

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

9 Attorneys for Plaintiff, Perfect 10, Inc.

10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA

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

14 Plaintiff,

15 v.

16 GOOGLE INC., a corporation; and
 17 DOES 1 through 100, inclusive,

18 Defendants.

19 AND CONSOLIDATED CASE.

Case No.: CV 04-9484 AHM (SHx)
 Consolidated with Case No. CV 05-4753
 AHM (SHx)

**PLAINTIFF PERFECT 10, INC.'S
 OPPOSITION TO GOOGLE'S
 MOTION FOR SUMMARY
 JUDGEMENT RE: SAFE HARBOR
 UNDER 17 U.S.C. §512(d) FOR WEB
 AND IMAGE SEARCH**

**PUBLIC REDACTED VERSION
 BEFORE JUDGE A. HOWARD MATZ**

Date: October 5, 2009
 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

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Filed Concurrently Herewith:

- 1) PERFECT 10'S STATEMENT OF GENUINE ISSUES IN OPPOSITION TO GOOGLE'S MOTION FOR SUMMARY JUDGMENT RE: SAFE HARBOR UNDER 17 U.S.C. § 512(d) FOR ITS WEB AND IMAGE SEARCH (FILED UNDER SEAL);**
- 2) DECLARATIONS OF DEAN HOFFMAN, C.J. NEWTON, LES SCHWARTZ, MARGARET JANE EDEN, DR. NORMAN ZADA (UNDER SEAL, WITH EXHIBIT 9, A DISK), JEFFREY N. MAUSNER (EXHIBITS G, H, K, N, AND P FILED UNDER SEAL), SEAN CHUMURA, DAVID O'CONNOR, BENNET MCPHATTER, SHEENA CHOU, AND MELANIE POBLETE SUBMITTED IN OPPOSITION TO GOOGLE'S THREE MOTIONS FOR SUMMARY JUDGMENT RE DMCA SAFE HARBOR FOR ITS WEB AND IMAGE SEARCH, BLOGGER SERVICE, AND CACHING FEATURE (DOCKET NOS. 428, 427, AND 426)**
- 3) PLAINTIFF PERFECT 10, INC.'S OPPOSITION TO GOOGLE'S MOTION FOR SUMMARY JUDGMENT RE: SAFE HARBOR UNDER 17 U.S.C. §512(c) FOR ITS BLOGGER SERVICE; AND PERFECT 10'S STATEMENT OF GENUINE ISSUES IN OPPOSITION TO GOOGLE'S MOTION FOR SUMMARY JUDGMENT RE: SAFE HARBOR UNDER 17 U.S.C. § 512(c) FOR ITS BLOGGER SERVICE; AND**
- 4) PLAINTIFF PERFECT 10, INC.'S OPPOSITION TO GOOGLE'S MOTION FOR SUMMARY JUDGMENT RE: SAFE HARBOR UNDER 17 U.S.C. §512(b) FOR CACHING FEATURE; AND PERFECT 10'S STATEMENT OF GENUINE ISSUES IN OPPOSITION TO GOOGLE'S MOTION FOR SUMMARY JUDGMENT RE: SAFE HARBOR UNDER 17 U.S.C. § 512(b) FOR CACHING FEATURE**

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

2 Defendant Google, Inc. (“Google”) has filed three separate motions arguing
3 that it should receive a DMCA safe harbor. Those motions will be referred to as
4 Google’s Search Motion, Google’s Blogger Motion, and Google’s Cache Motion.
5 Each Perfect 10 Opposition will incorporate the others and apply to all three
6 Google motions. This opposition will deal primarily with Google’s Search Motion.
7 Perfect 10’s Blogger Opposition will deal primarily with Google’s failure to
8 process blogger notices, and its failure to suitably implement a policy against
9 repeat infringers in Google’s Blogger and AdSense programs. (By “process,”
10 Perfect 10 will mean to remove or disable access to allegedly infringing material.)
11 Perfect 10’s Cache Opposition will refute, point by point, the specific instances of
12 alleged deficiencies that Google listed in its Cache, Search, and Blogger Motions.

13 Google is not entitled to receive safe harbor under the Digital Millennium
14 Copyright Act (“DMCA”) because it cannot satisfy either of two necessary
15 requirements: 1) *It did not process most identified URLs at all*, let alone
16 expeditiously, and 2) it did not suitably terminate repeat infringers.

17 Google cannot claim that Perfect 10’s notices were deficient because, among
18 other reasons: 1) Google has admittedly blocked ██████████ URLs identified by Perfect
19 10 out of ██████████ reviewed (Search Brief, page 13, lines 7-10); 2) Perfect
20 10’s notices follow Google’s instructions; 3) Yahoo! has processed similar notices
21 in three days; and 4) even ██████████ Alexa’s Rule 30(b)(6) deponent, has
22 testified that ██████████.

23 Google cannot receive a safe harbor when it has taken more than ten months to
24 process thousands of identified URLs and has not processed tens of thousands of
25 similarly identified URLs.

26 **A. Google Did Not Act Expeditiously, And In Most Cases Did Not**
27 **Act At All**

28 Google has not processed most of Perfect 10’s notices at all, let alone

1 expeditiously, as shown by the following: 1) In 2001, Google did not process any
2 of Perfect 10's 14 notices. 2) In 2004, Google waited four months to process any
3 notices; in fact, it waited until Perfect 10 sent it a draft complaint. 3) Google did
4 not process, at all, 900 URLs from Perfect 10's July 19, 2004 notice. 4) Google
5 admittedly failed to process Perfect 10's December 31, 2004, February 17, 2005,
6 and March 6, 2005 notices, for six months or more. 5) Google has not removed
7 any links to its massive infringing usenet/paysite advertisers. Google specifically
8 states that it will not do so. 6) Google has not suppressed any identified links to
9 other massive infringers, such as rapidshare.com and thepiratebay.org, even though
10 the operators of thepiratebay.org were convicted of criminal copyright
11 infringement. 7) Google admits that it was able to suppress ██████████ URLs identified
12 in Perfect 10's Adobe style 2007 notices (albeit ten months late). ██████████
13 ██████████
14 ██████████. 8) Google processed three Perfect 10 Adobe style notices
15 in June of 2009 that are similar to others that it has not processed. 9) Google has
16 failed to process 3,737 blogger.com URLs, and tens of thousands of Web page and
17 Image URLs, similar to others it has processed. 19) Google has not taken action
18 to stop displaying passwords to perfect10.com. Declaration of Dr. Norman Zada
19 ("Zada Decl.") ¶¶16-65, Exhs. 8-49.

20 Google's delay of ten months or more to suppress thousands of Perfect 10
21 identified URLs, and its complete failure to suppress tens of thousands of similarly
22 identified URLs from both its search results and from its servers, precludes a safe
23 harbor under either Section 512(c) or 512(d) of the DMCA.

24 **B. P10's Notices Cannot Be Deficient Because Others Have Processed**
25 **Them, and Google Itself Has Processed Some of Them**

26 To justify its failure to process most of Perfect 10's notices, let alone
27 expeditiously, Google claims that all of Perfect 10's notices are deficient, even
28 though they *follow Google's instructions*, and even though Google has admittedly

1 suppressed [REDACTED] Perfect 10 identified URLs from those notices. Google’s Search
2 Motion, page 13, lines 7-10. Yahoo! has processed similar notices from Perfect 10
3 in three days. Zada Decl. ¶¶62-63, Exhs. 46-47.

4 For example, Perfect 10’s spreadsheet style notices (which Google calls
5 Group B notices) exactly follow Google’s instructions. Perfect 10 placed the URL
6 that Google requested in the left side of its excel spreadsheet and placed the search
7 term that Google requested in the middle column. On the right side of its
8 spreadsheet, Perfect 10 identified the location of the copyrighted work at issue by
9 providing either a Volume No. and Issue No. of Perfect 10 Magazine, along with a
10 page range, or a reference to perfect10.com. Zada Decl. Exh. 13¹ Contrary to
11 Google’s claims, Perfect 10 did email to Google most of its notices, even though
12 that is not required by the DMCA. *Id.* ¶¶15, 26.

13 Perfect 10’s Adobe style notices (which Google calls Group C notices) also
14 follow Google’s instructions. The only difference is that instead of just providing
15 the complete URL that Google requested, Perfect 10 also provided a copy of the
16 infringing web page with the infringing image(s) clearly identified. *Id.* ¶38.

17 Google admits that it suppressed [REDACTED] URLs from Perfect
18 10’s Adobe style notices [REDACTED]
19 [REDACTED] (Google Search Motion, page 15, lines 11-20). That admission is fatal to
20 each of Google’s motions, particularly since Google states that it [REDACTED]
21 [REDACTED] when *Google could have rapidly*
22 *extracted them using Adobe’s URL extraction feature.* Zada Decl. ¶9 (lines 15-25),
23 Exh. 2 pages 7-8; Declaration of Sheena Chou (“Chou Decl.”) ¶7; Declaration of
24 Sean Chumura (“Chumura Decl.”) ¶4. Google’s DMCA agent, [REDACTED]

25 [REDACTED]
26 [REDACTED]
27 ¹ Perfect 10 thus provided more information in its spreadsheet style notices than
28 Google requires, which is just the title of the publication. AOL simply requires the
title of the publication or the website URL. Zada Decl. ¶¶8, 23, Exhs. 1, 12.

1 [REDACTED] Poovala Declaration,
2 submitted under seal as Exhibit P to Mausner Decl. (“Poovala Depo.”) 111:5-18.

3 [REDACTED]
4 [REDACTED] Google *has still refused* to process Perfect 10’s
5 outstanding Adobe style notices. Zada Decl. ¶¶39-61, Exhs. 26-45.

6 **C. Google Has Not Suitably Implemented A Repeat Infringer Policy**

7 Because of its inaction against websites that it hosts, as well as against its
8 AdSense affiliates, both of which Google concedes are account holders, Google
9 cannot have suitably implemented a policy against repeat infringers. In fact, as
10 explained in the Blogger Opposition, Google does not even keep track of the
11 identity of the alleged infringer. [REDACTED]

12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED] It does not include [REDACTED] identified by Perfect 10. Zada Decl.
16 ¶19. Google cannot suitably implement a policy against repeat infringers [REDACTED]

17 [REDACTED].
18 **D. Google’s Failure To Process Third Party Notices**

19 Google has made it unnecessarily difficult for Perfect 10 to submit notices
20 by changing its instructions, continuing to publish Perfect 10’s confidential notices
21 on the Internet in spite of Perfect 10’s repeated objections, and refusing to provide
22 even one concrete example of a compliant notice. Zada Decl. ¶¶26, 64, 70, Exhs.
23 48, 53. In the end, Perfect 10 has spent a tremendous effort to provide Google with
24 compliant notices, yet Google has refused to process most of them.

25 Other copyright holders have had similar experiences with Google. C.J.
26 Newton has stated that *Google did not respond to one hundred of his notices*.
27 Dean Hoffman states that *“Google just didn’t do anything at all to remove the*
28 *infringing links.”* Les Schwartz states that *“Google just kept giving me*

1 *contradictory instructions, and even when I did what they asked, Google did not*
2 *remove most of the infringing material.”* He wrote an email to Google stating,
3 *“There is no question in my mind that you are being disingenuous when you claim*
4 *you can’t find the infringing material, and you are just trying to make me jump*
5 *through hoops.”* Google’s arrogance is further illustrated by an email that it sent
6 to Margaret Jane Eden stating that it would not act unless she *resent all of her*
7 *notices by email.* This after Google published instructions demanding that notices
8 not be sent by email. *See* Declarations of Dean Hoffman, C.J. Newton, Margaret
9 Jane Eden, and Les Schwartz, filed concurrently.

10 Perfect 10’s experiences are similar to that of the above copyright holders in
11 the following respects. Google first demands that 1) notices *not be sent by email,*
12 then 2) notices be *resent solely by email,* and then 3) notices be *resent again solely*
13 *by email.* Each such Google demand is contrary to the language of the DMCA,
14 which allows both emailed and non-emailed notices. Finally, after the copyright
15 holder has done all this work, and Google has published their notices on the
16 Internet without permission, Google claims that it can’t locate the infringing
17 material. Schwartz, Newton, Eden, Hoffman Decls.

18 Google’s tactics are summed up by Jonathan Bailey, who describes Google’s
19 DMCA policy as “*obstructionist,*” “*hopelessly broken,*” “*unnecessarily difficult,*”
20 and “*legally dubious.*” Mausner Decl. Exh. C.

21 **E. Google Could Make It Very Easy For Copyright Holders, But Has**
22 **Chosen Not To Do So**

23 Google could remove from its index websites that are obviously engaged in
24 massive widespread copyright infringement. This action, which Google already
25 takes with respect to other sites engaged in illegal activity, such as child
26 pornography, would help enormously in protecting copyright and would
27 dramatically cut down the size of the notices that Perfect 10 needed to send to
28 Google. Zada Decl. ¶68, Exh. 52. Google could direct one or two employees to go

1 through its image search results looking for identified infringing images or images
2 displaying P10 copyright notices. Google could employ image recognition (or take
3 other steps) to dramatically reduce infringement on its system. Google could also
4 implement a “check the box” notification procedure, as suggested by this Court in
5 its May 8, 2006 Order.

6 Instead, because Google profits from all the infringement on its system,
7 which allows Google to place unauthorized ads next to millions of celebrity (and
8 P10 Images), Google has done nothing.

9 **F. Google Failed To Work With Perfect 10 To Implement A “Check**
10 **The Box” Notification System.**

11 Google gave Perfect 10 the runaround when Perfect 10 tried to work with
12 Google to implement a check the box notification system, as ordered by the Court
13 in May 2006. Declaration of Jeffrey N. Mausner (“Mausner Decl.”), filed
14 concurrently, ¶¶2-13, Exhs. A (¶9), AA (pages 1-18) . When Perfect 10 tried to
15 follow the Court’s suggestion on its own, by providing copies of infringing web
16 pages with check marks next to infringing images, Google refused to process such
17 notices. Zada Decl. ¶53, Exh. 38, pp. 7-8; Mausner Decl. Exh. B.

18 **G. Google Has Not Disabled Access To The Infringing Material**

19 Even in the rare circumstance when Google processed a Perfect 10 notice, it
20 has not actually “removed or disabled access to the infringing material” as required
21 by the statute. For example, Perfect 10 has provided notices identifying the same
22 infringing image over and over, yet Google continues to display that same image in
23 its Image search results, and place Google ads around it. Zada Decl. ¶¶2, 12-13,
24 58, 53-55, Exhs. 5-6, 43, 38-40.

25 Google has also continued to both link to, and accept payments from,
26 massive infringing paysite advertisers, such as giganews.com, even after Google
27 has received knowledge that giganews.com infringes over 15,000 Perfect 10
28 copyrighted images (“P10 Images”). *Id.*, ¶37. Google’s inaction is contrary to the

1 specific language of the DMCA, which indicates that a service provider such as
2 Google may be liable for “referring or linking users to an online location
3 containing infringing material or infringing activity.” §512(d) (emphasis added).

4 Google has taken the position that it must only remove links that directly
5 lead to an infringing image, and therefore does not need to end business dealings
6 with, or cut all links to, its infringing usenet advertisers. Mausner Decl. Exh. B.
7 That is not correct. See Section V, below.

8 **H. Google Cannot Receive A Safe Harbor For Refusing To Act At All** 9 **in Connection With Its Infringing Usenet Advertisers**

10 The DMCA is designed to protect only those who expeditiously act in
11 response to notices and satisfy other requirements. Once Google takes a position
12 that it is not required to act, independent of the sufficiency of the notice, as it has
13 done by refusing to remove any links unless they directly link to infringing
14 content, the issue is no longer one of receiving a safe harbor. It is an issue of
15 liability. Because Google has done nothing to remove links to, and/or end business
16 relationships with, massive infringers such as giganews.com, rapidshare.com,
17 thepiratebay.org, and usenet.com, Google cannot receive a safe harbor for its
18 inaction with respect to those infringers. It can only hope to receive a ruling that it
19 has no liability *even though it failed to act*. See Section V, below.

20 **II. GOOGLE’S INACTION WITH RESPECT TO GROUP A AND B** 21 **NOTICES**

22 **A. 2001: Google Did Not Process Any Of Fourteen Group A Notices**

23 The URL: <http://www.celebritypictures.com/MayaRubin/maya1.htm>

24 In 2001, beginning in May, Perfect 10 sent to Google fourteen short (roughly
25 four page) DMCA notices by email, that identified at least 40 allegedly infringing
26 URLs in Google search results. The URLs were complete, and were often
27 accompanied by copies of the identified infringing web pages and the infringed
28 image, as was the case with the URL shown above. Zada Decl. ¶¶15-17, Exhs. 8,

1 10, Exh. 9 (2001 DMCA notices folder). At the time, Google did not suggest that
2 any of Perfect 10's notices were deficient. After receiving 14 notices, Google
3 simply claimed that it could not suppress the identified URLs. *Id.* Exh. 10;
4 Mausner Decl. Exh. M. Google cannot receive a safe harbor for failing to act.

5 To justify its inaction, which precludes a safe harbor, Google incorrectly
6 argues that Perfect 10's 2001 notices are time barred.² At the time Perfect 10 sent
7 its notices in May and June of 2001, Google was linking to each of the 40
8 identified infringing web pages. Google has not proven that it removed *each* of the
9 40 identified infringing links as of November 10, 2001 (three years prior to the
10 date Perfect 10 filed its complaint). In fact, Google cannot do so, because it was
11 linking to the above infringing URL on September 10, 2004, well within the three
12 year statute of limitations. Perfect 10 has not waived its rights regarding any of its
13 notices sent in 2001, as Google seems to claim. Mausner Decl. ¶¶14-16.

14 **B. 2004: Google Waited Between 4 to 17 Months To Process Initial**
15 **Perfect 10 Group B Notices**

16
17 ² Google misinterprets the statute of limitations for copyright infringement, which
18 deals with the date when infringement, rather than notice, occurred. Section 507
19 bars a claim “unless it is commenced within three years after the claim accrued.”
20 “[I]n continuing infringement cases such as this, ‘[e]ach act of infringement is a
21 distinct harm giving rise to an independent claim for relief.’ [Citation omitted.]
22 Thus, as the District Court correctly held, Graham was not time-barred from
recovering for any acts of infringement that occurred on or after [three years before
the date of filing the complaint].” *William A. Graham Co. v. Haughey*, 568 F.3d
425, 433 (3d Cir. 2009); *see also Polar Bear Prods. v. Timex Corp.*, 384 F.3d 700,
706 (9th Cir. 2004) (“in a case of continuing copyright infringements, an action
may be brought for all acts that accrued within the three years preceding the filing
of suit.”)

23 This lawsuit was filed on November 10, 2004, which means the statute of
24 limitations would not protect any Google links to infringing web pages on or after
25 November 10, 2001. The claim accrues if there is infringement within three years
26 of the date the complaint was filed – it is not based on the date of the notice.
27 Notice relates only to Google's affirmative defense, not to the accrual of Perfect
28 10's claim. Therefore, claims involving any image that was available using
Google's search engine on or after November 10, 2001 are not time barred.
Google was definitely linking to at least one of the identified infringements as of
September 10, 2004, well within the three year statute of limitations. Google has
not proven that it removed *any* of the other 40 identified links prior to November
10, 2001. Zada Decl. ¶¶15-17, Exhs. 8-10.

1 **1. Google Waited Until It Received A Draft Complaint**

2 In May 2004, Perfect 10 discovered that Google was linking to many more
3 P10 Images in its Web Search results, and was even making thumbnails of P10
4 Images and including them in its Image Search results. Perfect 10 sent a DMCA
5 notice to Google on May 31, 2004, which was five pages long. All of the URLs in
6 that notice were complete URLs. Zada Decl. ¶21, Exhs. 11, pages 4-6. The notice
7 also contained complete Image URLs which Google did not remove for 17 months.
8 See Section II. F, below.

9 The URL *http://pix.alronix.net/Photo_Scans/Tits/Monika_Zsibrita/pic00076.htm.*

10 Shown above in italics is the very first URL in Perfect 10’s May 31, 2004
11 notice. That URL identified a web page containing one large P10 Image of
12 Monika Zsibrita. Perfect 10 also provided the exact location of that image in its
13 magazine, Perfect 10 Magazine, Vol. 2, No. 2, pp 27. *Id.* ¶21, Exh. 11.

14 Despite the obvious sufficiency of this URL, Google nevertheless waited
15 more than four months to remove that identified link from its Web Search results.
16 But as explained in Section D below, by removing the one identified Web Search
17 link, Google did not actually “remove, or disable access to, the material that is
18 claimed to be infringing.” Specifically, Google continued to directly link to that
19 same identified infringing web page via its Image Search results. Zada Decl. ¶¶26-
20 28, Exhs. 14-17.

21 **C. June 1, 2004: Perfect 10 Follows Google’s Instructions;**
22 **Subsequent Google Statements Contradict Its Prior Instructions**


23 On June 1, 2004, Perfect 10 received a set of instructions from Google.
24 Those instructions required Perfect 10 to “provide a written communication (*by fax*
25 *or regular mail, not by email*)...” Google went on to advise that “*you may be*
26 *liable to the alleged infringer for damages* (including costs and attorneys’ fees) if
27 you materially misrepresent that you own an item when you in fact do not.” The
28 instructions stated that the copyright holder needed to “provide (a) the search query

1 that you used, and (b) the URL for each allegedly infringing *search result*. **Note**
2 **that the URL for each search result appears in green at the end of the**
3 **description for that search result.**” (Emphasis added). Zada Decl. ¶23, Exh. 12.

4 Perfect 10 followed Google’s instructions. However, after Perfect 10 sent
5 notices by fax, Google asked Perfect 10 to *resend* its notices by email. When
6 Perfect 10 *resent all of the prior URLs in one electronic excel spreadsheet by*
7 *email*, Google asked Perfect 10 to *send them again by email*, separating out the
8 ones that had already been sent. Google gave Perfect 10 the runaround, and did
9 not remove anything until October 11, 2004, more than four months later, after it
10 received a draft complaint from Perfect 10. Zada Decl. ¶¶26, 70, Exhs. 14, 53.

11 **D. By Removing Identified Links From Web Search But Not Image**
12 **Search, Google Did Not Disable Access To The Infringing**
13 **Material**

14 Although Google finally processed some of Perfect 10’s notices beginning
15 on October 11, 2004, showing that they were in fact compliant, Google only
16 removed identified infringing links from its Web Search results and failed to
17 remove those same identified links from its Image Search results.

18 
19 Google concedes that Perfect 10’s June 28, 2004 notice included the above
20 URL. Perfect 10 sent this URL again to Google in an Excel spreadsheet, as part of
21 Perfect 10’s July 19, 2004 notice. According to the surreply of Alexander
22 Macgillivray, Google removed this URL from its Google Web Search results on
23 October 11, 2004, about 100 days later.³ Zada Decl. ¶26, Exh. 14 (Macgillivray

24 _____
25 ³ By taking more than three months to remove the infringing URL, Google failed
26 to respond “*expeditiously* to remove, or disable access to, the material that is
27 claimed to be infringing.” 17 U.S.C. §512(d)(1) and (3)(emphasis added). Yahoo!
28 was able to remove links and images from its search results within three days after
receiving similar notices from Perfect 10. Zada Decl. ¶¶62-63, Exhs. 46-47.
Moreover, Microsoft’s customer satisfaction policy requires removal of
infringements within three days. Deposition of Judy Weston in the Microsoft case
 (“Weston Depo.”) 33:24-34:8, attached as Exhibit D to the Mausner Decl. Taking
more than thirty times that long to act is not “expeditious.”

1 Sur-Reply Declaration). On July 9, 2006, however, *more than two years after*
2 *receiving notice*, Google was still linking to this same infringing web page via
3 Google's Image Search results. See Zada Decl. Exh. 17, page 3. As of that date,
4 Google was still offering to its users, a thumbnail that Google had created from
5 that same identified infringing full-size P10 Image, and was still providing a direct
6 link to that same identified infringing web page.

7 The above shows that: 1) Perfect 10's notice was DMCA compliant because
8 it provided Google with enough information to find and remove the identified
9 infringing link and web page from Google's Web Search results; and 2) Google did
10 not remove or disable access to the identified infringing web page, because Google
11 continued to provide, in its Image Search results, an infringing P10 thumbnail
12 created from the identified infringing full-size image, and continued to provide that
13 identified infringing web page to its users as shown in page 3 of Exhibit 17 to the
14 Zada Decl. Zada Decl. ¶¶26-28, Exhs. 14-17.

15 The URL [REDACTED]

16 Google received notice of the above infringing URL from Perfect 10 on
17 February 17, 2005, and removed the URL from Google Web Search results on
18 April 29, 2005, more than 70 days later. Zada Decl. ¶26, Exh. 14. Once again,
19 Perfect 10's notice provided Google with sufficient information to find the
20 infringing web page and Google had knowledge that the identified web page
21 infringed Perfect 10's copyrights. Despite this knowledge, Google continued to
22 display a P10 Image from that same infringing web page and link that thumbnail
23 directly to that infringing web page via its Image Search results, as late as July 9,
24 2006, *more than five hundred days after receiving notice*. Zada Decl. ¶¶26-28,
25 Exhs. 14-16, Exh. 17 page 5.

26 Because Google belatedly removed direct links to the identified infringing
27 web page from its Web Search results but not from its Image Search results,
28 Google both had knowledge of infringement and failed to remove or disable access

1 to that infringement. Google cannot argue that Perfect 10 should have followed
2 Google’s “Image Search” instructions since it did not even have separate
3 instructions for Image Search at that time. Zada Decl. ¶54, Exh. 39.

4 **E. 558 P10 Images Which Google Did Not Expeditiously Remove**

5 Google repeatedly failed to remove the same infringing links from its Image
6 Search results that it removed from its Web Search results. Exhibit 16 to the Zada
7 Decl. provides 558 additional examples. There are many more. Zada Decl. ¶27,
8 Exh. 16.

9 **F. Google Took Seventeen Months To Process Some Identified**
10 **Infringing Image URLs**

11 The URL [REDACTED]

12 Perfect 10 provided this complete Image URL to Google in Perfect 10’s
13 May 31, 2004 notice, along with the exact page from Perfect 10 Magazine that
14 contained the infringed work. Nevertheless, Google admittedly did not remove
15 this identified Image URL until November 3, 2005, more than *seventeen months*
16 after receiving notice. Zada Decl. ¶¶21, 26, Exhs. 11 page 4, 14.

17 **G. Google Failed To Remove 900 Identified Infringing Images From**
18 **Its Image Search Results**

19 The URLs [REDACTED]
20 [REDACTED]

21 These two URLs were among seven complete Image URLs that Alexander
22 Macgillivray listed in his sur-reply declaration *which Google never removed* even
23 though they were complete URLs that each identified a single full-size P10 Image
24 available through Google’s Image Search results. Google’s current Image Search
25 instructions require nothing else. Zada Decl. ¶¶26, 54, Exhs. 14 p. 9, 39.

26 The URLs [REDACTED]
27 [REDACTED]

28 The above URLs were part of approximately 900 URLs that Perfect 10

1 included in its July 19, 2004, electronic notice to Google, which were listed under
2 a heading entitled “IMAGE INFRINGEMENTS ON GOOGLE.COM.” The URLs
3 in this spreadsheet were copied verbatim from the URL that *Google placed* under
4 the thumbnail in its Image Search results. They are URLs which Google did not
5 suppress as of November 3, 2004. Google did not even list those 900 URLs in Mr.
6 Macgillivray’s sur-reply declaration as ever being processed, even though Google
7 admittedly received them. *Id.* ¶26, Exh. 14, pages 28-30. Any ellipses in such
8 URLs were of Google’s creation, but Google did not process the identified
9 complete URLs either. For URLs with ellipses, the corresponding infringing
10 images could have been found by simply doing a Google Image Search on the
11 model’s name, or by doing a combination search on the base URL along with other
12 characters contained in that URL. Zada Decl. ¶41, Exh. 28; Chumura Decl. ¶6.

13 **H. Google Has Not Removed Identified Infringing Links Forwarded**
14 **To It By Amazon For More Than Four Years**

15 The URLs [REDACTED]
16 [REDACTED]

17 Although Google claims that it processed the notices that Perfect 10 sent to
18 Amazon which Amazon then forwarded to Google in April 2005, Google did not
19 process the above four URLs. As of May 20, 2009, *more than four years after*
20 *notice*, Google had still not removed those URLs from its Web Search results. As
21 explained in the Zada Declaration, Google could have found the infringing search
22 results associated with those URLs simply by inputting the URLs into the Google
23 Search box. Zada Decl. ¶¶29-31, Exhs. 18-20; Chou Decl. ¶6.

24 **III. GOOGLE’S INACTION WITH RESPECT TO GROUP C NOTICES**

25 By June of 2007, Perfect 10 had already sent to Google at least 42
26 spreadsheet style notices, which identified over 9,000 infringing URLs. Most
27 were sent in electronic format, even though that is not required by the DMCA.
28 Nevertheless, Google was linking to more infringing P10 Images than ever before.

1 [REDACTED]

2 [REDACTED]; Zada Decl. ¶¶39-61, Exhs. 43-45; Chou Decl. ¶¶7-10.

3 **B. Google Did Not Process 3,737 Blogger URLs, Which Were Similar**
4 **To The Ones It Did Process**

5 Google did not process at least 3,737 Blogger URLs similar to the ones
6 described in Section A above. *See* Chou Decl. ¶8, Exh. 9; Perfect 10's Blogger
7 Opposition pages 10-11. Since Google could have processed the notices but did
8 not, it cannot have a safe harbor.

9 **C. Even Though Google Suppressed Some Blogger URLs, The Same**
10 **Images Are Available At Other Blogger.com URLs**

11 In some cases, Google provides a very large number of URLs that lead to the
12 same infringing blogger.com Web pages, so that simply suppressing one URL is
13 not sufficient to delete the infringing P10 Image(s). *Id.*; Zada Decl. ¶51, Exhs. 35,9.

14 **D. Google Has Not Removed Thousands Of Identified Infringing**
15 **Web Search Links Similar To The Ones It Has Removed**

16 The URL [REDACTED]

17 This URL was one of the [REDACTED] URLs Google suppressed, based on Group C
18 notices Perfect 10 sent to Google on June 28 and July 2, 2007. However, Perfect
19 10 has similarly identified thousands of other direct Google links to infringing web
20 pages that Google has not suppressed. Furthermore, Google did not suppress the
21 above URL until at least May 31, 2008, at least ten months after receiving notice.
22 *Id.* ¶¶59-60, Exhs. 44, 9.

23 The URLs [REDACTED]

24 [REDACTED]

25 Google admittedly suppressed the above URLs on or about June 18, 2009,
26 based on an Adobe style notice that Perfect 10 sent to Google on November 27,
27 2008, which Google initially incorrectly claimed could not be processed.
28 However, Perfect 10 had previously sent a similar Adobe style notice to Google,

1 identifying the same URLs, on July 31, 2007. Thus, Google actually waited more
2 than 700 days to suppress the above URLs. Zada Decl. ¶61, Exh. 45, page 10.

3 **E. Google Has Not Removed Identified Infringing Cache Pages**

4 Perfect 10 included, in its notices to Google, hundreds of copies of Google’s
5 infringing cache pages. These pages identified *both the infringing Google cache*
6 *link and the infringed P10 Image*. Nevertheless, 500 days after notice, Google has
7 still not removed most identified infringing cache links from its search results.
8 (Google finally removed a few identified cache links in June 2009, demonstrating
9 that it could process such notices.) Zada Decl. ¶¶39, 59-61, Exhs. 26, 44-45, 9.

10 **F. Google Has Not Removed Identified “See Full-Size Image Links”**
11 **Despite Receiving Notices Which Followed Its Instructions**

12 The URLs [REDACTED]

13 [REDACTED]

14 Sometime around December 2005, after Perfect 10 had already sent to
15 Google 51 DMCA notices, Google began, for the first time, to post separate
16 instructions for Image Search. Although Perfect 10 believed that such instructions
17 were unnecessary, Perfect 10 nevertheless followed them when creating the Adobe
18 style notices that it sent to Google in 2007. Google’s instructions for Image Search
19 simply required that the copyright holder provide the Image URL that one would
20 obtain by clicking on the “See full-size image” link. Perfect 10 provided that,
21 along with a copy of the infringing image.

22 Each of the URLs listed above were identified by Perfect 10 in its June 28,
23 2007 notice to Google, and were admitted removed by Google as part of the [REDACTED]
24 URLs which it suppressed. *Google waited, however, at least ten months to do so.*
25 Zada Decl., ¶¶54-55, Exhs. 39, 40 page 5, 9.

26 **G. Google Has Not Removed Infringing Material In Response To**
27 **Perfect 10’s Check The Box Notices**

28 Perfect 10 has gone so far as to provide Google with a copy of each

1 infringing Google thumbnail along with the three links that Google includes in its
2 Image Search results with that thumbnail; specifically, the “See full-size image”
3 link, Web Page link, and thumbnail link. Perfect 10 created these Adobe style
4 notices using a check-the-infringing-image program similar to that suggested by
5 the Court in its May 8, 2006 Preliminary Injunction order. Microsoft processed
6 such notices. However, Google refused to remove any of the approximately 1,000
7 P10 thumbnails that Perfect 10 identified in this fashion in its July 9, 2008, April
8 24, 2009, and May 7, 2009 notices. Zada Decl. ¶53, Exh. 38, pages 7-8, Exh. 9.

9 **H. Perfect 10’s Notices Cannot Be Deficient, Because Google Has**
10 **Suppressed [REDACTED] Perfect 10 Identified URLs, and Because Yahoo!**
11 **Has Processed Similar Notices In Three Days**

12 It should be clear by now that Google has substantially mischaracterized
13 Perfect 10’s notices. Perfect 10’s first forty notices to Google were largely
14 spreadsheet style notices (Group B), created *following Google’s instructions*.
15 Some were only four pages in length. Most were sent electronically in “soft copy”
16 as excel spreadsheets, so that Google could have readily processed them. In fact,
17 Google has stated that it processed some Perfect 10 notices completely in two
18 days. Zada Decl. ¶¶23-26, Exhs. 12-14.

19 Google has admittedly processed both Perfect 10’s spreadsheet style notices
20 and its Adobe style notices. Google cannot argue that Perfect 10’s notices were
21 burdensome, when [REDACTED]

22 Yahoo! has processed similar notices in three days. Zada Decl. ¶¶62-63,
23 Exhs. 46-47. [REDACTED]

24 [REDACTED]
25 [REDACTED] Google has refused to process Perfect 10’s “check
26 the box” style notices, which Microsoft has been able to process.

27 A further detailed rebuttal to Google’s claims that Perfect 10’s notices are
28 deficient is contained in Perfect 10’s Cache Opposition.

1 **IV. GOOGLE HAS NOT REMOVED OR DISABLED ACCESS TO THE**
2 **INFRINGING MATERIAL**

3 Because of Google’s failure to process most of Perfect 10’s notices, let alone
4 expeditiously, the Court does not need to reach the issue of whether Google’s
5 response was sufficient to actually remove or disable access to the allegedly
6 infringing material. However, yet another reason to deny Google’s Motions is
7 because Google does not actually disable access, for the following reasons:

8 **A. Google Continues To Make And Display The Same Infringing P10**
9 **Thumbnails In Its Image Search Results**

10 Google has displayed over 20,000 P10 Images in its Image Search results,
11 and has placed its ads next to at least 18,000 P10 Images. Once Perfect 10
12 identifies an image as being infringing, Google cannot simply continue to make
13 unauthorized copies of the same image or place Google ads around it, and still
14 receive a safe harbor. By doing so, not only has Google not disabled access to the
15 identified infringing material, Google is continuing to exploit it for its own
16 commercial gain. Zada Decl. ¶¶58, 13, 72, 53, Exhs. 43, 6, 54, 38.

17 Google has recently demonstrated that it has the ability to search for and
18 recognize similar images, through its “similar images” feature on its website. Zada
19 Decl. ¶67, Exh. 51. Google could employ that technology, or Google could simply
20 assign one or two employees to do searches on Perfect 10 model names and
21 remove previously identified P10 Images. Google could do many things to prevent
22 the same identified P10 Image from reappearing, over and over, in Google’s Image
23 Search results, or surrounded by Google ads. Instead, Google has chosen to do
24 nothing. Zada Decl. ¶¶12-13, 53-55, 58, 67, Exhs. 5-6, 37-40, 43, 51.

25 **B. Google’s Methodology For In-Line Linking Allows Google Users**
26 **To Download Identified Infringing P10 Images From Infringing**
27 **Websites, While Remaining At Google.com**

28 Google’s in-line linking technology generally allows its users to view or

1 download any image from an infringing website while remaining at google.com.
2 Consequently, to prevent further damage to identified P10 Images, Google must
3 either block all Image Search links to that identified infringing website, or require
4 the webmaster to actually remove the identified P10 Images. Because Google has
5 done neither, it has not disabled its users' access to the infringing material.

6 **C. Google Continues To Disseminate Perfect10.com Passwords From**
7 **Its Own Website**

8 Despite repeated Perfect 10 notices which have identified the location of
9 unauthorized perfect10.com passwords, Google is continuing to display such
10 passwords on its own website. By doing so, Google is continuing to contribute to
11 the infringement. It is not sufficient for Google to simply remove a few links to
12 password disseminating web sites out of thousands, although in many cases it has
13 not even done that. Zada Decl. ¶¶65, Exh. 49. Google must stop displaying
14 unauthorized passwords to perfect10.com from appearing in snippets of text on its
15 own website. In order to do that, Google must block from its search results, strings
16 of the form "username:password@ www.perfect10.com." Google has not done
17 that. Google even continues to host sites that display perfect10.com passwords.
18 *Id.* ¶¶12, 65, Exhs. 5, 49.

19 **D. Google Continues To Provide Access To The Same Link It**
20 **Removed, Via Chillingeffects.org**

21 Google's ongoing policy of forwarding Perfect 10's confidential notices to
22 chillingeffects.org for publication on the Internet creates yet another triable issue
23 of fact as to whether Google has actually disabled access to infringing material.
24 Zada Decl. ¶¶64, Exh. 48; Mausner Decl. Exh. L. By providing its users with a link
25 to a confidential Perfect 10 notice which identifies the locations of hundreds of P10
26 Images, Google is providing its users with a roadmap to the location of those
27 images. Other copyright owners who have submitted notices to Google have been
28 outraged that Google forwarded their confidential notices to chillingeffects.org for

1 publication without permission, and then linked to those notices in its search
2 results. *See* Declarations of Dean Hoffman and C.J. Newton, submitted herewith.

3 **V. GOOGLE CANNOT RECEIVE A SAFE HARBOR FOR FAILING TO**
4 **TAKE ACTION REGARDING ITS INFRINGING USENET**
5 **ADVERTISING AFFILIATES**

6 Google has admittedly done nothing in response to Perfect 10's notices
7 regarding its usenet/paysite advertising affiliates, and other massive
8 infringers, such as rapidshare.com and thepiratebay.org, even though it
9 knows that those websites massively infringe P10 Images, as well as most
10 movies and songs. Despite repeated notice from Perfect 10, Google
11 continues to both provide thousands of links to, and in many cases, have
12 business dealings with, such massive infringers. One of these massively
13 infringing usenet sites, usenet.com, was recently the subject of a lawsuit in
14 the Southern District of New York, *Arista Records LLC v. Usenet.com,*
15 *Inc.*, 2009 WL 1873589 (S.D.N.Y. June 30, 2009). The Court found that
16 "There can be no dispute that Defendants' services were used
17 overwhelmingly for copyright infringement."⁴ *Id.* at *3.

18 Google's contention is that it does not need to act with respect to such
19 massive infringers, because it does not *directly link* to the infringing material,
20 but rather to the home page or some other page of the infringing website.
21 Letter from Google's counsel dated May 20, 2009, Mausner Decl. Exh. B.
22 This position is faulty as a matter of law, logic, and policy. Under Google's
23 self-serving interpretation, Google would not have to remove any links to the
24 following sites: (i) paysites offering thousands of full-length movies, songs,
25 and images: (ii) file sharing sites like thepiratebay.org; (iii) sites that offer

26 _____
27 ⁴ Perfect 10 has sent to Google notices containing 16,050 full-size P10 Images
28 infringed by usenet.com, which was also a Google AdSense affiliate.
Nevertheless, as of July 22, 2009, Google still had 128,000 links to Usenet.com.
Zada Decl. ¶¶34, 37, Exhs. 22, page 6, 25, page 8.

1 stolen passwords, credit cards, and social security numbers; and more
2 generally, (iv) any illegal or infringing sites that require the user to click one
3 or more times before viewing or downloading infringing content.

4 However, Section 512(d) indicates that a search engine may be liable “for
5 infringement of copyright by reason of the provider *referring or linking* users to an
6 online location *containing* infringing material or infringing activity.” 17 U.S.C.
7 §512(d) (emphasis added.) In other words, the DMCA is concerned about
8 whether the location to which Google refers users *contains* infringing material, not
9 whether Google directly links to that infringing material. This is logical. The
10 Internet consists of both legitimate sites and infringing ones. Google should be
11 held accountable for knowingly helping users find stolen material, particularly if it
12 is being paid to do so via sponsored links. Once Google learns that a location to
13 which it is “linking or referring” its users contains allegedly infringing material,
14 Google must act in some way. It could contact the webmaster and ask him to
15 remove the infringing material, or it could remove regular and sponsored links to
16 the infringing website. But it must do something. That Google must act to stop its
17 contribution to further infringement upon receiving knowledge of such
18 infringement, is consistent with the Ninth Circuit’s standard for contributory
19 liability for a search engine:

20 Google could be held contributorily liable if it had knowledge that
21 infringing Perfect 10 images were available using its search engine,
22 could take simple measures to prevent further damage to Perfect 10's
23 copyrighted works, and failed to take such steps.

24 508 F.3d at 1172. Google makes infringing images available by finding and
25 referring its users to websites containing such images. Whether the user has
26 to click one more time to reach the infringing images once Google transports
27 the user to the home page or sign-up page, is irrelevant as to the damage
28 caused to the copyright holder. Once Google knows that a website is

1 infringing, it has no business getting paid to refer its users to that website,
2 splitting revenues with it, or providing it with thousands of links.

3 Google’s argument is similar to contending that it is permissible for Google
4 to receive payment for taking users to the front door of a warehouse full of stolen
5 cars, as long as Google does not take them to any particular car.

6 Perfect 10 complied with the DMCA’s standards by identifying “the
7 material that is claimed to be infringing or to be the subject of infringing activity.”
8 Perfect 10 did this by sending to Google copies of thousands of P10 Images
9 infringed by Google’s advertising affiliates. The vast majority of these infringing
10 copies still had Perfect 10’s copyright notice on them. These notices provided
11 Google with knowledge of infringement on such sites. Perfect 10 provided the
12 infringing websites’ home page URLs, and explained how to find the infringing
13 P10 Images. Zada Decl. ¶35. Google simply refused to respond to these notices,
14 based on its narrow view of its obligations. Google cannot receive a safe harbor
15 when it fails to take action to stop its contribution to known infringement.

16 **VI. GOOGLE DID NOT MAINTAIN A USABLE/COMPLETE DMCA LOG**

17 In order to receive a safe harbor, Google must prove not only that it has
18 expeditiously processed the Perfect 10 notices that could be processed (which it
19 cannot do), but also that it suitably terminated repeat infringers. In order to do this,
20 it must maintain a usable and complete DMCA log.

21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]

25 [REDACTED] Google waited at least *ten months* to do so. Zada
26 Decl. ¶¶19, 55, 61, Exhs. 40, 45, 9; Chou Decl. ¶¶8-10. Google has stated that it
27 suppressed some Perfect 10 identified URLs in two days. Waiting ten months is
28 far beyond “expeditious” and precludes a safe harbor.

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[REDACTED]
[REDACTED]
[REDACTED] Such inadequate
logs also preclude a safe harbor. Zada Decl. ¶19; Perfect 10's Blogger Opposition.
[REDACTED]
[REDACTED] 2. *Id.* ¶19. Google's complete disregard for its
notice and takedown obligations, and its [REDACTED]
[REDACTED], should preclude a safe
harbor.

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]; Chou Decl.

¶¶8-10. [REDACTED]. Google obviously did not
even look at the web pages identified by Perfect 10 in 2004 until late 2005,
because if it had, it would have seen Google ads and [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] All of these issues are
enough to deny Google's motion, because Google must prove its case. Without a

1 listing of what Google did and when, in response to each of the 30,000+ URLs it
2 received from Perfect 10, such a determination is not possible.

3 **VII. CONCLUSION**

4 Google has continued to misuse massive quantities of Perfect 10's
5 intellectual property for its own commercial gain, despite receiving at least 68
6 Perfect 10 DMCA notices since 2001.

7 Google did not process any of the *fourteen* DMCA notices it received from
8 Perfect 10 in 2001, waited three to four months to process Perfect 10's May 31,
9 2004 through July 19, 2004 notices, did not suppress hundreds of identified Image
10 URLs from those notices, and admittedly waited over *seventeen months* to
11 suppress others.

12 Google has continued to claim that Perfect 10's Adobe style notices are
13 defective, even though it has been able to process them. However, Google took at
14 least ten months to do so, and did not process other similar notices.

15 Google has suppressed [REDACTED] blogger.com URLs, but has failed to suppress at
16 least [REDACTED] blogger.com URLs identified in the same fashion.

17 Google has done nothing in response to notices regarding its massive
18 infringing usenet/paysite advertising affiliates, even though it knows those sites
19 offer hundreds of thousands of infringing copies of P10 Images. Google should
20 not receive a safe harbor for failing to act when it could have stopped referring its
21 users to known infringers.

22 Google mischaracterizes as "abusive," Perfect 10's notices, most of which
23 were spreadsheet style notices created *following Google's instructions*. Even after
24 being advised of Adobe's URL extraction feature, Google has still refused to use it
25 to rapidly process Perfect 10's remaining Adobe style notices.

26 Google has not maintained a [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 [REDACTED] Nor has Google even explained what a compliant notice
2 should look like. Google cannot be allowed to simply claim that everything
3 Perfect 10 does is deficient, without responding to Perfect 10's requests to provide
4 concrete examples of compliant notices.

5 Google has the burden to demonstrate that it has expeditiously suppressed
6 each of the more than 30,000 URLs identified to it by Perfect 10, or that they could
7 not have been suppressed.

8 Google has not even come close to meeting its burden, particularly since
9 Google continues to create thumbnails from, and place ads around, the same P10
10 Images that have been repeatedly identified to Google.

11 Google has also not proven that it has suitably terminated repeat infringers,
12 and cannot do so, because it has not even taken action against most of them.

13 For all of the above reasons, and the reasons set forth in P10's Cache and
14 Blogger Oppositions, the Court should deny each of Google's Motions.

15 Dated: August 9, 2009

16 Respectfully submitted,
17 Law Offices of Jeffrey N. Mausner

18 By: /s/ Jeffrey N. Mausner

19 Jeffrey N. Mausner,
20 Attorney for Perfect 10, Inc.