

1 QUINN EMANUEL URQUHART & SULLIVAN, LLP  
 2 Michael T. Zeller (Bar No. 196417)  
 3 michaelzeller@quinnemanuel.com  
 4 865 South Figueroa Street, 10th Floor  
 5 Los Angeles, California 90017-2543  
 6 Telephone: (213) 443-3000  
 7 Facsimile: (213) 443-3100  
 8 Charles K. Verhoeven (Bar No. 170151)  
 9 charlesverhoeven@quinnemanuel.com  
 10 50 California Street, 22nd Floor  
 11 San Francisco, California 94111  
 12 Rachel Herrick Kassabian (Bar No. 191060)  
 13 rachelkassabian@quinnemanuel.com  
 14 555 Twin Dolphin Drive, 5th Floor  
 15 Redwood Shores, California 94065  
 16 Attorneys for Defendant GOOGLE INC.

10 UNITED STATES DISTRICT COURT  
 11 CENTRAL DISTRICT OF CALIFORNIA

13 PERFECT 10, INC., a California  
 14 corporation,  
 15 *Plaintiff,*  
 16 vs.  
 17 GOOGLE INC., a corporation; and  
 18 DOES 1 through 100, inclusive,  
 19 *Defendants.*

CASE NO. CV 04-9484 AHM (SHx)  
**DISCOVERY MATTER**  
**GOOGLE INC.'S STATEMENT**  
**REGARDING THE STATUS OF**  
**DMCA-RELATED DISCOVERY**  
**ISSUES IN P10'S MOTION FOR**  
**EVIDENTIARY AND OTHER**  
**SANCTIONS IN RESPONSE TO**  
**THE COURT'S REQUEST AT THE**  
**MAY 27, 2010 HEARING**

19 AND COUNTERCLAIM

[Declaration of Bradley R. Love filed  
 concurrently]

Hon. Stephen J. Hillman

Date: None Set  
 Time: None Set  
 Crtrm.: 550

Discovery Cutoff: None Set  
 Pretrial Conference Date: None Set  
 Trial Date: None Set

1 Pursuant to the Court's request at the May 27, 2010 telephonic hearing,  
2 Google Inc. respectfully submits this Statement regarding the status of the DMCA-  
3 related discovery issues Perfect 10, Inc. ("P10") raised after the hearing on its  
4 Motion for Evidentiary and Other Sanctions (Dkt. No. 633) ("Sanctions Motion").

5 **I. STATUS OF THE PARTIES' MEET AND CONFER NEGOTIATIONS**

6 On May 29, Google requested that P10 agree to further meet and confer  
7 regarding P10's DMCA discovery demands upon issuance of Judge Matz's  
8 forthcoming final order on Google's motions for summary judgment re: entitlement  
9 to DMCA safe harbor ("DMCA Motions"). Declaration of Bradley R. Love ("Love  
10 Decl."), filed concurrently, Ex. E (5/29/10 email). P10 refused to meet and confer,  
11 insisting that Google comply with all of P10's demands immediately. Id.

12 **II. THIS COURT SHOULD DEFER RULING ON THE DISCOVERY**  
13 **DEMANDS IN P10'S SANCTIONS MOTION PENDING THE**  
14 **FORTHCOMING ORDER ON GOOGLE'S DMCA MOTIONS.**

15 As the Court is aware, on May 6, 2010, Judge Matz ruled on Google's DMCA  
16 Motions, issuing a tentative written order to the parties and scheduling a hearing for  
17 May 10, 2010. At that hearing, Judge Matz confirmed that the purpose of the  
18 hearing was to "address any factual errors that may have crept into [the tentative  
19 order] or material omissions that reflect or would consist of facts that should have  
20 been included." Love Decl., Ex. D (5/10/10 Hearing Transcript at 4:24-5:1). Judge  
21 Matz's forthcoming final order on the DMCA Motions will provide the parties and  
22 this Court with the necessary guidance regarding the scope of further DMCA-related  
23 discovery (if any) to be exchanged this case. A ruling on DMCA discovery issues  
24 prior to the imminent issuance of the DMCA Order would be a waste of resources,  
25 since any such ruling necessarily will have to be revisited upon issuance of the  
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1 DMCA Order to determine which portions are mooted by that Order.<sup>1</sup> Google  
2 suggests that upon issuance of the DMCA Order, the parties meet and confer within  
3 ten days regarding the impact of the DMCA Order upon P10's DMCA discovery  
4 demands. The parties could then submit a Joint Statement to this Court outlining  
5 which of P10's categories of requested DMCA discovery (if any) the parties agree  
6 are still relevant for production.

7 As for P10's claim that it will be prejudiced if this Court does not rule on its  
8 Sanctions Motion before Judge Matz rules on the DMCA Motions, this is a non-  
9 starter because the DMCA Motions have been fully argued and submitted and Judge  
10 Matz has *already* ruled – the parties are merely awaiting his final written order.  
11 Moreover, P10 cannot use any additional documents it might obtain to supplement  
12 its briefing on the DMCA Motions, given (1) its failure to file a Rule 56(f) motion  
13 with Judge Matz,<sup>2</sup> (2) its filing of its own cross-motion for summary judgment on  
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16 <sup>1</sup> See Hanni v. American Airlines, 2009 WL 1505286, \*7 (N.D. Cal. May 27,  
17 2009) (staying discovery pending resolution of a dispositive motion when “the  
18 pending motion is potentially dispositive of the entire case (or at least of the issue at  
19 which discovery is directed)”; Pabst Brewing Co., Inc. v. Corrao, 176 F.R.D. 552,  
20 561 (E.D. Wis. 1997) (dismissing as moot discovery motions regarding claims  
21 decided as a matter of law).

22 <sup>2</sup> See Brae Transp., Inc. v. Coopers & Lybrand, 790 F.2d 1439, 1443 (9th Cir.  
23 1986) (“Failure to comply with the requirements of Rule 56(f) is a proper ground for  
24 denying discovery and proceeding to summary judgment.”); see also Google's  
25 Surreply to P10's Sanctions Motion (Dkt. No. 706) (“Surreply”) at 17-18 (discussing  
26 P10's waiver of Rule 56(f)); Google's Opposition to P10's Request for a Telephonic  
27 Conference (Dkt. No. 755) at 2-3(same); Google's Response to P10's Statement of  
28 Clarification regarding Rule 56(f) (Dkt. No. 846) at 1-2 (same). Nor did P10 raise  
even the remotest suggestion at either the April 5 or May 10 hearings that P10  
needed additional discovery to oppose the DMCA Motions, or otherwise request  
that Judge Matz postpone ruling on the DMCA Motions pending further discovery.  
Love Decl. ¶ 6. Plainly, P10 is improperly using its Sanctions Motion to “hedge its  
bets” in the event the DMCA Order is not in its favor.

1 DMCA issues in July 2009,<sup>3</sup> and (3) Judge Matz’s express instruction that the  
2 parties not submit any further briefing on the DMCA Motions or P10’s Second  
3 Preliminary Injunction.<sup>4</sup>

4 **III. SHOULD THIS COURT WISH TO ISSUE A FINAL RULING ON**  
5 **P10’S SANCTIONS MOTION PRIOR TO ISSUANCE OF THE DMCA**  
6 **ORDER, THE MOTION SHOULD BE DENIED.**

7 The focus of P10’s Sanctions Motion was, as its title indicates, a demand for  
8 evidentiary sanctions. Once it became clear that the Court would not be issuing  
9 sanctions, P10 refocused its demand, asking that the Court order certain categories  
10 of documents produced. Both of P10’s demands should be rejected, and its  
11 Sanctions Motion denied in its entirety. For the Court’s convenience and in light of  
12 the voluminous materials submitted on P10’s Sanctions Motion, summarized below  
13 are the issues to be decided along with references to where in the record the Court  
14 may find the corresponding arguments and evidence.

15 **A. As This Court Has Already Found, Sanctions Are Not Warranted.**

16 This Court has already tentatively ruled that P10’s demand for sanctions  
17 should be denied. See Love Decl., Ex. A (1/15/10 Hearing Transcript at 43:20-  
18 44:10) (“the more I hear the less comfortable I would be today recommending very  
19 serious – extremely serious sanctions – evidentiary sanctions...and *it seems to me*  
20 *that all I really need to do is rule on the evidentiary sanctions motion, which at*  
21 *this point obviously I would deny.*”) (emph. added); id. (1/15/10 Hearing Transcript  
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23 <sup>3</sup> See Docket No. 436; see also Sullivan v. City of Springfield, 561 F.3d 7, 16  
24 (1st Cir. 2009) (plaintiffs could not argue that summary judgment was premature  
25 when “they affirmatively requested that the court resolve the case on the existing  
26 evidence”); Filiatrault v. Comverse Tech., Inc., 275 F.3d 131, 138 (1st Cir. 2001)  
27 (filing a cross-motion for summary judgment “almost invariably indicates that the  
28 moving party was not prejudiced by a lack of discovery”).

<sup>4</sup> Love Decl., Ex. C (4/5/10 Hearing Transcript at 25:15 & 51:21-25).

1 at 101:22-102:14 (“based on what I have read and heard, *I am not left with the*  
2 *impression that Google has violated a Court Order*”) (emph. added); *id.* Ex. B  
3 (1/27/10 Order) (“the Court reiterates its tentative conclusion that *Evidentiary*  
4 *Sanctions are not appropriate* at this juncture”) (emph. added). Google requests  
5 that the Court adopt its tentative order denying sanctions as the final order of this  
6 Court.<sup>5</sup>

7 **P10’s Demand For Additional DMCA Discovery Should Be Denied**  
8 **Because The Additional DMCA Documents P10 Seeks Were Either**  
9 **(1) Never Requested or (2) Already Produced.**

10 Following the January 15, 2010 hearing on P10’s Sanctions Motion, the  
11 parties met and conferred regarding three specific categories of DMCA documents  
12 P10 sought: (1) DMCA logs, (2) DMCA termination notices, and (3) third-party  
13 DMCA notices. See Declaration of Jeffrey Mausner in support of P10’s January 26,  
14 2010 Request for a Telephonic Conference (Dkt. No. 750), Ex. 1 (1/22/10 email).<sup>6</sup>

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17 <sup>5</sup> See also Google's Opposition to P10's Sanctions Motion (Dkt. No. 647)  
18 (“Opp.”) at 1-5 (P10 must establish (*inter alia*) (1) a violation of a court order by  
19 Google, (2) resulting prejudice to P10, and (3) satisfaction of other factors,  
20 including a demonstration that lesser sanctions are unavailable, and it has not);  
Surreply at 2 (P10 has not *addressed*, much less met, the standard for issuing  
evidentiary sanctions.).

21 <sup>6</sup> P10’s Sanctions Motion took issue with four additional categories of  
22 documents that P10 claimed were covered by prior discovery requests, but following  
23 the January 15, 2010 hearing, P10 dropped those four categories and did not press  
24 them further during the parties’ meet and confer. Even had P10 not dropped them,  
25 Google has already produced non-privileged, responsive documents in these four  
categories, and has provided the Court with samples of those produced documents in  
a binder handed up at the January 15, 2010 hearing:

26 (1) communications with the “owners” of the websites listed in Request No. 29  
27 (see Surreply at 10, Declaration of Rachel Herrick Kassabian in Support of Google’s  
Surreply (Dkt. No. 645) (“Kassabian Surreply Decl.”) ¶ 2, Reply Declaration of  
Norman Zada in support of P10’s Sanctions Motion (Dkt. No. 659) at ¶ 11);

28 (footnote continued)

1 As P10 acknowledges in its Sanctions Motion, none of these documents relates to  
2 infringements claimed by P10—rather, P10 believes they are relevant to  
3 determining whether Google has reasonably implemented an appropriate repeat  
4 infringer policy. See Sanctions Motion at 22.

5 As previously briefed and argued, P10’s demand for these three categories of  
6 documents should be denied, because (1) P10 has not even requested them via Rule  
7 34, (2) Google has already produced them, or (3) both. The following chart directs  
8 the Court to where in the parties’ briefing the Court may find the arguments and  
9 evidence supporting denial of these discovery demands (grouped by the Google  
10 products or services at issue):<sup>7</sup>

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13 (2) documents related to Google’s repeat infringer policies (see Opp. at 8-9,  
14 Surreply at 11, Declaration of Rachel Herrick Kassabian in support of Google’s  
15 Opp. (Dkt. No. 719) (“Kassabian Decl.”) ¶¶ 16, 26);

16 (3) reports and studies pertaining to certain custodians (see Opp. at 11, Surreply  
17 at 12, Kassabian Decl. ¶ 31); and

18 (4) board meeting minutes discussing copyright infringement, misappropriation  
19 of rights of publicity, or trademark infringement in connection with adult content  
20 (see Opp. at 10-11, Kassabian Decl. ¶ 30).

21 <sup>7</sup> Blogger is listed separately because as the Court recognized at the January 15,  
22 2010 hearing, P10 did not add its Blogger claims to the case until July 2008, and  
23 never served discovery requests directed to Blogger seeking these categories of  
24 documents. See Love Decl., Ex. A (1/15/10 Hearing Transcript at 142:15-18) (The  
25 Court: “It’s just inconceivable from what I know about the case that prior to Blogger  
26 being formally added to the case, that Google was on any kind of notice that  
27 anything other than Google’s Search was the nature of the case.”); id. at 33:2-4)  
28 (The Court: “but you’ve never even formally requested Blogger DMCA notices  
once Blogger has been in the case, and you certainly have not moved for them”).  
See also Kassabian Decl., Ex. Q p. 116 (7/14/08 Hearing Transcript on P10’s  
Motion for Leave to Amend its Complaint to Add Blogger Claims, at 18:6-21 (Mr.  
Mausner: “I don’t know if [the new Blogger discovery P10 intends to serve is] going  
to be exactly the same. We are going to take discovery regarding Blogger, but it  
depends on what we need obviously.”)); Surreply Kassabian Decl., Ex. C p. 14

(footnote continued)

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**Categories of DMCA-Related Discovery Sought by P10<sup>8</sup>**

	WEB SEARCH, IMAGE SEARCH, ADSENSE	BLOGGER
<b>(1) DMCA logs</b>	<p><b>Already produced.</b>  <u>See</u> Opp. at 5-8; Surreply at 2-6; Kassabian Decl. ¶¶ 12, 16 &amp; 17; Surreply Kassabian Decl. ¶ 3; Love Decl., Ex. A (1/15/10 Hearing Transcript at 51:9-22 (“if your Honor has any questions whatsoever about any of the representations in any of the papers about what documents Google produced in response to each of these categories, this courtesy binder shows sample documents for each of the, I believe, seven categories that Perfect 10 accuses,” including DMCA logs)).</p>	<p><b>Never requested and already produced.</b>  <u>See</u> Opp. at 7; Surreply at 6; Kassabian Decl. ¶¶ 12, 16 &amp; 17; Surreply Kassabian Decl. ¶ 3; Love Decl., Ex. A (1/15/10 Hearing Transcript at 102:12-14 (The Court: “I don’t think Blogger discovery has been propounded based on what’s been quoted to me and the excerpts that I have seen of the discovery and the Orders.”)), 141:24-142:5 (“Even though Blogger wasn’t in the case... Google produced its Blogger log in August [2008,] only one month after Perfect 10 was granted leave to add its Blogger claims and before Perfect 10</p>

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(4/14/08 Hearing Transcript on P10’s prior Motion to Compel at 33:13-17 (Mr. Mausner requesting only Google’s “DMCA log for *search*”) (emph. added)).

<sup>8</sup> See Declaration of Jeffrey Mausner in support of P10’s January 26, 2010 Request for a Telephonic Conference (Dkt. No. 750), Ex. 1 (1/22/10 email).

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		even requested it.”) & 51:9-22).
<b>(2) Termination notices</b>	<b>Already produced.</b> <u>See</u> Opp. at 10; Surreply at 9; Kassabian Decl. ¶ 25; Surreply Kassabian Decl. ¶ 4; Love Decl., Ex. A (1/15/10 Hearing Transcript at 62:14-19 (The Court: “But they have turned over termination notices. They have turned...over correspondence with the certain webmasters. They understand their duty is continuing until the day of trial.”) & 51:9-22).	<b>Never requested.</b> <u>See</u> Opp. at 10 n. 13; Surreply at 10; Love Decl., Ex. A (1/15/10 Hearing Transcript at 102:12-14 (The Court: “I don’t think Blogger discovery has been propounded based on what’s been quoted to me and the excerpts that I have seen of the discovery and the Orders.”)).
<b>(3) Third-party DMCA notices</b>	<b>Never requested and already produced.</b> <u>See</u> Opp. at 9-10; Kassabian Decl. ¶¶ 12, 16 & 17, Ex. J; Love Decl., Ex. A (1/15/10 Hearing Transcript at 40:16-20 (“Perfect 10 has not served a single document request asking for DMCA notices. ... They never asked. It’s never been ordered. [But] Google has voluntarily produced lots	<b>Never requested.</b> <u>See</u> Opp. at 7, 9-10; Surreply at 7-9; Kassabian Decl. ¶¶ 20-23, Ex. Q; Love Decl., Ex. A (1/15/10 Hearing Transcript at 33:2-4 (The Court: “But you’ve never even formally requested Blogger DMCA notices once Blogger has been in the case. And you certainly have not moved for them.”)).

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	of DMCA notices.”) & 51:9-22).	
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For the foregoing reasons, should the Court be inclined to issue a final ruling on the DMCA discovery demands encompassed within P10’s Sanctions Motion prior to issuance of Judge Matz’s DMCA Order, Google respectfully requests that P10’s Sanctions Motion be denied in its entirety.

DATED: June 1, 2010

QUINN EMANUEL URQUHART & SULLIVAN, LLP

By *Rachel Herrick Kassabian*  
Rachel Herrick Kassabian  
Attorneys for Defendant GOOGLE INC.