

1 Jeffrey N. Mausner (State Bar No. 122385)  
2 jeff@mausnerlaw.com  
3 David N. Schultz (State Bar No. 123094)  
4 Schu1984@yahoo.com  
5 Law Offices of Jeffrey N. Mausner  
6 21800 Oxnard Street, Suite 910  
7 Woodland Hills, California 91367-3640  
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  
13 CENTRAL DISTRICT OF CALIFORNIA

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

16 Plaintiff,

17 v.

18 GOOGLE INC., a corporation,

19 Defendants.

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

**Before Judge A. Howard Matz**

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PLAINTIFF PERFECT 10, INC.'S  
MOTION FOR REVIEW OF, AND  
OBJECTIONS TO, MAGISTRATE  
JUDGE HILLMAN'S JUNE 16, 2010  
ORDER ON PERFECT 10'S MOTION  
FOR EVIDENTIARY AND OTHER  
SANCTIONS AGAINST DEFENDANT  
GOOGLE INC.**

**[NOTICE OF MOTION SUBMITTED  
SEPARATELY HEREWITH]**

***PUBLIC REDACTED VERSION***

Date: August 16, 2010

Time: 10:00 a.m.

Place: Courtroom 14, Courtroom of the  
Honorable A. Howard Matz

Discovery Cut-Off Date: None Set

Pretrial Conference Date: None Set

Trial Date: None Set

**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

I. INTRODUCTION AND SUMMARY OF ARGUMENT. .... 1

    A. Judge Hillman’s Ruling Regarding “DMCA logs in an electronic spreadsheet format” Is Clearly Erroneous. .... 3

    B. Judge Hillman’s Ruling Regarding “DMCA Termination Notices” Is Clearly Erroneous. .... 3

    C. Judge Hillman’s Ruling Regarding Third Party DMCA Notices Is Clearly Erroneous And Contrary To Law. .... 4

    D. Judge Hillman’s Rulings Regarding Blogger Are Clearly Erroneous And Contrary To Law. .... 5

    E. Judge Hillman’s Ruling That Google Has Not Violated Court Orders Is Contrary To Law. .... 7

    F. Judge Hillman’s Ruling That Perfect 10 Has Suffered No Resulting Prejudice Is Clearly Erroneous And Contrary To Law. .... 7

II. RELEVANT PROCEDURAL BACKGROUND..... 8

III. LEGAL STANDARDS APPLICABLE TO THIS MOTION..... 9

IV. JUDGE HILLMAN’S RULINGS REGARDING GOOGLE’S PRODUCTION OF A DMCA LOG ARE CLEARLY ERRONEOUS AND CONTRARY TO LAW..... 10

V. THIS COURT SHOULD SUSTAIN PERFECT 10’S OBJECTIONS TO JUDGE HILLMAN’S RULING REGARDING DMCA TERMINATION NOTICES. .... 13

VI. THIS COURT SHOULD SUSTAIN PERFECT 10’S OBJECTIONS TO JUDGE HILLMAN’S RULING REGARDING THIRD-PARTY DMCA NOTICES. .... 16

VII. JUDGE HILLMAN’S RULINGS REGARDING BLOGGER ARE CLEARLY ERRONEOUS AND CONTRARY TO LAW. .... 18

VIII. JUDGE HILLMAN’S CONCLUSION THAT GOOGLE HAS NOT VIOLATED ANY COURT ORDERS IS CONTRARY TO LAW. .... 21

IX. JUDGE HILLMAN’S CONCLUSION THAT GOOGLE’S FAILURE TO COMPLY WITH COURT ORDERS REGARDING DISCOVERY HAS NOT PREJUDICED PERFECT 10 IS CONTRARY TO LAW. .... 21

X. CONCLUSION. .... 23

**TABLE OF AUTHORITIES**

**Cases**

*Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404 (9th Cir. 1991).....9

*Columbia Pictures, Inc. v. Bunnell*, 245 F.R.D. 443 (C.D. Cal. 2007).....10

*Grimes v. City and County of San Francisco*, 951 F.2d 236 (9th Cir. 1991) .....9

*Perfect 10, Inc. v. CCBill, LLC*, 488 F.3d 1102 (9th Cir.), *cert denied*,  
128 S. Ct. 709 (2007). .....11

*United States v. McConney*, 728 F.2d 1195 (9th Cir. 1984) .....10

*United States v. United States Gypsum Co.*, 333 U.S. 364 (1948).....9

**Statutes**

17 U.S.C. § 512 .....10

28 U.S.C. § 636 .....9

**Rules**

Fed. R. Civ. P. 26z.....6, 20

Fed. R. Civ. P. 72.....9

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

2 Plaintiff Perfect 10, Inc. (“Perfect 10”) moves this Court to review and set  
3 aside portions of Magistrate Judge Hillman’s June 16, 2010 Order (the “Order” or the  
4 “June 16 Order”), granting in part and denying in part Perfect 10’s Motion for  
5 Evidentiary and Other Sanctions against Defendant Google Inc. (the “Motion”).<sup>1</sup> As  
6 explained below, the Order is clearly erroneous and contrary to law because Judge  
7 Hillman repeatedly determined that Google had produced documents in response to  
8 discovery orders *when such documents have never been produced*. As a result,  
9 Judge Hillman mistakenly concluded that Google had not violated any Court Orders  
10 compelling Google to comply with discovery.

11 Perfect 10 filed the Motion because Google’s failure to produce thousands of  
12 documents, in violation of multiple Court Orders, has dramatically impacted Perfect  
13 10’s ability to fully and fairly oppose Google’s pending summary judgment motions  
14 and to otherwise litigate the case. In particular, Google has failed to produce the  
15 following critical documents ordered by the Court:

16 1) **Google’s DMCA Log**, in violation of this Court’s May 13, 2008 Order,  
17 which compelled Google to produce its DMCA Log in response to Perfect 10’s  
18 Request for Production (“RFP”) No. 196 and defined “DMCA log” as “a  
19 spreadsheet-type document summarizing DMCA notices received, the identity of the  
20 notifying party and the accused infringer, and the actions (if any) taken in response.”  
21 *See* May 13, 2008 Order (Docket No. 294) at 5:1-9.<sup>2</sup>

22  
23  
24 <sup>1</sup> For the convenience of the Court, a copy of the June 16 Order (Docket No. 896) is  
attached as Exhibit 1 to Perfect 10’s Notice of Motion, submitted separately herewith.

25 <sup>2</sup> *See, e.g.*, Perfect 10’s Memorandum of Points and Authorities in support of the  
26 Motion (Docket No. 633) (“Memo”), at 2:12-3:4, 6:6-9:24; Perfect 10’s Reply  
27 Memorandum of Points and Authorities in support of the Motion (Docket No. 683)  
28 (“Reply Memo”) at 6:4-8:16; Declaration of Dr. Norman Zada in support of the  
Motion (Docket No. 635) (“Zada Decl.”), ¶4, Exh. 1; Reply Declaration of Dr.  
Norman Zada in support of the Motion (Docket No. 681) (“Zada Reply Decl.”), ¶31.

1           2)     **Google’s Notices of Termination of Repeat Infringers**, in violation of  
2 Judge Hillman’s May 22, 2006 Order concerning RFP Nos. 26 and 27 (as modified),  
3 which compelled Google to produce “[a]ll notices of termination issued by Google as  
4 a result of alleged intellectual property violations.” *See* May 22, 2006 Order (Docket  
5 No. 163) at 5:15-20. *See, e.g.*, Memo at 13:4-24; Reply Memo at 12:12-13:3; Zada  
6 Reply Decl. ¶¶24, 29, 31, Exh. 39.

7           3)     **Third-Party DMCA Notices**, in violation of Judge Hillman’s May 22,  
8 2006 Order concerning RFP No. 51<sup>3</sup> and Google’s own subsequent representations  
9 that it had already produced documents responsive to RFP No. 51, “constituting all  
10 notices received by Google regarding intellectual property violations” and “all  
11 underlying notices of infringement.” *See* May 22, 2006 Order at 2:25-27. *See, e.g.*,  
12 Memo at 3:22-4:14; 11:24-13:3; Reply Memo at 9:7-12:11.

13           Despite the clear and compelling evidence of discovery abuse submitted by  
14 Perfect 10, Judge Hillman denied Perfect 10’s request for sanctions and ruled, among  
15 other things, that Google had not committed “any sanctionable violation of a  
16 Discovery Order.” Order at 1. Moreover, although Judge Hillman granted in part  
17 Perfect 10’s request for alternative relief and compelled Google to produce certain  
18 additional documents, his rulings concerning this relief are filled with incorrect  
19 statements that are clearly erroneous and contrary to law. Accordingly, this Court

20 \_\_\_\_\_  
21 <sup>3</sup> RFP No. 51 states as follows:

22           GOOGLE’S DMCA Log for the years 2001 through 2005, or any other  
23 DOCUMENTS sufficient to IDENTIFY all ENTITIES other than  
24 Perfect 10 from whom GOOGLE has received a notice regarding an  
25 intellectual property violation, the URLs complained about in each  
26 notice from each such ENTITY, and the dates of the complaints for each  
27 such URL. These DOCUMENTS should be provided in electronic  
28 format if available.

29 Declaration of Jeffrey N. Mausner in support of the Motion, filed on November 29,  
30 2009 (Docket No. 618) (“Mausner Decl.”) ¶2, Exh. A, pp. 12-13. Because Google  
31 admittedly did not produce a DMCA log in response to RFP No. 51, Perfect 10 was  
32 entitled to all notices received by Google from third parties regarding an intellectual  
33 property violation, including all DMCA notices. To date, however, Perfect 10 has  
34 received neither the log nor the requested notices.

1 should sustain Perfect 10's objections and set aside or modify the following portions  
2 of the June 16 Order:

3 **A. Judge Hillman's Ruling Regarding "DMCA logs in an electronic**  
4 **spreadsheet format" Is Clearly Erroneous.**

5 The Order states that "[s]uch documents were already produced in TIFF format  
6 as to Web Search, Image Search and AdSense." Order at 2, ¶1. **In fact, Google has**  
7 **never produced the DMCA Log this Court ordered Google to produce in its**  
8 **May 13, 2008 Order.** Instead of producing the "spreadsheet-type" document  
9 required by this Court, Google merely identified approximately xxxxxx pages of  
10 disorganized, duplicative and unreadable documents that Google previously had  
11 produced (the "Disorganized DMCA Pages") as its alleged log. The Disorganized  
12 DMCA Pages are a gigantic mess that fails to satisfy this Court's Order [REDACTED]

13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED] Accordingly, Judge  
17 Hillman's ruling regarding "DMCA logs" is clearly erroneous [*see* Section IV,  
18 below].

19 **B. Judge Hillman's Ruling Regarding "DMCA Termination Notices"**  
20 **Is Clearly Erroneous.**

21 The Order states that "[s]uch documents were already produced as to Web  
22 Search, Image Search and AdSense." Order at 2, ¶2. In fact, although Google was  
23 ordered to produce "all notices of termination" – which should have obligated Google  
24 to produce thousands of pages of documents – Google has only produced a handful of  
25 termination notices. **Google has never produced any termination notices that**  
26 **resulted from DMCA notices submitted to Google by third parties.** The number  
27 of termination notices issued by Google as a result of third party DMCA notices  
28 should dwarf the number of termination notices issued as a result of Perfect 10's

1 DMCA notices. Furthermore, **Google has failed to produce any termination**  
2 **notices dated after March 4, 2006.** Google has also failed to produce any  
3 termination notices related to any termination listed on the document Google  
4 characterizes as its “AdSense Repeat Infringer Tracking Sheet.” Moreover, a  
5 substantial percentage of the few documents that Google has identified as termination  
6 notices are not even termination notices. Rather, they are actually Perfect 10 DMCA  
7 notices, error messages, or reinstatement notices. Accordingly, Judge Hillman’s  
8 ruling regarding “DMCA termination notices” is simply wrong [*see* Section V,  
9 below].

10 **C. Judge Hillman’s Ruling Regarding Third Party DMCA Notices Is**  
11 **Clearly Erroneous And Contrary To Law.**

12 The Order states that “Third Party DMCA Notices were never requested for  
13 Web Search, Image Search, AdSense, nor for Blogger, and therefore are not ordered  
14 produced.” In fact, Perfect 10 requested such notices in RFP No. 51, which  
15 contained broad language that necessarily included all DMCA notices. *See* footnote  
16 3, *supra*. In response to RFP No. 51, Google was required to produce documents that  
17 identified every URL contained in a notice received by Google. Because Google  
18 never produced a complete DMCA log, RFP No. 51 required Google to produce all  
19 intellectual property notices, including all DMCA notices. Nevertheless, Google  
20 admits that it has not produced thousands of DMCA notices, despite having  
21 previously represented that it had produced “all notices received by Google regarding  
22 intellectual property violations.” Accordingly, Judge Hillman’s ruling regarding  
23 DMCA notices, which does not even mention Google’s failure to comply with RFP  
24 51 or Google’s previous statements that it had already produced all notices regarding  
25 intellectual property violations, is clearly erroneous and contrary to law [*see* Section  
26 VI, below].

1           **D. Judge Hillman’s Rulings Regarding Blogger Are Clearly Erroneous**  
2           **And Contrary To Law.**

3           The term “Blogger” refers to websites whose domain name includes the term  
4 blogger.com or blogspot.com. Google links to such websites in its Web Search and  
5 Image Search results and also hosts such websites. The Order states that Perfect 10  
6 did not propound requests for Blogger DMCA logs, Blogger DMCA termination  
7 notices or Blogger third-party DMCA notices, and they “are not ordered produced.”  
8 Order at 2, ¶¶1-3. The Order also states that “Blogger Repeat Infringer Tracking  
9 Sheets were never formally requested, and are not ordered produced.” *Id.* at 3, ¶5.  
10 Furthermore, the Order states that “Perfect 10 has not persuaded this Court . . . that  
11 Blogger-related documents were embraced within Discovery Orders issued prior to  
12 the date that Blogger was formally added to the case in 2008.” *Id.* at 1.

13           In fact, Blogger has been part of the case since at least January 2005, when  
14 Perfect 10 filed its First Amended Complaint in this action – **before Perfect 10**  
15 **served any of the discovery at issue in the Order.** The First Amended Complaint  
16 includes claims for copyright infringement arising out of Google’s alleged copying of  
17 copyrighted Perfect 10 images (“P10 Images”). These allegations cover any copies  
18 of P10 Images that Google made on its blogger.com and blogspot.com websites.  
19 Moreover, the First Amended Complaint also includes copyright infringement claims  
20 arising out of links in Google’s Web Search results and images in Google’s Image  
21 Search results. Blogger sites appear in Google’s Web Search and Image Search  
22 results just like any other website. Therefore, when Perfect 10’s discovery requests  
23 sought **all** notices of termination, a DMCA log summarizing all notices received by  
24 Google, and documents sufficient to identify all third parties from whom Google had  
25 received a notice regarding an intellectual property violation, the URLs complained  
26 about in each notice, and the dates of the complaints for each such URL, **these**  
27 **requests necessarily included requests for documents concerning Blogger.**  
28 Perfect 10’s discovery requests applied to websites with URLs that included the



1 terms blogger.com or blogspot.com just as much as they applied to other websites,  
2 such as 123celebs.com. Perfect 10's discovery requests applied to **all** websites to  
3 which Google linked, via either its Web Search or its Image Search results. The  
4 Order's arbitrary attempt to distinguish between discovery requests concerning  
5 blogger.com and blogspot.com websites, and those concerning any other website, is  
6 unsupportable. Accordingly, Judge Hillman's rulings in the Order that Perfect 10 did  
7 not propound Blogger-related discovery and that Blogger documents are not ordered  
8 produced are clearly erroneous and contrary to law.

9         Furthermore, it is undisputed that Google has produced some documents – but  
10 not all documents – concerning Blogger. Google now contends that it merely  
11 produced these documents voluntarily. Google never informed Perfect 10, however,  
12 that it was only producing some Blogger documents that it chose to produce, and not  
13 others. For example, when Google produced what it characterized as a “Blogger  
14 repeat infringer tracking spreadsheet,” it did not inform Perfect 10 that it was  
15 simultaneously withholding thousands of DMCA notices and notices of termination  
16 concerning Blogger which were not mentioned on the “tracking spreadsheet” it did  
17 produce. Google cannot simply pick and choose which documents concerning  
18 Blogger it wishes to produce. Under these circumstances, Judge Hillman's failure to  
19 order Google to produce documents concerning Blogger is clearly erroneous and  
20 contrary to law.

21         Finally, the Order explicitly states that Blogger became part of the case in  
22 2008. Since that date, Google was under a continuing duty under Fed. R. Civ. P. 26  
23 to supplement its prior production of documents and produce documents concerning  
24 Blogger that unquestionably were now responsive to Perfect 10's earlier document  
25 requests. For example, once “Blogger was formally added to the case,” Google was  
26 obligated to produce “all notices of termination” concerning Blogger, as sought by  
27 Perfect 10 in RFP Nos. 26 and 27 and as required by Judge Hillman's May 22, 2006  
28 Order. For this reason as well, the rulings set forth in Judge Hillman's June 16

1 Order's concerning Blogger documents are clearly erroneous and contrary to law [*see*  
2 Section VII, below].

3 **E. Judge Hillman's Ruling That Google Has Not Violated Court**  
4 **Orders Is Contrary To Law.**

5 The Order states that "Perfect 10 has not persuaded this Court that any  
6 sanctionable violation of a Discovery Order has occurred." Order at 1. In fact, at the  
7 very least: (i) Google has violated Judge Hillman's May 22, 2006 Order by failing to  
8 produce *all* notices of termination; and (ii) Google has violated this Court's May 13,  
9 2008 Order by failing to produce the "spreadsheet-type" DMCA log required by that  
10 Order [*see* Section VIII, below].

11 **F. Judge Hillman's Ruling That Perfect 10 Has Suffered No Resulting**  
12 **Prejudice Is Clearly Erroneous And Contrary To Law.**

13 The Order states that Perfect 10 has suffered no "resulting prejudice" as a  
14 result of Google's alleged failure to comply with discovery. Order at 1. In fact,  
15 Perfect 10 has demonstrated that it has suffered significant prejudice. For example,  
16 had Google produced all notices of termination (as required by Judge Hillman's May  
17 22, 2006 Order), Perfect 10 would have been able to conclusively demonstrate that  
18 Google has not suitably implemented a policy against repeat infringers and thus does  
19 not qualify for a safe harbor under the Digital Millennium Copyright Act (the  
20 "DMCA"). Had Google produced the DMCA log required by this Court's May 13,  
21 2008 Order, Perfect 10 would have been able to easily show that Google has received  
22 numerous DMCA notices regarding the same infringer but has failed to act, in  
23 violation of its own alleged policy. *See, e.g.*, Memo at 22:1-21. Moreover, this Court  
24 would have been able to more clearly and easily address the issues raised by  
25 Google's pending DMCA summary judgment motions (the "DMCA Motions"). For  
26 example, this [REDACTED]  
27 [REDACTED] had the Court  
28 had access to the DMCA log that it ordered Google to produce. *See* Perfect 10's

1 Response to Defendant Google Inc.’s Statement Regarding the Status of DMCA-  
2 Related Discovery Issues, filed June 8, 2010 (Docket No. 889) (“Perfect 10’s  
3 Response”), at 10:6-28. Accordingly, Judge Hillman’s ruling regarding the prejudice  
4 suffered by Perfect 10 is clearly erroneous and contrary to law [*see* Section IX,  
5 below].

6 **II. RELEVANT PROCEDURAL BACKGROUND.**

7 Perfect 10 filed the Motion on November 29, 2009. One of the alternative  
8 forms of relief sought by Perfect 10 in the Motion was an Order compelling Google  
9 to produce the documents that it had failed to produce, as discussed in the Motion,  
10 and giving Perfect 10 an opportunity to file a sur-reply in connection with the DMCA  
11 Motions once it received these documents. *See* Perfect 10’s Notice of Motion  
12 (Docket No. 617), ¶3; Proposed Order (Docket No. 617-2), ¶3.

13 In an Order dated December 16, 2009 (Docket No. 684), this Court removed  
14 the hearing on the Motion from its December 21, 2009 calendar and transferred the  
15 Motion to Judge Hillman for his determination, report, and recommendation. On  
16 January 15, 2010, a hearing on the Motion was held before Judge Hillman.  
17 Thereafter, in a January 27, 2010 Order (Docket No. 759), Judge Hillman ordered the  
18 parties to “meet and confer regarding Perfect 10’s Sanctions Motion as soon as  
19 practicable for all counsel.” Judge Hillman specifically noted that the documents at  
20 issue in the Motion “could be material to Perfect 10’s opposition to the pending  
21 Motions for Summary Judgment.”

22 Notwithstanding Judge Hillman’s Order requiring the parties to meet and  
23 confer “as soon as practicable for all counsel,” Google delayed the “meet and confer”  
24 process for almost three months, until April 19, 2010.<sup>4</sup> As Perfect 10 explained,  
25 Google was trying to delay production of these documents until after this Court ruled

26 \_\_\_\_\_  
27 <sup>4</sup> Google’s attempt to delay the Court-ordered “meet and confer” process is described  
28 in Perfect 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).

1 on the DMCA Motions, in order to prevent Perfect 10 and this Court from having  
2 highly relevant documents which could influence the outcome of the DMCA  
3 Motions. *See, e.g.*, Perfect 10’s Response (Docket No. 889), at 4 n.4. Google even  
4 conceded during the “meet and confer” process that it had responsive documents  
5 covered by the Motion that it had failed to produce.<sup>5</sup> Finally, after further briefing by  
6 the parties, Judge Hillman issued the Order.

7 **III. LEGAL STANDARDS APPLICABLE TO THIS MOTION.**

8 Rulings of magistrate judges on non-dispositive motions, such as Judge  
9 Hillman’s ruling on the Motion set forth in the June 16 Order, may be set aside or  
10 modified by the district court if these rulings are “clearly erroneous or contrary to  
11 law.” 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. Rule 72(a); *Bhan v. NME Hospitals,*  
12 *Inc.*, 929 F.2d 1404, 1414 (9th Cir. 1991). *See Grimes v. City and County of San*  
13 *Francisco*, 951 F.2d 236, 240 (9th Cir. 1991) (pretrial discovery matters are generally  
14 considered non-dispositive motions). The “clearly erroneous” standard applies to a  
15 magistrate judge’s factual findings. “A finding is ‘clearly erroneous’ when although  
16 there is evidence to support it, the reviewing court on the entire evidence is left with  
17 the definite and firm conviction that a mistake has been committed.” *United States v.*  
18 *United States Gypsum Co.*, 333 U.S. 364, 395 (1948). The “contrary to law” standard

---

19 <sup>5</sup> These concessions are found in: (i) the February 16, 2010 letter from Google  
20 attorney Rachel Herrick Kassabian to Perfect 10 attorney Jeffrey N. Mausner,  
21 attached as Exhibit A to the Declaration of Jeffrey N. Mausner in support of Perfect  
22 10’s Reply, filed April 27, 2010 (Docket No. 859-1) (“Mausner April 27, 2010  
23 Decl.”) [*see* Perfect 10’s Reply, filed April 27, 2010 (Docket No. 859), at 2:21-6:1];  
24 and (ii) Google’s Response to Perfect 10, Inc.’s Statement Regarding the Status of  
25 Perfect 10’s Motion for Evidentiary and Other Sanctions, filed April 23, 2010  
26 (Docket No. 856), at 4:28-5:1 (asserting that any additional “DMCA-related  
27 documents” that Google would produce “are merely cumulative of categories of  
28 documents Google previously produced”). As Perfect 10 has previously pointed out,  
documents relating to repeat infringement cannot be “merely cumulative.” These  
documents are particularly relevant to the question of whether Google has properly  
terminated repeat infringers. The more documents there are, the more repeat  
infringements there are. One or two notices regarding an alleged infringer may not  
constitute repeat infringement, but twenty such notices certainly would. Therefore,  
Google must produce all such notices, even if they are allegedly “merely  
cumulative.” *See* Perfect 10’s Reply, filed April 27, 2010 (Docket No. 859), at 5:3-  
6:1; Perfect 10’s Response, filed June 8, 2010 (Docket No. 889) at 3 n.3.

1 applies to a magistrate judge’s legal conclusions, which are reviewed independently  
2 and *de novo* by the district judge. *See, e.g., United States v. McConney*, 728 F.2d  
3 1195, 1200-01 (9th Cir. 1984); *Columbia Pictures, Inc. v. Bunnell*, 245 F.R.D. 443,  
4 446 (C.D. Cal. 2007). Here, as explained in Sections IV through IX, below, Judge  
5 Hillman’s rulings in the June 16 Order are clearly erroneous and/or contrary to law.

6 **IV. JUDGE HILLMAN’S RULINGS REGARDING GOOGLE’S**  
7 **PRODUCTION OF A DMCA LOG ARE CLEARLY ERRONEOUS AND**  
8 **CONTRARY TO LAW.**

9 The Order states that Google has already produced DMCA logs “in TIFF  
10 format as to Web Search, Image Search and AdSense.” Order at 2, ¶1. Furthermore,  
11 the Order concludes that Google’s failure to produce the DMCA log required by this  
12 Court’s May 13, 2008 Order does not constitute a “sanctionable violation of a  
13 Discovery Order.” Order at 1. As explained below, these rulings are clearly  
14 erroneous and contrary to law.

15 On January 18, 2007, Perfect 10 served RFP No. 196, seeking “Google’s  
16 DMCA log of DMCA notices received from 3<sup>rd</sup> parties.” Mausner Decl. ¶6, Exh. E,  
17 at 16:8. All of Perfect 10’s requests for production of documents, including the set  
18 containing RFP No. 196, provided: “*If a DOCUMENT is available in electronic*  
19 *form, it should be produced in that electronic form, even if it is also available in hard*  
20 *copy.*” *Id.*, Exh. E, at 2:22-23 (emphasis in original). Google previously had denied a  
21 Request for Admission stating: “Admit that Google does not keep a log of DMCA  
22 notices.” *Id.* ¶4, Exh. C, p. 26, Request No. 285. Perfect 10 sought Google’s DMCA  
23 log because it believed that production of this log was critical to the issue of Google’s  
24 eligibility for a DMCA safe harbor.<sup>6</sup>

25  
26 <sup>6</sup> In order to be eligible for the safe harbor provisions of the DMCA, a service  
27 provider such as Google must have “adopted and reasonably implemented . . . a  
28 policy that provides for the termination of . . . repeat infringers.” 17. U.S.C. § 512(i).  
The Ninth Circuit has held that a defendant’s failure to implement a “repeat  
infringer” policy does not have to be connected with the plaintiff in the lawsuit at  
hand. Rather, the plaintiff can submit evidence of the defendant’s failure to adopt

1 In its response to RFP No. 196, dated February 23, 2007, Google refused to  
2 produce its DMCA log. Mausner Decl., ¶7, Exh. F, p. 35, Response No. 196. Perfect  
3 10 then filed a motion to compel regarding Request No. 196. In his February 22,  
4 2008 Order, Judge Hillman granted the motion to compel and ordered Google to  
5 produce “Google’s DMCA Log.” *Id.* ¶8, Exh. G, p. 7, lines 1-2. Google objected to  
6 this order and sought review with this Court. In pleadings filed in support of its  
7 objections, Google continued to represent that it maintained a DMCA log. *Id.* ¶9,  
8 Exh. H, pp. 16-18. In its May 13, 2008 Order, this Court overruled Google’s  
9 objections and ordered Google to produce its DMCA log, which the order defined as  
10 “a spreadsheet-type document summarizing DMCA notices received, the identity of  
11 the notifying party and the accused infringer, and the actions (if any) taken in  
12 response.” May 13, 2008 Order (Docket No. 294) at 5:1-9.

13 ***Google has never obeyed this Court’s May 13, 2008 Order.*** Instead of  
14 producing the spreadsheet-type log required by the order, Google sent Perfect 10 a  
15 June 13, 2008 email claiming that its “DMCA log” that was responsive to this  
16 Court’s May 13, 2008 Order consisted of the Disorganized DMCA Pages –  
17 approximately ██████ pages of disorganized documents. *See* Mausner Decl. ¶12,  
18 Exh. K (the June 13, 2008 mail). The ██████ pages identified by Google fail to  
19 comply with this Court’s May 13, 2008 Order for at least four reasons.

20 First, Google has never produced a DMCA log in an “electronic spreadsheet  
21 format,” as required by this Court’s May 13, 2008 Order. A DMCA log produced in  
22 Microsoft Excel spreadsheet format would comply with this requirement and would  
23 be sortable and searchable. The ██████ separate pages identified by Google,  
24 however, are neither a spreadsheet nor a log. Rather, they are just a disorganized  
25

---

26 and implement such a policy in connection with third-parties as well. *See Perfect 10,*  
27 *Inc. v. CCBill, LLC*, 488 F.3d 1102, 1115 (9th Cir.) (“we remand to the district court  
28 to determine whether ***third-party notices made CCBill and CWIE aware that it provided services to repeat infringers, and if so, whether they responded appropriately***”) (emphasis added), *cert denied*, 128 S. Ct. 709 (2007).

1 mess of separate documents, that are often unreadable and duplicative. These  
2 documents could not be searched, sorted, or used for any purpose for which a DMCA  
3 log is created. Zada Decl. ¶4, Exh. 1.

4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED] Zada Decl. ¶4, Exhs. 1,

9 9. Nevertheless, Judge Hillman incorrectly ruled that Google already produced such  
10 logs. Order at 2, ¶1.<sup>7</sup>

11 [REDACTED]  
12 [REDACTED] This  
13 information is critical to the issue of whether Google suitably terminated repeat  
14 infringers and thus is entitled to a DMCA safe harbor.<sup>8</sup>

15 Fourth, the [REDACTED] Disorganized DMCA Pages identified by Google fail to  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED] For these reasons, it is inconceivable that Google could have used  
21 the Disorganized DMCA Pages to properly keep track of repeat infringers.

22 \_\_\_\_\_  
23 <sup>7</sup> [REDACTED]  
24 [REDACTED]  
25 [REDACTED]

26 <sup>8</sup> Because the same webmaster may operate many different websites, the identity of  
27 the alleged infringer was critical information that would have allowed Perfect 10 to  
28 demonstrate that Google had actually received numerous notices regarding the same  
webmaster, and yet had failed to act. Zada Decl. ¶40.

1 Moreover, the documents found in the [REDACTED] Disorganized DMCA Pages that  
2 concern the processing of Perfect 10's DMCA notices are often incomplete, because  
3 they fail to include the date the notice was processed or the action taken by Google in  
4 response to the notice. Accordingly, it is impossible for Perfect 10 to use these  
5 documents to determine when, if, and to what extent Google processed Perfect 10's  
6 DMCA notices. *See, e.g., Zada Decl.* ¶44.

7 For all of these reasons, Judge Hillman's rulings regarding Google's  
8 production of DMCA logs, and his conclusion that Google has not violated this  
9 Court's May 13, 2008 Order regarding production of a spreadsheet-style DMCA log,  
10 are clearly erroneous and contrary to law. Accordingly, this Court should sustain  
11 Perfect 10's objections to these portions of the June 16 Order and compel Google to  
12 produce the DMCA log required by the Court's May 13, 2008 Order. *See also* Memo  
13 at 2:12-3:4, 6:6-9:24; Reply Memo at 6:4-8:16; Supplemental Declaration of Dr.  
14 Norman Zada, lodged under seal on June 8, 2010 (order for filing entered but not yet  
15 on the Docket) ("Zada Supp. Decl.") ¶¶8-9, Exh. 42.

16 **V. THIS COURT SHOULD SUSTAIN PERFECT 10'S OBJECTIONS TO**  
17 **JUDGE HILLMAN'S RULING REGARDING DMCA TERMINATION**  
18 **NOTICES.**

19 This Court should set aside or modify Judge Hillman's ruling that DMCA  
20 termination notices "were already produced as to Web Search, Image Search and  
21 AdSense." *See* Order at 2, ¶2. This ruling is clearly erroneous and contrary to law  
22 because **Google has produced no termination notices related to third party**  
23 **complaints and no termination notices dated after March 4, 2006.**

24 In his May 22, 2006 Order, Judge Hillman ordered Google to produce "[a]ll  
25 notices of termination issued by Google as a result of alleged intellectual property  
26 violations." (Docket No. 163, at 5:15-20, concerning Document Request Nos. 26 and  
27 27, as modified). Google has failed to produce all such notices, for at least five  
28 reasons. First, Google has only produced a handful of termination notices, all of



1 which relate solely to DMCA notices submitted to Google by Perfect 10. **None of**  
2 **the termination notices produced by Google resulted from third party DMCA**  
3 **notices.** *See, e.g.,* Zada Decl. ¶7; Zada Supp. Decl. ¶¶4-7, Exh. 42. Second, Google  
4 has failed to produce any actual termination notices dated after March 4, 2006. Zada  
5 Supp. Decl., ¶¶4-7, Exh. 42. Third, Google has failed to produce a single termination  
6 notice related to any termination listed in its AdSense Repeat Infringer Tracking  
7 Spreadsheets. *Id.* Fourth, Google has not supplemented its production of termination  
8 notices since September 20, 2008. *Id.* ¶12. Fifth, Google admits, in a February 16,  
9 2010 letter from Google attorney Rachel Herrick Kassabian to Perfect 10 attorney  
10 Jeffrey N. Mausner, that it possesses notices of termination that it has not produced.  
11 *See* Mausner April 27, 2010 Decl. (Docket No. 859-1), Exh. A. *See also* Memo at  
12 13:4-24; Reply Memo at 12:12-13:3; Perfect 10's Reply (Docket No. 859) at 2:21-  
13 4:7; Perfect 10's Response (Docket No. 889) at 7:1-16.

14 Judge Hillman nevertheless found that DMCA termination notices “were  
15 already produced as to Web Search, Image Search and AdSense,” because he  
16 apparently believed Google's assertions regarding this issue. *See* Google's  
17 Statement, filed on June 1, 2010 (Docket No. 885), at 7:2-15. The only evidence  
18 relied upon by Google, however, utterly fails to support a finding that Google has  
19 produced all notices of termination, as required by Judge Hillman's May 22, 2006  
20 Order.

21 First, the evidence submitted by Google in opposition to the Motion only  
22 identified **five pages** of documents which Google asserted were examples of  
23 termination notices. *See* Declaration of Rachel Herrick Kassabian in Opposition to  
24 the Motion, filed December 7, 2009 (Docket No. 645), ¶25 and Exh. S. Second, Ms.  
25 Kassabian's Surreply Declaration, filed January 11, 2010 (Docket Nos. 719, 720-1),  
26 asserts that the documents Google produced bearing Bates numbers [REDACTED]  
27 [REDACTED] constitute termination  
28 notices. *Id.* ¶4. **None of the documents bearing these Bates numbers, however,**

1 **constitutes a termination notice issued as a result of a DMCA notice received**  
2 **from a third party other than Perfect 10.** Thus, the documents identified by Ms.  
3 Kassabian are only a [REDACTED] of the notices that Google was ordered to produce.  
4 Third, many of the documents identified by Google as “termination notices,” were  
5 not even termination notices. Instead, they were Perfect 10 DMCA notices (*see, e.g.,*  
6 [REDACTED]), error messages (*see, e.g.,*  
7 [REDACTED]), or reinstatement notices (*see,*  
8 *e.g.,* [REDACTED]).

9 Obviously, if Google has not produced any termination notices issued as a  
10 result of third party notices, or any termination notices dated after March 4, 2006, it  
11 has not produced all notices of termination as a result of intellectual property  
12 violations, as required by Judge Hillman’s May 22, 2006 Order. Consequently,  
13 Google’s contention that it has suitably implemented a repeat infringer policy is  
14 either false or unproven. *See* Perfect 10’s Reply, filed on April 27, 2010 (Docket No.  
15 859) at 2:21-4:7. If Google had actually suitably terminated repeat infringers, it  
16 should have issued [REDACTED] termination notices, not the [REDACTED] of  
17 notices it actually has produced. In short, Judge Hillman’s finding that Google has  
18 produced termination notices as to Web Search, Image Search, and AdSearch, and his  
19 conclusion that Google has not violated the May 22, 2006 Order compelling Google  
20 to produce all notices of termination, are clearly erroneous and contrary to law.

21 More than four years ago, Google was ordered to produce “**all** notices of  
22 termination.” The operative word here is “all.” This Court should not allow Google  
23 to continue to withhold notices of termination. It should not allow Judge Hillman’s  
24 erroneous rulings regarding Google’s production of notices of termination to stand.  
25 Instead, this Court should sustain Perfect 10’s objections and order Google to  
26 immediately produce “all notices of termination issued by Google as a result of  
27 alleged intellectual property violations,” as required by the May 22, 2006 Order.  
28

1 **VI. THIS COURT SHOULD SUSTAIN PERFECT 10'S OBJECTIONS TO**  
2 **JUDGE HILLMAN'S RULING REGARDING THIRD-PARTY DMCA**  
3 **NOTICES.**

4 The Order states that "Third Party DMCA Notices were never requested for  
5 Web Search, Image Search [or] AdSense, . . . and therefore are not ordered  
6 produced." Order at 2, ¶3. This ruling is clearly erroneous and contrary to law, for at  
7 least two reasons.

8 First, Perfect 10 specifically sought production of such DMCA notices in  
9 RFP No. 51. RFP No. 51 asked Google to produce its DMCA log or:

10 any other DOCUMENTS sufficient to IDENTIFY all ENTITIES other  
11 than Perfect 10 from whom GOOGLE has received a notice regarding an  
12 intellectual property violation, the URLs complained about in each  
13 notice from each such ENTITY, and the dates of the complaints for each  
14 such URL.

15 Mausner Decl. ¶2, Exh. A, pp. 12-13. The request in RFP No. 51 that Google  
16 produce documents sufficient to identify all third parties from whom Google "has  
17 received a notice regarding an intellectual property violation" **is very broad, and**  
18 **includes the production of all third-party DMCA notices.** Any DMCA notice  
19 would necessarily fall into the category of documents requested by RFP No. 51,  
20 because it would identify an ENTITY from whom GOOGLE has received a notice  
21 regarding an intellectual property violation and provide the URLs complained about.  
22 In its response to RFP No. 51, dated April 18, 2005, Google agreed to produce non-  
23 privileged documents responsive to this request in its possession, custody, or control.  
24 Mausner Decl. ¶3 and Exh. B at 24:23-25:10. Judge Hillman specifically ordered  
25 Google to produce such documents in his May 22, 2006 Order. *See* May 22, 2006  
26 Order (Docket No. 163) at 2:25-27. Thereafter, Google specifically represented that  
27 it had not produced its DMCA log in response to RFP No. 51. Mausner Decl., ¶7,  
28 Exh. F, p. 35, Response No. 196. Because Google admittedly did not produce a

1 DMCA log in response to RFP No. 51, Perfect 10 thus was entitled to production of  
2 all DMCA notices sent by third parties to Google under the alternative language set  
3 forth in RFP No. 51. Accordingly, Judge Hillman’s ruling that Perfect 10 never  
4 requested third-party DMCA notices for Web Search, Image Search, or AdSense, and  
5 his refusal to order production of these third-party notices, are clearly erroneous and  
6 contrary to law.

7 Second, Google affirmatively represented, on two separate occasions, that it  
8 had produced all third-party DMCA notices. In its response to RFP No. 196, dated  
9 February 23, 2007, Google represented that it “already produced documents  
10 responsive to Request No. 51, *constituting all notices received by Google regarding*  
11 *intellectual property violations.*” Mausner Decl., ¶7, Exh. F, p. 35, Response No.  
12 196 (emphasis added). Furthermore, in its opposition to a motion to compel brought  
13 by Perfect 10, filed October 9, 2007, Google represented that it had produced “*all*  
14 *underlying notices of infringement.*” *Id.* ¶13, Exh. L, at 86:21-22 (emphasis added).  
15 Google never qualified these statements and never stated that it was withholding any  
16 DMCA notices. *See also* Memo at 7:10-8:8; Reply Memo at 9:7-12:11.

17 Now, years later, Google has finally admitted that it has not produced all such  
18 notices. Google concedes that it possesses third-party notices for Web Search, Image  
19 Search, AdWords, and AdSense that it has not produced. *See* February 16, 2010  
20 letter from Rachel Herrick Kassabian to Jeffrey N. Mausner at 3, found at Mausner  
21 April 27, 2010 Decl., Exh. A. It is undisputed that these Google programs were all at  
22 issue in the case since at least January 14, 2005, when Perfect 10 filed its First  
23 Amended Complaint referring to these programs. Google further concedes that it has  
24 failed to produce ██████████ DMCA notices sent to Google by the Motion Picture  
25 Association of America, the Recording Industry Association of America (the  
26 “RIAA”), Playboy, Microsoft, and others, concerning Google’s Blogger, AdSense,  
27 and Google Groups services. Google’s Opposition to the Motion, filed December 7,  
28 2009 (Docket No. 650) at 10, n.11. In fact, the RIAA and its European affiliate, the

1 IFPI, have sent [REDACTED]  
2 [REDACTED]  
3 [REDACTED]

***Google produced none of those RIAA and IFPI notices to Perfect 10.***

4 Zada Supp. Decl. ¶¶9, 12.

5 In light of Google’s clear and unequivocal statements, on two separate  
6 occasions, that it had already produced all DMCA notices, it is clearly erroneous and  
7 contrary to law for Judge Hillman to rule that Google has no obligation to produce  
8 these notices. For this reason as well, this Court should set aside Judge Hillman’s  
9 ruling regarding third party DMCA notices and instead order Google to produce all  
10 such notices forthwith.

11 **VII. JUDGE HILLMAN’S RULINGS REGARDING BLOGGER ARE**  
12 **CLEARLY ERRONEOUS AND CONTRARY TO LAW.**

13 The June 16 Order includes several rulings that erroneously differentiate  
14 between Blogger websites (those websites whose URL contains the term blogger.com  
15 or blogspot.com) and other websites. In the Order, Judge Hillman made the  
16 following rulings regarding Blogger: (1) Perfect 10 did not propound requests for  
17 Blogger DMCA logs, Blogger DMCA termination notices, or Blogger third-party  
18 DMCA notices, and they “are not ordered produced” [Order at 2, ¶¶1-3];  
19 (2) “Blogger Repeat Infringer Tracking Sheets were never formally requested, and  
20 are not ordered produced” [*id.* at 3, ¶5] and (3) “Perfect 10 has not persuaded this  
21 Court . . . that Blogger-related documents were embraced within Discovery Orders  
22 issued prior to the date that Blogger was formally added to the case in 2008” [*id.* at  
23 1]. These rulings are clearly erroneous and contrary to law, for at least six reasons.

24 First, the assertion that Blogger did not become part of the case until 2008,  
25 when Perfect 10 was granted leave to file its Second Amended Complaint, is plainly  
26 incorrect. On the contrary, Perfect 10’s First Amended Complaint, which was filed  
27 in January 2005, ***before Perfect 10 served any of the discovery at issue in the Order,***  
28 includes copyright infringement claims arising out of links in Google’s Web Search

1 results and images in Google’s Image Search results.

2 Google Web Search and Image Search results have linked to blogger.com and  
3 blogspot.com sites just like they link to other websites. Zada Reply Decl. ¶6, Exh.  
4 27. Therefore, Perfect 10’s discovery requests at issue in the Order – including those  
5 seeking *all* notices of termination, a DMCA log summarizing notices received by  
6 Google, and documents sufficient to identify the third parties from whom Google had  
7 received a notice regarding an intellectual property violation, the URLs complained  
8 about in each notice, and the dates of the complaints for each such URL – *necessarily*  
9 *included requests for documents concerning both blogger.com and blogspot.com*  
10 *websites.*

11 Second, Perfect 10’s First Amended Complaint, which was filed in January  
12 2005, *before Perfect 10 served any of the discovery at issue in the Order*, also  
13 includes copyright infringement claims arising out of allegations that Google engaged  
14 in the copying of P10 Images. These allegations cover any copies of P10 Images that  
15 were made on blogger.com or blogspot.com websites hosted by Google. For this  
16 reason as well, Judge Hillman’s statement that Blogger-related documents were not  
17 embraced within Discovery Orders issued before the filing of the Second Amended  
18 Complaint in July 2008 [Order at 1] is clearly erroneous.

19 Third, Blogger has been at issue in this case since at least *February 11, 2005*,  
20 when Perfect 10 first sent Google a DMCA notice regarding a blogspot.com website  
21 listed in Google’s Web Search results. Zada Reply Decl. ¶¶4-8, Exh. 27; Zada Supp.  
22 Decl. ¶10.

23 Fourth, more than 50% of all *blogger.com* websites are also Google AdSense  
24 sites. Zada Supp. Decl. ¶9. Google itself concedes that AdSense sites have always  
25 been in the case. *See also* First Amended Complaint (Docket No. 8), ¶¶31-34.  
26 Therefore, at the very minimum, all Blogger sites that have also been AdSense sites  
27 have been in the case since its inception.

28 Fifth, it is undisputed that Google has produced some documents – but not all

1 documents – concerning Blogger. Google contends that it merely produced these  
2 documents voluntarily, even though the documents were not covered by any request  
3 for production propounded to it by Perfect 10. *See, e.g.*, Google’s Opposition to the  
4 Motion, filed December 7, 2009 (Docket No. 650) at 7:10-13 (claiming that Google  
5 “voluntarily” produced its Blogger tracking spreadsheets on August 29, 2008).  
6 Google never informed Perfect 10, however, that it was producing these documents  
7 “voluntarily” but was simultaneously withholding other documents concerning  
8 Blogger, such as DMCA notices and notices of termination. Google cannot simply  
9 pick and choose which documents concerning Blogger it wishes to produce. In light  
10 of Google’s production of certain Blogger documents, it is clearly erroneous and  
11 contrary to law for Judge Hillman to rule that Google has no obligation to produce  
12 other Blogger-related documents, such as DMCA notices and notices of termination.

13 Finally, the Order explicitly states that Blogger did not formally become part  
14 of the case until 2008. Even if this statement is correct (and it is not, for the reasons  
15 discussed above), it is undisputed that claims involving Blogger became part of the  
16 case in July 2008 when Perfect 10 obtained leave to file its Second Amended  
17 Complaint. Since that date, Google was under a continuing duty under Fed. R. Civ.  
18 P. 26 to supplement its prior production of documents and produce documents  
19 concerning Blogger that were now responsive to Perfect 10’s earlier document  
20 requests. *See* Fed. R. Civ. P. 26(e)(1)(A) (requiring a party to supplement its  
21 responses to requests for production of documents in a timely manner if the party  
22 learns that in some material respect the response is incomplete or incorrect). For  
23 example, once “Blogger was formally added to the case,” RFP Nos. 26 and 27 (as  
24 modified by Judge Hillman’s May 22, 2006 Order) unquestionably called for the  
25 production of “all notices of termination,” including those concerning Blogger. For  
26 this reason as well, the rulings set forth in the Order concerning Blogger, including  
27 Judge Hillman’s rulings that Perfect 10 never requested documents concerning  
28 Blogger and Google is not ordered to produce such documents, are clearly erroneous

1 and contrary to law. *See also* Reply Memo at 3:6-4:9; Perfect 10’s Response, filed  
2 June 8, 2010 (Docket No. 889) at 12:7-13:22.

3 Accordingly, for all of the above reasons, this Court should set aside Judge  
4 Hillman’s rulings concerning Blogger and order Google to produce documents  
5 concerning Blogger that are it issue in the Motion, including all DMCA notices, all  
6 termination notices, and a “spreadsheet-type” DMCA log.

7 **VIII. JUDGE HILLMAN’S CONCLUSION THAT GOOGLE HAS NOT**  
8 **VIOLATED ANY COURT ORDERS IS CONTRARY TO LAW.**

9 In the June 16 Order, Judge Hillman denied Perfect 10’s request for sanctions,  
10 stating that he was not persuaded that Google had failed to comply with any  
11 discovery orders. Order at 1. In fact, as the discussion in Sections IV through VI,  
12 above, demonstrates: (i) Google has violated Judge Hillman’s May 22, 2006 Order  
13 concerning RFP Nos. 26 and 27 (as modified) by failing to produce *all* notices of  
14 termination; (ii) Google has violated this Court’s May 13, 2008 Order concerning  
15 RFP No. 196 by failing to produce the “spreadsheet-type” DMCA log required by  
16 that order; and (iii) Google has violated Judge Hillman’s May 22, 2006 Order  
17 concerning RFP No. 51 by failing to produce all third-party DMCA notices.

18 Accordingly, Judge Hillman’s rulings regarding Google’s violation of Court Orders  
19 and his conclusion that sanctions are not warranted are clearly erroneous and contrary  
20 to law.

21 **IX. JUDGE HILLMAN’S CONCLUSION THAT GOOGLE’S FAILURE TO**  
22 **COMPLY WITH COURT ORDERS REGARDING DISCOVERY HAS**  
23 **NOT PREJUDICED PERFECT 10 IS CONTRARY TO LAW.**

24 The statement in the Order that Perfect 10 has suffered no “resulting prejudice”  
25 as a result of Google’s alleged failure to comply with discovery [Order at 1] is clearly  
26 erroneous and contrary to law. In fact, Perfect 10 has shown that it has suffered  
27 significant prejudice as a result of Google’s failure to comply with Court-ordered  
28 discovery in several separate ways.



1 First, had Google produced the DMCA log required by this Court's May 13,  
2 2008 Order, Perfect 10 would have been able to easily show that Google has received  
3 numerous DMCA notices regarding the same infringer but has failed to act, and thus  
4 does not qualify for a DMCA safe harbor. *See, e.g.*, Memo at 22:1-21. Had Google  
5 produced all notices of termination and all DMCA notices (as required by Judge  
6 Hillman's May 22, 2006 Order), Perfect 10 would also have been able to  
7 conclusively demonstrate that Google has not suitably implemented a policy against  
8 repeat infringers and thus does not qualify for a DMCA safe harbor. *Id.* at 22:22-  
9 23:2. In sum, Google's failure to comply with the various Court Orders concerning  
10 discovery has prevented Perfect 10 from obtaining critical, relevant documents that it  
11 could use to litigate this case more fairly and oppose Google's pending DMCA  
12 Motions more easily.

13 Furthermore, Google's failure to produce the "spreadsheet-type" DMCA log  
14 required by this Court's May 13, 2008 Order has already caused Perfect 10 to suffer  
15 significant prejudice in connection with the pending DMCA Motions. In particular,  
16 this Court's tentative ruling on the DMCA Motions contains [REDACTED]  
17 [REDACTED] had this Court had access to the DMCA log  
18 that Google was ordered to produce. For example:

19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED] Had this Court had the DMCA log that it ordered Google to produce, the  
22 Court could have readily seen that [REDACTED]  
23 [REDACTED]  
24 [REDACTED], but waited ten months to do so. The Court could have then reasoned that  
25 there was, at the very least, a triable issue of fact as to whether such notices were  
26 compliant, because Google suppressed some URLs from Group C notices. Because  
27 this Court did not have such a DMCA log, it [REDACTED]  
28 [REDACTED]

1 [REDACTED]  
2 (2) [REDACTED]  
3 [REDACTED]  
4 [REDACTED] In fact, Google never  
5 processed [REDACTED] found in Perfect 10's spreadsheet-style notices and  
6 failed to expeditiously process most Perfect 10 spreadsheet-style notices concerning  
7 Blogger. Zada Supp. Decl. ¶8. If this Court possessed the DMCA log it ordered  
8 Google to produce, which summarized Google's response to each of Perfect 10's  
9 notices, the Court would have also seen that Google did not fully process Perfect 10's  
10 Group B notices, because Google never removed the identified infringing links from  
11 Google's Image Search results, or the ads from the identified infringing web pages.  
12 The Court would have certainly recognized that [REDACTED]  
13 [REDACTED] See also Perfect 10's Response, filed June 8, 2010 (Docket No. 889)  
14 at 10:6-28. Accordingly, for all of the above reasons, the ruling set forth in the Order  
15 that Perfect 10 has not suffered "resulting prejudice," is clearly erroneous and  
16 contrary to law.

17 **X. CONCLUSION.**

18 Significant portions of the June 16 Order are clearly erroneous and contrary to  
19 law. Google has failed to produce the DMCA log required by this Court in its May  
20 13, 2008 Order and the notices of termination and DMCA notices required by Judge  
21 Hillman's May 22, 2006 Order. Google has also failed to produce documents  
22 concerning Blogger, even though those documents were called for by Perfect 10's  
23 discovery requests, because blogger.com and blogspot.com websites, just like any  
24 other websites to which Google links in its search results, have been at issue in this  
25 case since at least January 2005, when Perfect 10 filed its First Amended Complaint.  
26 Moreover, Google has admittedly not produced thousands of Blogger documents,  
27 even after the filing of Perfect 10's Second Amended Complaint in July 2008.  
28 Accordingly, for all of the foregoing reasons, this Court should sustain Perfect 10's

1 objections to the June 16 Order, set aside Judge Hillman’s rulings, and issue the  
2 rulings sought by Perfect 10 in connection with this motion.

3 Dated: July 12, 2010

Respectfully submitted,

4 LAW OFFICES OF JEFFREY N. MAUSNER

5 *David N. Schultz*

6 By: \_\_\_\_\_

7 David N. Schultz

8 Attorneys for Plaintiff Perfect 10, Inc.  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28