THE COURT: So if I were to consider entering a
23 preliminary injunction as to the Chilling Effects' side of this
24 go-around, tell me what would be the policy implications in
25 terms of the broad use of the internet and what's in the

1 interests of our evolving economy?

2 MR. ZELLER: I think they would be enormous, Your
3 Honor. I think the Court would be -- the injunction, rather,
4 would be impairing a research function of Chilling Effects of
5 this academic collaboration that is ongoing. I don't think it
6 would have any countervailing benefit for Perfect 10,
7 particularly since Perfect 10 understands this is completely
8 avoidable.

9 I would also point out that one linchpin of Perfect
10 10's argument here is is that the DMCA notices are, quote,
11 confidential, end quote. That is a word used over and over in
12 their briefs. Judge Hillman already rejected that and held
13 that they could not be designated under the protective order.

14 I would also note that Perfect 10 itself has
15 disseminated the DMCA notices, including by filing them
16 publically in this court, so the notion that somehow a
17 particular academic research organization should be denied that
18 information, that Google shouldn't be allowed to send it,
19 would, in fact, strike me as a serious impairment of free
20 speech rights of the fair use doctrine, which I'll get to in a
21 moment, with really no benefit whatsoever to Perfect 10.

22 I mean, anyone can go onto Pacer and find the same
23 notices because Perfect 10 at various times has put them into
24 the record.

25 THE COURT: Is there anything before me on this

1 record -- because I haven't had time to look at it in
2 excruciating detail -- that was submitted by or purportedly on
3 behalf of Chilling Effects itself?

4 MR. ZELLER: No, Your Honor.

5 THE COURT: Declarations? Any materials?

6 MR. ZELLER: No, not that I know of, Your Honor.

7 THE COURT: So if I thought it were relevant and a
8 factor to consider -- and the public interest is always a
9 factor in determining the propriety of a request to enjoin
10 something or someone -- you would have no objection to my
11 issuing an order inviting Chilling Effects to weigh in?

12 MR. ZELLER: No objection, Your Honor.

13 THE COURT: Okay. Now, you adverted a moment ago to
14 the fair use analysis. I take it you were about to respond now
15 to Question 5?

16 MR. ZELLER: Yes, Your Honor, as well as on its way
17 to Question 3, which is, wouldn't the linking of copies be
18 contributory infringement.

19 And we don't think so because, of course, Chilling
20 Effects is itself a fair user of these materials, so that in
21 itself would defeat any possibility of contributory
22 infringement for that reason alone.

23 With respect to Question 5, Your Honor, I see how the
24 Court has posed the question. We obviously would weigh these
25 factors differently.

1 With respect to Number 4, in particular, as the Court
2 is aware, where there is a highly transformative use, which I
3 think is undisputable here, market harm cannot be --

4 THE COURT: Which use is highly transformative?

5 MR. ZELLER: The use of the notices that are
6 forwarded to Chilling Effects, and as they are posted, they are
7 on Chilling Effects.

8 THE COURT: And you would say that's transformative
9 even if the notices and the posting includes full-size images?

10 MR. ZELLER: Correct. It's highly transformative
11 because --

12 THE COURT: Is there any authority you could cite for
13 that?

14 MR. ZELLER: I would certainly cite by analogy the
15 Ninth Circuit decision in this case which is that this is being
16 put to an academic research purpose. That is undisputed. Just
17 as Google uses, in terms of the thumbnails -- you know, puts it
18 to a highly transformative use because of the fact that it's
19 being used for information location.

20 But this is -- as far as I'm concerned, this is the
21 very heart of fair use and a highly transformative use.

22 There is absolutely no argument here that what
23 Chilling Effects does is for any purpose other than academic
24 research and in particular to protect free speech on the
25 internet. And I would be challenged to identify something even

1 more highly transformative than that differentiation and use.
2 Perfect 10 is not even remotely in that market.

3 And my point on Factor Number 4, the effect on the
4 marketplace, is that where you do have a transformative use, as
5 the Ninth Circuit has held, harm cannot be presumed.

6 And there is no evidence at all here of market harm.
7 None. And it certainly cannot be presumed.

8 We do think that Factor 3 weighs in our favor because
9 of the fact that -- and there are certainly a number of Ninth
10 Circuit cases where even if full-sized images and full-sized
11 reproductions of something is used where that is something that
12 is necessary and appropriate for the purpose -- for the
13 transformative purpose, then it is still considered to be a
14 fair use. I mean, there certainly has historically --

15 Are you talking about Kelly and Arriba?

16 MR. ZELLER: Well, there, it's a little different
17 because obviously it's the thumbnail size that were being dealt
18 with, but I would harken back to other cases, such as the
19 Walking Mountain case and a line of Ninth Circuit authority in
20 more recent years that moved away from the old notion that it
21 was almost never a fair use if the whole work was used.

22 That doctrine and those cases really are no longer
23 the law in the Ninth Circuit. And there's a number of cases
24 where once something is used for a different transformative
25 use, it's re-characterized and it's appropriate for that

1 particular use, then the amount of the work, even if it's the
2 entirety of the work, does not weigh against a fair use
3 finding. And that's what, we would submit, is here.

4 And particularly, again, with -- we're dealing in the
5 context here of a preliminary injunction, and, of course, that
6 is to prevent great, irreparable immediate harm.

7 All Perfect 10 has to do is comply with the
8 instructions that Google provides for compliant notices, which
9 is to give a spreadsheet-style list of the URLs, the actual
10 specific location of where the infringing material is located.

11 THE COURT: And you would characterize Group B as
12 examples of just that, correct?

13 MR. ZELLER: Correct.

14 THE COURT: And what is your representation to me, as
15 an officer of the Court, as to how Google has responded to each
16 of those Group B notices?

17 MR. ZELLER: The evidence that we put in the record,
18 Your Honor, is that overwhelmingly those Group B notices were
19 responded to within two weeks in terms of actually taking down
20 the URLs, the specific URLs that were identified in those
21 spreadsheet-style notices. That's in the Shantal Poovala
22 declaration as well.

23 In some instances, it was as short as two days where
24 it was actually provided in a compliant -- remotely compliant,
25 I should say, with at least identifying the URLs.

1 There are other defects in some of these notices, but
2 at least the URLs were there, and so they could be used
3 readily. And so in some cases, that was done in as little as
4 two days.

5 And I would also mention that -- also, as the record
6 reflects, that time period, a lot of it was done over the
7 holidays. Google hired extra people over Thanksgiving, over
8 other holidays in order to actually process those as quickly as
9 possible.

10 So there is no question that -- you know, again,
11 while there were other defects in those notices for a whole
12 host of reasons, including that Perfect 10 has really never
13 identified exactly what the infringed work is -- usually, it's
14 citing to a -- the entire Perfect 10 website or a collection of
15 15,000 images and the like, so they're not DMCA compliant.

16 At least where we have the specific web URLs and the
17 image URLs, Google can at least go above and beyond the call of
18 duty and do it, and that's what Google did with the Group B
19 notices.

20 THE COURT: Okay. Have a seat for a moment, Mr.
21 Zeller.

22 MR. ZELLER: Thank you.

23 THE COURT: Anything you wish to respond to what he
24 said before I move on to a different topic?

25 MR. MAUSNER: Yes, Your Honor.

1 The witness -- the third-party witness is Dean
2 Hoffman. It's Docket Number 776, Page 2, Lines 3 through 6.

3 As far as we can determine -- and the only evidence
4 is Google does not send all DMCA notices to Chilling Effects.
5 We gave evidence of notices that they did not send, and, you
6 know, to just speculate that there is a backlog is not -- you
7 know, doesn't overcome that evidence.

8 THE COURT: You haven't established that, to the
9 extent that the process is not exactly a hundred percent
10 comprehensive, there is a discriminatory or invidious selection
11 process that Google relies on to your detriment, have you?

12 MR. MAUSNER: They have not submitted a very large
13 number of notices from the RIAA and the MPAA. And, in fact,
14 there haven't been any that have shown up on Chilling Effects,
15 I think, for a couple of years.

16 For the MPAA, there were 90 notices that we know of
17 that we got from the MPAA that aren't on Chilling Effects and
18 none have been published since April of 2007.

19 THE COURT: Okay. Anything else you want to respond
20 to?

21 MR. MAUSNER: Yes. When we submit full notices to
22 the Court, we file those under seal. They are not available on
23 Pacer, the large, full notices that have full-size images and
24 so on.

25 Google did not process Group B notices in two days.

1 They did not -- let's put it this way. They did not remove or
2 disable access to Group B notices in two days.

3 For a very large number of the URLs that are on Group
4 B notices, those URLs are still up. They have never taken them
5 down.

6 For ones that they did process -- first of all, they
7 didn't do anything at all with the Group B notices for about
8 four months until Perfect 10 threatened to file a lawsuit.

9 Then what they did is they took down some links in
10 web search results. Some, but not nearly all.

11 They did not take down any links in image search
12 results based on the Group B notices for a very long period of
13 time, and they did not remove ads on the web pages that were
14 shown by these links. They still haven't removed them.

15 Now, the reason that Perfect 10 didn't continue with
16 the Group B spreadsheet-style notices is because Google was not
17 disabling access, you know, by removing web search links, image
18 search links and ads on the URLs that we were identifying.

19 May I hand something up to the Court?

20 We have a collection of the types of notices that
21 have been sent by Perfect 10 to Google which gives a very good
22 summary of when notices were sent and what information was
23 provided in each of those types of notices. That handout is
24 about 18, 19 pages.

25 THE COURT: This is not something that you chose to

1 include in the record so far, right?

2 MR. MAUSNER: It is. Everything in there are
3 exhibits, but we just took some pages out to make it easier for
4 the Court to see exactly what we did.

5 THE COURT: Have you shown this document to Mr.
6 Zeller?

7 MR. MAUSNER: We have a copy for them.

8 THE COURT: What are you saying this is?

9 MR. MAUSNER: It is a collection -- a summary of the
10 types of notices that Perfect 10 has sent to Google.

11 It has like a page from each of the types of notices
12 that shows exactly what information is contained and how it's
13 contained.

14 THE COURT: I'll let you hand it to the clerk, but it
15 should have been done before, and I'm not likely to -- whatever
16 is in this chamber's copy binder that says "Plaintiff Perfect
17 10, Inc.'s Handouts," do you say where it is in the record?

18 Like Handout 1 -- you're telling me that everything
19 in Handout 1 --

20 MR. MAUSNER: Yes.

21 THE COURT: -- and everything in Handout 2 is in the
22 record on this preliminary injunction, right?

23 MR. MAUSNER: Yeah, everything in Handout 1 is.

24 There's one page in Handout 2 which is an updated
25 version of an earlier exhibit that had been in.

1 If you take a look at Page 1, Your Honor --

2 THE COURT: Of what?

3 MR. MAUSNER: Of Handout 1.

4 THE COURT: Yes.

5 MR. MAUSNER: -- it says at the bottom Exhibit 47,
6 Page 1. That's where it came from. It came from Dr. Zada's
7 declaration in support of the P.I. motion, Exhibit 47, Page 1.

8 THE COURT: Okay. So I don't have time to go through
9 all these and to hear a lot about it. But, basically, what you
10 are trying to establish is that these handouts reflect samples
11 of things for which there was no timely or no actual response
12 to a Group B DMCA notice? Is that the crux of it?

13 MR. MAUSNER: Okay. Well, a Group B notice is shown
14 on Page 6.

15 THE COURT: So what is this handout supposed to be?

16 MR. MAUSNER: Okay. Page 1 is from a Group C notice,
17 you know, the Adobe-style notices.

18 THE COURT: I see that.

19 MR. MAUSNER: Page 2 is also --

20 THE COURT: But I don't want you to tell me what
21 every page is.

22 MR. MAUSNER: Okay.

23 THE COURT: I just want you to tell me what you think
24 this compilation is supposed to do for me.

25 MR. MAUSNER: Yes, Your Honor.

1 It contains samples of the types of notices that
2 Perfect 10 sent. Perfect 10 started with the spreadsheet-type
3 notices which contained the exact information that Google asked
4 for, the URL and the search term. An example is shown on Page
5 6.

6 THE COURT: Right.

7 MR. MAUSNER: And Google said that's deficient. They
8 did not remove or disable access for a very large number of the
9 URLs that we were providing in the Group B notices, and they
10 never, from the Group B notices, disabled access, you know, in
11 image search results. They just -- when they did do something,
12 they just did it for web search results; never did it for image
13 search results at all and never removed the ads that were on
14 that web page.

15 So what we started doing is we started giving them
16 notices like those on Pages 1 and 2, which contain everything
17 you could possibly want or need to completely process a notice,
18 to remove it from web search, to remove it from image search,
19 to remove the ads.

20 Like Page 1, it has the image. It has the actual
21 thumbnail.

22 THE COURT: I see it has the image, it has the web
23 page, and it has the thumbnail.

24 MR. MAUSNER: Right.

25 THE COURT: And all of this is in the papers?

1 MR. MAUSNER: Yes.

2 THE COURT: You're just trying to make my task
3 simpler by giving me a selected composite, right?

4 MR. MAUSNER: Yes.

5 THE COURT: And what about Handout 2?

6 MR. MAUSNER: Handout 2 deals with repeat infringer,
7 and it takes information that's already in the motion. There's
8 one page that was in the motion, but we did an updated version
9 of it so the Court could see. That's page 13.

10 And the only difference on Page 13 is that the mouse
11 was taken and put over one of the images so you could see all
12 the information that you could get from the actual notice,
13 because when we gave them the notice, it had the links in
14 there; you could just put your mouse over the image, and you
15 would get all the information that's shown in that pop-up box
16 there.

17 We submitted Exhibit 13 without the pop-up box.

18 This is what it looks like with the pop-up box
19 (indicating).

20 THE COURT: All right. What's the status of your
21 discovery disputes over obtaining the DMCA notices?

22 MR. MAUSNER: It's still pending before Judge
23 Hillman.

24 THE COURT: No, but isn't it supposed to be worked
25 out in good faith between the two sides?

1 MR. MAUSNER: We've asked them to meet and confer
2 with us. We want to have a telephone conversation with them,
3 and we have not been able to have a telephone conversation with
4 them yet.

5 THE COURT: Because of why?

6 MR. MAUSNER: Because they won't talk to us on the
7 telephone, basically. They keep sending e-mails. They
8 canceled a telephone conference we set up. We tried to call
9 them, left messages and never got a call back.

10 THE COURT: Well, let me just put it this way. Judge
11 Hillman will be very pleased to hear that.

12 MR. MAUSNER: Yeah, we submitted -- as one of the
13 exhibits, I've submitted the correspondence that's taken place
14 between us regarding this. Do you want me to get you that?

15 THE COURT: No, I don't. I don't. All right. Have
16 a seat, please.

17 MR. MAUSNER: Thank you.

18 THE COURT: Mr. Zeller, I want you to go to the
19 lectern, and I want to talk to you about Blogger and Blogspot.

20 MR. ZELLER: If Mr. Love may address that. I think
21 he can better address those questions.

22 THE COURT: All right. A little unusual.

23 What's your name?

24 MR. LOVE: Brad Love, Your Honor.

25 THE COURT: Love, L-O-V-E?

1 MR. LOVE: L-O-V-E.

2 THE COURT: Okay. So Blogger.com uses your server,
3 right?

4 MR. LOVE: Yes. Both Blogger and Blogspot are almost
5 entirely on servers that Google owns.

6 THE COURT: Okay. So how do you square the citations
7 that you gave us to those two cases with the Ninth Circuit's
8 adoption to the server test in this case?

9 MR. LOVE: It's a completely separate issue, Your
10 Honor.

11 The server test looks at the actual requirement of
12 copying for the infringement, whereas the volitional
13 requirement had been adopted to basically protect the sorts of
14 automatic copying.

15 It was paralleled to copying machine makers and sort
16 of the device manufacturers, and it was courts looking at the
17 structure of the internet and saying these services basically
18 are acting like you just sat a copying machine out in the
19 hallway and let people use it, and only if you had knowledge of
20 what they were doing were you liable for the copyright
21 infringement that was going on.

22 And it said you have to look at this as a
23 contributory infringement; you can't have direct infringement
24 based on these automatic, passive -- I mean, passive uses.

25 THE COURT: Well, are you aware of any authority that

1 extends that analogy of Xerox machines to ISPs and ones whose
2 servers contain the infringing material?

3 MR. LOVE: NetComm, Your Honor -- and it's been
4 adopted by a couple of cases in the Fourth Circuit -- Costar,
5 and also the Field case in Nevada.

6 THE COURT: So you would say that if it got to the
7 Ninth Circuit, it would say, "Notwithstanding that the content
8 appears on your server, because it's not content that you
9 generated, you can't be held liable for direct infringement"?

10 MR. LOVE: Yes, they already --

11 THE COURT: That's what it comes down to?

12 MR. LOVE: Yeah, they already implicitly adopted it
13 in Ellison. The District Court had dismissed the direct
14 infringement claims basically on that theory, and the Ninth
15 Circuit affirmed that decision.

16 And the DMCA statute itself endorses NetComm.
17 NetComm is specifically cited in the legislative history and
18 the committee report that was filed with the DMCA, and they
19 endorse that approach. They wanted to basically enshrine it in
20 the structure of the DMCA and make that protection statutory as
21 well as common law.

22 THE COURT: How does Blogger work? Is the copying
23 automatic?

24 MR. LOVE: It is, Your Honor.

25 Google has created this service that is widely

1 accessible. It's very much like a video uploading site in the
2 Veogh cases where a user comes on, selects whatever material
3 from their hard drive or their computer, be it text or photos,
4 that they want to post on their web blog, and then Google
5 allows them to just click a button and Google's automatic
6 back-end processing posts that on the Blogspot servers.

7 THE COURT: All right. Thank you, Mr. Love.

8 MR. LOVE: Thank you, Your Honor.

9 THE COURT: Are you going to address Item C as well?

10 MR. ZELLER: I will address that.

11 THE COURT: All right. We have tag team wrestling
12 here.

13 MR. ZELLER: That was the only issue he was going to
14 address.

15 THE COURT: All right. He answered my questions.
16 That's fine. I'm not upset.

17 So answer C-1.

18 MR. ZELLER: In our view, the answer to that question
19 is no. CC -- well, a qualified no. CCBill says very clearly
20 it has to be -- that it has to be a compliant DMCA notice, and
21 if it's not a compliant DMCA notice, it cannot provide
22 knowledge.

23 Now, of course, one could obtain knowledge from other
24 sources.

25 THE COURT: That's what I had in mind.

1 MR. ZELLER: Right, but there is no evidence of that
2 here. And the only basis that Perfect 10 is relying upon, as I
3 understand it from their papers, is the noncompliant DMCA
4 notices which CCBill unequivocally says cannot stand for that
5 proposition.

6 And also I would say, as a practical matter, Your
7 Honor -- particularly looking at the Group C notices. I mean,
8 how they could provide actual notice of anything to anyone
9 considering the tens of thousands of files and nested folders
10 and the -- the mess, frankly, that was provided to Google, how
11 that could constitute notice would be fairly remarkable.

12 THE COURT: Well, you know, I've cited CCBill and
13 you've mentioned -- or Mr. Love did -- the Veogh cases. I'm
14 familiar with it, but, you know, don't you think it's possible
15 that the Ninth Circuit is going to sooner or later directly
16 confront the problems that copyright owners of massive amounts
17 of content have in complying with the DMCA and doing so
18 consistent with the language of CCBill, which didn't involve
19 such a mass array of claimed ownership?

20 MR. ZELLER: Well, in some ways -- and I would
21 think -- and I obviously am not as close to CCBill as others,
22 but there, see, the Court actually pointed out it was, I think,
23 10,000 pages that Perfect 10 had provided.

24 I mean, Google isn't the only one who is receiving
25 these kinds of just scattershot notices that we're supposed to

1 cobble together in order to figure out what it is that either
2 is the infringed work or what the actual URL is of either the
3 web page or the image that Perfect 10 has asked them to take
4 down.

5 So I don't think that just because Perfect 10 has
6 chosen to take this path that that suggests there is anything
7 wrong with either the DMCA or with what the Ninth Circuit has
8 decided on this.

9 I think it's only proper and just, because the fact
10 is, out of complete fairness, Perfect 10 could provide to
11 Google and any other ISP comprehensible DMCA notices that
12 identify what's statutory required. And it's not that
13 difficult, it really isn't, for Perfect 10 to do that.

14 The cases make very clear that it is the
15 obligation -- the burden is on the copyright owner to compile
16 that information.

17 THE COURT: That is true. That is a principle I've
18 applied. I'm not unaware of that, but I am trying to be
19 practical in terms of protecting competing interests here, and
20 it's one of the interesting challenges of dealing with these
21 kinds of cases.

22 And I don't know what it takes in terms of time and
23 effort to set up a Group B kind of notice when you are a small
24 company and you may rely on very few people the way Perfect 10
25 claims to.

1 That could be a pretty disruptive task, couldn't it?

2 MR. ZELLER: Well, perhaps, in some cases, but that
3 isn't the record here. And, in fact, Perfect 10 has hired
4 vendors to allow them to do these sort of things, has hired
5 employees to do these sort of things. They appear to have
6 absolutely no problem in obtaining that information.

7 And, in fact, discovery showed that while Google was
8 asking for an electronic form, as is consistent with its
9 policy, of the Group B notices so it can actually just cut and
10 paste and go into the browser and actually go directly as
11 opposed to having to manually retype it and Perfect 10 wouldn't
12 provide it, that, in fact, Perfect 10 had its own vendors
13 create exactly those kind of spreadsheets.

14 So whatever hypothetical realm, you know, there may
15 be with other companies and the like, that is not the case with
16 Perfect 10.

17 Perfect 10 has certainly done over the years -- and
18 it made an effort to portray itself as a small, abused company
19 in a whole variety of cases. It has not been successful, and
20 one reason why is because it's just not factually correct.
21 It's business is litigation. That is what it does. That is
22 what it hires its employees to do. That is how they --

23 THE COURT: I may have invited you to do so, but I
24 realize where you're heading, but I don't need that kind of
25 characterization. It doesn't get to what I'm driving at here.

1 Is it correct that you haven't provided Perfect 10
2 with a list of the links that have been removed by Google?

3 MR. ZELLER: I don't believe that that is correct,
4 Your Honor.

5 My understanding is is that we have done that with
6 the '97 notices and, in fact, Perfect 10 attached some of those
7 e-mails showing it. I don't know that it was that much of a
8 issue previously, but there is some evidence in the record
9 that, in fact, Google did send the list of the links.

10 THE COURT: Is Google prepared to represent that it
11 would always do so?

12 MR. ZELLER: I would have to double-check to make
13 sure about the historical accuracy in terms of every single one
14 of them. My understanding is that it has, and, certainly,
15 that's something that I can -- I feel comfortable saying that
16 Google would do so. But that is something that we have done,
17 so I don't see any reason why we wouldn't continue to do it.

18 THE COURT: Okay. Now answer Number 4 on Page 5
19 because that, of course, dealt with Audible Magic. What about
20 "find similar images"? I don't know exactly how it works.

21 MR. ZELLER: Well, Number 4, it's --

22 THE COURT: Why can't that be imposed as a standard
23 to measure Google's good faith or lack of good faith compliance
24 with the DMCA?

25 MR. ZELLER: Well, I think there's the legal

1 component to this and the factual one.

2 The legal component is that the DMCA is very clear
3 where it says that it has to be -- you have to provide the
4 specific location.

5 And I would also note that images are not infringing,
6 uses are, and that's the language of the statute. It simply
7 cannot and is not the case. And this gets me into the factual
8 point that every single use of every single Perfect 10 image on
9 the internet is unlawful. It is an impossible proposition.

10 Not only are some of them fair uses, which is a
11 determination that courts and the DMCA put on the copyright
12 owner, not on Google, but there is evidence in the record that,
13 in fact, there are licensees, and there are other right holders
14 to these same images. And, in particular, there is evidence in
15 the record that, in fact, Perfect 10 acknowledged that.

16 There is a --

17 THE COURT: But it represented that every link that
18 it is warning you about is to a display of an image that is not
19 authorized and to a use that is not authorized without
20 exception. Doesn't that remove your argument?

21 MR. ZELLER: No, I don't think so, because, again, as
22 a matter of law, one cannot make the representation that it can
23 never be proper because there is the fair use doctrine. That's
24 why it's there.

25 If, say, for example, the New York Times were to

1 publish a Perfect 10 image, would Perfect 10 be in a position
2 to say that Google just needs to police the internet and take
3 it down? I mean, that would --

4 THE COURT: But that's not what I asked.

5 I think the answer to that is clear, but if it sent
6 you a notice that was sweeping and represented as to each and
7 every item in that notice -- none of the particular displays,
8 none of the particular uses of those images was authorized --
9 and it didn't include the New York Times, why doesn't that
10 impose the duty to search the web using "find similar images"
11 to take down the others?

12 MR. ZELLER: Well, Number 1, that would effectively
13 run afoul of the principle that the service provider is not
14 required to police the internet. That would be Number 1.

15 Number 2 is is that it would not be compatible with
16 the language of the DMCA itself and the obligations that are
17 placed on the copyright owner of the -- or, excuse me, on the
18 copyright owner under the DMCA.

19 And also I would, Your Honor, point out that it would
20 be impossible -- my factual point -- for Perfect 10 to make
21 that representation.

22 There was, for example -- and this is an e-mail from
23 Norm Zada to the outside vendor who he had searching the
24 internet for so-called infringing images. And he said that --
25 you know, that, "Some of these images were purchased from other

1 photographers and may be legitimately used by a number of sites
2 on the internet."

3 THE COURT: What is the record citation to that,
4 please?

5 MR. ZELLER: It's Exhibit J to the Kassabian
6 declaration.

7 Yeah, I'm sorry. Kassabian declaration in support of
8 the DMCA motions.

9 THE COURT: Meaning the summary judgment motions?

10 MR. ZELLER: Correct.

11 THE COURT: Now, what were you about to say?

12 MR. ZELLER: There's also evidence of record that
13 even the models -- for example, some of the models who we have
14 been able to depose so far, they use those images on their
15 website. They, in fact, control those images, and so there are
16 any number of instances where Perfect 10 could not make that
17 blanket statement. Even this is a factual matter.

18 THE COURT: Okay. Now, your turn, Mr. Mausner.

19 Answer Question 5 on Page 5, please.

20 MR. MAUSNER: I'm not aware of a case that says that,
21 but I think under the DMCA that -- you know, that would be the
22 applicable way to remove access to infringing content. Either
23 you cut the links to the website or the website has to remove
24 the infringing content that's there.

25 THE COURT: And which particular language or

1 provision of the DMCA would warrant that kind of advocacy?

2 MR. MAUSNER: The language that says that the service
3 provider is to remove or disable access to the infringing
4 material.

5 If you have a link to a website, then you are
6 providing access to the --

7 THE COURT: That's supposedly in 512(d)?

8 MR. MAUSNER: It's in various places in the statute.
9 It's either in (d) itself or it's incorporated from (c) into
10 (d).

11 THE COURT: Okay. Now, turn to vicarious
12 infringement and answer the first question which carries over
13 to Page 6. I don't know if you have the Ninth Circuit's
14 opinion before you.

15 MR. MAUSNER: Well, I do think that it's clear under
16 the Ninth Circuit's test for contributory infringement that
17 providing regular links -- sponsored links and AdSense
18 advertisements to these sites is contributory.

19 THE COURT: But I am asking about --

20 MR. MAUSNER: Vicarious -- yeah.

21 THE COURT: So -- I don't have unlimited time here.
22 Try to answer the questions I've put to you.

23 MR. MAUSNER: Well, Google has a tremendous amount of
24 control over the internet, what appears on the internet and
25 what people can find on the internet.

1 The Ninth Circuit talked about the fact that image
2 recognition was not available as one of its bases for saying
3 that there is not vicarious liability.

4 I think now it's clear that the image recognition is
5 available, but I think contributory is probably a stronger
6 grounds for this than vicarious.

7 THE COURT: And answer Number 4, please.

8 MR. MAUSNER: We have not been able to get discovery
9 from Google regarding click revenue. We do have evidence of
10 downloads from these sites.

11 THE COURT: What do you mean by you haven't been able
12 to?

13 MR. MAUSNER: Well, we've asked for it, and they
14 haven't given it to us. We have not --

15 THE COURT: Have you moved to compel it?

16 MR. MAUSNER: I don't know if we've actually moved to
17 compel this or not. There's been a lot that we've moved to
18 compel, and we've put damages stuff off. And I realize you are
19 asking about this regarding vicarious, but I think if the ads
20 are there and they're around an image, I think there can be an
21 assumption, at least for a preliminary injunction, that Google
22 is making money off of this. They wouldn't be doing it if they
23 weren't making money off of this.

24 THE COURT: I find it curious that you can't assure
25 me as an officer of the court that you've actually sought a

1 ruling entitling you to this kind of information.

2 MR. MAUSNER: We have sought it, but I don't think
3 that we have moved to compel that.

4 THE COURT: Okay. Let me see if there is something
5 else I wanted to ask you.

6 MR. MAUSNER: May I respond to some of the things
7 that Mr. Zeller said?

8 THE COURT: Very selective and very briefly.

9 MR. MAUSNER: Regarding the notices being large or
10 difficult to understand, Your Honor, what these notices were
11 were they --

12 THE COURT: I have seen them.

13 MR. MAUSNER: Yeah, okay. And we have continually
14 asked them, "What's deficient about this?" They have stated,
15 "This is deficient" -- everything that we've sent to them, they
16 said it's deficient, but they have not told us what exactly is
17 deficient and what to do to make it so that they won't say it's
18 deficient anymore.

19 And we have tried, as you'll see in this --

20 THE COURT: You are standing here and you're telling
21 me you don't have a clue what Google's problems are with the
22 Group C notices?

23 MR. MAUSNER: Yes. Yeah, other than that they're
24 large, they contain a lot of infringements. The reason they
25 contain a lot of infringements --

1 THE COURT: They contain a lot of steps that Google
2 would have to go through. Don't you acknowledge that?

3 MR. MAUSNER: Are you saying because there's a cover
4 letter and attachments?

5 THE COURT: Yeah, that's part of it. Yes.

6 MR. MAUSNER: How else can you do it? I mean, are
7 you supposed to take --

8 THE COURT: Well, you can do it by the methodology in
9 Group B, which they say they will respond to in good faith and
10 already have.

11 MR. MAUSNER: Well, the spreadsheet was also an
12 attachment, and they have not removed or disabled access to the
13 vast majority of what's in Group B.

14 The spreadsheet -- the spreadsheet notices contain
15 the cover letter and the spreadsheet.

16 The Group C notices contained the cover letter, and
17 they contained the attachments, which had not only the URLs,
18 but the images themselves as well.

19 And like for some of these, Your Honor, like Page
20 2 --

21 THE COURT: Of what?

22 MR. MAUSNER: -- of the first handout.

23 Google search results contain a group of images
24 there, okay. Now, how are you supposed to tell them, for this
25 page, "Everything is on there except for the one in the lower

1 right-hand corner"?

2 When they do the search themselves, it could change
3 the order of these things.

4 How do you describe which are Perfect 10 images and
5 which are not Perfect 10 images other than by giving them this
6 web page and crossing out the image that is not a Perfect 10
7 image?

8 That's certainly the easiest way to do it and
9 possibly the only way to do it.

10 If you take a look at Page 8 --

11 THE COURT: Okay. A lot of that is in your briefs
12 and some of it may be responsive to what I want to get to now.

13 MR. MAUSNER: Your Honor, may I just say one more
14 thing? You're looking at these things. You've gotten a
15 hundred-and-sixty-seven DMCA notices, and you're saying, "Wow,
16 this is really a lot of stuff," and it is, but that's not the
17 way Google got it.

18 Google got these things at certain periods in time.
19 They are technologically probably, you know, the best company
20 in the world or one of the best companies in the world. They
21 get a letter saying, "These are all Perfect 10 images. We
22 don't want you linking to them in either web search, image
23 search. We don't want ads on them," okay, and for them, it
24 wasn't such a big, hard thing to do them if they had done them
25 as they came in.

1 And they're not -- you know, I'm kind of sensing that
2 you're thinking, wow, there's so much here that how can Google
3 handle it. First of all, this is over many years.

4 THE COURT: Okay. Okay. You've made that point.

5 Now, look at the outline I gave you. And we're on
6 Item E, the DMCA Safe Harbor, which we've been bouncing around
7 anyway.

8 Answer Number 2 on Page 7.

9 MR. MAUSNER: The earlier Adobe-style notices were
10 not the same size, and the reason for that is because there was
11 much more infringement on Google than there was on Yahoo or
12 InterServer.

13 And what happened is InterServer and Yahoo processed
14 these notices and removed and disabled access so that we did
15 not have to keep sending them notices containing the same
16 material again. Google did not do that.

17 First of all, Google does have more -- a lot more
18 infringements, so the ones for Google were larger.

19 The '95 notices probably were about the same size,
20 but the earlier Adobe-style notices were larger because they
21 had to be larger.

22 THE COURT: Now answer Number 4, Pages 7 and 8.

23 MR. MAUSNER: Well, for certain repeat infringers,
24 they're also -- they're AdSense customers, so those are clearly
25 subscribers or account holders. They have an AdSense account

1 with Google.

2 For those repeat infringers that are not AdSense
3 customers, our argument is that they should be treated as
4 account holders and subscribers because for search engines, the
5 websites that they link to are basically tantamount to account
6 holders or subscribers. But another argument regarding that,
7 Your Honor, is even if they're not treated as account holders
8 and subscribers, removing repeat infringers is a simple measure
9 that Google could take to reduce damage to copyrighted works
10 under the Ninth Circuit's test. They should not continually be
11 linking to the same websites that they get notice after notice
12 from on under the Ninth Circuit's simple measures test.

13 THE COURT: Is there any authority that you can cite
14 to that establishes that a repeat infringer which posts a lot
15 of material that is not infringing and a lot that is can be
16 taken down altogether or must be?

17 MR. MAUSNER: Well, the service providers boasted to
18 say block or disable access to the infringing material. There
19 are some cites where that can be more pinpointed. There are
20 other sites where it can't be, where the only way to remove or
21 disable access is to cut links that basically cover everything
22 on the site.

23 At that point, the website can make the choice as to
24 whether to remove the infringing material or not.

25 Now, in reality, what's going on here is these pay

1 sites have lots and lots of material besides infringing Perfect
2 10 material, but what -- it turns out that what that material
3 is is infringements of other copyright holders' materials, so
4 if Your Honor ordered Google to cut access to those sites, if
5 they tried to remove the Perfect 10 material, that may, you
6 know, be sufficient, and then they could go up. But if the
7 other copyright holders came along also and said, "Wait a
8 minute. It's not just Perfect 10, it's our stuff, too, that's
9 on there," then --

10 THE COURT: Then what?

11 MR. MAUSNER: They may not go back up again because
12 everything on there is infringing somebody's copyright.

13 But the basis -- the authority for doing that is in
14 the DMCA itself, which says you have to remove or disable
15 access to the infringing material, and the service provider has
16 to figure out how to do that.

17 If there aren't links to the individual pages that
18 contain the images, then they've got to cut the other links
19 that allow you to get to those pages that contain the
20 infringing material.

21 THE COURT: Okay. Now answer Number 7.

22 MR. MAUSNER: On Page 8?

23 THE COURT: Yes.

24 MR. MAUSNER: That is partially covered by my
25 previous answer, which is we gave the URL that is available to

1 the infringing material.

2 For some websites, that goes right to an infringing
3 image. For other websites, it does not go right to an
4 infringing image.

5 For the pay sites, it goes to the home page, it goes
6 to the sign-up page, other types of pages in there where once
7 you get there, you do a couple clicks and then you get to the
8 infringing image.

9 The URLs don't exist for the material and you can't
10 get to the infringing material unless you pay for it. That's
11 the point of those pay sites.

12 So we gave whatever URL was available. The service
13 provider has the obligation to remove or disable access to the
14 infringing material.

15 If the way you get to that material is you go to the
16 home page and then from the home page, you click on the name of
17 the model and that's the only way you can get to the pictures,
18 to remove or disable access, you have to remove or disable
19 access to the link to the home page, okay, and then it's up to
20 the service provider to remove the infringing material if they
21 want to get put back in.

22 But whatever URL is available, that's what we gave to
23 Google, and then it's up to the service provider to determine
24 how to remove or disable access to the infringing material.

25 And think of this, Your Honor. If Your Honor held

1 that there has to be a direct link to the infringing picture,
2 every website in the world is going to start having a spacer
3 page in between the actual infringing image and the -- you
4 won't be able to go to the infringing image directly by putting
5 in the URL. You'll have to go to a page that says the name of
6 the model first, and then it has a little word "enter" there
7 and you click on the word "enter" to get to the pictures,
8 because that way, you know, the service provider could claim,
9 "We're not providing a direct link to the image. We're
10 providing a direct link to the spacer page."

11 THE COURT: Okay. Let me hear from you, Mr. Zeller,
12 about a whole host of things. We are going to go through it
13 quickly. I'm not going to ask -- hardly going to ask any more
14 questions.

15 Go ahead, Mr. Zeller. Here's what I want you to
16 answer. First answer E-1 on Pages 6 and 7.

17 MR. ZELLER: Page 13?

18 THE COURT: No, 6 and 7, Item E-1.

19 MR. ZELLER: E-1. This is about Yahoo.

20 The short answer is is that, as Mr. Mausner has
21 acknowledged, that they were not the same notices.

22 Number 2, there is no evidence in the record as to
23 what additional assistance or notification or discussions there
24 were between Yahoo and Perfect 10.

25 The record in our case is quite clear that there was

1 not cooperation. There were multiple communications where we
2 did notify Perfect 10 as to what was required, and in many
3 instances -- or at least in some instances, I should say,
4 Perfect 10 affirmatively stated it didn't think it was
5 necessary and, therefore, would not cooperate.

6 So we don't know what the additional back and forth
7 was between Yahoo or InterServer and Perfect 10 as to really
8 know whether this is an apples-to-apples kind of comparison.

9 And, furthermore, of course, we have no foundation
10 whatsoever for believing that their back end or their
11 processing or the ease by which they can process whatever it is
12 that Perfect 10 actually provided to them is comparable to what
13 occurred with Google.

14 THE COURT: Okay. Now, Mr. Zeller, on Page 7, Item
15 3 -- and what I really should have -- the way I should have put
16 it, because I don't want an open-ended narrative answer, is can
17 you tell me -- and maybe one of your aides could come up with
18 the cite -- where in the record before me there's evidence that
19 you have tried to implement an effective notification system.

20 MR. ZELLER: Well, there are, I think, two different
21 answers to that, and one is is, Your Honor, there is -- and I'd
22 have to get the exact citation, but in the interim, Google has
23 put up a Blogger DMCA web form, which I believe is in the
24 record. So that's part one to the answer.

25 That has been made available to all internet users,

1 including Perfect 10, and all claimed copyright owners,
2 including Perfect 10.

3 The second part of the answer is is that we believe
4 that what we've already done is compliant, and that we've taken
5 the reasonable steps, and the statute specifically says that
6 where you receive a deficient notice, you contact the sender
7 and tell them, which we do, and we give them direction as to
8 what needs to be done, which we have done.

9 So that's how we believe we have complied with that
10 statutory provision. But as a factual matter, we have put up,
11 as I mentioned, the Blogger web form.

12 THE COURT: Now turn to Page 9, please. What in the
13 record demonstrates that the processing of the Group B notices
14 was expeditious?

15 MR. ZELLER: That was the Poovala declaration that I
16 cited previously. It's in the record on the DMCA summary
17 judgment motions, and she has a heading where it talks about
18 the processing of the Group B notices.

19 And that's, of course, also where it talks about some
20 of the other efforts that were made with respect to other
21 notices and sort of a comparison between some of those notices.

22 THE COURT: Okay. Now turn to Page 11. This has to
23 do with the CDA.

24 MR. ZELLER: Right.

25 THE COURT: Item 2.

1 MR. ZELLER: Question 2, Your Honor, what I would
2 cite is the CCBill case again.

3 And this is specifically in the page dealing with the
4 CDA. And the language here, the Court makes it clear. It
5 says, "The majority of federal circuits have interpreted the
6 CDA to establish broad federal immunity to any cause of action
7 that would make service providers liable for information
8 originating with a third-party user of the service."

9 Here, Google is not the creator of the content, which
10 is why it provides that kind of immunity, but the Courts have
11 interpreted it so that the immunity isn't just simply for the
12 removal. It's that the immunity doesn't apply to
13 non-service-provider generated content.

14 THE COURT: And when you say "courts," you are
15 referring to CCBill and what other court?

16 MR. ZELLER: Well, they also cite here a number of
17 cases including one of the Amazon cases, the America Online
18 case, the MetroSplash case.

19 THE COURT: What page are you referring to?

20 MR. ZELLER: Let's see, this is specifically Page
21 1118 and following.

22 THE COURT: 1118 of CCBill?

23 MR. ZELLER: Correct.

24 THE COURT: Oh, okay. I thought you were reading
25 from your brief.

1 MR. ZELLER: No, no. I'm sorry. I'm reading right
2 from CCBill.

3 THE COURT: Okay. All right. Thank you, Mr. Zeller.
4 Is there something you feel compelled to respond to
5 what Mr. Mausner said before I excuse you?

6 MR. ZELLER: No, Your Honor.

7 THE COURT: All right. Mr. Mausner, turn to Page 12.
8 I don't understand what you are asking me to consider
9 doing on RapidShare. What's that all about?

10 What do you mean that I would preclude and enjoin
11 Google from powering it?

12 MR. MAUSNER: Google provides the search tag. I
13 believe -- and I don't know that much about this -- Google
14 provides the search technology for RapidShare.

15 It says on the RapidShare websites and websites that
16 allow searching through RapidShare "Search Powered by Google,"
17 so --

18 THE COURT: You construe that to mean by Google's
19 servers?

20 MR. MAUSNER: I don't know whether it's on Google's
21 servers, but another thing that Google does is it provides a
22 specific browser that allows people to find material from
23 RapidShare.

24 THE COURT: And you want me to enjoin Google from
25 doing that?

1 MR. MAUSNER: From cooperating with RapidShare to
2 allow people to find infringing materials.

3 RapidShare is basically a hundred percent infringing.
4 It's one of the most --

5 THE COURT: Yes, I know. The German court so said.
6 You keep telling me.

7 MR. MAUSNER: Yes.

8 THE COURT: Okay. I think I've run out of not only
9 time, but questions.

10 Tell me, though, Mr. Zeller, what does Google do for
11 RapidShare?

12 MR. ZELLER: Well, the short answer is I'd have to
13 investigate to know the specifics of like what's on whose
14 server and the like.

15 Google does provide, as an open-source matter,
16 technology, so just because of the fact that RapidShare is
17 doing certain things does not mean that Google participates in
18 it. But I would also add, of course, that --

19 THE COURT: When you say open-share or open-market
20 technology, does Google get compensated for that?

21 MR. ZELLER: Not that I'm aware of, Your Honor. I
22 believe it makes tools available for all manner of people.

23 I mean, I am sure there are different segments but,
24 again, I don't know enough about RapidShare or, frankly, even
25 understand enough about what Perfect 10's complaints have been

1 about it.

2 To date, it has been apparently just simply that
3 Google has any kind of links whatsoever to what they call these
4 massively infringing websites, which, of course, runs directly
5 counter to the Court's holdings that you can't just simply take
6 down all links to an entire website. That would suppress free
7 speech.

8 And, certainly, Perfect 10 has it within its power to
9 provide URLs to any RapidShare pages that it believes are
10 infringing.

11 And to the extent that there are -- it also, of
12 course, could send --

13 THE COURT: Or to take on RapidShare.

14 MR. ZELLER: I'm sorry?

15 THE COURT: Or to take on RapidShare.

16 MR. ZELLER: Correct.

17 THE COURT: Google doesn't own RapidShare?

18 MR. ZELLER: I can't be a hundred percent certain,
19 but I'd be very surprised. I can certainly investigate it if
20 it's important to the Court.

21 THE COURT: Well, I don't want any further
22 submissions.

23 I will take this motion under submission. I may get
24 around to the pending summary judgment motions first. I will
25 try to do this on a timely basis.

1 I know that you think, Mr. Mausner, that there is a
2 great urgency and that's why injunctive relief is necessary,
3 and I am considering that as well.

4 Now, I'm ordering the parties to order a transcript
5 and to split the cost. I will benefit from an opportunity to
6 review your answers, and I'll take the matter under submission.

7 *(Proceedings concluded.)*

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