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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
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**

**[SUPPLEMENTAL DECLARATION
OF DR. NORMAN ZADA (FILED
UNDER SEAL) AND DECLARATION
OF DAVID N. SCHULTZ SUBMITTED
SEPARATELY HEREWITH]**

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

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1 Pursuant to this Court’s June 3, 2010 Minute Order (Docket No. 887),
2 Plaintiff Perfect 10, Inc. (“Perfect 10”) submits this Response to Defendant Google
3 Inc.’s Statement Regarding the Status of DMCA-Related Discovery Issues in P10’s
4 Motion for Evidentiary and Other Sanctions (the “Statement” or “Google’s
5 Statement”).

6 **I. INTRODUCTION AND SUMMARY OF ARGUMENT.**

7 Google’s Statement is the latest example of Google’s continuing efforts to
8 avoid complying with its discovery obligations in this action. There is no reason
9 for this Court to further defer ruling on Perfect 10’s pending Motion for
10 Evidentiary and Other Sanctions against Google (the “Sanctions Motion”) until
11 after Judge Matz rules on Google’s three pending motions for summary judgment
12 (the “DMCA Motions”). Google possesses highly relevant documents that are the
13 subject of the Sanctions Motion, which should be produced immediately. As
14 explained below, this Court should address the three key issues raised by the
15 Sanctions Motion as follows:

16 **(1) This Court should rule on the Sanctions Motion as soon as**
17 **possible:** As this Court correctly noted during the course of the May 27, 2010
18 telephonic hearing, it is now time for the Court to rule upon the Sanctions
19 Motion. Google admittedly possesses documents at issue in the Sanctions Motion
20 that are directly relevant to Google’s pending DMCA Motions. *There can be no*
21 *justification for Judge Matz deciding the pending DMCA Motions without*
22 *having all of the evidence before him.* Furthermore, these documents should be
23 produced immediately, even apart from the pending DMCA Motions. Perfect 10
24 filed the Sanctions Motion more than six months ago. Very extensive meet and
25 confer proceedings have failed to resolve any issues raised by the Sanctions
26 Motion. The documents sought in connection with the Sanctions Motion are
27 relevant to this action regardless of Judge Matz’s ruling on Google’s pending
28 DMCA Motions [*see* Section II, below].

1 **(2) This Court should order Google to immediately produce the**
2 **documents that are the subject of the Sanctions Motion.** Such documents
3 include: (i) all notices of termination issued by Google as a result of alleged
4 intellectual property violations (Google has failed to produce any such notices
5 dated after March 4, 2006, as well as any such notices based on complaints from
6 third parties other than Perfect 10); (ii) all DMCA notices from third parties
7 (Google has failed to produce at least 1,600 such notices, and perhaps thousands
8 more, from the Motion Picture Association of America, the Recording Industry
9 Association of America, Playboy and others); (iii) a DMCA log, in an electronic
10 spreadsheet format such as Excel, “summarizing DMCA notices received, the
11 identity of the notifying party and the accused infringer, and the actions (if any)
12 taken in response;” (iv) complete Blogger and AdSense Repeat Infringer Tracking
13 Sheets, in an electronic spreadsheet format such as Excel (the sheets produced by
14 Google only cover the period from approximately the middle of 2006 to the
15 middle of 2008 and are missing at least 100,000 URLs each); (v) communications
16 with the AdSense account holders identified in Perfect 10’s Request for
17 Production (“RFP”) No. 29 (none of the communications produced by Google is
18 dated after October 2005); and (vi) critical reports sought by RFP Nos. 128-131
19 and 194-195. *See* Supplemental Declaration of Dr. Norman Zada, submitted
20 separately herewith (“Zada Supp. Decl.”) ¶¶4-10, Exh. 42.¹

21 Each of these categories of documents is the subject of this Court’s May 22,
22 2006 Order, Judge Matz’s May 13, 2008 Order, or Google’s own representations
23 that it had produced all such documents during the course of discovery. At the
24 very least, Google was required to produce these documents in the context of its

25 _____
26 ¹ It is undisputed that one of the alternative forms of relief sought by Perfect 10 in the
27 Sanctions Motion was an Order compelling Google to produce the documents that it
28 had failed to produce, as discussed in the Sanctions Motion, and giving Perfect 10 an
opportunity to file a sur-reply in connection with the DMCA Motions once it
received these documents. *See* Perfect 10’s Notice of Motion (Docket No. 617), ¶3;
Proposed Order (Docket No. 617-2), ¶3.

1 continuing duty to supplement its prior productions.² Nevertheless, *Google has*
2 *failed to voluntarily produce a single page of documents that is the subject of*
3 *the Sanctions Motion or to supplement its prior production of such documents*
4 *since at least September 2008.*³ Zada Supp. Decl. ¶12. Accordingly, this Court
5 should order Google to produce these documents as soon as possible [*see* Section
6 III, below].

7 **(3) This Court should either impose sanctions or make factual**
8 **findings as to whether Google has obeyed Court Orders.** Because Google has
9 violated Court Orders by failing to produce documents at issue in the Sanctions
10 Motion, this Court properly may impose appropriate sanctions. If the Court does
11 not wish to impose such sanctions, the Court at the very least should issue factual
12 findings as to whether Google has produced all documents covered by the
13 Requests for Production at issue in the Sanctions Motion [*see* Section V, below].

14 This Court has specifically noted that the documents at issue in the
15 Sanctions Motion “could be material to Perfect 10’s opposition to the pending
16

17 ² This Court specifically reminded Google’s counsel of Google’s continuing duty to
18 supplement its prior productions at the January 15, 2010 hearing on the Sanctions
19 Motion. *See* Transcript of January 15, 2010 Hearing at 62:17-19, 84:1-3, attached as
Exhibit A to the Declaration of David N. Schultz in support of this Response,
submitted separately herewith (the “Schultz Decl.”).

20 ³ Google even concedes that it has responsive documents it has not produced. These
21 concessions are found in: (i) the February 16, 2010 letter from Google attorney
Rachel Herrick Kassabian to Perfect 10 attorney Jeffrey N. Mausner (the “February
22 16 Letter”), attached as Exhibit A to the Declaration of Jeffrey N. Mausner in support
of Perfect 10’s Reply, filed April 27, 2010 (Docket No. 859-1) (the “Mausner
23 Decl.”); and (ii) Google’s Response to Perfect 10, Inc.’s Statement Regarding the
Status of Perfect 10’s Motion for Evidentiary and Other Sanctions, filed April 23,
24 2010 (Docket No. 856), at 4:28-5:1 (asserting that any additional “DMCA-related
documents” that Google would produce “are merely cumulative of categories of
25 documents Google previously produced”). As Perfect 10 has previously pointed out,
documents relating to repeat infringement cannot be “merely cumulative.” These
26 documents are particularly relevant to the question of whether Google has properly
terminated repeat infringers. The more documents there are, the more repeat
27 infringements there are. One or two notices regarding an alleged infringer may not
constitute repeat infringement, but twenty such notices certainly would. Therefore,
28 Google must produce all such notices, even if they are allegedly “merely
cumulative.” *See* Perfect 10’s Reply (Docket No. 859), at 5:3-6:1.

1 Motions for Summary Judgment.” See January 27, 2010 Order, found at Schultz
2 Decl., Exh. B. Google has refused to produce these documents because it knows
3 they are relevant to the DMCA Motions. Google should not be rewarded for
4 failing to comply with its discovery obligations. Instead, this Court should order
5 the immediate production of all documents covered by the Sanctions Motion.

6 **II. THIS COURT SHOULD RULE ON THE SANCTIONS MOTION AS**
7 **SOON AS POSSIBLE.**

8 In its Statement, Google asks this Court to further delay its ruling on the
9 Sanctions Motion until after Judge Matz rules upon its pending DMCA Motions.⁴
10 Google’s request lacks merit, for at least three reasons.

11 First, this request is based upon Google’s incorrect assertion that “Judge
12 Matz has *already* ruled” on its pending DMCA Motions. Statement at 2:9-10
13 (emphasis in original). In fact, as Judge Matz informed the parties at the May 10,
14 2010 hearing on the DMCA Motions, his tentative ruling was in no way final.
15 Perfect 10 specifically argued at the hearing that Judge Matz’s tentative ruling
16 contained critical factual errors regarding Google’s processing of Perfect 10’s
17 DMCA notices and its processing of third-party DMCA notices (an issue critical
18 to determining whether Google has suitably terminated repeat infringers, which is
19 a prerequisite to DMCA safe harbor eligibility). Judge Matz likely would not
20 have made these incorrect tentative findings had Google produced the
21 spreadsheet-style DMCA log summarizing all notices and Google’s response to
22

23 ⁴ Google has already sought to delay this Court’s ruling for months. Although this
24 Court, in its January 27, 2010 Order (Docket No. 759), ordered the parties to “meet
25 and confer regarding Perfect 10’s Sanctions Motion as soon as practicable for all
26 counsel,” Google delayed the “meet and confer” process for almost three months,
27 until April 19, 2010. Google’s attempt to delay this process is described in Perfect
28 10’s Second Status Report, filed April 7, 2010 (Docket Nos. 851, 851-1, 851-2, 851-
3, and 851-4), and in Perfect 10’s Reply Re: Second Status Report, filed April 9,
2010 (Docket No. 853). Google is obviously trying to delay the production of these
documents until after Judge Matz rules on the DMCA Motions, in order to prevent
Perfect 10 and Judge Matz from having highly relevant documents which could
influence the outcome of the DMCA Motions.

1 those notices, as required by Judge Matz’s May 13, 2008 Order, as well as the
2 other documents that are the subject of the Sanctions Motion. (*See* Section III,
3 below.) Moreover, Judge Matz appeared to suggest during the hearing that he
4 was going to reverse his tentative ruling regarding certain issues, including the
5 adequacy of at least some, if not all, of Perfect 10’s Adobe-style Group C
6 notices.⁵ Under these circumstances, Perfect 10 is entitled to the immediate
7 production of the documents at issue, before Judge Matz issues his ruling on the
8 DMCA Motions.

9 Second, the documents at issue in the Sanctions Motion will still be
10 relevant to the issues remaining for trial, even in the unlikely event that Judge
11 Matz’s final order on the DMCA Motions makes no changes whatsoever in his
12 tentative ruling. Even if the tentative ruling is left unchanged, Perfect 10 will still
13 be entitled to trial on its copyright infringement claim regarding the thousands of
14 infringing URLs identified in Perfect 10’s Group B spreadsheet-type notices.⁶

15 Third, the pending DMCA Motions only cover DMCA Motions and
16 Google’s infringing activity through approximately June 2009. The documents
17 that are the subject of the Sanctions Motion certainly would be relevant to any
18 infringing activity after that date. In fact, Google has not stopped infringing
19 Perfect 10’s copyrights. As of April 2010, Google was displaying at least 22,000
20 thumbnails of Perfect 10 copyrighted images (“P10 Images”) in its Image Search
21 results (which link to full-size P10 Images) and was copying and displaying at

22 ⁵ In particular, Judge Matz stated: “It says ‘Copyright 2001, Perfect 10, Inc.,’ and it
23 presents the necessary specific information as to the place on the web where it’s
24 improperly appearing as evidence of infringement. I don’t know what more should
25 be necessary.” *See* Transcript of May 10, 2010 Hearing at 24:1-5, found at Schultz
26 Decl., Exh. C. Judge Matz also stated, in response to the proposed notification
27 requirements advanced by Google’s counsel, “I’m inclined to find that to be
28 imposing and an unnecessary burden on a copyright holder.” *Id.* at 23:13-15.

⁶ For this reason, and for the next reason discussed above, the case law upon which
Google purports to rely [*see* Statement at 2 n.1] is completely inapposite. Judge
Matz’s decision on the DMCA Motions will not dispose of the issues to which the
documents that are the subject of the Sanctions Motion are relevant.

1 least 4,000 full-size P10 Images from Google's *blogger.com* servers. Google was
2 also placing thousands of Google ads next to P10 Images. Zada Supl. Decl. ¶11.
3 Furthermore, Perfect 10 has sent Google at least 108 additional DMCA notices
4 since Google filed its DMCA Motions. *Id.* The documents at issue in the
5 Sanctions Motion are relevant to these additional notices, Google's infringement
6 since June 2009, and any ultimate trial. There is no basis to further delay the
7 production of documents that are clearly relevant to the remainder of the case.

8 For all of these reasons, this Court should rule on the Sanctions Motion
9 without further delay, and should not defer its ruling until after Judge Matz issues
10 his final order on the DMCA Motions.⁷

11 **III. THIS COURT SHOULD ORDER GOOGLE TO IMMEDIATELY**
12 **PRODUCE THE DOCUMENTS THAT ARE THE SUBJECT OF THE**
13 **SANCTIONS MOTION.**

14 The documents sought by Perfect 10 as part of the Sanctions Motion
15 unquestionably are relevant to whether Google has satisfied the following
16 prerequisites for a DMCA safe harbor affirmative defense found in the statute:
17 whether Google has: (i) expeditiously responded to DMCA notices; (ii) suitably
18 terminated repeat infringers; (iii) suitably acted when it possessed knowledge of
19 infringement; and (iv) not benefited financially from infringement in situations
20 where it had the right and ability to control that infringement. Consequently, this
21 Court should order Google to immediately produce the following documents:

22 _____
23 ⁷ This Court should also reject Google's request to further delay its ruling because the
24 request is based upon two misstatements: that Judge Matz expressly instructed the
25 parties at an April 5, 2010 hearing not to submit any further briefing on the DMCA
26 Motions and that Perfect 10 has failed to "file a Rule 56(f) motion with Judge Matz."
27 Google's Statement at 3, 2. As Perfect 10 has previously explained in greater detail,
28 these assertions are demonstrably incorrect. *See* Perfect 10's Reply, filed April 27,
2010 (Docket No. 859) at 8:10-9:18. In fact, Perfect 10 has specifically reserved the
right to seek relief under Rule 56(f), to the extent that such relief is necessary or
proper. *See* Statement of Clarification of Perfect 10's Position Regarding
Applicability Of Rule 56(f) To Pending Motions for Summary Judgment and Motion
for Evidentiary and Other Sanctions (Docket No. 787).

1 **A. All Notices of Termination**

2 In its May 22, 2006 Order, this Court ordered Google to produce “[a]ll
3 notices of termination issued by Google as a result of alleged intellectual property
4 violations.” (Docket No. 163, at 5:15-20, concerning Document Request Nos. 26
5 and 27, as modified). Google incorrectly asserts that it has already produced such
6 termination notices. Google’s Statement at 7:2-15. Google is wrong. It has only
7 produced a handful of termination notices, all of which relate solely to DMCA
8 notices submitted to Google by Perfect 10. None of these termination notices
9 resulted from third party DMCA notices. Moreover, Google has failed to produce
10 any actual termination notices dated after March 4, 2006. Google has also failed
11 to produce a single termination notice related to any termination listed either in its
12 Blogger Sheets or in its AdSense Sheets. Zada Supp. Decl. ¶¶4-7, Exh. 42.
13 Furthermore, Google has not supplemented its production of termination notices
14 since September 20, 2008. *Id.* ¶12. Finally, Google admits in the February 16
15 Letter that it possesses notices of termination that it has not produced. Mausner
16 Decl. (Docket No. 859-1), Exh. A.

17 Google has identified the termination notices it produced as GGL 004778-
18 004939, 004939-005060, 049324-049330, and 052412-052475. Many of the
19 documents identified by Google as “termination notices,” however, are either Perfect
20 10 DMCA notices (*see, e.g.*, Bates Nos. GGL 4818-4824 and GGL 4906-4908,
21 4910), error messages (*see, e.g.*, Bates Nos. GGL 4836-4838, 4843, and 4847-4849),
22 or reinstatement notices (*see, e.g.*, Bates Nos. GGL 52438 and 52472). They are not
23 termination notices.

24 Obviously, if Google has not produced any termination notices issued as a
25 result of third party notices, or any termination notices dated after March 4, 2006, it
26 has not produced all notices of termination as a result of intellectual property
27 violations, as required by this Court’s May 22, 2006 Order. Consequently, Google’s
28 contention that it has suitably implemented a repeat infringer policy is either false or

1 unproven. *See* Perfect 10’s Reply (Docket No. 859) at 2:21-4:7. If Google had
2 actually suitably terminated repeat infringers, it should have issued thousands of
3 termination notices, not the minimal number of notices it actually has produced.

4 More than four years ago, this Court ordered Google to produce “**all** notices of
5 termination.” The operative word here is “all.” This Court should not allow Google
6 to continue to withhold notices of termination, as evidenced by its February 16
7 Letter. Instead, this Court should order Google to immediately produce “all notices
8 of termination issued by Google as a result of alleged intellectual property
9 violations,” as Google was ordered to do in this Court’s May 22, 2006 Order. The
10 Court should also order Google to identify the bates range of the termination notices
11 that it is now producing.

12 **B. All DMCA Notices From Third Parties**

13 Google represented, in its response to RFP No. 196, dated February 23,
14 2007, and in its opposition to a motion to compel brought by Perfect 10, filed
15 October 9, 2007, that it had produced “*all notices received by Google regarding*
16 *intellectual property violations*” and “*all underlying notices of infringement.*”
17 Google never qualified these statements and never stated that it was withholding
18 any DMCA notices. *See* Perfect 10’s Memorandum of Points and Authorities in
19 Support of the Sanctions Motion (Docket No. 633) (“Sanctions Memo”), at 7:10-
20 8:8; Perfect 10’s Reply Memorandum of Points and Authorities in Support of the
21 Sanctions Motion (Docket No. 683) (“Sanctions Reply Memo”), at 9:7-12:11.

22 Now, years later, Google has finally admitted that it has not produced all
23 such notices. Google concedes that it possesses third-party notices for Web
24 Search, Image Search, AdWords, and AdSense that it has not produced. February
25 16 Letter at 3, found at Mausner Decl., Exh. A. It is undisputed that these Google
26 programs were all at issue in the case since at least January 14, 2005, when
27 Perfect 10 filed its First Amended Complaint referring to these programs. Google
28 further concedes that it has failed to produce thousands of DMCA notices sent to

1 Google by the Motion Picture Association of America, the Recording Industry
2 Association of America (the “RIAA”), Playboy, Microsoft, and others,
3 concerning Google’s Blogger, AdSense, and Google Groups services. Google’s
4 Opposition to the Sanctions Motion, filed December 7, 2009 (Docket No. 650) at
5 10, n.11. In fact, the RIAA and its European affiliate, the IFPI, have sent more
6 than *1,500 notices to Google*. Declaration of Mark McDevitt, filed December 14,
7 2009 (Docket No. 682). *Google produced none of those RIAA and IFPI notices*
8 *to Perfect 10*. Zada Supp. Decl. ¶¶9, 12.

9 Perfect 10 has been substantially prejudiced by Google’s failure to produce
10 these thousands of DMCA notices, as well as thousands of other DMCA notices
11 that Perfect 10 does not even know about. It is impossible to speculate as to the
12 effect that such notices might have on the entire case. For example, these notices
13 are clearly relevant to such issues as Google’s knowledge of infringement and
14 whether Google suitably terminated repeat infringers. Moreover, these notices
15 may show that Google has processed other notices similar to the ones from
16 Perfect 10 that Google claims are defective. This Court should order Google to
17 produce these notices immediately.

18 **C. The DMCA Log Required By Judge Matz’s May 13, 2008 Order.**

19 In his May 13, 2008 Order, Judge Matz required Google to produce “a
20 spreadsheet-type document summarizing DMCA notices received, the identity of
21 the notifying party and the accused infringer, and the actions (if any) taken in
22 response.” Google cannot reasonably contend that it has produced such a log.
23 First, Google has never produced a DMCA spreadsheet for Web Search or Image
24 Search. Second, the 23,000 pages identified by Google in response to Judge
25 Matz’s May 13, 2008 Order fail to comply with that Order because they: (i) are
26 not a spreadsheet-type document summarizing the DMCA notices Google
27 received; (ii) do not identify the accused infringer; (iii) do not summarize the
28 actions (if any) taken by Google in response to each notice; and (iv) do not

1 include thousands of DMCA notices that Google received. Third, the Blogger
2 Sheets and the AdSense Sheets that Google produced late only cover
3 approximately two years of notices and are missing more than 100,000 URLs
4 each. Zada Supp. Decl. ¶¶8-9, Exh. 42. *See also* Sanctions Reply Memo at 7:7-
5 8:1; 17:19-18:24.

6 Google's failure to produce the "spreadsheet-type" DMCA log required by
7 Judge Matz's May 13, 2008 Order has already caused Perfect 10 to suffer
8 significant prejudice. Judge Matz's tentative ruling on Google's DMCA Motions
9 contains significant factual errors that likely would not have been made had Judge
10 Matz had access to the DMCA log he ordered Google to produce. For example:

11 (1) Judge Matz's tentative ruling states that Google did not process any of
12 Perfect 10's Adobe-style Group C DMCA notices until after Google filed the
13 DMCA Motions. Had Judge Matz had the DMCA log that he ordered Google to
14 produce, he could have readily seen that Google actually processed more than
15 2,200 URLs identified by Perfect 10's Adobe-style Group C notices before filing
16 the DMCA Motions. Judge Matz could have then reasoned that there was a
17 triable issue of fact as to whether such notices were compliant, because Google
18 processed a significant percentage of URLs from such notices. Because Judge
19 Matz did not have such a DMCA log, he tentatively ruled otherwise.

20 (2) Judge Matz's tentative ruling states that Google eventually processed all
21 of Perfect 10's spreadsheet-style Group B notices, and that Google expeditiously
22 processed all of the Group B notices regarding Blogger. In fact, Google never
23 processed at least 1,500 URLs found in Perfect 10's spreadsheet-style notices and
24 failed to expeditiously process most Perfect 10 spreadsheet-style notices
25 concerning Blogger. Zada Supp. Decl. ¶8. If Judge Matz possessed the DMCA
26 log he ordered Google to produce, which summarized Google's response to each
27 of Perfect 10's notices, he would have recognized that both of his tentative
28 findings were incorrect.

1 Perfect 10 is entitled to the DMCA log contemplated by Judge Matz’s May
2 13, 2008 Order. It has never received a coherent or usable spreadsheet-type log
3 detailing what actions Google has taken in response to the DMCA notices it has
4 received and when Google has taken these actions. Accordingly, this Court
5 should now order Google to produce the log required by Judge Matz’s May 13,
6 2008 Order, and identify its location in Google’s production by bates number.

7 **D. All Communications Between Google And The Owners Of Various**
8 **Named Websites.**

9 Google has also failed to obey this Court’s May 22, 2006 Order requiring
10 Google to produce all documents that relate to, constitute or embody
11 communications between Google and the owners of various websites. May 22,
12 2006 Order at 5:21-6:10 (Document Request No. 29, as modified). Among the
13 websites listed in the Order are at least twenty Google AdSense websites.
14 Because Google pays these websites, it must know the identities of their owners.
15 Nevertheless, Google has not produced any documents responsive to this portion
16 of the Court’s May 22, 2006 Order that are dated after October 2005. Zada Supp.
17 Decl. ¶6, Exh. 42. The documents sought by RFP No. 29 are relevant to Google’s
18 knowledge of infringement, Google’s implementation of a suitable repeat
19 infringer policy, and Google’s right and ability to control infringement in a
20 situation where it is financially benefiting from such infringement. This Court
21 should order Google to produce all documents responsive to this portion of its
22 May 22, 2006 Order.

23 **E. Complete Blogger And AdSense Logs In Excel Format.**

24 Google has also failed to produce complete Blogger or AdSense logs in a
25 usable format, such as Excel. The Blogger Sheets and AdSense Sheets produced
26 by Google are substantially incomplete and cannot be used in the format in which
27 they were produced. The Blogger Sheets only cover the period from March 10,
28 2006 to June 27, 2008. They contain only 19,232 URLs, and are missing at least

1 200,000 URLs from the RIAA alone. The AdSense Sheets are even more
2 deficient. They list only 642 URLs, and fail to include any URLs for
3 blogspot.com, even though most blogspot.com websites are also AdSense sites.
4 Zada Supp. Decl. ¶9, Exh. 42. Furthermore, neither the Blogger Sheets nor the
5 AdSense Sheets identify the alleged infringer. *Id.* ¶8. Consequently, they cannot
6 be used to track repeat infringers. *See* Sanctions Memo at 3:5-21; 14:11-17.

7 **IV. GOOGLE’S MISLEADING DISCUSSION OF BLOGGER PROVIDES**
8 **NO BASIS TO DENY THE SANCTIONS MOTION.**

9 Google’s Statement repeats the misleading and incorrect assertion that
10 Google’s Blogger hosting program did not become part of the case until July
11 2008, when Perfect 10 was granted leave to file its Second Amended Complaint.
12 Statement at 5 n.6. Relying upon this mistaken assertion, Google wrongly
13 contends that Perfect 10 never requested DMCA logs, termination notices, or
14 third-party DMCA notices concerning Blogger. *Id.* at 7-8. Google is wrong, for
15 at least four reasons.

16 First, Perfect 10’s First Amended Complaint, which was filed in January
17 2005 and was the pleading at issue at the time Perfect 10 served the discovery that
18 is the subject of the Sanctions Motion, included claims for copyright infringement
19 involving websites to which Google linked in its Web Search and Image Search
20 results. Such websites necessarily include websites that Google linked to in its
21 search results and also hosted, such as Blogger. In fact, Perfect 10 first provided
22 Google with a DMCA notice regarding a *blogger.com* site on February 11, 2005.
23 Zada Supp. Decl. ¶10. At that point, if not before, Google’s response to that
24 DMCA notice, whether Google took action to remove or disable access to the
25 identified Blogger infringement, and whether Google terminated the alleged
26 Blogger infringer were all issues relevant to the case. For this reason alone, the
27 assertion that Blogger did not become part of the case until July 2008 is simply
28 incorrect.

1 Second, Perfect 10's First Amended Complaint alleged that Google directly
2 copied, distributed, and displayed Perfect 10 copyrighted images. This allegation
3 necessarily covers any program in which Google was making, copying, and
4 displaying P10 Images, including Blogger. For this reason as well, any program
5 in which Google made copies of P10 Images, including Blogger, was in the case
6 from the time Perfect 10 filed its First Amended Complaint in January 2005.

7 Third, more than 50% of all *blogger.com* websites are also Google AdSense
8 sites. Zada Supp. Decl. ¶9. Google itself concedes that AdSense sites have
9 always been in the case. Therefore, at the very minimum, all Blogger sites that
10 have also been AdSense sites have been in the case since its inception.

11 Fourth, even if Google's assertion that Blogger was not part of the case
12 until July 2008 is correct (and it is not, for the reasons discussed above), it is
13 undisputed that claims involving Blogger became part of the case in July 2008
14 when Perfect 10 obtained leave to file its Second Amended Complaint. Since that
15 date, Google was under a continuing duty to supplement its prior production of
16 documents to include additional documents that were now responsive to Perfect
17 10's earlier document requests, including documents concerning Blogger. For
18 this reason as well, Google cannot properly assert that documents concerning
19 Blogger were never requested in this action.

20 Accordingly, for all of these reasons, any Order by this Court compelling
21 Google to produce documents at issue in the Sanctions Motion necessarily must
22 include documents concerning Google's Blogger hosting program.

23 **V. THIS COURT SHOULD EITHER IMPOSE APPROPRIATE**
24 **SANCTIONS AGAINST GOOGLE OR MAKE FACTUAL FINDINGS**
25 **REGARDING GOOGLE'S COMPLIANCE WITH COURT ORDERS.**

26 During the course of the January 15, 2010 hearing on the Sanctions Motion,
27 this Court indicated that it was not left with the impression that Google had
28 violated a Court Order. As the discussion in Section III, above, demonstrates,

1 however, Google’s failure to produce certain documents at issue in the Sanctions
2 Motion, including notices of termination and other documents that do not relate to
3 Google’s Blogger program, appears to violate both this Court’s May 22, 2006
4 Order and Judge Matz’s May 13, 2008 Order. Accordingly, this Court should
5 impose appropriate sanctions against Google. At the very least, this Court should
6 make the following factual findings that are relevant to the question of whether
7 Google has complied with court-ordered discovery:

8 1) That Google did not produce to Perfect 10 any notices of termination
9 issued by Google as a result of third party DMCA notices. Zada Supp. Decl. ¶¶4-
10 7, Exh. 42, pages 54-58.

11 2) That Google incorrectly identified as termination notices documents
12 that were actually Perfect 10 DMCA notices, error messages, communications
13 regarding payment, or reinstatement notices. Zada Supp. Decl. ¶¶5-7, Exh. 42,
14 pages 20-24, 26-44, 46-48, and 50-53.

15 3) That Google incorrectly represented to the Court and to Perfect 10
16 that it had produced to Perfect 10 “all notices received by Google regarding
17 intellectual property violations” and “all underlying notices of infringement.”
18 Zada Supp. Decl. ¶9.

19 4) That Google did not produce to Perfect 10 a “spreadsheet-type
20 document summarizing DMCA notices received, the identity of the notifying
21 party and the accused infringer, and the actions (if any) taken in response.” Zada
22 Supp. Decl. ¶8, Exh. 42, pages 14-15, 83-96.

23 5) That Google has not produced to Perfect 10 thousands of DMCA
24 notices that it has received. Zada Supp. Decl. ¶9.

25 Once this Court makes such findings, the findings may then be
26 communicated to Judge Matz, who can then determine if sanctions are warranted.
27
28

1
2 **VI. CONCLUSION.**

3 This Court must maintain an even-handed policy towards discovery. Both
4 sides must be required to obey Court Orders; otherwise, the legal process will
5 break down. Perfect 10 is entitled to receive all documents covered by this
6 Court's May 22, 2006 Order and Judge Matz's May 13, 2008 Order that are the
7 subject of the Sanctions Motion. There is no basis to deny Perfect 10 all such
8 documents, which are relevant not only to the pending DMCA Motions, but to the
9 entire case. Accordingly, this Court should order that such documents be
10 immediately produced, and that the location of various categories of documents
11 be identified by bates number. In addition, this Court should either impose
12 appropriate sanctions or make factual findings regarding Google's failure to
13 comply with Court-ordered discovery, which can then be forwarded to Judge
14 Matz.

15 Dated: June 8, 2010

Respectfully submitted,

LAW OFFICES OF JEFFREY N. MAUSNER

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18

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