

1 Jeffrey N. Mausner (State Bar No. 122385)
2 David N. Schultz (State Bar No. 123094)
3 Law Offices of Jeffrey N. Mausner
4 Warner Center Towers
5 21800 Oxnard Street, Suite 910
6 Woodland Hills, California 91367-3640
7 Email: Jeff@mausnerlaw.com
8 Telephone: (310) 617-8100, (818) 992-7500
9 Facsimile: (818) 716-2773

10 Attorneys for Plaintiff Perfect 10, Inc.

11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA

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

15 Plaintiff,

16 v.

17 GOOGLE INC., a corporation,
18 Defendants.

Case No.: CV 04-9484 AHM (SHx)

Before Judge Stephen J. Hillman

**PLAINTIFF PERFECT 10, INC.'S
REQUEST TO STRIKE AND BRIEF
RESPONSE TO DEFENDANT GOOGLE
INC.'S STATEMENT REGARDING THE
STATUS OF DMCA-RELATED
DISCOVERY ISSUES IN PERFECT 10'S
MOTION FOR EVIDENTIARY AND
OTHER SANCTIONS**

Discovery Cut-Off Date: None Set
Pretrial Conference Date: None Set
Trial Date: None Set

1 **I. GOOGLE’S IMPROPER AND UNSOLICITED STATEMENT SHOULD**
2 **BE STRICKEN AND THIS COURT SHOULD RULE UPON PERFECT**
3 **10’S PENDING SANCTIONS MOTION WITHOUT CONSIDERING**
4 **THE STATEMENT.**

5 Defendant Google Inc. (“Google”) has filed an unsolicited Statement
6 Regarding the Status of DMCA-Related Discovery Issues in P10’s Motion for
7 Evidentiary and Other Sanctions (Docket No. 885) (the “Statement” or “Google’s
8 Statement”) that is improper and incorrect. Without evidence or support, Google
9 incorrectly contends that it is submitting the Statement “[p]ursuant to the Court’s
10 request at the May 27, 2010 telephonic hearing” on the status of Perfect 10’s pending
11 Motion for Evidentiary and Other Sanctions against Google (the “Sanctions
12 Motion”). Statement at 1:1. *This Court made no such request.* On the contrary, this
13 Court specifically stated that it would proceed to rule upon the Sanctions Motion as
14 of June 1, 2010 unless the parties informed the Court that their “meet and confer”
15 negotiations could lead to a resolution of certain discovery issues pertaining to the
16 Sanctions Motion. This Court *never* requested that the parties file any further
17 statements.¹ The Court certainly did not grant Google permission to reargue the
18 Sanctions Motion, as the Statement seeks to do.

19 Google’s Statement is nothing more than an improper and disguised surreply,
20 which Google has no right to file without leave of Court. *See* Local Rule 7-10, Local
21 Rule 37-2.3. Perfect 10 does not wish to burden the Court with the need to review
22 further pleadings which correct the numerous errors and misstatements found in
23 Google’s Statement. Accordingly, this Court should strike Google’s inappropriate
24 and unsolicited Statement, and the accompanying declaration of Bradley R. Love
25 (Docket No. 885-1), in their entirety.

26
27 ¹ By contrast, when this Court wanted the parties to file statements regarding the
28 status of the Sanctions Motion, it issued a written order to that effect. *See* this
Court’s January 27, 2010 Order (Docket No. 759).

1 **II. IF THIS COURT CHOOSES TO CONSIDER GOOGLE’S**
2 **STATEMENT, IT SHOULD GRANT PERFECT 10 LEAVE TO FILE**
3 **AN APPROPRIATE RESPONSE.**

4 If this Court chooses to consider Google’s Statement (and it should not, for all
5 of the reasons set forth in Section I, above), this Court at the very least should grant
6 Perfect 10 leave to file an appropriate response. As discussed briefly below,
7 Google’s Statement is replete with misstatements and demonstrably incorrect
8 assertions, in addition to Google’s mistaken claim that this Court requested the filing
9 of Google’s Statement. For example:

10 1) Google incorrectly claims that “Judge Matz has *already* ruled” on its
11 pending DMCA summary judgment motions. Statement at 2:9-10 (emphasis in
12 original). In fact, as Judge Matz informed the parties at the May 10, 2010 hearing,
13 his tentative ruling was in no way final. Moreover, as Google concedes, one of the
14 purposes of the hearing was to “address any factual errors . . . or material omissions.”
15 Statement at 1:18-19. Perfect 10 specifically argued at the hearing that Judge Matz’s
16 tentative ruling contained critical factual errors regarding Google’s processing of
17 Perfect 10’s DMCA notices and its processing of third-party DMCA notices (an issue
18 critical to the determination of whether Google has suitably terminated repeat
19 infringers, which is a prerequisite to DMCA safe harbor eligibility). Judge Matz
20 likely would not have made these incorrect tentative findings had Google produced to
21 Perfect 10 the documents that are the subject of the Sanctions Motion, including:
22 (i) the “spreadsheet type” DMCA log required by Judge Matz’s May 13, 2008 Order;
23 (ii) all notices of termination of repeat infringers; and (iii) thousands of third-party
24 DMCA notices. Perfect 10 is entitled to immediate production of these documents,
25 before Judge Matz issues his ruling on the pending DMCA summary judgment
26 motions.

27 2) Google incorrectly asserts that it has produced all notices of termination
28 for Web Search, Image Search and AdSense. Statement at 7:2-15. In fact, Google

1 has previously conceded that it has failed to produce “[a]ll notices of termination
2 issued by Google as a result of alleged intellectual property violations,” as required
3 by this Court in its May 22, 2006 Order. Moreover, many of the documents
4 identified by Google as “termination notices” are either Perfect 10 DMCA notices,
5 error messages, or reinstatement notices. Finally, none of the documents identified
6 by Google as “termination notices” resulted from DMCA notices sent by third parties
7 other than Perfect 10. Consequently, Google cannot possibly have produced all
8 notices of termination as ordered by the Court, and Google’s contention that it has
9 suitably implemented a repeat infringer policy is either false or unproven. *See*
10 Plaintiff Perfect 10, Inc.’s Reply To Defendant Google Inc.’s Response To Perfect
11 10’s Statement Regarding The Status Of Its Motion For Evidentiary And Other
12 Sanctions (Docket No. 859), at 2:21-4:7.

13 Google’s Statement contains other demonstrably incorrect assertions, which
14 Perfect 10 will be forced to address if this Court chooses to consider the Statement.
15 Therefore, if this Court denies Perfect 10’s Request to Strike Google’s Statement, and
16 instead chooses to consider the Statement, Perfect 10 respectfully requests that it be
17 granted leave to file a full and complete Response to the Statement within 48 hours
18 after this Court informs the parties that it will consider Google’s Statement in
19 connection with its ruling on the Sanctions Motion.

20 Dated: June 1, 2010

Respectfully submitted,

21 LAW OFFICES OF JEFFREY N. MAUSNER

22 By: /s/ David N. Schultz

23 David N. Schultz

24 Attorney for Plaintiff Perfect 10, Inc.